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What's New

1 Moore's Manual--Federal Practice and Procedure Scope

Scope

HIGHLIGHTS

Release 91 May 2011

HIGHLIGHTS

Recent Rule Amendments. The publication has been updated to include important amendments to the Federal Rules of Civil Procedure and Appellate Procedure (effective 12/1/10). The publication has also been updated to cover extensive amendments to the Multidistrict Litigation Rules (effective 10/4/10).

Recent Case Law Developments. The publication has been updated with recent case law developments.

FEDERAL RULES AMENDMENTS

Civil Rule 8(c)(1). Under amended Rule 8(c)(1), discharge in bankruptcy is no longer an enumerated affirmative defense that must be included in a responsive pleading (*see § 11.50[1]*).

Civil Rule 26(a)(2)(B). Rule 26(a)(2)(B) is amended to specify that expert disclosure is only required regarding "facts or data" considered by the expert witness, instead of "data or other information" under the previous version of the Rule (*see* Ch. 15, *Discovery*).

Civil Rule 26(a)(2)(C). For those expert witnesses who do not need to provide an expert report, the party (not the expert witness) must disclose the subject matter of the expected expert testimony and a summary of the expected facts and opinions (*see* Ch. 15, *Discovery*).

Civil Rules 26(b)(4)(B) & (C). The work-product protections of Rule 26(b)(3)(A) & (B) are expanded to limit discovery of drafts of expert disclosure statements or reports and, with three exceptions, of communications between expert witnesses and counsel regardless of form (oral, written, electronic, or otherwise). The exceptions are for those parts of the attorney-expert communications regarding compensation, identifying facts or data considered by the expert in forming the opinions, and identifying assumptions relied on by the expert in forming the opinions (*see* Ch. 15,

Discovery).

Civil Rule 56. Rule 56 is revised to improve the procedures for presenting and deciding summary judgment motions, and to make the procedures more consistent with those already used in many courts. The procedural changes do not affect the standard for granting summary judgment. Subsections of the Rule have been renumbered, and new sections have been added for clarification purposes (*see* Ch. 17, *Summary Judgment,* completely revised).

Appellate Rule 29. The appellate rule on amicus briefs contains new disclosure requirements concerning authorship and funding (*see* Ch. 28, *Appeal to Court of Appeals*).

Multidistrict Rules. The Multidistrict Rules have been reorganized and revised extensively (*see* Ch. 2, *Concurrent and Conflicting Jurisdiction*).

RECENT CASE LAW DEVELOPMENTS

The publication has been updated with recent case law developments, including *Philip Morris USA Inc. v. Scott, ___ U.S. ___, 131 S. Ct. 1, 177 L. Ed. 2d 1040, 1042 (2010)* where the Supreme Court provided guidance as to when it will stay execution of a lower court judgment, such as an appellate mandate (*see* Ch. 29, *Appeal to Supreme Court), and Ortiz v. Jordan, ___ U.S. ___, 131 S. Ct. 884, 178 L. Ed. 2d 703, 709 (2011)* where the Court resolved a circuit split on the issue of whether the denial of a summary judgment motion is reviewable after a full trial on the merits (*see* Ch. 17, *Summary Judgment*).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS

1-1 Moore's Manual--Federal Practice and Procedure 1.syn

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§ 1.02 Source of Authority of Federal Courts

§ 1.03 Jurisdictional Authority of Federal Courts

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART I. COMPOSITION AND ORGANIZATION OF FEDERAL JUDICIAL SYSTEM

1-1 Moore's Manual--Federal Practice and Procedure § 1.01

§ 1.01 Limited Jurisdiction of Federal Courtsn*

A federal court may not hear or review the decision in a case unless the court has subject matter jurisdiction. Unlike state courts, n1 federal courts are courts of limited jurisdiction. n2 This means that a federal court may exercise judicial power only to the extent permitted by the Constitution--and, therefore, to the extent specified by Congress. n3 For example, a federal court may not adjudicate a matter that does not qualify as an actual "case or controversy" (as opposed to a hypothetical situation) under Article III of the Constitution. n4 Also, under Article III of the Constitution, Congress has created the federal district courts and granted them exclusive jurisdiction in matters involving admiralty, bankruptcy, patents, copyrights and trademarks, n5 and concurrent jurisdiction with the state courts in federal question and diversity of citizenship cases. n6

Outside of their limited jurisdiction as specified by the Constitution and Congress, the federal courts do not have authority to consider matters, even if the parties concede federal jurisdiction or do not consider the jurisdiction issue. n7 Furthermore, *Rule 82 of the Federal Rules of Civil Procedure* is intended to make clear that the federal rules may not in any way affect the federal courts' subject matter jurisdiction. n8 Rather, the exclusive purpose of the federal rules is to govern the fair and efficient administration of justice in the federal courts. n9

As a result of the limited jurisdiction of federal courts and the existence of concurrent state-court jurisdiction over most federal claims, it frequently occurs that a parallel proceeding is pending in another forum and that resolution of the controversy in that forum will moot the issues presented in the federal action. n9.1 This may be true whether the parallel forum is a state court lawsuit, n10 or an administrative proceeding. n11 The relationship between the exclusive jurisdiction of the federal courts and the concurrent jurisdiction of both the federal and the state courts creates many overlaps of legal rights and remedies and also conflicts between the jurisdiction of federal and state courts. These issues are discussed in Ch. 2, *Concurrent and Conflicting Jurisdiction*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited Jurisdiction

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 120.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Glidden Co. v. Zdanok, 370 U.S. 530, 545-546, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962)* (state and territorial courts are courts of general jurisdiction that may generally hear cases except in instances of specific prohibition).

(n3)Footnote 2. *Aldinger v. Howard, 427 U.S. 1, 14-15, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976)* (federal courts are courts of limited jurisdiction, as specified by Congress); *Abrego v. Dow Chem. Co, 443 F.3d 676, 684 (9th Cir. 2006)* (it is presumed that any claim lies outside limited jurisdiction of federal courts, and burden of establishing contrary rests on party asserting jurisdiction.).

(n4)Footnote 3. *Kontrick v. Ryan, 540 U.S. 443, 452-453, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)* (only Congress has power to specify which cases lower federal courts can entertain).

(n5)Footnote 4. *Flast v. Cohen, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)* .

(n6)Footnote 5. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 820, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (concern about lack of uniformity and forum-shopping led to grant of exclusive jurisdiction in Federal Circuit in most intellectual property cases); *see Payless Shoesource, Inc. v. Reebok Int'l, Ltd., 998 F.2d 985, 988 (Fed. Cir. 1993)* (patent infringement claims).

(n7)Footnote 6. *Compare* U.S. Const. Art. III *with 28 U.S.C. § 1331 et seq.*; *see* Ch. 2, *Concurrent and Conflicting Jurisdiction* (discussion of exclusive federal court jurisdiction)

(n8)Footnote 7. Douglas v. E.G. *Baldwin & Assocs., Inc., 150 F.3d 604, 607-609 (6th Cir. 1998)* (fact that parties agreed to incorporate terms and responsibilities of Family and Medical Leave Act into employment contract does not bring them within Act or establish subject matter jurisdiction under Act).

(n9)Footnote 8. *Fed. R. Civ. P. 82.*

(n10)Footnote 9. *Schiavone v. Fortune, 477 U.S. 21, 27, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)* ; *see Fed. R. Civ. P. 1* (federal rules designed to secure just, speedy, and inexpensive determination of every action).

(n11)Footnote 9.1. *Currie v. Group Ins. Comm'n, 290 F.3d 1, 3 (1st Cir. 2002)* .

(n12)Footnote 10. *Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1484 (10th Cir. 1995)* (federal challenge to state regulation of surface mining operations rendered moot once state's highest court issued ruling on merits of claim).

(n13)Footnote 11. *Aiona v. Judiciary of Hawaii, 17 F.3d 1244, 1248 (9th Cir. 1994)* .

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PART I. COMPOSITION AND ORGANIZATION OF FEDERAL JUDICIAL SYSTEM

1-1 Moore's Manual--Federal Practice and Procedure § 1.02

§ 1.02 Source of Authority of Federal Courtsn*

Article III of the United States Constitution establishes a single Supreme Court of the United States and authorizes, but does not require, Congress to create inferior federal courts. n1 Only Congress may create lower federal courts, and only Congress may precisely specify the subject matter jurisdiction of any of the courts it creates. n1.1 Congress has exercised this express constitutional authority by creating a structure of trial courts referred to as "District Courts," n2 and intermediate courts of appeals known as "United States Circuit Courts of Appeal." n3 These courts are collectively referred to as "Article III" courts, or "constitutional courts." n4 Thus, "constitutional courts" (or "Article III courts") are those that have been created under the provision of the Constitution specifically providing for the creation of courts, including the Supreme Court and the district courts and court of appeals established by Congress. Separate and apart from these Article III or constitutional courts, Congress has also created limited purpose or specialty courts under congress's general legislative powers under Article I of the Constitution, n5 such as, the court known as the United States Tax Court. n5.1 These courts are collectively referred to as "Article I courts" or "legislative courts," because they are not established by the court creation article of the Constitution but under the legislative enabling article of the Constitution. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional Sources

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 100.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *U.S. Const., Art. III § 1.*

(n3)Footnote 1.1. *Kontrick v. Ryan, 540 U.S. 443, 452-453, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) .*

(n4)Footnote 2. *28 U.S.C. § 1330 et seq.*

(n5)Footnote 3. *28 U.S.C. § 1291 et seq.*

(n6)Footnote 4. *Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* ; *see* § 102.03[2].

(n7)Footnote 5. *U.S. Const., Art. I, § 8, cl. 18* (Congress has power to create laws that are necessary and proper to carry out powers Constitution has vested in legislative branch of government).

(n8)Footnote 5.1. *See Ballard v. Comm'r, 544 U.S. 40, 70 n.4, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005)* .

(n9)Footnote 6. *Freytag v. Commissioner, 501 U.S. 868, 889, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART I. COMPOSITION AND ORGANIZATION OF FEDERAL JUDICIAL SYSTEM

1-1 Moore's Manual--Federal Practice and Procedure § 1.03

§ 1.03 Jurisdictional Authority of Federal Courtsn*

[1] Constitutional Courts

Although the federal Constitution is the underlying basis for the judicial power of all federal courts, n1 the expression "constitutional court" is a term of art generally used to describe any court created under the express provisions of Article III of the Constitution, including the Supreme Court and the district courts and appellate courts created by Congress. n2 Thus, the primary current Article III courts include the United States Supreme Court n3 and the following courts created by Congress:

1. The trial courts referred to as "District Courts." n4

2. The trial court known as the "Court of International Trade." n5

3. The intermediate courts of appeals n6 known as the United States Courts of Appeals for the circuit in which the court sits. n7

Because Congress has created these lower constitutional courts, it may impose jurisdictional prerequisites on particular types of relief in the courts. n8 Congress also has the power to establish specific procedures that a party must follow in order to obtain judicial relief. In this regard, the fact that Congress requires parties to proceed in a particular manner does not violate due process. However, those procedures must not be so oppressive or inadequate as to deprive a party of a meaningful judicial remedy, especially when state courts are unavailable. n9

[2] Legislative Courts

The Constitution makes no reference to "legislative courts," but the term gets its significance from judicial decisions n0.1 that make the distinction between constitutional courts, n1 in which the judicial power conferred by the Constitution is placed, and legislative courts, which are created to carry out the legislative functions of Congress. n2 Congress has used these legislative powers to create territorial courts, and certain other special tribunals to perform essential or helpful functions of government, although many legislative courts no longer exist, such as the Court of Private Land Claims and the Consular Courts. Current legislative courts, according to classification by statute or by the

Supreme Court, include the following:

1. United States Tax Court. n3

2. United States Court of Federal Claims. n4

3. Superior Court of the District of Columbia, n5 and the District of Columbia Court of Appeals, n6 which is not to be confused with the United States Court of Appeals for the District of Columbia Circuit.

4. Territorial Courts. n7

[3] Significance of Status of Court as Either Constitutional or Legislative

The most important difference between Article III courts (constitutional courts) and Article I courts (legislative courts) is that the judicial power of the United States is vested in the former. n.01 Thus, the judges have life tenure and their compensation is guaranteed, and they are insulated from legislative or executive pressures and their independence is protected. n.02 Legislative courts, on the other hand, such as military courts and regulatory agency tribunals do not share these attributes of independence, and are under legislative control. For this reason, it has been held that legislative courts may not be entrusted with parties' *Seventh Amendment* rights to a jury trial, and therefore when a case or controversy gives rise to a *Seventh Amendment* right to a jury trial, Congress may not give jurisdiction to a legislative court. n1 In addition, a territorial District Court judge does not qualify as a United States District Court judge and is not entitled to sit by assignment on the United States Circuit Court of Appeals under the statute that authorizes the circuit court to assign one or more district judges within a circuit to sit on the court of appeals "whenever the business of [the circuit court] so requires." n1.1

Another important significance of the Article III court is that separation-of-powers concerns require that an Article III court be given jurisdiction to inquire de novo into certain factual findings in order to ensure that the Constitution has not been violated. The findings that fall within this category are described as "constitutional facts," which are issues that if resolved one way would render the rulings constitutional, and if resolved another way would render them unconstitutional. n2

The distinction between constitutional courts and legislative courts also arises regarding the adjudication of public versus and private rights. "Public rights" are those arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. n3 The adjudication of a public right is not "inherently judicial"; therefore, public rights may be adjudicated by an Article III court, if Congress so specifies, but need not be. n3.1"Inherently judicial" cases, on the other hand, are disputes between private parties over private rights. These cases lie at the core of the historically recognized judicial power, and must, therefore, be heard by an Article III court. n4

A final distinction, which has lost some of its historical significance, is that although the Federal Rules of Civil Procedure are applicable to all proceedings adjudicated by Article III district courts, they are not necessarily applicable to all legislative court proceedings. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 100.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See § 1.02.*

(n3)Footnote 2. *U.S. Const., Art. III § 1.*

(n4)Footnote 3. *Spindel v. Spindel, 283 F. Supp. 797, 804 (E.D.N.Y. 1968)* .

(n5)Footnote 4. *See 28 U.S.C. § 1330.*

(n6)Footnote 5. *See 28 U.S.C. § 251(a).*

(n7)Footnote 6. *28 U.S.C. § 1291 et seq.*

(n8)Footnote 7. *28 U.S.C. § 43(a) et seq.*

(n9)Footnote 8. Douglas v. E.G. *Baldwin & Assocs., Inc., 150 F.3d 604, 607-609 (6th Cir. 1998)* (Family and Medical Leave Act's definition of "employer" requiring at least 50 employees is jurisdictional prerequisite); *Womble v. Bhangu, 864 F.2d 1212, 1213 (5th Cir. 1989)* (case remanded for determination of whether defendant met statutory definition of employer under Title VII, a jurisdictional prerequisite).

(n10)Footnote 9. *Bob Jones Univ. v. Simon, 416 U.S. 725, 746-747, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974)* .

(n11)Footnote 0.1. *See Dunmore v. United States, 358 F.3d 1107, 1114 (9th Cir. 2004)* .

(n12)Footnote 1. *See § 1.02.*

(n13)Footnote 2. *See* [3], *below.*

(n14)Footnote 3. *See Ballard v. Comm'r, 544 U.S. 40, 70 n.4, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005)* .

(n15)Footnote 4. *Keene Corp. v. United States, 508 U.S. 200, 205-207, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993)* ; *see 28 U.S.C. § 2503.*

(n16)Footnote 5. D.C. Code § 11-901.

(n17)Footnote 6. D.C. Code § 11-901.

(n18)Footnote 7. *See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-65, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* .

(n19)Footnote .01. *See Scott v. United States, 412 F.3d 1056, 1061 (9th Cir. 2005)* .

(n20)Footnote .02. *See Khanh Phuong Nguyen v. United States, 539 U.S. 69, 72, 123 S. Ct. 2130, 2133, 156 L. Ed. 2d 64 (2003)* (in contrast to Article III judges, who are life-tenured to hold office during good behavior, Article IV territorial-court judges are appointed by the President and confirmed by the Senate for a 10-year term).

(n21)Footnote 1. *See In re Clay, 35 F.3d 190, 195 (5th Cir. 1994)* .

(n22)Footnote 1.1. *Khanh Phuong Nguyen v. United States, 539 U.S. 69, 74, 123 S. Ct. 2130, 2134, 156 L. Ed. 2d 64 (2003)* ; *see 28 U.S.C. § 292(a).*

(n23)Footnote 2. *Crowell v. Benson, 285 U.S. 22, 46, 52 S. Ct. 285, 76 L. Ed. 598 (1932)* .

(n24)Footnote 3. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* .

(n25)Footnote 3.1. *Sheridan v. Michels, 362 F.3d 96, 107 n.11 (1st Cir. 2004)* .

(n26)Footnote 4. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68-70, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* .

(n27)Footnote 5. *Fed. R. Civ. P. 1*, Committee Note to 1948 Amendments; *see Lasky v. Commissioner, 235 F.2d 97, 98 (9th Cir. 1956)* (rules do not govern Tax Court proceedings).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
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1-1 Moore's Manual--Federal Practice and Procedure § 1.04

§ 1.04 Levels of Federal Courtsn*

[1] District Courts

[a] District Court System

The primary Article III federal trial courts are the federal district courts, which sit in all the states, the District of Columbia, and Puerto Rico. n1 Congress has over time created new federal district courts to accommodate the increasing population, and currently the United States has 94 federal districts. n2 Some large states have more than one federal district court, n3 while many states have only one federal judicial district. n4 Additionally, some federal districts have been subdivided into more than one "division" within the single district. n5

[b] Subject Matter Jurisdiction of District Court

The district courts have three basic types of subject matter jurisdiction, the court's statutory or constitutional power to adjudicate the case: n6

First, the district courts have original "federal question" jurisdiction, which is jurisdiction over actions arising under the Constitution, laws, or treaties of the United States. n7 General federal question jurisdiction is not exclusive; state courts also have jurisdiction to hear these types of actions regarding federal issues. n8 In addition to the general grant of federal question jurisdiction, particular federal statutes expressly provide that district courts have original jurisdiction over any claims involving or "arising under" those statutes. n9 One example of this statutory form of federal question jurisdiction is the district court's jurisdiction over bankruptcy cases. n10

Statutory federal question jurisdiction may be exclusive in the federal district court, or may be concurrent with state courts, depending on the intent of Congress based on the language used in the particular statute in question. n11 For example, district court jurisdiction over cases arising under the Bankruptcy Code is exclusively in the federal district courts; state courts may not hear such cases. n12 Another example of exclusive federal court jurisdiction is for any claim under the Federal Tort Claims Act. n13 On the other hand, for example, state courts have concurrent original jurisdiction with the federal courts over claims based on antidiscrimination statutes such as the Age Discrimination in Employment Act (ADEA). n14 The Supreme Court has held that there is a presumption of concurrent jurisdiction for

federal question cases that is so strong that the presumption is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts. n15

Second, the district courts have original "diversity jurisdiction" which is the district court's jurisdiction over certain civil actions that do not arise under federal law but that involve citizens of different states or citizens of the United States and aliens or foreign subjects. The district court has jurisdiction over any civil action in which the amount in controversy exceeds $75,000 and the action is between (a) citizens of different states; (b) citizens of a state and citizens or subjects of a foreign state; (c) citizens of different states, with foreign citizens or subjects as additional parties; or (d) a foreign state as plaintiff and citizens of a state or of different states as defendants. n16 Parties invoking the district court's diversity jurisdiction must be "completely diverse," which means that none of the defendants may be a citizen of the same state as any of the plaintiffs. If one plaintiff and one defendant are citizens of the same state (even a state other than the one in which the lawsuit is initiated), there is incomplete diversity and the federal court lacks jurisdiction. n17 However, federal district courts will not adjudicate several types of state-based claims, even though the opposing parties are from different states and technically are able to satisfy the standards for valid federal diversity jurisdiction. These judicially created exceptions are neither constitutionally nor statutorily mandated but are based on the policy consideration that certain areas of the law are exclusively within the purview of state control. Thus, the U.S. Supreme Court has stated that diversity jurisdiction is not available for suits seeking the issuance or modification of domestic relations decrees, such as divorce, alimony, or child custody, n18 and also that probate cases are outside the scope of federal diversity jurisdiction. n19

Third, a federal district court that has original jurisdiction over a civil action under federal diversity jurisdiction also may exercise "supplemental jurisdiction" of all other claims that are a part of the same case or controversy under Article III of the Constitution, including claims that involve the joinder or intervention of additional parties. n20 However, a district court's exercise of supplemental jurisdiction is discretionary, and the court may decline to exercise supplemental jurisdiction, for example, if the state-law claim raises a novel or complex issue of state law. n21

[c] Three-Judge District Court

While a district court ordinarily consists of a single judge sitting as a district judge, in certain cases, a statute requires that a district court be composed of three judges, one of whom must be a circuit judge. n22 A three-judge district court is required in cases challenging the constitutionality of state or federal legislative apportionment and in cases in which the convening of a three-judge court is otherwise authorized by congressional act. n23 Most of the statutes currently applicable involve some aspect of civil rights. Several of these statutes authorizing the convening of a three-judge court expressly require that a request must be filed before the court may be convened. Three-judge courts authorized under the Civil Rights Act of 1964, in the areas of public accommodations n24 and equal employment n25 are available only on request of the Attorney General. Another area of law providing for the use of three judge district courts is the law of elections, such as the Voting Rights Act of 1965. n26 These three-judge district court provisions are designed to protect important voting rights of the people. n27 When a request for a three-judge court is presented to the district judge, he or she must determine whether the case is one requiring the convening of such a court under the relevant statutory provisions. When the judge determines that a three-judge court is required, the judge must notify the chief judge of the circuit, who must then designate two additional judges; at least one must be a circuit judge. The two designees plus the district judge to whom the request was made make up the three-judge court. n28 Failure to appoint to the three-judge court the judge to whom the request was originally made has been held not to constitute a jurisdictional defect. n29

The Presidential Election Campaign Fund Act of 1971 contains two provisions authorizing the use of a specially constituted three-judge court. The first provision empowers the Federal Election Commission to institute actions for declaratory or injunctive relief concerning any civil matter covered by provisions of the Act which permit a taxpayer to designate a payment to the Presidential Election Campaign Fund. n30 Such actions are required to be heard by a three-judge court only on application of the Commission. The second provision calls for a specially constituted

three-judge court to hear actions brought to implement or construe any provision of the Act. n31

Appeals from a three-judge court must be taken directly to the Supreme Court when the three-judge court makes an order granting or denying an injunction in a proceeding within its exclusive jurisdiction. n32 In addition, appeals from final judgments lie to the Supreme Court in three-judge proceedings authorized by the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Presidential Election Campaign Fund Act of 1971. n33

If the trial court has refused to convene a three-judge court, or a three-judge court is dissolved after it has been convened, review must be taken to the appropriate court of appeals and not to the Supreme Court. n34 If, under these circumstances, an appeal has been taken to the Supreme Court and the time has lapsed within which to file an appeal in the appropriate court of appeals, the Supreme Court may vacate the trial court judgment so that a timely appeal from the new judgment may be taken to the proper court. n35

[2] Courts of Appeal

[a] Appellate Court System

The intermediate level Article III federal appellate courts are the "United States Circuit Courts of Appeal." n1 There are currently thirteen circuits: the First through Eleventh Circuits, the District of Columbia Circuit, and the Federal Circuit. Decisions of the district, bankruptcy, and territorial courts are appealed to the court of appeals for the circuit embracing the district in which the judgment is entered. n2 The Federal Circuit was created to provide uniformity throughout the country and to develop technical expertise in the interpretation and application of patent laws and other intellectual property fields. n3

[b] Subject Matter Jurisdiction of Appellate Court System

[i] Appellate Jurisdiction of Circuit Courts

The jurisdiction of the circuit courts of appeal is limited to review of trial court decisions, primarily the decisions of the district courts within the circuit. A circuit court may review a decision or order of a trial court by only two methods: either when a statute or rule provides for a direct appeal, n4 or by extraordinary writ, when no statute or rule provides for direct appeal. n5 Because an extraordinary writ requires the existence of exceptional circumstances, n6 the most common method of review is by direct appeal. n7

For further discussion of the jurisdiction of the circuit courts of appeal, see Ch. 28, *Appeal to Court of Appeals*.

[ii] Jurisdiction of Federal Circuit Court

The Federal Circuit was created to provide uniformity throughout the United States and to develop technical expertise in the interpretation and application of intellectual property laws, including patent, trademark, and copyright; consequently, it has exclusive jurisdiction over specific categories of cases as set forth in the Judiciary Act. n8 For example, the U.S. Court of Appeals for the Federal Circuit reviews decisions of the Court of International Trade n9 in the same manner as the Fourth Circuit would review a district court decision located in that circuit. n10 The U.S. Court of Appeals for the Federal Circuit has jurisdiction over any appeal from a final decision of any district court if the jurisdiction of that court was based in whole or in part on federal patent law, except in a case involving a claim arising under any act of Congress relating to copyrights or trademarks. n11 The Federal Circuit holds that the decisions of its predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, are binding precedent. n12

[iii] Jurisdiction of Distict of Columbia Circuit Court

The District of Columbia Circuit may hear appeals from the District Court of the District of Columbia and may also review federal agency decisions in addition to whichever circuit court has personal and subject matter jurisdiction over the matter. n13 It also has exclusive jurisdiction by statute in some areas. For example, one statute confers on the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review licensing decisions of the Federal Communications Commission. n14 When the District of Columbia Circuit Court has statutory, exclusive jurisdiction to hear a particular kind of proceeding, no other circuit court or district court may hear such a proceeding. n15 On the other hand, some statutes provide that the District of Columbia Circuit has jurisdiction over a specified type of proceeding that is concurrent with other circuit courts, such as the statute providing for review of Federal Aviation Administration orders. In such cases the appellant has the option to take the case to the District of Columbia Circuit or to the circuit in which the person resides or has its principal place of business. n16

For further discussion of the jurisdiction of the circuit courts of appeal, see Ch. 28, *Appeal to Court of Appeals*.

[3] United States Supreme Court

Article III of the United States Constitution provides that the United States Supreme Court both original and appellate jurisdiction. The Supreme Court has original, nonexclusive jurisdiction in cases in which one or both of the parties are states. n1 Original jurisdiction is the power of a court to hear and decide a claim for relief and any defenses before any other court has heard the claim. On the other hand, appellate jurisdiction means the authority of a court to review a decision on a claim previously made by another court. n2 Thus, original jurisdiction is that exercised by a court acting as a "trial court," n3 and appellate jurisdiction is that exercised by a court acting as a "court of appeals." n4 In the exercise of its original jurisdiction, the Supreme Court is not subject to the control of Congress, and it may proceed as it determines appropriate, for example, through the use of a special master appointed by the court. n5

The United States Supreme Court generally has appellate jurisdiction over all cases subject to federal judicial power. n6 However, Congress may regulate and make exceptions to the Supreme Court's appellate jurisdiction. n7 In this regard, Congress has provided for the exercise of most of the Supreme Court's appellate jurisdiction by means of writ of "certiorari." n8 Certiorari jurisdiction is discretionary with the Court, and an appeal will not be heard unless at least four justices vote to grant a writ of certiorari. n9

For further discussion of the original and appellate jurisdiction of the Supreme Court, see Ch. 29, *Appeal to Supreme Court*.

[4] Other Courts

The Court of Federal Claims is mainly a trial level court for the trial of monetary claims (including tax refund claims) against the United States. n1 However, its jurisdiction over these claims is not exclusive, and, therefore, claims against the United States need not be brought in the Court of Federal Claims. n2 Furthermore, if a person has filed a claim in another court, the Court of Federal Claims is prohibited from exercising jurisdiction if the claim is based on substantially the same operative facts as the claim filed in the Court of Federal Claims, even if the two claims are based on different legal theories. n3

As with other federal courts, the Court of International Trade is a court of limited jurisdiction, and must initially determine whether the claim brought before it is within that jurisdiction specified by statute. For example, the court has jurisdiction over civil actions that arise out of import transactions. n4 Outside of the Court of International Trade's original jurisdiction, the district courts have exclusive original jurisdiction over actions or proceedings to recover or enforce any fine, penalty, or forfeiture incurred under any federal statute. n5 Because the Court of International Trade has jurisdiction that is limited to its special subject matter, it must obey the decisions of the Court of Appeals for the Federal Circuit and the Supreme Court but does not owe obedience to the decisions of the district courts or the geographic regional circuit courts of appeal. n6

The United States Tax Court, formerly an independent agency in the Executive Branch, has been designated by Congress as a court of record. The Tax Court is an example of a "legislative" or "Article I" court, n7 based on the Supreme Court's analysis of the tax court's functions to define its constitutional status and its role in the constitutional scheme. Thus, the Court noted that the Tax Court's decisions are not subject to review by either Congress or the President. The Tax Court exercises its judicial power in much the same way as the federal district courts and its function and role in the federal judicial scheme closely resemble those of the federal district courts. Also, Congress has not made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, n8 with ultimate review in the Supreme Court. Furthermore, the courts of appeals review those decisions in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. n9

Other legislative courts include the territorial courts. There are territorial courts for Guam n10 and the Virgin Islands. n11 In Puerto Rico, in addition to the United States District Court for Puerto Rico, n12 there are local territorial courts that are analogous to state courts. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryGeneral OverviewGovernmentsCourtsCreation & Organization

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 120.02, 120.11 (Matthew Bender 3d ed.)

(n2)Footnote 1. Some states constitute one judicial district, but other states are divided into two or more districts. In each district there must be a United States district court. *28 U.S.C. § 132(a).*

(n3)Footnote 2. *28 U.S.C. § 81, et seq.*

(n4)Footnote 3. *See, e.g., 28 U.S.C. § 84* (California is divided into four judicial districts); *28 U.S.C. § 93* (Illinois is divided into three judicial districts); *28 U.S.C. § 124* (Texas is divided into four judicial districts).

(n5)Footnote 4. *See, e.g., 28 U.S.C. § 85* (Colorado); *28 U.S.C. § 99* (Maine).

(n6)Footnote 5. *See, e.g., 28 U.S.C. § 103* (Minnesota constitutes one judicial district, but has six divisions); *28 U.S.C. § 124* (Southern District of Texas has seven divisions).

(n7)Footnote 6. *See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* .

(n8)Footnote 7. *See 28 U.S.C. § 1331*; *see also* Ch. 5 *Original Jurisdiction over the Subject Matter.*

(n9)Footnote 8. *Lockerty v. Phillips, 319 U.S. 182, 187, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943)* .

(n10)Footnote 9. *See 28 U.S.C. § 1340* (tax cases).

(n11)Footnote 10. *See 28 U.S.C. § 1334(a).*

(n12)Footnote 11. *See Hinck v. United States, 550 U.S. 501, 506, 127 S. Ct. 2011, 167 L. Ed. 2d 888 (2007)* .

(n13)Footnote 12. *See 28 U.S.C. § 1334(a)* (explicit statutory language of exclusive jurisdiction).

(n14)Footnote 13. *See 28 U.S.C. § 1346(b)*; *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 578, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* .

(n15)Footnote 14. *See 29 U.S.C. § 621 et seq*; *Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 555, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002)* .

(n16)Footnote 15. *Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 928 (2009)* .

(n17)Footnote 16. *28 U.S.C. § 1332*.

(n18)Footnote 17. *Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999)* (complete diversity rule clarifies that statute authorizing diversity jurisdiction permits jurisdiction only when no party shares common citizenship with any party on opposing side).

(n19)Footnote 18. *Ankenbrandt v. Richards, 504 U.S. 689, 704, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992)* .

(n20)Footnote 19. *See Marshall v. Marshall, 547 U.S. 293, 310, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006)* (federal court has no jurisdiction to probate will nor administer estate; federal court only has equitable power to hear cases in favor of creditors, legatees, and heirs' against a decedent's estate in cases when federal court does not interfere with any probate proceedings nor assume general jurisdiction of probate).

(n21)Footnote 20. *See 28 U.S.C. § 1367(a)*; *see, e.g., Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co., 215 F.3d 195, 206 (1st Cir. 2000)* (federal court may exercise supplemental jurisdiction over state claim whenever it is joined with federal claim and two claims are based on common nucleus of operative fact).

(n22)Footnote 21. *See 28 U.S.C. § 1367(c)*.

(n23)Footnote 22. *28 U.S.C. § 2284(b)(1)*.

(n24)Footnote 23. *See 28 U.S.C. § 2284(a)*.

(n25)Footnote 24. *See 42 U.S.C. § 2000a-5*.

(n26)Footnote 25. *42 U.S.C. § 2000a-5*.

(n27)Footnote 26. *See 42 U.S.C. 1973c(a)*; *see also 28 U.S.C. § 2284*.

(n28)Footnote 27. *See Riley v. Kennedy, 553 U.S. 406, 128 S. Ct. 1970, 170 L. Ed. 2d 837, 846-847 (2008)* .

(n29)Footnote 28. *28 U.S.C. § 2284(b)*.

(n30)Footnote 29. *Hicks v. Miranda, 422 U.S. 332, 338 n.5, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975)* .

(n31)Footnote 30. *26 U.S.C. § 9010(c)*.

(n32)Footnote 31. *26 U.S.C. § 9011(b)*.

(n33)Footnote 32. *28 U.S.C. § 1253*; *see, e.g., Board of Regents v. New Left Education Project, 404 U.S. 541, 542, 92 S. Ct. 652, 30 L. Ed. 2d 697 (1972)* .

(n34)Footnote 33. *See* 17A *Moore's Federal Practice, § 404.22[1][b]* (Matthew Bender 3d ed.).

(n35)Footnote 34. *Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83, 83-84, 89 S. Ct. 60, 21 L. Ed. 2d 215 (1968)* .

(n36)Footnote 35. *Wilson v. Port Lavaca, 391 U.S. 352, 352, 88 S. Ct. 1502, 20 L. Ed. 2d 636 (1968)* .

(n37)Footnote 1. *28 U.S.C. § 1291 et seq.*; *see 28 U.S.C. § 43(a)* (official name)

(n38)Footnote 2. *28 U.S.C. § 1294*.

(n39)Footnote 3. *28 U.S.C. § 1295*.

(n40)Footnote 4. *See Crosby v. OrthAlliance New Image, 552 F.3d 413, 418 (5th Cir. 2008)* .

(n41)Footnote 5. *See 28 U.S.C. § 1651* (All Writs Act enables federal courts to issue all writs necessary or appropriate in aid of their jurisdiction); *see also Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* (if statute specifically addresses particular issue, that statute governs procedure that must be followed, and court may not issue writ under All Writs Act).

(n42)Footnote 6. *Ellis v. United States Dist. Court, 360 F.3d 1022, 1023 (9th Cir. 2004)* .

(n43)Footnote 7. *See Kelly v. Moore, 376 F.3d 481, 483 (5th Cir. 2004)* .

(n44)Footnote 8. *28 U.S.C. § 1295*.

(n45)Footnote 9. *See 28 U.S.C. § 1295(a)(5)*.

(n46)Footnote 10. *See SKF USA Inc. v. United States Customs & Border Prot., 556 F.3d 1337, 1349 (Fed. Cir. 2009)* (de novo review).

(n47)Footnote 11. *28 U.S.C. § 1295(a)(1)*; *see 28 U.S.C. § 1338*; *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Inc. Com. De Equip. Medico, 563 F.3d 1285, 1292 (Fed. Cir. 2009)* (noting that Federal Circuit reviews personal jurisdiction issues in patent infringement case under Federal Circuit law).

(n48)Footnote 12. *South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982)* .

(n49)Footnote 13. *See 29 U.S.C. § 160(e)*; *see 28 U.S.C. § 2343* (in actions seeking judicial review of agency orders, action may be brought in judicial circuit in which the petitioner resides or has its principal office, or in United States Court of Appeals for District of Columbia Circuit).

(n50)Footnote 14. *47 U.S.C. § 402(b)*.

(n51)Footnote 15. *Biltmore Forest Broad. FM, Inc. v. United States, 555 F.3d 1375, 1384 (Fed. Cir. 2009)* .

(n52)Footnote 16. *See 49 U.S.C. § 46110(a)*; *Safe Extensions, Inc. v. FAA, 509 F.3d 593 (D.C. Cir. 2007)* .

(n53)Footnote 1. *U.S. Const., Art. III, § 2, Cl. 2*; *28 U.S.C. § 1251(a)*; *see Connecticut v. Cahill, 217 F.3d 93, 103-104 (2d Cir. 2000)* .

(n54)Footnote 2. *See Marbury v. Madison, 5 U.S. 137, 174, 2 L. Ed. 60 (1803)* .

(n55)Footnote 3. *Union Planters Bank Nat'l Ass'n v. Salih, 369 F.3d 457, 462 (5th Cir. 2004)* (in federal system, district courts typically act as trial courts of original jurisdiction).

(n56)Footnote 4. *See Estate of Harshman v. Jackson Hole Mt. Resort Corp., 379 F.3d 1161, 1163 (10th Cir. 2004)* (court of appeals has jurisdiction to correct any errors of lower court in deciding claim).

(n57)Footnote 5. *Kansas v. Colorado, -- U.S. --, --, 129 S. Ct. 1294, 173 L. Ed. 2d 245, 248-250 (2009)* .

(n58)Footnote 6. U.S. Const., Art. III, § 2.

(n59)Footnote 7. *U.S. Const., Art. III, § 2, Cl. 2.*

(n60)Footnote 8. *28 U.S.C. § 1254 et seq.*

(n61)Footnote 9. *Donnelly v. DeChristoforo, 416 U.S. 637, 648, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) .*

(n62)Footnote 1. *See 28 U.S.C. § 1491 et seq.*

(n63)Footnote 2. *28 U.S.C. § 1346(a)*; *28 U.S.C. § 1491* (United States Court of Federal Claims has concurrent jurisdiction with district courts for claims not exceeding $10,000).

(n64)Footnote 3. *28 U.S.C. § 1500*; *see Keene Corp. v. United States, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993)* (time applicable to question of whether plaintiff has another suit pending in another court related to claim filed in Court of Federal Claims is when party files action in Court of Federal Claims, not when Court of Federal Claims rules on motion to dismiss).

(n65)Footnote 4. *See 28 U.S.C. § 1337(c)*; *28 U.S.C. § 1581(i)*; *see also United States v. Inn Foods, Inc., 560 F.3d 1338, 1342 (Fed. Cir. 2009) .*

(n66)Footnote 5. *28 U.S.C. § 1355(a)*; *see 28 U.S.C. § 1582.*

(n67)Footnote 6. *See 28 U.S.C. § 1295(a)(5)*; *SKF USA Inc. v. United States Customs & Border Prot., 556 F.3d 1337, 1349 (Fed. Cir. 2009) .*

(n68)Footnote 7. *Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 870, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) .*

(n69)Footnote 8. *26 U.S.C. § 7482* (appellate review of Tax Court decision to be in circuit of petitioner's legal residence or where stipulated in writing by government and petitioner); *see Comm'r v. Neal, 557 F.3d 1262, 1268-1269 (11th Cir. 2009)* (circuit court reviews Tax Court decisions in same manner as decisions of district courts in civil actions tried without jury).

(n70)Footnote 9. *Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 888-892, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) .*

(n71)Footnote 10. *48 U.S.C. § 1424.*

(n72)Footnote 11. *48 U.S.C. § 1611.*

(n73)Footnote 12. *28 U.S.C. § 119*; *see 48 U.S.C. § 864* (after Puerto Rico became associated commonwealth subsequent to the adoption of Federal Rule of Civil Procedure, its district courts are now constitutional courts within scope of rules).

(n74)Footnote 13. *Cf. Rojas-Hernandez v. Puerto Rico Power Auth., 925 F.2d 492, 493 (1st Cir. 1991) .*

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART I. COMPOSITION AND ORGANIZATION OF FEDERAL JUDICIAL SYSTEM

1-1 Moore's Manual--Federal Practice and Procedure §§ 1.05through 1.19

[Reserved]

§§ 1.05[Reserved]

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART II. USE OF RULES OF CIVIL PROCEDURE IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure § 1.20

§ 1.20 Promulgation of Federal Rules of Civil Proceduren*

[1] Power of Congress to Promulgate Procedural Rules

Congress has the power to make procedural rules for the lower federal courts, n1 based on two constitutional provisions: the first authorizes Congress to establish federal courts inferior to the U.S. Supreme Court, n2 and the second authorizes Congress to make all laws necessary and proper to establish those courts. n3 Furthermore, even though federal courts are required to follow state substantive law in diversity actions, federal courts must apply federal procedural law in all cases, both in diversity cases and in federal question cases. n4

Despite the Rules Enabling Act, Congress has retained the power to adopt procedural rules directly and has on occasion enacted rules of procedure or rules of evidence directly. For example, Congress made direct changes to the Federal Rules of Evidence. n5 However, in the usual course of rulemaking the Federal Rules of Civil Procedure are issued by the Supreme Court under rulemaking powers delegated by Congress, and proposed rules may be rejected by Congress; they are not generally affirmatively adopted by the legislature, as all statutes must be. n6

[2] Delegation of Rulemaking by Congress to Supreme Court

Pursuant to its constitutional authority, Congress has delegated its rulemaking power to the Supreme Court to make rules to specify the procedures that must be used in the federal courts n1 and has stated that all laws in conflict with the rules specified by the Supreme Court are of no force or effect. n2 This delegation has been challenged as a violation of the constitutional principle of separation of powers, but the Supreme Court has rejected this argument on the reasoning that Congress has the power to obtain assistance from the other governmental branches to adopt specific systems to implement the federal law. The Supreme Court has upheld this delegation because Congress has provided a safeguard that Congress approve any rules adopted prior to when they take effect. n3

The process specifies that the Supreme court transmit to the Congress the court's proposed rules, which take effect unless rejected by Congress. n4 However, any proposed rules affecting evidentiary privileges must be affirmatively approved by Congress. n5 The delegation provides that the rules must govern practice and procedure in the lower federal courts, n6 but expressly prohibits the rules from abridging, enlarging, or modifying substantive rights. n7

[3] Supreme Court Adoption of Rules With Approval by Congress

The Supreme Court has exercised its statutory rulemaking authority by adopting the "Federal Rules of Civil Procedure." Thus, the Supreme Court has promulgated a comprehensive civil procedure code that governs the entire litigation process. n1 The Federal Rules of Civil Procedure specify the practice and procedure to be followed from commencement of an action through entry of temporary and final remedies to initiation of appeals. Since its enactment by Congress, the Rules Enabling Act has been amended in various details, but the authority of the Supreme Court to prescribe rules of practice, procedure, and evidence for the lower federal courts remains in effect. n2

Congress has retained power to review any proposed uniform federal rules of practice and procedure, n3 and this power is essential to maintaining the constitutional system of checks and balances among the branches of government. Under the adoption process, the Supreme Court must transmit a proposed rule of practice and procedure to Congress by May 1 of the year in which the rule is to take effect. Congress may object to the proposed rule and may pass legislation to suspend its operation or to alter it. Unless Congress prescribes a different date, the proposed rule takes effect no earlier than December 1 of the year of its transmission to Congress. n4 In effect, if a proposed rule of practice and procedure is transmitted in compliance with the statute, affirmative action by Congress is not required for the rule to go into force, n5 with the exception of any rule that creates, abolishes, or modifies an evidentiary privilege. n6 In practice, Congress has only rarely exercised its power to amend a proposed rule of practice and procedure or to suspend its operation.

Pursuant to its rulemaking authority, Congress has officially placed the responsibility for reviewing, developing, and proposing federal court rules on the Judicial Conference, n7 which consists of the Chief Justice, the Chief Judge of each Circuit, the Chief Judge of the Court of International Trade, and one district judge from each judicial circuit. The Conference has the continuing responsibility of studying and analyzing the operation and effect of the procedural rules prescribed by the Supreme Court for the other federal courts. The Conference also has the duty to recommend to the Supreme Court changes in and additions to the procedural rules that the Conference determines will promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. n8 The Supreme Court will then consider such recommendations for their adoption, modification, or rejection. n9 To assist it in its task of evaluating and proposing procedural rules for adoption, the conference has discretion to appoint additional committees. n

[4] Validity and Effect of Federal Rules of Civil Procedure

Any rules promulgated by the Supreme Court are presumed to be valid. n1 The rationale behind this presumption is that the Committee on Rules of Practice and Procedure studies and reports on each proposed rule change, and the Judicial Conference and the Supreme Court approve each rule before its adoption. Furthermore, a rule is submitted to Congress before it becomes effective to ensure that the rule does not violate legislative policies. Otherwise, Congress would presumably legislate against it. The fact that Congress takes no adverse action indicates that Congress has found no violation of its current policies. n2

Rules that are adopted by the Supreme Court, and not rejected by Congress, n3 have the full effect of statutes, and, therefore, courts interpret the rules using principles of statutory construction. n4 Another result of the adoption of a rule is that all laws in conflict with the rule no longer have any force or effect. n5 Conversely, if Congress adopts a statute that is inconsistent with an existing rule after the effective date of the rule the statute takes precedence and has the effect of superseding or modifying the conflicting rule, provided that the congressional intent is clear. If the intent to supersede the prior rule is not clear, the courts must attempt to construe the statute as compatible with the rule to the extent possible. n6

[5] Adopted Rules Construed As Statute

Once a rule has been promulgated by the Supreme Court and adopted by Congress, the rule has the force of a statute, n1

and it must be construed by application of the same principles as those used in interpreting statutes. n2 Therefore, the courts apply the following standards of construction:

1. Each of the rules must be construed as a whole, n3 and must be considered in relation to each other rule with a similar subject. n4

2. A rule must be given its plain meaning, n5 and the text must be interpreted as it is written, without adding text to improve its meaning. n6

3. If the plain meaning of the words is clear, that meaning is conclusive. n7

4. If the words are unclear or ambiguous, the court may determine its meaning by analysis of the prior case decisions, n8 legislative history, n9 and committee notes. n10

[6] Lower Courts Retain Power to Promulgate Local Rules

Although the Supreme Court has inherent supervisory powers and primary responsibility for ensuring that federal court rules are consistent with the principles of justice, n1 the lower courts have historically had the inherent power to make their own local rules. n2 Federal law now expressly authorizes the district courts to adopt rules to govern their own particular procedures, provided the local rules are consistent with the Federal Rules of Civil Procedure and federal statutes. n3 This requirement of consistency for local rules allows overall uniformity to be maintained in the federal court procedural system, while at the same time permitting local district courts the option to control procedures not governed by the national rules and to address local issues not suitable to be dealt with on a national level. n4 For a further discussion of local rulemaking authority and resolution of conflicts between local and federal rules and laws, see *§ 1.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, §§ 1.03-1.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Willy v. Coastal Corp., 503 U.S. 131, 136-137, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* (Congress has constitutional power to regulate federal court procedures).

(n3)Footnote 2. *U.S. Const. art. I, § 8, cl. 9*.

(n4)Footnote 3. *U.S. Const. art. I, § 8, cl. 18*.

(n5)Footnote 4. *Gasperini v. Center for Humanities, 518 U.S. 415, 434 & n.7, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. *See Fed. R. Evid. 412-415*; Pub. L. No. 103-322, § 320935, 108 Stat. 1796 (1994).

(n7)Footnote 6. *Wisconsin Project v. United States Doc, 317 F.3d 275, 284 (D.C. Cir. 2003)* ; *see* [2], *below*.

(n8)Footnote 1. *28 U.S.C. § 2072(a)*; *see Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* (Supreme Court has constructed previous and current Federal Rules of Civil Procedure in response to Rules Enabling Act).

(n9)Footnote 2. *28 U.S.C. § 2072(b).*

(n10)Footnote 3. *See Loving v. United States, 517 U.S. 748, 755, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) .*

(n11)Footnote 4. *28 U.S.C. § 2074(a)*; *see* [3], *below.*

(n12)Footnote 5. *28 U.S.C. § 2074(b).*

(n13)Footnote 6. *28 U.S.C. § 2072(a)*; *see Touby v. United States, 500 U.S. 160, 165, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991) .*

(n14)Footnote 7. *28 U.S.C. § 2072(b)*; *see Kohlrautz v. Oilmen Participation Corp., 441 F.3d 827, 832 (9th Cir. 2006)* (when procedural rule conflicts with substantive law, court must apply correct rule of substantive law).

(n15)Footnote 1. *Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* (Supreme Court adopted Federal Rules of Civil Procedure in response to Rules Enabling Act); *Friends of the Earth, Inc. v. Chevron Chem. Co., 885 F. Supp. 934, 937 (E.D. Tex. 1995)* (Supreme Court adopted federal civil rules pursuant to Rules Enabling Act).

(n16)Footnote 2. *28 U.S.C. § 2072*; *see Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167, 1174 (10th Cir. 1986) .*

(n17)Footnote 3. *See 28 U.S.C. § 2074(a).*

(n18)Footnote 4. *28 U.S.C. § 2074(a).*

(n19)Footnote 5. *Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165, 1168-1169 n.29 (D.C. Cir. 1977) .*

(n20)Footnote 6. *28 U.S.C. § 2074(b).*

(n21)Footnote 7. *28 U.S.C. § 2073(a)(1).*

(n22)Footnote 8. *28 U.S.C. § 331*; *see 28 U.S.C. § 2073(b).*

(n23)Footnote 9. *28 U.S.C. § 331.*

(n24)Footnote . *28 U.S.C. § 331*; *see 28 U.S.C. § 2073(a)(2), (b).*

(n25)Footnote 1. *Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 552-553, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991) .*

(n26)Footnote 2. *Swint v. Chambers County Commission, 514 U.S. 35, 48 , + 115 S. Ct. 1203, 1211, 131 L. Ed. 2d 60 (1995)* ; *see* [3], *above.*

(n27)Footnote 3. *See* [3], *above.*

(n28)Footnote 4. *Esquivel v. Arau, 913 F. Supp. 1382, 1387 (C.D. Cal. 1996)* (Rule 41(d), which authorizes award of costs as sanctions, has force of statute and may provide authority for award of attorney's fees); *see* [5], *below.*

(n29)Footnote 5. *28 U.S.C. § 2072(b).*

(n30)Footnote 6. *Walsh v. Ford Motor Co., 807 F.2d 1000, 1012 (D.C. Cir. 1986) , cert. denied, 482 U.S. 915 (1987)* (Magnuson-Moss Act did not supersede procedures required by Rule 23 regarding class actions); *United States v. Gustin-Bacon Div., Certainteed Products Corp., 426 F.2d 539, 542 (10th Cir. 1970) , cert. denied, 400 U.S. 832*

(1970) (citing **Moore's Federal Practice**).

(n31)Footnote 1. *See* [4], *above*.

(n32)Footnote 2. *See Castro v. United States, 310 F.3d 900, 902 (6th Cir. 2002)* .

(n33)Footnote 3. *Castro v. United States, 310 F.3d 900, 902 (6th Cir. 2002)* ; *Paige v. Consumer Programs, Inc., 248 F.R.D. 272, 275 (C.D. Cal. 2008)* .

(n34)Footnote 4. *Maybin v. Northside Correctional Ctr., 891 F.2d 72, 74 (4th Cir. 1989)* ; *see Davis v. Mich. Dep't. of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)* .

(n35)Footnote 5. *Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1111 (9th Cir. 2002)* .

(n36)Footnote 6. *Burns v. Lawther, 53 F.3d 1237, 1240-1241 (11th Cir. 1995)* .

(n37)Footnote 7. *Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989)* .

(n38)Footnote 8. *Thacker v. New York Life Ins. Co., 796 F. Supp. 1338, 1341 (E.D. Cal. 1992)* .

(n39)Footnote 9. *De Osorio v. INS, 10 F.3d 1034, 1042-1043 (4th Cir. 1993)* .

(n40)Footnote 10. *Schiavone v. Fortune, 477 U.S. 21, 31, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)* (court may consider Committee Notes, but express language of properly adopted rule is controlling over Committee Note that is in conflict with rule).

(n41)Footnote 1. *Frazier v. Heebe, 482 U.S. 641, 645, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987)* .

(n42)Footnote 2. *Friends of the Earth, Inc. v. Chevron Chem. Co., 885 F. Supp. 934, 937-939 (E.D. Tex. 1995)* .

(n43)Footnote 3. *28 U.S.C. § 2071*; *Fed. R. Civ. P. 83*.

(n44)Footnote 4. *See Fed. R. Civ. P. 83*; *Members First Fed. Credit Union v. Members First Credit Union, 244 F.3d 806, 807 (11th Cir. 2001)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART II. USE OF RULES OF CIVIL PROCEDURE IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure § 1.21

§ 1.21 Purposes of Federal Rules of Civil Proceduren*

[1] Just and Expeditious Determination of Litigation

The primary purposes of the Federal Rules of Civil Procedure, and the fundamental policy that the district courts must follow in applying any of the federal rules in civil actions, is to provide a just, speedy, and inexpensive determination of the case and to promote a fair and effective trial. n1 For example, the liberal policy of Rule 15 allowing a claimant to file an amended pleading in order to state a claim for relief n2 must be weighed with the underlying purposes of the federal rules as stated in Rule 1. n3

The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. n4 Thus, courts routinely grant leave to parties to amend their pleadings under Rule 15(a) to set forth transactions, occurrences, or events that could have been included in the original pleading but were omitted for one reason or another. n5 For another example, the summary judgment procedure under Rule 56 should not be regarded as a disfavored procedural shortcut but rather as an integral part of the federal rules as a whole, designed to secure the just, speedy, and inexpensive determination of every action. n6

[2] Promotion of Uniform Procedures

The Federal Rules of Civil Procedure have been designed to create a uniform system of procedure in the federal district courts. A primary purpose of the civil rules is to establish an independent and uniform system of efficient procedure, applicable in every district court, thus eliminating unnecessary differences in the administration of legal proceedings that result from the use of local practice rules. n1 The courts have adopted the policy goal that attorneys throughout the United States should not be restrained by duplicative, unnecessary, or confusing local rules when practicing before federal courts. n2 For a discussion of local rule issues, see *§ 1.23*.

[3] Preference for Decisions on Merits

Another important purpose of the Federal Rules is to enable a proper decision on the merits of a claim, rather than have the determination made on procedural technicalities. n1 The rules are not intended to set technical traps and pitfalls for

unwary parties and attorneys but, rather, to secure speedy and inexpensive justice in a uniform, well-ordered manner. The basic purpose of the federal rules is to administer justice through fair trials, not through summary dismissals, even though that may be necessary on occasion. The rules were designed to avoid some of the old procedural booby traps that common-law pleaders could set to prevent unsophisticated parties from ever having an adjudication on the merits. n2

In this regard, it has been noted that the civil rules are intended to discourage what is commonly referred to as "the sporting theory of justice": the use of the adversarial system as a game of skill in which a single error can be the decisive factor between success and failure. n3 A common example has been the use of surprise or similar tactics by one party, intended to cause the other party to lose merely because of an inability to anticipate and to prepare adequately to counter the opponent's tactics. These tactics may lead to unjust determinations in violation of Rule 1, and, therefore, the courts will construe the civil rules to prevent parties from gaining such an advantage by unfair tactics. n4

The resolution of a claim on the merits promotes the policies stated in Rule 1 by solving a controversy with justice, speed, and less expense, while the refusal to reach a decision because of a procedural technicality often results in injustice and prolongs the controversy. Therefore, courts should liberally construe the civil rules so that they do not foreclose a decision on the merits merely because of a technicality, unless the result would be prejudicial to the other party. n5

However, even though a court may overlook a party's failure to meet every procedural technicality of a rule, the court must nevertheless require substantial compliance. The court must exercise its discretion to ensure that liberal construction of the rules to allow a judgment on the merits does not in fact cause an injustice to a party. n6 Furthermore, ignorance of the rules is not a sufficient defense to failure to comply with them. All attorneys practicing in federal courts are presumed to be familiar with the rules, and the parties are therefore charged with knowledge of the rule requirements. n7 The court may sanction a willful failure by an attorney or party to comply with the civil rules. If a party's noncompliance frustrates the primary goal to ensure a just, speedy, and inexpensive proceeding, the court has discretion to impose sanctions including dismissal with prejudice, an award of court expenses and attorney's fees that resulted from the violation, or both. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 1.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 1* (rules must be construed and administered to secure the just, speedy, and inexpensive determination of every action); *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (primary purpose of rules is to effect just, speedy, and inexpensive determination).

(n3)Footnote 2. *See Nunes v. Ashcroft, 375 F.3d 810, 813 (9th Cir. 2004)* .

(n4)Footnote 3. *Doonan v. Carnival Corp., 404 F. Supp. 2d 1367, 1373 (S.D. Fla. 2005)* .

(n5)Footnote 4. *Cler v. Ill. Educ. Ass'n, 423 F.3d 726, 729 (7th Cir. 2005)* .

(n6)Footnote 5. *Harris v. Garner, 216 F.3d 970, 996 (11th Cir. 2000)* .

(n7)Footnote 6. *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n8)Footnote 1. *Lumbermen's Mut. Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)* ; *see Ward v.*

Estaleiro Itajai S/A, 541 F. Supp. 2d 1344, 1357 (S.D. Fla. 2008) (uniformity in federal practice is aim and preferred result of unified judicial system).

(n9)Footnote 2. *See Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1048 (2d Cir. 1991)* .

(n10)Footnote 1. *Goodman v. PraxAir, Inc., 494 F.3d 458, 468 (4th Cir. 2007)* (citing **Moore's Federal Practice**).

(n11)Footnote 2. *Schiavone v. Fortune, 477 U.S. 21, 27, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)* .

(n12)Footnote 3. *Central Distributors, Inc. v. M. E. T., Inc., 403 F.2d 943, 946 (5th Cir. 1968)* (intent of rules was to end "sporting theory of justice").

(n13)Footnote 4. *Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 89 (1st Cir. 1988)* .

(n14)Footnote 5. *Schiavone v. Fortune, 477 U.S. 21, 27, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)* .

(n15)Footnote 6. *Coleman v. Frierson, 607 F. Supp. 1566, 1570 (N.D. Ill. 1985)* (court denied relief from default under Rule 60(b) when defendant's failures prior to default judgment were both numerous and egregious).

(n16)Footnote 7. *Merit Fin. Co. v. Service Fin. Co., 38 F.R.D. 482, 485 (D.S.C. 1965)* .

(n17)Footnote 8. *Pederson v. Louisiana State Univ., 912 F. Supp. 892, 937 (M.D. La. 1996)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
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1-1 Moore's Manual--Federal Practice and Procedure § 1.22

§ 1.22 Applicability of Federal Rules of Civil Proceduren*

[1] Scope of Rules

The Federal Rules of Civil Procedure apply in all suits of a civil nature brought in federal court, whether at law or in equity or in admiralty, with the exceptions stated in Rule 81, n1 and absent a direct expression by Congress of contrary intent. n2 Thus, when read together the clear intent of Rules 1 and 81 is to have the civil rules apply to all "district court" civil proceedings, in the absence of the express exceptions. n3 Courts have also stated that the rules apply in all "civil actions" absent a direct expression of congressional intent to the contrary. n4

[2] District Court Proceedings Subject to Federal Civil Rules

The Federal Rules of Civil Procedure control procedure in United States district courts. n1 The phrase "United States district court" has not been expressly defined for purposes of the Federal Rules of Civil Procedure in either the rules themselves or in any statutes. However, the courts have not used a narrow interpretation of this phrase, but rather apply the federal rules expansively to all courts that Congress from time to time designates as district courts. n2 At the least, Rule 1 encompasses within its scope all of the district courts that Congress has created in the various states pursuant to its constitutional powers. n3 This means that the Federal Rules of Civil Procedure are applicable to all proceedings adjudicated by constitutional, "Article III" district courts. n4 The federal rules are applicable to legislative, "Article I" trial courts n5 only when made applicable by Congress, and, therefore, they are not necessarily applicable to all legislative court proceedings. n6

The federal rules do apply to most proceedings in the United States district court for the District of Columbia, even though the rules do not explicitly state that they apply in that court. The Congressional intent that the rules should govern proceedings in the District Court for the District of Columbia is implied when the phrase "United States district courts" used in Rule 1 is read in conjunction with the statute that provides that the District of Columbia is a judicial district, its district court is the United States District Court for the District of Columbia, and the court personnel are district judges. n7 Additionally, the United States District Court for the District of Columbia has consistently applied the Federal Rules to all proceedings in that court. n8

[3] Nature of Civil Actions Which Are Governed by Federal Civil Rules

The Federal Rules of Civil Procedure apply and control procedure in all civil actions and proceedings in the United States District Courts, except as expressly limited by Congress and unless the proceedings are covered by other rules of practice and procedure as stated in Rule 81. n1 The courts have generally held that the rules apply only if a proceeding is adversarial in nature and has been initiated to obtain some remedy under a claim for relief. n2 The Federal Rules of Civil Procedure expressly provide for one form of lawsuit, the "civil action," and have eliminated the previous practice of separating actions at law from proceedings in equity. n3 Thus, a civil action retains its nature regardless of whether it is tried by a jury or by the court, n4 or is referred to a master, n5 or magistrate. n6 The civil rules apply in all federal district court proceedings n7 except for criminal and quasi-criminal actions, n8 and actions that are otherwise specifically designated as beyond the scope of the civil rules, as expressed by Rule 81. n9

Based on these principles, the Federal Rules of Civil Procedure are applicable to the following types of actions: proceedings for injunctive relief, n10 actions seeking declaratory judgments, n11 class actions, n12 shareholder derivative actions, n13 suits involving intellectual property such as patents n14 and copyrights, n15 actions related to estate receiverships, n16 property condemnation proceedings, n17 suits by and against a state or the United States government, n18 and suits removed from state court. n19

[4] Limitations on Applicability of Rules to Particular Types of Actions

[a] Civil Rules Contain Explicit Limitations and Exceptions Regarding Applicability

The Federal Rules of Civil Procedure govern the procedure in the United States district courts n1 in all suits of a civil nature n2 except for in the circumstances stated in Rule 81. n3 Most of these exceptions provide for limited or partial application of the civil rules. n4 Only a few of the exceptions make the rules completely inapplicable to particular situations. Thus, for example, the federal rules are completely inapplicable to prize proceedings in admiralty. n5

For a discussion of the limited applicability of the federal rules, see [b] through [h], *below*.

[b] Admiralty

The Federal Rules of Civil Procedure do not control prize proceedings in admiralty. n6 Prize proceedings involve the forfeiture of property based on violation of United States laws. They are governed by statute and the supplemental admiralty rules, which set forth in detail the procedures to be followed in such actions. Use of the prize statute is extremely rare because it applies only to the seizure of vessels during wartime under the authority of the United States or adopted and ratified by the President. n7

Other than prize proceedings, the Federal Rules control in cases of admiralty and maritime cases, except to the extent that they conflict with the Supplemental Rules for Admiralty and Maritime Claims. In cases involving both admiralty and nonadmiralty, for example, when a seaman is hurt aboard ship, the pleading may designate that the claim is to come within the admiralty or maritime jurisdiction for procedural purposes. n8 If such a claim does not receive a designation in the pleading, it will be treated as within nonadmiralty jurisdiction. When there is no basis for federal jurisdiction on a claim other than admiralty and maritime jurisdiction, the claim must be treated as an admiralty or maritime claim, even if no Rule 9(h) allegation is made in the pleading. n9 The purpose of Rule 9(h)(1) is to allow the claimant to elect that certain special admiralty and maritime procedures and rules apply. Rule 9(h)(1) also clarifies the applicability of these admiralty and maritime rules and procedures in a case when more than one basis for subject matter jurisdiction has been asserted. n10 See Ch. 9, *Pleadings and Motions in General,* for further discussion of commencing an action involving admiralty jurisdiction.

In a suit in an "Admiralty Act" case, the United States Supreme Court has indicated a strong preference for a uniform procedure in admiralty to be governed by the Federal Rules of Civil Procedure. The Suits in Admiralty Act is a waiver

of the federal government's sovereign immunity when a civil action is commenced by a seaman injured aboard a vessel owned by the United States. n11 The Act instructs that service of process in such cases must be made "forthwith." On the other hand, *Rule 4 of the Federal Rules of Civil Procedure* sets an extendable 120-day period for service of process. The Supreme Court has held that the Act's "forthwith" instruction has been superseded by Rule 4's 120-day extendable time limit. n12

[c] Arbitration

The Federal Rules of Civil Procedure apply to proceedings under the Federal Arbitration Act n13 but only to the extent that matters of procedure are not provided for in the Act. n14 It has been held that this means that it is only the judicial proceedings under the Arbitration Act that are subject to the federal rules. The federal rules do not govern the procedure in the hearings before the arbitrators. n15 Furthermore, when the Arbitration Act covers a procedure, the civil rules do not apply. For example, section 4 of the Act provides that courts must compel arbitration according to the terms of the parties' agreement. n16

[d] Citizenship

The Federal Rules of Civil Procedure govern procedure in admission to citizenship and cancellation of citizenship cases, to the extent that it is not otherwise provided by statute. n17 Procedures related to naturalization or cancellation of certificates of citizenship are significantly governed by statute. n17.1

The rules also apply to immigration proceedings before the Immigration and Naturalization Service, which include administrative and judicial review of administrative decisions. Many of those proceedings are governed by statute or federal regulation. n18 However, to the extent that they do not conflict with the statutory and regulatory scheme, the rules apply to immigration and naturalization proceedings. n19 For example, a district court may grant a new trial or amend a judgment in accordance with Rule 59, n20 or may grant relief from judgment pursuant to Rule 60. Furthermore, de novo immigration proceedings pursuant to the naturalization statutes n21 are governed by the federal civil rules, because of the broad statement set forth in Rule 1, as well as the specific reference in Rule 81(a)(2). Consequently, the civil rules are applicable in de novo citizenship proceedings, including Rule 12 regarding motions to dismiss and Rule 56 regarding summary judgment. n22

[e] Bankruptcy

Bankruptcy proceedings are governed by the Federal Rules of Bankruptcy Procedure, and not by the Federal Rules of Civil Procedure, except when a particular Civil Rule has expressly been incorporated by a particular Bankruptcy Rule. Numerous Bankruptcy Rules make such an explicit incorporation of the Civil Rules for adversary bankruptcy proceedings. n23 For example, *Bankruptcy Rule 7003* expressly makes Civil Rule 3, which requires the filing of a complaint to commence an action, applicable to adversary bankruptcy proceedings. n24 In another example, *Bankruptcy Rule 9015(a)* expressly makes Civil Rules 38, 39, 47, 48, 51, and 81(c) applicable to jury trials in bankruptcy cases and proceedings. n25 On the other hand, even though *Bankruptcy Rule 9006* is modeled on and very similar to Civil Rule 6, Civil Rule 6 is clearly not incorporated into the Bankruptcy Rules, in that *Bankruptcy Rule 9006* expressly provides a different method for the computation of time. Consequently, Civil Rule 6 is not applicable to the bankruptcy proceeding. n26

In addition to those parties making a claim for relief, numerous Bankruptcy Rules have explicitly incorporated the Civil Rules for defending parties. n27 For example, a motion to dismiss in a bankruptcy adversary proceeding is determined according to the provisions of Civil Rule 12(b). n28

When a Federal Rule of Civil Procedure has been incorporated by reference and made applicable to the Bankruptcy Rules, the Civil Rule that becomes applicable in a bankruptcy proceeding is the version in effect on the effective date of

the incorporating Bankruptcy Rule, and as the Civil Rule is thereafter amended, unless otherwise provided by such amendment or by the Bankruptcy Rules. n29 Once a Civil Rule has been incorporated, a bankruptcy court follows case law precedent for interpretation of the incorporated Civil Rule just as it would for a case law interpretation of a Bankruptcy Rule. n30

The Bankruptcy Rules do adapt many of the rules and much of the procedural scheme of the Civil Rules. The purpose of these similarities in Bankruptcy Rules and Civil Rules is to retain the same basic practice in the bankruptcy and district courts to the extent possible. However, distinctions remain between the Bankruptcy Rules and Civil Rules when necessary to accommodate the inherent differences between bankruptcy and civil litigation. n31 When there are similarities, a court may use the Civil Rule by analogy to interpret the similar Bankruptcy Rule, n32 even if no express provision of a Bankruptcy Rule has made the analogous Civil Rule applicable. n33

[f] Intellectual Property Cases

The Federal Rules of Civil Procedure now apply to copyright proceedings to the same extent as any other civil proceeding because the former Copyright Rules have been abrogated. n34

A provision has also been added specifically making the civil rules governing injunctions applicable to copyright impoundment proceedings. n35 This provision acknowledges that courts have for some time turned to Rule 65 in response to the apparent inconsistency of the former copyright rules and because of concerns that the former copyright rules did not satisfy contemporary requirements of due process. n36 Copyright proceedings are otherwise governed by the copyright statutes. n37

The Federal Rules of Civil Procedure also apply to other intellectual property cases, including patent infringement actions n38 and trademark actions. n39

[g] Habeas Corpus

A "habeas corpus" proceeding is one in which the petitioner requests the court to order a person in custody to be released from custody n40 or to be transferred. n41 In the federal district courts, habeas corpus proceedings are generally governed by statute, n42 and procedural rules particularly applicable to those statutes. n43 However, the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings to the extent that a particular practice is not set forth in a federal statute or in the rules peculiar to federal habeas statutes, to the extent that the Rules are not inconsistent with habeas corpus rules n44 and to the extent that the particular procedure has in the past conformed to the practice in civil actions generally. n45

If a Federal Rule of Civil Procedure provision cannot be reconciled with the application of the habeas corpus rules, the Federal Civil Rule is not applicable, and the Habeas Corpus Rules alone apply. For example, although in ordinary civil proceedings Civil Rule 8 requires only a short and plain statement of the claim, n46 the habeas rules require a more detailed statement; the petitioner must specify all the grounds for relief available and state the facts supporting each ground. n47 Furthermore, even though habeas corpus is generally considered a civil action, the federal civil rules regarding venue do not apply to the peculiar action of habeas corpus. n48 In another example, it has been held that the federal civil procedure rules governing discovery are generally inapplicable to habeas proceedings, and the district court may fashion appropriate alternate procedures. n49

The civil rules have abolished the peculiar procedures in proceedings which request a writ of mandamus or a writ of scire facias (writ of execution). n50 However, the writ of mandamus, which is a command order from a higher court to a lower court, is now codified under the All Writs Act. n51 The All Writs Act provides that the United States Supreme Court and all higher courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. n52 The writ of mandamus has been abolished in the district court. Relief previously available

through the writ must now be obtained by appropriate petition or motion under the Federal Civil Rules, such as a motion for the issuance of an injunction. n53 Such a motion may also essentially move the court to revisit and change its previous decision, such as a motion under Rule 59(e) to alter or amend a judgment. n54

[h] Administrative Subpoenas and Review Proceedings

The Federal Rules of Civil Procedure apply in proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States, except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings. n55 The Supreme Court has approved the principle that the Federal Rules of Civil Procedure are generally applicable to the enforcement of administrative subpoenas. n56 For example, if a particular statute is silent on the matter of attorney's fees and costs with respect to a motion to enforce a subpoena, the federal rules are applicable to procedures for obtaining fees and costs pursuant to Rule 81(a)(5). n57 However, the adjudicator has discretion to limit the application of the federal rules when their literal application would delay and complicate the proceeding. n58

The adoption of the Federal Rules of Civil Procedure did not alter the statutory method for initiating administrative review proceedings, including the following:

1. A proceeding in a United States district court for the review of orders of the Secretary of Agriculture. n59 However, the procedure in these proceedings in the district court must comply with the Federal Rules of Civil Procedure to the extent applicable. n60

2. A proceeding to review an order of the Secretary of the Interior. However, these proceedings in the district court must conform to the rules to the extent applicable. n61 These orders of the Secretary of the Interior relate to monopolies in restraint of trade. n62

3. A proceeding in the district court to enforce orders of the National Labor Relations Board n63 is not altered by the Federal Rules of Civil Procedure. The civil rules do apply, however, to the extent that those statutes do not govern procedures and to the extent the procedures under the civil rules are applicable. n64

[i] Removed Actions

[i] Applicable Rules Depend on Completion of Removal

State procedural rules generally govern state lawsuits until they are removed to federal court. n65 The method and authorization for removal to federal court is governed by federal statute, not the federal rules. n66 After removal to the United States district court from the state court has occurred, the Federal Rules of Civil Procedure govern procedure for the remainder of the action. n67 However, prior to removal, state law controls all procedural issues such as sufficiency of service, n68 the time at which an action is considered commenced, n69 the appearance of parties in the action, n70 and the form, filing, and service of pleadings. n71 State law also governs the applicability of any sanctions for conduct such as filing a frivolous complaint in state courts prior to removal. n72 Furthermore, there is no continuing duty to amend the complaint to be consistent with Rule 11 once a copy of the original complaint is filed in federal court after removal. n73

After an action has been removed, the federal rules govern the procedure to be followed before the district court as if the case had been originally commenced in the federal court. n74 Thus, if not completed until after removal, service must be made in accordance with the federal rules. n75 Any further papers filed in the removed action must conform to the federal rules, n76 and after removal amendments to papers originally filed in state court before removal must comply with the federal rules. n77 Additionally, removed actions that are covered by federal rules providing for special

requirements, such as class actions or shareholder derivative actions, must be in compliance with those rules. n78

[ii] Answer by Defendant

When the defendant has not filed an answer prior to removal, Rule 81(c) controls the time in which the defendant must answer after the case has been removed, n79 rather than Rule 4 and Rule 12, which specify the general time requirements for filing an answer in federal district court. n80 If the defendant has properly answered the complaint before removal of the case, the defendant need not refile the answer. n81 However, in the more usual situation, when the defendant has not filed an answer before removal, the defendant must answer or present other defenses or objections under the Civil Rules within the longest of the following applicable periods: n82

- 21 days after receiving a copy of the initial pleading stating the claim for relief; n83
- 21 days after being served with the summons for an initial pleading on file at the time of service; n84

or

- 7 days after the notice of removal is filed. n85

The appropriate time period from the list above may be extended under Rule 6(b). For example, even if the time period has already expired, the district court may extend the time for good cause if the party failed to act because of excusable neglect. n86

[iii] Demand for Jury Trial

If all the pleadings have been served, the general rule for demanding a jury trial in federal court after removal requires that a party who is entitled to a jury trial make a timely demand in the federal court. Under Rule 81(c), a jury trial demand is timely in either of the following situations within 14 days after either of the following events:

- the party files a notice of removal; n87 or
- the party is served with a notice of removal filed by another party. n88

Two exceptions are allowed to the general rule stated above for jury trial demands pursuant to Rule 81(c). First, a party who has made a proper demand for a jury trial under state law before removal of the action need not repeat that demand. n89 Whether the party made a proper demand in state court prior to removal is determined by state law. For example, when state law provided that a demand for jury by the defendant in the state proceeding perfected the right for all parties, the plaintiff was not required to make a new demand following removal. n90

The second exception in Rule 81(c) provides that if state law does not require a party to make an express demand for trial by jury in the initial pleadings, the party need not do so immediately after removal unless the court directs that the party do so. n91 This principle also applies when a state law allows a demand to be filed at any time, even at advanced stages of the proceedings. In this situation the court may allow a jury trial even if demanded later than 14 days after removal depending on whether: (1) the claims are traditionally triable by jury, (2) the parties were assuming that the trial would be a bench trial, and (3) the party opposing the jury demand consented in some manner to a jury trial or whether allowing a jury trial will be unduly prejudicial. n92 A local court rule requiring an express demand for trial by jury constitutes a directive by the district court for purposes of Rule 81(c), and a failure to comply with this local rule will result in a waiver of jury trial. n93 However, despite these rules, a court may exercise its discretion under Rule 39(b) to grant a motion for a jury trial when a demand is untimely after removal if the demand would have been granted if it had been made in a timely manner. n94

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 1.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 1.*

(n3)Footnote 2. *In re Davis, 194 F.3d 570, 577-579 (5th Cir. 1999)* (absent direct expression by Congress prohibiting nondischargeability action by administratrix, normal rules of civil procedure, including Rule 17(a) regarding suits filed by a representative on behalf of another, had to be applied in case where administratrix was authorized by both Texas and federal law to sue on behalf of the wrongful death beneficiaries).

(n4)Footnote 3. *Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* ; *see* [2], *below* (description of district court proceedings).

(n5)Footnote 4. *Walsh v. Ford Motor Co., 807 F.2d 1000, 1007 (D.C. Cir. 1986) , cert. denied, 482 U.S. 915 (1987)* ; *see* [3], *below* (description of civil actions that are subject to rules).

(n6)Footnote 1. *Fed. R. Civ. P. 1.*

(n7)Footnote 2. *See Fed. R. Civ. P. 1*, Committee Note to 1948 Amendments.

(n8)Footnote 3. *Fairhead v. Deleuw, Cather & Co., 817 F. Supp. 153, 157 (D.D.C. 1993) , aff'd without op., 1 F.3d 45 (1993) .*

(n9)Footnote 4. *See § 1.03[1].*

(n10)Footnote 5. *See § 1.03[2].*

(n11)Footnote 6. *See Hanna v. Plumer, 380 U.S. 460, 472-473, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *Lasky v. Commissioner, 235 F.2d 97, 98 (9th Cir. 1956)* (rules do not govern Tax Court proceedings); *cf.* U.S. Const., Art. III; *Fed. R. Civ. P. 1*, Committee Note to 1948 Amendments.

(n12)Footnote 7. *28 U.S.C. § 132(a).*

(n13)Footnote 8. *See, e.g., Pate v. United States, 328 F. Supp. 2d 62, 68 (D.D.C. 2004) .*

(n14)Footnote 1. *See Fed. R. Civ. P. 81(a).*

(n15)Footnote 2. *Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965)* (attorney disbarment proceedings are not within scope of civil rules).

(n16)Footnote 3. *Burlington Northern v. Nebraska Public Power Dist., 931 F. Supp. 1470, 1479 (D. Neb. 1996)* ; *see Fed. R. Civ. P. 2.*

(n17)Footnote 4. *Fed. R. Civ. P. 38, 39.*

(n18)Footnote 5. *See Fed. R. Civ. P. 53.*

(n19)Footnote 6. *See Fed. R. Civ. P. 53.*

(n20)Footnote 7. *See* [2], *above*.

(n21)Footnote 8. *United States v. Lacey, 982 F.2d 410, 412 (10th Cir. 1992)* (action for judgment of forfeiture of appearance bond was criminal proceeding not within scope of civil rules).

(n22)Footnote 9. *See also Fed. R. Civ. P. 81*.

(n23)Footnote 10. *See Fed. R. Civ. P. 65*.

(n24)Footnote 11. *See Fed. R. Civ. P. 57*.

(n25)Footnote 12. *Fed. R. Civ. P. 23*.

(n26)Footnote 13. *Fed. R. Civ. P. 23.1*.

(n27)Footnote 14. *SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1116 (9th Cir. 1985)* .

(n28)Footnote 15. *Marvullo v. Gruner & Jahr, Stern Magazine Corp., 105 F. Supp. 2d 225, 233 (S.D.N.Y. 2000)* (contributory copyright infringement plaintiff must plead complaint supported by factual assertions under Rule 12(b)(6)).

(n29)Footnote 16. *See Fed. R. Civ. P. 66*.

(n30)Footnote 17. *Fed. R. Civ. P. 71.1*.

(n31)Footnote 18. *See Fed. R. Civ. P. 4(i)*.

(n32)Footnote 19. *Fed. R. Civ. P. 81(c)*.

(n33)Footnote 1. *See* [2], *above*.

(n34)Footnote 2. *See* [3], *above*.

(n35)Footnote 3. *Fed. R. Civ. P. 1*.

(n36)Footnote 4. *Fed. R. Civ. P. 81(a)(2)* (bankruptcy).

(n37)Footnote 5. *Fed. R. Civ. P. 81(a)(1)*.

(n38)Footnote 6. *Fed. R. Civ. P. 81(a)(1)*.

(n39)Footnote 7. *10 U.S.C. § 7651(a)*.

(n40)Footnote 8. *Fed. R. Civ. P. 9(h)(1)*, *see Doyle v. Huntress, Inc., 419 F.3d 3, 6-7 (1st Cir. 2005)* ; *see also Fed. R. Civ. P. 14(c)*, *38(e)*, and *82*; Fed. R. Civ. P., Supplemental Rules for Admiralty and Maritime Claims.

(n41)Footnote 9. *Fed. R. Civ. P. 9(h)(1)*.

(n42)Footnote 10. *Doyle v. Huntress, Inc., 419 F.3d 3, 6 (1st Cir. 2005)* .

(n43)Footnote 11. *46 U.S.C. App. § 742*.

(n44)Footnote 12. *Henderson v. United States, 517 U.S. 654, 667-670, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996)* . In the suit, a petitioner who filed suit under the Suits in Admiralty Act for injuries he received as a seaman aboard a vessel owned by the United States accomplished service on the United States in the manner and within the time allowed

by *Federal Rule of Civil Procedure 4*.

(n45)Footnote 13. *9 U.S.C. § 1 et seq.*

(n46)Footnote 14. *Fed. R. Civ. P. 81(a)(6)(B).*

(n47)Footnote 15. *Glencore, Ltd. v Schnitzer Steel Prods. Co., 189 F.3d 264, 267-268 (2d Cir. 1999)* (Rule 81(a)(3) does not itself or by importation of Rule 42(a) give the district court power to order either consolidation or joint hearing of two separate arbitrations where the arbitration provisions of the relevant agreements do not provide for consolidation or joint hearing); *Champ v. Siegel Trading Co., 55 F.3d 269, 276 (7th Cir. 1995)* (citing **Moore's Federal Practice** to effect that although Arbitration Act is silent on class arbitration, Rule 23 is not applicable and plaintiff ordered to proceed to arbitration in accordance with agreement which did not provide for class arbitration).

(n48)Footnote 16. *Glencore, Ltd. v. Schnitzer Steel Prods. Co., 189 F.3d 264, 267-268 (2d Cir. 1999) .*

(n49)Footnote 17. *Fed. R. Civ. P. 81(a)(3).*

(n50)Footnote 17.1. *See 8 U.S.C. § 1421 et seq.*

(n51)Footnote 18. *See, e.g., 8 U.S.C. §§ 1421(c), 1447(b).*

(n52)Footnote 19. *Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003)* (documents may be authenticated in immigration proceedings through any recognized procedure, such as those prescribed in Immigration and Naturalization Service regulation or by Federal Rules of Civil Procedure).

(n53)Footnote 20. *Fed. R. Civ. P. 59.*

(n54)Footnote 21. *See 8 U.S.C. § 1421(c)* (judicial review of decision of naturalization application).

(n55)Footnote 22. *Alvear v. Kirk, 87 F. Supp. 2d 1241, 1243 (D.N.M. 2000)* ; *see Fed. R. Civ. P. 12, 56.*

(n56)Footnote 23. *See Fed. R. Bankr. P. 7002*, Committee Notes (Civil Rules 5, 12, 13, 14, 25, 27, 30, 41 and 52 have been explicitly incorporated to some extent by Bankruptcy Rules Part VII).

(n57)Footnote 24. *See Fed. R. Bankr. P. 7003.*

(n58)Footnote 25. *Fed. R. Bankr. P. 9015(a)* (excepted is demand for jury trial, which must be filed in accordance with *Bankruptcy Rule 5005*).

(n59)Footnote 26. *VFB LLC v. Campbell Soup Co., 336 B.R. 81, 84 (D. Del. 2005) .*

(n60)Footnote 27. *See Fed. R. Bankr. P. 7012* (incorporating Civil Rule 12(b)-(i) to presentation of defensive pleadings and motions in adversary bankruptcy proceedings).

(n61)Footnote 28. *See Fed. R. Bankr. P. 7012(b)*; *see also Fed. R. Civ. P. 12(b)(6)*; *Mullarkey v. Tamboer, 536 F.3d 215, 219-220 (3d Cir. 2008) .*

(n62)Footnote 29. *Fed. R. Bankr. P. 9032.*

(n63)Footnote 30. *See Brown v. Wilshire Credit Corp., 484 F.3d 1116, 1123 (9th Cir. 2007) .*

(n64)Footnote 31. *Fed. R. Bankr. P. 7001, 7002*, Committee Note to 1983 Amendments.

(n65)Footnote 32. *See Kontrick v. Ryan, 540 U.S. 443, 451, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)* (court

analogized time bar in the *Bankruptcy Rule 4004* to affirmative defenses governed by Civil Rule 8(c), stating that under both Bankruptcy Rules and Civil Rules, defense is lost if it is not included in answer or amended answer).

(n66)Footnote 33. *United States v. Mitchell, 518 F.3d 740, 745 (10th Cir. 2008)* .

(n67)Footnote 34. *Fed. R. Civ. P. 81(a)(1)*, Committee Note to 2001 Amendments.

31-32 [Reserved]

(n68)Footnote 35. *Fed. R. Civ. P. 65(f)*; *see Pem-America, Inc. v. Sunham Home Fashions, LLC, 2003 U.S. Dist. LEXIS 24801 (S.D.N.Y. 2003)* (Rule 65(f) has replaced former Copyright Rule 4).

(n69)Footnote 36. *Fed. R. Civ. P. 65(f)*, Committee Note to 2001 Amendments.

(n70)Footnote 37. *17 U.S.C. § 501 et seq.*

(n71)Footnote 38. *SRI Intl. v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1116 (9th Cir. 1985)* (application of Rule 56 on summary judgment was appropriate in patent case because patent actions are civil in nature).

(n72)Footnote 39. *WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1086-1087 (6th Cir. 1983)* (summary judgment rule applied in trademark infringement action; motion for summary judgment granted when there was no disputed question of fact).

(n73)Footnote 40. *See Mayle v. Felix, 545 U.S. 644, 651, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)* .

(n74)Footnote 41. *See, e.g., Littles v. De Francis, 517 F. Supp. 1137, 1138 (M.D. Ga. 1981)* .

(n75)Footnote 42. See *28 U.S.C. § 2254* (habeas corpus petition in federal court by person in custody of state); *28 U.S.C. § 2255* (habeas corpus petition in federal court by person in federal custody).

(n76)Footnote 43. *Fed. R. Civ. P. 81(a)*, Committee Notes to 2002 Amendments; *see 28 U.S.C. §§ 2254, 2255.*

(n77)Footnote 44. *Fed. R. Civ. P. 81(a)(4)(A)*; *see Banks v. Dretke, 540 U.S. 668, 687 n.8, 124 S. Ct. 1256, 1270, 157 L. Ed. 2d 1166 (2004)* .

(n78)Footnote 45. *Fed. R. Civ. P. 81(a)(4)(B).*

(n79)Footnote 46. *Fed. R. Civ. P. 8(a)(2).*

(n80)Footnote 47. *See R. Governing § 2254 Cases 2(c)*; *see also Mayle v. Felix, 545 U.S. 644, 649, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)* .

(n81)Footnote 48. *Rumsfeld v. Padilla, 542 U.S. 426, 124 S. Ct. 2711, 2728, 159 L. Ed. 2d 513 (2004)* .

(n82)Footnote 49. *Harris v. Nelson, 394 U.S. 286, 295, 299, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969)* (drafters of rules had no intention to extend broad discovery provisions as matter of right in habeas corpus proceedings).

(n83)Footnote 50. *Fed. R. Civ. P. 81(b).*

(n84)Footnote 51. *28 U.S.C. § 1651(a).*

(n85)Footnote 52. *See Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2586, 159 L. Ed. 2d 459 (2004)* ; *see* Ch. 27, General Principles of Appeal.

(n86)Footnote 53. *Fed. R. Civ. P. 81(b)*; *Split Family Support Group v. Moran, 232 F. Supp. 2d 1133, 1135 (D. Mont. 2002)* .

(n87)Footnote 54. *See Fed. R. Civ. P. 59(e)*.

(n88)Footnote 55. *Fed. R. Civ. P. 81(a)(5)*.

(n89)Footnote 56. *Upjohn v. United States, 449 U.S. 383, 398, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

(n90)Footnote 57. *NLRB v. Cable Car Advertisers, Inc., 319 F. Supp. 2d 991, 999-1000 (N.D. Cal. 2004)* .

(n91)Footnote 58. *Donaldson v. United States, 400 U.S. 517, 528-529, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971)* .

(n92)Footnote 59. *Fed. R. Civ. P. 81(a)(4)*; *Riccelli's Produce, Inc. v. Horton Tomato Co., 155 F.R.D. 411, 412 (N.D.N.Y. 1994)* .

(n93)Footnote 60. *Fed. R. Civ. P. 81(a)(6)(A)*.

(n94)Footnote 61. *Fed. R. Civ. P. 81(a)(6)(C)*.

(n95)Footnote 62. *15 U.S.C. § 522*.

47-48 [Reserved].

(n96)Footnote 63. *29 U.S.C. §§ 159*.

(n97)Footnote 64. *Fed. R. Civ. P. 81(a)(6)(E)*.

(n98)Footnote 65. *Fed. R. Civ. P. 81(c)(1)*.

(n99)Footnote 66. *See 28 U.S.C. §§ 1441-1452*.

(n100)Footnote 67. *Fed. R. Civ. P. 81(c)(1)*.

(n101)Footnote 68. *Boyle v. Am. Auto Serv., 571 F.3d 734, 740 (8th Cir. 2009)* (if process was properly issued and timely served under state law prior to removal, such service remains sufficient afterwards).

(n102)Footnote 69. *Greer v. Skilcraft, 704 F. Supp. 1570, 1582-1583 (N.D. Ala. 1989)* .

(n103)Footnote 70. *Nationwide Eng. & Control Sys., Inc. v. Thomas, 837 F.2d 345, 347 (8th Cir. 1988)* .

(n104)Footnote 71. *Lee v. City of Beaumont, 12 F.3d 933, 937 (9th Cir. 1993)* .

(n105)Footnote 72. *Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256 (4th Cir. 1987)* (Rule 11 does not extend to filing of complaint in state court).

(n106)Footnote 73. *Bisciglia v. Kenosha Unified Sch. Dist. No. 1, 45 F.3d 223, 227 (7th Cir. 1994)* (no continuing duty to update previously filed papers).

(n107)Footnote 74. *Fed. R. Civ. P. 81(c)(1)*; *see Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* .

(n108)Footnote 75. *Motsinger v. Flynt, 119 F.R.D. 373, 376 (M.D.N.C. 1988)* (120-day time limit within which to serve process provided by Rule 4 runs from date of removal, not date action was filed in state court, because rules only

govern after removal).

(n109)Footnote 76. *Krushinski v. Roadway Express, Inc., 110 F.R.D. 11, 14 (M.D. Pa. 1985)* .

(n110)Footnote 77. *Kendrick v. Zanides, 609 F. Supp. 1162, 1164 (N.D. Cal. 1985)* .

(n111)Footnote 78. *Bowman v. Home Fed. Sav. & Loan Ass'n, 521 F.2d 704, 707 (7th Cir. 1975)* .

(n112)Footnote 79. *Fed. R. Civ. P. 81(c)(1)*.

(n113)Footnote 80. *See Fed. R. Civ. P. 4*, *12*.

(n114)Footnote 81. *Fed. R. Civ. P. 81(c)(2)*.

(n115)Footnote 82. *Fed. R. Civ. P. 81(c)(2)*; *see Boyle v. Am. Auto Serv., 571 F.3d 734, 743 n.5 (8th Cir. 2009)* (construing former time periods).

(n116)Footnote 83. *Fed. R. Civ. P. 81(c)(2)(A)*.

(n117)Footnote 84. *Fed. R. Civ. P. 81(c)(2)(B)*.

(n118)Footnote 85. *Fed. R. Civ. P. 81(c)(2)(C)*.

(n119)Footnote 86. *Fed. R. Civ. P. 6(b)(1)(B)*; *see § 9.46*.

(n120)Footnote 87. *Fed. R. Civ. P. 81(c)(3)(B)(i)*.

(n121)Footnote 88. *Fed. R. Civ. P. 81(c)(3)(B)(iii)*.

(n122)Footnote 89. *Fed. R. Civ. P. 81(c)(3)(A)*.

(n123)Footnote 90. *Marcella v. Brandywine Hosp., 47 F.3d 618, 625 (3d Cir. 1995)* .

(n124)Footnote 91. *Fed. R. Civ. P. 81(c)(3)(A)*.

(n125)Footnote 92. *Lum v. Discovery Capital Mgmt., LLC, 625 F. Supp. 2d 82, 84 (D. Conn. 2009)* (construing former time periods).

(n126)Footnote 93. *Bruns v. Amana, 131 F.3d 761, 762 (8th Cir. 1997)* .

(n127)Footnote 94. *Gelardi v. Transamerica Occidental Life Ins. Co., 163 F.R.D. 495, 496 (E.D. Va. 1995)* ; *Fed. R. Civ. P. 39(b)*.

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART II. USE OF RULES OF CIVIL PROCEDURE IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure § 1.23

§ 1.23 Use of Local Rules in Federal Systemn*

[1] Promulgation of Local Rules

After giving appropriate public notice and an opportunity for comment, each district court has the authority on a vote by a majority of its district judges to make and amend rules governing procedures in the court. Any such local rule must be consistent with, but not duplicative of, any Federal Rule of Civil Procedure. Any local rule must also conform to any uniform numbering system prescribed by the Judicial Conference of the United States. n1 The district court may adopt local rules for efficient and expedient execution of justice, after considering any pertinent federal rules prior to the local rule adoption. n2 On promulgation of local rules, copies of the rules or amendments must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public. n3

[2] Consistency With Federal Statutes and National Rules

A local rule must be consistent with federal statutes and the federal rules of civil procedure, evidence, and bankruptcy adopted under the Judiciary Code, n1 but may not duplicate those federal rules. n2 In this regard, "consistent with" means that the provisions of the local rule may not conflict with the national rule, and if they do so, any conflicting provision of the local rule is invalid. n3 For example, a local district court rule was declared invalid when the local rule required the plaintiff to plead a claim with greater specificity than *Rule 8 of the Federal Rules of Civil Procedure*. n4 In another example, it was held that a local practice could not extend strict jurisdictional deadlines mandated by a federal rule. n5 Local rules that remove a court's discretion have also been declared invalid as inconsistent with national rules. n6 Furthermore, a local rule on trial settings is invalid if it conflicts with Rule 40 or any other rule. n7 Finally, if a judge enacts a "standing order" that conflicts with a local rule, the order may be stricken because the enactment of a standing order that conflicts with a local rule also violates Rule 83. n8

On the other hand, local district court rules may elaborate on national rules by adding operational details without being inconsistent with the national rules. n9 For example, a local court rule that highlighted the requirements for pleading a RICO claim would not be inconsistent with the federal rules. n10

Furthermore, when expressly provided in a national rule itself, a local rule may permit a standard different from the one specified in the national rule. n11 For example, Rule 54(d)(2)(B) states that unless otherwise provided by statute or

order of the court, a motion for attorney's fees must be filed no later than 14 days after entry of judgment. n12 Also, Rule 83 authorizes the district courts to adopt local rules governing practice and procedure, including rules establishing timeliness standards for the filing of claims for attorney's fees. n13 Therefore, it was proper for a court to adopt a local rule providing that "a motion for award of attorney's fees must be filed within the time specified in a scheduling order." n14

[3] Prohibition Against Duplication of Statutes or National Rules

Local rules may not duplicate either the federal rules or any act of Congress. n1 Such repetition is superfluous and counterproductive because the judiciary bench and bar already have access to existing federal rules and statutes through the published United States Code. Documentation that would restate existing law merely results in more paperwork and accompanying costs. Furthermore, if the law is restated only partially or is restated incorrectly, the public or practitioners may be mislead about the law which actually applies. n2

[4] Effect of Local Rules of Court

Local rules of the district courts have the force of law and are binding on the parties and court. n1 Therefore, they are subject to review by an appellate court. n2 Once promulgated, a local rule remains in effect until amended by the court or abrogated by the judicial council of the circuit. n3

The federal rules put limitations on the scope of local rules. Thus, a local rule which imposes a requirement of form must not be enforced in a way that causes a party to lose any right because of a failure to comply unless the failure is willful. n4 For example, a local rule requiring a party to make specific citations to the record for factual arguments is a matter regarding form rather than substance. Therefore, because nothing in the federal statutes or rules requires a party to make specific citations to the record, a party may not be sanctioned under such a local rule, unless the local rule or a court order provides actual notice of the requirement. n5 If a substantive penalty were allowed for a non-willful violation of a local rule on form, such a penalty would contradict the purpose and the intent of other federal rules and existing case law to promote justice. n6 However, a court may impose sanctions for a violation of a local rule when the violation concerns substance rather than form, for example, if it prejudices the outcome of the proceeding, n7 or if the violation is willful. The sanction may be either monetary or the loss of a substantive right. n8

[5] Court's Discretion in Absence of Controlling Law

In the absence of controlling law, the district court may regulate practice consistent with the federal rules, federal statutes, and the district court's local rules. n1 Any such regulation by the judge, however, does not supersede any applicable national rules. n2 In exercising this inherent power, the court may impose sanctions that do not directly conflict with federal and local law and rules. In an appropriate case, the court may even impose dismissal, or default. However, the imposition of such extreme sanctions is limited to cases involving bad faith, fraud, or undue delay by one of the parties. n3

When there is no local rule or standing district court order regarding a particular matter, the court may regulate its practice in such a manner as will facilitate the just determination of a particular action. n4 For example, in the absence of a local rule, a district court could require that the parties make specific citations to the record in their moving papers. However, under Rule 83(b), the court may not grant summary judgment on the ground that the nonmovant's papers failed to cite to the record, unless the parties were given actual notice of the requirement. n4.1 In another example, the court has the discretionary power to require security for costs on good cause shown, n5 or to refuse to require security when not warranted by the circumstances of the case. n6 However, a judge may not impose a sanction for noncompliance with any security requirement not in a federal statute, federal rule, or local district rule unless the alleged violator has been furnished in the particular case with actual notice of the requirement. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 83.02 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 83(a)(1)*; *28 U.S.C. §§ 2072, 2075.*

(n3)Footnote 2. *Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1048 (2d Cir. 1991)* .

(n4)Footnote 3. *Fed. R. Civ. P. 83(a)(1).*

(n5)Footnote 1. *Fed. R. Civ. P. 83(a)(1)*; *see 28 U.S.C. §§ 2072, 2075.*

(n6)Footnote 2. *Fed. R. Civ. P. 83(a)(1)*; *see 28 U.S.C. §§ 2072, 2075.*

(n7)Footnote 3. *Johnson v. United States, 460 F.3d 616, 621 (5th Cir. 2006)* (local rule is invalid if it is contrary to national rule).

(n8)Footnote 4. *In re Southeast Banking Corp., 69 F.3d 1539, 1551 (11th Cir. 1995)* .

(n9)Footnote 5. *Goode v. Winkler, 252 F.3d 242, 245-246 (2d Cir. 2001)* (court abused discretion by relying on local practice of back-dating documents filed by pro se litigants to extend time for litigant to file notice of appeal beyond strict jurisdictional deadline of Appellate Rule 4).

(n10)Footnote 6. *See, e.g., In re Baby Food Antitrust Litig., 166 F.3d 112, 138-139 (3d Cir. 1999)* (local rule providing for taxation of costs of depositions "used at trial" may not be applied to limit district court's power under *28 U.S.C. § 1920* to award costs of depositions used in summary judgment motions).

(n11)Footnote 7. *See Wilson v. City of Zanesville, 954 F.2d 349, 352-352 (6th Cir. 1992)* .

(n12)Footnote 8. *Martel v. County of Los Angeles, 21 F.3d 940, 946 (9th Cir. 1994)* , *cert. denied, 516 U.S. 944 (1995)* .

(n13)Footnote 9. *Huey v. United Parcel Serv., Inc., 165 F.3d 1084, 1085 (7th Cir. 1999)* .

(n14)Footnote 10. *Elliot v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989)* .

(n15)Footnote 11. *Members First Fed. Credit Union v. Members First Credit Union, 244 F.3d 806, 807 (11th Cir. 2001)* (local rule provided different time period than national rule for filing motion for attorney's fees).

(n16)Footnote 12. *Fed. R. Civ. P. 54(d)(2)(B).*

(n17)Footnote 13. *Fed. R. Civ. P. 83*; *see Zaklama, M.D. v. Mount Sinai Med. Ctr., 906 F.2d 645, 647 (11th Cir. 1990)* .

(n18)Footnote 14. *Members First Fed. Credit Union v. Members First Credit Union, 244 F.3d 806, 807 (11th Cir. 2001)* ; *see* N.D. Fla. R. 54.1.

(n19)Footnote 1. *Fed. R. Civ. P. 83(a)(1).*

(n20)Footnote 2. *Fed. R. Civ. P. 83*, Committee Note to 1995 Amendments.

(n21)Footnote 1. *Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994)* .

(n22)Footnote 2. *Frazier v. Heebe, 482 U.S. 641, 645-646, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987)* .

(n23)Footnote 3. *Fed. R. Civ. P. 83(a)(1)*; *see 28 U.S.C. § 2071(c)(1)*.

(n24)Footnote 4. *Fed. R. Civ. P. 83(a)(2)*.

(n25)Footnote 5. *Amnesty Am. v. Town of W. Hartford, 288 F.3d 467, 471 (2d Cir. 2002)* (under Rule 83(b), actual notice of existence of local rule is precondition to imposition of sanctions for party's failure to comply with citation requirement); *see Fed. R. Civ. P. 83(b)*.

(n26)Footnote 6. *See, e.g., Fed. R. Civ. P. 8(e)* (all pleadings are to be construed to do substantial justice); *Fed. R. Civ. P. 61* (at every stage of proceeding, court must disregard all errors and defects that do not affect any party's substantial rights).

(n27)Footnote 7. *Fed. R. Civ. P. 83(a)(2)*.

(n28)Footnote 8. *Zambrano v. City of Tustin, 885 F.2d 1473, 1484 (9th Cir. 1989)* (monetary penalties appropriate when attorney willfully, repeatedly, or recklessly disregards court rules).

(n29)Footnote 1. *Fed. R. Civ. P. 83(b)*.

(n30)Footnote 2. *Fruit of the Loom v. American Mktg. Enters., Inc., 192 F.3d 73, 75-77 (2d Cir. 1999)* .

(n31)Footnote 3. *Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 773-774 (7th Cir. 1997)* (dismissal not appropriate sanction for attorney's failure to file appearance and affidavit forms required by local rules, when rule did not expressly provide for dismissal).

(n32)Footnote 4. *Fed. R. Civ. P. 83(b)*.

(n33)Footnote 4.1. *Amnesty Am. v. Town of W. Hartford, 288 F.3d 467, 471 (2d Cir. 2002)* .

(n34)Footnote 5. *Hawes v. Club Ecuestre El Comandante, 535 F.2d 140, 143 (1st Cir. 1976)* .

(n35)Footnote 6. *National Distillers v. Hindech, 10 F.R.D. 229, 231 (D. Colo. 1950)* .

(n36)Footnote 7. *Fed. R. Civ. P. 83(b)*.

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART II. USE OF RULES OF CIVIL PROCEDURE IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure §§ 1.24 through 1.39

[Reserved]

§§ 1.24[Reserved]

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART III. FEDERAL COURT'S DECISION WHETHER TO ADJUDICATE CASE

1-1 Moore's Manual--Federal Practice and Procedure § 1.40

§ 1.40 Case or Controversy Requirementn*

[1] Constitutional Basis

Before a claim falls within the jurisdiction of the federal court, a plaintiff must demonstrate that the claim involves an actual case or controversy, as opposed to a hypothetical question. n1 The requirement of a "case or controversy" limits the power of federal courts to hear those questions that are presented in an adversary context n2 and in a form historically viewed as capable of resolution through the judicial process, as opposed to those presenting purely hypothetical or abstract issues. Therefore, a case or controversy is the threshold necessity for a federal court to have subject-matter jurisdiction. Because Article III is a limit on judicial power, a court will not have subject matter jurisdiction over an action absent the requisite case or controversy. n3 For a complete discussion of the nature and requirements of federal jurisdiction in general, see Ch. 5, *Original Jurisdiction Over the Subject Matter*.

The case or controversy requirement does not bar the court from considering all legal theories relevant to resolving the dispute before it. Once an issue or claim is properly before the court in an adversarial context, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. Thus, the Constitution does not force the court to accept the law as stated by the parties. n4 However, if the dispute before the court has been resolved, the court may not purport to resolve issues that are no longer in dispute between any of the parties. n5

[2] Prohibition Against Advisory Opinions

It is unconstitutional for a court to render an advisory opinion by deciding a case in which no injury has occurred, because such a situation does not present a case or controversy. n1 However, the distinction between an actual controversy and an advisory opinion is one of degree; and it is difficult or impossible to fashion a precise test whether an opinion is advisory. n2 Basically, a failure to identify the injury constitutes an advisory opinion. n3

For example, if the facts comprising the alleged injury are uncertain and the party is asking the court to make a legal ruling based on the possibility that certain facts will be found to exist at some point in the future, then a decision would necessarily constitute an advisory opinion based on a hypothetical situation. This is the type of judicial intervention that is prohibited, under the rationale that there is no actual dispute currently before the court, the facts may never develop

consistent with the hypothetical situation, and therefore the court's opinion would have no legal effect. n4 On the other hand, if a situation presents an actual dispute between adverse, noncollusive parties, and there is a substantial likelihood that a federal court decision would actually have some tangible effect on the relationship between the parties, it is not an advisory opinion. n5

[3] Requirement is Continuous

The Constitution requires that a plaintiff's claim exist not just when the action is initiated but throughout the litigation, including while the case is on appeal. n1 For example, a plaintiff would not be qualified to represent a class in a class action after the case had become moot with respect to the plaintiff. n2 In this regard, the various doctrines of justiciability each have a particular time focus. Standing and ripeness (*see* §§ 1.142, 1.143) focus on aspects of justiciability at the time the action is initiated. The mootness doctrine requires that the case or controversy exist throughout the pendency of the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityCase or Controversy RequirementsActual DisputesCivil ProcedureJusticiabilityCase or Controversy RequirementsAdverse Legal InterestsCivil ProcedureJusticiabilityCase or Controversy RequirementsImmediacyCivil ProcedureJusticiabilityCase or Controversy RequirementsThreats of Prosecution

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 101.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. U.S. Const., Art. III, § 2; *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)* .

(n3)Footnote 2. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* .

(n4)Footnote 3. *S. Jackson & Son Inc. v. Coffee, Sugar & Cocoa Exch., Inc., 24 F.3d 427, 431 (2d Cir. 1994)* .

(n5)Footnote 4. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 446-447, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993)* (parties' agreement that particular statute had not been repealed did not take away court's jurisdiction to independently consider that issue).

(n6)Footnote 5. *New Jersey v. Heldor Indus., Inc., 989 F.2d 702, 707 (3d Cir. 1993)* .

(n7)Footnote 1. *Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 661 (D.C. Cir. 1996)* ; *see* [1], *above*.

(n8)Footnote 2. *GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615, 618-620 (7th Cir. 1995)* ; *see Flast v. Cohen, 392 U.S. 83, 96-97, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)* (advisory opinion cases not precisely framed).

(n9)Footnote 3. *Partington v. Gedan, 961 F.2d 852, 862 (9th Cir. 1992)* , *cert. denied, 506 U.S. 999 (1992)* .

(n10)Footnote 4. *California Bankers Ass'n v. Shultz, 416 U.S. 21, 56, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974)* (such a party is not, and may never be, subject to any harm).

(n11)Footnote 5. *See C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948)* (opinion would be merely advisory when judicial ruling could be modified or disregarded by President of United States).

(n12)Footnote 1. *Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478, 110 S. Ct. 1249, 108 L. Ed. 2d 400*

(1990) .

(n13)Footnote 2. *Tucker v. Phyfer, 819 F.2d 1030, 1034 (11th Cir. 1987)* .

(n14)Footnote 3. *Western Oil & Gas Assoc. v. Sonoma County, 905 F.2d 1287, 1290 (9th Cir. 1990)* , *cert. denied, 498 U.S. 1067 (1991)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART III. FEDERAL COURT'S DECISION WHETHER TO ADJUDICATE CASE

1-1 Moore's Manual--Federal Practice and Procedure § 1.41

§ 1.41 Justiciability of Casen*

Justiciability is a general and relatively imprecise term n1 that is used to describe the two components required for federal court adjudication: n1.1 (1) the requirement of a Constitution Article III "case and controversy"; and (2) the prudential considerations for the federal exercise of jurisdiction. Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from participating in abstract or hypothetical disagreements. It requires that before a federal court may consider a claim or issue, there must exist a real, substantial controversy between parties having adverse legal interests, a controversy that is definite and concrete and not hypothetical or abstract. It prevents parties from simply submitting questions of general interest or curiosity to the federal courts. n2

The justiciability doctrine considers both whether a federal court has the constitutional power to entertain a particular dispute n3 and whether it is wise to do so, which is referred to as the "prudential" determination. n3.1 With respect to their power, justiciability means a court's examination of whether the parties are presented with an actual case or controversy. With respect to prudential considerations, justiciability doctrines are self-imposed limitations on federal court jurisdiction. Thus, "justiciability" refers to principles that limit federal court review when it would be inappropriate or not prudent to exercise jurisdiction and decide a case or controversy. These doctrines are also anchored in the Article III case and controversy requirement. n4

Although a federal court may have valid jurisdiction, it may determine that a particular litigation presents a "nonjusticiable" case or controversy and, therefore, prudentially decline to exercise its valid jurisdiction. n5 The most significant and common justiciability doctrines are standing, n6 ripeness, n7 mootness, n8 and political questions. n9

The justiciability doctrines are based on the "private rights" theory of adjudication, which states that the only function of the federal judiciary is to adjudicate live disputes, and any judicial pronouncements of law must come as an incident to performance of that adjudicatory function. Therefore, there must be a tangible dispute that is capable of resolution in a manner that will have a concrete impact on the parties to the dispute. n10

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureJusticiabilityRipenessGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 101.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Poe v. Ullman, 367 U.S. 497, 508, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)* (justiciability is not legal concept with fixed content).

(n3)Footnote 1.1. *Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* ; *Alaska Right to Life v. Feldman, 504 F.3d 840, 848 (9th Cir. 2007)* .

(n4)Footnote 2. *Nebraska Public Power District v. Midamerican Energy Co, 234 F.3d 1032, 1037-1038 (8th Cir. 2000)* .

(n5)Footnote 3. *Renne v. Geary, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991)* .

(n6)Footnote 3.1. *Young Apts., Inc. v. Town of Jupiter, 529 F.3d 1027, 1038 (11th Cir. 2008)* .

(n7)Footnote 4. *Goldwater v. Carter, 444 U.S. 996, 997, 100 S. Ct. 533, 62 L. Ed. 2d 428 (1979)* .

(n8)Footnote 5. *See Digital Properties, Inc. v. City of Plantation, 121 F.3d 586, 589-590 (11th Cir. 1997)* .

(n9)Footnote 6. *See § 1.42*.

(n10)Footnote 7. *See § 1.43*.

(n11)Footnote 8. *See § 1.44*.

(n12)Footnote 9. *See § 1.45*.

(n13)Footnote 10. *Church of Scientology v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992)* .

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PART I Judicial Powers; Law Applied; Evidence
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1-1 Moore's Manual--Federal Practice and Procedure § 1.42

§ 1.42 Standingn*

[1] Description of Standing Doctrine

The standing doctrine determines whether a particular party is the proper person to initiate a particular claim for federal court adjudication. n1 Standing is based on the principle that federal courts should grant relief only to a real party in interest to particular claims. n2 Thus, standing is focused on whether the party invoking federal court jurisdiction had the requisite stake in the outcome when the suit was filed, throughout maintenance of the claim, and during any appeal. A person's standing is not based on an entire case. Rather, a claimant must demonstrate standing for each claim he or she seeks to adjudicate and for each form of relief that is sought. n2.1 The Supreme Court has stated that of the several doctrines that courts have recognized as comprising the "case or controversy" requirement, the element of standing is perhaps the most important. n3 Furthermore, although it is usually considered a prudential concept that is a matter of sound judicial policy, the Court has stated that at its basis, standing is a constitutional question. n4

In considering the standing requirement, the Supreme Court has identified two components: n5 the first consists of the existence of constitutional requirements that are necessary prerequisites to standing in all cases. These constitutional requirements n6 are not mere pleading requirements. Rather, they are an indispensable part of the claimant's case and, accordingly, must be supported at each stage of litigation in the same manner as any other essential element of the case. n6.1 The second component of standing is "prudential standing." Prudential considerations under this component are considerations made by the judiciary to determine in a particular case whether it would be inappropriate or prudent for a federal court to use its resources to exercise jurisdiction and decide a case or controversy. Thus, although it may have valid jurisdiction the court may nevertheless determine that a particular litigation presents a nonjusticiable case or controversy and prudentially decline to exercise jurisdiction. n7

Under the first component, the constitutional aspects of standing, the plaintiff has the burden of alleging and establishing facts that demonstrate three elements: n8 (1) an injury in fact--an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; n9 (2) a causal connection between the injury and the conduct complained of; n10 and (3) the likelihood that the injury will be redressed by a favorable decision. n11 These three constitutional requirements are not mere pleading requirements. Rather, they are an indispensable part of any claim for relief and must be supported at each stage of litigation in the same manner as any

other essential element of the case. Note that at the summary judgment stage of a case, the plaintiffs need not establish that they in fact have standing but only that there is a genuine question of material fact as to the required standing elements, which is the summary judgment standard for all motions. n12

Even after a claimant has met these three threshold constitutional requirements, the claimant has to qualify for standing under the "prudential standing" evaluation. Using the three prudential standing considerations, n13 the court decides whether it is prudentially unwise to exercise jurisdiction. This component is discussed in [5], *below*.

[2] Injury to Party Making Claim for Relief

[a] Requirement of Injury in Fact

A claimant seeking federal court adjudication must have in fact incurred a completed or imminent threat of injury. n1 In other words, the party must have a "personal stake" in the subject matter of the adjudication. n1.1 Article III of the Constitution requires the party who invokes the court's authority to show that he or she personally has suffered some actual or threatened injury as a result of the asserted wrongful conduct of the defendant. n2 Therefore, the exercise of judicial power, which may profoundly affect the lives and property of those to whom it extends, is restricted to parties who can show injury in fact resulting from the action which they seek to have the court adjudicate. n3

"Injury in fact" does not necessarily mean that some physical damage n3.1 or financial loss n3.2 has already occurred at the time of the filing of a claim for relief. The Supreme Court has explicitly recognized that threatened injury, rather than actual injury, may satisfy the constitutional standing requirement of injury in fact. A party subject to prospective injury has standing to sue provided that the threatened injury is real, imminent, and direct. n3.3

[b] Concrete Injury

The standing doctrine requires that the person invoking jurisdiction have incurred, or imminently will occur, n4 an actual injury that is concrete and particularized to the party asserting the claim. n5 For example, a federal contractor suffered no injury when the contractor sought review of a federal agency order reopening contract bidding because of the contractor's misrepresentations when, before petitioning for review, the contractor was allowed to participate in a new bidding process and won an even more lucrative contract. The court found no evidence that the agency's misrepresentation findings had present or future consequences for the contractor, in that it did not cast any shadow over the contractor's business activities and that the second contract award suggested the improbability of any such injury to the contractor's business. n6

The injury in fact required for standing must be concrete, that is, the plaintiff must allege an injury that is distinct and palpable, n7 as opposed to merely abstract. n8 An injury does not suffice if it is merely conjectural, speculative, or hypothetical. n9 A mere ideological interest in or concern about a situation is also not sufficient injury, no matter how strongly felt or how important the issue. Rather, the plaintiff must have suffered a harm that is real and concrete. n10 Similarly, standing is not measured by the intensity of the party's interest. Therefore, a person's genuine motivation to sue does not by itself amount to a personalized injury in fact, n11 nor does a person's high degree of willingness to litigate or fervent advocacy. n12

However, stigmatization caused by racial discrimination is sufficient standing to authorize a demand for legal remedy; because a badge of inequality and stigmatization is an actual harm to the stigmatized person in relation to other persons and does not merely exist in the mind of the wronged person. n13 A stigmatizing injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct. n14

[c] Economic Injury Not Required

To assert standing, a plaintiff must demonstrate that its alleged injury constitutes an injury in fact. A pecuniary injury

clearly provides a sufficient basis for standing. Thus, any reduction in monetary interest or injury to person or property is sufficient. n15 For example, a person whose property is diminished by a payment of money wrongfully induced is injured by a deprivation of his or her property rights. n16

However, even though economic injury is sufficient injury for standing purposes, it is not necessary. The injury aspect of standing may be based on noneconomic as well as economic injury. Thus, a plaintiff's alleged injury may be an injury to aesthetic, conservational, and recreational values. n17 In housing discrimination cases, for example, a deprivation of the social and professional advantages of living in an integrated community constitutes sufficient injury. n18

Although the injury in fact requirement typically involves a substantive harm, federal courts also recognize procedural injuries as sufficient for standing. For example, a plaintiff has standing to challenge the defendant's removal to federal court, because the plaintiff can assert that it lost the right to sue in the forum of its choice. n19 Procedural injury is most typically used as a grounds for standing on appeal. Thus, when a deprivation of procedural rights was caused by a dismissal order and the appellate court may remedy that deprivation by reversing the dismissal order, the defendant has standing to appeal the order. n20

[d] Present or Imminent Injury Required

In general, a plaintiff must have suffered either a past or present injury. If a plaintiff has not yet suffered an actual injury at the time suit is filed, the plaintiff must be able to establish that such an injury is likely to occur imminently. Therefore, the injury must be a harm that has already occurred or a sufficiently probable threatened injury. n21 Thus, the possibility of future injury is sufficient to confer standing on a plaintiff, and threatened injury constitutes injury in fact for purposes of satisfying the constitutional standing requirements when there has been a credible threat of imminent harm. n21.1 The fact that the imminent injury would be the result of a series or chain of events need not destroy the standing claim. n22

In contrast to the situation when there a threatened injury is imminently probable, n23 allegations asserting nothing more than the mere possibility of future injury do not satisfy the standing requirements of Article III. A threatened injury must be "certainly impending" to constitute an injury in fact. An assertion of an injury that is no more than speculative is insufficient to afford standing. n24 A party may not allege future injury based solely on the defendant's past wrongful conduct; to do so the plaintiff must also show that the wrongdoer will likely engage in the wrongful activity and that it will likely be directed at the plaintiff. n25

The question of whether a future injury constitutes a sufficient actual injury for purposes of standing may also be considered in the context of the doctrine of ripeness. n26 For a detailed discussion of the doctrine of ripeness, see *§ 1.43*.

[3] Injury Caused by Defendant

The second element of the constitutional standing doctrine is a "causation" element. A party must satisfy this causation element by showing that the injury fairly can be traced to the defendant's challenged action. Thus, standing requires that there be a causal connection between plaintiff's asserted injury and the defendant's action. n1 However, although there must be a causal connection the injury may be indirect, n2 provided that the complaint establishes that the injury is fairly traceable to the defendant's acts or omissions. n3 However, in order to establish the link between the injury and the defendant's conduct, the plaintiff need not establish the technical requirements for "proximate cause." n4

The causal chain may be broken if an injury is self-inflicted or is due to the plaintiff's own fault. n5 For example, one court of appeals held that plaintiffs who voluntarily resigned their employment positions to take advantage of a severance package after being reassigned to unpleasant work lacked standing to sue their former employer for reinstatement because the plaintiffs' injury was not traceable to the defendant's conduct. The plaintiffs' voluntary

departure precluded a claim that the employer deprived them of their employment, even if the employer's prior treatment was actionable. n6

[4] Injury Must be Subject to Remedy

The third and last required element of the constitutional standing doctrine is that the plaintiff's injury likely can be redressed by a favorable decision in the action. n1 This requirement has been described as the "redressability" element of Article III. n2 Redressability examines whether the relief sought by the party is likely to alleviate the injury alleged. n3 To demonstrate redressability, a plaintiff need not show beyond doubt that a favorable judgment would redress plaintiff's injury. A probable benefit resulting from a winning suit is sufficient. n4

For example, the Supreme Court has held that the plaintiffs met their burden of alleging that their injury, lack of irrigation water, would be redressed if a Fish and Wildlife Service biological opinion were set aside because another federal agency would be unlikely to impose minimum water restrictions in the absence of the biological opinion. n5 However, a party may not show redressability based on the assumption that a nonparty to the action will act in a certain way in response to a ruling in the plaintiff's favor, and that such action would ultimately redress plaintiff's injury. n6

[5] Prudential Considerations Regarding Standing

[a] Three Prudential Considerations

As noted in [1], *above*, the standing requirement is composed of two separate components; the constitutional component, discussed in [2]-[4] *above*, and the "prudential" component, which consists exclusively of judiciary-made limitations on standing designed to foster effectiveness and judicial restraint. These prudential limitations, unlike the constitutionally dictated standing rules, may be modified or revoked by Congress. n1 Thus, a federal statute may afford a plaintiff the express right to bring a suit, extending the plaintiff's standing to the limits permitted by the Constitution and relieving the plaintiff of the judicially created prudential standing requirements. n2

In deciding whether standing exists, a court must consider the following three prudential factors: n2.1

1. Whether the alleged injury to the plaintiff falls within the "zone of interests" protected by the statute or constitutional provision at issue. n3

2. Whether the complaint raises only generalized grievances (or abstract questions) that are more appropriately resolved by the legislative and executive branches. n4

3. Whether the plaintiff is asserting the plaintiff's own legal rights and interests, rather than those of third parties. n5

[b] Zone of Interests

Prudential standing requires that a plaintiff's claim fall within the zone of interests protected by the law invoked by the plaintiff. n5.1 Thus, a party bringing a claim for relief must demonstrate that the party has incurred, or likely is in imminent danger of incurring, some direct and personal injury resulting from the violation of an asserted constitutional or statutory right designed to protect the party. In other words, the only parties who may sue to enforce a law are individuals who belong to the class that the law was designed to protect. n6 Because the zone of interests protected by the statute is not a constitutional requirement but is a judicially imposed limitation on the concept of standing, the scope of the zone of interests varies according to the provisions of the law in issue. n7 Because the concept is not mandated by the Constitution, Congress may decrease or increase the scope of the zone of interests; Congress may even increase the zone until it is coextensive with the constitutional standing requirements, in effect abrogating the zone of interests requirement. n8

[c] Generalized Grievances

The second prudential standing factor is a rule barring adjudication of generalized grievances that would more appropriately be addressed in the representative branches of government. n8.1 This factor is based on the principle that the exercise of federal jurisdiction is not justified if the harm asserted is merely a generalized grievance that is shared equally by a large class of citizens. n9 A claim of generalized or amorphous harm does not constitute an injury sufficient to provide standing. n10 For example, the Supreme Court has held that an assertion by a teachers' association that they had a special interest in the quality of education in the state did not alone confer federal standing. Such an argument, the Court reasoned, fails to distinguish the members of a teachers' association from students, their parents, or any other citizens. n11 It should also be noted that the presence of a disagreement is insufficient by itself to meet standing requirements, however severe and acrimonious the disagreement may be. n12

[d] Third-Party Standing

A party generally must assert the party's own legal arguments and interests and may not rely on the legal rights or interests of third parties to assert a claim for relief. n13 This rule is based on the prudential consideration that a third party is the best advocate of its own assertions, and the plaintiff may place a slightly different, self-interested viewpoint on its own presentation. n14 Another reason for the rule is that courts should not adjudicate rights unnecessarily. n15

However, there is an exception to this prudential standing rule, referred to as "third party standing." n15.1 Under the doctrine of third-party standing, plaintiffs may assert the rights of others not before the court if they can demonstrate three factual elements: n15.2

1. The plaintiff has suffered an injury in fact, thus giving the plaintiff a concrete interest in the outcome of the litigation. n16 The injury in fact requirement is one of the constitutional requirements for standing n16.1 and is discussed in *§ 1.42[2]*.

2. There is a close relationship between the plaintiff and the third party. n17 The purpose of the close relationship requirement is to ensure that the plaintiff will act as an effective advocate for the third party. n18 If the third-party right holder is unable to raise its own rights, and its relationship with the plaintiff suggests an identity of interests, courts may be certain that the litigation is necessary and the issues will be framed clearly and effectively. n19 The requisite close relationship is not satisfied if it is a future relationship or a hypothetical relationship. n19.1

3. There is some impediment to the third-party's ability to protect its own interests. n20 Any legal or physical inability to bring suit qualifies as such an obstacle. n21 The third party need not face insurmountable hurdles nor need there be an absolute impossibility of suit in order to fall within the impediment exception. A concrete, practical disincentive to sue is a sufficient impediment. n21.1

Unless the three criteria are met, the rule against third-party standing applies even if the same allegedly illegal act that affects the third party also affects the party. n22 Thus, even if the plaintiff has suffered palpable injury because some third party has been denied legal rights, the plaintiff may not generally assert the third party's rights as the basis of its claim. n23

[6] Procedural Considerations Related to Standing

[a] Court or Party May Initiate Standing Contest

Standing is an element of subject matter jurisdiction. Consequently, the issue of standing may be raised by a party by a motion to dismiss for lack of jurisdiction over the subject matter, or by means of a motion for summary judgment. n1

Because the question of whether a party has standing to pursue a claim is jurisdictional, standing may not be waived and may be undertaken at any point in the proceedings. n2 Furthermore, the absence of standing may be raised for the first time on appeal. n3 Additionally, because federal courts have an independent obligation to examine their own jurisdiction n4 and standing is an important jurisdictional doctrine, the federal trial courts and appellate courts have an independent obligation on their own initiative to ensure that litigants have standing under Article III, at both the trial and appellate stages, n5 even if the parties fail to raise the question. n5.1

Standing must be determined as of the time the suit is filed. n5.2 Whether a plaintiff has standing at the time of trial implicates the related doctrine of mootness, which is discussed in *§ 1.44*. n6 In this regard, the Supreme Court has characterized the doctrine of "mootness" as being the doctrine of standing set in a time frame. n7

[b] Burden to Establish Standing

The party invoking federal jurisdiction has the burden of establishing the elements of standing. n8 To meet this burden, the party must clearly state facts sufficient to satisfy the Article III standing requirements. n9 However, it should be noted that the burden on the party asserting standing is ultimately more than a requirement of pleading. Rather, it is an essential part of the case and each element must be supported with evidence in the same manner as any other matter on which that party bears the burden of proof. The burden is even greater when the plaintiff is asserting third-party rights. n10 When the district court raises the issue of standing on its own initiative, and disputed factual questions or credibility findings essential to standing are required, the court must hold an evidentiary hearing to allow the party with the burden to establish standing and may not resolve the issue solely based on the record. n11

[c] Appeal of Ruling on Standing

A determination of standing is generally not considered a final order. Therefore, it is not subject to immediate appellate review in and of itself. Also, the issue of standing does not fit within the collateral order doctrine because a motion to dismiss on justiciability grounds is not effectively unreviewable on appeal from the final judgment. n11.1 However, the standing determination is immediately reviewable if the standing issue is inextricably intertwined with an otherwise appealable order, or the determination of standing is essential to the resolution of the appealable order. n12

As a practical matter, a determination that a party lacks standing to pursue a claim effectively ends the case for that party and, therefore, is typically part of a final judgment disposing of the matter. In such a situation, a determination that the plaintiff lacks standing is immediately appealable. n12.1 Standing is an issue of law, and therefore a district court's ruling on the issue is reviewed de novo by the court of appeals. n13 However, courts of appeals will review for clear error the factual determinations underlying the district court's decision on standing. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingBurdens of ProofCivil ProcedureJusticiabilityStandingInjury in FactCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureJusticiabilityStandingThird Party Standing

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 101.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 747 (2008)* .

(n3)Footnote 2. *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* ; *Sprint Communs. Co., L.P. v. APCC Servs., ___ U.S. ___, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 438 (2008)* (assignee has traditionally been

entitled to bring suit for injury to assignor).

(n4)Footnote 2.1. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 748 (2008)* ; *see Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (court must examine allegations of complaint or other pleading to determine whether particular plaintiff or defendant is entitled to federal adjudication of each particular claim for relief).

(n5)Footnote 3. *Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* .

(n6)Footnote 4. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 747 (2008)* (requirement that claimant have standing is essential and unchanging part of case-or-controversy requirement of Constitution Article III).

(n7)Footnote 5. *Caplin & Drysdale v. United States, 491 U.S. 617, 624 n.3, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)* (court must consider both constitutional and prudential aspects of standing).

(n8)Footnote 6. *See* [2]-[4], *below*.

(n9)Footnote 6.1. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 747 (2008)* .

(n10)Footnote 7. *See Digital Properties, Inc. v. City of Plantation, 121 F.3d 586, 589-590 (11th Cir. 1997)* .

(n11)Footnote 8. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 747 (2008)* ; *Sprint Communs. Co., L.P. v. APCC Servs., ___ U.S. ___, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 446 (2008)* (three requirements: injury in fact, causation, and redressability).

(n12)Footnote 9. *See* [2], *below*.

(n13)Footnote 10. *See* [3], *below*.

(n14)Footnote 11. *See* [4], *below*.

(n15)Footnote 12. *Central Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002)* .

(n16)Footnote 13. *See Devlin v. Scardelletti, 536 U.S. 1, 7, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* (prudential standing requirements include three factors).

(n17)Footnote 1. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 747 (2008)* .

(n18)Footnote 1.1. *Sprint Communs. Co., L.P. v. APCC Servs., ___ U.S. ___, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 439 (2008)* (personal stake requirement part of); *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (injury must affect plaintiff in personal and individual way).

(n19)Footnote 2. *Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1055 (10th Cir. 1993)* ; *see Central Delta Water Agency v. United States, 306 F.3d 938, 948 (9th Cir. 2002)* (in environmental cases relevant showing for purposes of constitutional standing injury in fact requirement is not injury to environment, but injury to plaintiff).

(n20)Footnote 3. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* ; *see Illinois Dept. of Transp. v. Hinson, 122 F.3d 370, 373 (7th Cir. 1997)* .

(n21)Footnote 3.1. *See* [b], *below*.

(n22)Footnote 3.2. *See* [c], *below*.

(n23)Footnote 3.3. *Davis v. FEC, ___ U.S. ___, 128 S. Ct. 2759, 171 L. Ed. 2d 737, 748 (2008)* .

(n24)Footnote 4. *See* [d], *below*.

(n25)Footnote 5. *Anjelino v. New York Times Co., 200 F.3d 73, 92 (3d Cir. 1999)* .

(n26)Footnote 6. *Advanced Mgmt. Tech., Inc. v. FAA, 211 F.3d 633, 636-637 (D.C. Cir. 2000)* .

(n27)Footnote 7. *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* .

(n28)Footnote 8. *Lee v. Oregon, 107 F.3d 1382, 1391 (9th Cir. 1997)* ; *see National Treasury Employees Union v. United States, 101 F.3d 1423, 1429-1430 (D.C. Cir. 1996)* (impediment to organization's objectives is too abstract to confer organizational standing; direct conflict must exist between defendant's conduct and organization's purpose).

(n29)Footnote 9. *Coral Constr. Co. v. King County, 941 F.2d 910, 929 (9th Cir. 1991)* , *cert. denied, 502 U.S. 1033 (1992)* .

(n30)Footnote 10. *Sierra Club v. Morton, 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)* .

(n31)Footnote 11. *In re United States Catholic Conference, 885 F.2d 1020, 1024 (2d Cir. 1989)* .

(n32)Footnote 12. *Foster v. Center Township of LaPorte County, 798 F.2d 237, 244 (7th Cir. 1986)* .

(n33)Footnote 13. *Heckler v. Mathews, 465 U.S. 728, 739-740, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984)* .

(n34)Footnote 14. *Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* .

(n35)Footnote 15. *County of Oakland v. City of Detroit, 866 F.2d 839, 845 (6th Cir. 1989)* , *cert. denied, 497 U.S. 1003 (1989)* (buyer who is induced to pay illegally inflated price for goods or services suffers requisite injury in fact).

(n36)Footnote 16. *County of Oakland v. City of Detroit, 866 F.2d 839, 845 (6th Cir. 1989)* , *cert. denied, 497 U.S. 1003 (1989)* .

(n37)Footnote 17. *Sierra Club v. Morton, 405 U.S. 727, 734-735, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)* .

(n38)Footnote 18. *Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111-112, 115, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979)* .

(n39)Footnote 19. *International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991)* .

(n40)Footnote 20. *Cella v. Togum Constructeur Ensemleier En Industrie Alimentaire, 173 F.3d 909, 911-912 (3d Cir. 1999)* .

(n41)Footnote 21. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* .

(n42)Footnote 21.1. *Central Delta Water Agency v. United States, 306 F.3d 938, 949-950 (9th Cir. 2002)* (in environmental cases, ability to challenge actions creating threatened harms is particularly important, because in contrast to many other types of harms, monetary compensation may not adequately return plaintiffs to their original position; extinction of species or fouling of air or water are harms that are frequently difficult or impossible to remedy, and plaintiffs need not wait until the natural resources are despoiled before challenging government action leading to potential destruction).

(n43)Footnote 22. *Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515 (9th Cir. 1992)* .

(n44)Footnote 23. *See Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 527 (6th Cir. 1998)* .

(n45)Footnote 24. *Prestage Farms, Inc. v. Board of Supervisors of Noxubee County, Mississippi, 205 F.3d 265, 268 (5th Cir. 2000)* (livestock producer's alleged future harm was too conjectural to establish standing to challenge ordinance regulating new and expanding livestock farms).

(n46)Footnote 25. *See Sierakowski v. Ryan, 223 F.3d 440, 443-445 (7th Cir. 2000)* (patient who had been tested for HIV without knowledge or consent lacked standing to seek declaration invalidating statute permitting such testing because fact that the plaintiff had previously been tested without consent did not establish significant likelihood that the patient would again be tested without consent, considering discretion granted physicians under that statute).

(n47)Footnote 26. *Employers Assoc. of N.J. v. New Jersey, 601 F. Supp. 232, 237 (D.N.J. 1985)* .

(n48)Footnote 1. *Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 670 (D.C. Cir. 1996)* (greater number of uncertain links in causal connection, less likely it is that causation holds true).

(n49)Footnote 2. *United States v. SCRAP, 412 U.S. 669, 689 n.15, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)* .

(n50)Footnote 3. *O'Shea v. Littleton, 414 U.S. 488, 498, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* ; *see Heldman v. Sobol, 962 F.2d 148, 156 (2d Cir. 1992)* (in order to establish standing, beneficiaries had to show that increased medical bills were fairly traceable to allegedly illegal government conduct).

(n51)Footnote 4. *Smith v. Block, 784 F.2d 993, 995 (9th Cir. 1986)* .

(n52)Footnote 5. *Petro-Chem Processing, Inc. v. Envtl. Protection Agency, 866 F.2d 433, 438 (D.C. Cir. 1989)* .

(n53)Footnote 6. *Taylor v. FDIC, 132 F.3d 753, 767 (D.C. Cir. 1997)* (court noted that plaintiffs might have been entitled to reinstatement had they continued in employment).

(n54)Footnote 1. *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Ill., 9 F.3d 1290, 1292 (7th Cir. 1993)* .

(n55)Footnote 2. *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* .

(n56)Footnote 3. *Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 663-664 (D.C. Cir. 1996)* .

(n57)Footnote 4. *Lepelletier v. FDIC, 164 F.3d 37, 43 (D.C. Cir. 1999)* ; *see, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185-188, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (deterrent effect of civil penalties paid to government satisfied the redressability requirement, even though penalties would be paid to public coffers, because a sanction of civil penalties would effectively abate challenged conduct and prevents its recurrence; such penalty provides form of redress even though plaintiff would receive no money).

(n58)Footnote 5. *Bennett v. Spear, 520 U.S. 154, 169-171, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* .

(n59)Footnote 6. *Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n, 23 F.3d 208, 209-210 (8th Cir. 1994)* , *cert. denied, 513 U.S. 951 (1994)* .

(n60)Footnote 1. *Bennett v. Spear, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* .

(n61)Footnote 2. *American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357-1358 (D.C. Cir. 2000)* (Congress may grant express right of action to persons otherwise barred by prudential standing rules).

(n62)Footnote 2.1. *See Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27, 36 (2002)* .

(n63)Footnote 3. *National Recycling Coalition, Inc. v. Browner, 984 F.2d 1243, 1248 (D.C. Cir. 1993)* ; *see* [b], *below*.

(n64)Footnote 4. *Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1396 (10th Cir. 1992)* , *cert. denied, 507 U.S. 949 (1993)* ; *see* [c], *below*.

(n65)Footnote 5. *Haskell v. Washington Township, 864 F.2d 1266, 1275 (6th Cir. 1988)* (plaintiff must be proper proponent of rights on which action is based); *see* [d], *below*.

(n66)Footnote 5.1. *See Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27, 36 (2002)* (stating that plaintiff's complaint clearly fell within zone of interests of the requirement that a settlement be fair to all class members).

(n67)Footnote 6. *Kyles v. J.K. Guardian Security Servs., Inc., 222 F.3d 289, 297-301 (7th Cir. 2000)* (employment "testers" who experience race discrimination when applying for employment have standing to sue under Title VII, even if job applicant tester has no genuine interest in job, because when job applicant is not considered for job merely because of race, applicant has suffered injury in precisely form that statute was intended to protect against).

(n68)Footnote 7. *Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1125-1127 (8th Cir. 1999)* (scope of zone of interests test varies depending on statutory language).

(n69)Footnote 8. *Bennett v. Spear, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* .

(n70)Footnote 8.1. *See Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27, 36 (2002)* .

(n71)Footnote 9. *Barlow v. Collins, 397 U.S. 159, 170-171, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970)* .

(n72)Footnote 10. *National Wildlife Fed'n v. Burford, 871 F.2d 849, 852 (9th Cir. 1989)* .

(n73)Footnote 11. *Asarco, Inc. v. Kadish, 490 U.S. 605, 616, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)* .

(n74)Footnote 12. *Diamond v. Charles, 476 U.S. 54, 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)* .

(n75)Footnote 13. *Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)* .

(n76)Footnote 14. *See Amato v. Wilentz, 952 F.2d 742, 748 (3d Cir. 1991)* (county lacked third-party standing to raise *First Amendment* rights of movie studio that wanted to film at county court house)

(n77)Footnote 15. *Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984)* .

(n78)Footnote 15.1. *Kowalski v. Tesmer, 543 U.S. 125, 130, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004)* .

(n79)Footnote 15.2. *Aid for Women v. Foulston, 441 F.3d 1101, 1111-1112 (10th Cir. 2006)* .

(n80)Footnote 16. *Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)* (law firm had standing to challenge forfeiture law's alleged infringement of criminal defendants' *Sixth Amendment* right to counsel of choice).

(n81)Footnote 16.1. *Aid for Women v. Foulston, 441 F.3d 1101, 1109-1111 (10th Cir. 2006)* .

(n82)Footnote 17. *Wasson v. Sonoma County Junior College, 203 F.3d 659, 663-664 (9th Cir. 2000)* , *cert.*

denied, 531 U.S. 927 (2000) .

(n83)Footnote 18. *Lepelletier v. FDIC, 164 F.3d 37, 43-45 (D.C. Cir. 1999)* (plaintiff satisfied close relationship requirement based on potential vendor-vendee relationship).

(n84)Footnote 19. *Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)* .

(n85)Footnote 19.1. *Kowalski v. Tesmer, 543 U.S. 125, 130-131, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004)* .

(n86)Footnote 20. *Voigt v. Savell, 70 F.3d 1552 (9th Cir. 1995)* , *cert. denied, 517 U.S. 1209*) (obstacle to third party's assertion of rights required); *The Pitt News v. Fisher, 215 F.3d 354, 362-363 (3d Cir. 2000)* (student newspaper lacked prudential standing to challenge state statute barring alcohol advertising in educational institution newspapers because it failed to show that advertisers or paper's adult readers faced any impediment to challenging statute themselves).

(n87)Footnote 21. *Hodel v. Irving, 481 U.S. 704, 711, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)* (statutory executor refused to sue).

(n88)Footnote 21.1. *Aid for Women v. Foulston, 441 F.3d 1101, 1113-1114 (10th Cir. 2006)* (citing **Moore's Federal Practice**).

(n89)Footnote 22. *United States Dep't of Labor v. Triplett, 494 U.S. 715, 720, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990)* .

(n90)Footnote 23. *Housing Auth. v. City of Ponca City, 952 F.2d 1183, 1187 (10th Cir. 1991)* .

(n91)Footnote 1. *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* ; *see Fed. R. Civ. P. 56.*

(n92)Footnote 2. *See Evident Corp. v. Church & Dwight Co., 399 F.3d 1310, 1313 (Fed. Cir. 2005)* .

(n93)Footnote 3. *Louisiana Acorn Fair Hous. v. LeBlanc, 211 F.3d 298, 304-306 (5th Cir. 2000)* .

(n94)Footnote 4. *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)* .

(n95)Footnote 5. *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 126 S. Ct. 1854, 164 L. Ed. 2d 589, 2006 U.S. LEXIS 3956, *15-*16 (2006)* .

(n96)Footnote 5.1. *Louisiana Acorn Fair Hous. v. LeBlanc, 211 F.3d 298, 304-306 (5th Cir. 2000)* .

(n97)Footnote 5.2. *Paradise Creations, Inc. v. U V Sales, Inc., 315 F.3d 1304, 1309 (Fed. Cir. 2003)* .

(n98)Footnote 6. *Pederson v. Louisiana State Univ., 213 F.3d 858, 875-876 (5th Cir. 2000)* .

(n99)Footnote 7. *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

(n100)Footnote 8. *Bischoff v. Osceola County, Florida, 222 F.3d 874, 878-882 (11th Cir. 2000)* .

(n101)Footnote 9. *Pederson v. Louisiana State Univ., 213 F.3d 858, 869 (5th Cir. 2000)* ; *see* [2]-[5], *above*.

(n102)Footnote 10. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ; *see* [5][d], *above*.

(n103)Footnote 11. *Bischoff v. Osceola County, Florida, 222 F.3d 874, 878-882 (11th Cir. 2000)* .

(n104)Footnote 11.1. *Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1334-1335 (11th Cir. 1999)* , *cert. denied, 529 U.S. 1012 (2000)* .

(n105)Footnote 12. *Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1334-1335 (11th Cir. 1999)* .

(n106)Footnote 12.1. *Nickless v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 317 B.R. 455, 456 (D. Mass. 2004)* .

(n107)Footnote 13. *Pneumo Abex Corp. v. High Point Thomasville & Denton R. Co., 142 F.3d 769, 773 (4th Cir. 1998)* , *cert. denied, 525 U.S. 963 (1998)* .

(n108)Footnote 14. *General Instrument Corp. v. Nu-Tek Elecs. & Mfg., Inc., 197 F.3d 83, 86 (3d Cir. 1999)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART III. FEDERAL COURT'S DECISION WHETHER TO ADJUDICATE CASE

1-1 Moore's Manual--Federal Practice and Procedure § 1.43

§ 1.43 Ripenessn*

[1] Character of Ripeness Doctrine

The doctrine of ripeness is a requirement designed to avoid premature decision making. n1 Thus, the ripeness doctrine concerns the timing of a civil action. n2 The doctrine considers whether a case has been brought at a point that is too early for adjudication, in that it is not yet clear whether a real dispute to be resolved exists between the parties. n3 The ripeness requirement promotes the interests of judicial restraint by avoiding possible judicial interference with the other branches of government that would ultimately prove unnecessary if a live dispute were never to develop. Furthermore, unless a case is ripe for adjudication, a court cannot be sure that the facts have been sufficiently developed and the matter is sufficiently concrete for the court to render a decision that will resolve the dispute and affect the conduct of the parties. Therefore, the ripeness doctrine prevents the courts from becoming involved in purely abstract or theoretical disagreements. n4

The ripeness determination affects whether the district court has subject matter jurisdiction n5 and on the appellate level, is an independent requirement for judicial review. n6 However, like the parallel doctrines of standing and mootness, the ripeness doctrine represents a combination of both constitutional and lesser, "prudential" elements. n7 In other words, the ripeness doctrine is drawn both from Article III limitations on the judicial power of the court to decide a controversy at a particular time and from prudential considerations, which concern whether it would be advisable for the court to exercise jurisdiction at a particular time. n8 While ripeness addresses *when* the suit should be brought, standing addresses *who* may bring the suit. n9 In comparison with the mootness doctrine, the ripeness inquiry asks whether there is a present need for the court to act. Mootness, on the other hand, determines if there are any actual issues left for the court to adjudicate. n10

[2] Principles of Ripeness

[a] Fitness for Judicial Review

An issue constitutes an actual case or controversy under the ripeness doctrine only if the issue involved is "fit" for adjudication. n1 Fitness for adjudication requires certainty. n2 The crucial question concerning fitness for adjudication is whether the claim assumes the occurrence of uncertain and contingent events that may not occur as anticipated or

may not occur at all. Included in the fitness inquiry are sub-issues concerning determinations such as the finality of the issue presented for review, the definiteness of the threat of harm, n2.1 and the extent to which resolution of the matter depends on facts not yet developed. n3 Courts are particularly careful to ensure that cases are ripe when constitutional questions are in issue, n4 except that the doctrine of ripeness is more liberally applied in the *First Amendment* context, because of the possible chilling effect of potentially unconstitutional burdens on free speech. n5

When considering the fitness aspect of ripeness, courts must consider the degree of factual development in the controversy. The more factual development that has occurred, the greater the probability is that the court will determine that the case is ripe for adjudication. n6 Furthermore, a court will more likely find that the fitness requirement for ripeness is satisfied if the issues presented are purely legal ones that do not require additional factual development. n7

When a case involves the action of an administrative agency, the first requirement for fitness is that the agency action must be final, which means that the agency need not complete any more steps regarding the subject matter and will not be further modifying its action. However, finality is not the only requirement for fitness (i.e., when the agency has issued a final regulation). An agency regulation is not ordinarily considered the type of agency action that is "ripe" for judicial review unless the factual scope of the controversy has been reduced to manageable proportions and its factual components developed by some concrete action applying the regulation to the claimant's situation in a way that harms, or threatens to harm, the claimant. The exceptions to this general rule are (1) a statutory provision providing for immediate judicial review of the regulation, or (2) when the regulation constitutes a substantive rule that, as a practical matter, requires the claimant to adjust his or her conduct immediately. n8

[b] Hardship to Parties if Adjudication is Declined

In its ripeness determination, the court must consider whether the claimant has demonstrated that deferring judicial review will result in a real hardship to the claimant. Furthermore, the hardship must be based on adverse effects of a strictly legal kind. n9 Thus, a hardship examination requires the court to determine whether the subject matter of the claim presents a true hardship for the parties, n10 or whether the parties' course of action would be unlikely to be altered regardless of any decision that the court could render. n11 The primary attribute of hardship is direct and immediate harm. n12

The greater the anticipated harm, the more likely the court will consider the matter ripe for resolution. A matter that is likely to cause extreme hardship for the parties may be found to be ripe even if some factual issues remain unresolved. Even though both the fitness test n13 and the hardship test must be met for the ripeness requirement to be satisfied, there are no exact standards, and a particularly strong showing in one area may offset a marginal showing in the other area. n14 Some courts have indicated that a claim may be ripe and, therefore, justiciable despite a total lack of fitness when the challenged action creates a direct, immediate, and severe hardship. n15

[c] Remedy Ordered Must Have Conclusive Effect

An issue is not ripe for adjudication unless the court will be able to grant relief or fashion a remedy in a manner that would have a conclusive effect on the issue in dispute. If the dispute concerns events that have not yet occurred, the plaintiff must show that the probability of the future event occurring is of "sufficient immediacy and reality" to have a current effect on the actions of the parties and to provide a concrete set of circumstances on which the court can base a ruling. n16 Cases that are mostly legal in nature do not require significant factual development and are particularly ripe if additional facts would not further affect the framing of the issue or the type of relief to be obtained. n17 However, even in cases involving purely legal questions, the issue will not be considered concrete enough to pass the ripeness test if the anticipated events and injury are too remote to justify a current adjudication. n18

[d] Remedy Ordered Must Have Practical Utility

Many courts analyze ripeness in terms of the relief that is requested and its utility to the parties. An issue is not ripe unless the anticipated remedy either allows the status quo to be preserved n19 or guides the parties in directing their future actions. Therefore, if the issue involved or the decision that could be rendered is too contingent to know the extent to which the parties will be affected, then the decision would not serve a useful purpose. A decision would not be of practical utility if it would not affect the parties' future actions or would not be of practical help in resolving the underlying controversy. n20

[3] Initiating Challenge to Ripeness

When a party files a complaint or other claim for relief, the claimant has the affirmative burden to allege facts which demonstrate ripeness, that is, the appropriateness of invoking a judicial resolution of the claim. When the defending party challenges that the claim is ripe, the proper procedure for the challenge is to file a motion to dismiss. n1 Although the proper method to challenge a claim based on the lack of ripeness is a motion to dismiss, an appellate court may uphold a grant of summary judgment for lack of ripeness when the district court properly concluded that the claim will never ripen. n3 Additionally, the court may consider the jurisdiction question of ripeness on its own initiative. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityRipenessImminenceCivil ProcedureJusticiabilityRipenessRationaleCivil ProcedureJusticiabilityRipenessTests

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 101.70 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Younger v. Harris, 401 U.S. 37, 42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n3)Footnote 2. *Regional Rail Reorganization Act Cases, 419 U.S. 102, 139-140, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)* .

(n4)Footnote 3. *Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-734, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998)* .

(n5)Footnote 4. *Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

(n6)Footnote 5. *New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995)* (question of whether claim is ripe bears on court's subject matter jurisdiction).

(n7)Footnote 6. *Burlington N. R.R. Co. v. Surface Transp. Bd., 75 F.3d 685, 691 (D.C. Cir. 1996)* .

(n8)Footnote 7. *Cheffer v. Reno, 55 F.3d 1517, 1524 (11th Cir. 1995)* .

(n9)Footnote 8. *National Park Hospitality Ass'n v. Department of Interior,538 U.S. 803, 123 S. Ct. 2026, 155 L. Ed. 2d 1017, 1024 (2003)* .

(n10)Footnote 9. *Wilderness Soc. v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996)* (important distinction between two doctrines is that standing focuses on party, ripeness on correct time to bring complaint).

(n11)Footnote 10. *Western Oil & Gas Ass'n v. Sonoma County, 905 F.2d 1287, 1290 (9th Cir. 1990)* , *cert. denied, 498 U.S. 1067 (1991)* .

(n12)Footnote 1. *Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

(n13)Footnote 2. *Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 261 (7th Cir. 1995)* .

(n14)Footnote 2.1. *See Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-737, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998)* (case not ripe for review because further factual development and agency refining of policy was necessary, and postponement of judicial review would not cause additional hardship).

(n15)Footnote 3. *National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 123 S. Ct. 2026, 155 L. Ed. 2d 1017, 1024 (2003)* (case was not ripe when further factual development would significantly advance court's ability to analyze legal issues presented).

(n16)Footnote 4. *Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 81, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961)* .

(n17)Footnote 5. *Cheffer v. Reno, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995)* (abortion opponents' *First Amendment* claims found ripe for adjudication).

(n18)Footnote 6. *National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808-809, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)* .

(n19)Footnote 7. *Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 665 (4th Cir. 1997)* ; *see, e.g., Utah v. United States Dep't of the Interior, 210 F.3d 1193, 1196 (10th Cir. 2000)* (state's action challenging federal agency's refusal to permit state to participate in lease approval process for nuclear waste facility was not ripe for review because agency had not completed its Environmental Impact Statement or issued license to operate proposed facility, which were conditions precedent to further lease review).

(n20)Footnote 8. *National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 809-812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)* .

(n21)Footnote 9. *National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 809-812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)* .

(n22)Footnote 10. *National Ass'n of Home Builders v. United States Army Corps of Engineers, 417 F.3d 1272, 1282-1284 (D.C. Cir. 2005)* ; *Artway v. Attorney Gen., 81 F.3d 1235, 1247 (3d Cir. 1996)* (court inquired whether hardship existed because threat of criminal prosecution was credible rather than merely speculative).

(n23)Footnote 11. *W.R. Grace & Co. v. United States EPA, 959 F.2d 360, 364 (1st Cir. 1992)* .

(n24)Footnote 12. *Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 746-747 (9th Cir. 1996)* .

(n25)Footnote 13. *See* [a], *above*.

(n26)Footnote 14. *See Ernst & Young v. Depositors Econ. Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995)* (discussing possibility of sliding scale under which very powerful exhibition of immediate hardship might compensate for questionable fitness); *see also National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 814-815, 123 S. Ct. 2026, 155 L. Ed. 2d 1017, 1028-1029 (2003)* (concurring opinion indicating that when there is greater need for further development of facts of subject matter to clarify legal question under "fitness" analysis, stronger demonstration of hardship to parties would be required to justify prompt adjudication of subject matter).

(n27)Footnote 15. *See Nutritional Health Alliance v. Shalala, 144 F.3d 220, 225-228, 226 n.12 (2d Cir. 1998)* , *cert. denied, 525 U.S. 1040, 119 S. Ct. 589 (1998)* .

(n28)Footnote 16. *Steffel v. Thompson, 415 U.S. 452, 460, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)* .

(n29)Footnote 17. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)* .

(n30)Footnote 18. *Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 537 (1st Cir. 1995)* (even if plaintiff's claim is predominantly legal, if claim depends on future events that may never occur, it is not ripe for judicial revue).

(n31)Footnote 19. *Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 412 (3d Cir. 1992)* .

(n32)Footnote 20. *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994)* , *cert. denied, 513 U.S. 919 (1994)* (one way of rating adverseness is to evaluate nature of relief requested).

(n33)Footnote 1. *Verizon Cal., Inc. v. Peevey, 413 F.3d 1069, 1083-1084 (9th Cir. 2005)* ; *see Fed. R. Civ. P. 12(b)(1)*.

(n34)Footnote 3. *Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 596-598 (3d Cir. 1998)* (summary judgment may be appropriate in that ripeness determination concerns justiciability of claim).

(n35)Footnote 4. *Thomas v. City of New York, 143 F.3d 31, 34 (2d Cir. 1998)* (because ripeness doctrine is based on Article III limitations on judicial power and prudential reasons for declining jurisdiction, courts may raise issue sua sponte, even for first time on appeal).

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART III. FEDERAL COURT'S DECISION WHETHER TO ADJUDICATE CASE

1-1 Moore's Manual--Federal Practice and Procedure § 1.44

§ 1.44 Mootnessn*

[1] Nature of Mootness Doctrine

The essence of the mootness doctrine is that even though there may be an actual and justiciable "case or controversy" at the time the litigation is commenced, if that case or controversy ceases to exist, the federal court must dismiss the action for want of jurisdiction. n1 Mootness requires federal courts to avoid ruling on controversies that have been resolved by the passage of time or by intervening events. n2 The constitutional case or controversy requirement of Article III, n3 as well as the prudential considerations underlying justiciability, n4 are related to the mootness doctrine because each of these concepts requires that any case or dispute that is presented to a federal court be definite, concrete, and amenable to specific relief. n5

A controversy becomes moot if it ceases to be real or definite because the issues presented are no longer "live," n6 or the parties lack a legally cognizable interest in the outcome. n7 Thus, if the controversy initially presented to the court has been resolved during the pendency of the action, if either of the parties experiences a change in the party's legal status while the case is pending, or if the dispute loses its adverse character for any other reason, the court will not be able to grant effective relief, n8 unless it appears that the precise conditions of the case are likely to recur. n9

The purpose of the mootness doctrine is to require a court to dismiss a case because federal courts are without power to decide questions that cannot affect the rights of parties. n10 If a case is moot, the plaintiff can no longer have a "personal stake" in the outcome. n11 Thus, the mootness doctrine reflects the assumptions of the "private rights" model of adjudication, under which the court's function is confined to the resolution of concrete private controversies. n12 Legal pronouncements by the judiciary that are untied to the resolution of a live controversy constitute an intrusion into the legislative lawmaking power and thus are a violation of the separation of powers doctrine. n13

[2] Circumstances Triggering Mootness

[a] Cessation of Live Controversy

The mootness doctrine generally requires a court to dismiss a claim when the claim ceases to present a "live controversy" at any time during the course of an action, including on appeal. Thus, a trial or appellate court, including

the Supreme Court in its appellate capacity, may refuse to exercise jurisdiction because the appealed claim has ceased to exist as a live controversy. n1

A claim will be considered moot because it ceases to present a live controversy, and therefore the court is no longer able to grant effective relief, because of any of the following reasons:

1. The passage of time has made the claim stale and it is unlikely that the precise conditions of the case will ever recur. The most common example of a case in which the passage of time may render a claim moot is when the claim arises out of a transitory event or condition. For example, when the plaintiff commenced a lawsuit alleging that a ban against press coverage of a military operation violated the *First Amendment* and, during the pendency of the action, the operation was ended and the military troops were withdrawn, there was no longer a "live" controversy. Because the military action was not likely to recur, the plaintiff's claims were moot. n1.1 However, the transitory event or condition will not render a claim moot unless the event or condition is directly related to the claim. For example, the expiration of a nonsolicitation covenant in a contract did not moot the appeal of a district court's denial of a motion for preliminary injunction to enforce during the trial all nonsolicitation and nondisclosure covenants, because injunctions are equitable in nature and the district court could impose an injunction that lasted beyond the contract provision's expiration date. n1.2

2. An intervening factual event may render a case moot if the plaintiff, as a result of the event, has lost a present right to secure relief in the action or no longer has a stake or interest in the outcome of the litigation. n2 The intervening event renders the case moot only if the plaintiff is completely divested of all personal interest in the outcome of the controversy or if the event completely eliminates the effect of the alleged violation n2.1 and there is no reason to believe that the alleged violation will recur. n2.2 If, however, the plaintiff retains some personal stake in the controversy and there are some outstanding issues that are amenable to judicial resolution, those claims may proceed for review even though an intervening event might render other issues moot. n3

3. If pending litigation involves a legal issue that is later disposed of in another forum, the resolution of the issue or claim renders the pending lawsuit moot, provided the resolution of the claim in the other forum is conclusive. This principle applies regardless of whether the resolution of the issue occurred by means of subsequently enacted legislation or by the entry of a judgment or order that affects either the underlying issue or the precise claim in dispute. n4

4. If the parties voluntarily agree to enter into a settlement, pending litigation concerning the controversy is rendered moot because an effective resolution has been reached and further court action is unnecessary. n5 However, a defendant's promise to refrain from further allegedly wrongful conduct does not necessarily render the pending litigation moot if the promise has not been fully executed n6 or there is a reasonable probability that the defendant will resume the wrongful conduct. n7 Furthermore, the settlement moots only those claims and defenses that are directly encompassed by the settlement. n7.1

[b] Parties Lose Legal Interest or Stake in Outcome

Under the mootness doctrine, the required personal interest by the plaintiff that must exist in the outcome of the litigation at the time the action is commenced must continue throughout the pendency of the action, and if it does not, the case becomes moot. n7.2 This may occur for any of the following reasons:

1. A change in the personal status or condition of a party to the litigation when that status forms the basis of a claim or defense in the litigation. For example, the Supreme Court has held that an action by students at a state operated military college against the superintendent of the college became moot because the students lost their status by graduation and the superintendent lost his status by retirement. n8 However, if the issue is one that is subject to repetition, yet evades review because it is based on short term conditions, the court may nevertheless review the case as an exception to the mootness doctrine. n9

2. A lawsuit may be rendered moot if an intervening event affects, resolves, or terminates the subject matter of the controversy, and as a result, the plaintiff is divested of all interest, stake, or claim in the subject of the dispute. n10

3. If the complaint names a certain individual or official as the defendant, but the named defendant loses responsibility for the challenged conduct during the pendency of the action, n10.1 the case is rendered moot unless a proper substitution of defendants is made. In these situations, mootness occurs either because the plaintiff is no longer exposed to harm by that particular defendant, or because the defendant can no longer comply with the remedy that may be ordered by the court. n11 However, a case is not rendered moot if the plaintiff seeks relief from alleged past unconstitutional discrimination, rather than relief designed to prevent future discriminatory practices. n12

[c] Court Becomes Unable to Grant Requested Relief

A court may declare the case or the issue moot on the grounds that it no longer has the capability to grant relief affecting the legal rights of the parties on the claim. n12.1 For example, a case becomes moot when the defending party has permanently ceased committing the allegedly wrongful conduct, or when the plaintiff has lost the required legal interest to maintain the claim. n13 Before it dismisses a case on mootness grounds because of the defendant's decision to cease the conduct or activity that is challenged, the court must ensure that the defendant will not resume the activity once the threat of litigation has been removed. n14

[d] Decision on Claim is Rendered by Another Court

Proceedings parallel to the federal civil action in question are commonly pending, due to the limited jurisdiction of federal courts, and the existence of concurrent state court jurisdiction over most federal claims. Thus, resolution of the controversy in the state forum may moot the issues presented in the federal action. n15 When a binding decision is rendered by a tribunal that is exercising proper jurisdiction over the claim, the parties have been provided a hearing for their arguments. Therefore, assuming the presence of a full and fair opportunity to litigate before the other tribunal, the mooting of the federal action is proper because it does not divest the parties of their due process right to be heard. n16

[e] Change in Legislation, Statute, or Regulation

If a statute, regulation, or other type of legislation is passed or amended while litigation is pending, and the new legislation corrects or cures the condition that is the subject of the suit, the underlying claim is rendered moot because there is no longer an actual controversy for the court to address and a judicial remedy is no longer needed. n17 This principle also applies to cases in which legislation is challenged by means of a court action, but the legislation has been repealed or has expired before a judicial declaration as to its validity. n18 However, statutory changes will not moot an action challenging the validity of legislation in two situations. The first situation occurs when there is a reasonable expectation that the challenged law will be reenacted; n19 the second situation is when the new legislation does not resolve all of the issues that the parties sought to address in the litigation. n20

[3] Exceptions to Mootness Doctrine

[a] Issues That Are Capable of Repetition and Will Evade Review

The mootness doctrine does not apply if the defendant's conduct is capable of repetition, yet will evade judicial review. The exception applies if the following two conditions exist: n1

1. The challenged conduct is inherently too short in its duration to be completely litigated prior to cessation or expiration; and

2. There is a reasonable expectation that the same complaining party will be subject to the same conduct.

> This second prong of the exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. The same controversy is sufficiently likely to recur when a party has a reasonable expectation that it will again be subjected to the alleged illegal conduct. n1.1

The "capable of repetition, yet evading review" exception to mootness is narrow, applying only in exceptional situations when both factors are simultaneously present. n2 Furthermore, the Supreme Court has made it clear that the exception applies only if the claim of the very same party will evade review. It is not sufficient that other, similarly situated parties would face the same issue under similar time constraints. n3 The exception also does not apply when a party fails to take advantage of existing means to challenge the order in issue, such as by filing an immediate appeal and seeking a stay pending that appeal. n4

[b] Voluntary Cessation of Conduct by Defendant Merely to Avoid Adjudication

The voluntary cessation of challenged conduct by a defendant does not render the underlying controversy moot unless there is no reasonable possibility that the challenged conduct will resume. n5 Whether the voluntary cessation of activity by a defendant is justification for dismissing a case on mootness grounds depends on two key questions: (1) whether the defendant would be free to return to its allegedly wrongful conduct, n6 and (2) whether it is probable that the defendant will do so. n7 In the consideration of these two factors, the court should evaluate the history, pattern, and length of the conduct engaged in by the defendant. The court should also make an assessment of the enforceability of a defendant's promise or representation that it will not resume the allegedly wrongful conduct; this test is a stringent one. n8 In order to obtain a dismissal of the case on mootness grounds, the defendant bears the burden of establishing that its voluntary cessation of objectionable conduct is permanent in nature. n9 Furthermore the voluntary cessation doctrine will not save a suit from mootness unless the defendant shows that the cessation of the conduct did not result merely from the litigation. n10

[c] Past Acts Which Have Present, Future, or Collateral Consequences

Even though a change in circumstances, an intervening event, an amendment to legislation, or a revision in policy may moot a claim, n11 the doctrine of mootness does not apply if those past acts have present, future, or collateral consequences. n12 Examples of future disabilities that constitute collateral consequences precluding mootness include the deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses and restrictions on the procurement of licenses and permits. n13 The "collateral or future consequences" exception to the mootness doctrine also applies in cases in which the underlying claim has significant constitutional ramifications or in cases that present an issue of public importance. n14 These types of cases are exceptions to the mootness doctrine because the plaintiff will not only challenge specific or isolated actions taken by a defendant but also the ongoing policy that prompted the action. n15

[4] Procedural Considerations Regarding Mootness

[a] Initiation of Challenge Based on Mootness

Any party may initiate a challenge on the grounds of mootness at any time because the issue is jurisdictional. n1 The condition of mootness is not a defense that could be waived by a party but rather is a condition that deprives the court of subject matter jurisdiction. n2 Additionally, the court has an obligation to raise and decide the issue of mootness on its own initiative if facts come to its attention suggesting mootness, even if the parties have not raised the issue, because resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. n3

[b] Burden to Establish Mootness

Any party raising the issue of mootness has the burden of establishing the circumstances of mootness. n4 Thus, for

example, a party asserting mootness has the burden of establishing that because of the change in circumstances, no effective relief remains for the court to provide. n5 The burden of showing mootness is a considerable burden, n6 because the party must establish that it is absolutely clear that alleged wrongdoing could not reasonably be expected to recur under the "capable of repetition" exception. n7 For example, in one case, the defendants failed to meet the heavy burden of showing mootness. By failing to state their intention to abide by an injunction, they failed to make absolutely clear that violations could not be reasonably expected to recur. n8

[c] Use of Class Action

If a large number of individuals are affected by the conduct or activity of a defendant, the doctrine of mootness is applied in a very flexible manner. In particular, if the claims of the named plaintiffs in a class action become moot after the class is certified, mootness has no effect on the suit or on the named plaintiffs' status as class representatives. n9 On the other hand, if the claims of the named plaintiffs become moot before the class is certified, the claims of the entire class become moot as well. There is a qualification to this principle. If the nature of the claims are inherently transitory, the termination of the representative's claim does not render moot the claims of the unnamed members of the class, even if certification of the class has not occurred until after the claims of the individual class members are no longer viable. n10 In such circumstances, the courts deem that the certification relates back to the filing of the complaint because, when a claim is of such a transitory nature, the court cannot be expected to rule on the class certification motion before the claim expires. This relation back doctrine avoids the mooting of the entire controversy. n11

[d] Mootness Applicable Only to Some Issues in Case

If a case involves several claims for relief in different forms, the fact that some of the claims have been rendered moot does not divest the court of jurisdiction to entertain any claims that remain live and on which effective judicial relief may still be granted. This type of situation usually arises when a plaintiff makes a request for declaratory or injunctive relief, and includes a claim for monetary damages arising from the plaintiff's past exposure to the illegal conduct. In these circumstances, the mere fact that an intervening event or a change in circumstances may have obviated the need for a declaration or injunction will not automatically moot the plaintiff's request for compensatory or punitive damages. n12

In a similar manner, even though the trial court should refuse to consider the merits of a moot issue, there may remain issues that are still viable. If these remaining issues independently present a justiciable question, the court may properly adjudicate the issues. On the other hand, if the basis for the mootness has effectively divested the plaintiff of all personal stake in the outcome of the controversy, the mootness doctrine demands that the entire case be dismissed for lack of any justiciable controversy. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityMootnessEvading Review ExceptionCivil ProcedureJusticiabilityMootnessPublic Interest ExceptionCivil ProcedureJusticiabilityMootnessReal Controversy RequirementCivil ProcedureJusticiabilityMootnessVoluntary Cessation Exception

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 101.90 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987)* .

(n3)Footnote 2. *Coalition for the Abolition on Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1309-1310 (11th Cir. 2000)* (when subsequent law brings existing controversy to end, case becomes moot and should be

treated accordingly).

(n4)Footnote 3. *See § 1.40*.

(n5)Footnote 4. *See § 1.41*.

(n6)Footnote 5. *Arizonans for Official English v. Arizona, 520 U.S. 43, 68-71, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n7)Footnote 6. *Bunting v. Mellen, 541 U.S. 1019, 1019-1022, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004)* (concurring opinion denying certiorari because claim had become moot and therefore Supreme Court would not exercise certiorari jurisdiction).

(n8)Footnote 7. *Powell v. McCormack, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)* .

(n9)Footnote 8. *City of Erie v. Pap's A.M, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)* .

(n10)Footnote 9. *Burlington N. R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1244 (9th Cir. 1991)* (case becomes moot when court can no longer grant effective relief).

(n11)Footnote 10. *DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S. Ct. 1704, 40 L.Ed. 2d 164 (1974)* .

(n12)Footnote 11. *Rosetti v. Shalala, 12 F.3d 1216, 1223 (3d Cir. 1993)* .

(n13)Footnote 12. *See Blumenthal v. Murray, 946 F. Supp. 623, 626-627 (N.D. Ill. 1996)* .

(n14)Footnote 13. *See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* .

(n15)Footnote 1. *Bunting v. Mellen, 541 U.S. 1019, 1019-1022, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004)* (concurring opinion denying certiorari because Supreme Court would not exercise jurisdiction because of mootness).

(n16)Footnote 1.1. *Flynt v. Weinberger, 762 F.2d 134, 135 (D.C. Cir. 1985)* .

(n17)Footnote 1.2. *Guy Carpenter & Co. v. Provenzale, 334 F.3d 459, 464 (5th Cir. 2003)* .

(n18)Footnote 2. *Christopher Village, Ltd. Partnership v. Retsinas, 190 F.3d 310, 314-315 (5th Cir. 1999)* (because request for injunctive relief against agency would necessarily involve transfer of property in question, suit was mooted by foreclosure sale and transfer of property to city).

(n19)Footnote 2.1. *Bunting v. Mellen, 541 U.S. 1019, 1020, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004)* (students' constitutional challenge to state college's dinner prayer requirement was mooted by students' graduation and superintendent's retirement).

(n20)Footnote 2.2. *Ramirez v. Ramos, 438 F.3d 92, 100 (1st Cir. 2006)* .

(n21)Footnote 3. *Desiderio v. NASD, 191 F.3d 198, 201-202 (2d Cir. 1999)* , *cert. denied, 531 U.S. 1069 (2001)* .

(n22)Footnote 4. *Powder River Basin Res. Council v. Babbitt, 54 F.3d 1477, 1484-1485 (10th Cir. 1995)* (plaintiffs' federal suit to compel payment of counsel fees rendered moot when state supreme court ruled in parallel state litigation that plaintiffs would be awarded fees).

(n23)Footnote 5. *See, e.g., S-1 v. Spangler, 832 F.2d 294, 297 (4th Cir. 1987)* , *cert. denied, 513 U.S. 876 (1994)* ; *see also Johnson v. Horn, 150 F.3d 276, 287-288 (3d Cir. 1998)* (admission or concession at oral argument satisfies

all requested relief).

(n24)Footnote 6. *Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 563 (2d Cir. 1991)* , *cert. denied, 501 U.S. 1218 (1991)* (settlement not binding).

(n25)Footnote 7. *Secretary of Labor v. Burger King Corp., 955 F.2d 681, 683-685 (11th Cir. 1992)* .

(n26)Footnote 7.1. *See Gonzalez v. Spencer, 336 F.3d 832, 834 (9th Cir. 2003)* (per curiam) (settlement of claims enjoining future conduct did not moot claims for damages based on past conduct).

(n27)Footnote 7.2. *Incumaa v. Ozmint, 507 F.3d 281, 286 (4th Cir. 2007)* .

(n28)Footnote 8. *Bunting v. Mellen, 541 U.S. 1019, 1020, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004)* .

(n29)Footnote 9. *See* [3], *below*.

(n30)Footnote 10. *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, 97 F.2d 223, 225 (7th Cir. 1938)* (lawsuit requesting injunction to prevent radio broadcasting of football game declared moot after broadcast of game on date in question).

(n31)Footnote 10.1. *Bunting v. Mellen, 541 U.S. 1019, 1020, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004)* (superintendent of state college lost legal interest in upholding dinner prayer requirement after he retired, and there was no showing that he would ever return to college in official capacity).

(n32)Footnote 11. *Commodity Futures Trading Comm'n v. Board of Trade, 701 F.2d 653, 656 (7th Cir. 1983)* ; *see* Ch. 13, *Interests of Parties* (requirements for substitution of another proper party or parties).

(n33)Footnote 12. *Mumford v. Basinski, 105 F.3d 264, 273-274 (6th Cir. 1997)* .

(n34)Footnote 12.1. *Qureshi v. Gonzales, 442 F.3d 985, 988 (7th Cir. 2006)* .

(n35)Footnote 13. *Park County Resource Council, Inc. v. United States Dep't of Agriculture, 817 F.2d 609, 614-615 (9th Cir. 1987)* (environmental group's request to enjoin oil drilling on national forest land dismissed as moot because drilling had been abandoned).

(n36)Footnote 14. *Grano v. Barry, 733 F.2d 164, 167-168 (D.C. Cir. 1984)* (challenge to district court's injunction against issuance of permit to demolish historic tavern rendered moot by passage into law of public initiative that prohibited demolition).

(n37)Footnote 15. *Powder River Basin Res. Council v. Babbitt, 54 F.3d 1477, 1484 (10th Cir. 1995)* .

(n38)Footnote 16. *Enrico's Inc. v. Rice, 730 F.2d 1250, 1253-1254 (9th Cir. 1984)* .

(n39)Footnote 17. *See Bronx Household v. Community Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997)* (claim that school district policy prohibiting renting of public school facilities for religious services violated Religious Freedom Restoration Act became moot when Supreme Court ruled Act unconstitutional).

(n40)Footnote 18. *Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990)* (challenge to constitutionality of congressional appropriation statute rendered moot as result of expiration of last extension of statute).

(n41)Footnote 19. *City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289-290, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1983)* .

(n42)Footnote 20. *Building & Constr. Dept. v. Rockwell Int'l Corp., 7 F.3d 1487, 1491 (10th Cir. 1993)* .

(n43)Footnote 1. *FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 341 (2007)* .

(n44)Footnote 1.1. *FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 341-342 (2007)* .

(n45)Footnote 2. *United States v. Ladd (In re AP), 162 F.3d 503, 511 (7th Cir. 1998)* (determination that challenged situation is likely to recur must be practical, and not simply ingenious academic exercise in what is conceivable).

(n46)Footnote 3. *DeFunis v. Odegaard, 416 U.S. 312, 315-317, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974)* ; *Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 797-798 (9th Cir. 1999)* .

(n47)Footnote 4. *Minnesota Humane Soc. v. Clark, 184 F.3d 795, 797 (8th Cir. 1999)* .

(n48)Footnote 5. *City of Erie v. Pap's A.M., 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)* .

(n49)Footnote 6. *City of Erie v. Pap's A.M., 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)* .

(n50)Footnote 7. *Milwaukee Police Ass'n v. Jones, 192 F.3d 742, 746-748 (7th Cir. 1999)* (action not moot because no reasonable basis existed to conclude that challenged conduct would not recur).

(n51)Footnote 8. *FTC v. Affordable Media, LLC, 179 F.3d 1228, 1237-1238 (9th Cir. 1999)* .

(n52)Footnote 9. *FTC v. Affordable Media, LLC, 179 F.3d 1228, 1237-1238 (9th Cir. 1999)* .

(n53)Footnote 10. *Sze v. INS, 153 F.3d 1005, 1008-1009 (9th Cir. 1998)* .

(n54)Footnote 11. *See* [2], *above*.

(n55)Footnote 12. *Beattie v. United States, 949 F.2d 1092, 1094 (10th Cir. 1992)* (past employment disputes may have future consequences).

(n56)Footnote 13. *Spencer v. Kemna, 523 U.S. 1, 12, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)* .

(n57)Footnote 14. *City of Houston v. HUD, 24 F.3d 1421, 1429-1430 (D.C. Cir. 1994)* .

(n58)Footnote 15. *Washington v. Daley, 173 F.3d 1158, 1164-1165 (9th Cir. 1999)* (actions challenging fishing regulations as arbitrary and capricious were not moot to extent that framework regulation remained in place).

(n59)Footnote 1. *In re Smith, 921 F.2d 136, 138 (8th Cir. 1990)* (mootness goes to heart of Article III jurisdiction).

(n60)Footnote 2. *Fox v. Board of Trustees, 42 F.3d 135, 140 (2d Cir. 1994)* , cert. denied, *515 U.S. 1169 (1995)* .

(n61)Footnote 3. *North Carolina v. Rice, 404 U.S. 244, 245, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)* .

(n62)Footnote 4. *Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 458-459 (D.C. Cir. 1998)* .

(n63)Footnote 5. *GATX/Airlog Co. v. United States Dist. Court, 192 F.3d 1304, 1306 (9th Cir. 1999)* .

(n64)Footnote 6. *County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979)* ; *NEC Corp. v. United States, 151 F.3d 1361, 1369 (Fed. Cir. 1998)* .

(n65)Footnote 7. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66, 108 S. Ct. 376,*

98 L. Ed. 2d 306 (1987) .

(n66)Footnote 8. *New York State Nat'l Org. for Women v. Terry, 159 F.3d 86, 91 (1998)* .

(n67)Footnote 9. *Franks v. Bowman Transp. Co., 424 U.S. 747, 752-756, 96 S. Ct. 1251, 1258-1260, 47 L. Ed. 2d 444 (1976)* .

(n68)Footnote 10. *Gerstein v. Pugh, 420 U.S. 103, 110 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)* (pretrial detention claim survived because of transitory nature of detention).

(n69)Footnote 11. *See, e.g., Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993)* (civil rights class action initiated by welfare applicants to challenge delays in state procedure for obtaining benefits was deemed not moot despite the fact that when motion for class certification came before court, applicants had already received their benefits).

(n70)Footnote 12. *National Iranian Oil Co. v. Mapco Int'l, Inc., 983 F.2d 485, 489 (3d Cir. 1992)* (if plaintiff seeks monetary damages, entire action is not rendered moot unless there is no possibility that plaintiff can ever recover judgment).

(n71)Footnote 13. *See Government of Territory of Guam v. Sea-Land Serv., Inc., 958 F.2d 1150, 1153 (D.C. Cir. 1992)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART III. FEDERAL COURT'S DECISION WHETHER TO ADJUDICATE CASE

1-1 Moore's Manual--Federal Practice and Procedure § 1.45

§ 1.45 Political Questionsn*

The political question doctrine prevents the federal courts from reviewing matters that another branch of government may more appropriately resolve. n1 The political question doctrine presents issues of justiciability distinct from those implicated by the concepts of standing, mootness, and ripeness. In broad terms, the doctrine requires federal courts to abstain from the review of constitutional claims that are more amenable to resolution by other branches of the federal government instead of rendering a judgment on the merits. n2 However, the precise nature of the political question doctrine is difficult to define, and its application requires a case-by-case analysis in order to determine whether the doctrine's broad criteria have been met. n3

Reviewing the cases in which it had been held that issues were "political" the following guidelines are apparent: (1) the doctrine is primarily a function of separation of powers; (2) an understanding of the limits of the doctrine requires a case-by-case analysis, despite sweeping statements in some of the opinions; and (3) on the surface of any case held to involve a political question, one of the following factors is evident: a demonstrable constitutional commitment of an issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from several pronouncements by various departments on one issue. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureJusticiabilityPolitical QuestionsForeign AffairsCivil ProcedureJusticiabilityPolitical QuestionsNational SecurityCivil ProcedureJusticiabilityPolitical QuestionsSeparation of PowersCivil ProcedureJusticiabilityPolitical QuestionsTreaties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice,* § 101.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)* .

(n3)Footnote 2. *Larsen v. Senate of Commonwealth of Pa., 152 F.3d 240, 246-248 (3d Cir. 1998)* .

(n4)Footnote 3. *Larsen v. Senate of Commonwealth of Pa., 152 F.3d 240, 246-248 (3d Cir. 1998)* .

(n5)Footnote 4. *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)* .

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1-1 Moore's Manual--Federal Practice and Procedure §§ 1.46through 1.59

[Reserved]

§§ 1.46[Reserved]

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART IV. ONLY ONE FORM OF CIVIL ACTION ADJUDICATED IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure § 1.60

§ 1.60 Nature of Single Form of Civil Actionn*

[1] Combination of Common-Law Procedures

There is only one form of action in cases in federal court subject to the Federal Rules of Civil Procedure, the form known as the "civil action." n1 Thus, in accordance with Rules 2 and 81(c) the words "civil action" have replaced the words "case," "cause," "suit," "lawsuit" and other similar expressions. The term "civil action" encompasses an entire civil case, including claims filed by plaintiffs, claims by defendants, claims filed by third-party defendants, and the responses to all of those claims. n2

Rule 2 establishes that all of these claims and responses are not separate actions within a larger case, but simply "part and parcel" of the existing action. n3 Even more significantly, Rule 2 and the rest of the federal civil rules combine into a single, simple form of action all of the many formal common-law causes of action, each of which was rigidly defined with respect to requirements of proof, appropriate defenses, available remedies, and specific forms of pleading. The civil rules were designed to avoid some of the old procedural booby traps that common-law pleaders could set to prevent unsophisticated parties from ever having an adjudication on the merits. n4

[2] Merger of Law, Equity, and Admiralty

The creation of a single form of action has brought about the merger of the systems of law and equity. The merger of law and equity eliminates the practice that existed in federal courts prior to promulgation of the civil rules: separate sides for adjudicating claims at law or in equity, each of which had its own procedures depending on the nature of the claim asserted. n1 Thus, the merger destroyed purely procedural impediments to the presentation of any issue by any party based on the difference between law and equity. n2 The merger of law and equity also eliminated the fiction that a single federal official was both a "chancellor" in equitable suits and a "judge" in legal actions. n3

The rules also include admiralty claims within their scope, resulting in a similar merger of the civil and admiralty procedures. n4 Actions based on admiralty jurisdiction are no longer assigned to a separate admiralty docket but, rather, are assigned to the same civil docket as legal and equitable actions and are governed principally by the same rules. n5

The merger of law and equity allows the court to resolve claims that have both legal and equitable aspects and to

preserve the right to trial by jury on the legal aspects of the claim. n6 Prior to the merger, a court of equity had the power to adjudicate claims with legal aspects on the grounds that a court of equity was required to provide full relief between the parties and that it could not do so without resolving legal issues. The party generally lost the right to trial by jury on such claims, however. n7 The use of a single form of action generally precludes a federal court's use of any form of action other than a civil action to resolve disputes within the scope of the rules. Therefore, the court may not generally adjudicate disputes without the full procedural protections of the civil rules, and summary proceedings, which are defined as proceedings that may be conducted without formal pleadings, on short notice, or without formal trial procedures, are prohibited in federal court. n8

[3] Elimination of Most Procedural Differences Based on Legal or Equitable Nature of Claim

Under the federal rules, an action is not an equitable action or a legal action, but simply a civil action governed by the same procedural rules. Because it requires a single form of action, Rule 2 eliminates most procedural distinctions based on whether a plaintiff's claims are legal or equitable. n1 This is because, in general, procedure should not depend on the labels of law and equity unless justified by a rational and coherent policy. n2 The distinction between law and equity continues to have relevance in determining whether a party is entitled to a jury trial because the constitutional right to a trial by jury is protected only for legal issues and by the civil rules themselves. n3

The distinction between law and equity also continues to be relevant in determining applicable statutes of limitation in diversity cases. Because the merged practice of the civil rules does not affect substantive law, the statute of limitation applicable to a particular claim in a diversity case is not generally affected by the merger of law and equity actions. n4 Statutes of limitation are considered substantive for purposes of the *Erie* doctrine, which states that state law controls substantive issues in diversity actions, while federal law controls procedural issues. n5 As a result, if determination of the applicable statute of limitation under state law depends on the nature of the complaint asserted, the nature of the complaint will determine the governing statute of limitation in federal court. n6

By requiring a single form of action, Rule 2 eliminates most procedural distinctions based on whether a plaintiff asserts admiralty or non-admiralty claims, or both. n7 Therefore, in most circumstances the procedure that will apply does not depend on whether the plaintiff's claims are based in admiralty. Indeed, the rules generally apply even if they are inconsistent with pre-merger admiralty practice. n8 However, despite the unification of admiralty and general federal civil practice, it is sometimes necessary to determine whether a claim may be heard in admiralty. In the most common example, which occurs at the initiation of a civil action, the district court's subject-matter jurisdiction may depend on whether a claim is properly characterized as an admiralty claim. n9

[4] Elimination of Most Pleading Formalities

By combining all forms of action into one, Rule 2 enables the court to grant full relief among the parties without regard to whether a claim or defense accurately describes the legal theory that is the basis for the claim or defense. The court interprets the pleadings based on the facts alleged and remedy sought, and not the "form of action" asserted by the pleader. n1 Thus, the court must determine the true nature of a claim, such as, whether in contract or in tort, in law or in equity, n2 or corresponding to some specific common-law form of action from the facts alleged, rather than from assertion of a particular legal theory. n3

Rule 2 does not eliminate substantive rules that may depend on the nature of a claim. n4 It merely provides that the nature of the action does not depend on the form of action or legal theory designated by the pleader in the pleading itself. n5 On the other hand, a pleading is not inadequate solely because it inaccurately describes a contract claim as a tort claim or an equitable claim as a legal claim, provided that it adequately describes the facts that entitle the pleader to relief. n6 Indeed, even if the complaint alleges one theory of relief, the action may in appropriate cases properly be tried and plaintiff may recover on a different theory. n7 However, a complaint may still be dismissed under Rule 8(a) if it does not contain a short and plain statement of the claim or if the statement is so unintelligible that the meaning cannot

be determined. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewGovernmentsCourtsCommon Law

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 2.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 2*; *see Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 734 (2d Cir. 1953)* (one civil action under rules is used to vindicate any civil power district court has; any action within scope of civil rules must be brought as civil action).

(n3)Footnote 2. *Davis v. McCourt, 226 F.3d 506, 510-511 (6th Cir. 2000)* .

(n4)Footnote 3. *Nolan v. Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990)* , *cert. denied, 499 U.S. 962 (1991)* .

(n5)Footnote 4. *Schiavone v. Fortune, 477 U.S. 21, 27, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)* ; *Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966)* .

(n6)Footnote 1. *Weaver v. Florida Power & Light Company, 172 F.3d 771, 774 n.7 (11th Cir. 2000)* .

(n7)Footnote 2. *Ross v. Bernhard, 396 U.S. 531, 539-540, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n8)Footnote 3. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n9)Footnote 4. *Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 152-153 & n.2 (4th Cir. 1995)* (in one civil action, federal courts are authorized to exercise several types of subject matter jurisdiction historically exercised by separate courts, including courts of law, equity, and admiralty); *Wilmington Trust v. United States Dist. Court, 934 F.2d 1026, 1030 (9th Cir. 1991)* , *cert. denied, 503 U.S. 966 (1992)* (prior to merger of law and admiralty, plaintiff could choose whether to file claim on civil side or admiralty side of federal court).

(n10)Footnote 5. *Fed. R. Civ. P. 79(a).*

(n11)Footnote 6. *Ross v. Bernhard, 396 U.S. 531, 532-533, 538-540, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n12)Footnote 7. *Ross v. Bernhard, 396 U.S. 531, 533-537, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n13)Footnote 8. *New Hampshire Fire Ins. Co. v. Scanlon, 362 U.S. 404, 406-407, 80 S. Ct. 843, 4 L. Ed. 2d 826 (1960)* .

(n14)Footnote 1. *Employers Ins. v. Shell Oil Co., 820 F.2d 898, 900 (7th Cir. 1987)* (because of merger of law and equity, the distinction between law and equity has become irrelevant in most federal litigation).

(n15)Footnote 2. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 285-288, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n16)Footnote 3. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-472, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* ; *see Fed. R. Civ. P. 38, 39*; *see also § 1.63.*

(n17)Footnote 4. *Guaranty Trust Co. v. York, 326 U.S. 99, 110-112, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* .

(n18)Footnote 5. *Erie R.R. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n19)Footnote 6. *Lift-A-Loft Corp. v. Rodes-Roper-Love Ins. Agency, 975 F.2d 1305, 1311-1312 (7th Cir. 1992)* .

(n20)Footnote 7. *Fed. R. Civ. P. 2.*

(n21)Footnote 8. *Kotsopoulos v. Asturia Shipping Co., 467 F.2d 91, 93-95 (2d Cir. 1972)* .

(n22)Footnote 9. *J. Lauritzen A/S v. Dashwood Shipping, Ltd., 65 F.3d 139, 142-143 (9th Cir. 1995)* (no admiralty jurisdiction despite substantial connection to traditional maritime activity because alleged interference with contract occurred on land).

(n23)Footnote 1. *See Riemer V. Illinois Dept. of Trans., 148 F.3d 800, 804 (7th Cir. 1998)* (plaintiff's complaint was sufficient to give opposition notice that plaintiff alleged claim based on Americans With Disability Act).

(n24)Footnote 2. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 662 (6th Cir. 1996)* (court based characterization of case as equitable not on form of complaint alone, but on request for injunctive relief).

(n25)Footnote 3. *Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997)* (facts need not be matched to legal theories; it is only necessary that complaint set out facts that support claim in form of grievance).

(n26)Footnote 4. *Zunamon v. Brown, 418 F.2d 883, 888-889 (8th Cir. 1969)* .

(n27)Footnote 5. *Randolph v. Resolution Trust Corp., 995 F.2d 611, 619 n.6 (5th Cir. 1993)* (plaintiff could not mischaracterize legal malpractice claim as contract rather than tort action to gain benefit of longer statute of limitation).

(n28)Footnote 6. *Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992)* (on motion to dismiss, court need not review adequacy of legal theory stated in pleading, but whether relief is possible under any set of facts that could be proved consistent with complaint).

(n29)Footnote 7. *Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992)* (complaint sufficiently provides statement of claim for relief, even if it points to wrong legal theory as basis for that claim, provided that relief is possible under any set of facts that could be established consistent with allegations).

(n30)Footnote 8. *See Simmons v. Abruzzo, 49 F.3d 83, 86-87 (2d Cir. 1995)* .

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1-1 Moore's Manual--Federal Practice and Procedure § 1.61

§ 1.61 Claims for Relief May Be Legal, Equitable, and in Admiraltyn*

[1] Court May Adjudicate All Types of Claims Supported by Facts

The effect of the use of a single form of action for all actions within the scope of the rules is that the court may combine all legal, equitable, and admiralty claims in a single action. Thus, a party need not bring legal claims in one legal action and equitable claims in a separate equitable suit. n1 Furthermore, once all of the claims are joined together, they may also all be tried together. n2 Permitting all claims to be joined in a single action promotes the efficient resolution of disputes. The traditional practice, that a court of equity could not take jurisdiction over an action that included claims recognized only at law created considerable inconvenience, because it necessitated two separate trials of the same case whenever that case contained both legal and equitable claims. n3

[2] Adequate Legal Remedy

The merger of law and equity under the rules allows a federal court to exercise both legal and equitable jurisdiction concurrently. Consequently, the court's jurisdiction over an equitable claim does not generally depend on the lack of an adequate legal remedy, unless the court lacks subject-matter jurisdiction over the legal claim. n1 This means that in diversity cases a state law rule requiring a plaintiff to elect between legal and equitable remedies at the commencement of an action or suit does not apply if those rules exist because the state's procedure maintains separate law and equity courts. n2 However, while a complaint may seek both legal and equitable relief without a prior showing of an inadequate legal remedy, the court may still not grant equitable relief unless it first determines that the party seeking equitable relief has no adequate legal remedy. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 2.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 18(a)*; *see* *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* (civil rules permit joinder of legal and equitable claims in single action).

(n3)Footnote 2. *Wilmington Trust v. United States Dist. Court, 934 F.2d 1026, 1031 (9th Cir. 1991)* , *cert. denied, 503 U.S. 966 (1992)* (liberal joinder rules permit joinder of legal and equitable claims while preserving constitutional or statutory right to trial by jury); *see Fed. R. Civ. P. 18(b)* (whenever any claim is one that before enactment of rules was cognizable only after another claim had been prosecuted to conclusion, two claims may now be joined in single action).

(n4)Footnote 3. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n5)Footnote 1. *United States v. Oncology Assocs., 198 F.3d 489, 494-501 (4th Cir. 1999)* ; *New York v. White, 528 F.2d 336, 339 (2d Cir. 1975)* .

(n6)Footnote 2. *Carbone v. Gulf Oil Corp., 812 F.2d 1416, 1421 (Temp. Emer. Ct. App. 1987)* (election of remedies doctrine is inapplicable under civil rules); *see* *United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 494-501 (4th Cir. 1999)* (under modern pleading rules, claims in law and equity may be asserted in single civil action under Rule 2, and relief may be demanded in the alternative or of several different types).

(n7)Footnote 3. *Massengill v. Guardian Mgmt. Co., 19 F.3d 196, 205 & n.4 (5th Cir. 1994)* (specific performance generally not available if damages provide adequate remedy at law).

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1-1 Moore's Manual--Federal Practice and Procedure § 1.62

§ 1.62 Defenses May Involve Legal, Equitable, and Admiralty Issuesn*

There is now only one form of action which is known as the civil action. n1 The merger of legal and equitable jurisdiction is complete, and a court now may determine all claims, defenses and issues in a single civil action. n1.1 The merger of law and equity eliminates any procedural barrier to the assertion of defenses based on one form of action to claims arising out of another form of action or complaint. For example, there is no procedural barrier to the assertion of equitable defenses to legal claims. n2 Whether a particular defense may be applied to a particular claim depends on the applicable substantive law, which in a diversity case will be state law. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 2.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 2.*

(n3)Footnote 1.1. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) .*

(n4)Footnote 2. *United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 494-501 (4th Cir. 1999) .*

(n5)Footnote 3. *Patton v. Bearden, 8 F.3d 343, 347-348 (6th Cir. 1993)* (applying Tennessee law concerning availability of laches).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 1 FEDERAL COURTS
PART IV. ONLY ONE FORM OF CIVIL ACTION ADJUDICATED IN FEDERAL COURT

1-1 Moore's Manual--Federal Practice and Procedure § 1.63

§ 1.63 Right to Jury Trial Preserved for Legal Issuesn*

Rule 38 expressly preserves the right to jury trial to the extent granted by the United States Constitution or by federal statute but also provides that the rules do not create a right to jury trial of admiralty issues. n1 Thus, despite the procedural provision for a single form of action under Rule 2, the question of whether a party has a right to jury trial depends on the substantive nature of each issue. n2 Under the merged procedure of Rule 2, in which both jury and non-jury issues may be joined in a single action, the existence of a right to trial by jury is examined for each issue separately, not for the action as a whole. n3 Thus, the right to trial by jury of legal issues is not lost by joinder with equitable issues. n4

The form of an action is generally dispositive as to whether the parties may claim a right to trial by jury. n5 The existence of a right to trial by jury depends on whether an action is more similar in form historically to cases that were tried in courts of law or more similar to suits that were tried in courts of equity or admiralty. n6 For a complete discussion of the applicability of the right to a jury trial, see Ch. 22, *Trial by Jury*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 2.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 38(a)*; *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-472, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* (federal rules expressly preserve existence of right to jury for legal issues).

(n3)Footnote 2. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471-472* & n.5, *82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* (citing **Moore's Federal Practice** and stating that civil rules have not changed fundamental principle that right to trial by jury of legal claims must be preserved).

(n4)Footnote 3. *Ross v. Bernhard, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n5)Footnote 4. *Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 426 (2d Cir. 1995)* , *cert. denied, 518 U.S. 1017 (1996)* (jury right exists for claim for damages under Fair Housing Act, *42 U.S.C. § 3601 et seq.*, even if joined with equitable claims).

(n6)Footnote 5. *Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 152-153 (4th Cir. 1995)* (while *Seventh Amendment* guarantees jury trial in cases at common law, no constitutional provision guarantees jury trials for cases tried in equity or in admiralty).

(n7)Footnote 6. *Waldrop v. Southern Co. Servs., Inc., 24 F.3d 152, 157 (11th Cir. 1994)* (party does not have right to jury trial in action for disgorgement of improper profits, because historically that was equitable action).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure 2.syn

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART I. PRINCIPLES CONTROLLING EXERCISE OF CONCURRENT AND EXCLUSIVE JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure § 2.01

§ 2.01 Nature of Concurrent Jurisdictionn*

[1] Description of Concurrent Jurisdiction

The term "concurrent jurisdiction" means the power of two or more courts to hear a particular dispute at any given time. n1 The term may be used to describe simultaneous jurisdiction by courts within the same court system, for example, when two federal courts have the power to hear a dispute, n2 but usually venue is proper in only one of these courts. n3 However, the term is usually used in the context of simultaneous jurisdiction by state and federal courts, n4 and that is the manner in which the term is generally used in this chapter. For a discussion of "concurrent jurisdiction" as applied to the simultaneous exercise of jurisdiction by more than one federal district court, see *§ 2.07*. For a discussion of "concurrent jurisdiction" as applied to simultaneous jurisdiction among federal courts at different levels, see Ch. 1, *Federal Courts*.

The concept of concurrent jurisdiction forms the primary basis for removal of a case from state to federal court. Thus, when federal and state courts have concurrent jurisdiction over a suit, a plaintiff has the initial option to select a state or federal forum for the suit. n5 If the plaintiff files in state court, the defendant may be entitled by federal statute to remove the case to federal court. In general, only cases that could have originally been brought in federal court are subject to removal. n6

The relationship between the exclusive or removal jurisdiction of the federal courts and the concurrent jurisdiction of both the federal and the state courts creates many facets of legal rights and remedies within which the jurisdiction of federal and state courts may conflict. Such conflicts must be resolved according to the applicable statutes, if any, the rules developed by the courts themselves, and the general principles of comity, n7 as discussed in part II. n8

[2] Source of Concurrent Jurisdiction of State and Federal Courts

Federal courts are courts of limited jurisdiction, which means that the courts may exercise their judicial power only to the extent permitted by the Constitution and, therefore, to the extent specified by Congress. n1 On the other hand, state courts are courts of general jurisdiction, which means that a state court may generally hear any types of cases except those cases that have been specifically prohibited, either by federal law or by the state of the particular court. n2

Pursuant to Article III of the Constitution, Congress has created the federal district courts as trial courts and granted them exclusive jurisdiction in matters involving admiralty, bankruptcy, patents, copyrights and trademarks, and concurrent jurisdiction with the state courts in federal question and diversity of citizenship cases. n3 Based on this constitutional and statutory language, the Supreme Court has held that there is a presumption of concurrent jurisdiction, even over federal claims, absent evidence of a congressional intent to vest exclusive jurisdiction over a particular matter in the federal courts. n4 The Supreme Court has also noted that, until Congress in 1875 provided the lower federal courts with general federal question jurisdiction, the state courts provided the only forum for vindicating most important federal claims. n5

[3] Possible Effects of Concurrent Jurisdiction

[a] Repetitive and Reactive Suits

The existence of dual federal/state court systems with concurrent jurisdiction may have the effect of encouraging the filing of repetitive suits in the federal and state courts. A "repetitive suit" occurs when a plaintiff files multiple actions based on similar or identical causes of action against the same defendant in different forums. n1 A plaintiff may file a repetitive suit, for example, to try to ensure that the court will have personal jurisdiction over the defendant, n2 to "shop" for the most favorable forum, such as the forum with favorable applicable law, jury selection, and possible remedies or damage awards, n3 or to obtain the fastest adjudication possible, when one forum's courts are subject to possible delays, docket congestion, or a backlog of cases. n4

A "reactive suit" is similar to a repetitive suit in that it is a new suit filed by the defendant in the first suit in another court system, seeking relief against the plaintiff in the first suit, based on the same transaction or occurrence that is the subject matter of the first suit. n5 One of the most common types of reactive suits is a federal declaratory judgment action, which a state court defendant typically initiates in federal court, seeking a declaration that the state court defendant is not liable for the state claim. The rationale for this action is that if the federal court issues a favorable declaratory judgment prior to the state court's resolution of the issue, the federal declaratory judgment may preclude relitigation of the issue in state court. n6

[b] Race to Judgment and Court's Attempts to Control Dual Litigation

Neither federal nor state courts have the power to simply ignore the preclusive effects of judgments that have been rendered; thus, a litigant may not file a repetitive or reactive suit if the suit is merely an attempt to relitigate a suit that has already come to judgment, n7 or if the suit is an "unreasonable" and "vexatious" multiplication of proceedings, because in such circumstances the party and attorney may both be subjected to sanctions and awards of costs for filing frivolous pleadings or pursuing vexatious litigation. n8 The result of the res judicata effect is that litigants will often initiate a "race to judgment" by filing either repetitive or reactive suits in both state and federal forums in order to be the first to obtain the judgment. n9

The effects of concurrent jurisdiction and preclusion by judgment may in turn result in procedural maneuvering in which the litigant will request that the federal court enjoin the state action. Generally, this has been prohibited by Congress under the Anti-Injunction Act, n10 which imposes a ban on the issuance of a federal injunction against a pending state court action. However, there are several statutory and judicially recognized exceptions to this ban, which are discussed in Part II of this chapter. n11 Another related issue that results from concurrent jurisdiction is that of federal court abstention. Under the doctrine of abstention, the federal court may decline to adjudicate a case, even though all jurisdictional requirements have been met and the dispute is justiciable, on the grounds that sound judicial administration requires the court not to hear the case in the context of duplicative, concurrent federal-state litigation. n12 The ramifications of abstention are discussed in Part III of this chapter. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 120.01, 120.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Norfolk Southern Ry. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638, 647 (2007)* (Federal Employers' Liability Act provides for concurrent jurisdiction in state and federal courts); *Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 444, 121 S. Ct. 993, 999, 148 L. Ed. 2d 931 (2001)* (federal statutory "saving to suitors" clause preserves concurrent state court jurisdiction over some admiralty and maritime claims).

(n3)Footnote 2. *See, e.g., Adam v. United States, 429 F. Supp. 38, 41 (D. Wyo. 1977)* (in tax refund suits, federal statute grants federal district courts and United States Court of Federal Claims concurrent jurisdiction).

(n4)Footnote 3. *See* Ch. 7, *Venue*.

(n5)Footnote 4. *Norfolk Southern Ry. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638, 647 (2007)* (Federal Employers' Liability Act expressly provides for concurrent jurisdiction in state and federal courts); *Tafflin v. Levitt, 493 U.S. 455, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990)* (state courts have concurrent jurisdiction with federal courts to hear civil RICO actions because Congress did not expressly provide that federal jurisdiction over such matters was exclusive).

(n6)Footnote 5. *Schulman v. California (In re Lazar), 237 F.3d 967, 973 n.2 (9th Cir. 2001)* .

(n7)Footnote 6. *See 28 U.S.C. § 1441(a)*; *Burroughs v. Palumbo, 871 F. Supp. 870, 872 (E.D. Va. 1994)* ; *see also* Ch. 8, *Removal From State Court*.

(n8)Footnote 7. *Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 103, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981)* .

(n9)Footnote 8. *See § 2.20* et seq.

(n10)Footnote 1. Douglas v. E.G. *Baldwin & Assocs., Inc., 150 F.3d 604, 607-608 (6th Cir. 1998)* ; *see § 2.02*.

(n11)Footnote 2. *Glidden Co. v. Zdanok, 370 U.S. 530, 545-546, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962)* ; *Gottlieb v. Carnival Corp., 436 F.3d 335, 337 (2d Cir. 2006)* ; *see* Ch. 1, *Federal Courts*.

(n12)Footnote 3. *See* U.S. Const. Art. III; *28 U.S.C. §§ 1331-1365*.

(n13)Footnote 4. *Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990)* ; *see § 2.03[1]*.

(n14)Footnote 5. *Palmore v. United States, 411 U.S. 389, 401-402, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973)* ; *see also Gottlieb v. Carnival Corp., 436 F.3d 335, 337 (2d Cir. 2006)* (in Telephone Consumer Protection Act (*47 U.S.C. § 227(b)(3)*), Congress created exclusive state-court jurisdiction over private actions; holding, however, that claimant may bring such claim in federal court based on diversity jurisdiction).

(n15)Footnote 1. *Tovar v. Billmeyer, 609 F.2d 1291, 1292-1293 (9th Cir. 1979)* (plaintiff filed suit against city in state court to compel city to issue permit for adult bookstore, and during pendency of state court action, plaintiff filed action in federal court for declaratory and injunctive relief).

(n16)Footnote 2. *O'Hare Int'l Bank v. Lambert, 459 F.2d 328, 330 (10th Cir. 1972)* (during pendency of plaintiff's

appeal from jurisdictional dismissal entered by federal court in Illinois, plaintiff commenced identical actions in federal district courts in Illinois, Oklahoma, Arkansas, and Texas).

(n17)Footnote 3. *Mars, Inc., v. Standard Brands, Inc., 386 F. Supp. 1201, 1204-1205 (S.D.N.Y. 1974)* .

(n18)Footnote 4. *Applegate v. Devitt, 509 F.2d 106, 107-109 (8th Cir. 1975)* (actions in state court were subject to three-year delay in coming to trial).

(n19)Footnote 5. *See, e.g., Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 533 (7th Cir. 1982)* (reactive suit may seek affirmative relief, the type of relief that, in absence of concurrent jurisdiction, would ordinarily have to be asserted in answer and counterclaim filed in first suit).

(n20)Footnote 6. *Donovan v. City of Dallas, 377 U.S. 408, 412, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964)* (when state court and federal court have concurrent jurisdiction over in personam suits, both suits may proceed at least until one court renders judgment, which then has res judicata effect).

(n21)Footnote 7. *Ramsden v. AgriBank, FCB, 214 F.3d 865, 868-869 (7th Cir. 2000)* , *cert. denied, 531 U.S. 1036 (2000)* ; *see Angel v. Bullington, 330 U.S. 183, 186-187, 67 S. Ct. 657, 91 L. Ed. 832 (1947)* (final judgment in one suit generally has effect of precluding relitigation of identical claim in duplicative suit).

(n22)Footnote 8. *28 U.S.C. § 1927*; *Fed. R. Civ. P. 11*.

(n23)Footnote 9. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 79-80, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n24)Footnote 10. *28 U.S.C. § 2283*.

(n25)Footnote 11. *See § 2.40* et seq.

(n26)Footnote 12. *See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 708, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* (abstention doctrine based on considerations of federalism and comity).

(n27)Footnote 13. *See § 2.60* et seq.

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART I. PRINCIPLES CONTROLLING EXERCISE OF CONCURRENT AND EXCLUSIVE JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure § 2.02

§ 2.02 Nature of Exclusive Jurisdictionn*

[1] Exclusive Jurisdiction in Federal Court

In contrast to cases of concurrent jurisdiction, in which multiple courts have the power to determine a controversy, n1 exclusive jurisdiction means that only a particular level or type of court may determine the claim or controversy. n2 Such jurisdiction usually arises by statute. Under the Federal Tort Claims Act, n3 for example, the federal district courts have exclusive jurisdiction over civil actions against the United States for money damages for injury to, or loss of, property, personal injury, or wrongful death. n3.1 Similarly, The Tucker Act n3.2 gives the United States Court of Federal Claims exclusive jurisdiction over claims for damages exceeding $ 10,000 that are founded on any express or implied contract with the United States. n3.3

However, exclusive jurisdiction does not necessarily mean that a claim under an exclusively federal statute may never be decided in state court. Even if federal courts have exclusive jurisdiction over a cause of action arising under a particular federal statute, a state court may decide federal issues under that statute if the issues arise in the course of a proceeding that is within the state court's jurisdiction. For example, federal district courts have original, exclusive jurisdiction over patent cases. n4 However, if the validity of a patent becomes an issue in a breach of contract action in state court, the state court may decide the validity of the patent for purposes of that action. n5

[2] Exclusive Jurisdiction in State Court

Some federal statutes specifically provide that the jurisdiction to enforce the statute is exclusively in the federal courts or exclusively in the state courts. n1 Otherwise, federal courts generally do not have subject matter jurisdiction unless a case involves a federal question n2 or arises under state law and involves citizens of different states and an amount in controversy exceeding $75,000. n3 All other cases are within the exclusive jurisdiction of the state courts. n4

Under the common law, the Supreme Court has also imposed restrictions on the federal courts' jurisdiction in two areas and established that state courts have exclusive jurisdiction in those areas. These two exceptions to federal diversity jurisdiction recognize that the disposition of these types of cases are appropriate only in state, n5 rather than federal, court: n6

1. Certain domestic relations claims. A federal court may not exercise diversity jurisdiction in a narrow range of domestic relations issues. The federal court may not exercise jurisdiction regarding divorce, alimony, and child custody decrees. However, the Supreme Court has held that the federal courts may take claims alleging the commission of torts. n7

2. Claims in probate proceedings. A federal court may not exercise diversity jurisdiction to probate a will, annul a will, or administer a decedent's estate. Furthermore, it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. However, this probate exception does not bar federal courts from adjudicating matters such as claims of creditors, legatees, heirs, and other claimants against a decedent's estate provided that the federal court does not interfere with the probate proceedings. n8 For further discussion of federal court jurisdiction based on diversity of citizenship, see Ch. 5, *Original Jurisdiction over the Subject Matter*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 120.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 2.01*.

(n3)Footnote 2. *See, e.g., Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, 895 F.2d 116, 122-123 (3d Cir. 1990)* (only federal courts may decide admiralty claim seeking title to vessel and salvage award).

(n4)Footnote 3. *See 28 U.S.C. § 2671 et seq*.

(n5)Footnote 3.1. *Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F.3d 76, 80 (2d Cir. 2005)* .

(n6)Footnote 3.2. *See 28 U.S.C. § 1491(a)(1)*.

(n7)Footnote 3.3. *See Skokomish Indian Tribe v. United States, 410 F.3d 506, 511 (9th Cir. 2005)* .

(n8)Footnote 4. *See 28 U.S.C. § 1338(a)*.

(n9)Footnote 5. *See Lear, Inc. v. Adkins, 395 U.S. 653, 675-676, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* .

(n10)Footnote 1. *See, e.g., 47 U.S.C. § 227*; *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* (federal Telephone Consumer Protection Act explicitly gives exclusive jurisdiction to state courts to hear cases based on that statute).

(n11)Footnote 2. U.S. Const., Art. III § 2.

(n12)Footnote 3. *28 U.S.C. § 1332*.

(n13)Footnote 4. *See Aldinger v. Howard, 427 U.S. 1, 14-15, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976)* .

(n14)Footnote 5. *Rienhardt v. Kelly, 164 F.3d 1296, 1299-1301 (10th Cir. 1999)* .

(n15)Footnote 6. *Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 2006 U.S. LEXIS 3456, *29 (2006)* .

(n16)Footnote 7. *Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 2006 U.S. LEXIS 3456, *28-*29 (2006)* .

(n17)Footnote 8. *Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 2006 U.S. LEXIS 3456, *33-*36 (2006)* (Supreme Court affirmed federal jurisdiction over in personam claim of tortious interference against son of deceased).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
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1-2 Moore's Manual--Federal Practice and Procedure § 2.03

§ 2.03 Whether Jurisdiction Is Concurrent or Exclusive Is Based on Type of Claimn*

[1] Claims Based on Federal Law

[a] Presumption That Jurisdiction Is Concurrent

Jurisdiction over claims arising from federal law is presumed to be concurrent in both state and federal courts. As a general principle, a state court may assume jurisdiction over cases arising under federal laws in the absence of a provision by Congress to the contrary or disabling incompatibility between the federal claims and state-court adjudication. n1 The presumption is based on the reasoning that the Constitution does not require the creation of any federal courts other than the United States Supreme Court n2 and, therefore, that the drafters of the Constitution intended originally that state courts would serve as trial courts for the adjudication of federal law, along with any federal courts that would be specifically created by Congress. n3

Congress has the power to allocate jurisdiction over federal law claims between federal and state courts but often fails to make an allocation, either intentionally or inadvertently. The omission of a provision stating that federal jurisdiction is exclusive is strong evidence that Congress had no such intent. n4

[b] Rebuttal of Presumption of Concurrent Jurisdiction

The presumption that jurisdiction over a federal claim is concurrent in both state and federal courts may be rebutted by establishing any one of the following three circumstances: n5

1. An explicit statutory directive by Congress that jurisdiction over the claim is exclusive in the federal court. Congress has the constitutional authority to allocate jurisdiction between state and federal courts with regard to claims based on federal law n6 and has frequently specified that only federal courts may adjudicate certain types of claims. For example, Congress has expressly provided that federal district courts have exclusive original jurisdiction over admiralty and maritime cases, except to the extent that the jurisdictional "save to suitors" statute n7 allows plaintiffs to pursue remedies to which they are otherwise entitled in state court. n8

2. An unmistakable implication from the legislative history that Congress intended to create exclusive jurisdiction. For

example, the inclusion of clear language restricting jurisdiction to the federal district courts, without any qualifying statements, overcomes the presumption of concurrent jurisdiction, because it demonstrates Congress's intent to restrict jurisdiction to the federal courts. n9

3. A clear incompatibility between state court jurisdiction and federal interests. n10 Several factors may indicate that the exercise of state court jurisdiction would be incompatible with federal interests, such as the desirability of uniform interpretation of federal law, the expertise of federal judges in federal law, and the presumably greater accommodation that federal courts would provide to federal claims. For example, if a federal statute creates a cause of action that incorporates state laws, concurrent state jurisdiction is not incompatible with the statute, because there would be no need for uniform interpretation, and state judges have expertise about and accommodation toward the state laws incorporated in the federal cause of action. n11

It should be noted that, after analysis of the three factors specified above, the court may well conclude that Congress intended that the state courts have exclusive jurisdiction over a particular cause of action. For example, it has been held that state courts have exclusive jurisdiction over private actions filed to obtain an injunction or treble damages under the federal Telephone Consumer Protection Act. n12

[2] Claims Based on State Law

Generally, state courts have exclusive jurisdiction over claims arising from state law. n1 However, federal courts have concurrent jurisdiction over claims arising from state law in the limited circumstances of "diversity jurisdiction" or "supplemental jurisdiction." Diversity jurisdiction is applicable when a case arising under state law involves citizens of different states and the amount in controversy exceeds $75,000. A party invoking a federal court's diversity jurisdiction must be completely diverse, which means that none of the defendants may be a citizen of the same state as any of the plaintiffs. n2

A federal court may exercise supplemental jurisdiction over a state law claim when the federal court already has original jurisdiction of the case based on a federal question or on diversity, and the state law claim is part of the same case or controversy. n3 Without the rule of supplemental jurisdiction, federal courts could not assume jurisdiction over a purely state based claim even if it were intimately related to a federal claim, and if litigants were forced to split their cases up between federal and state forums, the doctrines of res judicata and collateral estoppel might produce unpredictable and unfair results. n4

For further discussion of federal court jurisdiction based on diversity of citizenship, and for further discussion of supplemental jurisdiction, see Ch. 5, *Original Jurisdiction over the Subject Matter*. For a discussion of the *Erie* doctrine, and the law that must be applied by federal courts deciding state law issues, see Ch. 3, *Law Applied*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 120.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1349 (11th Cir. 2000)* .

(n3)Footnote 2. *U.S. Const., Art. III § 1* (federal judicial power given to Supreme Court and to any inferior Courts

that Congress may from time to time establish).

(n4)Footnote 3. *Palmore v. United States, 411 U.S. 389, 401-402, 93 S. Ct. 1670, 36 L Ed. 2d 342 (1973)* .

(n5)Footnote 4. *Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990)* (state courts have concurrent jurisdiction over Title VII actions because of presumption that state courts have concurrent jurisdiction over federal causes of action and because statute was silent as to state court jurisdiction); *Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962)* (concurrent jurisdiction exists whenever it is not excluded by express provision, or by incompatibility in its exercise arising from nature of particular case).

(n6)Footnote 5. *Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1350 (11th Cir. 2000)* .

(n7)Footnote 6. *See U.S. Const., Art. I §§ 1*, 8 (congressio nal power regarding creation of judiciary and enactment of laws necessary and proper to execute that power); *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483, 484, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* .

(n8)Footnote 7. *28 U.S.C. § 1333(1).*

(n9)Footnote 8. *Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, --, 121 S. Ct. 993, 999, 148 L. Ed. 2d 931 (2001)* .

(n10)Footnote 9. *Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1351 (11th Cir. 2000)* .

(n11)Footnote 10. *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-484, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* .

(n12)Footnote 11. *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-484, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* (cause of action under Outer Continental Shelf Lands Act).

(n13)Footnote 12. *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* ; *Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 514 (5th Cir. 1997)* .

(n14)Footnote 1. *See Aldinger v. Howard, 427 U.S. 1, 14-15, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976)* .

(n15)Footnote 2. *28 U.S.C. § 1332*; *see State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-531, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* .

(n16)Footnote 3. *See 28 U.S.C. § 1367.*

(n17)Footnote 4. *See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 722-726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART I. PRINCIPLES CONTROLLING EXERCISE OF CONCURRENT AND EXCLUSIVE JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure § 2.04

§ 2.04 State Court Exercise of Jurisdiction Over Federal Claimn*

The United States Constitution generally requires state trial courts to hear and determine claims that arise under federal law. n1 However, a state court may not adjudicate a federal claim when Congress, under the preemption doctrine, has denied state-court jurisdiction over a particular, federal-law based claim. n1.1 Additionally, a state court has discretion to decline to hear a federal claim when it has a valid reason under some other law. For example, a state court may decline jurisdiction for the following reasons:

1. A state rule of judicial administration, provided that the rule does not discriminate against federal claims and is not preempted by federal law. n2

2. The existence of a more convenient forum is in the federal court, and the state court is an inconvenient forum under the doctrine of forum non conveniens. n3

3. State law provides for discretionary dismissal of both federal and state claims when neither the plaintiff nor the defendant is a resident of the forum state. n4

4. State law limits the state court's subject-matter jurisdiction and the subject matter of the federal suit is outside the court's jurisdiction. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 120.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *U.S. Const., Art. VI, cl. 2* (state courts required to follow federal law); *see, e.g., Jefferson v. City of Tarrant, 522 U.S. 75, 78-79, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997)* .

(n3)Footnote 1.1. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179, 2006 U.S. LEXIS 2497, *6-*7 (2006)* (intent of Congress to preclude state court claims based on securities fraud claims).

(n4)Footnote 2. *Howlett v. Rose, 496 U.S. 356, 368-381, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n5)Footnote 3. *Howlett v. Rose, 496 U.S. 356, 367-375, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n6)Footnote 4. *Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377, 386-387, 49 S. Ct. 355, 73 L. Ed. 747 (1929)* .

(n7)Footnote 5. *Herb v. Pitcairn, 324 U.S. 117, 121, 65 S. Ct. 459, 89 L. Ed. 789 (1945)* (subject matter of action outside court's territorial jurisdiction).

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1-2 Moore's Manual--Federal Practice and Procedure § 2.05

§ 2.05 Removal to Federal Court Allowed in Some Cases of Concurrent Jurisdictionn*

"Removal" is a statutory right that may apply when federal and state courts have concurrent jurisdiction over a suit. When jurisdiction is concurrent, the plaintiff has the initial option to select a state or federal forum for the suit. n1 If the plaintiff files in state court, the defendant may be entitled by the federal removal statute to remove the case to federal court. n2 The requirements for removal are beyond the scope of this chapter and are discussed in Ch. 8, *Removal From State Courts*. However, this section briefly summarizes the removal concepts that are particularly pertinent to the problems of overlapping state and federal jurisdiction.

Generally, any civil action filed in state court may be removed to the federal district court for the district in which the state court is located if the district court could have exercised original jurisdiction over the action. n3 However, it is not necessary that the state court have valid jurisdiction over the case in order for there to be valid removal jurisdiction. n4 A federal court that would have had original jurisdiction over a case may hear and determine any claim removed from state court, even if the state court lacked proper jurisdiction. n5

The federal court must generally rely on either federal question or diversity jurisdiction to support removal. However, Congress has enacted special removal provisions applicable to a variety of actions, including certain civil actions against federal officers. n6 If a state complaint contains multiple claims, including a federal question or a claim supporting diversity jurisdiction, the entire case may be removed to federal court, even if some of the claims thus removed are separate and independent from the claim involving a federal question or diversity jurisdiction and could not be removed by themselves. Once an entire case is removed to federal court, the court then has discretion to adjudicate the entire case or remand to state court any matters that are predominantly governed by state law. n7 Additionally, federal courts may remand actions that were improperly removed to federal court. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 120.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Schulman v. California (In re Lazar), 237 F.3d 967, 973 n.2 (9th Cir. 2001)* .

(n3)Footnote 2. *See 28 U.S.C. § 1441(a).*

(n4)Footnote 3. *See 28 U.S.C. § 1441(a).*

(n5)Footnote 4. *See Beighley v. FDIC, 868 F.2d 776, 780 (5th Cir. 1989)* .

(n6)Footnote 5. *See 28 U.S.C. § 1441(e).*

(n7)Footnote 6. *See 28 U.S.C. § 1442.*

(n8)Footnote 7. *See 28 U.S.C. § 1441(c).*

(n9)Footnote 8. *28 U.S.C. § 1447(c).*

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1-2 Moore's Manual--Federal Practice and Procedure § 2.06

§ 2.06 Constitutional Prohibition Against Certain Federal Suits Against State Governmentn*

[1] Eleventh Amendment Immunity for States Against Certain Suits

The *Eleventh Amendment* grants sovereign immunity to the states against suits in federal court and prevents subjecting a nonconsenting state to the process of judicial tribunals at the initiation of private parties. n1 Thus, the *Eleventh Amendment* generally prohibits federal courts from exercising original jurisdiction over any suit against a state by citizens of another state or by citizens or subjects of any foreign country. n2 The courts have also interpreted the *Eleventh Amendment* to prevent federal courts from exercising original jurisdiction in the following types of suits:

1. A suit against a state by one of its own citizens. n3

2. A suit against a state by a foreign sovereign. n4

3. A suit against a state by a Native American tribe. In this regard, Native American tribes are deemed to be sovereigns by the courts. n5 Although the *Eleventh Amendment* does not expressly preclude suits by sovereigns, as noted in item 2, above, the courts have interpreted the *Eleventh Amendment* sovereign immunity to extend to suits against states by any sovereign other than the United States government, including Native American tribes. n6

4. A suit against a state official when the state government is actually the real party in interest. If a judgment will operate against the state, litigation against a state officer effectively makes the state a real party in interest. n7

5. A suit against a state agency or state board when such an entity is acting as an arm of the state and when liability of the entity would have the same practical consequences as a judgment against the state itself. n8 For purposes of this rule, the Supreme court has held that a county is not an arm of the state, and therefore, sovereign immunity does not extend to counties. n9

[2] Scope of Eleventh Amendment Immunity

The Supreme Court has not yet decided whether *Eleventh Amendment* immunity is a matter of federal subject-matter jurisdiction. n1 The *Eleventh Amendment* is sufficiently in the nature of a jurisdictional requirement that a state may raise the defense at any time, including for the first time on appeal, n2 and the court has discretion to raise the issue sua sponte. n3 *Eleventh Amendment* immunity is not a jurisdictional requirement because it is not coextensive with the restriction on judicial power set out in Article III of the Constitution. However, unlike subject-matter jurisdiction, a state may waive *Eleventh Amendment* immunity through its own conduct: by legislation, by removing an action to federal court, or by appearing without objection and defending on the merits. n4

The Supreme Court has held that when a claim is barred by the *Eleventh Amendment*, the federal court may dismiss or remand the claims, n6 except in the case of removed claims. n7 When a claim that has been removed to federal court is barred by the *Eleventh Amendment*, the case must be remanded to the state court and may not be dismissed by the federal court. n8

[3] Exceptions to Eleventh Amendment Prohibition of Suit Against State

[a] Exceptions Are Based on Nature of Claim and Parties

The *Eleventh Amendment* is limited in scope by its language n.01 and by case law interpreting that language. n1 There are five general categories of limitations on the *Eleventh Amendment* prohibition of suits against a state government. The first exception is for any cases that are not filed in the federal trial courts, such as cases on appeal and cases in state court. n2 Second, the immunity provided by the *Eleventh Amendment* generally does not apply when particular persons are suing the state. n3 Third, the *Eleventh Amendment* does not apply when the suit designates a defendant other than a state government. n4 Fourth, a state may waive the immunity that it has under the *Eleventh Amendment* or otherwise consent to suit in federal court. n5 Fifth, Congress may by statute abrogate the states' *Eleventh Amendment* immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under *Section 5 of the Fourteenth Amendment* to protect an important constitutional interest. n5.1

[b] Amendment Not Applicable to Appeals or Cases in State Court

The *Eleventh Amendment* applies only to cases involving original jurisdiction in federal court. It does not apply to appellate jurisdiction--therefore, the United States Supreme Court may exercise its appellate jurisdiction to review state court decisions in any suits brought against a state. n6 Additionally, the *Eleventh Amendment* does not affect state court jurisdiction to adjudicate suits against a state. n7 Also, a state has no sovereign immunity against suits filed in other states' courts. n8

[c] Exception for Certain Plaintiffs

The immunity provided by the *Eleventh Amendment* generally applies only when particular persons are suing the state. Thus, a state has protection from suit in federal court only when the plaintiff is a citizen of another state, a citizen of a foreign country, or foreign country. n9 Therefore, the *Eleventh Amendment* does not bar the federal government n10 or other states n11 from suing a state in federal court. n12

[d] Exception When Defendant is Other Than State Government

The *Eleventh Amendment* applies only to suits that designate a state government as a defendant. Therefore, a state officer who is sued in an individual capacity is not protected under the Amendment, while an individual sued in a official state capacity is protected. n13 Similarly, the *Eleventh Amendment* does not prevent a party from suing a state political subdivision of a state in federal court unless the political subdivision is actually acting as part of the state government. n14 In the same way, a local government is not protected by the *Eleventh Amendment* unless it is acting as the state. n15 A number of factors may be considered in making the determination of whether an entity is acting as the

state government, such as whether state funds would be used to pay a judgment against the entity, the nature of the entity as created by state law, and whether the entity exercises the state power and is under state control. n16

[e] Waiver or Consent to Suit

A state may waive its *Eleventh Amendment* immunity from federal court suit with regard to a particular claim, n17 either by express statement n18 or by conduct. n19 A state may waive its *Eleventh Amendment* immunity to suit in three particular ways: (1) by a clear declaration that it intends to submit itself to the jurisdiction of a federal court or administrative proceeding; (2) by consent to, or participation in, a federal program for which waiver of immunity is an express condition; or (3) by affirmative conduct in litigation. n20 The following are the requirements for each type of waiver:

1. To make an express waiver, a state must, through a person or entity authorized to take state action, explicitly and unequivocally set forth the state's intention to subject itself to suit in federal court with respect to a particular claim or type of claim. n21 A state may not waive *Eleventh Amendment* immunity by implication, and a waiver may not be constructive. n22 A waiver of immunity may be accomplished by provision of the state constitution or by legislation, provided that the constitutional or statutory provision explicitly specifies the state's intention to subject itself to suit in federal court. n23 A state official may also waive a state's *Eleventh Amendment* immunity, provided that the official is specifically authorized to do so by that state's constitution, statutes, or court decisions. n24

2. The second type of waiver occurs if a state consents to, or participates in, a federal program that expressly conditions participation in the program on a total or partial waiver of *Eleventh Amendment* immunity. For example, the federal program may require that the state waive its immunity with respect to awards of prospective equitable relief in a federal forum resulting from grievance procedures applicable to disputes regarding the program. n25 Such a waiver must be specified in unequivocal terms or by such overwhelming implication from the text as will leave no room for any other reasonable construction. n26

3. A state may also waive its immunity under the *Eleventh Amendment* by direct conduct. n27 Thus, a state may waive its immunity by voluntarily invoking the jurisdiction of the federal courts, n28 such as by voluntarily removing an action to federal court n29 or by defending a case in federal court on the merits. n30 On the other hand, a state does not waive its immunity by appearing in federal court merely to object to federal jurisdiction. n31 The Supreme court has also held that a state essentially waives its *Eleventh Amendment* immunity when it approves a consent decree based on a federal law directed to protecting federal interests. n32

[f] Explicit Abrogation of Immunity by Congress

The Supreme Court has held that Congress may, by statute, abrogate the states' *Eleventh Amendment* immunity from suit in federal court, provided that two conditions are met: (1) Congress must make its intention to abrogate unmistakably clear in the language of the statute, and (2) Congress must have acted pursuant to a valid exercise of its constitutional power under *Section 5 of the Fourteenth Amendment*. n33 The Supreme Court has established a two-step analysis to determine if these conditions have been met. n34 In the first step, the court determines whether Congress has unequivocally expressed its intent to abrogate the immunity. This intent must be obvious from a clear legislative statement in the language of the statute. n35 For example, the Supreme Court has held that a provision of the Americans with Disabilities Act is precisely the required type of unequivocal expression of intent to abrogate state immunity; n36 it provides that "A State shall not be immune under the *eleventh amendment to the Constitution of the United States* from an action in Federal or State court of competent jurisdiction for a violation of this Act." n37

If the court finds that Congress clearly intended to abrogate *Eleventh Amendment* immunity, it then determines whether Congress acted pursuant to a valid exercise of power in promulgating the abrogation. In this step, the Court determines if the statute in question was passed pursuant to a constitutional provision that gives Congress the power to abrogate

Eleventh Amendment immunity, n38 that is, by *Section 5 of the Fourteenth Amendment*. n39 An abrogation is not valid unless it is structured to safeguard a constitutionally protected interest, n40 such as, the right to be free from gender-based discrimination pursuant to the *Equal Protection Clause*. n41 The Supreme Court has also held that Congress has also effectively abrogated the states' *Eleventh Amendment* immunity with respect to Title II of the Americans With Disabilities Act n42 which states that no qualified individual with a disability may be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, including access to the courts. n43

For a complete discussion of Congressional abrogation of the states' *Eleventh Amendment* immunity, see 17A *Moore's Federal Practice, § 123.42* (Matthew Bender 3d ed.) and 22 *Moore's Federal Practice, § 402.02[2][a]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityFederal Judicial LimitationsCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityWaiverConstitutional LawState AutonomyGeneral OverviewConstitutional LawState AutonomyWaiverGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 123.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Seminole Tribe v. Florida, 517 U.S. 44, 54-59, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 273 (1996)* ; *see Northern Ins. Co. v. Chatham County, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367, 2006 U.S. LEXIS 3449, *9 (2006)* (states' immunity from suit is fundamental aspect of sovereignty that preceded ratification of Constitution).

(n3)Footnote 2. *U.S. Const., Amend. XI*; *see, e.g., Breard v. Greene, 523 U.S. 371, 377-378, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998)* (prohibition against federal suits against state by citizens or subjects of foreign state).

(n4)Footnote 3. *Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 787-788, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)* (False Claims Act does not authorize private individual's qui tam suit against state).

(n5)Footnote 4. *Principality of Monaco v. Mississippi, 292 U.S. 313, 330, 54 S. Ct. 745, 78 L. Ed. 1282 (1934)* (state generally may not be sued unless it has consented to suit or waived its immunity).

(n6)Footnote 5. *Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267-270 (1997)* .

(n7)Footnote 6. *Blatchford v. Native Village of Noatak, 501 U.S. 775, 778-782, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)* .

(n8)Footnote 7. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)* (suit against official in his or her official capacity is no different from suit against state).

(n9)Footnote 8. *See Jones v. Washington Metro. Area Transit Auth., 205 F.3d 428, 432 (D.C. Cir. 2000)* .

(n10)Footnote 9. *Northern Ins. Co. v. Chatham County, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367, 2006 U.S. LEXIS 3449, *12-*14 (2006)* .

(n11)Footnote 1. *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 391-393, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* .

(n12)Footnote 2. *Calderon v. Ashmus, 523 U.S. 740, 745 n.2, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998)* .

(n13)Footnote 3. *Higgins v. Mississippi, 217 F.3d 951, 953-954 (7th Cir. 2000)* .

(n14)Footnote 4. *Nair v. Oakland County Community Mental Health Auth., 443 F.3d 469, 474 (6th Cir. 2006)* .

(n15)Footnote 6. *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 386-393, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* .

(n16)Footnote 7. *See 28 U.S.C. § 1447(c).*

(n17)Footnote 8. *Roach v. West Va. Reg'l Jail & Correctional Facility Auth., 74 F.3d 46, 48-49 (4th Cir. 1996)* .

(n18)Footnote .01. See *U.S. Const., Amend. XI.*

(n19)Footnote 1. *See, e.g., Northern Ins. Co. v. Chatham County, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367, 2006 U.S. LEXIS 3449, *12-*14 (2006)* ; *Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726-727, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)* ; *Alden v. Maine, 527 U.S. 706, 713-735, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)* .

(n20)Footnote 2. *See* [b], *below.*

(n21)Footnote 3. *See* [c], *below.*

(n22)Footnote 4. *See* [d], *below.*

(n23)Footnote 5. *See* [e], *below.*

(n24)Footnote 5.1. *See* [f], *below.*

(n25)Footnote 6. *South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999)* ; *DLX, Inc. v. Kentucky, 381 F.3d 511, 527 (6th Cir. 2004)* .

(n26)Footnote 7. *See U.S. Const., Amend. XI*; *see also Alden v. Maine, 527 U.S. 706, 713-716, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)* (noting, however, that state sovereign immunity is not controlled by *Eleventh Amendment* alone).

(n27)Footnote 8. *Nevada v. Hall, 440 U.S. 410, 416-427, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979)* .

(n28)Footnote 9. *Principality of Monaco v. Mississippi, 292 U.S. 313, 330, 54 S. Ct. 745, 78 L. Ed. 1282 (1934)* .

(n29)Footnote 10. *Bethel Native Corp. v. Department of Interior, 208 F.3d 1171, 1173-1177 (9th Cir. 2000)* (third-party claim by United States against third party defendant state in property owner's damage suit against federal government was not barred by *Eleventh Amendment* even though private plaintiff might also benefit from claim).

(n30)Footnote 11. *Maryland v. Louisiana, 451 U.S. 725, 745 n.21, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)* .

(n31)Footnote 12. *Blatchford v. Native Village of Noatak, 501 U.S. 775, 781, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)* (states surrendered sovereign immunity to suits by other states by adopting Constitution).

(n32)Footnote 13. *Tapley v. Collins, 211 F.3d 1210, 1211-1212 n.2 (11th Cir. 2000)* .

(n33)Footnote 14. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 279-281, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)* (suit was allowed in federal court against school district that under state's law was not considered part

of state government).

(n34)Footnote 15. *Conley v. Village of Bedford Park, 215 F.3d 703, 709 n.3 (7th Cir. 2000)* .

(n35)Footnote 16. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 400-401, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979)* ; *see Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1311 (11th Cir. 2000)* .

(n36)Footnote 17. *Ku v. Tennessee, 322 F.3d 431, 433-435 (6th Cir. 2003)* .

(n37)Footnote 18. *See Maysonet-Robles v. Cabrero, 323 F.3d 43, 50-52 (1st Cir. 2003)* .

(n38)Footnote 19. *Meyers v. Texas, 410 F.3d 236, 241 (5th Cir. 2005)* (state may waive its sovereign immunity by voluntarily consenting to suit, usually by voluntarily invoking federal court jurisdiction or by making clear statement that it submits itself to federal court jurisdiction); *In re Harleston, 331 F.3d 699, 701-702 (9th Cir. 2003)* (state waived immunity by filing proof of claim in bankruptcy proceedings).

(n39)Footnote 20. *New Hampshire v. Ramsey, 366 F.3d 1, 15 (1st Cir. 2004)* .

(n40)Footnote 21. *Maysonet-Robles v. Cabrero, 323 F.3d 43, 50-52 (1st Cir. 2003)* .

(n41)Footnote 22. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-677, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)* ; *see MCI Telecomm. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 339-340 (7th Cir. 2000)* , *cert. denied, 531 U.S. 1132 (2001)* .

(n42)Footnote 23. *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)* .

(n43)Footnote 24. *Lapides v. Board of Regents, 535 U.S. 613, 620, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)* .

(n44)Footnote 25. *New Hampshire v. Ramsey, 366 F.3d 1, 18 (1st Cir. 2004)* .

(n45)Footnote 26. *Vives v. Rey, 310 F. Supp. 2d 402, 404 (D.P.R. 2004)* .

(n46)Footnote 27. *Ku v. Tennessee, 322 F.3d 431, 433-435 (6th Cir. 2003)* , *cert. denied, 540 U.S. 880 (2003)* .

(n47)Footnote 28. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 679-680, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)* .

(n48)Footnote 29. *Lapides v. Board of Regents, 535 U.S. 613, 620, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)* ; *Omosegbon v. Wells, 335 F.3d 668, 672-674 (7th Cir. 2003)* .

(n49)Footnote 30. *Ku v. Tennessee, 322 F.3d 431, 433-435 (6th Cir. 2003)* , *cert. denied, 540 U.S. 880 (2003)* .

(n50)Footnote 31. *Neinast v. Texas, 217 F.3d 275, 277-280, & n.6 (5th Cir. 2000)* , *cert. denied, 531 U.S. 1190 (2000)* .

(n51)Footnote 32. *Frew v. Hawkins, 540 U.S. 431, 438, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004)* .

(n52)Footnote 33. *Tennessee v. Lane, 541 U.S. 509, 518, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)* .

(n53)Footnote 34. *Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726-728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)* (applying two-part test, Supreme Court held that Congress had abrogated state's *Eleventh Amendment* immunity with respect to Family and Medical Leave Act; consequently, employees may recover money damages in

federal court for state's failure to comply with the Act's family-care provision).

(n54)Footnote 35. *Seminole Tribe v. Florida, 517 U.S. 44, 56, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)* .

(n55)Footnote 36. *United States v. Georgia, 546 U.S. 151, 154, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)* .

(n56)Footnote 37. *42 U.S.C. § 12202*.

(n57)Footnote 38. *Tennessee v. Lane, 541 U.S. 509, 518-519, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)* .

(n58)Footnote 39. *See U.S. Const., Amend. XIV, § 5*.

(n59)Footnote 40. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672-675, 691, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)* .

(n60)Footnote 41. *Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726-728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)* .

(n61)Footnote 42. *42 U.S.C. § 12132*.

(n62)Footnote 43. *United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)* .

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART I. PRINCIPLES CONTROLLING EXERCISE OF CONCURRENT AND EXCLUSIVE JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure § 2.07

§ 2.07 Concurrent Multidistrict Litigation in Federal Courtsn*

[1] Definition of Multidistrict Litigation

In the federal courts, the expression "multidistrict litigation" is used to denote related actions pending simultaneously in more than one district court. n1 "Multidistrict litigation" means multiple civil actions pending in different districts that involve one or more common questions of fact. The term arises under a statutory scheme allowing for transfer for coordination or consolidation of pretrial proceedings for the convenience of the parties and to promote the just and efficient conduct of multidistrict actions. n2 There are no numerical requirements specifying either the minimum number of actions or the minimum number of districts that must be involved before a transfer may be considered by the Panel on Multidistrict Litigation. As few as two cases may warrant multidistrict litigation pretrial coordination or consolidation. n3 One common type of case that has been consolidated as multidistrict litigation for pretrial proceedings is litigation involving medical products, such as the "bone screw" used to fuse bones together, which may involve thousands of related lawsuits. n4

[2] Purpose of Multidistrict Litigation Statute

If more than one civil action involving one or more common questions of fact is pending in different judicial districts, the multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation to consolidate and transfer them to a single district for coordinated or consolidated pretrial proceedings. n1 The purpose of this transfer procedure is to conserve judicial resources n2 and to avoid the delays that would result if all aspects of each action, such as discovery, were conducted separately. n3 However, it must be emphasized that the multidistrict litigation procedure applies only to pretrial proceedings. The statute permits the transferee court to deal with the pretrial proceedings that are common to all of the actions in a single unified setting, but then requires that the actions be remanded to the districts from which they were transferred for trial, if necessary. n4

[3] Function of Judicial Panel on Multidistrict Litigation

Under the multidistrict litigation statute, Congress created a Judicial Panel on Multidistrict Litigation (Panel), and authorized the Panel to: (1) initiate proceedings for transfer of appropriate multidistrict litigation cases and hold hearings on proposed transfers; (2) transfer civil actions for pretrial proceedings; (3) assign a judge to hear and conduct

such proceedings; (4) act as deposition judges and designate other judges when appropriate to act as deposition judges in any district; and (5) remand transferred actions to the district from which they were transferred. n1 The Judicial Panel on Multidistrict Litigation consists of seven circuit and district court judges chosen by the Chief Justice of the United States. n2

A case may be transferred under the Multidistrict Litigation Statute only if the prospective transferor court has subject-matter jurisdiction over the action. n3 Once this threshold requirement is met, the Panel may transfer an action to any district; thus, venue objections do not prevent the Panel from transferring a case. n4 The Panel has enacted its own rules of procedure that control the manner in which such a transfer is made. n5 These Multidistrict Rules primarily prescribe how the Panel conducts consolidations and transfers pursuant to the multidistrict statute, but the transferor courts and transferee courts are controlled by the Rules only as explicitly provided, and only in a manner not inconsistent with federal statutes and the Federal Rules of Civil Procedure. n6 These rules are discussed in [5], *below,* and are reproduced verbatim at the end of this chapter in Appendix 2.

The Panel has authority to transfer civil actions involving one or more common questions of fact that are pending in different judicial districts to any federal district court for coordinated or consolidated pretrial proceedings if it determines that the transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions. n7 Civil actions of any kind may be transferred by the Panel. The most frequently consolidated matters are: n8 antitrust cases, n9 products liability suits, n10 securities litigation, patent and trademark cases, n11 and air crash disaster claims. n12

At the conclusion of the transferred pretrial proceedings, each transferred action is to be remanded to the district from which it was transferred, for trial or additional proceedings, unless the action has been terminated in the course of the consolidated pretrial proceedings. Although the essential purpose of the multidistrict litigation statute is to achieve pretrial efficiency, such as by supervising discovery, the transferee judge also has the authority to decide all pretrial motions, including motions that entirely dispose of the case. n13

[4] Grounds for Transfer of Case

[a] Bases for Grant of Transfer

There are three requirements necessary for an order of transfer under the multidistrict litigation statute. The civil actions pending in different districts must involve (1) one or more common questions of fact, (2) the transfer must be for the convenience of parties and witnesses, and (3) the transfer must promote the just and efficient conduct of the actions. n1 The party moving for transfer has the burden of showing that the statutory requirements for transfer are met. n2 When balancing these three individual requirements for transfer, the Panel must consider the overall purpose of the multidistrict litigation statute to achieve efficiencies in the pretrial process. n3 Thus, no individual requirement is determinative. n4

Under the first requirement, a common question of fact among the cases must be sufficient that a transfer under the multidistrict litigation statute would serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of the entire litigation, and if the separate actions could be conducted separately just as efficiently as if consolidated, the transfer should be denied. n5 With respect to the second requirement of the multidistrict litigation statute, the Panel must consider the convenience of the parties and the witnesses as a factor in determining whether a transfer should be ordered. The Panel must look to the overall convenience of all the parties and witnesses rather than looking to the individual convenience of each party and each witness. n6

Under the third requirement for transfer, the Panel must determine whether consolidating and transferring the related civil actions will promote the just and efficient conduct of the actions. n7 This requirement also has been considered the most important, because the requirement essentially implements the purpose of the Multidistrict Litigation Act. n8 The

term "efficiency" in the statute means to conserve judicial resources by streamlining pretrial proceedings to avoid conflicting contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict civil actions involving common questions of fact. n9 For example, efficient judicial administration can be achieved by conducting the pretrial proceedings in the related cases in one forum and avoiding the duplication of discovery that would result from litigating the actions separately. Additionally, one judge may make a single ruling on pretrial matters, thus avoiding repeated rulings on the same issue and the possibility of conflicting rulings issued by several judges. n10

[b] Bases for Denial of Transfer

Several factors may be considered by the Panel that weigh against the consolidation of multidistrict litigation. First, the Panel may deny consolidation by transfer if the pretrial proceedings in a case or group of cases have been completed or are near completion, because a transfer of the actions under the multidistrict litigation statute would not serve any of the purposes of the statute. n11

Second, the Panel may deny transfer if there is insufficient complexity or commonality of factual issues. Therefore, the Panel requires the party moving for a transfer to show that any common questions of fact are so complex, n12 and the accompanying discovery so time-consuming, that the advantages of combining the actions for coordinated or consolidated pretrial proceedings overcomes the inconvenience to some of the litigants and their witnesses in the actions that are being considered for transfer. n13 This factor of complexity is weighed more heavily if only a few actions are involved in the proposed transfer. n14

Third, even though it has the authority to order a group of actions transferred for coordinated or consolidated pretrial proceedings the Panel may consider the strong opposition of the parties to the transfer and any absence of the party's affirmative support for a transfer as a factor (although not determinative) in denying a transfer. n15 The court may also consider offers of voluntary cooperation among parties against a transfer; however, such offers are also not determinative. n16

[5] Procedure for Transfer of Multidistict Litigation

[a] Motions, Filing, and Proof of Service

All requests of the Judicial Panel on Multidistrict Litigation to take any action, including an initial Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings n1 must be in the form specified by the multidistrict rules. n2 The Panel uses an "Electronic Case Filing" (ECF) automated system that receives and stores documents filed in electronic form. All attorneys filing pleadings with the Panel *must* do so using ECF. n3 All pro se individuals are to file as non-ECF users, unless the Panel orders otherwise. n4 The term *pleadings* as used in the rules refers to all papers, motions, responses, or replies of any kind filed with the Panel, including exhibits attached to such documents, as well as all orders and notices that the Panel issues. n5

Pleadings must be in the following format: n6

> 1. The heading "Before the United States Judicial Panel on Multidistrict Litigation," the identification "MDL No. _____" and the descriptive title designated by the Panel. If the Panel has not yet designated a title, counsel must use an appropriate description. n7
>
> 2. The last page of each pleading must contain the name, address, telephone number, fax number, and email address of the attorney or party designated to receive service of pleadings in the case, and the name of each party represented. n8
>
> 3. Each brief submitted with a pleading and any response to it shall not exceed 20 pages, exclusive of

exhibits. Each reply shall not exceed 10 pages and shall address arguments raised in the response(s). In exceptional circumstances, the Panel will not grant motions to exceed page limits. n9

4. Each pleading must be typed in size 12 point font (for both text and footnotes), double spaced (text only), in a letter size document (8 1/2 x 11 inch) with sequentially numbered pages. n10

5. Each exhibit must be separately numbered and clearly identified. n11

Motions for consolidation must be filed with the Panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of the motion must also be filed in the district court in which the moving party's action is pending, n12 and in each district court where the motion affects a pending action. n13 Counsel must sign and verify all pleadings electronically in accordance with the Multidistrict Rules and the Panel's Administrative Policies and Procedures for Electronic Case Filing found at www.jpml.uscourts.gov. A pleading filed electronically constitutes a written document for the purpose of the Multidistrict Rules and the Federal Rules of Civil Procedure and is deemed the electronically signed original of the pleading. n14 Counsel must also serve the Clerk of the Panel with a courtesy paper copy of most pleadings within one business day of their filing. n15

All pleadings must contain a proof of service on all other parties in all involved actions. The Panel's notice of electronic filing shall constitute service of pleadings. Registration/possession by counsel of an ECF account with any United States federal court will be deemed consent to receive electronic service of all pleadings. n16 The proof of service pertaining to motions for a transfer or remand pursuant to Section 1407(a) must certify that counsel has transmitted a copy of the motion for filing to the clerk of each district court where an affected action is pending. n17

[b] Entities Entitled to Move for Transfer and Consolidation

Either the Judicial Panel on Multidistrict Litigation itself, or any party in any action in which coordinated or consolidated pretrial proceedings would be appropriate, may initiate a proceeding to transfer an action under the multidistrict litigation statute. n18 If the proceedings are to be initiated by a party, the initiation process is commenced by the filing of a motion for transfer and a brief in support of the motion. Motions for consolidation must be filed with the Panel. A copy of the motion must also be filed in the district court in which the moving party's action is pending, n19 and in each district court where the motion affects a pending action. n20 If the Panel learns of the pendency of related or similar cases filed in different district courts, the Panel will initiate the transfer proceedings by having the Clerk of the Panel serve a show-cause order on all the parties involved, directing them to show cause why the actions should not be transferred for coordinated or consolidated pretrial proceedings. n21

[c] Hearing on Motions

The Panel must notify the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are being contemplated, either through a motion to transfer or a show-cause order, and must specify the time and place for a hearing where a determination on whether to order the transfer will be made. n22

The Panel will not consider transfer or remand of any action pending in a federal district court when any party timely opposes such transfer or remand without first holding a hearing session for the presentation of oral argument. The Panel may dispense with oral argument if it determines either that the dispositive issue(s) have been authoritatively decided or that the facts and legal arguments are adequately presented and oral argument would not significantly aid the decisional process. Unless otherwise ordered, the Panel will consider all matters on the basis of the pleadings. n23 Any party affected by a motion may file a separate statement setting forth reasons why oral argument should, or need not, be heard. The parties affected by a motion to transfer may agree to waive oral argument, and the Panel will take this into consideration in determining the need for oral argument. n24

The Chair of the Panel determines the time, place, and agenda for any hearing session, and the Clerk of the Panel must give appropriate notice to counsel for all parties. n25 Absent exceptional circumstances, the Panel will allot a maximum of 20 minutes for oral argument in each matter, the time to be divided among those with varying viewpoints. Counsel for the moving party or parties shall generally be heard first. n26

The Panel must promptly notify counsel of those matters in which oral argument is scheduled, as well as those matters that the Panel will consider on the pleadings. The Clerk of the Panel will require counsel to file and serve notice of their intent to either make or waive oral argument. Failure to do so shall be deemed a waiver of oral argument. If counsel does not attend oral argument, the matter will not be rescheduled and that party's position shall be treated as submitted for decision on the basis of the pleadings filed. n27

Absent Panel approval and good cause shown, only those parties to actions who have filed a motion or written response to a motion or order will be permitted to present oral argument. n28 The Panel will not receive oral testimony except upon notice, motion and an order expressly providing for it. n29

In any action set for oral argument the attorneys must confer separately prior to that argument for the purpose of organizing their arguments and selecting representatives to present all views without duplication. Oral argument is a means for the attorneys to emphasize the key points of their arguments, and to update the Panel on any events occurring after the conclusion of briefing. n30

[d] Determination of Order Granting or Denying Motion to Transfer

After consideration of the motions and the papers submitted in the case, n31 and the record of any hearing, n32 the Panel will issue an order granting or denying a transfer. The court must support its order by findings of fact and conclusions of law, n33 and the order must be based on the factors used to determine the issue. n34 A transfer order and any other orders that the Panel may issue in the matter afterward must be filed with the clerk of the transferee district court and are effective when filed. n35

In its order, the Panel must specify the district court that will be the transferee court for the actions. n36 The transferee court must be the court that will further the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions. n37 The Panel is not restricted by venue and personal jurisdiction considerations in its determination. n38 Rather, provided that the convenience of the parties and witnesses is accommodated and a just and efficient conduct of the actions may be achieved, the Panel may transfer the actions to any district. n39 Thus, the Panel will consider factors such as the district in which the broader-based of the actions, as well as the earliest to be filed, was originally initiated, n40 which district has the most cases pending, n41 which district has pending any related bankruptcy actions involving a party, n42 and a potential transferee forum's docket condition. n43

Finally, the Panel must assign the transferred cases to a particular judge or judges to conduct the actions in the transferee district. n44 Even though the Panel usually assigns the actions to a judge who is a member of the transferee district court, and the presence of a judge in that district may be an important factor in selecting that district as the transferee forum, n45 the judge or judges need not be members of the transferee district court. n46 The Panel generally will favor a judge who is most familiar with the particular facts and legal issues raised by the cases. n47 Especially in the case of particularly complex multidistrict litigation, the Panel will favor assignment to a judge who has already demonstrated an ability to handle such litigation. n48

[e] Conditional Transfer Orders for Tag-Along Actions

A "tag along action" refers to any civil action pending in a district court which involves common questions of fact with either actions on a pending motion to transfer to create an MDL or actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407. n49

If the Clerk of the Judicial Panel on Multidistrict Litigation becomes aware of a possible tag-along action pending in a district court other than the transferee district court, the Clerk may enter a conditional transfer order. Such an order provides for the transfer of the tag-along action to the previously designated transferee district court, on the basis of the prior hearing and for the reasons expressed in the previous opinions and orders of the Panel that consolidated and transferred the previous group of related civil actions. n50 However, just as in the multidistrict litigation, the Panel or the district court may deny a motion to transfer a tag-along action unless the requested consolidation would promote the just and efficient conduct of the lawsuit. n51

[f] Termination or Remand

In many cases, an action that had been transferred for consolidated or coordinated pretrial proceedings under the multidistrict litigation statute is disposed of completely in the transferee court. n52 A case that has been completely disposed of need not be remanded to the transferor district by the Panel, but rather is terminated and dismissed by the transferee district court. Even though the essential purpose of the multidistrict litigation statute is to achieve pretrial efficiency, including facilitating speedy discovery, the transferee judge also has the authority to decide pretrial motions that completely dispose of a case, n53 such as motions for judgment approving a settlement, n54 for dismissal, for judgment on the pleadings, and for summary judgment. n55 However, if a transferred action has not been terminated in the transferee district court, the Panel must remand it to the transferor district at the conclusion of the coordinated or consolidated pretrial proceedings. n56 Remand by the panel is mandatory if both (1) the case has not been previously terminated and (2) coordinated or consolidated pretrialproceedings have concluded. In all other cases, remand is discretionary. For remand purposes, pretrial proceedings do not conclude until a final pretrial order is entered and all prior proceedings, such as rulings on motions for summary judgment, have been decided. n57

A request for remand may be initiated by a party, at the suggestion of the transferee district court, or by the Panel itself. Although remand proceedings may be initiated by any of those persons, actions transferred under the multidistrict litigation statute may be actually remanded only by order of the Panel itself. n58 In practice, the Panel will remand on the suggestion of the transferee district court judge, who indicates that the coordinated or consolidated pretrial proceedings assigned to the judge by the Panel have been successfully completed. The transferee court should make such a suggestion when the judge determines that his or her role in the case has been completed. n59 The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court, n60 but if a district court does suggestion remand, the panel gives it considerable weight. n61 However, if there is no suggestion from the transferee court to remand, a party that requests remand must do so by filing a motion with the Panel. A motion for remand must include a copy of the transferee district court's final pretrial order, if that order has been entered, n62 and an affidavit which specifies in detail why a remand is necessary. n63 However, the party seeking remand to the transferor court has the heavy burden of establishing that the remand is required. n64

[g] Appeal of Order Relating to Multidistrict Transfer

A court order denying a motion to transfer an action for consolidated or coordinated pretrial proceedings is not subject to review, either by appeal or any other procedure. n65 On the other hand, a grant of a transfer, or any other order of the multidistrict litigation panel may be reviewed by writ of mandamus issued by a court of appeals. n66 A party appealing a transfer may file a petition for a writ of mandamus only in the court of appeals having jurisdiction over the transferee district. n67 Additionally, even though there are no formal statutory provisions or rules governing motions for reconsideration by the Panel, such motions are recognized in the Panel's Rules of Procedure. n68

[6] Status of Transferred Case in Transferor Court

A transfer is effective under the multidistrict litigation statute when the Panel's order of transfer is filed with the clerk of the transferee court. n1 After that filing, the general rule is that the jurisdiction of the transferor court transfers and

ceases with respect to the pretrial matters, n2 and the transferee court assumes complete jurisdiction over all pretrial matters under the Federal Rules of Civil Procedure. n3 However, the mere pendency of a motion to transfer, of an order to show cause, or of a conditional transfer order before the Panel does not in any way restrict the jurisdiction of the court in which the action is pending. Thus, the pendency of any transfer motions or a conditional transfer order before the Panel does not affect or suspend any orders and pretrial proceedings in the original district court in which the action is pending. n4 During the pendency of a transfer, the transferor court has the option to either continue with ruling on its pretrial proceedings or to stay any rulings pending determination of the pending transfer, based on a consideration of factors such as the likelihood that the transfer will actually occur and whether it would serve judicial economy to have the questions resolved by the transferor court. n5

After the coordinated or consolidated pretrial proceedings have been concluded in the transferee court, an action must be remanded to the district court from which it was transferred. n6 Thus, the case is transferred to the original transferor court's regular docket for further proceedings and trial, and generally, the transferor court has control of the action after the time of remand. n7 However, one of the important rules of multidistrict litigation is that following remand, transferor judges are not allowed to reconsider or modify orders issued by the transferee judges. The rationale for this rule is that to allow the transferor court to reconsider the transferee court's orders would defeat the purposes of the multidistrict litigation statute by leading to inefficiency and piecemeal litigation. n8 Therefore, if a party wants to appeal a final order or move for a rehearing on a decision of the transferee court, the party should appeal or make the motion prior to remand. n9

[7] Status of Transferred Case in Transferee Court

When multidistrict litigation is transferred, the transferee court has complete control of the coordinated or consolidated pretrial proceedings, and thus has all of the pretrial powers over the transferred actions that could have been exercised by the original district court under the Federal Rules of Civil Procedure. n1 The transferee court has the authority to supervise all pretrial matters, including the exclusion of issues under a pretrial order n2 and to rule on all pretrial motions. n3 Thus, for example, the transferee court has the authority to determine class certification issues. n4 Furthermore, one of the most important duties of the transferee court is to manage discovery, and the multidistrict litigation statute provides the transferee judge with the authority to enforce completion of pretrial depositions and to order that nonparties comply with a subpoena duces tecum issued by another district judge. n5

The transferee court also has the authority to set aside pretrial orders issued by the transferor court n6 and to modify or vacate protective orders entered by the transferor court, n7 because such powers to change pretrial orders are ordinarily accorded to district courts in general. n8

Once pretrial proceedings have been concluded in the transferee court, any transferred action that has not been terminated must then be remanded to the district from which it was transferred. n9 The transferee court, however, does not have the power to remand an action; only the Judicial Panel on Multidistrict Litigation has that authority. n10 The transferee court may suggest to the Panel that it issue a remand order for an action or actions, and the Panel generally defers to the transferee court's suggestion. n11

Once it has completed pretrial proceedings, the transferee court has no authority to retain a case for trial, either on its own initiative or on the motion of a party. The Supreme Court decided this issue after some transferee courts had attempted to retain transferred cases or had attempted to invoke the venue statutes n12 to transfer the cases to their own district for trial. n13 However, the Court has not considered whether it would be appropriate for the transferee court to retain the case if all parties consented and the transferee court were a court where the action might have been filed in the first place. n14 Thus, some appellate courts have indicated that the parties should be able to agree that jurisdiction and venue were proper in the transferee court, and that the transferee court could decide the claims and defenses on the merits. n15 Otherwise, it would appear contrary to the purpose of the multidistrict litigation statute to require the parties to return to a transferor court, where they do not want to litigate, to make a motion in the transferor court seeking a

transfer back to the transferee court. However, the Supreme Court's literal ruling apparently could require such a procedure. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureVenueMultidistrict Litigation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 112.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Buckman Co. v. Plaintiffs' Legal Comm'n, 531 U.S. 341, 346, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (J.P.M.L. 2001)* .

(n3)Footnote 2. *See 28 U.S.C. § 1407(a).*

(n4)Footnote 3. *In re Clark Oil & Ref. Corp. Antitrust Litig., 364 F. Supp. 458, 458 (1973)* .

(n5)Footnote 4. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm'n, 531 U.S. 341, 346, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (J.P.M.L. 2001)* ; *In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 785 (3d Cir. 1999)* .

(n6)Footnote 1. *See 28 U.S.C. § 1407* (multidistrict litigation transfer statute); *In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315 (3d Cir. 2001)* (numerous product liability cases involving the use of bone screws as implants in spinal fusion surgery consolidated in the Eastern District of Pennsylvania under multidistrict-litigation procedures for pretrial discovery); *see also* [3], *below*.

(n7)Footnote 2. *In re Ford Motor Co., 591 F.3d 406, 413 (5th Cir. 2009)* (purpose is to promote just and efficient conduct of proceedings).

(n8)Footnote 3. *In re Dow Co. "Sarabond" Prods. Liab. Litig., 664 F. Supp. 1403, 1404 (D. Colo. 1987)* ; *see 28 U.S.C. § 1407(a).*

(n9)Footnote 4. *28 U.S.C. § 1407(a)*; *In re Wilson, 451 F.3d 161, 165 (3d Cir. 2006)* (citing **Moore's Federal Practice**).

(n10)Footnote 1. *28 U.S.C. § 1407(a)-(c).*

(n11)Footnote 2. *28 U.S.C. § 1407(d).*

(n12)Footnote 3. *Glasstech, Inc. v. AB Kyro OY, 769 F.2d 1574, 1576-1577 (Fed. Cir. 1985)* .

(n13)Footnote 4. *In re Regents of Univ. of Cal., 964 F.2d 1128, 1133 (Fed. Cir. 1992)* .

(n14)Footnote 5. *See 28 U.S.C. § 1407(f).*

(n15)Footnote 6. *Bellevue Drug Co. v. CaremarksPCS (In re Pharm. Benefit Managers Antitrust Litig.), 582 F.3d 432, 441 (3d Cir. 2009)* (nothing in JPML rules authorizes transferee court to vacate or modify order of transferor court).

(n16)Footnote 7. *See 28 U.S.C. § 1407(a).*

(n17)Footnote 8. S. Rep. No. 454, 90th Cong., 1st Sess. 7 (1967) (listing types of actions particularly susceptible to transfer).

(n18)Footnote 9. *See, e.g., In re Gypsum Antitrust Cases, 565 F.2d 1123, 1127 (9th Cir. 1977)* .

(n19)Footnote 10. *In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 785 (3d Cir. 1999)* .

(n20)Footnote 11. *In re Butterfield Patent Infringement, 328 F. Supp. 513, 514 (J.P.M.L. 1970)* .

(n21)Footnote 12. In re Air Crash near *Duarte, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973)* .

(n22)Footnote 13. *Kaiser Indus. Corp. v. Wheeling-Pittsburgh Steel Corp., 328 F. Supp. 365, 370-371 (D. Del. 1971)* ; *see* [7], *below*.

(n23)Footnote 1. *28 U.S.C. § 1407(a)*.

(n24)Footnote 2. *In re Chiropractic Antitrust Litig., 483 F. Supp. 811, 813 (J.P.M.L. 1980)* .

(n25)Footnote 3. *United States ex rel. Chyrissa v. Columbia/Hca Healthcare Corp., 587 F. Supp. 2d 757, 761 (W.D. Va. 2008)* (citing **Moore's Federal Practice** for principle that multidistrict litigation statute must be applied to streamline pretrial proceedings to avoid conflicting contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions).

(n26)Footnote 4. *Pinney v. Nokia, Inc., 402 F.3d 430, 452 (4th Cir. 2005)* (court must weigh all factors and interests of all plaintiffs and all defendants and consider multidistrict litigation as whole in light of purposes of statute).

(n27)Footnote 5. *Debruyne v. National Semiconductor Corp. (In re Repetitive Stress Injury Litig.), 11 F.3d 368, 373 (2d Cir. 1993)* (transfer of personal injury actions was not appropriate when only common fact was so general that it encompassed many different ailments with numerous possible causes).

(n28)Footnote 6. *In re Swine Flu Immunization Prods. Liab. Litig., 453 F. Supp. 648, 649-650 (J.P.M.L. 1978)* .

(n29)Footnote 7. *28 U.S.C. § 1407(a)*.

(n30)Footnote 8. *See In re Vernitron Sec. Litig., 462 F. Supp. 391, 394 (J.P.M.L. 1978)* .

(n31)Footnote 9. *Royster v. Food Lion, Inc. (In re Food Lion, Inc.), 73 F.3d 528, 532 (4th Cir. 1996)* ; *United States ex rel. Chyrissa v. Columbia/HCA Healthcare, 587 F. Supp. 2d 757, 759-760 (W.D. Va. 2007)* (quoting **Moore's Federal Practice**)

(n32)Footnote 10. *See* In re Air Crash Disaster near *Chicago, 476 F. Supp. 445, 447 (J.P.M.L. 1979)* .

(n33)Footnote 11. *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 360 (7th Cir. 1987)* ; *In re A.H. Robins Co., "Dalkon Shield" IUD Prod. Liab. Litig., 570 F. Supp. 1480, 1481-1482 (J.P.M.L. 1983)* (because discovery proceedings in actions that had previously been transferred were almost complete, transfer of additional cases denied); *see 28 U.S.C. § 1407(a)* (transfer of civil actions allowed only to coordinate or consolidate pretrial proceedings).

(n34)Footnote 12. *See Allen v. Bayer Corp. (In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.), 460 F.3d 1217, 1222-1223 (9th Cir. 2006)* .

(n35)Footnote 13. *In re Interstate Medicaid Patients at Good Samaritan Nursing Ctr., 415 F. Supp. 389, 391 (J.P.M.L. 1976)* .

(n36)Footnote 14. *In re Garrison Diversion Unit Litig., 458 F. Supp. 223, 225 (J.P.M.L. 1978)* (extremely complex discovery justify transfer of even minimal number of actions).

(n37)Footnote 15. *In re "Lite Beer" Trademark Litig., 437 F. Supp. 754, 755-756 (J.P.M.L. 1977)* .

(n38)Footnote 16. *See In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 36-38 (D.D.C. 2000)* .

(n39)Footnote 1. *28 U.S.C. § 1407(a)*; JPML Rule 6.2(a).

(n40)Footnote 2. JPML Rule 6.1(a), (b).

(n41)Footnote 3. JPML Rules 1.1(d), 3.1(a); *see* JPML Rule 3.2(b), (c).

(n42)Footnote 4. JPML Rule 1.1(d); *see* JPML Rule 3.3.

(n43)Footnote 5. JPML Rule 1.1(g).

(n44)Footnote 6. JPML Rule 3.2(a)(i).

(n45)Footnote 7. JPML Rule 3.2(a)(ii).

(n46)Footnote 8. JPML Rule 3.2(a)(iii).

(n47)Footnote 9. JPML Rule 3.2(a)(iv).

(n48)Footnote 10. JPML Rule 3.2(a)(i).

(n49)Footnote 11. JPML Rule 3.2(a)(v).

(n50)Footnote 12. *28 U.S.C. § 1407(c)(ii)*.

(n51)Footnote 13. JPML Rule 6.2(a).

(n52)Footnote 14. JPML Rule 3.2(b).

(n53)Footnote 15. JPML Rule 3.2(d).

(n54)Footnote 16. JPML Rule 4.1(a).

(n55)Footnote 17. JPML Rule 4.1(b).

(n56)Footnote 18. *28 U.S.C. § 1407(c)*.

(n57)Footnote 19. *28 U.S.C. § 1407(c)(ii)*.

(n58)Footnote 20. JPML Rule 6.2(a).

(n59)Footnote 21. JPML Rule 8.1(a).

(n60)Footnote 22. *28 U.S.C. § 1407(c)*; JPML Rule 11.1(a); *see* [d], *below*.

(n61)Footnote 23. JPML Rule 11.1(c).

(n62)Footnote 24. JPML Rule 11.1(b).

(n63)Footnote 25. JPML Rule 11.1(a).

(n64)Footnote 26. JPML Rule 11.1(f).

(n65)Footnote 27. JPML Rule 11.1(d).

(n66)Footnote 28. JPML Rule 11.1(d)(i).

(n67)Footnote 29. JPML Rule 11.1(d)(ii).

(n68)Footnote 30. JPML Rule 11.1(e).

(n69)Footnote 31. *See In re Shoulder Pain Pump Chrondrolysis Products Liab. Litig., 571 F. Supp.2d 1367, 1368 (J.P.M.L. 2008)* .

(n70)Footnote 32. *Allen v. Bayer Corp., 460 F.3d 1217, 1230-1231 (9th Cir. 2006)* .

(n71)Footnote 33. *28 U.S.C. § 1407(c)*.

(n72)Footnote 34. *See* [4], *above*.

(n73)Footnote 35. JPML Rule. 2.1(d).

(n74)Footnote 36. *See Armstrong v. Lasalle Bank Nat'l Ass'n, 552 F.3d 613, 615 (7th Cir. 2009)* .

(n75)Footnote 37. *28 U.S.C. § 1407(a)*.

(n76)Footnote 38. *In re Ivy, 901 F.2d 7, 9 (2d Cir. 1990)* .

(n77)Footnote 39. *In re Ivy, 901 F.2d 7, 9-10 (2d Cir. 1990)* .

(n78)Footnote 40. *In re Regents of Univ. of Cal., 964 F.2d 1128, 1136 (Fed. Cir. 1992)* .

(n79)Footnote 41. *In re Republic National-Realty Equities Sec. Litig., 382 F. Supp. 1403, 1407 (J.P.M.L. 1974)* .

(n80)Footnote 42. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 130 F.R.D. 475, 476 (J.P.M.L. 1990)* .

(n81)Footnote 43. *In re Peruvian Rd. Litig., 380 F. Supp. 796, 798 (J.P.M.L. 1974)* .

(n82)Footnote 44. *28 U.S.C. § 1407(b)*.

(n83)Footnote 45. *In re Data Gen. Corp. Antitrust Litig., 470 F. Supp. 855, 859 (J.P.M.L. 1979)* .

(n84)Footnote 46. *28 U.S.C. § 1407(b)*.

(n85)Footnote 47. *In re IBM, 302 F. Supp. 796, 800 (J.P.M.L. 1969)* .

(n86)Footnote 48. *In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1101 (J.P.M.L. 1992)* .

(n87)Footnote 49. JPML Rule 1.1(h).

(n88)Footnote 50. JPML Rule 7.1(b); *see Ill. Mun. Ret. Fund v. Citigroup, Inc., 391 F.3d 844, 850-851 (7th Cir. 2009)* .

(n89)Footnote 51. *Dabon v. GlaxoSmithKline, Inc. (In re Avandia Mktg.), 528 F. Supp. 2d 1339, 1340 (J.P.M.L. 2007)* ; *see* JPML Rules 7.1(a)(iii), 7.1(b)(i).

(n90)Footnote 52. *See 28 U.S.C. § 1407(a)*; JPML Rule 10.1(a).

(n91)Footnote 53. JPML Rule 10.1(a); *see Temporomandibular Joint Implant Recipients v. E.I. Du Pont De Nemours & Co. (In re Temporomandibular Joint Implants Prods. Liab. Litig.), 97 F.3d 1050, 1055 (8th Cir. 1996)* .

(n92)Footnote 54. *In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 321 (3d Cir. 2001)* .

(n93)Footnote 55. *Kaiser Indus. Corp. v. Wheeling-Pittsburgh Steel Corp., 328 F. Supp. 365, 370-371 (D. Del. 1971)* .

(n94)Footnote 56. *28 U.S.C. § 1407(a)*; JPML Rule 10.1(b).

(n95)Footnote 57. *United States ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 36-37 (D.D.C. 2007)* .

(n96)Footnote 58. *28 U.S.C. § 1407(c)*; JPML Rule 10.1(b); *see In re Roberts, 178 F.3d 181, 184 (3d Cir. 1999)* .

(n97)Footnote 59. JPML Rule 10.1(b)(i); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34-35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998)* .

(n98)Footnote 60. JPML Rule 10.3(a).

(n99)Footnote 61. *United States ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 36-37 (D.D.C. 2007)* .

(n100)Footnote 62. JPML Rule 10.3(a)(ii).

(n101)Footnote 63. JPML Rule 10.3(a)(i).

(n102)Footnote 64. *In re Patenaude, 210 F.3d 135, 142-146 (3d Cir. 2000)* .

(n103)Footnote 65. *28 U.S.C. § 1407(e)*; *In re New York City Mun. Sec. Litig., 572 F.2d 49 (2d Cir. 1978)* .

(n104)Footnote 66. *In re Patenaude, 210 F.3d 135, 142-146 (3d Cir. 2000)* , *cert. denied, 531 U.S. 1011 (2000)* .

(n105)Footnote 67. *28 U.S.C. § 1407(e)*.

(n106)Footnote 68. *See* JPML Rule 11.1(c).

(n107)Footnote 1. *28 U.S.C. § 1407(c)*; JPML Rule 2.1(d).

(n108)Footnote 2. *FMC Corp. v. Glouster Eng'g Co., 830 F.2d 770 (7th Cir. 1987)* .

(n109)Footnote 3. *See In re Ivan Boesky Sec. Litig., 170 B.R. 61, 62 (S.D.N.Y. 1994)* .

(n110)Footnote 4. JPML Rule 2.1(d); *Ill. Mun. Ret. Fund v. Citigroup, Inc., 391 F.3d 844, 850 (7th Cir. 2004)* .

(n111)Footnote 5. *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 120 n.2 (2d Cir. 2006)* ; *Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885, 888 (W.D. Ark. 1999)* .

(n112)Footnote 6. *28 U.S.C. § 1407(a)*; *In re Wilson, 451 F.3d 161, 165 (3d Cir. 2006)* (citing **Moore's Federal**

Practice); *see § 2.07[5], above*.

(n113)Footnote 7. *28 U.S.C. § 1407(a)*; JPML Rule 10.1(b).

(n114)Footnote 8. *United States ex rel. Chyrissa v. Columbia/Hca Healthcare Corp., 587 F. Supp. 2d 757, 761 (W.D. Va. 2008)* .

(n115)Footnote 9. *In re Briscoe, 448 F.3d 201, 214 (3d Cir. 2006)* (quoting from **Moore's Federal Practice** for principle that "once an action is remanded to the transferor district, it will be the court of appeals for the transferor district that will have appellate jurisdiction over any unreviewed matters. That court of appeals will have appellate jurisdiction over any unreviewed rulings made by the transferee court prior to transfer as well as rulings made by the transferor court subsequent to remand").

(n116)Footnote 1. *In re "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1435 (2d Cir. 1993)* .

(n117)Footnote 2. *In re Multi-Piece Rim Prods. Liab. Litig., 464 F. Supp. 969, 975 (J.P.M.L. 1979)* .

(n118)Footnote 3. In re Thirteen Appeals Arising out of *San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 300 (1st Cir. 1995)* .

(n119)Footnote 4. *Equitable Life Assurance Soc'y of the United States v. Shapira (In re Phar-Mor Sec. Litig.), 875 F. Supp. 277, 278-280 (W.D. Pa. 1994)* .

(n120)Footnote 5. *28 U.S.C. § 1407(b)*; *see In re Clients & Former Clients of Baron & Budd, P.C., 478 F.3d 670, 671-672 (5th Cir. 2007)* (citing **Moore's Federal Practice**); *In re Auto. Refinishing Paint Antitrust Litig., 229 F.R.D. 482, 486 (E.D. Pa. 2005)* (quoting **Moore's Federal Practice**).

(n121)Footnote 6. *Firestone Tire & Rubber Co., 653 F.2d 671, 676-677 (D.C. Cir. 1981)* .

(n122)Footnote 7. *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114, 118 (6th Cir. 1981)* .

(n123)Footnote 8. *See Fed. R. Civ. P. 16(b)*; *see also* Ch. 18, *Pretrial Conferences; Scheduling; Management*.

(n124)Footnote 9. *28 U.S.C. § 1407(a)*; JPML Rule 10.1(b); *see* [5], *above*.

(n125)Footnote 10. *28 U.S.C. § 1407(a)*; JPML Rule 10.1(b); *see In re Roberts, 178 F.3d 181, 184 (3d Cir. 1999)* .

(n126)Footnote 11. JPML Rule 10.1(b)(i); *see In re Richardson-Merrell, Inc. Bendectin Prods. Liab. Litig., 606 F. Supp. 715, 716 (J.P.M.L. 1985)* ; *see* [5], *above*.

(n127)Footnote 12. *See 28 U.S.C. §§ 1404, 1406*.

(n128)Footnote 13. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 39-40, 118 S. Ct. 956, 140 L. Ed. 62 (1998)* .

(n129)Footnote 14. *Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ; *see 28 U.S.C. § 1404(a)* (transfer under venue statutes must be to district in which action might have been brought).

(n130)Footnote 15. *See In re African-American Slave Descendants Litig., 471 F.3d 754, 763 (7th Cir. 2006)* .

(n131)Footnote 16. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 39, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998)* (any order made under venue transfer statute must be made after remand to originating district court); *see Moore v. N. Am. Sports, Inc., 623 F.3d 1325, 1330 (11th Cir. 2010)* (failure to remand consolidated case

back to court of origin after conclusion of pretrial matters pursuant to § 1407(a)--required reversal because § 1407 would lose all meaning if party who continuously objected to uncorrected categorical violation of § 1407(a) mandate could obtain no relief at end of day).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART I. PRINCIPLES CONTROLLING EXERCISE OF CONCURRENT AND EXCLUSIVE JURISDICTION

1-2 Moore's Manual--Federal Practice and Procedure §§ 2.08through 2.19

[Reserved]

§§ 2.08[Reserved]

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART II. LIMITATION ON FEDERAL COURT AUTHORITY TO ENJOIN STATE PROCEEDINGS
A. APPLICATION OF ANTI-INJUNCTION ACT

1-2 Moore's Manual--Federal Practice and Procedure § 2.20

§ 2.20 Function and Purpose of Anti-Injunction Actn*

[1] Federal Injunction Against State Court Proceedings Prohibited

In reaction to the aspect of concurrent jurisdiction that allows simultaneous litigation of a particular matter in both federal and state court, n1 a party will frequently request that the federal court enjoin or stay the proceedings in the state court. Generally, however, the federal Anti-Injunction Act prohibits a federal court from issuing an injunction to stay proceedings that have been initiated in a state court. n2 There are only three statutory exceptions to the general rule, n3 allowing injunctions in the following circumstances: n4

1. When expressly authorized by an act of Congress. n5

2. When necessary in aid of the federal court's jurisdiction. n6

3. If needed to protect or effectuate a judgment of the federal court. n7

These three are the only statutory exceptions to the prohibition against enjoining state court proceedings, and courts have consistently stated that the exceptions are narrow and may not be enlarged by liberal statutory construction. n8 Thus, the Anti-Injunction Act has been interpreted as a broad prohibition on the power of federal courts to enjoin state court proceedings. n9 Furthermore, the Anti-Injunction Act may not create an independent jurisdictional basis when such jurisdiction does not exist. n10

However, there are two important limitations in the Anti-Injunction Act. First, the Anti-Injunction Act is a prohibition against injunctions directed at state *court* proceedings; it does not prohibit injunctions against state administrative proceedings, n11 or against arbitration proceedings. n11.1 Second, the Act prohibits injunctions only against *pending* state court proceedings; it does not preclude injunctions against the institution of state court proceedings. This limitation has been held to prohibit a federal court from issuing an injunction against state court proceedings that are commenced after the institution of the federal suit but before the issuance of the injunction. n11.2

It should be noted that the Anti-Injunction Act is not the only limitation on a federal court's power to issue an injunction when the enjoined matter is a state court proceeding. n11.3 A party seeking a federal injunction of pending state proceedings must satisfy the requirements of both the Anti-Injunction Act and those for obtaining equitable relief, as is required of all injunctions generally: that the party would suffer irreparable injury and lacks an adequate remedy at law. n12 Furthermore, even if a federal court may enjoin state proceedings under the Anti-Injunction Act, it is not required to do so. n13 For a complete discussion of these requirements, See Ch. 10A, *Injunctions*.

[2] Purpose of Act

The purpose of the Anti-Injunction Act is to prevent friction between state and federal courts, and to protect state court proceedings from federal interference. n1 Thus, the Act is based on federalist principles of government, the doctrine of comity, and the need to prevent unnecessary conflict between state and federal courts in cases of concurrent jurisdiction. n2 The doctrines of comity and federalism foster a proper respect by the federal judiciary for state court functions, ensuring that states have the freedom to perform their separate functions in their separate ways. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 121.02-121.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 2.01*.

(n3)Footnote 2. *28 U.S.C. § 2283*; *see Tropf v. Fidelity National Title Insurance Co., 289 F.3d 929, 941 (6th Cir. 2002)* (Anti-Injunction Act generally prohibits federal court injunctions against pending state proceedings).

(n4)Footnote 3. *Thomas v. Powell, 247 F.3d 260, 261 (D.C. Cir. 2001)* .

(n5)Footnote 4. *See 28 U.S.C. § 2283*.

(n6)Footnote 5. *See § 2.40*.

(n7)Footnote 6. *See § 2.41*.

(n8)Footnote 7. *See § 2.42*.

(n9)Footnote 8. *Hatcher v. Avis Rent-A-Car Sys., 152 F.3d 540, 542 (6th Cir. 1998)* ; *see Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc., 985 F.2d 459, 461 (9th Cir. 1993)* (prohibition of Act may not be evaded by enjoining utilization of results of completed state proceeding).

(n10)Footnote 9. *Euge v. Smith, 418 F.2d 1296, 1299 (8th Cir. 1969)* (Act is comprehensive in its prohibition unless case presents facts that bring it within one of three exceptions).

(n11)Footnote 10. *Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir. 1999)* (although Anti-Injunction Act may not bar injunctive relief in habeas corpus case, Act did not support exercise of jurisdiction by Ninth Circuit over Missouri prison officials).

(n12)Footnote 11. *Tropf v. Fidelity National Title Insurance Co., 289 F.3d 929, 943 (6th Cir. 2002)* ; *see § 2.23[1][b]*.

(n13)Footnote 11.1. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879-880 (9th Cir. 2000)* (arbitration is "state court proceeding" for purposes of Anti-Injunction Act only if arbitration proceeding or arbitration award is result of state court judicial proceeding); *see § 2.23[2].*

(n14)Footnote 11.2. *Tropf v. Fidelity National Title Insurance Co., 289 F.3d 929, 941-942 (6th Cir. 2002)* ; *see § 2.23[1][c].*

(n15)Footnote 11.3. *Mitchum v. Foster, 407 U.S. 225, 242-243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)* .

(n16)Footnote 12. *Amwest Mortgage Corp. v. Grady, 925 F.2d 1162, 1164 (9th Cir. 1991)* .

(n17)Footnote 13. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 151, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)* .

(n18)Footnote 1. *Ramsden v. AgriBank, FCB, 214 F.3d 865, 869 (7th Cir. 2000)* , *cert. denied, 148 L. Ed. 2d 534 (2000)* .

(n19)Footnote 2. *Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524-525, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986)* .

(n20)Footnote 3. *See Younger v. Harris, 401 U.S. 37, 44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* ; *United States Liab. Ins. Co. v. Wise, 887 F. Supp. 348, 352 (D. Mass. 1995)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.21

§ 2.21 Only Federal Courts Controlled by Actn*

The Anti-Injunction Act prohibits only a "court of the United States" from enjoining state proceedings. n1 Therefore, only the following five types of courts are controlled by the prohibition in the Act: n2

1. The United States Supreme Court.

2. The Circuit Courts of Appeals.

3. The District Courts of the United States established by Chapter 5 of Title 28. n3

4. The Court of International Trade.

5. Any court created by Congress whose judges hold office during good behavior.

Because the Act is applicable only to the courts, it does not apply to the United States government apart from the courts. Therefore, the Anti-Injunction Act does not prohibit the United States from obtaining an injunction of state proceedings to prevent threatened irreparable injury to a national interest, because in such circumstances, the United States government is deemed to be using its superseding power. n4 However, the court may not automatically grant an injunction based on the government's request alone, n5 and may do so only after considering principles of comity and equity. n6 In addition to the United States, an injunction of a federal agency, such as the Department of Transportation, is exempt from the impact of the Anti-Injunction Act, n7 if the agency properly can be equated to the United States as sovereign, and the agency asserts a superior federal interest. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 121.02-121.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 2283.*

(n3)Footnote 2. *28 U.S.C. § 451.*

(n4)Footnote 3. *See 28 U.S.C. § 81 et seq.*

(n5)Footnote 4. *Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-226, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957)* (stating that Act is designed to prevent conflict between federal and state courts, and that purpose is much more compelling when litigation between private parties threatens to draw two judicial systems into conflict, rather than when United States seeks stay to prevent threatened irreparable injury to national interest).

(n6)Footnote 5. *United States v. Certified Indus., Inc. 361 F.2d 857, 859 (2d Cir. 1966)* (absent some express superseding power, United States may not maintain suit in federal courts that interferes with valid and subsisting in rem or quasi in rem jurisdiction of state court).

(n7)Footnote 6. *United States v. Augspurger, 452 F. Supp. 659, 668 (W.D.N.Y. 1978) .*

(n8)Footnote 7. *American Airlines, Inc. v. DOT, 202 F.3d 788, 802 (5th Cir. 2000) , cert. denied, 530 U.S. 1284 (2000) .*

(n9)Footnote 8. *NLRB v. Nash-Finch Co., 404 U.S. 138, 147, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971) .*

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1-2 Moore's Manual--Federal Practice and Procedure § 2.22

§ 2.22 Nature of Injunction Prohibited by Actn*

The Anti-Injunction Act provides that a court of the United States may not grant an injunction to stay proceedings in a state court. Thus, it applies to any type of injunction. It has been held that the Act also covers declaratory judgments and other orders that have essentially the same effect as an injunction. n1 Therefore, the Anti-Injunction Act prohibits any federal court order that, although not technically an injunction enjoining a state proceeding, has the effect of deciding or preempting a pending state proceeding. n2

However, while a federal court declaratory judgment that has the effect of an injunction comes within the Anti-Injunction prohibition, n3 a federal court is not prohibited from issuing a declaratory judgment if a claim turns on a question of federal law more familiar to the federal court and the state court would not normally determine the issue. n4 The purpose of the Federal Declaratory Judgment Act n5 is to provide litigants a means of judicial relief when a dispute is not sufficiently developed to authorize traditional coercive relief. n6 Federal declaratory judgment jurisdiction is discretionary and partially based in equitable principles, and a court may withhold such relief on equitable grounds. n7 In considering whether to grant equitable relief, federal courts must consider whether the parties are involved in pending state court proceedings that may resolve the controversy, and whether there are possible inequities in one action having precedence over the other. n8

The Anti-Injunction Act does not prohibit a federal court from issuing a temporary restraining order to preserve existing conditions while it determines whether it has jurisdiction. n9 This also means that a federal court may stay state proceedings temporarily while it considers whether the Act applies. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 121.02-121.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States Steel Corp. Plan for Employee Ins. Benefits v. Musisko, 885 F.2d 1170, 1175 (3d Cir. 1989)* , *cert. denied, 493 U.S. 1074 (1990)* (practical effect of order would create doubt about validity of state's ruling and on judgment that might result from it; because order obstructed and interfered with state court process, it had effect of stay, and therefore was prohibited by Act).

(n3)Footnote 2. *Gloucester Marine Rys. Corp. v. Charles Parisi, Inc., 848 F.2d 12, 15 (1st Cir. 1988)* (federal court declaration with injunction effect invalid).

(n4)Footnote 3. *Sun Ref. & Mktg. Co. v. Brennan, 921 F.2d 635, 639-640 (6th Cir. 1990)* .

(n5)Footnote 4. *Steffel v. Thompson, 415 U.S. 452, 460-461, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)* (declaratory judgment on constitutional question permitted in extraordinary circumstances).

(n6)Footnote 5. *See 28 U.S.C. § 2201*; *see also* Ch. 25A, *Declaratory Judgment*.

(n7)Footnote 6. *Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491, 505 (5th Cir. 1988)* , *cert. denied, 490 U.S. 1035 (1989)* .

(n8)Footnote 7. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 19-22, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

(n9)Footnote 8. *Rowan Cos., Inc. v. Griffin, 876 F.2d 26, 29 (5th Cir. 1989)* .

(n10)Footnote 9. *United States v. United Mine Workers of Am., 330 U.S. 258, 292-293, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

(n11)Footnote 10. *Baines v. City of Damville, 337 F.2d 579, 593-594 (4th Cir. 1964)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.23

§ 2.23 State Proceedings Protected by Actn*

[1] Only Pending State Judicial Proceedings Are Protected

[a] Scope of Judicial Proceedings

The Anti-Injunction Act prohibits the federal courts from issuing an injunction that stays state court proceedings. n1 State court "proceedings" include all steps taken or which may be taken in the state court or by its officers from the initiation of the action to the close of the final process. It applies to appellate as well as to original proceedings and to actions both by the court and by its ministerial officers. The term also applies to an execution issued on a judgment, and to any proceedings supplemental or ancillary taken for the purpose of making the suit or judgment effective. n2

[b] State Administrative Proceedings

The Anti-Injunction Act by its terms refers only to injunctions issued by federal courts to stay proceedings in a state court. While the Supreme Court has expressly declined to address whether the Anti-Injunction Act applies to state administrative proceedings, n3 every circuit that has addressed the question has held that the Act does not generally prohibit injunctions against such proceedings. n4 Furthermore, because the purpose underlying the statute is the prevention of unnecessary friction between state and federal courts, an injunction related to an administrative proceeding does not necessarily impact state courts. Both the text of the statute and its purpose support the conclusion that the Act applies only to state courts and not to state administrative agencies. n5

On the other hand, it has been held that the Anti-Injunction Act is not limited to official state courts in all circumstances but also applies to a state agency proceeding if the agency is performing activities that are judicial in nature. n6 A federal court determines the nature of a state agency by evaluating the character of the agency's proceedings, rather than the entity in which they occur. A judicial body is not a "court" for purposes of the Anti-Injunction Act when it performs only legislative or administrative functions. n7 State activities that have been held to be "judicial" include the activities of a state Industrial Accident Commission n8 and post judgment garnishment proceedings. n9 On the other hand, activities that have been held to be "non judicial," and therefore not protected by the Act, include Agricultural Labor Relations Board proceedings n10 and state civil service commission proceedings. n11

[c] Injunctions Against Future Proceedings Not Prohibited

The prohibition of the Act against enjoining state proceedings applies only to pending proceedings. n12 Therefore, an injunction restraining the prosecution of a state action prior to initiation of the action is not prohibited. n13 However, the Act's prohibition may not be circumvented by a federal court injunction that stays utilization of the results of a completed state proceeding. n14

[2] Arbitration Proceedings

As discussed above, only judicial proceedings are protected from injunction under the Act. Generally, the federal courts have held that an arbitration proceeding is a not a "proceeding in state court" subject to the Act because arbitration is not a judicial proceeding. n1 However, some courts hold that an arbitration proceeding that is ordered by a state court is a proceeding that is protected by the Anti-Injunction Act. n2 On the other hand, most courts hold that an arbitration pursuant to a private agreement is not a judicial proceeding, even though a state court may eventually have the power to confirm, modify, vacate, or enforce the arbitration award. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 121.03, 121.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 2283.*

(n3)Footnote 2. *Roudebush v. Hartke, 405 U.S. 15, 20-21, 92 S. Ct. 804, 31 L. Ed. 2d 1 (1972) .*

(n4)Footnote 3. *Gibson v. Berryhill, 411 U.S. 564, 573 n.12, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) .*

(n5)Footnote 4. *Bud Antle, Inc. v. Barbosa, 45 F.3d 1261, 1271 (9th Cir. 1995) , cert. denied, 515 U.S. 1159 (1995) .*

(n6)Footnote 5. *Entergy, Arkansas, Inc. v. Nebraska, 210 F.3d 887, 900 (8th Cir. 2000) .*

(n7)Footnote 6. *Six Clinics Holding Corp., II v. Cafcomp Sys., 119 F.3d 393, 398 (6th Cir. 1997)* (in addition to Act's express exceptions, courts have recognized that Act applies only to judicial "proceedings in a State court").

(n8)Footnote 7. *Patmon v. Michigan Sup. Ct., 224 F.3d 504, 508 (6th Cir. 2000) .*

(n9)Footnote 8. *North Pac. S.S. v. Industrial Accident Comm'n, 23 F.2d 109, 110 (9th Cir. 1918) .*

(n10)Footnote 9. *Garrett v. Hoffman, 441 F. Supp. 1151, 1157-1158 (D.C. Pa. 1977) .*

(n11)Footnote 10. *Bud Antle, Inc. v. Barbosa, 45 F.3d 1261, 1271-1272 (9th Cir. 1994) , cert. denied, 515 U.S. 1159 (1995) .*

(n12)Footnote 11. *Delaware Coach Co. v. Public Serv. Comm'n, 265 F. Supp. 648, 653 (D.C. Del. 1967) .*

(n13)Footnote 12. *See National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982)* (Anti-Injuntion Act inapplicable when federal court was first forum to obtain jurisdiction; determinative date being when plaintiff initially

filed for federal injunctive relief).

(n14)Footnote 13. *Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)* .

(n15)Footnote 14. *Los Angeles Mem. Coliseum Comm'n v. City of Oakland, 717 F.2d 470, 473 (9th Cir. 1983)* .

(n16)Footnote 1. *Six Clinics Holding Corp., II v. Cafcomp Sys., 119 F.3d 393, 398 (6th Cir. 1997)* ; *Big Apple Cookie Co. v. Springwater Cookie Co., 517 F. Supp. 367, 371 (S.D. Ohio 1981)* (state court-ordered arbitration did not constitute "state court proceeding" within meaning of Act because court's duties in connection with enforcement of private arbitration agreements did not include investigation, declaration, or enforcement of liabilities, and therefore did not constitute judicial inquiry).

(n17)Footnote 2. *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 985 F.2d 459, 461-462 (9th Cir. 1993)* ; *see Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879-880 (9th Cir. 2000)* (arbitration is a "state proceeding" for purposes of the Anti-Injunction Act if the arbitration has been ordered or its award enforced by a state court in a judicial, in contrast to merely ministerial, proceedings).

(n18)Footnote 3. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879-880 (9th Cir. 2000)* (Act does not apply to private and voluntary arbitrations in which state courts have not become and may never become involved).

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1-2 Moore's Manual--Federal Practice and Procedure § 2.24

§ 2.24 Proceedings Not Subject to Actn*

[1] Request for Injunction by Nonparty

The Anti-Injunction Act does not bar one who is not a party to a state proceeding, nor in privity with a party, from seeking a federal injunction against enforcement of the resulting judgment. n1 Some courts refer to this rule as the "strangers to the state court proceeding" exception to the Anti-Injunction Act. "Privity," for purposes of this exception, has the same meaning as for purposes of collateral estoppel. Therefore, one who is not bound directly because of a sufficiently close relationship with a party to a state proceeding is not bound indirectly by the Anti-Injunction Act. n2

[2] Proceedings in Foreign Sovereign

The Anti-Injunction Act does not apply to protect proceedings in any foreign sovereign jurisdictions. n1 However, as a general rule, principles of international comity require restraint regarding extra-territorial interference with international litigation. n2 Federal courts ordinarily will not issue an injunction against a foreign proceeding if the foreign litigation poses no threat to federal court jurisdiction or to any important national public policy. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 121.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Imperial County v. Munoz, 449 U.S. 54, 59-60, 101 S. Ct. 289, 66 L. Ed. 2d 258 (1980)* .

(n3)Footnote 2. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879-880 (9th Cir. 2000)* .

(n4)Footnote 1. *China Trade & Dev. Corp. v. M/V Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)* .

(n5)Footnote 2. *Phillipines v. Marcos, 862 F.2d 1355 (9th Cir. 1988)* , *cert. denied, 490 U.S. 1035 (1989)* .

(n6)Footnote 3. *China Trade & Dev. Corp. v. M/V Choong Yong, 837 F.2d 33, 35-36 (2d Cir. 1987)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.25

§ 2.25 Coordination With All Writs Statuten*

The Anti-Injunction Act must be read in conjunction with the All Writs Statute, n1 which provides that a federal court may issue any writ necessary or appropriate in aid of its jurisdiction that otherwise comports with the principles of law under the Constitution or by statute. n2 The two statutes are compatible because both are based on equitable considerations. n3 The Anti-Injunction Act does impose additional limitations on federal court power to enjoin state court proceedings, and therefore, the All Writs Statute must be construed in conjunction with those limitations imposed by the Anti-Injunction Act. n4 Even if a federal court may enjoin state proceedings under the Anti-Injunction Act, it is not required to do so. n5 For a complete discussion of these requirements, See Ch. 10A, *Injunctions*.

Although the Anti-Injunction Act generally imposes limitations on federal court power to issue an injunction when the enjoined matter is a state court proceeding, n6 the All Writs Statute may also be used to effectuate the provisions of the Anti-Injunction Act, for example, when an appellate court issues the extraordinary writ of mandamus under the All Writs Statute to a district court to comply with the Anti-Injunction Act. n7 Additionally, the All Writs Statute may be read in conjunction with exceptions to the Anti-Injunction Act. For example, federal courts have relied on the All Writs Statute in conjunction with the Anti-Injunction Act's "in aid of jurisdiction" exception n8 to justify enjoining duplicative state proceedings. A federal district court may enjoin prosecution of subsequent state court claims under the All Writs Statute to enforce its continuing orders against relitigation and to protect the integrity of its prior rulings over which it has retained jurisdiction. n9 However, the All Writs Statute does not confer jurisdiction on the federal courts, and therefore cannot confer original jurisdiction necessary to support removal. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction ActCivil ProcedureRemediesWritsAll Writs Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 121.31 (Matthew Bender 3d

ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1651.*

(n3)Footnote 2. *See Cole v. United States, 657 F.2d 107, 110 (7th Cir. 1981)* , *cert. denied, 454 U.S. 1083 (1981)* ; *see 28 U.S.C. § 1651(a).*

(n4)Footnote 3. *See Amwest Mortgage Corp. v. Grady, 925 F.2d 1162, 1164 (9th Cir. 1991)* (party seeking a federal injunction of state proceedings must satisfy requirements of both Anti-Injunction Act and those for obtaining equitable relief that party would suffer irreparable injury and lacks adequate remedy at law).

(n5)Footnote 4. *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1069 (11th Cir. 1993)* .

(n6)Footnote 5. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 151, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)* .

(n7)Footnote 6. *Mitchum v. Foster, 407 U.S. 225, 242-243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)* .

(n8)Footnote 7. *Cf. In re Justices of Super. Ct. Dep't of Mass. Trial Ct., 218 F.3d 11 (1st Cir. 2000)* .

(n9)Footnote 8. *28 U.S.C. § 2283*; *see § 2.25.*

(n10)Footnote 9. *In re Baldwin United Corp., 770 F.2d 328, 336-338 (2d Cir. 1985)* .

(n11)Footnote 10. *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.26

§ 2.26 Appeal of Determinations Related to Anti-Injunction Actn*

Whether an injunction may issue under the Anti-Injunction Act is a question of law. n1 Thus, the district court's determination of whether an injunction falls within the permissible limits of the Anti-Injunction Act is reviewed de novo. n2 However, after the district court determines that an injunction is permissible, n3 its determination of whether to actually enter an injunction is reviewed for abuse of discretion. A district court abuses its discretion only if its conclusions are based on clearly erroneous factual findings or incorrect legal standards. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction ActCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 121.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011-1015 (9th Cir. 1999)* .

(n3)Footnote 2. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879 (9th Cir. 2000)* ; *Blalock Eddy Ranch v. MCI Telecomm. Corp., 982 F.2d 371, 375 (9th Cir. 1992)* .

(n4)Footnote 3. *Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1377 (9th Cir. 1997)* (fact that injunction may issue under Act does not mean that court must issue injunction).

(n5)Footnote 4. *United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011-1015 (9th Cir. 1999)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.27

§ 2.27 Tax Anti-Injunction Actn*

[1] Function of Tax Anti-Injunction Act

The Tax Anti-Injunction Act, similar to the general Anti-Injunction Act, provides that a federal district court may not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law when a plain, speedy, and efficient remedy is provided in the courts of the state. n1 The purposes of the Tax Anti-Injunction Act are to promote comity and to afford states broad independence in the administration of their affairs and revenue raising that is consistent with the federal constitution. n2 Thus, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration. Comity's constraint is especially strong when the lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity, because taxation is the chief means for states to carry on their respective governments, and it very important to states that the methods adopted to enforce assessments of taxes should be interfered with as little as possible. n3

[2] Application of Tax Anti-Injunction Act

[a] Prohibition Applies Only to Taxes

The Tax Anti-Injunction Act's prohibition of a federal injunction applies only to a state assessment, levy, or collection of a tax. In this regard, a "tax" has been liberally defined by the courts to include any state or local taxes imposed by state law. n1 Because of the congressional noninterference policies underlying the Tax Anti-Injunction Act, n2 the determination of what constitutes a tax is determined by federal and not state law. n3 The primary inquiry in determining whether a charge is a tax examines the purpose of the assessment and the ultimate use of the funds: n4 the characterization of an assessment's purpose usually depends on whether it primarily raises revenue or regulates activity--an assessment is a tax if it primarily raises revenue. n5 Thus, a charge is likely to be classified as a tax if (1) the revenue is allocated to the general fund, (2) the charge is enacted by the legislature in contrast to an administrative agency, (3) the charge is called a "tax" in the statute, and (4) the statute is administered by the tax assessor. n6 On the other hand, a fee is more likely to be used to recoup the expenses of the program to which the fee relates. n7

[b] Absence of Adequate State Remedy

The Tax Anti-Injunction Act's prohibition on a federal injunction applies only when there is a plain, speedy, and efficient remedy available in the courts of the state. n8 This means that a federal injunction related to a state tax is only prohibited when the state provides the taxpayer a full hearing and judicial determination of the controversy. n9 To qualify, a remedy must include the opportunity to appeal to higher courts and may not preclude preservation or consideration of a plaintiff's constitutional and other federal rights. n10 The courts have broadly interpreted what is an adequate remedy; therefore, the Tax Anti-Injunction Act has been widely applied. Thus, it has been held that a remedy provided by the state need not be the best of all remedies, only adequate. For example, the Supreme Court noted that the potential for refund relief alone may constitute a plain, speedy, and efficient remedy. n11 Whether a plain, speedy, and efficient remedy exists in the state court is a question of federal law. n12

[3] Exceptions to Tax Anti-Injunction Act

There are several judicially created exemptions to the Tax Anti-Injunction Act, as follows:

1. Cases involving the original jurisdiction of the United States Supreme Court. The Tax Anti-Injunction Act does not apply when the Supreme Court of the United States has original jurisdiction over a case. Thus, the Act is not applicable when there are disputes between states, because the United States Supreme court has exclusive original jurisdiction over such disputes, n1 and that jurisdiction is superior to the jurisdiction of the courts of either state. n2

2. The United States Government is the plaintiff. The Tax Anti-Injunction Act does not apply when the United States Government challenges as plaintiff a tax enacted or collected by a state. n3 The United States Supreme Court has held that because of the presumption against subjecting the federal government to suit in state courts, the United States must be permitted to sue for injunctions against state imposed taxes. Thus, under this exception to the Act, the United States may initiate actions in federal court to protect itself from an unconstitutional state exaction of taxes. n4

3. When expressly authorized by statute. The Supreme Court has held that some statutes authorize federal district courts to enjoin the assessment or collection of state taxes. n5 However, whenever possible, a court must construe federal statutes as not providing an exception to the Tax Anti-Injunction Act. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 121.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1341.*

(n3)Footnote 2. *Collins Holding Corp. v. Jasper County, 123 F.3d 797, 799 (4th Cir. 1997)* .

(n4)Footnote 3. *Levin v. Commerce Energy, Inc., ___ U.S. ___, 130 S. Ct. 2323, 176 L. Ed. 2d 1131, 1140-1141 (2010)* .

(n5)Footnote 1. *Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia, 478 F.2d 456, 458 (3d Cir. 1973)* .

(n6)Footnote 2. *Lightwave Techs., L.L.C. v. Escambia County, 43 F. Supp. 2d 1311, 1314 (S.D. Ala. 1999)* .

(n7)Footnote 3. *See Folio v. City of Clarksburg, 134 F.3d 1211, 1217 (4th Cir. 1998)* (federal court determined that municipal charge for fire protection was tax even though state's highest court characterized it as fee).

(n8)Footnote 4. *Empress Casino Joliet Corp. v. Blagojevich, 674 F. Supp. 2d 993, 1005 (N.D. Ill. 2009)* (assessment is tax if its purpose is to raise revenue either for general fund or for more specialized fund).

(n9)Footnote 5. *See Hedgepeth v. Tennessee, 215 F.3d 608, 611-615 & n.3 (6th Cir. 2000)* (one of guiding factors is cost of assessment and whether cost is nominal or exacts amount for general revenue-raising purposes).

(n10)Footnote 6. *Cumberland Farms, Inc. v. Tax Assessor, 116 F.3d 943, 946-947 (1st Cir. 1997)* .

(n11)Footnote 7. *See Ariz. Life Coalition, Inc. v. Stanton, 515 F.3d 956, 962-963 (9th Cir. 2008)* (fee is not tax if fee is charged in consideration of providing extra service).

(n12)Footnote 8. *28 U.S.C. § 1341*.

(n13)Footnote 9. *California v. Grace Brethren Church, 457 U.S. 393, 411, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982)* .

(n14)Footnote 10. *Empress Casino Joliet Corp. v. Blagojevich, 674 F. Supp. 2d 993, 1006 (N.D. Ill. 2009)* .

(n15)Footnote 11. *Barnes v. E-systems, Inc., 501 U.S. 1301, 1303, 112 S. Ct. 1, 115 L. Ed. 2d 1087 (1991)* .

(n16)Footnote 12. *Kerns v. Dukes, 153 F.3d 96, 100-103 (3d Cir. 1998)* .

(n17)Footnote 1. *28 U.S.C. § 1251(a)*; *U.S. Const., Art. III § 2, cl. 2*.

(n18)Footnote 2. *Maryland v. Louisiana, 451 U.S. 725, 741, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)* .

(n19)Footnote 3. *Department of Employment v. United States, 385 U.S. 355, 357-358, 87 S. Ct. 464, 17 L. Ed. 2d 414 (1966)* .

(n20)Footnote 4. *Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-226, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957)* (federal government should be able to obtain injunction to prevent threatened irreparable injury to national interest free of severe restrictions imposed by Act).

(n21)Footnote 5. *Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457-458, 464, 107 S. Ct. 1855, 95 L. Ed. 2d 404 (1987)* (federal court may issue injunction for state tax of railroad property that violates Railroad Revitalization and Regulatory Reform Act).

(n22)Footnote 6. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 19-20, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

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1-2 Moore's Manual--Federal Practice and Procedure §§ 2.28through 2.39

[Reserved]

§§ 2.28[Reserved]

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B. EXCEPTIONS TO ANTI-INJUNCTION ACT

1-2 Moore's Manual--Federal Practice and Procedure § 2.40

§ 2.40 Injunctions Expressly Authorized by Congressn*

[1] Scope of Exception

Federal courts may enjoin state court proceedings as expressly authorized by an act of Congress. n1 In other words, there is an exception to the Anti-Injunction Act that authorizes a federal court to issue an injunction to stay state court proceedings if Congress expressly authorizes an injunction under specified circumstances. n2 To qualify as expressly authorizing an injunction, the federal statute need not specifically refer to the Anti-Injunction Act nor refer to an injunction against state court proceedings. Rather, the legislation must create an enforceable federal right or remedy that may be effected only by the stay of conflicting state-court proceedings. This rule has three required elements: (1) the statute must create a uniquely federal right or remedy; (2) the right or remedy must be enforceable in a federal court of equity; and (3) the right or remedy could be frustrated if the federal court was not permitted to enjoin a state court proceeding. n3 For a discussion of the statutes that courts have held within the exception, see [2], *below*.

It should be noted that a federal court does not have inherent power to ignore the prohibitions of the Anti-Injunction Act and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. n4 Examples of statutes that do not fall within the "expressly authorized" provision include: the antitrust statutes; n5 the Americans with Disabilities Act; n6 ERISA; n7 and the Equal Credit Opportunity Act. n8

[2] Particular Statutes Within Express Authorization Exception

[a] Bankruptcy

The Bankruptcy Code expressly provides for a broad stay of litigation, lien enforcement, and other actions which would affect or interfere with the property of the estate or with the debtor. This statute provides for an automatic stay on the filing of the a bankruptcy petition. n1 Therefore, the "expressly authorized" exception permits a federal court to enjoin state court proceedings in bankruptcy despite the prohibition of the Anti-Injunction Act. n2

[b] Removal

The removal statute specifically provides that after the filing of the notice of removal of a civil action the defendant must give written notice of the removal to all adverse parties and must file a copy of the notice with the clerk of the state court. The filing effects the removal of the case to federal court and prohibits the state court from proceeding further unless and until the case is remanded. n3 It has been held that the language of this statute expressly authorizes a federal court to enjoin all state court proceedings related to the case removed to federal court. n4 Provided that the removal is valid, a federal court may issue an injunction against state proceedings even if the defendant moved for removal solely to avoid the Act's prohibition. n5 Furthermore, the federal court may issue an injunction if the state plaintiff files a second substantially identical state court suit for the purpose of circumventing the removal. n6

The removal exception does not apply when separate state and federal proceedings have common issues. Thus, the removal exception does not permit the federal court to enjoin a state court from deciding an issue in another proceeding filed before the removed case merely because the removed case also raises that same issue. The defendant has the right to have the federal court decide the removed case, but not the right to have every issue in that case decided by the federal court, if the state court has proper jurisdiction to consider the issue in another proceeding. n7 Additionally, the Anti-Injunction exception for removed cases applies only to the extent the federal court maintains removal jurisdiction. Once the federal court remands the case or dismisses it without prejudice, and the plaintiffs institute another suit in state court, the federal court's power to enjoin the state court proceeding ends. n8

[c] Civil Rights

The Supreme Court has held that the Civil Rights Act n9 falls within the "expressly authorized" exception to the Anti-Injunction Act. n10 However, in its decision the Supreme Court did not abandon its previous rule that only in cases of harassment, bad faith prosecutions, or other extraordinary circumstances may a federal court enjoin a pending state criminal prosecution. n11

The Supreme Court found the express exception in the Civil Rights Act because it provides that any aggrieved party may bring a "suit in equity" to redress a deprivation of civil rights under color of state law. n12 The Court reasoned that Congress intended the Civil Rights Act to open federal courts to private citizens to enforce the *Fourteenth Amendment* against state action and to use the federal courts as guardians of the people's federal rights to be free from unconstitutional action under color of state law, and that an injunction in the proper circumstances n13 would be an appropriate tool to accomplish that goal. n14

[d] Statutory Interpleader

The statute governing interpleader n15 provides that in any civil action of statutory interpleader or in the nature of statutory interpleader, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any state or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Furthermore, the district court may hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. n16 The courts have held that this authorization is an "expressly authorized" exception to the Anti-Injunction Act. n17 Thus, if a court has entered an order discharging the liability of an interpleader plaintiff and extinguishing claims against it by any participating claimants, that court may protect its decree by enjoining an action brought in state court by a partly satisfied claimant to recover the balance of a claim. n18 However, the exception does not apply to rule interpleader actions n19 and injunctions in such cases are prohibited by the general provision of the Anti-Injunction Act. n20

[e] Limitation of Shipowner's Liability

It has been held that the Limitation of Liability Act governing shipowner liability n21 falls within the "expressly

authorized" exception to the Anti-Injunction Act. n22 The Act provides that after a shipowner (1) deposits with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of the owner in the vessel and freight, or approved security for that value, or (2) transfers the owner's interest in the vessel and freight to a trustee for the benefit of the claimants, all claims and proceedings against the owner with respect to the matter in question cease. n23 This provision operates as an exception under the Anti-Injunction Act and permits a federal court to enjoin state court proceedings prosecuted in violation of the provision. n24 Thus, when a shipowner has made the requisite deposit in court or transfer to a trustee, the court hearing the limitation of liability case may stay all related claims against the shipowner pending in any other forum, may require all of the claimants to assert their claims in the limitation court, may take jurisdiction to entertain those claims without a jury, and must ensure that the shipowner will not be held liable in excess of the amount ultimately fixed in the limitation suit. n25

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 121.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2283.*

(n3)Footnote 2. *NLRB v. Nash-Finch Co., 404 U.S. 138, 139-141, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)* (NLRB's attempt to "enjoin" or "restrain" a state court injunction falls under exception).

(n4)Footnote 3. *Mitchum v. Foster, 407 U.S. 225, 237, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) .*

(n5)Footnote 4. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988) .*

(n6)Footnote 5. *Village of Bolingbrook v. Citizens Utils. Co., 864 F.2d 481, 483-485 (7th Cir. 1988)* (purposes of antitrust laws may be secured without federal injunction against state case); *see 15 U.S.C. § 26.*

(n7)Footnote 6. *Lussier v. Department of Highway Safety & Motor Vehicles, 972 F. Supp. 1412, 1418-1422 (M.D. Fla. 1997)* ; *see 42 U.S.C. § 12117.*

(n8)Footnote 7. *Employers Resource Mgmt. Co. v. Shannon 65 F.3d 1126, 1129 (4th Cir. 1995) , cert. denied, 516 U.S. 1094 (1996)* ; *see 42 U.S.C. § 12101 et seq.*

(n9)Footnote 8. *Bledsoe v. Fulton Bank, 940 F. Supp. 804, 807-809 (E.D. Pa. 1996)* ; *see 15 U.S.C. § 1691e.*

(n10)Footnote 1. *See 11 U.S.C. § 362.*

(n11)Footnote 2. *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 640, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977) .*

(n12)Footnote 3. *28 U.S.C. § 1446(d).*

(n13)Footnote 4. *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 640, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977) .*

(n14)Footnote 5. *Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 841-842 (1st Cir. 1988) .*

(n15)Footnote 6. *Kansas Pub. Emp. Ret. Sys. v. Reimer & Koger Assocs., 77 F.3d 1063, 1069-1070 (8th Cir. 1996) , cert. denied, 519 U.S. 948 (1996) .*

(n16)Footnote 7. *Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1378-1379 (9th Cir. 1997)* .

(n17)Footnote 8. *Hickey v. Duffy, 827 F.2d 234, 243 (7th Cir. 1987)* .

(n18)Footnote 9. *See 42 U.S.C. § 1983.*

(n19)Footnote 10. *Mitchum v. Foster, 407 U.S. 225, 243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)* .

(n20)Footnote 11. *See Younger v. Harris, 401 U.S. 37, 54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* ; *Dombrowski v. Pfister, 380 U.S. 479, 483-485, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)* .

(n21)Footnote 12. *See 42 U.S.C. § 1983.*

(n22)Footnote 13. *See* [1], *above.*

(n23)Footnote 14. *Mitchum v. Foster, 407 U.S. 225, 243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)* .

(n24)Footnote 15. *28 U.S.C. § 1335*; *Fed. R. Civ. P. 22(b).*

(n25)Footnote 16. *28 U.S.C. § 2361.*

(n26)Footnote 17. *Employees Sav. Plan of Mobil Oil Corp. v. Vickery, 99 F.R.D. 138, 141 (S.D.N.Y. 1983)* ; *see Melton v. White, 848 F. Supp. 1513, 1514 (W.D. Okla. 1994)* .

(n27)Footnote 18. *Geler v. National Westminster Bank, 763 F. Supp. 722, 727 (S.D.N.Y. 1991)* .

(n28)Footnote 19. *Fed. R. Civ. P. 22(b).*

(n29)Footnote 20. *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454 (D.P.R. 1992)* .

(n30)Footnote 21. *46 U.S.C. § 181 et seq.*

(n31)Footnote 22. *Magnolia Marine Transp. Co. v. Laplace Towing Corp., 964 F.2d 1571, 1580 (5th Cir. 1992)* .

(n32)Footnote 23. *46 U.S.C. § 185.*

(n33)Footnote 24. *See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 121 S. Ct. 993, 1004, 148 L. Ed. 2d 931 (2001)* .

(n34)Footnote 25. *Magnolia Marine Transp. Co. v. Laplace Towing Corp., 964 F.2d 1571, 1580 (5th Cir. 1992)* .

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PART I Judicial Powers; Law Applied; Evidence
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1-2 Moore's Manual--Federal Practice and Procedure § 2.41

§ 2.41 Injunctions Necessary to Aid Federal Jurisdictionn*

[1] Function of Exception

The second exception specified in the Anti-Injunction Act permits a federal court to grant an injunction against state court proceedings when the injunction is necessary to aid the federal court's jurisdiction. n1 Despite its broad language, this exception has not been broadly applied and has been used only in limited circumstances. First, it has been used most often when the federal court acquires jurisdiction in concurrent in rem actions. n2 Second, federal courts may issue injunctions to restrain state proceedings that threaten federal court jurisdiction in removed cases. n3 However, federal courts are also authorized to enjoin state proceedings in removed cases under the "expressly authorized" exception, as discussed in *§ 2.40[2][b]*. The Notes to the Anti-Injunction Act provide little guidance in interpreting this exception. n4 The phrase "in aid of its jurisdiction" was added to conform to the All Writs Statute n5 and to make clear the recognized power of the federal courts to stay proceedings in state cases removed to the district courts. n6 The All Writs Statute, which gives a federal court the power to issue all writs necessary in aid of its jurisdiction, is discussed in *§ 2.25*. The only other circumstance encompassed by the second exception appears to be in cases when a state proceeding would interfere with continuing federal jurisdiction and monitoring of a case, such as cases involving desegregation orders. n7

Exclusive federal jurisdiction over a matter is not in itself sufficient to bring a case within the "necessary in aid of jurisdiction" exception to the Anti-Injunction Act's prohibition. Even when a state court invades a field Congress has preempted and the state court is wholly without jurisdiction, the district court may not apply this exception. n8 However, when Congress specifically vests exclusive jurisdiction in a federal agency with express authorization to enforce its orders in federal court, the federal court may properly issue an injunction in aid of jurisdiction to enforce an agency order. n9

[2] In Rem Cases

A federal court may issue an injunction in aid of its jurisdiction if the injunction is necessary to prevent a state court from interfering with a federal court's consideration or disposition of a case to the extent the interference would seriously impair the federal court's flexibility and authority to decide the case. n1 Federal courts have interpreted this standard to permit an injunction when federal and state proceedings involve the same res, or when the federal and state

proceedings are both in rem. n2 In deciding whether to issue an injunction against a parallel state court claim, the federal court must consider whether the courts would be required to assume simultaneous jurisdiction over the same res. n3

When a conflict arises between federal and state in rem jurisdiction and the same res is the subject of both actions (which each court must control to provide relief), the court that assumes jurisdiction over the property first must maintain and exercise that jurisdiction to the exclusion of the other. n4 Thus, a federal court may issue an injunction against state proceedings to protect its in rem jurisdiction when the federal court acquires jurisdiction before the state court, and the state court proceedings interfere with the control and disposition of the res. n5 On the other hand, if the state court properly acquires jurisdiction before the federal court, the federal court may not exercise jurisdiction over the same res. n6

The essential inquiry, therefore, is whether the two actions are of such nature that both are essentially in rem, demanding control and disposition of the res. n7 If one action is in personam and may be adjudicated without physically controlling a right in the res, the requisite conflict does not exist. n8 On the other hand, certain actions in rem that also seek to establish personal liability may still be governed by the general rules governing parallel in rem actions. n9 However, a court's prior jurisdiction over a res serves to exclude a subsequent in rem action only if the subsequent action requires control of the res for relief, such as an action for an accounting where results depend on the property being delivered. The doctrine would not apply to a suit alleging fraud and breach of fiduciary duty. n10 Finally, if concurrent in personam actions are between the same parties and involve the same subject matter, they may proceed simultaneously in the courts of the same forum or two or more forums. Concurrent in personam jurisdiction does not satisfy the "necessary in aid of jurisdiction" exception to the Anti-Injunction Act. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 121.07 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 288, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)* .

(n3)Footnote 2. *Gunderson v. ADM Investor Servs., Inc., 976 F. Supp. 818, 823 (N.D. Iowa 1997)* ; *see* [2], *below*.

(n4)Footnote 3. *Hyde Park Partners L.P. v. Connolly, 839 F.2d 837, 842 (1st Cir. 1988)* .

(n5)Footnote 4. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 294-295, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)* .

(n6)Footnote 5. *28 U.S.C. § 1651*.

(n7)Footnote 6. *See 28 U.S.C. § 2283*, Note to 1948 Amendments.

(n8)Footnote 7. *See Garcia v. Bauza-Salas, 862 F.2d 905, 909 (1st Cir. 1988)* ; *Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383, 383-384 (4th Cir. 1974)* .

(n9)Footnote 8. *Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 515, 75 S. Ct. 452, 99 L. Ed. 600, 56 Ohio Op. 249 (1955)* .

(n10)Footnote 9. *Capital Serv., Inc. v. NLRB, 347 U.S. 501, 504-505, 74 S. Ct. 699, 98 L. Ed. 887 (1954)* .

(n11)Footnote 1. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)* .

(n12)Footnote 2. *Garcia v. Bauza-Salas, 862 F.2d 905, 909 (1st Cir. 1988)* .

(n13)Footnote 3. *Rienhardt v. Kelly, 164 F.3d 1296, 1302-1303 (10th Cir. 1999)* .

(n14)Footnote 4. *Donovan v. City of Dallas, 377 U.S. 408, 412, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964)* .

(n15)Footnote 5. *Hyde Constr. Co. v. Koehring Co., 388 F.2d 501, 508 (10th Cir. 1968)* , *cert. denied, 391 U.S. 905 (1968)* .

(n16)Footnote 6. *See United States v. One 1985 Cadillac Seville, 866 F.2d 1142 (9th Cir. 1989)* .

(n17)Footnote 7. *United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011-1015 (9th Cir. 1999)* .

(n18)Footnote 8. *United States v. One 1986 Chevrolet Van, 927 F.2d 39, 44-45 (1st Cir. 1991)* .

(n19)Footnote 9. *First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011 (4th Cir. 1981)* .

(n20)Footnote 10. *See Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 231-232 (4th Cir. 2000)* (suit for money damages that did not involve any particular property or res).

(n21)Footnote 11. *Texas v. United States, 837 F.2d 184, 186-187 (5th Cir. 1988)* , *cert. denied, 488 U.S. 821 (1988)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.42

§ 2.42 Relitigation Exceptionn*

[1] Function of Exception

Although the Anti-Injunction Act generally denies federal courts the power to grant an injunction to stay proceedings in a state court, the third exception specified in the Act provides that a federal court may enjoin state court proceedings to protect or effectuate its judgments. n1 The purpose of this exception, known as the "relitigation exception," n2 is to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. The exception, based on the well-recognized concepts of res judicata and collateral estoppel, n3 allows a party with a favorable federal judgment to protect that judgment by having the federal court enjoin repetitive state court proceedings rather than relying on a plea of res judicata or collateral estoppel. n4

Under the exception, a federal court may enjoin any further state proceedings that attempt to relitigate previously adjudged matters or that may impair the prior judgment's effect. n5 The injunction, however, may not exceed the extent of the matters that the federal court determined in the prior proceeding. n6 Additionally, the injunction may not bar claims that arise after the time of the prior judgment. n7

The courts apply a four-part test to determine whether the exception is applicable: n8 (1) the parties in a later action must be identical to, or at least in privity with, the parties in a prior action; n9 (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction; n10 (3) the prior action must have concluded with a final judgment on the merits; n11 and (4) the same claim or cause of action must be involved in both suits. n12

[2] Four Requirements for Exception

[a] Parties or Privies

The first requirement of the relitigation exception is that the parties in a later action must be identical to, or at least in privity with, the parties in a prior action. n1 The basis for this requirement is due process. n2 If the parties are identical, the requirement is satisfied because they had an opportunity to litigate. But even if the parties are not identical, the exception may apply when the party in the enjoined suit had some relationship of privity with the party in the prior suit.

n3 For example, the exception may apply to claims by one spouse that are derivative of injuries of other spouse. n4

[b] Judgment by Court of Competent Jurisdiction

The second requirement of the relitigation exception is that the judgment in the prior action must have been rendered by a court of competent jurisdiction. n5 If the court had no valid basis for subject matter jurisdiction, such as diversity or federal question jurisdiction, any subsequent injunction regarding the matter litigated is also not valid. n6

[c] Entry of Judgment on Merits

The third requirement of the relitigation exception is that the prior action must have concluded with a final judgment on the merits. This means that the relitigation exception permits a federal court to enjoin state proceedings only as to those issues that federal courts have fully and finally decided based on the merits. n7 The relitigation exception does not apply if the earlier federal court decision was based on procedural grounds rather than the merits. n8 For example, a prior federal forum non conveniens dismissal ordinarily is procedural and not an adjudication of the appropriateness of any other particular forum. n9 Consequently, the federal court ordinarily may not enjoin subsequent litigation in a particular state court on the grounds of a forum non conveniens determination in the federal court. n10

[d] Identity of Claim

The fourth requirement of the relitigation exception is that the same claim or cause of action must be involved in both suits. The court must use a transactional test to determine whether the two claims or causes of action are the same. n11 In this test, the critical question is not the relief requested or the theory of law asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts. Thus, in evaluating the res judicata effect of a prior claim on a subsequent one, the transactional test does not inquire whether the same evidence has been presented in support of the two claims but rather asks whether the same key facts are at issue in both of them. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 121.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2283.*

(n3)Footnote 2. *Thomas v. Powell, 247 F.3d 260, 263 (D.C. Cir. 2001)* .

(n4)Footnote 3. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)* .

(n5)Footnote 4. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 293, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)* .

(n6)Footnote 5. *Rutledge v. Scott Chotin, Inc., 972 F.2d 820, 825 (7th Cir. 1992)* .

(n7)Footnote 6. *Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 565 (2d Cir. 1991)* , *cert. denied, 501 U.S. 1218 (1991)* (federal court could not issue injunction regarding state damages issue when the issue had not been determined in federal court litigation).

(n8)Footnote 7. *Huguley v. General Motors Corp., 35 F.3d 1052, 1055-1056 (6th Cir. 1994)* .

(n9)Footnote 8. *New York Life Ins. Co. v. Gillispie, 203 F.3d 384, 387 (5th Cir. 2000)* .

(n10)Footnote 9. *See* [2][a], *below*.

(n11)Footnote 10. *See* [2][b], *below*.

(n12)Footnote 11. *See* [2][c], *below*.

(n13)Footnote 12. *See* [2][d], *below*.

(n14)Footnote 1. *Imperial County v. Munoz, 449 U.S. 54, 59-60, 101 S. Ct. 289, 66 L. Ed. 2d 258 (1980)* .

(n15)Footnote 2. *See Calvatia v. Metropolitan Club, 924 F.2d 689, 691 (7th Cir. 1991)* .

(n16)Footnote 3. *See Thomas v. Powell, 247 F.3d 260, 263-264 (D.C. Cir. 2001)* .

(n17)Footnote 4. *Terrell v. De Conna, 877 F.2d 1267, 1270-1273 (5th Cir. 1989)* .

(n18)Footnote 5. *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* (right, question, or fact distinctly put in issue and directly determined by court of competent jurisdiction may not be disputed in subsequent suit between same parties or their privies).

(n19)Footnote 6. *See New York Life Ins. Co. v. Gillispie, 203 F.3d 384, 387 (5th Cir. 2000)* .

(n20)Footnote 7. *LCS Serv. v. Hamrick, 925 F.2d 745, 749-750 (4th Cir. 1991)* .

(n21)Footnote 8. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 288-296, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)* .

(n22)Footnote 9. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146-150, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)* .

(n23)Footnote 10. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 572-573 (5th Cir. 1996)* , *cert. denied, 520 U.S. 1181 (1997)* .

(n24)Footnote 11. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)* (essential prerequisite for applying relitigation exception is that claims or issues which federal injunction insulates from litigation in state proceedings actually have been decided by federal court).

(n25)Footnote 12. *New York Life Ins. Co. v. Gillispie, 203 F.3d 384, 387 (5th Cir. 2000)* .

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1-2 Moore's Manual--Federal Practice and Procedure §§ 2.43through 2.59

[Reserved]

§§ 2.43[Reserved]

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PART I Judicial Powers; Law Applied; Evidence
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PART III. DOCTRINE OF ABSTENTION BY FEDERAL COURT

1-2 Moore's Manual--Federal Practice and Procedure § 2.60

§ 2.60 Nature of Abstention Doctrinen*

[1] Abstention Defined

"Abstention" is a federal court doctrine which provides that, in some circumstances, a federal court should either stay or dismiss federal litigation in deference to a parallel state court proceeding. Abstention is a judicially created principle in which a federal court, which otherwise has competent jurisdiction in a case, withholds that jurisdiction based on the principles of either (1) comity or (2) judicial economy. n1 "Comity" means that lower federal courts should resist engagement in certain cases falling within their jurisdiction because of a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a recognition that the nation will fare best if the States are left free to perform their separate functions in separate ways. n2 "Judicial economy" means that courts should avoid making duplicate efforts or unnecessarily deciding difficult questions. n3

The doctrine of abstention is one of several related doctrines that govern the timing of federal court decision making, including exhaustion of administrative remedies, finality, and ripeness. n4 Thus, abstention is appropriate only if, at a particular time, a pending state court proceeding should be allowed to proceed without federal court interference. n5 The Supreme Court has stated that abstention is available only in specific and limited circumstances, and that federal courts generally have a virtually unflagging obligation to exercise the jurisdiction that has been given to them. n6

Abstention allows a federal court to decline to exercise jurisdiction even though the dispute satisfies all of the jurisdictional requirements and is currently justiciable. n7 The question of abstention is whether a federal court should refrain from deciding a case within its constitutionally and congressionally conferred jurisdiction in the interests of judicial comity and efficiency. n8 In other words, the abstention doctrine in essence operates to yield proper federal court jurisdiction to a state tribunal when a prudential decision is made that the state tribunal is the more appropriate forum to hear and decide the suit. n9

[2] Types of Abstention

Federal case law has recognized five particular situations in which jurisdiction should be withheld: n1

1. To avoid deciding a federal constitutional question when the case may be disposed of on questions of

state law; this is known as *Pullman* abstention. n2

2. To avoid needless conflict with the administration by a state of its own affairs; this is known as *Burford* abstention. n3

3. To leave to the states the resolution of unsettled questions of state law, under the doctrine of *Thibodaux* abstention. n4

4. To avoid duplicative litigation; this is referred to as *Colorado River* abstention. n5

5. To refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its own laws in its own courts; this is known as *Younger* abstention. n6

[3] Abstention Distinguished From Similar Doctrines

The abstention doctrines are similar to justiciability doctrines in that both are self-imposed limitations on a federal court from deciding a case when the court has jurisdiction. The term "justiciability" refers to principles that limit a federal court from deciding a case when it would be inappropriate or not prudent for a federal court to exercise jurisdiction. "Justiciability" is a federal court doctrine which provides that a federal court may not consider a claim or issue unless a real, substantial controversy exists between persons having adverse legal interests, and not merely a hypothetical or abstract dispute. n1 Justiciability prevents parties from simply submitting questions of general interest or curiosity to the federal court. n2 A "justiciable case" or controversy is one that presents an actual dispute between adverse, non-collusive litigants. n3 Abstention may thus be considered the application of a particular type of justiciability, when there is a concurrent state court proceeding involving the same matter that is presented to the federal court. In essence, the federal court is considering whether to hear the case, and whether the state court proceedings would make it more prudent not to hear the case because of comity or judicial economy. n4

Doctrines related to abstention include standing, ripeness, and mootness. "Standing" is a doctrine that inquires whether a court should hear a particular case based on whether the particular party instituting the case is the proper person to do so, and whether the courts could grant relief to that person. Part of the standing doctrine consists of prudential considerations, similar to those in the abstention doctrine, which are considerations made by the judiciary to determine in a particular case whether it is appropriate or prudent for a federal court to use its resources to exercise jurisdiction and decide a case or controversy, based on the person bringing the suit. n5

"Ripeness" is a federal court doctrine which concerns whether a lawsuit has been filed at the correct time. n6 It analyzes whether a claim for relief has been filed too early because there is only a potential for a claim, and not yet an actual controversy that a court can resolve between the parties. n7 Thus, ripeness is another prudential consideration that furthers the interests of judicial economy by avoiding possible judicial interference with the other branches of government that would ultimately prove unnecessary if an actual dispute were never to develop. n8

"Mootness" is also a prudential consideration which provides that, although there may be an actual and justiciable controversy at the time litigation was commenced, once that actual controversy ceases to exist, the federal court should dismiss the action. n9 A controversy ceases to be real or definite under the doctrine when the issues presented are no longer actual, or the parties cease to have a legally cognizable interest in the outcome. n10 See Ch. 1, *Federal Courts*, for further discussion of justiciability and the related doctrines of standing, ripeness, and mootness. n11

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityGeneral OverviewCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 122.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Stoe v. Flaherty, 436 F.3d 209, 214 n.1 (3d Cir. 2006)* .

(n3)Footnote 2. *Levin v. Commerce Energy, Inc., ___ U.S. ___, 130 S. Ct. 2323, 176 L. Ed. 2d 1131, 1141 (2010)* .

(n4)Footnote 3. *Chiropractic Am. v. LaVecchia, 180 F.3d 99, 103 (3d Cir. 1999)* .

(n5)Footnote 4. *McCarthy v. Madigan, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)* ; *see* [3], *below*.

(n6)Footnote 5. *Cruz v. Melecio, 204 F.3d 14, 22-25 & ns.7, 9 (1st Cir. 2000)* (at time of abstention ruling, appellate court review was pending in Puerto Rico court, and plaintiff's conduct in filing suit in federal court after adverse judgment raised probability of forum shopping).

(n7)Footnote 6. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n8)Footnote 7. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n9)Footnote 8. *See Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 467 (6th Cir. 2009)* .

(n10)Footnote 9. *Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978)* (decision whether to defer to concurrent jurisdiction of state court is matter committed to district court's discretion).

(n11)Footnote 1. *Chiropractic Am. v. LaVecchia, 180 F.3d 99, 99 (3d Cir. 1999)* , *cert. denied, 528 U.S. 930 (1999)* .

(n12)Footnote 2. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* ; *see § 2.61*.

(n13)Footnote 3. *Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* ; *see § 2.62*.

(n14)Footnote 4. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* ; *see § 2.63*.

(n15)Footnote 5. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* ; *see § 2.64*.

(n16)Footnote 6. *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* ; *see § 2.65*.

(n17)Footnote 1. *City of Los Angeles v. Lyons, 461 U.S. 95, 101-102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* .

(n18)Footnote 2. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037-1038 (8th Cir. 2000)* .

(n19)Footnote 3. *United States v. Johnson, 319 U.S. 302, 304, 63 S. Ct. 1075, 87 L. Ed. 1413 (1943)* .

(n20)Footnote 4. *Younger v. Harris, 401 U.S. 37, 41, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n21)Footnote 5. *See Digital Properties, Inc. v. City of Plantation, 121 F.3d 586, 589-590 (11th Cir. 1997)* .

(n22)Footnote 6. *See Somoza v. N.Y. City Dep't of Educ., 538 F.3d 106, 115 (2d Cir. 2008)* .

(n23)Footnote 7. *Wis. Cent., Ltd. v. Shannon, 539 F.3d 751, 759 (7th Cir. 2008)* .

(n24)Footnote 8. *Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

(n25)Footnote 9. *Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 116 (4th Cir. 2000)* (suit was mooted by substantial amendments to challenged statutory scheme).

(n26)Footnote 10. *Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 563 (2d Cir. 1991)* .

(n27)Footnote 11. *See Roark & Hardee LP v. City of Austin, 522 F.3d 533, 541-542 (5th Cir. 2008)* (these doctrines have fleshed out the "actual controversy" requirement).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART III. DOCTRINE OF ABSTENTION BY FEDERAL COURT

1-2 Moore's Manual--Federal Practice and Procedure § 2.61

§ 2.61 Abstention to Avoid Unnecessary Federal Constitutional Decisionn*

[1] Statement of Doctrine

A federal court should in the exercise of sound judicial discretion abstain from hearing an action challenging the constitutionality of an unclear state statute or administrative order, if the construction of the pertinent but unclear state law by state courts may obviate the necessity for a decision of a federal constitutional question, even if federal jurisdiction has been properly invoked. This doctrine is known as *Pullman* abstention, based on the leading case. n1 The *Pullman* abstention doctrine represents an accommodation of three important principles: (1) federal courts are generally obligated to decide cases properly within their jurisdiction; n2 (2) the decision of constitutional issues should be avoided whenever possible; n3 and (3) conflict between the federal and state systems should be minimized. n4 Therefore, when a litigant challenges a state law action on federal constitutional grounds, the *Pullman* doctrine directs the federal district courts to avoid possible errors in forecasting how the state courts would decide an unsettled state law question; rather, the court should abstain in order to allow the state court to resolve questions of state law that might dispose of the entire litigation. n5

Pullman abstention involves a three-step process. n6 The court must determine: n7 (1) whether the state law is unclear; n8 (2) if it is, whether state court resolution of the unclear state issue will obviate or modify the federal constitutional issue; n9 and (3) whether the costs of abstention are too great in a particular case or there is some other aspect of the case which weighs in favor of or against abstention. n10

[2] Required Elements

[a] Both Elements Required

A federal court may abstain from deciding a claim that a state law is not valid under the federal Constitution if the claim presents both of two interrelated elements: n1 (1) the meaning of the state law is unclear, and (2) the state law could be construed by the state court in any way that renders it constitutional. The Court has specifically held that abstention is inappropriate in cases involving only unsettled or difficult questions of state law or cases involving only a federal constitutional question. n2 Thus, the discretion to abstain under this doctrine n3 is limited to situations in which both of these circumstances are present. n4

These two requirements are the minimal prerequisites. Some circuits add further requirements. For example, in a three-part test for *Pullman* abstention, the Ninth Circuit has adopted an additional requirement that the claim must touch a sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudication. n5

[b] Unclear State Law

A court may not abstain under *Pullman* unless there is an unsettled, uncertain, or unresolved state law question that only a state tribunal may construe. n6 By contrast, a federal court should not abstain if state law is certain and unambiguous, and there is nothing for a state court to construe. Furthermore, the Supreme Court has noted that if state law is certain and unambiguous, federal courts should not abstain from deciding constitutional claims. n7 A state law is unresolved or unsettled if state courts have never interpreted it. n8 However, it must be remembered that the fact that a state tribunal has never interpreted a statute is not enough to warrant abstention. Additionally, the state interpretation of the statute must have the potential for rendering a decision on the federal constitutional question unnecessary, or substantially modify the constitutional question. n9

[c] State Construction Will Eliminate Necessity for Federal Constitutional Decision

A federal court may abstain under *Pullman* only if the state judiciary's resolution of the unsettled question of law n10 may avoid, entirely or partially, the necessity for federal constitutional adjudication, or at least materially alter the nature of the question. n11 A court's construction of a state statute involves analysis of the statute and its legislative history. If that history is such that it allows no reasonable interpretation of the statute that would eliminate or modify the federal constitutional question, then the court should not abstain. n12

Because the primary purpose of *Pullman* abstention is to avoid unnecessary constitutional decisions, the doctrine does not apply to a case in which the only federal issues are matters of nonconstitutional law. Thus, in a suit involving a nonconstitutional federal question whose resolution depends on an issue of unsettled state law, the federal court will resolve the state law issue without abstaining and sending the parties to state court. n13

[3] Discretionary Abstention Based on Balancing of Costs

Pullman abstention requires the court to exercise discretion based on the federal court's equitable powers. n1 Therefore, abstention is not mandatory even if the two required circumstances exist. n2 If the federal court does abstain, then the state court will resolve the state law claims. However, unless the adversaries submit all issues to the state court, the federal court may allow return of the case to federal court to resolve federal claims. n3 This means that *Pullman* abstention may require piecemeal adjudication, increasing costs and delay. The Supreme Court has stated that considerations of federalism, which require deference to the state courts for unsettled questions of state law, generally outweigh concerns over the costs and delay of *Pullman* abstention n4 but that such costs favor the federal court hearing the entire case, especially for *First Amendment* claims, when delay caused by state court proceedings might chill *First Amendment* rights. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 122.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n3)Footnote 2. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* ; *United States v. Kentucky, 252 F.3d 816, 827 (6th Cir. 2001)* .

(n4)Footnote 3. *Artway v. Attorney Gen., 81 F.3d 1235, 1247 (3d Cir. 1996)* .

(n5)Footnote 4. *See Green v. City of Tucson, 255 F.3d 1086, 1094 (9th Cir. 2001)* .

(n6)Footnote 5. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n7)Footnote 6. *Kan. Judicial Review v. Stout, 519 F.3d 1107, 1118-1119 (10th Cir. 2008)* .

(n8)Footnote 7. *Vermont Right to Life Comm'n, Inc. v. Sorrell, 221 F.3d 376, 385 (2d Cir. 2000)* .

(n9)Footnote 8. *See* [2][a], *below*.

(n10)Footnote 9. *See* [2][b], *below*.

(n11)Footnote 10. *See* [3], *below*.

(n12)Footnote 1. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-501, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n13)Footnote 2. *Meredith v. Winter Haven, 320 U.S. 228, 234-235, 64 S. Ct. 7, 88 L. Ed. 9 (1943)* .

(n14)Footnote 3. *See* [3], *below*.

(n15)Footnote 4. *Zwickler v. Koota, 389 U.S. 241, 248, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)* .

(n16)Footnote 5. *Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994)* .

(n17)Footnote 6. *Harman v. Forssenius, 380 U.S. 528, 534, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965)* .

(n18)Footnote 7. *Wisconsin v. Constantineau, 400 U.S. 433, 439, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971)* ; *see Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 739 (6th Cir. 2000)* (court may not abstain under *Pullman* when federal suit involves only matter of federal constitutional law rather than unsettled state law issue).

(n19)Footnote 8. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n20)Footnote 9. *Harman v. Forssenius, 380 U.S. 528, 535, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965)* ; *see* [c], *below*.

(n21)Footnote 10. *See* [b], *above*.

(n22)Footnote 11. *Carey v. Sugar, 425 U.S. 73, 78-79, 96 S. Ct. 1208, 47 L. Ed. 2d 587 (1976)* .

(n23)Footnote 12. *Procunier v. Martinez, 416 U.S. 396, 404, 94 S. Ct. 1800, 40 L. Ed. 2d 224, 71 Ohio Op. 2d 139 (1974)* .

(n24)Footnote 13. *Propper v. Clark, 337 U.S. 472, 490, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949)* .

(n25)Footnote 1. *See Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir. 1995)* ; *Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 375 (4th Cir. 1994)* .

(n26)Footnote 2. *Baggett v. Bullitt, 377 U.S. 360, 375, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)* .

(n27)Footnote 3. *England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 417, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* .

(n28)Footnote 4. *Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 172-173, 62 S. Ct. 986, 86 L. Ed. 1355 (1942)* .

(n29)Footnote 5. *Zwickler v. Koota, 389 U.S. 241, 252, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)* ; *see Vermont Right to Life Comm'n, Inc. v. Sorrell, 221 F.3d 376, 385-386 (2d Cir. 2000)* (district court was not required to abstain from resolving challenge to state campaign finance disclosure and reporting statutes when abstention would force corporation to suffer delay of state court proceedings that might constitute impermissible chilling of *First Amendment* rights).

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PART I Judicial Powers; Law Applied; Evidence
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PART III. DOCTRINE OF ABSTENTION BY FEDERAL COURT

1-2 Moore's Manual--Federal Practice and Procedure § 2.62

§ 2.62 Abstention to Defer to Complex State Administrative Proceduresn*

[1] Statement of Doctrine

A federal court in equity should decline to interfere with the proceedings or orders of state administrative agencies in cases when timely and adequate state court review is available and there are either difficult questions of state law pertaining to public policy problems or the exercise of federal jurisdiction would be disruptive of state efforts to establish a coherent public policy. Federal abstention is appropriate to defer to comprehensive state administrative procedures in such cases. This abstention doctrine is called "administrative abstention," or *Burford* abstention, after the leading case on the doctrine. n1

In *Burford* abstention, as in *Pullman* abstention, n2 there must be an uncertain state law question. In *Pullman* abstention, however, that state law question must be susceptible of a construction that will eliminate the need to decide the federal constitutional question or materially alter the way the federal court will view that issue. n3 In *Burford* abstention, however, state law issues predominate and federal constitutional issues are secondary. When a federal court invokes *Pullman* abstention, the federal court remands the case to state court for a clarification of the state law. However, a federal court invoking *Burford* abstention defers to a state administrative agency or state procedures for judicial review of agency action. n4

[2] Required Elements

[a] Adequate State Remedy

The Supreme Court has made a clear statement of the *Burford* abstention doctrine prerequisites. First, there must be timely and adequate state court review available for the court to abstain. n1 Stated conversely, *Burford* abstention is not proper if the state's administrative structure fails to provide an adequate remedy. For example, a court may not abstain if a state statutory remedy requires a minimum number or percentage of residents to initiate an administrative procedure and provides for an administrative recommendation that is not binding on any party or tribunal. Such a remedy is not an adequate administrative remedy sufficient to allow *Burford* abstention. n2

[b] State Administrative Regulation Must be Central to Claim

The second requirement for *Burford* abstention, assuming an adequate state remedy, is that the federal court should decline to interfere with the proceedings or orders of state administrative agencies only if either of the following is true regarding the issue: (a) there are difficult questions of state law bearing on policy problems of substantial public import whose importance exceeds the result in the case then at bar; or (b) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. n3 In other words, the state administrative regulation must be central to the claim involved. n4 *Burford* abstention is not appropriate if the suit primarily involves only federal questions and does not involve any issues of state law that need to be resolved before the federal issues may be determined. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 122.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Burford v. Sun Oil Co., 319 U.S. 315, 318-332, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* .

(n3)Footnote 2. *See § 2.61.*

(n4)Footnote 3. *Public Serv. Co. v. Patch, 167 F.3d 15, 24 (1st Cir. 1998)* .

(n5)Footnote 4. *Burford v. Sun Oil Co., 319 U.S. 315, 333-334, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* .

(n6)Footnote 1. *New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)* .

(n7)Footnote 2. *See McNeese v. Board of Educ., 373 U.S. 668, 675, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963)* .

(n8)Footnote 3. *New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)* .

(n9)Footnote 4. *See Johnson v. Collins Entertainment Co. 199 F.3d 710, 719-720 (4th Cir. 1999)* (district court should have abstained under *Burford* from in case alleging claims for injunctive relief and damages that video gambling operators violated gaming regulations, because control of gambling is at the heart of a state's police power; by failing to abstain, district court improperly interfered with state regulatory scheme whose design was at heart of state's police power).

(n10)Footnote 5. *New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.63

§ 2.63 Abstention Because Important State Law Is Unclear in Diversity Casen*

[1] Statement of Doctrine

Although a federal court has diversity jurisdiction, it should nevertheless abstain if the diversity case raises an issue that is intimately involved with the state's sovereign prerogative, and the adjudication of that issue may be impaired by an unsettled question of state law. n1 This type of abstention is known as *Thibodaux* abstention, based on the first case applying its principles. n2 The Supreme Court has stated that federal courts may stay proceedings pending a state court determination of a decisive state law, especially if it involves an intricate question of state sovereignty. n3 However, the mere difficulty of interpreting state law does not otherwise justify a federal court's relinquishment of its diversity jurisdiction in favor of state court action. n4 A court should abstain in diversity cases under *Thibodaux* if there is uncertain state law and an important state interest that is intimately involved with the state government's sovereign prerogative. This type of abstention is appropriate when a diversity case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case. n5

[2] Nature of State Interest Protected

Both *Thibodaux* abstention and *Pullman* abstention n1 involve federal restraint in litigation concerning an unsettled or unclear state law question. Both doctrines permit abstention to allow state courts to address an unsettled issue before the federal court adjudicates the matter. However, although the doctrines are similar, there are some distinctions; *Pullman* abstention typically involves litigation in which a party raises a federal constitutional challenge to state action, based on an uncertain state law. The state law must be susceptible of a construction that would eliminate the need to decide the federal constitutional question, or that would materially alter the way the federal court views that issue. n2 *Thibodaux* abstention, however, involves a suit that does not allege federal constitutional issues but only state claims involving public policy issues of substantial import or local concern. The purpose of *Thibodaux* abstention is thus to give the parties the benefit of the same rule of law that will apply to all other litigants concerned with the issue. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 122.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct. 1712, 1721, 135 L. Ed. 2d 1 (1996)* .

(n3)Footnote 2. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* .

(n4)Footnote 3. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n5)Footnote 4. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* .

(n6)Footnote 5. *See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n7)Footnote 1. *See § 2.61*.

(n8)Footnote 2. *Kusper v. Pontikes, 414 U.S. 51, 54-55, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973)* .

(n9)Footnote 3. *Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 594, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.64

§ 2.64 Abstention for Reasons of Sound Judicial Administrationn*

[1] Statement of Doctrine

A federal court may abstain from exercising its jurisdiction over a matter for reasons of sound judicial administration if the federal and state courts have concurrent jurisdiction over duplicative litigation. Abstention to further sound judicial management is called *Colorado River* abstention, after the case in which the Supreme Court first applied the doctrine. The purpose of abstention for reasons of sound judicial administration is to conserve judicial resources and permit a comprehensive disposition of litigation. *Colorado River* abstention is permissible even if abstention would not be justified under the other abstention doctrines. n1

[2] Duplicative Litigation

Colorado River abstention typically arises when a party files a federal action that essentially duplicates a simultaneous state lawsuit. Normally, when state and federal courts have concurrent jurisdiction over virtually identical lawsuits, the Anti-Injunction Act prohibits the federal court from enjoining the state proceedings. n1 On the other hand, federal courts generally must exercise their validly conferred jurisdiction n2 and need not dismiss or stay an action because of pending parallel state litigation. However, to avoid the waste of judicial resources and increased costs, the Supreme Court has held that federal courts may abstain from exercising their validly conferred jurisdiction in certain exceptional circumstances n3 of parallel, duplicative litigation. The federal courts may do so in the interests of sound judicial administration and economy. n4

[3] Factors Balanced in Abstention Decision

The Supreme Court has identified five factors a federal court should consider when determining whether the interests of sound judicial administration outweigh a court's duty to exercise its jurisdiction. These factors include: (1) which court first assumed in rem or quasi in rem jurisdiction over property involved in both actions, (2) the relative inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, (4) the order of filing in the state and federal actions and the progress of each action, and (5) whether federal or state law controls the litigation. The Court emphasized that no single factor was determinative, and that there must be specific justification for dismissal of the federal action. n1

In a subsequent case, the Supreme Court stated that under *Colorado River,* a federal court may abstain from exercising jurisdiction only in exceptional circumstances, and the factors should not be used as a mere checklist. Rather, federal courts should carefully balance all considerations involved and the factors are to be applied in a pragmatic, flexible manner with a view to the realities of the case at bar. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 122.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n3)Footnote 1. *See 28 U.S.C. § 2283*; *see also § 2.20* et seq.

(n4)Footnote 2. *United States v. Kentucky, 252 F.3d 816, 827 (6th Cir. 2001)* .

(n5)Footnote 3. *See* [3], *below*.

(n6)Footnote 4. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n7)Footnote 1. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* (listing first four factors but also considering optional factors, including extent of federal proceedings beyond complaint, proximity of state court, and federal government participation in other state proceedings involving same claims); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* (adding fifth factor).

(n8)Footnote 2. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* ; *see, e.g., Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 650-651 (5th Cir. 2000)* (district court abused its discretion in staying federal proceedings and abstaining under *Colorado River* even though the state court suit was filed first and involved only state issues, when case did not involve any res or property over which state court had taken control, state court had taken no action, federal and state courts were similarly located within state, and both proceedings were progressing at approximately same pace).

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 2 CONCURRENT AND CONFLICTING JURISDICTION
PART III. DOCTRINE OF ABSTENTION BY FEDERAL COURT

1-2 Moore's Manual--Federal Practice and Procedure § 2.65

§ 2.65 Abstention To Avoid Interference With Certain Pending State Proceedingsn*

[1] Statement of Doctrine

A federal court should abstain from exercising jurisdiction over a case if (1) state proceedings are pending that involve important state interests, and (2) adequate relief is available in the state proceedings. This doctrine is called *Younger* abstention, after the case in which the Supreme Court first stated the doctrine. n1 In practical terms, this type of abstention is usually applied regarding state criminal proceedings. A federal court generally should not enjoin such a proceeding, even if the criminal prosecution is based on an unconstitutional statute, unless the state prosecution presents a great and immediate danger of irreparable injury to the accused. n2 *Younger* abstention is based on equitable principles and federal-state comity, which is the federal respect for state proceedings and the belief that the federal system prospers when the states have the freedom to perform their separate functions in their separate ways. n3

[2] Required Elements

The *Younger* abstention doctrine holds that an injunction against state court criminal proceedings may be applied only in "extraordinary circumstances," which include a great and immediate danger of irreparable injury to the accused. To constitute a danger of irreparable injury that would justify federal court intervention in a pending state criminal prosecution, there must be a threat to the accused's federally protected rights that cannot be eliminated by the accused's defense. For example, a danger of irreparable injury exists if there is prosecutorial bad faith or repeated prosecutions to harass the accused; in such a case the federal court may enjoin the state proceedings. n1

Absent "extraordinary circumstances," *Younger* abstention is proper when all of the following three conditions have been met:

1. There are ongoing state judicial proceedings;

2. The proceedings implicate important state interests; and

3. The state proceedings provide the plaintiff with an adequate opportunity to raise the federal claims.

When these three prerequisites are met, *Younger* abstention may apply to state civil proceedings, n2 including state administrative proceedings. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 122.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Younger v. Harris, 401 U.S. 37, 45, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n3)Footnote 2. *Younger v. Harris, 401 U.S. 37, 43-54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n4)Footnote 3. *Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001)* (*Younger* abstention based on "our federalism" which relies in part on traditional equitable principles and in part on considerations of comity among dual judicial systems).

(n5)Footnote 1. *Younger v. Harris, 401 U.S. 37, 43-54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n6)Footnote 2. *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-17, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)* (because state's control of its own appeals processes is important, federal courts should defer to state courts to determine if state's appellate bonding rules deny judgment debtors due process under U.S. Constitution).

(n7)Footnote 3. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 625-628, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.66

§ 2.66 Certification by Federal Court as Alternative to Abstentionn*

[1] Use of Certification

The Supreme Court has indicated that certification is usually preferable to abstention whenever certification is available. The Supreme Court has explained that certification today covers territory once dominated by a deferral device called *Pullman* deferral. Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* deferral mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. The certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the state's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. n1

Most states have established certification procedures that enable a federal court to certify an issue and request an advisory opinion from the state's highest court. n2 Most of the states permit certification by the federal trial and appellate courts, n3 but some authorize certification only by the courts of appeal and the United States Supreme Court. n4 Certification permits federal courts to ask the highest court of a state directly to resolve a question of state law and to do so while the federal suit is pending. Like abstention, certification is appropriate in those circumstances when the state statute is susceptible to an interpretation that would eliminate the asserted constitutional issue and terminate the litigation. n5

Certification means that, if the state court's decision as to state law makes a federal constitutional judgment necessary, the federal issue will be resolved by a federal court. Conversely, abstention leads to the federal question being decided by a state court, which is subject to federal review only through the improbable vehicle of a writ of certiorari to the U.S. Supreme Court. Therefore, by certifying, the federal courts may refer the state law issues to state courts, while retaining the authority to rule on the federal constitutional questions that might come up, rather than ceding that responsibility to the state courts. n6 For a general discussion of certification of questions to determine state law, see Ch. 3, *Law Applied*.

[2] Factors That Determine Whether Certification Is Appropriate

In determining whether to exercise its discretion in favor of certification, the court should consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law, including statutes,

judicial decisions, and attorney general opinions, to provide a principled rather than conjectural conclusion. Also to be evaluated is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. Finally, a court must take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. n1

Certification is not appropriate when a state law is challenged on federal constitutional grounds, when the highest court of the state has not interpreted the relevant statute, or when a saving construction, which is one that would permit avoidance of the constitutional issue, is possible. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 122.07[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Arizonans for Official English v. Arizona, 520 U.S. 43, 75-76, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* ; *Allstate Ins. Co. v. Serio, 2001 U.S. App. LEXIS 16510, *24-*25 (2d Cir. July 23, 2001)* .

(n3)Footnote 2. *Virginia v. American Booksellers Ass'n, 484 U.S. 383, 395-396, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)* (United States Supreme Court certified issue to Virginia Supreme Court); *Lehman Bros. v. Schein, 416 U.S. 386, 389-392, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)* (use of certification procedure is within discretion of federal court).

(n4)Footnote 3. *See, e.g., Minn. Stat. § 480.061.*

(n5)Footnote 4. *See, e.g.,* N.Y. Comp. Codes Tit. 22, § 500.17(a).

(n6)Footnote 5. *Allstate Ins. Co. v. Serio, 2001 U.S. App. LEXIS 16510, *22 (2d Cir. July 23, 2001)* .

(n7)Footnote 6. *Allstate Ins. Co. v. Serio, 2001 U.S. App. LEXIS 16510, *25 (2d Cir. July 23, 2001)* .

(n8)Footnote 1. *Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-275 (5th Cir. 1976*).

(n9)Footnote 2. *Allstate Ins. Co. v. Serio, 2001 U.S. App. LEXIS 16510, *24 n.14 (2d Cir. July 23, 2001)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.67

§ 2.67 Abstention Proceduresn*

[1] Stay Pending State Court Resolution

When a federal court abstains, the court is not denying federal jurisdiction, but only postponing its exercise. n1 Following a determination to abstain from exercising its jurisdiction, the district court should not dismiss the pending federal action, unless it seeks equitable relief. Rather, when the claim requests monetary damages, the court should order a stay of the federal proceedings during the time the parties are pursuing appropriate state remedies for resolution of the state law issue. n2 However, this principle is flexible, and the abstaining federal court may dismiss the federal suit without prejudice if a dismissal is necessary to enable the plaintiff to invoke state court jurisdiction. n3

When a case is stayed in deference to state court proceedings, a party may restrict the state court suit to the relevant issues of state law. If the state court's adjudication does not eliminate the constitutional conflict, the plaintiff may then return to federal court for adjudication of the constitutional issue. n4 However, a party may choose to litigate all issues, including federal constitutional claims, in state court. A party who chooses this option, however, relinquishes the right to return to federal court. n5

[2] Dismissal

Most types of abstentions defer rather than an abdicate federal jurisdiction. n1 Consequently, abstaining courts are generally required to stay an action rather than dismiss it outright. n2 The primary exception to this rule is for *Younger* abstention, which forbids federal courts from interfering in certain pending state proceedings. n3 *Younger* abstention provides for complete dismissal of the federal suit and the presentation of all federal and state claims to the state court. n4

In other types of abstention, the abstaining court generally has the option to either stay or dismiss the federal proceeding. As one court has pointed out, whether the court grants a stay or a dismissal of the federal proceedings is not of crucial importance, because the purpose of the abstention is to obtain a state court decision that will bind the parties and have preclusive effect under the principles of res judicata. However, there may be some situations, when the preclusive effect of the state proceedings will not completely resolve the entire federal litigation, and in these situations a stay is preferable. As the Supreme Court has noted, a stay avoids unnecessary statutes of limitation issues. n5

When a federal court does dismiss a claim based on abstention, it should generally do so without prejudice. n6 For example, if the abstaining federal court dismisses rather than stays the proceeding in order to remove any possible obstacles to state court jurisdiction, the dismissal should be without prejudice so that any remaining federal claim may be raised in a federal forum after the state court has been given the opportunity to address the state-law questions in the case. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstention

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 122.07 (Matthew Bender 3d ed.).

(n2)Footnote 1. *England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411, 413, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* ; *see Johnson v. Collins Entertainment Co., 199 F.3d 710, 727-728 (4th Cir. 1999)* .

(n3)Footnote 2. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 730 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* (when equitable or other discretionary relief is being sought, federal courts may decline to exercise jurisdiction altogether by dismissing suit; but abstaining federal courts may only stay actions for damages and generally may not dismiss them).

(n4)Footnote 3. *England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411, 415-416, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* .

(n5)Footnote 4. *England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411, 415-416, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* .

(n6)Footnote 5. *England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 419, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* .

(n7)Footnote 1. *Arizonans for Official English v. Arizona, 520 U.S. 43, 75-76, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n8)Footnote 2. *See Johnson v. Collins Entertainment Co., 199 F.3d 710, 727-728 (4th Cir. 1999)* .

(n9)Footnote 3. *See § 2.65.*

(n10)Footnote 4. *Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000)* , *cert. denied, 531 U.S. 877 (2000)* .

(n11)Footnote 5. *Wilton v. Seven Falls Co., 515 U.S. 277, 283-5, 115 S. Ct. 2137, 2141, 132 L. Ed. 2d 214 (1995)* .

(n12)Footnote 6. *Bass v. Butler, 258 F.3d 176, 177 (3d Cir. 2001)* (federal district court dismissed federal action without prejudice in deference to appellate proceedings in state court).

(n13)Footnote 7. *Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88-89* & n.14, *95 S. Ct. 870, 43 L. Ed. 2d 32 (1975)* .

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1-2 Moore's Manual--Federal Practice and Procedure § 2.68

§ 2.68 Appeals of Decisions Related to Abstentionn*

[1] Appealability of Abstention Decisions

A district court's decision to abstain and stay a proceeding under *Pullman* abstention is a final decision and immediately appealable n1 for purposes of the final judgment rule. n2 The Supreme Court stated that the abstention order is reviewable because it effectively put the litigants out of federal court. n3 The Supreme Court has also held that a district court's order staying a federal proceeding under *Colorado River* is a final decision that is immediately appealable because the order put the litigants effectively out of court and surrenders federal jurisdiction to a state court. n4 Similarly, a remand order issued under *Burford* abstention is immediately appealable. n5 On the other hand, if a federal court denies a motion to abstain, the Supreme Court has stated that the order denying abstention is generally not appealable because it is an inherently tentative order that may be reheard by the ordering court. n6

[2] Standard of Review

The standard of review generally, but not uniformly, applied to a lower court's grant or denial of a motion to abstain is abuse of discretion, n1 except for orders of *Younger* abstention, which are reviewed de novo. n2 However, some courts have offered a rationale for de novo review of abstention decisions generally reasoning that the theories of state and federal law and the principles of federalism and comity are so intertwined in the decision whether to abstain that such determinations are elevated to a level of importance that requires de novo review. n3 Other courts have pointed out that the type of review is not crucial, and that there is little practical distinction between review for abuse of discretion and review de novo in abstention cases, because the district court's discretion to abstain is narrowed by a federal court's obligation to exercise its jurisdiction in all but the most extraordinary of cases. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstentionCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 122.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715* & n.2, *82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962)* .

(n3)Footnote 2. *See 28 U.S.C. § 1291.*

(n4)Footnote 3. *Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962)* .

(n5)Footnote 4. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 11* & n.11, *103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* .

(n6)Footnote 5. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 708, 116 S. Ct. 1712, 1728, 135 L. Ed. 2d 1 (1996)* .

(n7)Footnote 6. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n8)Footnote 1. *AAR Int'l, Inc. v. Nimellias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001)* , *cert. denied, 534 U.S. 995, 151 L. Ed. 2d 380 (2001)* (decision to abstain under *Colorado River* doctrine is reviewed for abuse of discretion); *Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 (11th Cir. 2000)* (decision to abstain reversed for abuse of discretion).

(n9)Footnote 2. *Joseph A. ex rel. Wolfe v. Ingram, 275 F.3d 1253, 1266-1267 (10th Cir. 2002)* (*Younger* abstention generally reviewed de novo); *Green v. City of Tuscon, 255 F.3d 1086, 1092-1093 (9th Cir. 2001)* (*Younger* abstention reviewed de novo); *Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000)* , *cert. denied, 531 U.S. 877 (2000)* (decision to abstain under *Younger* doctinre reviewed de novo).

(n10)Footnote 3. *MacDonald v. Village of Northport, 164 F.3d 964, 967-968 (6th Cir. 1999)* .

(n11)Footnote 4. *United States v. Kentucky, 252 F.3d 816, 825 (6th Cir. 2001)* .

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1-2 Moore's Manual--Federal Practice and Procedure .syn

§ Synopsis to Appendix 2: APPENDIX TO CHAPTER 2: FEDERAL RULES OF PROCEDURE FOR MULTIDISTRICT LITIGATION AND MULTICIRCUIT REVIEW

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TITLE I. RULES FOR MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407

1-2 Moore's Manual--Federal Practice and Procedure Rule 1.1

Rule 1.1. Definitions

(a) "Panel" means the members of the United States Judicial Panel on Multidistrict Litigation appointed by the Chief Justice of the United States pursuant to *28 U.S.C. § 1407*.

(b) "Chair" means the Chair of the Panel appointed by the Chief Justice of the United States pursuant to Section 1407, or the member of the Panel properly designated to act as Chair.

(c) "Clerk of the Panel" means the official that the Panel appoints to that position. The Clerk of the Panel shall perform such duties that the Panel or the Panel Executive delegates.

(d) "Electronic Case Filing (ECF)" refers to the Panel's automated system that receives and stores documents filed in electronic form. All attorneys filing pleadings with the Panel must do so using ECF. All pro se individuals are non-ECF users, unless the Panel orders otherwise.

(e) "MDL" means a multidistrict litigation docket which the Panel is either considering or has created by transferring cases to a transferee district for coordinated or consolidated pretrial proceedings pursuant to Section 1407.

(f) "Panel Executive" means the official appointed to act as the Panel's Chief Executive and Legal Officer. The Panel Executive may appoint, with the approval of the Panel, necessary deputies, clerical assistants and other employees to perform or assist in the performance of the duties of the Panel Executive. The Panel Executive, with the approval of the Panel, may make such delegations of authority as are necessary for the Panel's efficient operation.

(g) "Pleadings" means all papers, motions, responses, or replies of any kind filed with the Panel, including exhibits attached thereto, as well as all orders and notices that the Panel issues.

(h) "Tag-along action" refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407.

(i) "Transferee district" is the federal district court to which the Panel transfers an action pursuant to Section 1407, for inclusion in an MDL.

(j) "Transferor district" is the federal district court where an action was pending prior to its transfer pursuant to Section 1407, for inclusion in an MDL, and where the Panel may remand that action at or before the conclusion of pretrial proceedings.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 2.1

Rule 2.1. Rules and Practice

(a) Customary Practice. The Panel's customary practice shall govern, unless otherwise fixed by statute or these Rules.

(b) Failure to Comply with Rules. When a pleading does not comply with these Rules, the Clerk of the Panel may advise counsel of the deficiencies and set a date for full compliance. If counsel does not fully comply within the established time, the Clerk of the Panel shall file the non-complying pleading, but the Chair may thereafter order it stricken.

(c) Admission to Practice before the Panel. Every member in good standing of the Bar of any district court of the United States is entitled to practice before the Panel, provided, however, that he or she has established and maintains a CM/ECF account with any United States federal court. Any attorney of record in any action transferred under Section 1407 may continue to represent his or her client in any district court of the United States to which such action is transferred. Parties are not required to obtain local counsel.

(d) Pendency of Motion or Conditional Order. The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to *28 U.S.C. § 1407* does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court. An order to transfer or remand pursuant to *28 U.S.C. § 1407* shall be effective only upon its filing with the clerk of the transferee district court.

(e) Reassignment. If for any reason the transferee judge is unable to continue those responsibilities, the Panel shall make the reassignment of a new transferee judge.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 3.1

Rule 3.1. Electronic Records and Files; Copy Fees

(a) Electronic Record. Effective October 4, 2010, the official Panel record shall be the electronic file maintained on the Panel's servers. This record includes, but is not limited to, Panel pleadings, documents filed in paper and then scanned and made part of the electronic record, and Panel orders and notices filed. The official record also includes any documents or exhibits that may be impractical to scan. These documents and exhibits shall be kept in the Panel offices.

(b) Maintaining Records. Records and files generated prior to October 4, 2010, may be (i) maintained at the Panel offices, (ii) temporarily or permanently removed to such places at such times as the Clerk of the Panel or the Chair shall direct, or (iii) transferred whenever appropriate to the Federal Records Center.

(c) Fees. The Clerk of the Panel may charge fees for duplicating records and files, as prescribed by the Judicial Conference of the United States.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 3.2

Rule 3.2. ECF Users: Filing Requirements

(a) Form of Pleadings. This Rule applies to pleadings that ECF users file with the Panel.

(i) Each pleading shall bear the heading "Before the United States Judicial Panel on Multidistrict Litigation," the identification "MDL No. _____" and the descriptive title designated by the Panel. If the Panel has not yet designated a title, counsel shall use an appropriate description.

(ii) The final page of each pleading shall contain the name, address, telephone number, fax number and email address of the attorney or party designated to receive service of pleadings in the case, and the name of each party represented.

(iii) Each brief submitted with a motion and any response to it shall not exceed 20 pages, exclusive of exhibits. Each reply shall not exceed 10 pages and shall address arguments raised in the response(s). Absent exceptional circumstances and those set forth in Rule 6.1(d), the Panel will not grant motions to exceed page limits.

(iv) Each pleading shall be typed in size 12 point font (for both text and footnotes), double spaced (text only), in a letter size document (8 1/2 x 11 inch) with sequentially numbered pages.

(v) Each exhibit shall be separately numbered and clearly identified.

(vi) Proposed Panel orders shall not be submitted.

(b) Place of Filing. Counsel shall sign and verify all pleadings electronically in accordance with these Rules and the Panel's Administrative Policies and Procedures for Electronic Case Filing found at www.jpml.uscourts.gov. A pleading filed electronically constitutes a written document for the purpose of these Rules and the Federal Rules of Civil Procedure and is deemed the electronically signed original thereof. All pleadings, except by pro se litigants, shall conform with this Rule beginning on October 4, 2010.

(i) Pleadings shall not be transmitted directly to any Panel member.

(c) Attorney Registration. Only attorneys identified, or to be identified, pursuant to Rule 4.1, shall file pleadings. Each of these attorneys must register as a Panel CM/ECF user through www.jpml.uscourts.gov. Registration/possession of a CM/ECF account with any United States federal court shall be deemed consent to receive electronic service of all Panel orders and notices as well as electronic service of pleadings from other parties before the Panel.

(d) Courtesy Copy of Specified Pleadings. Counsel shall serve the Clerk of the Panel with a courtesy paper copy of the following pleadings within 1 business day of their filing: (i) a motion to transfer and its supporting brief, (ii) a response to a show cause order, (iii) a motion to vacate a conditional transfer order or a conditional remand order, (iv) any response or reply related to those pleadings and (v) a corporate disclosure statement. No courtesy copies of any other pleadings are required. The courtesy copy shall include all exhibits, shall be clearly marked "Courtesy Copy-Do Not File," shall contain the CM/ECF pleading number (if known), and shall be mailed or delivered to:

Clerk of the Panel
United States Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20002-8041

(e) Privacy Protections. The privacy protections contained in *Rule 5.2 of the Federal Rules of Civil Procedure* shall apply to all Panel filings.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 3.3

Rule 3.3. Non-ECF Users: Filing Requirements

(a) Definition of Non-ECF Users. Non-ECF users are all pro se individuals, unless the Panel orders otherwise. This Rule shall apply to all motions, responses and replies that non-ECF users file with the Panel.

(b) Form of Pleadings. Unless otherwise set forth in this Rule, the provisions of Rule 3.2 shall apply to non-ECF users.

(i) Each pleading shall be flat and unfolded; plainly written or typed in size 12 point font (for both text and footnotes), double spaced (text only), and printed single-sided on letter size (8 1/2 x 11 inch) white paper with sequentially numbered pages; and fastened at the top-left corner without side binding or front or back covers.

(ii) Each exhibit shall be separately numbered and clearly identified. Any exhibits exceeding a cumulative total of 50 pages shall be bound separately.

(c) Place of Filing. File an original and one copy of all pleadings with the Clerk of the Panel by mailing or delivering to:

Clerk of the Panel
United States Judicial Panel on Multidistrict Litigation

Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20002-8041

(i) Pleadings not exceeding a total of 10 pages, including exhibits, may be faxed to the Panel office.

(ii) The Clerk of the Panel shall endorse the date for filing on all pleadings submitted for filing.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 4.1

Rule 4.1. Service of Pleadings

(a) Proof of Service. The Panel's notice of electronic filing shall constitute service of pleadings. Registration/possession by counsel of a CM/ECF account with any United States federal court shall be deemed consent to receive electronic service of all pleadings. All pleadings shall contain a proof of service on all other parties in all involved actions. The proof of service shall indicate the name and manner of service. If a party is not represented by counsel, the proof of service shall indicate the name of the party and the party's last known address. The proof of service shall indicate why any person named as a party in a constituent complaint was not served with the Section 1407 pleading.

(b) Service Upon Transferor Court. The proof of service pertaining to motions for a transfer or remand pursuant to *28 U.S.C. § 1407* shall certify that counsel has transmitted a copy of the motion for filing to the clerk of each district court where an affected action is pending.

(c) Notice of Appearance. With 14 days after the filing of (i) notice of the filing of a motion to initiate transfer under Rule 6.2, (ii) the opposition to a CTO under Rule 7.1, (iii) a show cause order under Rules 8.1, (iv) the opposition to a CRO under Rule 10.2, or (v) a motion to remand under Rule 10.3, each party or designated attorney shall file a Notice of Appearance notifying the Clerk of the Panel of the name, address and email address of the attorney designated to file and receive service of all pleadings. Each party shall designate only one attorney. Any party not represented by counsel shall be served by mailing such pleadings to the party's last known address. Except in extraordinary circumstances, the Panel will not grant requests for an extension of time to file the Notice of Appearance.

(d) Liaison Counsel. If the transferee district court appoints liaison counsel, this Rule shall be satisfied by serving each party in each affected action and all liaison counsel. Liaison counsel shall receive copies of all Panel orders concerning their particular litigation and shall be responsible for distribution to the parties for whom he or she serves as liaison counsel.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 5.1

Rule 5.1. Corporate Disclosure Statement

(a) Requirements. Any nongovernmental corporate party shall file a statement listing (i) all its parent, subsidiary, and other affiliate corporations, (ii) any publicly held company that owns 10% or more of the party's stock, and (iii) any publicly owned corporation, not a party to the matter, that has a financial interest in the outcome of the matter (e.g., by reason of insurance, a franchise agreement, or an indemnity agreement) and describing the nature of that interest. A corporation is an affiliate for purposes of this Rule if it controls, is under the control of, or is under common control with a publicly owned corporation.

(b) Deadline. A party shall file the corporate disclosure statement within 14 days after issuance of a notice of the filing of a motion to transfer or remand, an order to show cause, or a motion to vacate a conditional transfer order or a conditional remand order.

(c) Updating. Each party must update its corporate disclosure statement to reflect any change in the information therein (i) until the matter before the Panel is decided, and (ii) within 14 days after issuance of a notice of the filing of any subsequent motion to transfer or remand, order to show cause, or motion to vacate a conditional transfer order or a conditional remand order in that docket.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 6.1

Rule 6.1. Motion Practice

(a) Application. This Rule governs all motions requesting Panel action generally. More specific provisions may apply to motions to transfer (Rule 6.2), miscellaneous motions (Rule 6.3), conditional transfer orders (Rule 7.1), show cause orders (Rule 8.1), conditional remand orders (Rule 10.2) and motions to remand (Rule 10.3).

(b) Form of Motions. All motions shall briefly describe the action or relief sought and shall include:

(i) a brief which concisely states the background of the litigation and movant's factual and legal contentions;

(ii) a numbered schedule providing

(A) the complete name of each action involved, listing the full name of each party included as such on the district court's docket sheet, not shortened by the use of references such as "et al." or "etc.";

(B) the district court and division where each action is pending;

(C) the civil action number of each action; and

(D) the name of the judge assigned each action, if known;

(iii) a proof of service providing

(A) a service list listing the full name of each party included on the district court's docket sheet and the complaint, including opt-in plaintiffs not listed on the docket sheet; and

(B) in actions where there are 25 or more plaintiffs listed on the docket sheet, list the first named plaintiff with the reference "et al." if all the plaintiffs are represented by the same attorney(s);

(iv) a copy of all complaints and docket sheets for all actions listed on the Schedule; and

(v) exhibits, if any, identified by number or letter and a descriptive title.

(c) Responses and Joinders. Any other party may file a response within 21 days after filing of a motion. Failure to respond to a motion shall be treated as that party's acquiescence to it. A joinder in a motion shall not add any action to that motion.

(d) Replies. The movant may file a reply within 7 days after the lapse of the time period for filing a response. Where a movant is replying to more than one response in opposition, the movant may file a consolidated reply with a limit of 20 pages.

(e) Alteration of Time Periods. The Clerk of the Panel has the discretion to shorten or enlarge the time periods set forth in this Rule as necessary.

(f) Notification of Developments. Counsel shall promptly notify the Clerk of the Panel of any development that would partially or completely moot any Panel matter.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 6.2

Rule 6.2. Motions to Transfer for Coordinated or Consolidated Pretrial Proceedings

(a) Initiation of Transfer. A party to an action may initiate proceedings to transfer under Section 1407 by filing a motion in accordance with these Rules. A copy of the motion shall be filed in each district court where the motion affects a pending action.

(b) Notice of Filing of Motion to Transfer. Upon receipt of a motion, the Clerk of the Panel shall issue a "Notice of Filing of Motion to Transfer" to the service list recipients. The Notice shall contain the following: the filing date of the motion, caption, MDL docket number, briefing schedule and pertinent Panel policies. After a motion is filed, the Clerk of the Panel shall consider any other pleading to be a response unless the pleading adds an action. The Clerk of the Panel may designate such a pleading as a motion, and distribute a briefing schedule applicable to all or some of the parties, as appropriate.

(c) Notice of Appearance. Within 14 days of issuance of a "Notice of the Filing of a Motion to Transfer," each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(d) Notice of Tag-along Actions. Any party or counsel in a new group of actions under consideration for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any tag-along actions in which that party is also named or in which that counsel appears.

(e) Interested Party Responses. Any party or counsel in one or more tag-along actions as well as amicus curiae may file a response to a pending motion to transfer. Such a pleading shall be deemed an Interested Party Response.

(f) Amendment to a Motion. Before amending a motion to transfer, a party shall first contact the Clerk of the Panel to ascertain whether such amendment is feasible and permissible considering the Panel's hearing schedule. Any such amendment shall be entitled "Amendment to Motion for Transfer," and shall clearly and specifically identify and describe the nature of the amendment.

(i) Where the amended motion includes new civil actions, the amending party shall file a "Schedule of Additional Actions" and a revised Proof of Service.

(ii) The Proof of Service shall state (A) that all new counsel have been served with a copy of the amendment and all previously-filed motion papers, and (B) that all counsel previously served with the original motion have been served with a copy of the amendment.

(iii) The Clerk of the Panel may designate the amendment with a different denomination (e.g., a notice of potential tag-along action(s)) and treatment.

(h) [g] Oral Argument. The Panel shall schedule oral arguments as needed and as set forth in Rule 11.1. [Editor's explanatory note: The bracketed subsection [g] designation has been inserted to indicate the probable intent of the Panel on Multidistrict Litigation.]

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1-2 Moore's Manual--Federal Practice and Procedure Rule 6.3

Rule 6.3. Motions for Miscellaneous Relief

(a) Definition. Motions for miscellaneous relief include, but are not limited to, requests for extensions of time, exemption from ECF requirements, page limit extensions, or expedited consideration of any motion.

(b) Panel Action. The Panel, through the Clerk, may act upon any motion for miscellaneous relief, at any time, without waiting for a response. A motion for extension of time to file a pleading or perform an act under these Rules must state specifically the revised date sought and must be filed before the deadline for filing the pleading or performing the act. Any party aggrieved by the Clerk of the Panel's action may file objections for consideration. Absent exceptional circumstances, the Panel will not grant any extensions of time to file a notice of opposition to either a conditional transfer order or a conditional remand order.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 7.1

Rule 7.1. Conditional Transfer Orders (CTO) for Tag-Along Actions

(a) Notification of Potential Tag-along. Any party or counsel in actions previously transferred under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears. The Panel has several options: (i) filing a CTO under Rule 7.1, (ii) filing a show cause order under Rule 8.1, or (iii) declining to act (Rule 7.1(b)(i)).

(b) Initiation of CTO. Upon learning of the pendency of a potential tag-along action, the Clerk of the Panel may enter a conditional order transferring that action to the previously designated transferee district court for the reasons expressed in the Panel's previous opinions and orders. The Clerk of the Panel shall serve this order on each party to the litigation but shall not send the order to the clerk of the transferee district court until 7 days after its entry.

(i) If the Clerk of the Panel determines that a potential tag-along action is not appropriate for inclusion in an MDL proceeding and does not enter a CTO, an involved party may move for its transfer pursuant to Rule 6.1.

(c) Notice of Opposition to CTO. Any party opposing the transfer shall file a notice of opposition with the Clerk of the Panel within the 7-day period. In such event, the Clerk of the Panel shall not transmit the transfer order to the clerk of the transferee district court, but shall notify the parties of the briefing schedule.

(d) Failure to Respond. Failure to respond to a CTO shall be treated as that party's acquiescence to it.

(e) Notice of Appearance. Within 14 days after the issuance of a CTO, each opposing party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(f) Motion to Vacate CTO. Within 14 days of the filing of its notice of opposition, the party opposing transfer shall file a motion to vacate the CTO and brief in support thereof. The Clerk of the Panel shall set the motion for the next appropriate hearing session. Failure to file and serve a motion and brief shall be treated as withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee district court.

(g) Notification of Developments. Parties to an action subject to a CTO shall notify the Clerk of the Panel if that action is no longer pending in its transferor district court.

(h) Effective Date of CTO. CTOs are effective when filed with the clerk of the transferee district court.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 7.2

Rule 7.2. Miscellaneous Provisions Concerning Tag-along Actions

(a) Potential Tag-alongs in Transferee Court. Potential tag-along actions filed in the transferee district do not require Panel action. A party should request assignment of such actions to the Section 1407 transferee judge in accordance with applicable local rules.

(b) Failure to Serve. Failure to serve one or more of the defendants in a potential tag-along action with the complaint and summons as required by *Rule 4 of the Federal Rules of Civil Procedure* does not preclude transfer of such action under Section 1407. Such failure, however, may constitute grounds for denying the proposed transfer where prejudice can be shown. The inability of the Clerk of the Panel to serve a CTO on all plaintiffs or defendants or their counsel shall not void the transfer but may constitute grounds for remand as to such party where prejudice is shown.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 8.1

Rule 8.1. Show Cause Orders

(a) Entry of Show Cause Order. When transfer of multidistrict litigation is being considered on the initiative of the Panel pursuant to *28 U.S.C. § 1407(c)(i)*, the Clerk of the Panel may enter an order directing the parties to show cause why a certain civil action or actions should not be transferred for coordinated or consolidated pretrial proceedings. Any party shall also promptly notify the Clerk of the Panel whenever they learn of any other federal district court actions which are similar to those which the show cause order encompasses.

(b) Notice of Appearance. Within 14 days of the issuance of an order to show cause, each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(c) Responses. Unless otherwise provided by order, any party may file a response within 21 days of the filing of the show cause order. Failure to respond to a show cause order shall be treated as that party's acquiescence to the Panel action.

(d) Replies. Within 7 days after the lapse of the time period for filing a response, any party may file a reply.

(e) Notification of Developments. Counsel shall promptly notify the Clerk of the Panel of any development that would partially or completely moot any matter subject to a show cause order.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 9.1

Rule 9.1. Transfer of Files; Notification Requirements

(a) Notice to Transferee Court Clerk. The Clerk of the Panel, via a notice of electronic filing, will notify the clerk of the transferee district whenever a Panel transfer order should be filed in the transferee district court. Upon receipt of an electronically certified copy of a Panel transfer order from the clerk of the transferee district, the clerk of the transferor district shall transmit the record of each transferred action to the transferee district and then, unless Rule 9.1(b) applies, close the transferred action in the transferor district.

(b) Retention of Claims. If the transfer order provides for the separation and simultaneous remand of any claim, cross-claim, counterclaim, or third-party claim, the clerk of the transferor district shall retain jurisdiction over any such claim and shall not close the action.

(c) Notice to Clerk of Panel. The clerk of the transferee district shall promptly provide the Clerk of the Panel with the civil action numbers assigned to all transferred actions and the identity of liaison counsel, if or when designated. The clerk of the transferee district shall also promptly notify the Clerk of the Panel of any dispositive ruling that terminates a transferred action.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 10.1

Rule 10.1. Termination and Remand

(a) Termination. Where the transferee district court terminates an action by valid order, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, the transferee district court clerk shall transmit a copy of that order to the Clerk of the Panel. The terminated action shall not be remanded to the transferor court and the transferee court shall retain the original files and records unless the transferee judge or the Panel directs otherwise.

(b) Initiation of Remand. Typically, the transferee judge recommends remand of an action, or a part of it, to the transferor court at any time by filing a suggestion of remand with the Panel. However, the Panel may remand an action or any separable claim, cross-claim, counterclaim or third-party claim within it, upon

(i) the transferee court's suggestion of remand,

(ii) the Panel's own initiative by entry of an order to show cause, a conditional remand order or other appropriate order, or

(iii) motion of any party.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 10.2

Rule 10.2. Conditional Remand Orders (CRO)

(a) Entering a CRO. Upon the suggestion of the transferee district judge or the Panel's own initiative, the Clerk of the Panel shall enter a conditional order remanding the action or actions to the transferor district court. The Clerk of the Panel shall serve this order on each party to the litigation but shall not send the order to the clerk of the transferee district court for 7-days from the entry thereof.

(i) The Panel may, on its own initiative, also enter an order that the parties show cause why a matter should not be remanded. Rule 8.1 applies to responses and replies with respect to such a show cause order.

(b) Notice of Opposition. Any party opposing the CRO shall file a notice of opposition with the Clerk of the Panel within the 7 day period. In such event, the Clerk of the Panel shall not transmit the remand order to the clerk of the transferee district court and shall notify the parties of the briefing schedule.

(c) Failure to Respond. Failure to respond to a CRO shall be treated as that party's acquiescence to it.

(d) Notice of Appearance. Within 14 days after the issuance of a CRO, each opposing party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(e) Motion to Vacate CRO. Within 14 days of the filing of its notice of opposition, the party opposing remand shall file a motion to vacate the CRO and brief in support thereof. The Clerk of the Panel shall set the motion for the next appropriate Panel hearing session. Failure to file and serve a motion and brief shall be treated as a withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee district court.

(f) Effective Date of CRO. CROs are not effective until filed with the clerk of the transferee district court.

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1-2 Moore's Manual--Federal Practice and Procedure Rule 10.3

Rule 10.3. Motion to Remand

(a) Requirements of the Motion. If the Clerk of the Panel does not enter a CRO, a party may file a motion to remand to the transferor court pursuant to these Rules. Because the Panel is reluctant to order a remand absent the suggestion of the transferee judge, the motion must include:

(i) An affidavit reciting whether the movant has requested a suggestion of remand and the judge's response, whether the parties have completed common discovery and other pretrial proceedings, and whether the parties have complied with all transferee court orders.

(ii) A copy of the transferee district court's final pretrial order, if entered.

(b) Filing Copy of Motion. Counsel shall file a copy of the motion to remand in the affected transferee district court.

(c) Notice of Appearance. Within 14 days of filing of a motion to remand, each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 10.4

Rule 10.4. Transfer of Files on Remand

(a) Designating the Record. Upon receipt of an order to remand from the Clerk of the Panel, the parties shall furnish forthwith to the transferee district clerk a stipulation or designation of the contents of the record or part thereof to be remanded.

(b) Transfer of Files. Upon receipt of an order to remand from the Clerk of the Panel, the transferee district shall transmit to the clerk of the transferor district the following concerning each remanded action:

(i) a copy of the individual docket sheet for each action remanded;

(ii) a copy of the master docket sheet, if applicable;

(iii) the entire file for each action remanded, as originally received from the transferor district and augmented as set out in this Rule;

(iv) a copy of the final pretrial order, if applicable; and

(v) a "record on remand" as designated by the parties in accordance with 10.4(a).

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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TITLE I. RULES FOR MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407

1-2 Moore's Manual--Federal Practice and Procedure Rule 11.1

Rule 11.1. Hearing Sessions and Oral Argument

(a) Schedule. The Panel shall schedule sessions for oral argument and consideration of other matters as desirable or necessary. The Chair shall determine the time, place and agenda for each hearing session. The Clerk of the Panel shall give appropriate notice to counsel for all parties. The Panel may continue its consideration of any scheduled matters.

(b) Oral Argument Statement. Any party affected by a motion may file a separate statement setting forth reasons why oral argument should, or need not, be heard. Such statements shall be captioned "Reasons Why Oral Argument Should [Need Not] Be Heard" and shall be limited to 2 pages.

(i) The parties affected by a motion to transfer may agree to waive oral argument. The Panel will take this into consideration in determining the need for oral argument.

(c) Hearing Session. The Panel shall not consider transfer or remand of any action pending in a federal district court when any party timely opposes such transfer or remand without first holding a hearing session for the presentation of oral argument. The Panel may dispense with oral argument if it determines that:

(i) the dispositive issue(s) have been authoritatively decided; or

(ii) the facts and legal arguments are adequately presented and oral argument would not significantly aid the decisional process.

Unless otherwise ordered, the Panel shall consider all other matters, such as a motion for reconsideration, upon the basis of the pleadings.

(d) Notification of Oral Argument. The Panel shall promptly notify counsel of those matters in which oral argument is scheduled, as well as those matters that the Panel will consider on the pleadings. The Clerk of the Panel shall require counsel to file and serve notice of their intent to either make or waive oral argument. Failure to do so shall be deemed a waiver of oral argument. If counsel does not attend oral argument, the matter shall not be rescheduled and that party's position shall be treated as submitted for decision on the basis of the pleadings filed.

(i) Absent Panel approval and for good cause shown, only those parties to actions who have filed a motion or written response to a motion or order shall be permitted to present oral argument.

(ii) The Panel will not receive oral testimony except upon notice, motion and an order expressly providing for it.

(e) Duty to Confer. Counsel in an action set for oral argument shall confer separately prior to that argument for the purpose of organizing their arguments and selecting representatives to present all views without duplication. Oral argument is a means for counsel to emphasize the key points of their arguments, and to update the Panel on any events since the conclusion of briefing.

(f) Time Limit for Oral Argument. Barring exceptional circumstances, the Panel shall allot a maximum of 20 minutes for oral argument in each matter. The time shall be divided among those with varying viewpoints. Counsel for the moving party or parties shall generally be heard first.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rules 12-15

Rules 12-15 [Reserved]

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 25.1

Rule 25.1. Definitions

The Panel promulgates these Rules pursuant to its authority under *28 U.S.C. § 2112(a)(3)* to provide a means for the random selection of one circuit court of appeals to hear consolidated petitions for review of agency decisions.

An "Agency" means an agency, board, commission or officer of the United States government, that has received two or more petitions for review in a circuit court of appeals to enjoin, set aside, suspend, modify or otherwise review or enforce an action.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 25.2

Rule 25.2. Filing of Notices

(a) Submitting Notice. An affected agency shall submit a notice of multicircuit petitions for review pursuant to *28 U.S.C. § 2112(a)(3)* to the Clerk of the Panel by electronic means in the manner these Rules require and in accordance with the Panel's Administrative Policies and Procedures for Electronic Case Filing, except that the portion of Rule 3.2(d) requiring a courtesy copy is suspended in its entirety.

(b) Accompaniments to Notices. All notices of multicircuit petitions for review shall include:

(i) a copy of each involved petition for review as the petition for review is defined in *28 U.S.C. § 2112(a)(2)*; and

(ii) a schedule giving

(A) the date of the relevant agency order;

(B) the case name of each petition for review involved;

(C) the circuit court of appeals in which each petition for review is pending;

(D) the appellate docket number of each petition for review;

(E) the date of filing by the court of appeals of each petition for review; and

(F) the date of receipt by the agency of each petition for review.

(c) Scope of Notice. All notices of multicircuit petitions for review shall embrace exclusively petitions for review filed in the courts of appeals within 10-days after issuance of an agency order and received by the affected agency from the petitioners within that 10 day period.

(d) Filing at the Panel. The Clerk of the Panel shall file the notice of multicircuit petitions for review and endorse thereon the date of filing.

(e) Filing with Each Circuit Clerk. The affected agency shall file copies of notices of multicircuit petitions for review with the clerk of each circuit court of appeals in which a petition for review is pending.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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TITLE II. RULES FOR MULTICIRCUIT PETITIONS FOR REVIEW UNDER 28 U.S.C. § 2112(a)(3)

1-2 Moore's Manual--Federal Practice and Procedure Rule 25.3

Rule 25.3. Service of Notices

(a) Proof of Service. Notices of multicircuit petitions for review shall include proof of service on all other parties in the petitions for review included in the notice. *Rule 25 of the Federal Rules of Appellate Procedure* governs service and proof of service. The proof of service shall state the name, address and email address of each person served and shall indicate the party represented by each and the manner in which service was accomplished on each party. If a party is not represented by counsel, the proof of service shall indicate the name of the party and his or her last known address. The affected party shall submit proof of service for filing with the Clerk of the Panel and shall send copies thereof to each person included within the proof of service.

(b) Service on Clerk of Circuit. The proof of service pertaining to notices of multicircuit petitions for review shall certify the affected party has mailed or delivered copies of the notices to the clerk of each circuit court of appeals in which a petition for review is pending that is included in the notice. The Clerk shall file the notice with the circuit court.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 25.4

Rule 25.4. Form of Notices; Place of Filing

(a) Unless otherwise provided here, Rule 3.2 governs the form of a notice of multicircuit petitions for review. Each notice shall bear the heading "Notice to the United States Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review," followed by a brief caption identifying the involved agency, the relevant agency order, and the date of the order.

(b) Rule 3.2(b) and (c) govern the manner of filing a notice of multicircuit petitions for review.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 25.5

Rule 25.5. Random Selection

(a) Selection Process. Upon filing a notice of multicircuit petitions for review, the Clerk of the Panel shall randomly select a circuit court of appeals from a drum containing an entry for each circuit wherein a constituent petition for review is pending. Multiple petitions for review pending in a single circuit shall be allotted only a single entry in the drum. A designated deputy other than the random selector shall witness the random selection. Thereafter, an order on behalf of the Panel shall be issued, signed by the random selector and the witness,

(i) consolidating the petitions for review in the court of appeals for the circuit that was randomly selected; and

(ii) designating that circuit as the one in which the record is to be filed pursuant to *Rules 16* and *17 of the Federal Rules of Appellate Procedure*.

(b) Effective Date. A consolidation of petitions for review shall be effective when the Clerk of the Panel enters the consolidation order.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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1-2 Moore's Manual--Federal Practice and Procedure Rule 25.6

Rule 25.6. Service of Panel Consolidation Order

(a) The Clerk of the Panel shall serve the Panel's consolidation order on the affected agency through the individual or individuals, as identified in Rule 25.2(a), who submitted the notice of multicircuit petitions for review on behalf of the agency.

(b) That individual or individuals, or anyone else designated by the agency, shall promptly serve the Panel's consolidation order on all other parties in all petitions for review included in the Panel's consolidation order, and shall promptly submit a proof of that service to the Clerk of the Panel. Rule 25.3 governs service.

(c) The Clerk of the Panel shall serve the Panel's consolidation order on the clerks of all circuit courts of appeals that were among the candidates for the Panel's random selection.

* For a complete discussion of Multidistrict Litigation, *see* 17 Moore's Federal Practice, Ch. 112 (Matthew Bender 3d ed.).

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§ 3.02 Statutes Governing Law Applicable in Federal Court

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1-3 Moore's Manual--Federal Practice and Procedure § 3.01

§ 3.01 Source of Principles Governing Law Applicable in Dual Court Systemn*

The United States Constitution is the ultimate source governing the substantive law to be applied in the dual system of federal and state courts. n1 Article VI of the Constitution, referred to as the "*Supremacy Clause*", makes the laws of the United States the ultimate law of the land and requires the courts of every state to apply those laws, n2 even if state law is to the contrary. n2.1 This rule is supported by the fact that the drafters of the Constitution intended originally that state courts would serve as trial courts for the adjudication of federal law issues, and state courts would be augmented only by federal courts later specifically designated by Congress. n2.2 Thus, it is Congress and the courts established by Congress that have the authority to specify which federal and state substantive and procedural law is to be applied to federal issues decided in both state and federal courts. n3 The selection of the substantive and procedural law that is to be applied in the federal and state courts represents a balancing of the conflicting interests of federal powers and states' rights. n4

Through its constitutional authority, Congress has enacted a statutory scheme that regulates which law controls in cases involving federal issues. n5 Even though the state courts generally have the authority to decide federal law issues concurrently with federal courts, n6 Congress has the constitutional power to deny state courts jurisdiction over particular federal law issues; for such issues, Congress grants the federal courts exclusive jurisdiction. n7

Alternatively, Congress may provide that a federal law issue may be decided only in a state court. For example, the federal Telephone Consumer Protection Act n8 explicitly gives exclusive jurisdiction to state courts to hear cases based on that federal statute. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie Doctrine

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 120.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *U.S. Const., Art. VI, Cl. 2* (judges of every state are bound by Constitution and laws of United States).

(n3)Footnote 2. *Harper v. PSC, 396 F.3d 348, 355 (4th Cir. 2005)* .

(n4)Footnote 2.1. *See Gibson v. American Bankers Ins. Co., 289 F.3d 943, 948-949 (6th Cir. 2003)* .

(n5)Footnote 2.2. *Palmore v. United States, 411 U.S. 389, 401-402, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973)* .

(n6)Footnote 3. *Lear, Inc. v. Adkins, 395 U.S. 653, 675-676, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* (state court to decide federal issue of validity of patent in state breach of contract action); *see 28 U.S.C. § 1652* (Rules of Decision Act, discussed in *§ 3.02*).

(n7)Footnote 4. *See, e.g., Mercado v. Division of N.Y. State Police, 989 F. Supp. 521, 522 (S.D.N.Y. 1998)* (applying state law privilege in federal Title VII action against state police).

(n8)Footnote 5. *See 28 U.S.C. § 1652* (Rules of Decision Act).

(n9)Footnote 6. *See* Ch. 2, *Concurrent and Conflicting Jurisdiction*.

(n10)Footnote 7. *28 U.S.C. § 1346(b)* (district courts have exclusive jurisdiction of civil actions on claims against the United States government for money damages for injury or loss of property, or personal injury or death caused by government employee); *see Gulf Offshore Co., Div. v. Mobil Oil Corp., 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* (Congress may allocate jurisdiction to federal or state court).

(n11)Footnote 8. *47 U.S.C. § 227*.

(n12)Footnote 9. *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.02

§ 3.02 Statutes Governing Law Applicable in Federal Courtn*

[1] Rules of Decision Act Governs Applicability of Substantive Law

Under the "Rules of Decision Act," the laws of each of the states operate as the rules of decision in civil actions in the courts of the United States, except when the federal Constitution, federal treaties, or acts of Congress otherwise require or provide. n1 In other words, when the Constitution, laws, and treaties of the United States are silent regarding substantive law, state laws apply in civil actions in federal courts. n2

One of the primary effects of the Rules of Decision Act is that in a diversity case, which by definition arises under state law, the federal district court must apply state substantive law, including state statutory and common law. n3 However, in the exercise of its authority granted by Congress in the Rules Enabling Act, n4 the Supreme Court has prescribed rules of procedure for federal district court cases. n5 Therefore, in both diversity cases and federal question cases, the federal court must apply federal procedural rules. n6

[2] Rules Enabling Act Governs Applicability of Procedural Law

Under the Rules Enabling Act, the Supreme Court has the power to prescribe general rules of practice and procedure for cases in the United States district courts and courts of appeals. n1 However, such rules may not abridge, enlarge, or modify any substantive right. n1.1 Once rules are promulgated and become effective, all other procedural laws in conflict with the rules have no force or effect. n2 Pursuant to this authority, the Supreme Court has actually prescribedextensive federal rules of procedure for federal district court cases and circuit court of appeals cases. n3

Read together, n4 the Rules of Decision Act n5 and the Rules Enabling Act provide that in a diversity case the federal district court must apply state substantive law and federal procedural rules. n6 In other words, if a particular matter is covered by the Federal Rules of Civil Procedure, the federal procedural rule on point that does not abridge, enlarge, or modify any substantive right, and is in accordance with the Constitution, applies to the matter despite any contrary state law. n7 Furthermore, because Congress has delegated the power to enact and amend federal rules to the Supreme Court, subject to congressional review, n8 the federal district courts and appellate courts do not have authority to revise them by judicial mandate. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit Statute

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 124.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1652*.

(n3)Footnote 2. *See Keesee v. Bank of Am., NA, 371 F. Supp. 2d 1370, 1373 (M.D. Fla. 2005)* .

(n4)Footnote 3. *Hanna v. Plumer, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 5. *Sain v. City of Bend, 309 F.3d 1134, 1137 (9th Cir. 2002)* .

(n7)Footnote 6. *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 750 (7th Cir. 2005)* .

(n8)Footnote 1. *28 U.S.C. § 2072(a)*.

(n9)Footnote 1.1. *28 U.S.C. § 2072*; *see Sain v. City of Bend, 309 F.3d 1134, 1137 (9th Cir. 2002)* .

(n10)Footnote 2. *28 U.S.C. § 2072(b)*.

(n11)Footnote 3. *See 28 U.S.C. § 2072*; *see also Fed. R. Civ. P. 1 et seq.*; *Fed. R. Evid. 101 et seq.*; *Fed. R. App. P. 1 et seq*.

(n12)Footnote 4. *See Huff v. Shumate, 360 F. Supp. 2d 1197, 1201 (D. Wyo. 2004)* .

(n13)Footnote 5. *See* [1], *above*.

(n14)Footnote 6. *Hanna v. Plumer, 380 U.S. 460, 470-471, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n15)Footnote 7. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 142 (2d Cir. 2008)* .

(n16)Footnote 8. *See 28 U.S.C. §§ 2072, 2074*; *see also Gaddis v. United States, 381 F.3d 444, 467 (5th Cir. 2004)* .

(n17)Footnote 9. *United States v. Glover, 242 F.3d 333, 335 (6th Cir. 2001)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.03

§ 3.03 Distinction Between Substantive and Procedural Lawn*

As discussed above, n1 whether state law or federal law applies may depend on whether the matter is categorized as substantive or procedural. Generally, if a law controls the method or the manner of the presentation of a claim, it is procedural rather than substantive. n2 On the other hand, if the law specifies the elements necessary to determine the outcome of the claim, the law is substantive. n3 In practice, the difference between substantive and procedural matters is more difficult to determine in some cases. n4 Therefore, the United States Supreme Court has developed three inquiries to determine whether federal or state law governs a particular issue in a diversity case when there is a conflict between the two and it is difficult to determine if the issue is substantive or procedural: n5

1. If a specific federal procedural rule or statute is applicable to a situation, it must control the issue. n6

2. If no specific law is applicable to a particular situation, the federal law controls when there is a conflict between the state and federal law. n7 However, if there is no conflict, the state law controls if the state law is outcome determinative. n8

3. Even if an applicable state law is outcome-determinative, the federal court may apply a general federal law if on balance it promotes an overriding federal interest. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawApplicability

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 124.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 3.02*.

(n3)Footnote 2. *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n4)Footnote 3. *McKethan v. Texas Farm Bureau, 996 F.2d 734, 741-742 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1046 (1994)* .

(n5)Footnote 4. *Gasperini v. Center for Humanities, 518 U.S. 415, 434-439, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (determining whether law should be classified as substantive or procedural may be challenging task).

(n6)Footnote 5. *See Keesee v. Bank of Am., NA, 371 F. Supp. 2d 1370, 1372-1373 (M.D. Fla. 2005)* .

(n7)Footnote 6. *Hanna v. Plumer, 380 U.S. 460, 470-471, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *see § 3.22[2]*.

(n8)Footnote 7. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 142 (2d Cir. 2008)* .

(n9)Footnote 8. *Guaranty Trust Co. v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* ; *see Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090-1093 (9th Cir. 2001)* ; *see § 3.22[3]*.

(n10)Footnote 9. *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-539, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* (overriding federal interest may overcome outcome-determinative state law); *see § 3.22[4]*.

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 3 LAW APPLIED
PART I. FUNDAMENTALS CONTROLLING WHETHER STATE OR FEDERAL LAW APPLIES IN PARTICULAR COURT SYSTEM

1-3 Moore's Manual--Federal Practice and Procedure § 3.04

§ 3.04 Creation of Federal Common Lawn*

[1] Nature of Federal Common Law

There is no general federal common law that controls substantive determinations, and the federal courts may not apply a uniform federal common law on all issues. n1 The court may not apply a general federal common law even if the court believes that a federal common law would be appropriate to resolve a particular situation. n2 This principle has been announced by the Supreme Court because, under the *Erie* doctrine, the law applied in federal court must be either the state law of the forum (in diversity cases) or federal statutory or constitutional law (in federal question cases). n3 However, federal courts may create federal common law and displace state created rules in very limited circumstances that require a special federal rule. n4 This may occur when the proponent establishes that the dispute implicates a uniquely federal interest and that state law conflicts with a significant federal policy or interest. n5 For example, the Supreme Court has held that one of the federal common-law "enclaves" concerns the legal principles governing the nation's relationship with other nations in the international community. n6 These areas of federal common law are listed in [2], *below*.

[2] Areas of Federal Common Law

The Supreme Court has held that the federal courts may create and apply federal common law in certain limited areas to effectuate congressional intent n1 or protect uniquely federal interests. n2 Consequently, federal courts have developed and applied federal common law in the following specific areas:

1. The nation's relationship with other nations. n3 For example, the long-standing federal common-law principle, the "act of state" doctrine, precludes courts from questioning the legality of actions that a foreign government has taken within its own borders. n4

2. Disputes between states. n5 In the absence of a relevant federal statute, the Supreme Court has original, exclusive jurisdiction over suits between states, n6 and it must apply federal common law because it would be unfair to apply either states' laws to resolve the dispute. The most typical example of this type is the federal common law of water rights between bordering states. n7

3. Litigation regarding a federal statute that requires national uniformity of application. n8 Thus, federal courts may create "interstitial federal common law" n9 provided that Congress has enacted a general regulatory scheme and intends that the federal courts create coherent national substantive standards to fill gaps necessary to effectuate the scheme, such as for ERISA litigation. n10

4. Enforcement of an important constitutional right when there is an absence of a constitutional or statutory remedy for violation of the constitutional right. n11

5. Federal proprietary interests, such as debts owed to the United States. n12 Proprietary interests are "uniquely federal interests" so committed by the Constitution and federal statute that the federal law preempts and replaces state law where necessary. n13 Federal proprietary interests requiring the application of federal common law include interests such as: (1) the title the United States holds to property; n14 (2) the right of the United States to bring tort actions; n15 (3) the rights and obligations of the United States under its contracts, especially when the contracts relate directly to federal regulatory programs, n16 and (4) the rights and duties of the United States regarding commercial paper that it issues or holds. n17

6. Disputes based on admiralty and maritime jurisdiction. n18 Because the Constitution grants federal courts jurisdiction over admiralty and maritime cases, regardless of the amount in controversy, diversity of citizenship, or whether the controversy arises under a federal statute, n19 the Supreme Court has held that federal courts have the authority to develop and apply federal common law to admiralty and maritime cases. n20

7. Indian relations and land rights. Under the United States Constitution, Indian relations fall within the exclusive province of federal law, and numerous Supreme Court decisions have recognized that Indians have federal common-law rights in aboriginal lands. n21

[3] Adoption of State Law As Federal Common Law

In certain cases when there are gaps in federal statutory schemes, n1 the federal court may borrow, incorporate, or adopt state law to provide the rule of decision, and thenincorporate that rule into the federal common law. n2 In developing federal common law, federal courts may borrow from state law except in two situations. Courts may not borrow from state common law if: (1) the case involves an area of uniquely federal interest where there is a demonstrated need for a uniform national rule; n3 or (2) there is a significant conflict between state law and some discernible federal policy. n4

On the other hand, borrowing state law is particularly appropriate in those areas in which private parties have entered legal relationships with the expectation that state law would govern their rights and obligations. These are areas of the law in which federal courts have given traditional deference to state law, for example, in litigation regarding the corporate entity n5 and family and domestic relationships. n6

When necessary, federal courts may also borrow rules that control litigation. For example, when Congress has not expressly provided a statute of limitation governing actions based on a federal statute, federal courts may apply the most closely analogous state statute, unless application of the state statute would be inconsistent with underlying federal policies. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawApplicabilityCivil ProcedureFederal & State InterrelationshipsFederal Common LawInterstitial LawCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.40 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 691-692, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* (Supreme Court noted that there is no federal common law of contracts, even for litigation in federal court involving federal government contracts).

(n3)Footnote 2. *Ileto v. Glock Inc., 349 F.3d 1191, 1218 (9th Cir. 2003)* ; *Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 635 (7th Cir. 2002)* .

(n4)Footnote 3. *See Illinois v. City of Milwaukee, 406 U.S. 91, 107, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* (enactment of new federal statutes and new federal regulations supercede any federal common law that may have developed).

(n5)Footnote 4. *O'Melveny & Myers v. FDIC, 512 U.S. 79, 87, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994)* .

(n6)Footnote 5. *Atherton v. FDIC, 519 U.S. 213, 218-224, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997)* .

(n7)Footnote 6. *See Sosa v. Alvarez-Machain, 542 U.S. 692, 728-730, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)* .

(n8)Footnote 1. *See Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 698, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* (when federal Constitution or statute is not controlling, federal courts generally required to adopt ready made body of state law as federal rule of decision, unless Congress clearly intends otherwise); *Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002)* (Congress intended to create federal common law regarding ERISA).

(n9)Footnote 2. *Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 615, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997)* .

(n10)Footnote 3. *Bettis v. Islamic Republic of Iran, 315 F.3d 325, 332-333 (D.C. Cir. 2003)* (federal common law regarding Foreign Sovereign Immunities Act).

(n11)Footnote 4. *Patrickson v. Dole Food Co., 251 F.3d 795, 799 (9th Cir. 2001)* .

(n12)Footnote 5. *Illinois v. City of Milwaukee, 406 U.S. 91, 103, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* (suit to abate pollution of interstate waters).

(n13)Footnote 6. *28 U.S.C. § 1251(a).*

(n14)Footnote 7. *See Virginia v. Maryland, 540 U.S. 56, 74-75, 124 S. Ct. 598, 157 L. Ed. 2d 461 (2003)* .

(n15)Footnote 8. *De Jesus Nazario v. Rodriguez, 554 F.3d 196, 205 (1st Cir. 2009)* (uniformity required for application of civil rights statutes); *United States v. General Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005)* (uniformity required for application of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)).

(n16)Footnote 9. *Sosa v. Alvarez Machain, 542 U.S. 692, 726-728, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)* .

(n17)Footnote 10. *See Admin. Comm. of the Wal Mart Stores, Inc. v. Shank, 500 F.3d 834, 837 (8th Cir. 2007)* ; *Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323, 329-330 (5th Cir. 2005)* .

(n18)Footnote 11. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (recognizing cause of action for damages to enforce *Fourth Amendment* prohibition of unreasonable searches and seizures).

(n19)Footnote 12. *West Virginia v. United States, 479 U.S. 305, 308-309, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987)* (state's liability for prejudgment interest on debt owed to United States must be determined by federal common-law rule).

(n20)Footnote 13. *Boyle v. United Techs. Corp. 487 U.S. 500, 504-506, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988)* .

(n21)Footnote 14. *California ex rel State Lands Comm. v. United States, 457 U.S. 273, 278-283, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982)* .

(n22)Footnote 15. *United States v. Standard Oil Co., 332 U.S. 301, 305-311, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947)* .

(n23)Footnote 16. *West Virginia v. United States, 479 U.S. 305, 308-313, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987)* .

(n24)Footnote 17. *Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367, 63 S. Ct. 573, 87 L. Ed. 838 (1943)* .

(n25)Footnote 18. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 22-24, 125 S. Ct. 385, 160 L. Ed. 2d 283(2004)* .

(n26)Footnote 19. *U.S. Const., Art. III. § 2, Cl. 3.*

(n27)Footnote 20. *Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 899 (11th Cir. 2004)* .

(n28)Footnote 21. *See, e.g., City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 207-210, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005)* .

(n29)Footnote 1. *Barrer v. Chase Bank United States, N.A., 566 F.3d 883, 892 (9th Cir. 2009)* .

(n30)Footnote 2. *See Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 691-692, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* .

(n31)Footnote 3. *Zatuchni v. Sec'y of HHS, 516 F.3d 1312, 1330 (Fed. Cir. 2008)* (application of Vaccine Act under uniform federal rule rather than by adopting state law).

(n32)Footnote 4. *In re Pharm. Indus. Average Wholesale Price Litig. v. Abbott Labs., 339 F. Supp. 2d 165, 177 (D. Mass. 2004)* ; *see Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 691-692, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* .

(n33)Footnote 5. *See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* ; *United States v. Gen. Battery Corp., 423 F.3d 294, 314 (3d Cir. 2005)* .

(n34)Footnote 6. *See Manning v. Hayes, 212 F.3d 866, 872 (5th Cir. 2000)* ; *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris, 217 F. Supp. 2d 759, 761 (E.D. Tex. 2004)* .

(n35)Footnote 7. *Zubi v. AT&T Corp. 219 F.3d 220, 226 (3d Cir. 2000)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 3 LAW APPLIED
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1-3 Moore's Manual--Federal Practice and Procedure § 3.05

§ 3.05 Summary of Law Applicable in Federal Courtn*

Ordinarily, federal substantive law would apply at all times in federal court because of the *Supremacy Clause*, which provides that the Constitution, the statutes and laws enacted by Congress pursuant to the Constitution, and all federal treaties are the supreme law of the land and that the federal and state courts located in every State are bound by the Constitution, statutes, and treaties. n1 However, pursuant to its constitutional authority, Congress has enacted the Rules of Decision Act, which provides that in cases in which the laws of the states apply, a federal court must apply state substantive law as the rule of decision in the courts of the United States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide. n2 Furthermore, Congress explicitly made state law applicable in federal court by providing for diversity jurisdiction, n3 which by definition arises under state law in actions between citizens of different states. n4 The bulk of this Chapter is a discussion in PART II of the various circumstances in diversity cases which require the application of either federal or state law. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawSupremacy ClauseSupreme Law of the Land

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See U.S. Const., Art. VI, Cl. 2.*

(n3)Footnote 2. *28 U.S.C. § 1652*; *see § 3.02[1].*

(n4)Footnote 3. *See 28 U.S.C. § 1332.*

(n5)Footnote 4. *Hanna v. Plumer, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* (federal district court must apply state substantive law, including state statutory law and state common law, in diversity cases).

(n6)Footnote 5. *See § 3.20* et seq.

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PART I Judicial Powers; Law Applied; Evidence
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1-3 Moore's Manual--Federal Practice and Procedure § 3.06

§ 3.06 Law Applicable in State Courtn*

[1] State Law Claims

The courts of each state have jurisdiction over all claims arising from the law of the state, whether statutory or common law. The applicable law of decision for such claims is the statutes and common law of the state, n1 except when there are "choice of law" issues resulting because more than one state has sufficient "contacts" with the claims or parties. Choice of law analysis determines which state law applies when two or more states are involved. n2

In the dual court system, state courts are not the only courts that have power to decide claims based on state law. Federal courts have concurrent jurisdiction over claims arising from state law in the limited circumstances of "diversity jurisdiction," "supplemental jurisdiction," or "removal jurisdiction," and state law claims may be filed or heard in federal courts in those cases. A federal court has diversity jurisdiction over a claim, even though it arises under state law, if the claim is between citizens of different states and the amount in controversy exceeds $75,000. n5 A federal court has supplemental jurisdiction over a state law claim when the federal court already has original jurisdiction of the case based on a federal question or on diversity, and the state law claim is part of the same case or controversy. n6 It should also be noted that a case based on a state law may be removed to federal court if the federal court would have had jurisdiction over the case originally based on diversity of citizenship. n7 For a discussion of issues of the subject matter jurisdiction in the federal-state dual court system, see Ch. 2, *Concurrent and Conflicting Jurisdiction*.

[2] Federal Law Claims

[a] Obligation of State Court to Hear Federal Claim

State courts are presumed to have concurrent jurisdiction with federal courts to hearall claims arising under federal law; this means that state courts are competent to adjudicate federal law claims unless the Constitution, federal statutes, or case precedent clearly give exclusive jurisdiction to the federal courts for a particular claim. Furthermore, when a state court does have concurrent or exclusive jurisdiction over a federal claim, the *Supremacy Clause of the federal Constitution* n1 provides that the state court has the obligation to hear and decide all federal claims. n2

The presumption of concurrent state and federal jurisdiction to hear federal claims is so strong that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts. n3 Consequently, a state court may decline to exercise its jurisdiction over a federal claim for one or more of the following reasons:

1. A state law limits the state court's subject-matter jurisdiction and the subject matter of the federal claim is outside the state court's jurisdiction. n4 However, a state court may not justify its refusal to entertain a federal claim merely because it characterizes a rule as jurisdictional. The state court need not hear the federal claim only if the rule is truly jurisdictional, n5 which means that the rule must affect the court's power over the parties and the court's competence over the subject matter. n6

2. A state rule of judicial administration, such as the state courts' rules of procedure, permits the court to decline to adjudicate a federal claim, provided that the procedural rule does not discriminate against federal claims, n7 and is not preempted by federal law. n8

3. The existence of a more convenient forum in the federal court, provided that the state court also qualifies as an inconvenient forum under the doctrine of forum non conveniens. n9

4. A state law provides for discretionary dismissal of both federal and state claims when neither the plaintiff nor the defendant is a resident of the forum state. n10

Under these exceptions to the requirement that a state court must exercise its jurisdiction to hear federal claims, a State cannot simply refuse to entertain a federal claim based on a policy disagreement. n11

[b] Application of Federal Law in State Court

A state court adjudicating a claim based on federal law must apply federal substantive law, n12 including any federal common law developed in the area, n13 even when the federal claim arises in the course of a lawsuit primarily based on state law. For example, a state court was required to apply federal patent law to decide the the validity of a patent when that issue arose in a case that was otherwise based on a state breach of contract claim. n14

In state court litigation of a federal claim, federal law governs the elements and defenses. Thus, federal law controls the proper measure of damages and the availability of prejudgment interest. n15 A state court may not apply a state law defense to a federal claim that the parties could not raise in federal court, because to do so would alter federal law by denying relief on the merits of the federal claim. n16 In other words, federal rights could be defeated if state courts were permitted to determine what defenses may be raised to claims based on federal statutes. n17 The *Supremacy Clause* also prohibits state courts from refusing to apply federal law to a federal claim on the grounds that the federal law conflicts with state law. n18

The state court may apply state procedural rules when adjudicating a federal claim, provided that those rules do not have the effect of denying substantial rights under the federal law. n19 For example, if federal law provides for the right to a jury trial, the statecourt may not deny that benefit by applying contrary local procedure permitting disposition of the issues by the court alone. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureFederal & State InterrelationshipsChoice of

LawGovernmental InterestsCivil ProcedureFederal & State InterrelationshipsChoice of LawSignificant Relationships

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 120.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Orion Ref. Corp. v. Fluor Enters., 319 B.R. 480, 488 (E.D. La. 2004)* .

(n3)Footnote 2. *See Reicher v. Berkshire Life Ins. Co. of Am., 360 F.3d 1 (1st Cir. 2004)* .

(n4)Footnote 5. *See 28 U.S.C. § 1332*; *see also State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-531, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* .

(n5)Footnote 6. *See 28 U.S.C. § 1367*.

(n6)Footnote 7. *See 28 U.S.C. § 1441(a)*.

(n7)Footnote 1. *U.S. Const., Art. VI, cl. 2*.

(n8)Footnote 2. *Miles v. Illinois C. R. Co., 315 U.S. 698, 703, 62 S. Ct. 827, 86 L. Ed. 1129 (1942)* ; *Miles v. Illinois C. R. Co., 315 U.S. 698, 703, 62 S. Ct. 827, 86 L. Ed. 1129 (1942)* ; *see* Ch. 2, *Concurrent and Conflicting Jurisdiction*.

(n9)Footnote 3. *Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 928 (2009)* .

(n10)Footnote 4. *Herb v. Pitcairn, 324 U.S. 117, 121, 65 S. Ct. 459, 89 L. Ed. 789 (1945)* (subject matter of action outside court's territorial jurisdiction).

(n11)Footnote 5. *Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 928 (2009)* (jurisdictional rule may not be used to dissociate state judicial system from federal law because of state's disagreement with content of federal law or state's refusal to recognize superior authority of federal law).

(n12)Footnote 6. *Howlett v. Rose, 496 U.S. 356, 381-382, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n13)Footnote 7. *Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 928 (2009)* (such state rule qualifies as "neutral" rule of judicial administration only if rule is not be designed to nullify federal claim that state believes is inconsistent with its local policies).

(n14)Footnote 8. *Howlett v. Rose, 496 U.S. 356, 368-381, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n15)Footnote 9. *Howlett v. Rose, 496 U.S. 356, 367-375, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n16)Footnote 10. *Douglas v. New York, New Haven & Hartford R.R. Co., 279 U.S. 377, 386, 49 S. Ct. 355, 73 L. Ed. 747 (1929)* .

(n17)Footnote 11. *Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 928 (2009)* .

(n18)Footnote 12. *See Denzik v. Reg'l Airport Auth., 361 F. Supp. 2d 659, 663 (W.D. Ky. 2005)* .

(n19)Footnote 13. *Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361-362, 72 S. Ct. 312, 96 L. Ed. 398, 47 Ohio Op. 53 (1952)* ; *see § 3.04*.

(n20)Footnote 14. *Lear, Inc. v. Adkins, 395 U.S. 653, 675-676, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* .

(n21)Footnote 15. *Monessen Southwestern R.R. Co. v. Morgan, 486 U.S. 330, 335, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)* .

(n22)Footnote 16. *Martinez v. California, 444 U.S. 277, 284, n. 8, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)* (giving state immunity defense to have controlling effect over federal claim violates *Supremacy Clause*).

(n23)Footnote 17. *See Howlett v. Rose, 496 U.S. 356, 369-381, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* .

(n24)Footnote 18. *Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 362-364, 72 S. Ct. 312, 96 L. Ed. 398, 47 Ohio Op. 53 (1952)* ; *see Wisconsin Bell, Inc. v. Bie, 340 F.3d 441, 443 (7th Cir. 2003)* .

(n25)Footnote 19. *Felder v. Casey, 487 U.S. 131, 143, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988)* (state court may apply only neutral state procedural rules to federal claims and only if such rules are not preempted by federal law).

(n26)Footnote 20. *Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 362-364, 72 S. Ct. 312, 96 L. Ed. 398, 47 Ohio Op. 53 (1952)* .

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1-3 Moore's Manual--Federal Practice and Procedure §§ 3.07through 3.19

[Reserved]

§§ 3.07[Reserved]

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 3 LAW APPLIED
PART II. APPLICATION OF STATE SUBSTANTIVE LAW AND FEDERAL PROCEDURE IN DIVERSITY CASES IN FEDERAL COURT
A. NATURE OF APPLICABILITY OF LAW IN DIVERSITY CASES

1-3 Moore's Manual--Federal Practice and Procedure § 3.20

§ 3.20 Statement of Applicability of Law in Diversity Casen*

A federal court exercising diversity jurisdiction under the *Erie* doctrine n1 must determine whether a matter in issue is procedural or substantive. If procedural, then federal law will apply; however, if substantive, the court must apply the law of the forum state, n2 including the forum state's statutory and common law. n3 The requirement of the application of federal procedural law is based on the United States Supreme Court's express promulgation of rules of procedure under the Rules Enabling Act. n4

The *Erie* doctrine has three general purposes: to promote uniform results in federal and state courts, to discourage forum shopping, and to avoid inequitable administration of the laws. n5 However, for purposes of the *Erie* doctrine, there is a gray area in which a matter in issue might reasonably be categorized as either procedural or substantive. In such cases, the federal court must generally follow a hierarchy of tests developed by the Supreme Court to determine whether to apply federal or state law. n6 For a discussion of these tests, see *§ 3.22*.

When a federal court sitting in diversity applies state substantive law under the *Erie* doctrine, the court must apply the law of the forum state, which is the state in which the district court is located; the state's law includes the forum state's choice of law principles. n6.1 Therefore, if a case involves contacts with more than one state, a federal district court may be required to apply the forum state's substantive law or the law of a different state, if the forum state's courts would apply another state's law to the case, under the forum's choice of law principles. n6.2 For a discussion of choice of law principles in diversity cases, see *§ 3.60* et seq.

The *Erie* doctrine requirement of the application of state substantive law and federal procedural law in diversity cases was initially developed in the context of federal diversity litigation. However, the doctrine also applies to supplemental state claims that are litigated in the federal courts. n7 For a discussion of supplemental jurisdiction, see Ch. 5, *Original Jurisdiction over the Subject Matter*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie Doctrine

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 124.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1332.*

(n3)Footnote 2. *Erie R.R. v. Tompkins, 304 U.S. 64, 71-77, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n4)Footnote 3. *McKethan v. Texas Farm Bureau, 996 F.2d 734, 741-742 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1046 (1994)* (state law determined elements of liability for intentional infliction of emotional distress, as well as measure of damages).

(n5)Footnote 4. *See Hanna v. Plumer, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *see also 28 U.S.C. § 2072.*

(n6)Footnote 5. *See Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090-1093 (9th Cir. 2001)* ; *see also § 3.21.*

(n7)Footnote 6. *Houben v. Telular Corporation, 309 F.3d 1028, 1039 (7th Cir. 2002)* .

(n8)Footnote 6.1. *Wisland v. Admiral Beverage Corp., 119 F.3d 733, 735-737 (8th Cir. 1997)* .

(n9)Footnote 6.2. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* .

(n10)Footnote 7. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* ; *see Lundgren v. McDaniel, 814 F.2d 600, 604-607 (11th Cir. 1987)* (state presuit notice requirement held to be procedural).

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1-3 Moore's Manual--Federal Practice and Procedure § 3.21

§ 3.21 Purpose of Application of State Substantive Law and Federal Procedural Lawn*

The Rules of Decision Act provides that, except when otherwise provided by the federal constitution, treaty, or statute, state laws must be applied as the laws of decision in civil actions in the courts of the United States, in cases where they apply. n1 The Supreme Court in the *Erie* case found that the purpose of the Rules of Decisions Act is to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity cases will apply the laws of a state, as set forth in that state's constitution, statutes, and judicial opinions, including opinions that formulate the state's common law. n2 Federal procedural law is applied in federal courts, rather than state procedural law, because the United States Supreme Court has, under the Rules Enabling Act, expressly adopted the Federal Rules of Civil Procedure for the federal courts. n3

Under the *Erie* doctrine, federal courts in diversity cases perform the role of state trial courts applying state statutes and state common law. The *Erie* doctrine is based on the rationale that it would be unfair for the result of litigation to depend on whether the suit is brought in state or federal court. Therefore, the *Erie* doctrine has three purposes: (1) to assure uniform results in state and federal courts; (2) to discourage forum shopping between the state and federal system; and (3) to avoid inequitable administration of the laws. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit Statute

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1652.*

(n3)Footnote 2. *Erie R.R. v. Tompkins, 304 U.S. 64, 71-77, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n4)Footnote 3. *See Hanna v. Plumer, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *see also 28 U.S.C. § 2072*.

(n5)Footnote 4. *Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.22

§ 3.22 Determination of Applicable Law When Issue is Not Clearly Substantive or Proceduraln*

[1] Tests to Determine Whether to Apply Either Federal or State Law

As discussed above, n1 a federal court in a diversity case must apply the forum state's law for substantive issues and federal law for procedural issues. As a general rule, if a law controls the method or the manner of the presentation of a claim, the law is procedural. n2 On the other hand, if the law specifies the elements necessary to determine the outcome of a claim, the law is substantive. n3

However, as a practical matter, the distinction between substantive and procedural matters is sometimes difficult to determine. n4 Therefore, the United States Supreme Court has developed three inquiries to help determine whether to apply state law or federal law when it is difficult to ascertain whether a particular issue in a diversity case is substantive or procedural:

1. If a specific federal procedural rule or statute is applicable to the issue, it must control the Issue. n5

2. If no specific procedural rule or statute applies and a state law that does apply would be outcome determinative, the applicable state law generally controls, unless there is an overriding federal interest present. n6

3. Even if an applicable state law is outcome determinative, the federal court may apply a general federal law if on balance it promotes an overriding federal interest. n7

[2] Specific Federal Procedural Rule or Statute Pertinent to Issue

If a federal statute or rule of civil or appellate procedure is specifically pertinent in a situation, then the federal statute or rule controls and a conflicting state law does not apply. n1 Thus, if it is difficult for the federal court to classify an issue as either substantive or procedural, but a federal law directly controls that issue, the federal law applies regardless of contrary state law. n2 Under this test, there are three inquiries: n3

1. Whether the federal law actually applies to the particular matter involved. In this regard, the court must determine whether the federal rule or statute is sufficiently broad to cover the situation in question. n4 When there is merely an apparent conflict, rather than a actual conflict between the federal and state law, the apparent conflict may be resolved by a finding that the federal rule does not actually cover the point at issue. n5

2. Whether the federal law is rationally capable of classification as a procedural law. If not, the law is substantive and the court must apply the state law. n6

3. Whether the federal law is constitutional and is a valid exercise of the Supreme Court's rule-making power. n7 The Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence are deemed valid because they have been adopted pursuant to the Rules Enabling Act. n8 The only rare exception to this rule is where the Rules Committee, the Supreme Court, and Congress have collectively erred and adopted a federalprocedural rule that is either unconstitutional or should not have been adopted under the Rules Enabling Act process because it is a matter of substantive law. n9

[3] Pertinent State Law Would be Outcome Determinative

If a federal rule or statute is not pertinent to an issue in a diversity case, n1 but a state law would be outcome determinative to the issue, the federal court should generally apply the state law, even if it conflicts with a federal judicially created law. n2 An exception applies, however, if there is an overriding federal interest regarding the issue, in which case the court should apply the federal law. n3 Under this inquiry, when no federal statute or federal rule governs a situation, the federal court sitting in diversity must apply forum state law to the situation if a failure to apply state law would (1) significantly affect the outcome of the litigation and (2) encourage forum shopping or result in inequitable administration of the laws. The court must ask whether application of state law would have so important an effect on the results obtained by the parties that the court's failure to apply state law would unfairly discriminate against forum state citizens, or likely cause a plaintiff to choose the federal court. n4 In the utilization of this test, the court must be guided by the two purposes of the *Erie* doctrine: to discourage forum shopping and avoid inequitable administration of the laws. n5

The following are examples of state laws that federal courts have held to be outcome determinative and applicable in diversity suites:

1. A state law imposing penalties on the defendant for failure to settle. n6

2. A state statute of limitation. n7

3. A state law requiring certain plaintiffs in shareholders' derivative suits to give security for defendants' litigation expenses. n8

4. A state law denying any recovery on particular claims or to particular kinds of claimants. n9

5. A state law that allocates the burden of proof. n10

[4] Overriding Federal Interest May Require Application of Federal Law

If a federal rule or statute is not pertinent to an issue in a diversity case, n1 and there is an outcome-determinative state law covering the matter, a federal court ordinarily will apply the outcome-determinative state law. n2 However, if there is an overriding federal interest in the particular matter, then a federal court will not apply even an outcome determinative state law. n3 For example, if a state law allows the court to decide certain factual issues rather than a jury,

the state law may be considered outcome determinative. n4 But, because there is a strong federal constitutional policy favoring jury decisions of disputed fact questions, contrary state rules are disfavored, n5 and despite the possible outcome determinative nature of the state law, the federal court will apply the federal right-to-jury law to disputed factual issues. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawApplicability

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* §§ 124.02-124.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See §§ 3.20, 3.21.*

(n3)Footnote 2. *Hanna v. Plumer, 380 U.S. 460, 464-465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* (prescribing manner in which defendant is to be notified that suit has been instituted against defendant is procedural).

(n4)Footnote 3. *McKethan v. Texas Farm Bureau, 996 F.2d 734, 741-742 (5th Cir. 1993) , cert. denied, 510 U.S. 1046 (1994)* (law that determines elements of cause of action and measure of damages for intentional infliction of emotional distress is substantive).

(n5)Footnote 4. *Gasperini v. Center for Humanities, 518 U.S. 415, 434-439, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (federal courts sitting in diversity must apply state substantive law and federal procedural law, but determining whether particular law should be classified as "substantive" or "procedural" for such purposes may be challenging endeavor); *Houben v. Telular Corporation, 309 F.3d 1028, 1039 (7th Cir. 2002)* (for purposes of *Erie* rule, there is a gray area in which matter may rationally be categorized as either procedural or substantive).

(n6)Footnote 5. *Hanna v. Plumer, 380 U.S. 460, 470-471, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *see* [2], *below.*

(n7)Footnote 6. *Guaranty Trust Co. v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* ; *see Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090-1093 (9th Cir. 2001)* ; [3], *below.*

(n8)Footnote 7. *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-539, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* (overriding federal interest may overcome outcome-determinative state law); *see* [4]. *below.*

(n9)Footnote 1. *See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28-32, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* (federal venue statute determined validity of parties' forum selection clause, rather than state law,).

(n10)Footnote 2. *Burke v. Smith, 252 F.3d 1260, 1265-1266 (11th Cir. 2001) .*

(n11)Footnote 3. *Houben v. Telular Corporation, 309 F.3d 1028, 1039 (7th Cir. 2002)* (federal law applies if it either controls the matter before the court or is in direct conflict with pertinent state law, is rationally capable of classification as procedural, and is constitutional).

(n12)Footnote 4. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* (*Fed. R. Civ. P. 41(b)* does not cover claim preclusive effect of involuntary dismissal in diversity case).

(n13)Footnote 5. *Guaranty Trust Co. v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* ; *see Torre v. Brickey, 278 F.3d 917, 919-920 (9th Cir. 2002)* (circuit court concluded that there was no conflict between

Fed. R. Civ. P. 4(m) and Oregon substantive law, because Rule 4(m) set procedural maximum time frame for serving complaint, while Oregon statute was substantive decision that actual service on, and actual notice to, defendant was necessary part of substantive policies provided by statute of limitation); *Walker v. Armco Steel Corp. 446 U.S. 740, 752-753, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)* (*Fed. R. Civ. P. 3*, which provides that filing of complaint commences lawsuit, did not define "commencement of action" for purposes of statute of limitation).

(n14)Footnote 6. *Houben v. Telular Corporation, 309 F.3d 1028, 1034 (7th Cir. 2002)* .

(n15)Footnote 7. *Burlington N. R. Co. v. Woods, 480 U.S. 1, 5, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987)* .

(n16)Footnote 8. *Hanna v. Plumer, 380 U.S. 460, 471, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n17)Footnote 9. *Burke v. Smith, 252 F.3d 1260, 1265 n.7 (11th Cir. 2001)* .

(n18)Footnote 1. *See* [2], *above*.

(n19)Footnote 2. *Burke v. Smith, 252 F.3d 1260, 1265-1266 (11th Cir. 2001)* .

(n20)Footnote 3. *See* [4], *below*.

(n21)Footnote 4. *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 429-431, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* .

(n22)Footnote 5. *Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090-1093 (9th Cir. 2001)* ; *Chamberlain v. Giampapa, 210 F.3d 154, 159 (3d Cir. 2000)* .

(n23)Footnote 6. *Jarvis v. Johnson, 668 F.2d 740, 742-746 (3d Cir. 1982)* .

(n24)Footnote 7. *Guaranty Trust Co. v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* ; *see Walker v. Armco Steel Corp. 446 U.S. 740, 752-753, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)* (failure to apply state statute of limitation tolling provision would cause inequitable administration of laws).

(n25)Footnote 8. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-556, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n26)Footnote 9. *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 971-973 (9th Cir. 1999)* , *cert. denied, 530 U.S. 1203 (2000)* ; *see Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 883-887 (1st Cir. 1981)* (federal court applied state malpractice review statute).

(n27)Footnote 10. *Palmer v. Hoffman, 318 U.S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* .

(n28)Footnote 1. *See* [2], *above*.

(n29)Footnote 2. *See* [3], *above*.

(n30)Footnote 3. *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-539, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* .

(n31)Footnote 4. *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* .

(n32)Footnote 5. *U.S. Const., Amend VII*.

(n33)Footnote 6. *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 533-539, 78 S. Ct. 893, 2 L. Ed. 2d 953*

(1958) (court balanced strong federal interest in maintaining *Seventh Amendment* jury trial right against state's less compelling policy of permitting judges to adjudicate matter).

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1-3 Moore's Manual--Federal Practice and Procedure §§ 3.23through 3.39

[Reserved]

§§ 3.23[Reserved]

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B. DETERMINATION OF CONTENT OF STATE SUBSTANTIVE LAW IN DIVERISTY CASE

1-3 Moore's Manual--Federal Practice and Procedure § 3.40

§ 3.40 Mechanics of Determining Content of State Law by Federal Courtn*

When state law applies to a particular issue because it is a diversity case in federal court, the federal court must determine the content of the substantive state law. The federal court makes this determination first by considering all applicable state statutes and the decisions of the state's highest court, including decisions construing state statutes and common law. n1 If the decisions of the state's highest court are silent on a particular issue, the federal court must determine how that court would decide the issue, looking to the sources of law that the state's highest court would look to for persuasive authority, including intermediate appellate court decisions of that state. In the absence of precedents from the state's intermediate appellate courts, the federal court may consider the case law of other jurisdictions that have examined similar issues. Finally the court may consider the opinions on that state's law by other federal courts sitting in diversity on the issue. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967)* .

(n3)Footnote 2. *State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1230-1231 (11th Cir. 2004)* (citing **Moore's Federal Practice**).

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1-3 Moore's Manual--Federal Practice and Procedure § 3.41

§ 3.41 Time of Determination of State Lawn*

A federal district court must apply the state law as of the time of determination of the issue in the district court, up until the time of judgment. This means that a district court must recognize a change in state law that occurs while trial is in process. n1 In the same way, a federal circuit court of appeals must determine the state law as of the time of appeal, thus giving effect to any intervening state court decisions in the event the substantive law of the state changes between the time of the federal trial and appeal. n2 This means that the federal appellate court must apply a change in state law while the federal appeal is pending, up until the time of the appellate decision. n3 However, there is a strong argument that, rather than automatically adopting any change in law up to the time of its determination, both district and appellate courts should take into consideration the law of the state as to whether the state courts give retroactive effect to changes by applying subsequent changes to prior lower state court decisions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie Doctrine

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Hisrich v. Volvo Cars of N. Am., Inc., 226 F.3d 445, 449 (6th Cir. 2000)* (state law determines substance of jury instructions in diversity action).

(n3)Footnote 2. *Blackhawk-Central City Sanitation Dist. v. American Guar. & Liab. Ins. Co., 214 F.3d 1183, 1193-1194 (10th Cir. 2000)* .

(n4)Footnote 3. *Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 541, 61 S. Ct. 347, 85 L. Ed. 327 (1941)* ;

Kona Enters. v. Estate of Bishop, 229 F.3d 877, 886-887 (9th Cir. 2000) .

(n5)Footnote 4. *See* 17A *Moore's Federal Practice, § 124.21* (Matthew Bender 3d ed.); *see also Dickerson v. Lexington Ins. Co., 2008 U.S. App. LEXIS 26504, at *43 (5th Cir. Dec. 22, 2008)* (appellate courts required to conform their orders to state law as of time of entry of order).

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1-3 Moore's Manual--Federal Practice and Procedure § 3.42

§ 3.42 Decisions of State's Highest Courtn*

A state's highest court determines that state's law for diversity cases, based either on decisions that the highest court has actually made or in the manner that the court would decide if called on to do so. n1 The federal court must generally follow the decision of the state's highest court regarding a particular matter, even if it believes the decision imprudent or incorrect. n2 Thus, in adjudicating a case under state law, the federal court is not free to impose its own view of what state law should be; rather, the federal court must apply existing state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before the federal court. n3

However, there are situations in which the federal court need not follow a decision of the state's highest court if there has been a clear and persuasive indication that the state's highest court would modify, limit, or overrule the decision. n4 Such persuasive indications include: the state's subsequent enactment or amendment of a statute that apparently changes the law as stated in the decision; n5 later decisions of the state's highest court that overrule the decision by implication; n6 and dicta from the state's highest court criticizing or casting doubt on the decision. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1231 (11th Cir. 2004)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *See Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1164 (9th Cir. 1995)* (federal courts are bound to follow considered dicta of state's highest court).

(n4)Footnote 3. *Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1445 (3d Cir. 1996)* .

(n5)Footnote 4. *West v. American Tel. & Tel. Co., 311 U.S. 223, 237-238, 61 S. Ct. 179, 85 L. Ed. 139, 19 Ohio Op. 77 (1940)* .

(n6)Footnote 5. *Dawkins v. White Prods. Corp., 443 F.2d 589, 593-594 (5th Cir. 1971)* .

(n7)Footnote 6. *Pauley v. Combustion Eng'g, Inc., 528 F. Supp. 759, 761-763 (S.D. W. Va. 1981)* .

(n8)Footnote 7. *Mason v. American Emery Wheel Works, 241 F.2d 906, 908-909 (1st Cir. 1957)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.43

§ 3.43 Decisions of State's Intermediate Courtsn*

When state law provides no definitive answers to a question presented, a federal district court must make an educated prediction as to how the state supreme court would resolve the issue if presented with the question. In making this "Erie guess," the federal court will look for guidance from intermediate state appellate court decisions, unless convinced by other persuasive data that the highest court of the state would decide otherwise, such as the general rule on the issue, decisions from otherjurisdictions, and general policy concerns. n1 n2-3 Thus, the federal court should consider the state intermediate court decision but is not absolutely bound by it. n4 For example, a federal court would not be required to follow an intermediate state court decision that conflicted with otherwise settled law, because the state supreme court would be unlikely to follow that decision. n5 Furthermore, when intermediate state appellate court decisions are in conflict, the federal court must determine which approach the state's highest court would likely adopt. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475, 483 (5th Cir. 2008)* ; *see § 3.44[1].*

(n3)Footnote 2-3. [Reserved]

(n4)Footnote 4. *Lexington Ins. Co. v. Rugg & Kopp, Inc., 165 F.3d 1087, 1090 (7th Cir. 1999)* .

(n5)Footnote 5. *FDIC v. McSweeney, 976 F.2d 532, 536 n.3 (9th Cir. 1992)* , *cert. denied, 508 U.S. 950 (1993)* .

(n6)Footnote 6. *Stifle v. Marathon Petroleum Co., 876 F.2d 552, 557-559 (7th Cir. 1989)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.44

§ 3.44 Determination of Novel State Lawn*

[1] Prediction of How Highest State Court Would Decide Issue

Absent a case on point from the courts of the state, or when state law is unsettled, the federal court must attempt to predict how the state's highest court would rule if confronted with the same issue. This is known as an "*Erie* guess" of what the highest court of the state would hold on the issue. n1 Thus, in the absence of direct authority the federal court may look to state high court decisions in related or analogous cases for an indication of how the state's highest court is likely to rule. n2

After considering the highest court's previous decisions, the federal court should consider any relevant decisions of the state's intermediate courts, n3 and other federal courts. When a higher federal court has ruled on a particular point of state law, a lower court must ordinarily follow that decision in the absence of an intervening, authoritative state decision. n4 Federal courts also may consider public policy, including the policy underlying a statute, as shown by legislative history. n5 Additionally, federal courts may seek guidance from persuasive case law from other jurisdictions and from learned treatises. n6

[2] Interpretation of State Statutes

When interpreting a statute that has been construed by a state's highest court, a federal court must interpret the statute as though it actually reads precisely as the highest court of the state has interpreted it. n1 However, when a state court has not construed a state statute, the federal court must exercise its independent judgment to interpret the statute, using the same method and approach that the state's highest court would use, n1.1 and following the state's rules of statutory interpretation. n1.2 The federal court should be guided by any analogous decisions and the federal court's own interpretation of the statute's intended policy. The federal court should consider all available resources to predict how the state's highest court would interpret the statute. These resources include the statutory language, legislative history, the statutory scheme set in historical context, how the statute could be harmonized with other state laws including state decisional law, any federal cases that construe the state statute, and scholarly works. n2 The federal court may also consider decisions of any state administrative agencies that are responsible for enforcement and interpretation of a state

statute or rule. n3

[3] Possible Alternatives to Determination of Unsettled State Law

The degree of difficulty for a federal court to determine applicable state law does not justify a federal court to dismiss or stay its proceedings until a state court has decided the issue. Absent special circumstances, federal district courts must decide questions involving the application of state law even if they are extraordinarily difficult to resolve. n1 However, when a decision is to be made on the basis of state law the Supreme Court has a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts. n2

This preference is based on principles of federalism, and because a federal court could create friction with state counterparts if the federal court makes an error when it attempts to construe a novel, complex state law which has not yet been reviewed by the state's highest court. n2.1 Consequently, in exceptional and appropriate circumstances a federal court may avoid premature decisions on questions of federal constitutional law and erroneous rulings with respect to state law. The first of these practices is abstention, n3 which is a judicially created doctrine in which a federal court that otherwise has competent jurisdiction in a case withholds that jurisdiction based on the principles of comity and judicial economy. Absention is discussed in Ch. 2, *Concurrent and Conflicting Jurisdiction*. The other practice is certification of the question to the state court, which is discussed in *§ 3.45*. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *McAvey v. Chen-Horng Lee, 260 F.3d 359, 365 (5th Cir. 2001)* .

(n3)Footnote 2. *Horsehead Indus., Inc. v. Paramount Communs., Inc., 258 F.3d 132, 140-141 (3d Cir. 2001)* ; *Maska U.S., Inc. v. Kansa Gen. Ins. Co., 198 F.3d 74, 78 (2d Cir. 1999)* (federal courts must give fullest weight to decisions of state's highest court and also consider lower court decisions).

(n4)Footnote 3. *Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967)* ; *Howe v. Scottsdale Ins. Co., 204 F.3d 624, 627 (5th Cir. 2000)* .

(n5)Footnote 4. *Lexington Ins. Co. v. Rugg & Kopp, Inc., 165 F.3d 1087, 1092-1093 (7th Cir. 1999)* .

(n6)Footnote 5. Rural Water Sys. # 1 v. *City of Sioux Center, 202 F.3d 1035, 1037-1038 (8th Cir. 2000)* , *cert. denied, 531 U.S. 820 (2000)* .

(n7)Footnote 6. *F.D.I.C. v. Ogden Corp., 202 F.3d 454, 460-461 (1st Cir. 2000)* (citing **Moore's Federal Practice**).

(n8)Footnote 1. *Rivkin v. Century 21 Teran Realty LLC, 535 F.3d 105, 108 (2d Cir. 2008)* .

(n9)Footnote 1.1. *IMS Health Inc. v. Ayotte, 550 F.3d 42, 61 (1st Cir. 2008)* .

(n10)Footnote 1.2. *Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 930 (9th Cir. 2004)* .

(n11)Footnote 2. *Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325, 1329-1339 (8th Cir. 1985)* (court looked to other

states' decisions interpreting similar worker's compensation statutes).

(n12)Footnote 3. *Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 167, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971)* .

(n13)Footnote 1. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-818, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n14)Footnote 2. *Arizonans for Official English v. Arizona, 520 U.S. 43, 76, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (noting the advantage of "placing state-law questions in [state] courts [which are] equipped to rule authoritatively on them"); *Allstate Ins. Co. v. Serio, 261 F.3d 143, 150-151 (2d Cir. 2001)* .

(n15)Footnote 2.1. *Arizonans for Official English v. Arizona, 520 U.S. 43, 79, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n16)Footnote 3. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 25-31, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* (abstention for unclear state law when case intimately involves the state government's sovereign prerogative).

(n17)Footnote 4. *Allstate Ins. Co. v. Serio, 261 F.3d 143, 151 (2d Cir. 2001)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.45

§ 3.45 Certification of State Law Question to Highest State Courtn*

[1] Function and Purpose of Certification

The Supreme Court has stated that certification of a question of state law to a state court is a favored procedure. The Supreme Court has explained that certification is designed to avoid federal court error in deciding state law questions, because it allows a federal court to put a novel state-law question directly to the state's highest court, thus reducing delay, cutting cost, and increasing the assurance of making an authoritative determination of the state law. n1

Most states have established certification procedures that permit a federal court to certify an issue and request an advisory opinion from the state's highest court. n2 Whether to use a certification procedure is within the discretion of the federal court, n3 but the procedure itself is within the control of the individual states. While most states permit certification by both federal trial and appellate courts, n4 some authorize certification only by the federal courts of appeal and the United States Supreme Court. n5 directly to resolve a question of state law and to do so while the federal suit is pending. If the state court's decision as to state law makes a federal constitutional judgment necessary, the federal issue will be resolved by a federal court. Therefore, by certifying, the federal courts refer the state law issues to state courts, while retaining the authority to rule on the federal constitutional questions that might come up, rather than ceding that responsibility to the state courts. n6

Certification is a particularly important process for federal courts sitting in diversity because the procedure frees federal courts from having to speculate on how state courts will decide important questions of state law. Essentially, the federal court must be presented with an unsettled question of state law, n7 because the certification procedure may not be used when the law is settled. n8 Certification is discretionary only, n9 for use when the federal court determines it would be more efficient to attempt to obtain a definitive determination directly from that state's highest court, rather than attempting to predict how the state's highest court would have decided an unsettled issue of state law. n10

[2] Factors That Determine Whether Certification is Appropriate

A federal court should not seek certification in a diversity case any time there is any uncertainty with respect to the state

law question. Issues of state law cannot be routinely certified to the highest court of a state simply because a certification procedure is available. Because it is the federal court's duty to predict how the forum state's highest court would decide the issues before it, it will not certify questions of law where sufficient precedents exist for it to make this determination. Therefore, certification should be used in those cases where there is a split of authority on the issue, where a statute's plain language does not indicate the answer, or when presented with a complex question of state common law that has no apparent authority. n0.1 In making the determination whether to exercise its discretion in favor of certification, the court should consider many factors.

Factors for consideration include the closeness and complexity of the question, and whether it is unsettled; the existence of sufficient sources of state law bearing on the question, including statutes, judicial decisions, and attorney general opinions, to provide a principled rather than speculative conclusion; the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and practical limitations of the certification process, such as significant delay or inability to frame the issue in a manner that will produce a helpful response on the part of the state court. n1 Other factors include whether the question is of first impression or likely to recur, n2 and whether the unsettled law is outcome determinative. n3

Certification is not appropriate when the state law is settled; n4 when, challenged on federal constitutional grounds, the highest court of the state has not interpreted the relevant statute; or when a saving construction is possible. A saving construction is one that would permit avoidance of the constitutional issue. n5 If a federal court denies a motion to certify a question to a state's highest court, the denial is reviewed for abuse of discretion. n6

[3] Effect of Certification

When a state court answers a certified question, the parties in the federal case are bound by the answer because it constitutes the law of the case. n1 If the highest court of a state accepts a certified question, the state court willingly undertakes a substantial burden, and the federal court may not disregard the state court's opinion. Thus, once a federal court has certified a question of unsettled law to the state's highest court, the federal court is required to follow state law as declared by the state's highest court. The federal court is bound by the state court's answer except in extreme circumstances. Therefore, a party may not contest the law with respect to the answer to a certified question except when there has been an obvious subterfuge to evade consideration of a federal issue or a violation of federal law that could undercut the state court analysis. n1.1 This requirement protects a state's sovereignty. For example, when a state supreme court's response to a certified question states what types of claims are not valid under state law, those claims should be dismissed with prejudice. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureAppealsAppellate JurisdictionCertified QuestionsGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Arizonans for Official English v. Arizona, 520 U.S. 43, 75-76, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n3)Footnote 2. *Virginia v. American Booksellers Ass'n, 484 U.S. 383, 395-396, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)* (United States Supreme Court certified issue to Virginia Supreme Court).

(n4)Footnote 3. *Lehman Bros. v. Schein, 416 U.S. 386, 389-392, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)* .

(n5)Footnote 4. *Cincinnati Ins. Co. v. Grand Pointe, LLC, 501 F. Supp. 2d 1145, 1167 (E.D. Tenn. 2007)* (certification procedure established by Tennessee Rules of the Supreme Court).

(n6)Footnote 5. *See, e.g., Israel v. State Farm Mut. Auto. Ins. Co., 239 F.3d 127, 135-136 (2d Cir. 2000)* .

(n7)Footnote 6. *Allstate Ins. Co. v. Serio, 261 F.3d 143, 151 (2d Cir. 2001)* .

(n8)Footnote 7. *Grover by Grover v. Eli Lilly & Co., 33 F.3d 716, 719 (6th Cir. 1994)* .

(n9)Footnote 8. *Smith v. FCX, Inc., 744 F.2d 1378, 1379 (4th Cir. 1984)* , *cert. denied, 471 U.S. 1103 (1985)* ; *see* [2], *below*.

(n10)Footnote 9. *Copier By & Through Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 838 (10th Cir. 1998)* .

(n11)Footnote 10. *See Jennings v. BIC Corp., 181 F.3d 1250, 1254-1256 (11th Cir. 1999)* .

(n12)Footnote 0.1. *DiBella v. Hopkins, 403 F.3d 102, 110 (2d Cir. 2005)* .

(n13)Footnote 1. *Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-275 (5th Cir. 1976)* .

(n14)Footnote 2. *Geib v. Amoco Oil Co., 29 F.3d 1050, 1060-1061 (6th Cir. 1994)* .

(n15)Footnote 3. *Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 507-510 (7th Cir. 1998)* (in suit challenging constitutionality of state statute that regulated political action committees, certification was granted when issue would be outcome determinative).

(n16)Footnote 4. *Simmons-Harris v. Zelman, 234 F.3d 945, 962 (6th Cir. 2000)* (district court did not abuse its discretion by refusing to certify question because state law was clear and uncontroverted).

(n17)Footnote 5. *Allstate Ins. Co. v. Serio, 261 F.3d 143, 151 n.14 (2d Cir. 2001)* .

(n18)Footnote 6. *Copier By & Through Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 838 (10th Cir. 1998)* .

(n19)Footnote 1. *Sifers v. General Marine Catering Co., 892 F.2d 386, 391 (5th Cir. 1990)* .

(n20)Footnote 1.1. *See United States v. Manning, 527 F.3d 828, 838 (9th Cir. 2008)* .

(n21)Footnote 2. *Grover by Grover v. Eli Lilly & Co., 33 F.3d 716, 719 (6th Cir. 1994)* (federal court that certifies question of state law is not free to treat answer as merely advisory unless state court has expressly stated that effect).

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1-3 Moore's Manual--Federal Practice and Procedure § 3.46

§ 3.46 Appeal of District Court Determination of State Lawn*

If a party appeals a district court's determination of state law, the court of appeals must review the determination de novo. n1 De novo review means that the appellate court may substitute its determination of an unsettled state law issue for the district court's when the appellate court would resolve the issue differently. n2 Thus, on appeal the appellate court may make its own determination, interpretation, application, and prediction of state law. n3

Before the Supreme Court decided the issue, many appellate courts reviewed a district court's determination of state law under a deferential abuse of discretion standard, which meant that the appellate court would reverse the district court's state law determination only if it were clearly erroneous. n4 However, the Supreme Court concluded that appellate deference to a district court's determination of state law was inconsistent with the two aims of the *Erie* doctrine: to discourage forum-shopping and avoid inequitable administration of the laws, in that deferential appellate review invites disparate development of state law among the federal trial courts even within a single state and because the substantive rule applied to a dispute could depend on the choice of forum. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Salve Regina College v. Russell, 499 U.S. 225, 231-240, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* ; *Guaranty Nat'l Ins. Co. v. Azrock Indus., Inc., 205 F.3d 253, 255-256 (5th Cir. 2000)* .

(n3)Footnote 2. *In re Complaint of McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984)* .

(n4)Footnote 3. *Horsehead Indus., Inc. v. Paramount Communs., Inc., 258 F.3d 132, 140 (3d Cir. 2001)* .

(n5)Footnote 4. *Hylton v. John Deere Co., 802 F.2d 1011, 1014-1015 (8th Cir. 1986)* .

(n6)Footnote 5. *Salve Regina College v. Russell, 499 U.S. 225, 233-235, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

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1-3 Moore's Manual--Federal Practice and Procedure §§ 3.47through 3.59

[Reserved]

§§ 3.47[Reserved]

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1-3 Moore's Manual--Federal Practice and Procedure § 3.60

§ 3.60 Choice of Law in Diversity Casesn*

[1] Application of Choice of Law of Forum State

Choice of state law questions often arise in applying the *Erie* doctrine to diversity cases that have contacts with more than one state. n1 Diversity cases often involve choice of law questions because the parties must reside in different states. In addition, the cause of action may have arisen in a state other than the parties' residence. In such cases, a federal court must apply the choice of law rules of the state in which it sits, which is known as the "forum state," n1.1 to determine which state's substantive law applies. n2 For a discussion of the various choice of law tests used by the states, see *§ 3.61*.

[2] Procedure for Choice of Law Questions

A federal court exercising diversity jurisdiction must engage in a two-step inquiry to determine the applicable law. In the first step, the court must determine whether the matter in issue is procedural or substantive for *Erie* purposes. If procedural, then federal law will apply; however, if substantive, the court must apply the law of the forum state, including its choice of law principles. The two steps are independent of each other, and thus a finding that a matter is substantive or procedural for *Erie* purposes does not necessarily require the same characterization for choice of law purposes. n1 For example, while a statute of limitation is substantive under the *Erie* doctrine, n2 it may be procedural under a state's choice of law rules. n3 Thus, when the forum state characterizes a principle as procedural, the forum's procedural law applies, even though the state's choice of law rules would require the federal court to apply another state's substantive law to resolve substantive issues. n4

In the second step, the federal court must apply the forum state's choice of law rules exactly as a state court would apply them. n5 A federal court may not make exceptions or modifications to state conflict rules that may seem appropriate to the federal court, but which have not been adopted by the state in which the federal court sits. n6 The only time a federal court may decline to apply the forum state's choice of law rules is if they violate the Constitution, n7 as discussed in [3], *below*, or if there is a significant conflict between a federal policy or interest and the use of state law. n7.1

[3] Constitutional Restrictions On Application of Choice of Law Rules

When it applies a state law in deciding a diversity case, a federal court may not apply state choice of law rules that violate either the Due Process or the *Full Faith and Credit Clauses of the United States Constitution*. n1 The Due Process Clause protects individual parties and prohibits the application of law that is insignificantly related to the litigation. n2 Due process requires fundamental fairness. Application of the forum state's law would be fundamentally unfair if there were no reasonable relationship between the forum and the parties or the cause of action. n3 Thus, a state substantive law may be applied only if the state has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. n4 For example, if a plaintiff moves to a particular jurisdiction *after* the occurrence of the alleged wrong because the plaintiff has a preference for the law of that forum, the move is entitled to little or no significance in the determination of whether the law of that forum should apply. n4.1

The *Full Faith and Credit Clause* requires the forum to respect the laws and judgments of other states, subject to the forum's own interests in furthering its public policies. Under the *Full Faith and Credit Clause*, each state must give full faith and credit to the public acts, records, and judicial proceedings of every other state. n5 However, the Supreme Court has explained that in compliance with *Full Faith and Credit Clause* a court may lawfully apply either the law of onestate or the contrary law of another. Therefore, a state need not substitute the statutes of other states for its own statutes when the state has competently legislated a law regarding the particular subject matter. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProcedureFederal & State InterrelationshipsChoice of LawSignificant RelationshipsCivil ProcedureFederal & State InterrelationshipsErie Doctrine

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See, e.g., Medical Mut. v. DeSoto, 234 F.3d 298, 306-307 (6th Cir. 2000)* .

(n3)Footnote 1.1. *Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 604 (6th Cir. 2005)* .

(n4)Footnote 2. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* (federal court in Delaware was required to apply Delaware choice of law rule to determine which state's law governed addition of interest to judgment for damages for breach of contract executed and to be performed in New York).

(n5)Footnote 1. *McMahan v. Toto, 256 F.3d 1120, 1131 (11th Cir. 2001)* ; *Allstate Ins. Co. v. Stanley, 282 F. Supp. 2d 1342, 1343 (S.D. Fla. 2003)* ; *see Medical Mut. v. DeSoto, 234 F.3d 298, 306-307 (6th Cir. 2000)* .

(n6)Footnote 2. *Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* .

(n7)Footnote 3. *Phelps v. McClellan, 30 F.3d 658, 661 (6th Cir. 1994)* .

(n8)Footnote 4. *Crase v. Astroworld, Inc., 941 F.2d 265, 266 (5th Cir. 1991)* .

(n9)Footnote 5. *Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 3-5, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975)* .

(n10)Footnote 6. *Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 3-5, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975)* .

(n11)Footnote 7. *Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-320, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* .

(n12)Footnote 7.1. *In re Gaston & Snow, 243 F.3d 599, 605-607 (2d Cir. 2001)* .

(n13)Footnote 1. *Sun Oil Co. v. Wortman, 486 U.S. 717, 722-730, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988)* .

(n14)Footnote 2. *U.S. Const., Amend. XIV, § 1.*

(n15)Footnote 3. *Home Ins. Co. v. Dick, 281 U.S. 397, 407-410, 50 S. Ct. 338, 74 L. Ed. 926 (1930)* .

(n16)Footnote 4. *Allstate Ins. Co. v. Hague, 449 U.S. 302, 320, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* .

(n17)Footnote 4.1. *American Ins. Ass'n v. Garamendi, 539 U.S. 396, 426, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)* (noting that postoccurrence change of residence to is by itself insufficient to justify application of forum law).

(n18)Footnote 5. *U.S. Const., Art. IV, § 1.*

(n19)Footnote 6. *Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494, 123 S. Ct. 1683, 1687, 155 L. Ed. 2d 702 (2003)* (while compliance with full faith and credit is very strict with respect to final judgments rendered by a court, it is less demanding with respect to choice of laws principles).

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1-3 Moore's Manual--Federal Practice and Procedure § 3.61

§ 3.61 Choice of Law Tests Utilized by Statesn*

[1] Applicable Law Is Based on Choice of Law Tests

For a diversity action to be properly filed in federal court, each party on one side to the action must generally have a different state of residence from each party on the other side. n1 Consequently, disputes frequently arise regarding which state's substantive law applies to the claims in the action. When a federal court sits in diversity to hear state law claims, the conflicts laws of the forum state determine which state's substantive law applies. n2 In its determination, the federal court will use one or more of the following tests that has been adopted by the forum state: n3 (1) the most significant relationship test of the Restatement (Second) of Conflicts; n4 (2) the balancing test, also known as the governmental interest test; n5 or (3) the vested rights test set out in the First Restatement of Conflicts. n6 These three tests are listed in the order of the total number of states that use each test. State courts have increasingly abandoned the traditional vested rights approach, n7 which involves the application of rigid rules, in favor of the other two, more modern tests. n8 Furthermore, the federal court will apply a "blend" or "hybrid" choice of law test, which combines attributes of more than one test, when such a test has been adopted by the forum state. n9

[2] Most Significant Relationship Test

[a] Factors Considered in Test

The most significant relationship test of the Restatement (Second) of Conflicts provides that a single state's law does not necessarily govern all substantive issues. In determining which state's law applies, the forum focuses on each issue separately and applies the state law that has the most significant relationship to the issue. The forum state determines the state with the most significant relationship to an issue by analyzing seven factors specified in the Restatement (Second) of Conflicts, which is an authoritative source of guidance for the federal courts. n1 The court must consider specific types of contacts with each state, depending on whether the case is based in tort n2 or in contract. n3 In any determination, the court considers the following seven general policy factors: n4

1. The requirements of the interstate systems.

2. The relevant policies of the forum.

3. The relevant policies of other states involved and respective interests in having their policies followed.

4. The protection of justified expectations.

5. The basic policies underlying the particular field of law.

6. The certainty, predictability, and uniformity of result.

7. The ease in determining and applying the law chosen.

As a practical matter, some courts combine the most significant relationship with some factors in the governmental interest test. n5

[b] Relationship to State in Tort Case

In a torts case, the parties' rights and liabilities are determined by the state that has the most significant relationship to the occurrence and the parties under the seven factors stated in [a], *above*. In its determination, the court should consider the following contacts: n6

1. The place where the injury occurred.

2. The place where the conduct causing the injury occurred.

3. The domicile, residence, nationality, and place of incorporation or place of business, if any, of the parties.

4. The place where the relationship, if any, between the parties is centered.

The court should evaluate these contacts according to their relative importance with respect to the particular issue involved. n7 Thus, when a law's primary purposeis to deter or punish misconduct, the state where the conduct took place may have the most significant relationship. However, if a law's main purpose is victim compensation, the state where the injury occurred may have a greater interest. n8

[c] Relationship to State in Contract Case

If the parties have expressly specified in their contract that the law of a particular state will govern their contractual rights and duties, the general rule is that the courts will enforce that provision. The Restatement (Second) of Conflicts promotes the parties' negotiation of the terms of their contracts, and therefore encourages the parties to state in the contract their choice for the applicable law for the contract. n9

However, the court will not apply the law specified by the parties in either of the following situations: (1) the selected state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice; or (2) application of the law of the selected state would be contrary to a fundamental policy of a state that has a materially greater interest than the selected state in the determination of the particular issue, and the state with the greater interest would be the state of the applicable law in the absence of a selection of law by the parties. n10

If the parties have not specified an applicable law in their contract, the court will apply the law of the state that has the most significant relationship to the transaction and the parties under the seven factors stated in [a], above. n11 In making that determination, the court should also consider the following contacts: n12

1. The place of contracting.

2. The place where the contract was negotiated.

3. The place of performance.

4. The location of the subject matter of the contract.

5. The domicile, residence, nationality, and any place of incorporation and place of business of the parties.

[3] Governmental Interest Test

The second test is the governmental interest test, also referred to as the balancing of interest test. n1 In the governmental interest test, the forum state uses a three step analysis to determine which state's substantive law applies. First, the court examines the substantive law of each state to determine whether the laws differ as applied to the relevant transaction. Second, if the laws do differ, the court must determine whether a "true conflict" exists in that each of the states has an actual interest in having its law applied. If only one state has a legitimate interest in the application of its rule of decision, there is a "false conflict" and the law of the interested state is applied. On the other hand, if more than one state has a legitimate interest, the court must move to the third step of the analysis, which focuses on the "comparative impairment" of the interested states. Third, the court identifies and applies the law of the state whose interest would be the more impaired if its law were not applied. n2

In other words, when there is a true conflict, the court should make an unbiased assessment of which law is more effective or fair, and not just simply apply the forum law. n3 However, the default is for the court to apply the law of the forum state, and the burden is with the proponent of foreign law to show that the foreign rule of decision will further the interests of that state. n4

[4] Vested Rights Test

The third test is the vested rights test, which provides that a state court (or federal court applying state law) must apply the state law in which the parties' rights vested. Under the test, rights vest in the place where they are created, in the state where the act occurred or the relationship that is the subject of the suit was created. State law in which rights vest governs all substantive issues, whether in tort or in contract. n1 In tort suits, the parties' rights are deemed to vest in the place where the wrong occurred. The place where the wrong occurred is the place where the last event necessary to make the actor liable took place. n2 In contracts suits, the law of the state where the contract is made governs contract validity. n3 Generally, a contract is made where the parties complete the last act necessary to form the contract under forum state law: that is, the place where the parties accept the offer. n4

The vested rights test has fallen from favor in some courts, who have accepted the argument that the test is based on a formalized and impractical fiction that the parties to a dispute have rights that "vest" before a court has resolved their dispute and delineated those rights. n5

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProcedureFederal & State InterrelationshipsChoice of LawSignificant Relationships

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, § 124.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* Ch. 5, Original Jurisdiction over the Subject Matter, PART III.

(n3)Footnote 2. *CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1141 (9th Cir. 2010)* .

(n4)Footnote 3. *Fields v. Legacy Health Sys., 413 F.3d 943, 951 (9th Cir. 2005)* .

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 5. *See* [3], *below*.

(n7)Footnote 6. *See* [4], *below*.

(n8)Footnote 7. *Kohlrautz v. Oilmen Participation Corp., 441 F.3d 827, 833 (9th Cir. 2006)* .

(n9)Footnote 8. *Booking v. General Star Mgmt. Co., 254 F.3d 414, 422 (2d Cir. 2001)* .

(n10)Footnote 9. *See Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 842 (D.C. Cir. 2009)* (blend of modern tests); *Hammersmith v. TIG Ins. Co., 480 F.3d 220, 230 (3d Cir. 2007)* (hybrid based on two modern tests).

(n11)Footnote 1. *Inacom Corp. v. Sears Roebuck & Co., 254 F.3d 683, 688 (8th Cir. 2001)* (when considering choice of law issue related to most significant relationship test, federal courts rely on applicable provisions of the Restatement (Second) of Conflict of Laws for guidance).

(n12)Footnote 2. *See* [b], *below*.

(n13)Footnote 3. *See* [c], *below*.

(n14)Footnote 4. Restatement (Second) of Conflicts § 6(2); *Jasty v. Wright Med. Tech., Inc., 528 F.3d 28, 41 (1st Cir. 2008)* .

(n15)Footnote 5. *See Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 842 (D.C. Cir. 2009)* .

(n16)Footnote 6. Restatement (Second) of Conflicts § 145(2); *see Montgomery v. Wyeth, 580 F.3d 455, 459-460 (6th Cir. 2009)* (test applied to products liability claim).

(n17)Footnote 7. Restatement (Second) of Conflicts § 145(2); *Fuqua Homes, Inc. v. Beattie, 388 F.3d 618, 621 (8th Cir. 2005)* .

(n18)Footnote 8. Restatement (Second) of Conflicts § 145, comment c.

(n19)Footnote 9. *See* Restatement (Second) of Conflicts § 187(1),(2); *see also New Eng. Surfaces v. E.I. du Pont de Nemours & Co., 546 F.3d 1, 10 (1st Cir. 2008)* .

(n20)Footnote 10. Restatement (Second) of Conflicts § 187(2); *see Great Lakes Reinsurance (UK) PLC v. Durham Auctions Inc., 585 F.3d 236, 243 (5th Cir. 2009)* .

(n21)Footnote 11. Restatement (Second) of Conflicts § 188(1); *see* Restatement (Second) of Conflicts § 6; *see also Hoiles v. Alioto, 461 F.3d 1224, 1230 (10th Cir. 2006)* .

(n22)Footnote 12. Restatement (Second) of Conflicts § 188(2); *see Jasty v. Wright Med. Tech., Inc., 528 F.3d 28, 40 (1st Cir. 2008)* .

(n23)Footnote 1. *See Booking v. General Star Mgmt. Co., 254 F.3d 414, 422 (2d Cir. 2001)* ; *Arno v. Club Med Inc., 22 F.3d 1464, 1467 (9th Cir. 1994)* .

(n24)Footnote 2. *CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1142 (9th Cir. 2009)* .

(n25)Footnote 3. *See Hammersmith v. TIG Ins. Co., 480 F.3d 220, 231 (3d Cir. 2007)* .

(n26)Footnote 4. *CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1142 (9th Cir. 2009)* .

(n27)Footnote 1. *Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 871 (2d Cir. 1994)* (federal court applied vested rights rule to determine that law of state where injury occurred and contract was formed governed attorney malpractice and breach of contract claims).

(n28)Footnote 2. *Combs v. Int'l Ins. Co., 354 F.3d 568, 579 (6th Cir. 2004)* ; *see* Restatement (First) of Conflicts § 377.

(n29)Footnote 3. *Booking v. General Star Mgmt. Co., 254 F.3d 414, 422-423 (2d Cir. 2001)* .

(n30)Footnote 4. *Combs v. Int'l Ins. Co., 354 F.3d 568, 594 (6th Cir. 2004)* .

(n31)Footnote 5. *Booking v. General Star Mgmt. Co., 254 F.3d 414, 422, n.7 (2d Cir. 2001)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 3 LAW APPLIED
PART II. APPLICATION OF STATE SUBSTANTIVE LAW AND FEDERAL PROCEDURE IN DIVERSITY CASES IN FEDERAL COURT
C. DIVERSITY CASE CHOICE OF SUBSTANTIVE LAW FROM TWO OR MORE STATES

1-3 Moore's Manual--Federal Practice and Procedure § 3.62

§ 3.62 Application of Choice of Law Rules After Transfer of Venuen*

[1] Transfer On Ground of Convenience

When a court transfers a case within the federal system from one venue to another under the convenience transfer statute, n1 the transferee court must apply the choice of law rules of the state in which the transferor court is located. n2 Thus, a transfer for convenience entitles the parties only to a change of courtrooms, not a change of law. This rule applies regardless of which party initiates the transfer, the defendant, n3 or the plaintiff. n4

There are three reasons for the rule. First, a convenience transfer should not deprive parties of state law advantages that would exist absent diversity jurisdiction, and a convenience transfer assumes that the plaintiffs have chosen a proper venue so they should be allowed to retain whatever advantages may flow from the state laws of the forum they have initially selected. n5 Second, a convenience transfer should not increase the likelihood of forum shopping, which could occur if defendants were allowed to use a convenience transfer to obtain a change of law as an advantage from the change of venue. Third, the decision to transfer venue for convenience should depend on the interest of justice and considerations of expediency of the court and parties. If a change in law were allowed to accompany a change in venue, the remedial purpose of a transfer for convenience would be thwarted. n6

[2] Transfer On Ground of Improper Venue

When a case is transferred because of improper venue, n1 as opposed to transfer merely for convenience, n2 the transferee court must apply the choice of law rules of the state in which the transferee court is located. n3 In the absence of this rule, a plaintiff would be encouraged to file in a state with substantive law that favored the plaintiff, even if that forum were improper, because the plaintiff would realize that even if the case were transferred, the plaintiff would still benefit by having the law of the transferor court applied in the action. n4 When it is difficult to determine whether a transfer is for convenience or for improper venue, the transferee court must determine from the facts and circumstances the actual reason the court made the transfer; that determination is not controlled by how the transfer was characterized by the parties or transferor court. n5

[3] Transfer On Ground of Lack of Personal Jurisdiction

When the venue of an action is technically proper, but then the action is transferred because the transferor court actually lacks personal jurisdiction over the defendants, the general rule is that the transferee court must apply the law of the transferee state. n1 Thus, when the plaintiff chooses a venue where the court lacks personal jurisdiction over the defendants, application of the law of the original legally defective forum upon transfer to a legally appropriate forum would be improper. n2 If the transferee court were to apply the law of the transferor court, it would permit a plaintiff to benefit by bringing an action in an impermissible forum, and unfairly obtain the law of the transferor state by filing a federal action, when the state court would have dismissed it for lack of jurisdiction. n3 Therefore, when there is a lack of personal jurisdiction in the transferor court, federal courts will refuse to treat a transfer motion as a motion under Section 1404(a) and instead require the transfer to be effected under Section 1406(a), the improper venue transfer statute, even though venue is technically proper. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureFederal & State InterrelationshipsChoice of LawGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.30[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. 1404(a).*

(n3)Footnote 2. *Ferens v. John Deere Co., 494 U.S. 516, 521-532, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* ; *Financial One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 333 (2d Cir. 2005)* .

(n4)Footnote 3. *Van Dusen v. Barrack, 376 U.S. 612, 626-640, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n5)Footnote 4. *Computer Assocs. Int'l v. Altai, Inc., 22 F.3d 32, 35 n.3 (2d Cir. 1994)* .

(n6)Footnote 5. *Van Dusen v. Barrack, 376 U.S. 612, 635-637, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n7)Footnote 6. *Ferens v. John Deere Co., 494 U.S. 516, 527-528, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

(n8)Footnote 1. *28 U.S.C. 1406(a).*

(n9)Footnote 2. *Bristol West Ins. Co. v. Whitt, 406 F. Supp. 2d 771, 786 (W.D. Mich. 2005)* .

(n10)Footnote 3. *Doering v. Copper Mountain, Inc., 259 F.3d 1202, 1209 (10th Cir. 2001)* ; *Wisland v. Admiral Beverage Corp., 119 F.3d 733, 735-737 (8th Cir. 1997)* .

(n11)Footnote 4. *See LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 526 (4th Cir. 1987)* , *cert. denied, 484 U.S. 1065 (1988)* ; *Gonzalez v. Volvo of America Corp., 734 F.2d 1221, 1223-1224 (7th Cir. 1984)* .

(n12)Footnote 5. *Jackson v. West Telemarketing Corp. Outbound, 245 F.3d 518, 522 (5th Cir. 2001)* (transfer was actually made because venue in transferor court was improper under forum selection clause, not because of convenience).

(n13)Footnote 1. *Doering v. Copper Mt., Inc., 259 F.3d 1202, 1209 (10th Cir. 2001)* ; *Klayman v. Barmak, 634 F. Supp. 2d 56, 61 (D.D.C. 2009)* .

(n14)Footnote 2. *Eggleton v. Plasser & Theurer Exp. Von Bahnbaumaschinen Gesellschaft, 495 F.3d 582, 588-589 (8th Cir. 2007)* .

(n15)Footnote 3. *Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1532 (10th Cir. 1996)* .

(n16)Footnote 4. *Jackson v. West Telemarketing Corp. Outbound, 245 F.3d 518, 523 (5th Cir. 2001)* .

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1-3 Moore's Manual--Federal Practice and Procedure § 3.63

§ 3.63 Application of Choice of Law Rules After Consolidationn*

When one or more diversity jurisdiction cases have been consolidated, the federal court must determine which state's law applies in the consolidated case, because in the consolidated case only one state's law may govern. n1 When a transferee court presides over several consolidated diversity actions, the transferee court must use choice of law rules of each state in which the transferred actions were originally filed to complete its choice of law analysis and determine the applicable substantive law. n2 If a choice of law analysis of each state would require the court to apply differing state substantive laws, the court must analyze the 'balance of interests" to determine the one state law to apply. Under the balancing of interests test, the court must balance the interests of each state in having its law apply, and then apply the law of the state with the most compelling interests. n3 For a discussion of the balancing of interests test, see *§ 3.61[3]*. For a discussion of the consolidation of cases, see Ch. 20, *Trial Practice in General*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice,* § 124.30[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See In re Relafen Antitrust Litig., 221 F.R.D. 260, 277-278 (D. Mass. 2004)* .

(n3)Footnote 2. *In re OnStar Contract Litig., 600 F. Supp. 2d 861, 865 (E.D. Mich. 2009)* ; *see Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 674 (5th Cir. 2003)* .

(n4)Footnote 3. *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752-753 (11th Cir. 1998)* ; *see Corr. Officers' Benevolent Ass'n of the City of N.Y. v. Express Scripts, Inc., 522 F. Supp. 2d 1132, 1139-1140 (E.D.*

Mo. 2007) .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure 4.syn

§ 4.syn Synopsis to Chapter 4: FEDERAL EVIDENCE SUMMARY

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[3] Direct and Circumstantial Evidence

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§ 4.12 Authentication and Identification of Evidence

[1] Requirements for Authentication or Identification

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.01

§ 4.01 Functions and Categories of Evidencen*

[1] Purpose of Evidence

Evidence broadly consists of the testimony, writings, and other materials presented to the court because they have a reasonable tendency to prove or disprove a matter promoted by a party. Thus, the primary requirement of evidence is that it must make the existence of a disputed fact more or less probable. n1

[2] Relevant and Irrelevant Evidence

A. Relevant Evidence.

"Relevant evidence" means evidence having a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence. n1

B. Irrelevant Evidence.

"Irrelevant evidence," which is not allowed to be presented in court, is evidence that does not have a tendency to prove or disprove a significant matter in dispute. Relevance does not have anything to do with the weight that should be given to the matter offered for evidence or the sufficiency of proof required to enable a party to persuade the jury on an issue. n2 Rather, relevance is a consideration of whether the matter is even concerned with an issue in the case. n3

[3] Direct and Circumstantial Evidence

A. Direct Evidence.

"Direct evidence" is evidence that, if believed by the trier of fact, will prove the particular fact in issue without the trier of fact having to rely on any additional inference or presumption. n1

B. Circumstantial Evidence.

"Circumstantial evidence" is evidence that requires an inferential step in its proof. n2 Thus, in contrast to direct evidence, circumstantial evidence does not present a particular proposition under consideration but asserts some second

proposition from which the trier of fact may either reasonably infer the truth of the first proposition, or at least reasonably infer an increase in the probability that the first proposition is actually true. n3 For example, if the plaintiff presented circumstantial evidence that a property owner left a foreign substance on the floor for an inordinate period of time, the trier of fact could reasonably conclude that the property owner was negligent, even though there is no evidence that the owner had actual knowledge that the substance was on the floor. n4 Generally, circumstantial evidence is treated no differently than direct evidence. n5 However, because it does require an extra inferential step, the courts may impose additional requirements to establish claims based on circumstantial evidence. n6

[4] Admissibility of Evidence

A. Admissible Evidence.

"Admissible evidence" does not have a particular definition. Rather, it is a legal conclusion that either a trial or an appellate court may make, after analysis of all the applicable rules and principles of evidence, that a particular item should be presented to the trier of fact for consideration. n1

B. Inadmissable Evidence.

"Inadmissible evidence" does not have a particular definition. Rather, it is a conclusion that a trial or appellate court may make, after analysis of all the applicable rules and principles of evidence, that a particular item should be excluded from the trier of fact for consideration in a trial. n2

[5] Categories Based on Form of Evidence

A. Testimonial Evidence.

"Testimonial evidence" is evidence that is presented in the conventional way of asking questions of a witness, who then makes assertions in court. The trier of fact then decides the weight to be given those assertions. The classification of evidence as testimonial is important, for example, because some privileges are reserved for testimonial evidence, n1 and in some circumstances, documentary evidence may be admitted rather than testimonial evidence. n2

B. Documentary Evidence.

"Documentary evidence" is evidence in written form that represents an occurrence or status relevant to the factual scenario that is in issue in the case. n3

C. Demonstrative Evidence.

"Demonstrative evidence" may consist of a dramatization or demonstration designed to replicate activity that occurred during the subject matter that is in issue during a case. For example, in a civil rights action alleging injury due to a police officer's excessive force, the officer's demonstration of his wristlock hold on plaintiff was helpful to the jury in deciding whether the tactic contributed to or caused the plaintiff's injuries. n4 Demonstrative evidence may also be a tangible article that is not an actual item in existence during an actual incident in the case but is fabricated for trial to demonstrate some proposition relevant to the case. Demonstrative evidence may also commonly take the form of a summary of other evidence in the case. n5

D. Real Evidence.

"Real evidence" is evidence that actually relates to the occurrence that constitutes the subject matter of the case. An example of real evidence is when a plaintiff shows his or her actual injuries. n6 A party that wants to introduce real evidence must demonstrate its relevancy by showing that, the object is the one claimed, it is linked to an issue in the

case, and it is in substantially the same condition as when the event at issue occurred. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceGeneral OverviewEvidenceProcedural ConsiderationsGeneral OverviewEvidenceRelevanceGeneral OverviewEvidenceRelevanceCircumstantial & Direct EvidenceEvidenceRelevanceRelevant Evidence

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 1 *Weinstein's Evidence*, Ch. 101 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Adams v. Ameritech Servs., Inc., 231 F.3d 414, 425 (7th Cir. 2000)* (statistical evidence).

(n3)Footnote 1. *Fed. R. Evid. 401*; *see Olsen v. American S.S. Co., 176 F.3d 891, 896-897 (6th Cir. 1999)* .

(n4)Footnote 2. *United States v. Murphy, 768 F.2d 1518, 1534-1535 (7th Cir. 1985)* , *cert. denied, 475 U.S. 1012 (1986)* .

(n5)Footnote 3. *Spain v. Gallegos, 26 F.3d 439, 452 (3d Cir. 1994)* .

(n6)Footnote 1. *Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 863 (7th Cir. 1997)* .

(n7)Footnote 2. *See Ratliff v. City of Gainesville, 256 F.3d 355, 360 n.7 (5th Cir. 2001)* .

(n8)Footnote 3. *United States v. Ruiz, 105 F.3d 1492, 1499-1500 (1st Cir. 1997)* .

(n9)Footnote 4. *Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001)* .

(n10)Footnote 5. *United States v. Jackson, 863 F.2d 1168, 1171 (4th Cir. 1989)* .

(n11)Footnote 6. *See, e.g., Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1359 (11th Cir. 1999)* , *cert. denied, 529 U.S. 1109 (2000)* (establishing four-part test in evaluating age discrimination wrongful discharge claims based on circumstantial evidence).

(n12)Footnote 1. *Mota v. University of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 527 (5th Cir. 2001)* .

(n13)Footnote 2. *Walker v. Soo Line R.R., 208 F.3d 581, 588-589 (7th Cir. 2000)* , *cert. denied, 531 U.S. 930 (2000)* (discussing inadmissibility of experts' opinion).

(n14)Footnote 1. *United States v. McKeon, 558 F. Supp. 1243, 1246 (E.D.N.Y. 1983)* (handwriting exemplars not precluded under spousal privilege).

(n15)Footnote 2. *See United States v. Alexander, 326 F.2d 736, 740 (4th Cir. 1964)* .

(n16)Footnote 3. *Dykes v. Raymark Indus., Inc., 801 F.2d 810, 818 (6th Cir. 1986)* , *cert. denied, 481 U.S. 1038 (1987)* .

(n17)Footnote 4. *Jones v. Ralls, 187 F.3d 848, 853 (8th Cir. 1999)* .

(n18)Footnote 5. *See United States v. Meshack, 225 F.3d 556, 581-582 (5th Cir. 2000)* .

(n19)Footnote 6. *Caldwell v. Ohio Power Co., 710 F. Supp. 194, 200 (N.D. Ohio 1989)* (amputated foot).

(n20)Footnote 7. *See Fed. R. Evid. 901.*

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.02

§ 4.02 Scope of Federal Rules of Evidencen*

[1] Scope and Purpose of Rules

The Federal Rules of Evidence n1 govern all proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges. n2 The purpose of the rules is to ensure fairness in administration, eliminate unjustifiable expense and delay, and promote growth and development of the law of evidence to ascertain truth and justly determine proceedings. The courts must construe the rules to further those purposes. n3

[2] Extent of Rules Coverage and Exceptions to Rules

A. Courts.

The Federal Rules of Evidence basically apply to all United States district courts, the United States courts of appeals, the United States Claims Court, and to the United States bankruptcy judges and United States magistrate judges. n1

B. Types of Actions.

The Federal Rules of Evidence apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code. n2 With respect to the rule of evidence on privileges, the rule applies at all stages of all actions, cases, and proceedings. n3

C. Exceptions in Civil Cases.

1. Preliminary Evidentiary Determinations by Court.

The Evidence Rules do not apply to the determinations of fact that must be decided by the court before evidence is admitted, other than rules of privilege. n4

2. Arbitration.

Arbitration proceedings are not controlled by the Federal Rules of Evidence. n5

3. Administrative Proceedings.

The Federal Rules of Evidence do not apply in administrative hearings. n6

4. Grand Jury.

Federal evidence rules do not control in grand jury inquiries. n7

5. Other Statute or Rule Applicable.

If another statute or a rule adopted by the Supreme Court governs a special type of proceeding, and specifically concerns an evidentiary matter, the FederalRules of Evidence apply only to the extent not inconsistent with the statute or rule.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceGeneral OverviewEvidenceProcedural ConsiderationsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 1 *Weinstein's Evidence,* Ch. 101 and Ch. 102 (Matthew Bender 2d ed.); and 6 *Weinstein's Evidence,* Ch. 1101 (Matthew Bender 2d ed.).

(n2)Footnote 1. *See Fed. R. Evid. 1103.*

(n3)Footnote 2. *Fed. R. Evid. 101.*

(n4)Footnote 3. *Fed. R. Evid. 102*; *see, e.g., New York v. Operation Rescue Nat'l, 80 F.3d 64, 72 (2d Cir. 1996)* , *cert. denied, 519 U.S. 825 (1996)* (Evidence Rule 102 applied to deny litigant absolute right to show entire hour-long videotape, even though otherwise admissible).

(n5)Footnote 1. *Fed. R. Evid. 1101(a).*

(n6)Footnote 2. *Fed. R. Evid. 1101(b).*

(n7)Footnote 3. *Fed. R. Evid. 1101(c).*

(n8)Footnote 4. *Fed. R. Evid. 1101(d)(1)*; *see Fed. R. Evid. 104.*

(n9)Footnote 5. *Bates v. Long Island R.R., 997 F.2d 1028, 1035 (2d Cir. 1993)* , *cert. denied, 510 U.S. 992 (1993)* .

(n10)Footnote 6. *Brown ex rel. Brown v. Bowen, 668 F. Supp. 146, 149 (E.D.N.Y. 1987)* (Social Security Administration).

(n11)Footnote 7. *Fed. R. Evid. 1101(d)(1)*; *see Alexiou v. United States (In re Subpoena to Testify Before the Grand Jury), 39 F.3d 973, 975-976 (9th Cir. 1994)* , *cert. denied, 514 U.S. 1097 (1995)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.03

§ 4.03 Court's Determinations Related to Evidencen*

[1] Objections

A. Party Must Object.

The court will not exclude evidence on its own initiative; the opponent must make an objection to the evidence. n1

B. Timely Objection Required.

The objection must be timely or it will not be considered on appeal. n2 An objection is "timely" if it is made as soon as the opponent of the evidence should become aware that the objection is applicable. n3

C. Specific Objection Required.

The objection must be specific enough that both the trial court and the appeals court will be able to ascertain the basis for the objection. n4

[2] Offer of Proof to Preserve Appeal of Exclusion

If the court rules that evidence is inadmissible, the proponent generally must have made an offer of proof in order to preserve appeal that the evidence should have been admitted. An "offer of proof" is a clear indication by the proponent to the court of what the proposed evidence consists, either by the attorney's explanation or by the context of questions and answers given to the witness outside the jury's presence. n1

[3] Renewal Not Necessary

A party need not renew an objection or offer of proof to preserve a claim of error for appeal after the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial. n1

[4] Arguments Made Out of Presence of Jury

Whenever practical in jury cases, proceedings to determine the admissibility of evidence must be conducted to prevent

inadmissible evidence from being exposed to the jury. n1 Furthermore, because the jury decides matters of weight or credibility, the jury should not be informed of matters of preliminary determination regarding admissibility. n2

[5] Standard for Court's Decision on Admissibility

When making a finding whether to admit evidence, the court is not bound by the rules of evidence except those regarding privileges. n1 The court generally must make such a determination using a preponderance of the evidence standard. n2

[6] Admission of Evidence for Limited Purposes

Evidence may be admissible for one purpose but inadmissible for another. In such circumstances, the court may allow the evidence to be admitted but, on request, must restrict the evidence to its proper scope and instruct the jury accordingly. n1

[7] Conditional Ruling of Relevance

The Federal Rules of Evidence provide for the admission of conditionally relevant evidence, which the court has the discretion to admit when the relevancy of some items of evidence depends on the existence of a particular preliminary fact. The court may admit such offered evidence subject to the introduction of the evidence of the conditional fact. n1 Because the rule allows the court to admit evidence "subject to" a finding of the fulfillment of the condition, the court may submit a question of the existence of a preliminary fact to the jury when appropriate. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsLimited AdmissibilityEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 1 *Weinstein's Evidence,* Ch. 103 et seq. (Matthew Bender 2d ed.).

(n2)Footnote 1. *Fed. R. Evid. 103(a)(1)*; *Webster v. M/V Moolchand, Sethia Liners, Ltd., 730 F.2d 1035, 1039-1040 (5th Cir. 1984)* .

(n3)Footnote 2. *Fed. R. Evid. 103(a)(1)*; *Building Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1396 (6th Cir. 1995)* .

(n4)Footnote 3. *McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1407-1408 (8th Cir. 1994)* (defendant's objection not timely because not made when grounds became apparent while witness was testifying).

(n5)Footnote 4. *Miksis v. Howard, 106 F.3d 754, 761 (7th Cir. 1997)* .

(n6)Footnote 1. *Fed. R. Evid. 103(a)(2)*; *see Badami v. Flood, 214 F.3d 994, 998 (8th Cir. 2000)* .

(n7)Footnote 1. *Fed. R. Evid. 103(a)*; *see National Envtl. Serv. Co. v. Ronan Eng'g Co., 256 F.3d 995, 1002 (10th Cir. 2001)* (example of definitive ruling).

(n8)Footnote 1. *Fed. R. Evid. 103(c)*, *104(c)*; *see United States v. Adames, 56 F.3d 737, 743-744 (7th Cir. 1995)* , *cert. denied, 517 U.S. 1250 (1996)* .

(n9)Footnote 2. *See Fed. R. Evid. 104(e).*

(n10)Footnote 1. *Fed. R. Evid. 104(a).*

(n11)Footnote 2. *See Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995)* ; *Earle v. Benoit, 850 F.2d 836, 841 (1st Cir. 1988)* .

(n12)Footnote 1. *Fed. R. Evid. 105*; *see Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 685 (4th Cir. 1995)* , *cert. denied, 517 U.S. 1103 (1996)* (evidence admitted for limited purpose of establishing foreseeability).

(n13)Footnote 1. *Fed. R. Evid. 104(b)*; *see MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274, 1280-1282 (8th Cir. 1994)* , *cert. denied, 513 U.S. 824 (1994)* .

(n14)Footnote 2. *See Barrett v. United States, 965 F.2d 1184, 1195 (1st Cir. 1992)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.04

§ 4.04 n* Judicial Notice

[1] Function of Judicial Notice

There is a specific provision for "judicial notice" of adjudicative facts in the Federal Rules of Evidence. This provision acknowledges that certain information does not need to be proved by the introduction of evidence at trial, n1 and that by taking judicial notice, the court affirmatively establishes such information without requiring any formal evidentiary proof. n2 A court may take judicial notice of adjudicative facts, n3 legislative facts, n4 and the law. n5 Adjudicative facts are those facts related to a particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or the enactment of a legislative body. n6

[2] Requirements for Judicial Notice of Adjudicative Fact

To qualify for judicial notice as an adjudicative fact, the fact must be either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. n1

[3] Judicial Notice of Legislative Facts

Because the Federal Rules of Evidence specifically apply only for judicial notice of adjudicative facts, federal courts may take judicial notice of legislative facts even when matters are neither indisputable nor easily verifiable. n1 A court may take judicial notice of legislative facts if they are established truths, or if they do not change from case to case but apply universally. n2

[4] Judicial Notice of Law

A federal court may take judicial notice of virtually all types of law, including not only federal statutes and rules n1 but also state law, if relevant. n2 Furthermore, federal courts may take judicial notice of federal regulations n3 and even bills that have been introduced before Congress or a state legislature. n4

[5] Judicial Notice Is Mandatory on Proper Request

A court must take judicial notice if requested by a party and supplied with the necessary information. n1 Otherwise, a court has discretion to take judicial notice even though not requested by a party. n2

[6] Procedural Requirements

A. Opportunity to Contest Judicial Notice.

A party that makes a timely request is entitled to an opportunity to be heard regarding the propriety of taking judicial notice, and the substance of the matter to be noticed. n1

B. Timing of Judicial Notice.

Any court may take judicial notice at any stage of the proceeding, provided that the facts are indisputable. n2 Thus, judicial notice may be taken by an appellate court; appellate courts may even take judicial notice of events that occurred after judgment was entered in the lower court. n3

[7] Effect of Judicial Notice

After the court takes judicial notice of an adjudicative fact, the Federal Rules of Evidence bar contrary evidence in civil cases, and the court must instruct the jury to accept the noticed fact as conclusive. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsFacts Generally KnownEvidenceJudicial NoticeAdjudicative FactsVerifiable FactsEvidenceJudicial NoticeLaws of Foreign States

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 1 *Weinstein's Evidence,* Ch. 201 (Matthew Bender 2d ed.).

(n2)Footnote 1. *See Fed. R. Evid. 201.*

(n3)Footnote 2. *Cupey Bajo Nursing Home, Inc. v. United States, 36 Fed. Cl. 122, 135 n.22 (1996) .*

(n4)Footnote 3. *Fed. R. Evid. 201(a)*; *see* [2], *below.*

(n5)Footnote 4. *See* [3], *below.*

(n6)Footnote 5. *See* [4], *below.*

(n7)Footnote 6. *Ellis v. Weasler Eng'g, Inc., 258 F.3d 326, 334 n.12 (5th Cir. 2001) .*

(n8)Footnote 1. *Fed. R. Evid. 201(b)*; *see, e.g., General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1081 (7th Cir. 1997) .*

(n9)Footnote 1. *See United States v. Coffman, 638 F.2d 192, 195 (10th Cir. 1980) , cert. denied, 451 U.S. 917 (1981) .*

(n10)Footnote 2. *United States v. Coffman, 638 F.2d 192, 195 (10th Cir. 1980) , cert. denied, 451 U.S. 917 (1981) .*

(n11)Footnote 1. *Northern Heel Corp. v. Compo Indus., 851 F.2d 456, 458 (1st Cir. 1988)* .

(n12)Footnote 2. *Kucel v. Walter E. Heller & Co., 813 F.2d 67, 74 (5th Cir. 1987)* .

(n13)Footnote 3. *United States v. Holmes, 414 F. Supp. 831, 839 (D. Md. 1976)* (judicial notice of regulations issued by army).

(n14)Footnote 4. *County of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179 (2d Cir. 2001)* .

(n15)Footnote 1. *Fed. R. Evid. 201(d).*

(n16)Footnote 2. *Fed. R. Evid. 201(c)*; *see FDIC v. Houde, 90 F.3d 600, 607-608 (1st Cir. 1996)* .

(n17)Footnote 1. *Fed. R. Evid. 201(e).*] However, the "opportunity to be heard" under Rule 201 does not require a formal hearing under all circumstances. The court has discretion to hear and consider the parties' arguments in a motion or brief.

American Stores Co. v. Commissioner, 170 F.3d 1267, 1270-1271 (10th Cir. 1999) , *cert. denied, 528 U.S. 875 (1999)* .

(n18)Footnote 2. *Fed. R. Evid. 201(f).*

(n19)Footnote 3. *Opoka v. INS, 94 F.3d 392, 394-395 (7th Cir. 1996)* .

(n20)Footnote 1. *Fed. R. Evid. 201(g)*; *see Qualley v. Clo-Tex Int'l, Inc., 212 F.3d 1123, 1132 (8th Cir. 2000)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.05

§ 4.05 Presumptions and Burdensn*

[1] Nature of Presumptions

A. Rebuttable Presumption.

A "presumption" in federal evidence law is an evidentiary relationship between a basic fact and a presumed fact. Under this relationship, the presumed fact is automatically assumed to exist merely based on the existence of the other, basic fact. Thus, for a "rebuttable presumption," once the basic fact is established, the trier of fact must accept that the presumed fact has also been established, even without evidence of the presumed fact, unless the presumption is rebutted. n1 Because a presumption is only a relationship, it is not a form of evidence and does not affect the weight of evidence. n2 Presumptions do effect evidence, n3 however, in that they may shift either type of the burden of proof: (1) the "burden of going forward with the evidence" also known as the "burden of production," and (2) the "burden of persuasion." n4 Many rebuttable presumptions are created by statute. n5

B. Irrebuttable Presumption.

An irrebuttable presumption refers to a presumption that may not be overcome by any degree of evidence. Thus, if a presumption is irrebuttable, once the basic fact is established, the presumed fact must be assumed conclusively and may not be overcome in any event. This type of presumption is generally acknowledged to be a misnomer and recognized to actually constitute a substantive law rather than a rule of procedure or evidence. n6

[2] Nature of Burdens

A. Burden of Production.

The "burden of production," also known as the burden of going forward with evidence, refers to the obligation of one party to initially produce evidence that supports its position in the case. n1 Usually, it is the plaintiff that has the initial obligation to produce evidence and if the plaintiff fails to do so, the result is an adverse finding against the plaintiff. n2 However, the burden of production may initially be placed by statute on the defendent, or may be shifted by a presumption. n3

B. Burden of Persuasion.

In contrast to the burden of production, the burden of persuasion does not merely require the introduction of evidence to support a party's case, but concerns the weight of evidence and requires a party to produce the degree of evidence that entitles the party to prevail on an issue, based on the requisite standard of proof required under the substantive law for the particular issue. n4 Thus, for example, even if a plaintiff has the burden of persuasion in a particular case, n5 the defendant may have the burden of persuasion with regard to affirmative defenses. n6

[3] Effect of Presumption

Unless otherwise provided by statute n1 or rules of evidence, a presumption imposes on the party against whom it is directed, the burden to produce evidence to rebut or meet the presumption but does not shift to that party the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast. n2 Thus, under Rule 301, the effect of a presumption is to shift to the other party the burden of production, which is the burden of going forward with evidence to rebut or meet the presumption. However, Evidence Rule 301 does not shift the burden of persuasion, which is the degree to which a party must prove each element of the case. n3 If the opposing party presents evidence sufficient to rebut the presumption, it disappears form the case. n4

[4] Presumptions in Application of State Law

A federal court must apply state law, rather than federal procedural law, to determine the existence and effect of a presumption concerning a fact that is an element of a claim or defense that is based on state law. n1 Thus, in diversityactions, which are controlled by state substantive law, the federal court must apply the state law of presumptions applicable to the claim or defense. n2 This rule also applies to any issue or claim in a nondiversity case when the issue or claim is based on state law, such as an action under the Federal Tort Claims Act when it is based on a state medical malpractice claim. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsCreation of PresumptionsEvidenceInferences & PresumptionsPresumptionsEffectsEvidenceInferences & PresumptionsPresumptionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofUltimate Burden of Persuasion

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 1 *Weinstein's Evidence,* Ch. 301, Ch. 302 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Rice v. Office of Servicemembers' Group Life Ins., 260 F.3d 1240, 1248 (10th Cir. 2001)* (rebuttable presumption that person acting as testator possesses testamentary capacity); *see Fed. R. Evid. 301.*

(n3)Footnote 2. *Routen v. West, 142 F.3d 1434, 1439 (Fed. Cir. 1998) , cert. denied, 525 U.S. 962 (1998) .*

(n4)Footnote 3. *Se* [3], *below.*

(n5)Footnote 4. *See* [2], *below.*

(n6)Footnote 5. *See* 1 *Weinstein's Evidence,* § 301.20 et seq. (Matthew Bender 2d ed.).

(n7)Footnote 6. *See County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) .*

(n8)Footnote 1. *United States v. Santee Sioux Tribe, 254 F.3d 728, 733 n.3 (8th Cir. 2001)* .

(n9)Footnote 2. *See, e.g., McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983)* .

(n10)Footnote 3. *Fed. R. Evid. 301*; *see* [3], *below*.

(n11)Footnote 4. *Routen v. West, 142 F.3d 1434, 1440 (Fed. Cir. 1998)* , *cert. denied, 525 U.S. 962 (1998)* .

(n12)Footnote 5. *See, e.g., Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1319 (9th Cir. 1995)* , *cert. denied, 516 U.S. 869 (1995)* .

(n13)Footnote 6. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1038-1039 (Fed. Cir. 1992)* .

(n14)Footnote 1. *Donnelly Corp. v. Gentex Corp., 918 F. Supp. 1126, 1131 (W.D. Mich. 1996)* (Congress has option to provide particular rules related to presumptions that control particular causes of action).

(n15)Footnote 2. *Fed. R. Evid. 301*; *see* [2], *above*.

(n16)Footnote 3. *Fed. R. Evid. 301*; *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)* .

(n17)Footnote 4. *Marcantel v. Department of Transp. & Dev., 37 F.3d 197, 200 (5th Cir. 1994)* .

(n18)Footnote 1. *Fed. R. Evid. 302*.

(n19)Footnote 2. *Johnston v. Pierce Packing Co., 550 F.2d 474, 476 n.1 (9th Cir. 1977)* .

(n20)Footnote 3. *Welsh v. United States, 844 F.2d 1239, 1243 (6th Cir. 1988)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.06

§ 4.06 Relevancyn*

[1] Status of Evidence as Relevant

"Relevant evidence" is evidence that has a tendency to make the existence of any fact that is of consequence to the determination of an issue or claim either more probable or less probable than it would be without that evidence. n1 "Irrelevant evidence" is all evidence that is not relevant--in other words, evidence that does not have any tendency to prove or disprove a matter that is significant in the dispute. Thus, relevance is only a consideration of whether evidence has any bearing on an issue in the case. n2

[2] Requirement of Relevancy

Relevancy is an indispensable prerequisite to admissibility in evidence law. Thus, no evidence may be admitted to be considered by the trier of fact unless it is relevant. n1 However, the converse is not necessarily true: the mere fact that it is relevant does not make evidence admissible; it must be admissible under the test of all the other rules of evidence. n2

[3] Court's Discretion to Exclude Evidence

The trial court has discretion whether to exclude relevant evidence, n1 because the trial court is in the most favorable position to determine issues such as probative value, prejudice, delay and confusion. n2 When the trial court excludes evidence under Evidence Rule 403, the court should ensure that a clear statement of the reason is included in the record and should make the ruling outside the jury's hearing if prejudice could result. n3

[4] Particular Circumstances Providing for Exclusion of Relevant Evidence

A. Probative Value Outweighed by Negative Factors.

1. Unfair Prejudice.

The trial court has discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. n1 "Unfair prejudice" means an undue tendency to suggest a decision on an improper basis. The most common but not exclusive example of an improper basis is a decision based on emotion.

n2

2. Confusion of Issues or Misleading of Jury.

The court may exclude evidence that is relevant if its probative value is substantially outweighed by the danger of confusion of issues or of misleading the jury. n3 Whether confusion of issues or misleading the jury would result from the admission of evidence turns on the facts in the particular case. n4 With regard to misleading the jury, courts are particularly cautious in admitting statistical evidence, because such evidence is subject to misuse. n5

3. Undue Delay or Waste of Time.

Relevant evidence may be excluded by the court if its probative value is substantially outweighed by considerations of undue delay or waste of time. n6

4. Needless Presentation of Cumulative Evidence.

The trial court has discretion to exclude relevant evidence if its probative value is substantially outweighed by concern that its admission would be a needless presentation of cumulative evidence. n7 "Cumulative evidence" is repetitive evidence which adds very little probative force to the case, so that if it were admitted its contribution to the determination of truth would be outweighed byits contribution to the length of trial. n8 The trial court has considerable discretion to exclude cumulative evidence to further the purpose of conducting the trial efficiently. n8.1 Thus, the court may exclude evidence regarding a particular issue in a case if the evidence would be merely repetitive of, or in addition to, other evidence that has already established the existence of that issue. n9

B. Character.

1. Inadmissible as General Rule.

In a civil case, evidence of a person's character or character trait is not admissible to prove that the person acted in conformity with that character or character trait. n10

2. Exceptions.

a. Character in Issue.

If a person's particular character or trait is a material element of a claim or defense under the substantive law, evidence of such character is admissible. In that case, the evidence is not being offered to prove that the person acted in conformity with that character trait on a particular occasion, n11 but rather because the character trait itself is significant as the element of the claim or defense. For example, in a defamation action or libel action, an essential element of the claim is injury to reputation, and this makes the plaintiff's reputation or character an essential element of the case. n12

b. Character Admissible to Impeach Witness.

Evidence of the character of a witness is admissible for the limited purposes of impeaching a witness. Thus, character of a witness may be admitted to attack the credibility of the witness. n13 However, only evidence that is related to truthfulness or lack of truthfulness is admissible under this exception. n14

c. Other Wrongful Acts Sometimes Admissible.

Although evidence of other particular wrongs, crimes, or acts is not admissible to prove the character of a person in order to show action in conformity with such acts, the court may admit such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. n15

3. Methods of Proving Character.

If character evidence is admissible under one of the three exceptions stated in 2, *above*, proof may be made by: n16 testimony as to reputation, n17 or testimony in the form of an opinion. n18 Generally, evidence of specific instances of conduct is not admissible to show character. However, if character is in issue, as in cases in which character or a trait of character is an essential element of a claim or defense, proof may also be made of specific instances of that person's conduct. n19

C. Habit and Routine.

1. Admissible as General Rule.

Evidence of the habit of a person or of the routine practice of an organization, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Habit and routine practice is admissible whether corroborated or not and regardless of the presence of eyewitnesses. n20

2. Admissible Habit of Individual.

The "habit" of an individual that qualifies under Evidence Rule 406 is a regular, specific response to a repeated, specific behavior or situation. The more regular and repeated the response, the more likely the court is to find a habit. A habit is distinguished from character in that habit is specific and particular, whereas character is a generalized description of an individual's disposition or general trait, such as frugality or honesty. n21

3. Admissible Routine Practice of Organization.

Routine practice is sufficient under Evidence Rule 406 if it is standard operating procedure for an organization. n22 For evidence of routine practice to be admitted, the entity in question must be a cohesive organization characterized by structure and routine. Thus, the practices of an informal group of independent contractors would not qualify as an organization under the rule. n23 Evidence of a routine practice is particularly persuasive in for-profit businesses and corporatecontexts because the incentive for profits necessitates predictability and regularity. n24

D. Subsequent Remedial Measures.

1. Inadmissible as General Rule.

As a general rule, evidence of remedial measures that have been taken by an individual or entity after an injury or harm allegedly caused by an event is inadmissable to prove negligence, culpable conduct, a defect in a product or a product's design, or a need for a warning or instruction. n25 A "remedial measure" that qualifies under Evidence Rule 407 includes any kind of modification, repair, or precaution. n26

2. Admissible to Prove Matter Other Than Culpability.

Evidence of subsequent remedial measures is admissible when offered for a purpose other than showing culpability, such as proving ownership; control; feasibility of precautionary measures, if controverted; or impeachment. n27 Furthermore, if a defendant attempts to use proof of conditions at the time of litigation to prove the conditions were not dangerous, the plaintiff may in rebuttal use evidence of remedial measures to show that conditions have changed in significant respects since the accident's occurrence. n28

E. Compromise.

1. Evidence of Compromise Generally Inadmissible.

a. Evidence of Attempt to Give Consideration in Compromise.

Evidence of an attempt to give or take a valuable consideration in the compromise of a claim is inadmissable to prove liability for, invalidity of, or amount of, the claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction. n29

b. Evidence of Conduct or Statements Made in Compromise Negotiations Generally Inadmissable

Evidence of particular conduct or statements related to an attempt to give or take a valuable consideration in the compromise of a claim is inadmissable to prove liability for, invalidity of, or amount of, a claim that was disputed as to validity or amount. However such conduct or statements are admissible when they relate to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. n30

2. Evidence of Compromise Admissible to Prove Matter Other Than Liability or Amount of Damages

Evidence need not be excluded under this rule if the evidence is offered for purposes other than to prove liability for, invalidity of, or amount of the claim in issue. Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. n31 n32-34

F. Payment of Medical Expenses. As a general rule, evidence of the furnishing, offering, or promising to pay medical, hospital, or similar expenses resulting from injury is inadmissible if offered to prove liability for the injury. n35

G. Liability Insurance.

1. Inadmissible as General Rule.

As a general rule, evidence of a person's insurance against liability is not admissible to show that the person acted negligently or otherwise wrongfully. n36

2. Admissible to Prove Matter Other Than Neglect or Wrongful Conduct.

Evidence that a person was or was not insured against liability is admissible if offered for a purpose other than whether the person acted negligently or wrongfully, such as proof of agency, ownership, or control, or the bias or prejudice of a witness. n37 This list is exemplary, and insurance evidence is admissible whenever it is for a purpose other than showing negligence or wrongful conduct. n38

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceGeneral OverviewEvidenceRelevanceCharacter EvidenceEvidenceRelevanceConfusion, Prejudice & Waste of TimeEvidenceRelevancePrior Acts, Crimes & WrongsEvidenceRelevanceRelevant Evidence

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 2 *Weinstein's Evidence,* Ch. 401 et seq. (Matthew Bender 2d ed.).

(n2)Footnote 1. *Fed. R. Evid. 401.*

(n3)Footnote 2. *Spain v. Gallegos, 26 F.3d 439, 452 (3d Cir. 1994)* ; *see § 4.01[2].*

(n4)Footnote 1. *Fed. R. Evid. 402* (all relevant evidence admissible except as provided by Federal Rules of Evidence).

(n5)Footnote 2. *Fed. R. Evid. 402*; *see, e.g., Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 715-716 (8th Cir. 2001)* (admission of relevant evidence too prejudicial); *see also* [4], *below*.

(n6)Footnote 1. *McAvey v. Lee, 260 F.3d 359, 374 (5th Cir. 2001)* .

(n7)Footnote 2. *Fed. R. Evid. 403*; *see Daigle v. Maine Med. Ctr., 14 F.3d 684, 690 (1st Cir. 1994)* .

(n8)Footnote 3. *Glass v. Philadelphia Elec. Co., 34 F.3d 188, 191-192 (3d Cir. 1994)* .

(n9)Footnote 1. *Fed. R. Evid. 403*; *see World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132, 1139 (10th Cir. 2006)* .

(n10)Footnote 2. *Fed. R. Evid. 403*, Committee Note; *see United States v. Ozsusamlar, 428 F. Supp. 2d 161, 170 (S.D.N.Y. 2006)* .

(n11)Footnote 3. *Fed. R. Evid. 403*.

(n12)Footnote 4. *Arnold v. Groose, 109 F.3d 1292, 1297 (8th Cir. 1997)* .

(n13)Footnote 5. *See Siharath v. Sandoz Pharms. Corp., 131 F. Supp. 2d 1347, 1359 (N.D. Ga. 2001)* ; *Martincic v. Urban Redev. Auth., 844 F. Supp. 1073, 1076 (W.D. Pa. 1994)* .

(n14)Footnote 6. *Fed. R. Evid. 403*; *see Northside Mercury Sales & Serv., Inc. v. Ford Motor Co., 871 F.2d 758, 760 (8th Cir. 1989)* (financial statements of persons other than parties were properly excluded); *Stathos v. Bowden, 728 F.2d 15, 19 (1st Cir. 1984)* .

(n15)Footnote 7. *Fed. R. Evid. 403*; *see Forrest v. Beloit Corp., 424 F.3d 344, 355 (3d Cir. 2005)* .

(n16)Footnote 8. *Hall v. UNUM Life Ins. Co., 300 F.3d 1197, 1207 (10th Cir. 2002)* .

(n17)Footnote 8.1. *Nora Bevs. v. Perrier Group of Am., 269 F.3d 114, 125 (2d Cir. 2005)* .

(n18)Footnote 9. *Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 47 (1st Cir. 2001)* (court properly excluded evidence of motive when party already had established motive with previous evidence).

(n19)Footnote 10. *Fed. R. Evid. 404(a)*; *Fed. R. Evid. 404(a)*, Committee Note to 2006 Amendments.

(n20)Footnote 11. *See Fed. R. Evid. 404(a)*.

(n21)Footnote 12. *Schafer v. Time, Inc., 142 F.3d 1361, 1371 (11th Cir. 1998)* .

(n22)Footnote 13. *Fed. R. Evid. 404(a)(3)*; *Fed. R. Evid. 608(a)*; *see Fed. R. Evid. 607-609*; *see also § 4.07[5]* (character evidence regarding witnesses).

(n23)Footnote 14. *See United States v. Butt, 955 F.2d 77, 84 (1st Cir. 1992)* .

(n24)Footnote 15. *Fed. R. Evid. 404(b)*; *see Searles v. Van Bebber, 251 F.3d 869, 877 (10th Cir. 2001)* .

(n25)Footnote 16. *Fed. R. Evid. 405(a)*.

(n26)Footnote 17. *See Blackburn v. UPS, Inc., 179 F.3d 81, 100-101 (3d Cir. 1999)* .

(n27)Footnote 18. *Tyler v. White, 811 F.2d 1204, 1206 (8th Cir. 1987)* .

(n28)Footnote 19. *Fed. R. Evid. 405(a)*; *see Schafer v. Time, Inc., 142 F.3d 1361, 1371 (11th Cir. 1998)* .

(n29)Footnote 20. *Fed. R. Evid. 406*.

(n30)Footnote 21. *See Jones v. Southern Pac. R.R., 962 F.2d 447, 449 (5th Cir. 1992)* (habit is stronger evidence because uniformity of response to habit is greater).

(n31)Footnote 22. *Federal Kemper Life Assur. Co. v. Ellis, 28 F.3d 1033, 1040 (10th Cir. 1994)* .

(n32)Footnote 23. *United States v. Rangel-Arreola, 991 F.2d 1519, 1523 (10th Cir. 1993)* .

(n33)Footnote 24. *Mobil Exploration & Producing U.S., Inc. v. Cajun Constr. Servs., 45 F.3d 96, 99 (5th Cir. 1995)* .

(n34)Footnote 25. *Fed. R. Evid. 407*; *see Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192, 1195-1196 (6th Cir. 1980)* ; *see Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 481 (1st Cir. 1997)* (rule does not apply when remedial measure took place before event in question).

(n35)Footnote 26. *McPadden v. Armstrong World Indus., 995 F.2d 343, 345 (2d Cir. 1993)* (placement of warnings on asbestos products).

(n36)Footnote 27. *Fed. R. Evid. 407*.

(n37)Footnote 28. *Pitasi v. Stratton Corp., 968 F.2d 1558, 1560-1561 (2d Cir. 1992)* .

(n38)Footnote 29. *Fed. R. Evid. 408(a)(1)*; *see Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1048 (8th Cir. 2005)* .

(n39)Footnote 30. *Fed. R. Evid. 408(a)(2)*; *see Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1048 (8th Cir. 2005)* .

(n40)Footnote 31. *Fed. R. Evid. 408(b)*; *see Athey v. Farmers Ins. Exch., 234 F.3d 357, 362 (8th Cir. 2000)* .

(n41)Footnote 32-34. [Reserved]

(n42)Footnote 35. *Fed. R. Evid. 409*; *Wilcox v. Petroleum Helicopters, Inc., 145 F.R.D. 406, 408 (S.D. Tex. 1993)* (purpose of rule is to promote such payments and to preclude unjustified inferences).

(n43)Footnote 36. *Fed. R. Evid. 411*; *see Rios v. Bigler, 67 F.3d 1543, 1550 (10th Cir. 1995)* ; *cf. Blanke v. Alexander, 152 F.3d 1224, 1229-1230 (10th Cir. 1998)* (insurance evidence not prohibited pursuant to state law, in joint action against insured and insurer).

(n44)Footnote 37. *Fed. R. Evid. 411*.

(n45)Footnote 38. *See, e.g., Foster v. Board of Trustees, 771 F. Supp. 1122, 1127-1128 (D. Kan. 1991)* (evidence that individual employee driver did not have automobile insurance properly admitted under Evidence Rule 411 because it was not offered to show that driver was negligent, but that employer was negligent in allowing driver to transport passenger).

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.07

§ 4.07 Privilegesn*

[1] Federal Privilege Law

There is a general duty for witnesses to give testimony, because the public has a right to everyone's evidence. However, the courts recognize common situations in which exceptions to this duty are justified by public policy. The Supreme Court has required that for a privilege to be recognized, it must promote sufficiently important interests to outweigh the need for probative evidence. n1

The Federal Rules of Evidence do not contain detailed privilege rules (which were proposed by the Supreme Court), but contain a flexible standard specified in Evidence Rule 501. This rule requires courts to determine the privilege of a witness by the principles of the common law as they are interpreted by the courts of the United States in the light of reason and experience. n2 Essentially Evidence Rule 501 has provided a method to gradually establish a federal privilege common law. n3

[2] Privilege Law Applicable in Federal Courts

A. Federal Questions.

The federal law of privilege generally applies to federal question claims. n1 Thus, under the rules of evidence, the federal law of privilege n2 applies in federal courts except in civil cases in which state law supplies the rule of decision, and as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority. n3

B. Diversity Cases.

State privilege law is controlling in diversity cases, except to the extent that the evidence concerns an issue or claim that is governed by federal law. n4 This results from Evidence Rule 501, which provides that the federal law of privilege applies in federal courts except with respect to any element of a claim or defense for which state law supplies the rule of decision. n5

[3] Assertion of Privilege

A privilege is a right of the person whose interest or relationship is intended to be promoted by the particular privilege, and only that person may assert the privilege. For example, the patient is the one protected by the psychotherapist-patient privilege. Consequently, only the patient or someone on the patient's behalf may assert it, and not the psychotherapist, unless the psychotherapist is doing so on behalf of the patient. n1

[4] Supreme Court Standards for Privileges

When the Federal Rules of Evidence were adopted, the Supreme Court also proposed that many "Supreme Court Standards" of privilege be adopted. n1 However, the Supreme Court Standards were not adopted by Congress as Rules of Evidence. Nonetheless, the Supreme Court Standards are deemed persuasive authority for interpretation of Evidence Rule 501, n2 and retain considerable utility as a guide to the federal common law referred to in Evidence Rule 501. n3 The Supreme Court Standards are referred to in this chapter when particularly important.

[5] Recognized Privileges

A. Attorney-Client Privilege.

1. Purpose of Privilege.

The attorney-client privilege was the first privilege for confidential communications recognized by law. Its purposes are to encourage clients to seek legal advice who might otherwise be deterred from seeking it, to promote full disclosure by clients to their attorneys, and to enable attorneys to act more efficiently, justly, and expeditiously. n1

2. Required Elements.

A client holds a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and the client's lawyer when the communications were made to further the performance of professional legal services to the client. n2 Consultations with an attorney not acting in a professional capacity are not privileged. n3

3. Client Holds Privilege.

The client is the holder of the privilege. A "client" is a person or an entity such as a corporation who is rendered professional legal services by an attorney, or a person who is seeking professional legal services from an attorney, even if the attorney ultimately does not perform those legal services. n4 The representative of a client also holds the privilege on behalf of the client. n5

4. Confidential Communication and Waiver of Privilege.

a. Confidential Communications Protected.

The attorney-client privilege applies only to privileged communications, which are any expressions through which a privileged person conveys information to or from the other person, and any document or electronic record that embodies such expressions. n6 A communication is protected only if it is confidential, which means the communicator intended that it not be disclosed in any way to a third person, other than those to whom disclosure is in furtherance of providing professional legal services to the client. n7 Thus, the privilege applies to communications from attorney to client and client to attorney. n8

b. Voluntary Disclosure Generally Waives Protection.

A voluntary disclosure of an attorney-client communication to a third party for purposes inconsistent with maintaining

confidentiality generally waives the attorney-client privilege with respect to the disclosed matter. n9 Furthermore, if there is intent to disclose, the presence of a third person at the time of disclosure indicates a lack of confidentiality and therefore the privilege does not apply. n9.1 However, the mere presence of an eavesdropper or third person who inadvertently overhears the communication does not destroy its confidentiality. n9.2

c. Federal Context Disclosures May Retain Protection.

To ensure the predictability of the effects of waiver of attorney-client protection by disclosure, n9.3 Congress has enacted *Federal Rule of Evidence 502*. n9.4 There are two primary provisions in Rule 502 applicable to disclosures made in a federal proceeding or to a federal office or agency. n9.5 First, if a disclosure and waiver is made of particular material, that waiver does not apply to undisclosed material, even if the undisclosed material concerns the same subject matter. n9.6 Second, the rule provides that protection for material contained in an inadvertent disclosure is not waived, provided that the disclosing party had reasonably attempted to prevent the disclosure, and attempted to correct the mistake. n9.7 For a complete discussion of Rule 502, *see* [7], *below*.

5. Exceptions to Privilege.

a. Breach of Duty.

The privilege is inapplicable to communications relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney. n10

b. Fraud or Crime.

Clients do not hold the privilege to protect communications made in contemplation or furtherance of a crime or fraud. n11

c. Joint Clients.

Communications are not privileged if they are relevant to a matter of common interest between joint clients and are offered in an action between any of the clients. n12

d. Deceased Client.

There is a testamentary exception to the attorney-client privilege, n13 which provides that a statement made by a subsequently deceased client to an attorney regarding the execution of a will or other similar documents is not protected by the privilege. n13.1

B. Psychotherapist-Patient Privilege.

1. Function and Purpose of Privilege.

Federal courts recognize the psychotherapist-patient privilege, which protects communications between mental health professionals and their patients. n14 The purpose of the psychotherapist-patient privilege is to promote the public interest by facilitating treatment for individuals suffering the effects of a mental or emotional problem and to provide individuals with confidence and trust in mental health professionals. n15

2. Scope of Privilege.

The privilege extends to confidential communications made to social workers, aswell as to licensed psychologists and psychiatrists. n16 The privilege also extends to confidential communications made to counselors in employee assistance programs, which are programs that assist corporate employees in resolving mental health problems. This is so even if

the counselors are not formally licensed in psychology or social work, when the communications are made by employees in the course of diagnosis or treatment. n17

3. Confidential Communications Protected.

To further its purposes, the psychotherapist-patient privilege only protects confidential communications from disclosure. Therefore, if a communication is not confidential between the psychotherapist and the patient, it is not within the protection of the privilege. n18 A communication is confidential if the patient does not intend it to be disclosed to third persons. The crucial element is intent. If a patient makes a communication with the expectation that it could be disclosed, other than to persons reasonably necessary for the patient's diagnosis and treatment under the direction of the mental health provider, the privilege is not confidential nor protected. n19 Furthermore, communications are not confidential or protected if a party places his mental or emotional condition at issue by relying upon the condition as an element of his claim or defense. n19.1

C. Physician-Patient Privilege.

1. Existence of Privilege.

Unlike the psychotherapist-patient privilege, discussed in B, above, federal courts do not absolutely recognize a general federal privilege between a physician and patient, and the Supreme Court has not promulgated a Supreme Court Standard regarding the privilege. Because the necessity for protection is not as strong, federal common law has not historically recognized a privilege between patients and physicians, and the evidentiary privileges that apply to federal-question suits are given not by state law but by federal law, n20 which does not recognize a physician-patient or a hospital-patient privilege. n21 However, many state jurisdictions recognize the privilege. Therefore, in diversity cases in federal court, in which a claim or defense is governed by state law, any asserted privilege pertaining to the state claim or defense is also governed by state law. n21.1 Therefore, a state law physician-patient privilege may be recognized and applied by a federal court to a state law claim or defense but generally not to matters involving federal law. n22

2. Requirements.

The privilege belongs only to the patient and not the doctor. However, it may be invoked by the patient, the court, or the patient's doctor on the patient's behalf. n23 The privilege protects only communications made in confidence, but confidentiality is not destroyed by the presence of third persons necessary to the patient's diagnosis and treatment or close family members. n24 The privilege applies only when the patient consults a doctor for diagnosis or medical treatment. It does not apply, for example, when the patient is examined by the doctor for another purpose, such as preparing for trial or insurance examination. n25

3. Exceptions.

There are numerous exceptions to the privilege, to the extent that the exceptions have eliminated the effectiveness of the privilege. n26 The most common exception is that the privilege does not apply when the patient puts his or her medical condition in issue in litigation. n27 Some states apply this exception or find the privilege waived in any case in which the patient relies on his or her physical condition as an element of a claim or defense. n28

D. Marital Privileges.

1. Two Types of Privileges.

The federal courts recognize two distinct marital privileges, n29 as discussed below: (1) the privilege against adverse testimony and (2) the confidential marital communications privilege. n29.1 The adverse testimony privilege is a privilege that belongs to the testifying spouse only, n30 applies only if the parties are still married at the time of the

trial, and applies to statements made before the marriage took place. n31 The confidential communications privilege applies only to statements made during the marriage and applies even if the parties are no longer married by the time of the trial. n32 The adverse testimony privilege is usually allowed only in criminal cases, n33 but the confidential communications privilege is usually available in civil as well as criminal cases. The adverse testimony privilege prevents the non-party spouse from testifying even with respect to acts committed by the spouse but the confidential communications privilege applies only to communications. n34

2. Testimonial Privilege.

The privilege against adverse spousal testimony allows a witness spouse to refuse to testify regarding a defendant spouse in a criminal proceeding. It applies to testimony against a spouse on any subject, including even nonconfidential matters and matters that occurred prior to the marriage. n35 The privilege is held by the witness, who alone decides whether to testify or waive the privilege. n36 The testimonial privilege may not be asserted after the marriage has terminated. n37

3. Communication Privilege.

The confidential marital communications privilege is a bar to one spouse from testifying as to conversations or communications with the other spouse made in confidence during their marriage. n38 The marital communications privilege is held by the non-testifying spouse, applies in both civil and criminal proceedings, and survives the termination of the marital relationship. n39 Like the attorney-client privilege, the spousal communications privilege is waived if the asserting spouse has voluntarily disclosed the confidential communications to a third party. n39.1

E. Privilege for Communications to Clergy.

1. Function and Purpose of Privilege.

The federal courts recognize that a person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his or her professional capacity as spiritual consultant. n40 The privilege is based on the benefit of spiritual freedom that result from protection for communications with spiritual advisors, and this benefit is held to outweigh the systemic costs incurred by excluding the contents of such communications from disclosure in court proceedings. The privilege also is designed as a protection for religious liberty. n41

2. Elements.

The clergy and penitent privilege has three elements: (1) a communication to a member of the clergy, n42 (2) the clergy person acting in a spiritual capacity, n43 and (3) an intent that the communication remain confidential. n44

[6] Developing Privileges

A. Government Information Privilege.

Federal courts recognize that the government may have a privilege not to disclose information that it collects and stores. n1 These privileges protect several types of information: the state secrets privilege protects diplomatic and military information; n2 the official information privilege protects disclosure of certain information within the custody or control of a governmental department or agency; n3 and the executive privilege is a privilege of the President of the United States to decline to disclose confidential communications among senior governmental officials. n4

B. Trade Secret Privilege.

Although not technically categorized as a privilege, in civil litigation, a person has a right to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by the person, n4.1 provided that the nondisclosure would not conceal fraud or otherwise effect injustice. n5 In the determination of whether to grant a trade secret privilege, the court must balance possible damage to the holder if the trade secret is revealed, the public's interest in promoting fair trials, and the litigant's need for the evidence to adequately prepare and argue the case, and the availability of other means of proof. n6 The court must also be able to provide adequate protective measures for the parties. n7

C. Informer Privilege.

The government has a recognized privilege to refuse to disclose the identity of aperson who has furnished information relating to or assisting in an investigation of a violation of law to a law enforcement officer or member of a legislative committee conducting an investigation. n8 The privilege generally applies only to the identity of the informer; however, if disclosure of the substance of the communication would identify the informer, the scope of the privilege may be extended to the contents of the communication itself, at least to the extent necessary to protect the informer's identity. n9

D. Voter Privilege.

Every person has a privilege to refuse to disclose the substance of his vote at a political election conducted by secret ballot unless the vote was cast illegally. n10

E. Peer Review Privilege.

Many states have by statute protected from discovery medical peer reviews of patient care, and the privilege has been extended to other areas, such as academic peer reviews, railroad accident investigations, product safety assessments, and products liability assessments. The "peer review privilege" n10.1 is also known as the self-analysis privilege, the self-evaluative privilege, or the self-examination privilege. n11 Both federal and state statutes typically provide that the privilege applies to information resulting from critical self analysis by the party seeking protection, and prohibit the disclosure or discovery of information collected by a peer review entity in the course of its business, n11.1 if the public has strong interest in preserving the free flow of the type of information sought, the information is of a type that would be impeded if discovery were allowed, and the document at issue was prepared with the expectation that it would be kept confidential and has in fact been kept confidential. n12

The peer review privilege has not been absolutely acknowledged, and many federal courts have refused to recognize it under federal common law. n12.1 For example, one case has declined to recognize a federal privilege for medical peer review materials, noting that only when state law supplies the rule of decision for such a privilege, as in a diversity case, would the materials be privileged. n13

[7] Limitations on Waiver by Disclosure of Attorney-Client Privilege and Work Product Protection

A. Purpose and Scope of Limitations on Waiver.

1. Purpose.

Congress has enacted *Federal Rule of Evidence 502* n1 which has several purposes: (1) to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by either the attorney-client privilege or the work product doctrine; (2) to resolve court disputes about the effect of inadvertent disclosures and subject matter waiver; and (3) to control exorbitant litigation costs that have been recently brought about by the necessity for litigants to protect against waiver resulting from any disclosure, however innocent or minimal, especially in cases involving electronic discovery. n2

2. Proceedings Subject to Limitations.

a. Federal and State Proceedings.

To ensure the predictability of waiver by disclosure, the rule regulates the waiver consequences of disclosure of protected information at both the federal and state levels. n3 Thus, notwithstanding the other Federal Rules of Evidence, n4 the waiver effect of disclosure of protected material in federal and state courts is governed by Rule 502. n5

b. Claims Based on Diversity of Citizenship.

The waiver effect of Rule 502 also controls even in diversity cases, n6 where state law ordinarily applies the rule of decision. n7

c. Arbitration Proceedings.

Rule 502 applies in all federal court proceedings, including court-annexed and court-ordered arbitrations, n8 without regard to any possible limitations of Rules 101 and 1101. n9

3. Communications and Information Subject to Limitations.

The provisions of Rule 502 apply to disclosure of a communication or information covered by either the attorney-client privilege or work product protection. n10 For purposes of the rule, "attorney-client privilege" means the protection that applicablesubstantive law provides for confidential attorney-client communications; n11 and "work product protection" means the protection that applicable substantive law provides for tangible and intangible material prepared in anticipation of litigation or for trial. n12 Rule 502 does not cover waiver of other types of privilege. Furthermore, the rule only covers waivers by disclosure, and not other methods of waiver, n13 such as when a party relies on attorney advice in either a claim or defense. n14

4. Rule Does Not Control Whether Particular Disclosure or Information Is Protected.

Rule 502 does not in any way alter federal or state law on whether a particular communication or information is protected under the attorney-client privilege or work product immunity as an initial matter; that is determined by the applicable substantive law. Furthermore, while it does establish some exceptions to waiver, the rule does not modify or add to the applicable waiver doctrine generally. n15

B. Federal Context Disclosures Generally Do Not Waive Undisclosed Matters.

1. Disclosure of Matter Does Not Generally Waive Undisclosed Matter.

If a disclosure is made in a federal proceeding or to a federal office or agency, and the disclosure waives the attorney-client privilege or work product protection, that waiver generally does not extend to an undisclosed communication or information in a federal or state proceeding. n16 However, undisclosed matters are waived if *all* three of the factors in item 2 below, apply.

2. Three Factors Required for Waiver of Undisclosed Matters.

a. Waiver is Intentional.

The first prerequisite to waiver of undisclosed matter is that the original disclosure must be intentional. n17 Inadvertent disclosures do not waive similar, undisclosed information. n18

b. Identical Subject Matter.

The second prerequisite to waiver of undisclosed matter is that the disclosed and undisclosed communications or information must concern the same subject matter. n19

c. Fairness Requirement.

The third prerequisite to waiver of undisclosed matter is that disclosed and undisclosed matters ought in fairness to be considered together. n20 Thus, if a party makes a selective, misleading disclosure that is unfair to the adversary, the disclosing party waives protection of undisclosed information on the same topic, and opens itself to a more complete and accurate presentation. n21

C. Nonwaiver of Inadvertent Disclosures.

1. Disclosures Generally Waived.

A voluntary disclosure of protected matters is generally deemed waived in federal court. n22 However, when made in a federal proceeding or to a federal office or agency, a disclosure is not deemed waived in any federal or state proceeding provided that *all three* of the factors listed in 2, below, apply. n23

Once the producing party has shown at least minimal compliance with the three factors listed in 2 below, but that "reasonableness" is still in issue, the court may then proceed to the traditional five-factor test regarding inadvertent disclosure. n23.1

2. Three Factors Required for Nonwaiver of Disclosure.

a. Inadvertent Disclosure.

The first prerequisite is that the disclosure is inadvertent. n24 Whether a disclosure is inadvertent depends on the facts of each case. n25

b. Reasonable Steps to Prevent Disclosure.

The second prerequisite to nonwaiver is that the holder of the privilege or protection took reasonable steps to prevent disclosure of the matters not waived. n26 Whether steps are reasonable depends on the circumstances of each case, and include the nature of precautions taken, the scope of discovery, the extent of disclosure, and a consideration of fairness. n27

c. Reasonable Steps to Rectify Erroneous Disclosure.

The third prerequisite to nonwaiver is that the disclosing party promptly took reasonable steps to rectify the error after the disclosure, n28 including complying with any applicable requirements of Civil Rule 26(b)(5)(B), which includes notifying the opposition of the claim of protection and the basis for the claim, and preserving the disclosed information until the claim is resolved. n29 Such reasonable steps to prevent disclosure may include taking legal action to prevent access to the information to more parties, including filing a motion and memorandum of law to intervene in a case. n30

D. Disclosures Made in State Court Proceeding.

If a disclosure is made in a state proceeding and is not the subject of a state court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if *either* of the following is true:

(1) The disclosure would not be a waiver under Rule 502 if it had been made in a federal proceeding; n31

or

(2) The disclosure is not a waiver under the law of the state where the disclosure occurred. n32

Thus, whether a waiver occurs in a state court proceeding depends on an application of that law, state or federal, that is most protective of privilege and work product. n33

E. Controlling Effect of Court Order on Waiver.

1. Federal Court Order.

A Federal court may order that a privilege or protection is not waived by disclosure connected with the litigation pending before the court. Such an order has the effect that the disclosure is also not a waiver in any other federal or state proceeding. n34 Such an order allows the court to tailor its discovery orders to provide for fairness in the case, and to facilitate discovery agreements among the parties. n35

2. State Court Order.

A state court may enter an order concerning waiver of protected material, and if it makes such an order, the court in federal proceedings may give effect to that order. n36 Whether the federal court must give effect to the state court order depends on both statutory law and on the principles of federalism and comity. n37

F. Controlling Effect of Party agreement on Waiver.

If parties have made an agreement on the effect of disclosure in a federal proceeding, that agreement is binding only on the parties to the agreement, unless a court incorporates the agreement into a court order. n38 Therefore, if parties want protection against non-parties from a finding of waiver by disclosure, they must request the court to include the agreement in an order of the court. n39

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 3 *Weinstein's Evidence,* Ch. 501 et seq. (Matthew Bender 2d ed.).

(n2)Footnote 1. *Jaffee v. Redmond, 518 U.S. 1, 9-10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* .

(n3)Footnote 2. *Fed. R. Evid. 501.*

(n4)Footnote 3. *Jaffee v. Redmond, 518 U.S. 1, 7, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* .

(n5)Footnote 1. *Price v. Howard County Gen. Hosp., 950 F. Supp. 141, 143 (D. Md. 1996)* .

(n6)Footnote 2. *See* [1], *above.*

(n7)Footnote 3. *Fed. R. Evid. 501.*

(n8)Footnote 4. *Star Editorial v. United States Dist. Ct. for C.D. of Cal., 7 F.3d 856, 859 (9th Cir. 1993)* (privilege derived from state law in diversity case).

(n9)Footnote 5. *Fed. R. Evid. 501.*

(n10)Footnote 1. *Lora v. Board of Educ. of New York, 74 F.R.D. 565, 586 (E.D.N.Y. 1977)* .

(n11)Footnote 1. *See, e.g.,* Supreme Court Standard 504.

(n12)Footnote 2. *See In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994)* (applying attorney-client privilege based on authorization of Supreme Court Standard 503 and Supreme Court case law).

(n13)Footnote 3. In re August, 1993, *Regular Grand Jury, 854 F. Supp. 1392, 1396 (S.D. Ind. 1993)* ; *see Fed. R. Evid. 501.*

(n14)Footnote 1. *In re Grand Jury Proceeding, Cherney, 898 F.2d 565, 569 (7th Cir. 1990)* ; *see* Supreme Court Standard 503.

(n15)Footnote 2. *Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 19 n.3 (E.D.N.Y. 1996)* .

(n16)Footnote 3. *See In re Kinoy, 326 F. Supp. 400, 403-405 (S.D.N.Y. 1970)* .

(n17)Footnote 4. *United States v. Layton, 855 F.2d 1388, 1406 (9th Cir. 1988)* , *cert. denied, 489 U.S. 1046 (1989)* .

(n18)Footnote 5. *In re Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1191 (4th Cir. 1991)* .

(n19)Footnote 6. *See United States v. Defonte, 441 F.3d 92, 95 (2d Cir. 2006)* .

(n20)Footnote 7. *United States v. BDO Seidman, LLP, 492 F.3d 806, 827 (7th Cir. 2007)* .

(n21)Footnote 8. *United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980)* .

(n22)Footnote 9. *Maday v. Pub. Libraries, 480 F.3d 815, 821 (6th Cir. 2007)* .

(n23)Footnote 9.1. *United States v. Evans, 113 F.3d 1457, 1462-1468 (7th Cir. 1997)* .

(n24)Footnote 9.2. *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 259-260 (N.D. Ill. 1981)* .

(n25)Footnote 9.3. *See Fed. R. Evid. 502(g)(1).*

(n26)Footnote 9.4. *See Fed. R. Evid. 502.*

(n27)Footnote 9.5. *Fed. R. Evid. 502(a), (b).*

(n28)Footnote 9.6. *Fed. R. Evid. 502(a).*

(n29)Footnote 9.7. *Fed. R. Evid. 502(b).*

(n30)Footnote 10. *See Anderson v. Calderon, 232 F.3d 1053, 1099 (9th Cir. 2000)* .

(n31)Footnote 11. *Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 660 (10th Cir. 1998)* .

(n32)Footnote 12. *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906, 910 (D.D.C. 1982)* .

(n33)Footnote 13. *Edmonds v. Hammett (In re Estate of Covington), 450 F.3d 917, 921 n.6 (9th Cir. 2006)* .

(n34)Footnote 13.1. *Glover v. Patten, 165 U.S. 394, 406, 17 S. Ct. 411, 41 L. Ed. 760 (1897)* .

(n35)Footnote 14. *Jaffee v. Redmond, 518 U.S. 1, 9-10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* ; *see* Supreme Court Standard 504.

(n36)Footnote 15. *Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* .

(n37)Footnote 16. *Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* .

(n38)Footnote 17. *Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1157-1158 (9th Cir. 2001)* .

(n39)Footnote 18. *Sims v. Blot, 534 F.3d 117, 129-130 (2d Cir. 2008)* .

(n40)Footnote 19. *Smiley v. Chrysler, 538 F. Supp. 2d 711, 718 (D. Del. 2008)* .

(n41)Footnote 19.1. *Sims v. Blot, 534 F.3d 117, 125 (2d Cir. 2008)* .

(n42)Footnote 20. *See Fed. R. Evid. 501.*

(n43)Footnote 21. *United States v. Jong Hi Bek, 493 F.3d 790, 802 (7th Cir. 2007)* .

(n44)Footnote 21.1. *In re Baycol Prods. Litig., 219 F.R.D. 468, 469 (D. Minn. 2003)* .

(n45)Footnote 22. *United States v. Moore, 970 F.2d 48, 49-50 (5th Cir. 1992)* .

(n46)Footnote 23. *Jewell v. Holzer Hosp. Found., Inc., 899 F.2d 1507, 1513-1514 (6th Cir. 1990)* .

(n47)Footnote 24. *State v. Bryant, 167 S.E.2d 841, 844 (N.C. Ct. App. 1969)* .

(n48)Footnote 25. *Van Sickle v. McHugh, 430 N.W.2d 799, 800-802 (Mich. Ct. App. 1988)* .

(n49)Footnote 26. Committee Note to Proposed Evidence Rules.

(n50)Footnote 27. *Lee v. Calhoun, 948 F.2d 1162, 1166-1167 (10th Cir. 1991)* , *cert. denied, 504 U.S. 973 (1992)* .

(n51)Footnote 28. *Lind v. Canada Dry Corp., 283 F. Supp. 861, 864 (D. Minn. 1968)* .

(n52)Footnote 29. *See Pereira v. United States, 347 U.S. 1, 6, 74 S. Ct. 358, 98 L. Ed. 435 (1954)* ; *see also* Supreme Court Standard 505 (marital testimonial privilege).

(n53)Footnote 29.1. *United States v. Griffin, 440 F.3d 1138, 1143-1144 (9th Cir. 2006)* (two types of marital privileges have been established by federal common law).

(n54)Footnote 30. *United States v. Koehler, 790 F.2d 1256, 1258 (5th Cir. 1986)* .

(n55)Footnote 31. *United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984)* .

(n56)Footnote 32. *United States v. Lustig, 555 F.2d 737, 747-748 (9th Cir. 1977)* .

(n57)Footnote 33. *United States v. Ramos-Oseguera, 120 F.3d 1028, 1034 n.1 (9th Cir. 1997)* , *cert. denied, 522 U.S. 1135 (1998)* .

(n58)Footnote 34. *See Emery v. Johnson, 139 F.3d 191, 196 (5th Cir. 1997) , cert. denied, 525 U.S. 969 (1998) .*

(n59)Footnote 35. *United States v. Owens, 424 F. Supp. 421, 423 (E.D. Tenn. 1976) .*

(n60)Footnote 36. *Trammel v. United States, 445 U.S. 40, 53, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) .*

(n61)Footnote 37. *United States v. Porter, 986 F.2d 1014, 1018 (6th Cir. 1993) , cert. denied, 510 U.S. 933 (1993) .*

(n62)Footnote 38. *United States v. Roberson, 859 F.2d 1376, 1381 (9th Cir. 1988) .*

(n63)Footnote 39. *See Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) .*

(n64)Footnote 39.1. *United States v. General Mar. Mgmt. (Port.) L.D.A., 2008 U.S. Dist. LEXIS 55163, at *7-*8 (S.D. Tex. 2008) .*

(n65)Footnote 40. *Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* ; *see* Supreme Court Standard 506.

(n66)Footnote 41. *Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) .*

(n67)Footnote 42. *In re Grand Jury Investigation, 918 F.2d 374, 385 (3d Cir. 1990) .*

(n68)Footnote 43. *Ellis v. United States, 922 F. Supp. 539, 540-543 (D. Utah 1996) .*

(n69)Footnote 44. *Mockaitis v. Harcleroad, 104 F.3d 1522, 1531-1533 (9th Cir. 1997) .*

(n70)Footnote 1. *Frost v. Perry, 919 F. Supp. 1459, 1464-1465 (D. Nev. 1996)* ; *see* Supreme Court Standard 509.

(n71)Footnote 2. *Frost v. Perry, 919 F. Supp. 1459, 1464-1465 (D. Nev. 1996)* (military and state secret privilege).

(n72)Footnote 3. *See, e.g., Sanders v. Canal Ins. Co., 924 F. Supp. 107, 110 (D. Or. 1996) .*

(n73)Footnote 4. *See, e.g., United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) .*

(n74)Footnote 4.1. *Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir. 2002) .*

(n75)Footnote 5. *Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1186 (D.S.C. 1974)* ; *see* Supreme Court Standard 508.

(n76)Footnote 6. *See Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 996 (10th Cir. 1965) , cert. denied, 380 U.S. 964 (1965) .*

(n77)Footnote 7. *See Penthouse International, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 391 (2d Cir. 1981) .*

(n78)Footnote 8. *Roviaro v. United States, 353 U.S. 53, 59-60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* ; *see* Supreme Court Standard 510.

(n79)Footnote 9. *United States v. Smith, 780 F.2d 1102, 1108-1109 (4th Cir. 1985)* (court must balance public interest in non-disclosure against defendant's right to prepare defense).

(n80)Footnote 10. *In re Dinnan, 661 F.2d 426, 432 (5th Cir. 1981) , cert. denied, 457 U.S. 1106 (1982)* ; *see*

Supreme Court Standard 507.

(n81)Footnote 10.1. *See Adkins v. Christie, 488 F.3d 1324, 1330 (11th Cir. 2007)* (medical peer review privilege is recognized by all 50 states and District of Columbia).

(n82)Footnote 11. *See Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 185 (S.D. Iowa 1993)* .

(n83)Footnote 11.1. *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 444 F.3d 991, 994 (8th Cir. 2006)* .

(n84)Footnote 12. *Morgan v. Union Pacific R.R., 182 F.R.D. 261, 266 (N.D. Ill. 1998)* .

(n85)Footnote 12.1. *P.J. v. Utah, 247 F.R.D. 664, 671 (D. Utah 2007)* .

(n86)Footnote 13. *Virmani v. Novant Health, Inc., 259 F.3d 284, 287 n.3-289 (4th Cir. 2001)* .

(n87)Footnote 1. *See Fed. R. Evid. 502*.

(n88)Footnote 2. *See Fed. R. Evid. 502*, Original Committee Notes.

(n89)Footnote 3. *See Fed. R. Evid. 502*, Original Committee Notes.

(n90)Footnote 4. *See Fed. R. Evid. 101*, *1101(a)*, *(b)*.

(n91)Footnote 5. *Fed. R. Evid. 502(f)*; *see Fed. R. Evid. 502(a)*, *(b)*.

(n92)Footnote 6. *Fed. R. Evid. 502(f)*.

(n93)Footnote 7. *See Fed. R. Evid. 501*.

(n94)Footnote 8. *Fed. R. Evid. 502(f)*.

(n95)Footnote 9. *See Fed. R. Evid. 101*, *1101(a)*, *(b)*.

(n96)Footnote 10. *Fed. R. Evid. 502*.

(n97)Footnote 11. *Fed. R. Evid. 502(g)(1)*.

(n98)Footnote 12. *Fed. R. Evid. 502(g)(2)*.

(n99)Footnote 13. *See Fed. R. Evid. 502*, Original Committee Notes.

(n100)Footnote 14. *Pritchard v. County of Erie (In re County of Erie), 546 F.3d 222, 228 (2d Cir. 2008)* .

(n101)Footnote 15. *See Fed. R. Evid. 502*, Original Committee Notes.

(n102)Footnote 16. *Fed. R. Evid. 502(a)*.

(n103)Footnote 17. *Fed. R. Evid. 502(a)(1)*.

(n104)Footnote 18. *See Fed. R. Evid. 502(a)*, Original Committee Notes; *see* item c, *below*.

(n105)Footnote 19. *Fed. R. Evid. 502(a)(2)*.

(n106)Footnote 20. *Fed. R. Evid. 502(a)(3)*.

(n107)Footnote 21. *See Fed. R. Evid. 502(a)*, Original Committee Notes; *see also Fed. R. Evid. 106*.

(n108)Footnote 22. *See Maday v. Pub. Libraries, 480 F.3d 815, 821 (6th Cir. 2007)* ; *Fed. R. Evid. 502(b)*, Original Committee Notes (Rule 502 does not replace applicable waiver doctrine generally).

(n109)Footnote 23. *Fed. R. Evid. 502(b)*.

(n110)Footnote 23.1. *Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226 (E.D. Pa. 2008)* (five factors are: precautions taken to prevent inadvertent disclosure; number of inadvertent disclosures; extent of disclosures; any delay to rectify disclosure; and overriding interests of justice).

(n111)Footnote 24. *Fed. R. Evid. 502(b)(1)*.

(n112)Footnote 25. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 388 (7th Cir. 2008)* .

(n113)Footnote 26. *Fed. R. Evid. 502(b)(2)*.

(n114)Footnote 27. *See Fed. R. Evid. 502(b)*, Original Committee Notes.

(n115)Footnote 28. *Fed. R. Evid. 502(b)(3)*.

(n116)Footnote 29. *See Fed. R. Civ. P. 26(b)(5)(B)*; *Fed. R. Evid. 502(b)*, Original Committee Notes (producing party is required to follow up on any obvious indications that protected communication or information has been produced inadvertently).

(n117)Footnote 30. *Convertino v. United States DOJ, 674 F. Supp. 2d 97, 110 (D.D.C. 2009)* .

(n118)Footnote 31. *Fed. R. Evid. 502(c)(1)*.

(n119)Footnote 32. *Fed. R. Evid. 502(c)(2)*.

(n120)Footnote 33. *See Fed. R. Evid. 502(c)*, Original Committee Notes.

(n121)Footnote 34. *Fed. R. Evid. 502(d)*.

(n122)Footnote 35. *See* Capitol Records, Inc, v. MP3tunes, *LLC, 261 F.R.D. 44, 51 n.6 (S.D.N.Y. 2009)* ; *see also Fed. R. Evid. 502(e)*.

(n123)Footnote 36. *See Fed. R. Evid. 502(c)*; *Fed. R. Evid. 502(d)*, Original Committee Notes.

(n124)Footnote 37. *Fed. R. Evid. 502(d)*, Original Committee Notes.

(n125)Footnote 38. *Fed. R. Evid. 502(e)*.

(n126)Footnote 39. *Fed. R. Evid. 502(e)*, Original Committee Notes.

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.08

§ 4.08 Witnessesn*

[1] Competency

A. Witnesses Assumed Competent Regarding Federal Claims.

With respect to federal claims, every person is deemed competent to be a witness except as provided by the Rules of Evidence. n1 Thus, regarding claims decided by substantive federal law, n2 everyone is competent except: n3 a person who refuses to swear that he or she will testify truthfully, n4 the presiding judge, n5 and any member of the jury hearing the current case. n6

B. State Law of Competence Controls Regarding State Claims.

State law regulations on competency govern in civil cases and proceedings with respect to elements of claims or defenses as to which state law furnishes the rule of decision. n7 This means that in diversity cases and in federal question cases with supplemental state claims, state substantive law determines whether a witness is competent with respect to that issue. n8

C. Competency of Judge to Be Witness.

The judge presiding at the trial is not competent to testify in that trial as a witness. n9 This prohibition is absolute and may not be waived. n10 Thus, no objection need be made by a party to preserve the error of a judge's testimony on appeal. n11 Furthermore, the prohibition applies even if the judge testifies without being called as a witness. n12

D. Competency of Juror to Be Witness.

1. Testimony at Trial.

A juror is prohibited from testifying as a witness before the jury on which the juror is currently serving. n13 If a juror is called at trial, the opposition must be given the opportunity to object out of the presence of the jury. n14

2. Testimony About Validity of Verdict.

If there is an inquiry into the validity of a verdict, a juror may not generally testify as to any matter or statement occurring during the course of the jury's deliberations,to the effect of anything on deliberations or any other juror's mind or emotions as influencing the juror's vote on the verdict, or concerning the juror's mental processes in connection with the verdict. Furthermore, a juror's affidavit or evidence of a juror's statement concerning such matters are also generally prohibited. n15 However, there are three exceptions to the rule prohibiting juror testimony. A juror may testify regarding (1) whether extraneous prejudicial information was improperly brought to the jury's attention; (2) whether someone improperly brought to bear any outside influence on any juror; or (3) whether any juror made a mistake in entering the verdict onto the verdict form. n16 The district court has discretion to evaluate whether any of these exceptions apply, according to the facts and circumstances of each case. n17

E. Competency Not Affected by Religious Belief.

Under the Federal Rules of Evidence, a party may not offer evidence of a witness' religious beliefs or opinions to either impair or to enhance the witness' credibility. n18 Thus, attorneys may not inquire about the witness' religious beliefs or opinions to show that they affect his or her character for truthfulness. n19 This rule does not prohibit evidence that is offered to prove something other than the effect of a witness' religion on his or her credibility. n20 Thus, for example, a plaintiff's testimony about his belief in God and attendance at church did not violate Evidence Rule 610 when he was not attempting to enhance his credibility though statements of religious belief but was merely showing the hardships caused by his medical condition in attending church. n21

[2] Declaration of Truthfulness Required of Witness

A witness may not testify regarding any matter until the witness has declared that he or she will testify truthfully, either by oath or affirmation, administered in a form calculated to pique the witness' conscience and impress on the witness that he or she has a duty to testify truthfully. n1

[3] Personal Knowledge of Witness Required

A lay witness may not testify regarding any matter unless the witness has personal knowledge of the matter and evidence is introduced sufficient to support a finding of that personal knowledge. n1 This requires that the witness' testimony must be based on events perceived by the witness through one of the person's senses. n2 The required personal knowledge may be established either through the witness' own testimony or through extrinsic testimony. n3 Evidence Rule 701, governing opinion testimony by lay witnesses, incorporates the knowledge requirement of Evidence Rule 602. Thus, testimony by a layperson in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness. n4

[4] Interrogation of Witness

A. Four Typical Stages of Examination.

The typical examination of a witness goes through as many as four stages: (1) direct examination, which is performed by the party calling the witness; (2) cross-examination which is performed by an opposition party; (3) redirect examination which is conducted by the calling party; (4) recross-examination, which is conducted by the cross-examining party. A party is entitled to each successive stage of examination when new matter is introduced by the opposition at a preceding stage. n1 Thus, cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. However, the court has discretion at any stage to permit inquiry into additional matters as if on direct examination, n2 as discussed in B, *below*.

B. Court's Discretion to Control Examination.

The court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence

so that the interrogation and presentation of witnesses is effective for the ascertainment of the truth, avoids needless consumption of time, and protects witnesses from harassment or undue embarrassment. n3 This language is broad enough to authorize the trial court to use innovations in the presentation of testimonial evidence, provided that the court ensures that no prejudice results to parties or witnesses. For example, the court may allow written jury questions to be given to witnesses, and examination by jurors may be particularly desirable in complex or lengthy trials. n4 The court has greater discretion regarding the mode of questioning in a bench trial than a jury trial. n5

C. Court's Initiation of Examination of Witness.

1. Court May Call Its Own Witnesses.

The trial court has specific authority under the Federal Rules of Evidence to call witnesses, either on its own initiative or at the suggestion of a party. n6 All parties are entitled to cross-examine witnesses called by the court. n7

2. Interrogation of Witness by Court.

A federal court has specific authority under the Federal Rules of Evidence to interrogate witnesses, whether called by itself or by a party. n8 Such questioning should be in a neutral and impartial manner. n9 Such questioning may be particularly appropriate or even required in extremely complex cases. n10

3. Objections.

Any party may object either to the calling of witnesses by the court, or to the particular interrogation of a witness by the court. The objection must be made at the time of the objectionable act or at the next available opportunity when the jury is not present. n11 If a party fails to make a timely objection, the failure will waive the objection, unless the court's interrogation of witnesses constitutes plain error. n12

D. Leading Questions. A trial court should not permit leading questions on the direct examination of a witness, n13 except as necessary to developthe witness' testimony. n14 On the other hand, the court should ordinarily permit leading questions on cross-examination. The court may also allow interrogation by leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. n15

[5] Impeachment of Witness

A. Parties Entitled to Impeach.

Any party may attack the credibility of a witness, including the party calling the witness. n1 Thus, the party may elicit on direct examination matters that are unfavorable to the witness, usually on the rationale that the matter will cause less damage presented on direct examination rather than if brought out on cross-examination. n2

B. Methods of Impeachment.

1. Character of Witness.

The credibility of a witness may be attacked or enhanced by evidence in the form of opinion or reputation. However, the character evidence may refer only to character for truthfulness or untruthfulness, and evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by other evidence. n3

2. Conduct of Witness.

For the purpose of attacking or supporting a witness' character for truthfulness, specific instances of the conduct of a

witness may not generally be proved by extrinsic evidence. n4 However, the trial court has discretion to admit specific instances of conduct on cross-examination if they concern the witness' character for truthfulness or untruthfulness, or if they concern the character for truthfulness or untruthfulness of another witness as to whose character the current witness has testified. n5 When a witness gives testimony that relates only to character for truthfulness, that testimony does not operate as a waiver of the accused's or the witness' privilege against self-incrimination. n5.1

C. Grounds for Impeachment.

1. Conviction of Crime.

a. Two Types of Crimes Used to Impeach Witness.

A party may use two types of criminal convictions as evidence to attack the character for truthfulness of a witness: (1) that a witness other than an accused has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or that an accused has been convicted of such a crime if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on the accused; n6 and (2) evidence that any witness has been convicted of a crime regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. n7 Crimes come under category (2) only if the crime required the factfinder to find an act of dishonesty or false statement, such as perjury or embezzlement. n8 The pendency of an appeal from a criminal conviction does not render evidence of that conviction inadmissible. n9

b. Time Limitation.

Evidence of a conviction is generally not admissible for impeachment of a witness if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later, unless the trial court determines that in the interests of justice the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. n10

c. Juvenile Convictions.

Evidence of juvenile adjudications is generally not admissible for impeachment purposes. n11

d. Impeachment Prohibited if Convict Has Been Pardoned or Rehabilitated.

Evidence of a conviction is generally not admissible for impeachment of a witness if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or based on a finding of innocence of the person convicted. n12

2. Prior Statements.

a. Prior Statement Used for Impeachment Only.

A prior statement of the witness may be used to impeach the credibility of the current testimony of the witness. However, such a statement may be introduced only for impeachment to contradict the witness' testimony with a priorstatement; it may not be used as substantive evidence for the underlying issues in the case. n13

b. Foundation for Prior Statement.

When an attorney is examining a witness concerning a prior verbal or written statement made by the witness, the statement need not be revealed or its contents disclosed to the witness at the time of examination, but, on request, the statement must be shown or disclosed to the opposition attorney. n14

c. Prior Inconsistent Statement.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is given an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement, or the interests of justice otherwise require, and unless the statement constitutes an admission of a party opponent as defined in the hearsay rule. n15 Once the witness is given an opportunity to explain the inconsistent statement, the statement itself may be admitted into evidence. n16

3. Bias.

A party may impeach a witness for bias, which is trait of a witness that adversely affects credibility in that a relationship or circumstances impair the witness' impartiality. n17 Bias may be proved by extrinsic evidence of specific instances of conduct. n18 Thus, the existence of bias usually is demonstrated circumstantially by proof of relationships, conduct, or utterances. The issue of hearsay is generally not a problem in this context because the testimony is being used to show the witness' state of mind. n19

4. Mental Capacity.

A witness' credibility may be attacked by showing that his or her mental capacity to observe, remember, or narrate is impaired, either at the time of the occurrence in question or at the time of trial. Because defects of this type reflect on mental capacity for telling the truth, rather than moral capacity, the requirements regarding character evidence under Evidence Rule 608 n20 are not controlling. n21

[6] Interpreters for Witnesses

The Federal Rules of Civil Procedure give the trial court discretion to order the appointment and compensation of interpreters who may assist witnesses in giving testimony. n1 While interpreters themselves are not witnesses, they are subject to the federal evidence rules relating to qualification as an expert n2 and administration of an oath or affirmation n3 to make a true translation. n4 A federal statute, the Court Interpreters Act, n5 also provides for the use of interpreters in federal court. The Act requires an interpreter when the court determines that a witness speaks a foreign language, or a witness suffers from a hearing impairment that restricts his or her comprehension. n6 Interpreters must be qualified as experts in the skill of translation, n7 and must make an oath or affirmation to communicate to the court exactly the intent that the witness conveys by his or her testimony. n8

[7] Exclusion of Witnesses From Hearing Other Testimony

A. Exclusion of Witnesses at Request of Party.

A party has a right to request the exclusion of witnesses from the courtroom, n1 and a court may not deny such a request, n2 unless the witnesses fall into one of the exempt categories listed in C, *below*.

B. Exclusion of Witnesses On Court's Own Initiative.

The trial court may order the witnesses excluded from the courtroom on the court's own motion. n3 In the absence of a party's request, the trial court has discretion to order exclusion of any particular witness. n4

C. Witnesses Excepted From Exclusion.

1. Parties Who Are Natural Persons.

The trial court may not exclude a witness who is a party and a natural person. n5

2. Natural Persons Who Represent Entity Parties.

The trial court may not exclude a witness who is an officer or employee of a party that is not a natural person and is designated as its representative by its attorney. n6

3. Natural Persons Who Represent Entity Parties.

The trial court may not exclude a witness whose presence is shown by a party to be essential to the presentation of the party's cause. n7

4. Persons Entitled to Be Present by Statute.

The trial court may not exclude a witness authorized by statute to be present. n8 For example, under the Victims' Rights and Restitution Act, crime victims have the right to be present at all public court proceedings related to the offense, unless the trial court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceCompetencyGeneral OverviewEvidenceCompetencyAffirmations & OathsEvidenceCompetencyJudgesEvidenceCompetencyJurorsGeneral OverviewEvidenceTestimonyExaminationGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 3 *Weinstein's Evidence,* Chs. 601-606 (Matthew Bender 2d ed.) and 4 *Weinstein's Evidence,* Chs. 607-615 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Fed. R. Evid. 601.*

(n3)Footnote 2. *Phoenix Mut. Life Ins. Co. v. Adams, 828 F. Supp. 379, 388 (D.S.C. 1993) , aff'd on other grounds, 30 F.3d 554 (4th Cir. 1994) .*

(n4)Footnote 3. *Fed. R. Evid. 601.*

(n5)Footnote 4. *See Fed. R. Evid. 603.*

(n6)Footnote 5. *See Fed. R. Evid. 605.*

(n7)Footnote 6. *See Fed. R. Evid. 606.*

(n8)Footnote 7. *Fed. R. Evid. 601*; *see Knotts v. Black & Decker, Inc., 204 F. Supp. 2d 1029, 1035 (N.D. Ohio 2002)* (application of factors of competency under Ohio law in product liability case).

(n9)Footnote 8. *Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1036 (8th Cir. 2007)* (Nebraska law governed competency of witness to testify in negligence case).

(n10)Footnote 9. *Fed. R. Evid. 605*; *see Tyler v. Swenson, 427 F.2d 412, 415 (8th Cir. 1970) .*

(n11)Footnote 10. *Fed. R. Evid. 605*, Committee Note.

(n12)Footnote 11. *Fed. R. Evid. 605.*

(n13)Footnote 12. *United States v. Jonnet, 597 F. Supp. 999, 1003 (W.D. Pa. 1984)* , *rev'd on other grounds, 762 F.2d 16, 20 (3d Cir. 1985)* .

(n14)Footnote 13. *Fed. R. Evid. 606(a)*; *United States v. Robinson, 645 F.2d 616, 618 (8th Cir. 1981)*.

(n15)Footnote 14. *Fed. R. Evid. 606(a)*.

(n16)Footnote 15. *Fed. R. Evid. 606(b)*; *see Great Pines Water Co. v. Liqui-box Corp., 203 F.3d 920, 924-925 & n.10 (5th Cir. 2000)* .

(n17)Footnote 16. *Fed. R. Evid. 606(b)*; *see Pyles v. Johnson, 136 F.3d 986, 992 (5th Cir. 1998)* .

(n18)Footnote 17. *See Salazar v. Dretke, 419 F.3d 384, 403-405 (5th Cir. 2005)* .

(n19)Footnote 18. *Fed. R. Evid. 610*; *see Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754, 761 (8th Cir. 1995)* .

(n20)Footnote 19. *Malek v. Federal Ins. Co., 994 F.2d 49, 54-55 (2d Cir. 1993)* .

(n21)Footnote 20. *See Hanna v. Sec'y of the Army, 513 F.3d 4, 11 (1st Cir. 2008)* (consideration testimony regarding party's religious belief proper when used as evidence of conscientious objector status).

(n22)Footnote 21. *Mauldin v. Upjohn Co., 697 F.2d 644, 649 (5th Cir. 1983)* , *cert. denied, 464 U.S. 848 (1983)* .

(n23)Footnote 1. *Fed. R. Evid. 603*; *see United States v. Hawkins, 76 F.3d 545, 551-552 (4th Cir. 1996)* (court's reliance on attorney's unsworn testimony constituted reversible error).

(n24)Footnote 1. *Fed. R. Evid. 602*.

(n25)Footnote 2. *See United States v. Porter, 821 F.2d 968, 974 (4th Cir. 1987)* , *cert. denied, 485 U.S. 934 (1988)* .

(n26)Footnote 3. *Fed. R. Evid. 602*.

(n27)Footnote 4. *Fed. R. Evid. 701*; *see Sheek v. Asia Badger, Inc., 235 F.3d 687, 695 (1st Cir. 2000)* .

(n28)Footnote 1. *Fed. R. Evid. 611(b)*; *see also United States v. Riggi, 951 F.2d 1368, 1376 (3d Cir. 1991)* .

(n29)Footnote 2. *Fed. R. Evid. 611(b)*.

(n30)Footnote 3. *Fed. R. Evid. 611(b)*; *see Taskett v. Dentlinger, 344 F.3d 1337, 1343 (Fed. Cir. 2003)* .

(n31)Footnote 4. *United States v. Richardson, 233 F.3d 1285, 1288-1289 (11th Cir. 2000)* .

(n32)Footnote 5. *Maasen v. Lucier, 961 F.2d 717, 719 (8th Cir. 1992)* (trial court in bench trial was within discretion to suggest answers to defense witness and restrict plaintiff's right to impeach witness).

(n33)Footnote 6. *Fed. R. Evid. 614(a)*; *Capital Marine Supply, Inc. v. M/V Roland Thomas, II, 719 F.2d 104, 107 (5th Cir. 1983)* (court may call witnesses to testify even after parties have rested).

(n34)Footnote 7. *Fed. R. Evid. 614(a)*.

(n35)Footnote 8. *Fed. R. Evid. 614(b)*; *see, e.g., Logue v. Dore, 103 F.3d 1040, 1045 (1st Cir. 1997)* .

(n36)Footnote 9. *Price v. Kramer, 200 F.3d 1237, 1252 (9th Cir. 2000)* ; *Collins v. Kibort, 143 F.3d 331, 336*

(7th Cir. 1998) .

(n37)Footnote 10. *United States v. Manko, 979 F.2d 900, 905 (2d Cir. 1992)* .

(n38)Footnote 11. *Fed. R. Evid. 614(c)*.

(n39)Footnote 12. *Miley v. Delta Marine Drilling Co., 473 F.2d 856, 857-858 (5th Cir. 1973)* .

(n40)Footnote 13. *Fed. R. Evid. 611(c)*.

(n41)Footnote 14. *United States v. Archdale, 229 F.3d 861, 866 (9th Cir. 2000)* (use of leading questions on direct examination of child witness is acknowledged exception to this rule).

(n42)Footnote 15. *Fed. R. Evid. 611(c)*.

(n43)Footnote 1. *Fed. R. Evid. 607*.

(n44)Footnote 2. *United States v. Schatzle, 901 F.2d 252, 256 (2d Cir. 1990)* .

(n45)Footnote 3. *Fed. R. Evid. 608(a)*.

(n46)Footnote 4. *Fed. R. Evid. 608(b)*; *see Wilson v. Muckala, 303 F.3d 1207, 1216-1217 (10th Cir. 2005)* .

(n47)Footnote 5. *Fed. R. Evid. 608(b)*; *see, e.g., Elcock v. Kmart Corp., 233 F.3d 734, 752-754 (3d Cir. 2000)* ; *see also United States v. Goings, 313 F.3d 423, 426-427 (8th Cir. 2002)* .

(n48)Footnote 5.1. *Fed. R. Evid. 608(b)*.

(n49)Footnote 6. *Fed. R. Evid. 609(a)(1)*.

(n50)Footnote 7. *Fed. R. Evid. 609(a)(2)*.

(n51)Footnote 8. *Fed. R. Evid. 609(a)(2)*.

(n52)Footnote 9. *Fed. R. Evid. 609(e)*.

(n53)Footnote 10. *Fed. R. Evid. 609(b)*; *United States v. Orlando-Figueroa, 229 F.3d 33, 46 (1st Cir. 2000)* .

(n54)Footnote 11. *Fed. R. Evid. 609(d)*.

(n55)Footnote 12. *Fed. R. Evid. 609(c)*.

(n56)Footnote 13. *Santos v. Murdock, 243 F.3d 681, 684 (9th Cir. 2001)* ; *Lippay v. Christos, 996 F.2d 1490, 1499-1500 (3d Cir. 1993)* ; *see Fed. R. Evid. 613*.

(n57)Footnote 14. *Fed. R. Evid. 613(a)*; *Gotch v. Ensco Offshore Co., 168 F.R.D. 567, 570 (W.D. La. 1996)* .

(n58)Footnote 15. *Fed. R. Evid. 613(b)*; *see Fed. R. Evid. 801(d)(2)* (admission of party opponent).

(n59)Footnote 16. *United States v. Lashmett, 965 F.2d 179, 182 (7th Cir. 1992)* .

(n60)Footnote 17. *United States v. Abel, 469 U.S. 45, 50-51, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984)* .

(n61)Footnote 18. *Quinn v. Haynes, 234 F.3d 837, 844-845 (4th Cir. 2000)* , *cert. denied, 522 U.S. 1004 (2001)* .

(n62)Footnote 19. *Smith v. United States, 283 F.2d 16, 20 (6th Cir. 1960)* , *cert. denied, 365 U.S. 847 (1961)* .

(n63)Footnote 20. *Fed. R. Evid. 608*; *see* (B)(1), *above*).

(n64)Footnote 21. *United States v. Lindstrom, 698 F.2d 1154, 1162 n.6 (11th Cir. 1983)* .

(n65)Footnote 1. *See Fed. R. Civ. P. 43(d).*

(n66)Footnote 2. *See Fed. R. Evid. 702.*

(n67)Footnote 3. *See Fed. R. Evid. 603.*

(n68)Footnote 4. *Fed. R. Evid. 604.*

(n69)Footnote 5. *See 28 U.S.C. § 1827.*

(n70)Footnote 6. *28 U.S.C. § 1827(d).*

(n71)Footnote 7. *Fed. R. Evid. 604.*

(n72)Footnote 8. *See, e.g., United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988)* .

(n73)Footnote 1. *Fed. R. Evid. 615*; *see Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996)* (purpose is to prevent falsification of testimony and to uncover fabrication of testimony that may have already taken place).

(n74)Footnote 2. *Sanford v. CBS, Inc., 594 F. Supp. 713, 716-717 (N.D. Ill. 1984)* .

(n75)Footnote 3. *Fed. R. Evid. 615.*

(n76)Footnote 4. *Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1967)* .

(n77)Footnote 5. *Fed. R. Evid. 615(1)*; *see, e.g., Johnson v. United States, 780 F.2d 902, 909 (11th Cir. 1986)* (in wrongful death action only those relatives of deceased who are properly bringing action as plaintiffs qualify as parties who are entitled to remain in courtroom).

(n78)Footnote 6. *Fed. R. Evid. 615(2)*; *see, e.g., Nanoski v. General Motors Acceptance Corp., 874 F.2d 529, 531 (8th Cir. 1989)* .

(n79)Footnote 7. *Fed. R. Evid. 615(3)*; *see, e.g., Tasty Baking Co. v. NLRB, 254 F.3d 114, 122-123 (D.C. Cir. 2001)* .

(n80)Footnote 8. *Fed. R. Evid. 615(4).*

(n81)Footnote 9. *42 U.S.C. § 10606(b)(4).*

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.09

§ 4.09 Opinion Testimonyn*

[1] Opinion Testimony by Lay Witness

A. Three Requirements for Lay Opinion.

A layperson may testify in the form of an opinion or inference n1 if all of three requirements are met: n2 the testimony must be (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge.

B. Rationally Related to Witness' Personal Perception.

Lay opinion or inference testimony is admissible only if it is rationally based on the witness' personal perceptions, n3 which means that the opinion or inference must be one that a reasonable layperson would form from what the witness became aware of through the senses. n4

C. Helpful to Finder of Fact.

A lay witness' opinion testimony is admissible only if it is be helpful to the trier of fact in understanding the witness' testimony or in determining a fact in issue. n5 Such an opinion is not helpful if the trier of fact is in as good a position as the witness to draw the opinion or inference. n6

D. Opinion Not Based on Scientific, Technical, or Other Specialized Knowledge.

Lay opinion or inference testimony is not admissible if it requires scientific, technical, or specialized knowledge that would be required by an expert to form such an opinion. n7

[2] Opinion Testimony by Expert Witness

A. Admissibility of Expert Opinion Testimony.

Opinion testimony is admissible when: (1) it is given by a person who qualifies as an expert; (2) the testimony meets

certain scientific data requirements; and (3) scientific, technical, or other specialized knowledge would assist the trier of fact to understand the evidence or to determine a fact in issue. n1 Requirements for expert qualification and expert testimony are set out in § 4.09.

B. Bases of Expert Opinion Testimony.

1. Time of Perception.

An expert may base his or her opinion on facts or data perceived by or made known to the expert n2 either at trial n3 or before the time of trial. n4

2. Bases of Opinion Need Not Be Admissible.

If the facts or data forming the basis of the expert opinion are of a type reasonably relied on by experts in the particular field, the facts need not be admissible in evidence in order for the court to admit the opinion or inference. n5

3. Inadmissible Bases May Not Be Revealed to Jury.

The proponent of expert testimony may not disclose to the jury facts or data that are otherwise inadmissible, even though they are the basis of expert opinion, unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. n6

4. Disclosure of Bases May Be Required.

An expert may testify in terms of an opinion or inference and give the reasons for such opinion or inference without first testifying to the underlying facts ordata, unless the court requires otherwise. n7 Additionally, the expert may be required to disclose the underlying facts or data on cross-examination. n8

[3] Opinion On Ultimate Issue

A. Admissibility of Ultimate Issue Opinion Testimony.

A layperson or an expert may give testimony in the form of an opinion or inference, even if about an ultimate issue, provided that the testimony is otherwise admissible under the Rules of Evidence. n1 However, if the witness is an expert, the ultimate issue opinion testimony must fall within his or her area of expertise. n2

B. Legal Conclusions Inadmissible.

A witness is generally not allowed to testify in terms of a legal standard or legal conclusion or to testify about the legal implications of evidence. n3 However, if a witness is giving an opinion that is a legal term of art but not exclusively a legal conclusion, it may be admitted if the court can instruct the jury so as to eliminate confusion. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesOpinion TestimonyHelpfulnessEvidenceTestimonyLay WitnessesOpinion TestimonyNonspecialized KnowledgeEvidenceTestimonyLay WitnessesOpinion TestimonyPersonal PerceptionsEvidenceTestimonyLay WitnessesOpinion TestimonyRational Basis

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 4 *Weinstein's Evidence,* Chs. 701-705 (Matthew Bender 2d

ed.).

(n2)Footnote 1. *See Fed. R. Evid. 701*; *Virgin Islands v. Knight, 989 F.2d 619, 629 n.4 (3d Cir. 1993)* , *cert. denied, 510 U.S. 994 (1993)* .

(n3)Footnote 2. *Fed. R. Evid. 701*.

(n4)Footnote 3. *Fed. R. Evid. 701(a)*.

(n5)Footnote 4. *Certain Underwriters at Lloyd's v. Sinkovich, 232 F.3d 200, 204 (4th Cir. 2000)* .

(n6)Footnote 5. *Fed. R. Evid. 701(b)*.

(n7)Footnote 6. *Hester v. BIC Corp., 225 F.3d 178, 184-185 (2d Cir. 2000)* .

(n8)Footnote 7. *Fed. R. Evid. 701(c)*; *see Fed. R. Evid. 702*; *see also Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001)* (lay witness permitted to testify as to medical facts but not as to medical reasons for facts).

(n9)Footnote 1. *Fed. R. Evid. 702*;.

(n10)Footnote 2. *Fed. R. Evid. 703*.

(n11)Footnote 3. *Moore v. Ashland Chem., Inc., 126 F.3d 679, 690 (5th Cir. 1997)* (data may be given in terms of hypothetical question or expert may attend trial and hear testimony).

(n12)Footnote 4. *Moore v. Ashland Chem., Inc., 126 F.3d 679, 690-691 (5th Cir. 1997)* (through personal observation or collection and analysis of data).

(n13)Footnote 5. *Fed. R. Evid. 703*; *see Sphere Drake Ins. PLC v. Trisko, 226 F.3d 951, 955 (8th Cir. 2000)* .

(n14)Footnote 6. *Fed. R. Evid. 703*; *see Brennan v. Reinhart Institutional Foods, 211 F.3d 449, 450-451 (8th Cir. 2000)* .

(n15)Footnote 7. *Fed. R. Evid. 705*; *see, e.g., University of R.I. v. A. W. Chesterton Co., 2 F.3d 1200, 1218-1219 (1st Cir. 1993)* (court has considerable discretion under Evidence Rule 705 to require disclosure of underlying data).

(n16)Footnote 8. *Fed. R. Evid. 705*; *see Ratliff v. Schiber Truck Co., 150 F.3d 949, 955 (8th Cir. 1998)* .

(n17)Footnote 1. *Fed. R. Evid. 704(a)*; *see, e.g., Adalman v. Baker, Watts & Co., 807 F.2d 359, 370 (4th Cir. 1986)* .

(n18)Footnote 2. *Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776, 789 (7th Cir. 2000)* .

(n19)Footnote 3. *See, e.g., Woods v. Lecureux, 110 F.3d 1215, 1219-1220 (6th Cir. 1997)* .

(n20)Footnote 4. *See, e.g., United States v. Sheffey, 57 F.3d 1419, 1426 (6th Cir. 1995)* , *cert. denied, 516 U.S. 1065 (1996)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.10

§ 4.10 Expert Witness Qualification and Expert Testimonyn*

[1] Qualification as Expert Witnesses

A witness may not testify as an expert unless qualified as an expert by his or her knowledge, skill, experience, training, or education. The determination of expert qualification is made within the discretion of the trial court, n1 which must make the determination in light the liberal policy of the Federal Rules of Evidence regarding admissibility of expert testimony. n2

[2] Court Appointed Experts

A. Authority and Process for Appointment.

The court may on its own motion or on the motion of any party order appointment of an expert witness, on the consent of the witness and after proposing the appointment under an order to show cause; n1 the court may request that the parties submit nominations. n2 The court appointment process does not limit the right of the parties to call expert witnesses of their own selection. n3

B. Effect of Appointment.

When an expert witness is appointed by the court, the court must specify the witness' duties in writing or at a conference in which the parties have an opportunity to participate. The appointed witness must inform the parties of the witness' findings, if any, and the witness' deposition may be taken by any party. The witness may be called to testify by the court or any party, and the witness is subject to cross-examination by each party, including a party calling the witness. n4 The court has discretion to authorize disclosure to the jury of the fact that the court appointed the expert witness. n5

C. Compensation of Appointed Expert.

Court appointed expert witnesses are entitled to reasonable compensation, which must be set by the court. n6 The compensation must be paid by the parties in the proportion and at the time specified by the court. n7

[3] Admission of Expert Testimony

A. Requirements for Bases of Expert Testimony.

Expert testimony is not admissible unless it meets three requirements: n1 (1) the testimony must be based on sufficient facts or data, (2) the testimony must be the product of reliable principles and methods, and (3) the witness must apply the principles and methods reliably to the facts of the case.

B. Helpfulness to Trier of Fact Required.

Expert testimony is not admissible unless scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsCourt-Appointed
ExpertsAppointmentsEvidenceTestimonyExpertsCourt-Appointed
ExpertsCompensationEvidenceTestimonyExpertsCourt-Appointed
ExpertsProceduresEvidenceTestimonyExpertsQualifications

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 4 *Weinstein's Evidence*, Chs. 702-706 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Brooks v. Outboard Marine Corp., 234 F.3d 89, 91 (2d Cir. 2000)* ; *see McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995)* .

(n3)Footnote 2. *See Daubert v. Merrell Dow Pharms., 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* ; *see, e.g., Diefenbach v. Sheridan Transp., 229 F.3d 27, 31 (1st Cir. 2000)* .

(n4)Footnote 1. *Fed. R. Evid. 706(a)*; *see Ledford v. Sullivan, 105 F.3d 354, 358 (7th Cir. 1997)* .

(n5)Footnote 2. *Fed. R. Evid. 706(a)*.

(n6)Footnote 3. *Fed. R. Evid. 706(d)*.

(n7)Footnote 4. *Fed. R. Evid. 706(a)*; *see Good v. Austin, 800 F. Supp. 557, 559 (W.D. Mich. 1992)* (specifying duties of expert).

(n8)Footnote 5. *Fed. R. Evid. 706(c)*.

(n9)Footnote 6. *Fed. R. Evid. 706(b)*; *see Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 442, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n10)Footnote 7. *Ledford v. Sullivan, 105 F.3d 354, 360-361 (7th Cir. 1997)* .

(n11)Footnote 1. *Fed. R. Evid. 702*; *see, e.g., Elcock v. Kmart Corp., 233 F.3d 734, 745-751, 754-756 (3d Cir. 2000)* (detailed analysis and list of factors to consider for sufficiency and reliability of underlying data).

(n12)Footnote 2. *Fed. R. Evid. 702*; *see Sphere Drake Ins. PLC v. Trisko, 226 F.3d 951, 955 (8th Cir. 2000)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.11

§ 4.11 Hearsayn*

[1] Determination Whether Statement Constitutes Hearsay

A. Statements and Declarants That Are Controlled by Hearsay Rule.

1. Purpose of Hearsay Rule to Ensure Reliability of Out of Court Declarants and Statements.

The hearsay rule and its exceptions are designed to protect against the unreliability of out of court statements that are offered in court in another form to prove the truth of the matter asserted in the statement. n1 Consequently, the hearsay rule applies only to declarants and their statements, n2 as described below.

2. Statement.

A "statement" that is subject to the hearsay rule is any of three types of assertions: n3 an oral assertion; a written assertion; or an assertion intended by the nonverbal conduct of a person. An "assertion" is an a verbalization, writing, or act that is performed with the belief that the subject of the verbalization, writing, or act is true. n4

3. Declarant.

A "declarant" under the hearsay rule is a person who makes a statement, as defined in item 2, *above*. n5 Consequently, because a statement requires an assertion under the hearsay rule, n6 a person's words, writing, or conduct cannot qualify as hearsay unless it is made as an assertion by the person of some truth. n7

B. Statements That Are Defined as Hearsay.

1. Definition of Hearsay.

"Hearsay" is a statement, other than made by the declarant while testifying at the trial or hearing, offered in evidence at a trial or hearing to prove the truth of the matter asserted. n8

Hearsay may be included within hearsay. n9 Such "hearsay within hearsay" or "multiple hearsay" occurs when the current declarant attempts to testify that one person stated to the declarant what a second person had stated. n10 It also

typically occurs in a writing prepared by one person that reports a statement made by a second person. n11

C. Statements That Do Not Constitute Hearsay.

1. Prior Inconsistent Statement by Witness.

A statement is not hearsay if it is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, and the declarant testifies as a witness at the trial or hearing and is subject to cross-examination concerning the statement. n12 Such a prior inconsistent statement is admissible as substantive evidence, assuming it is otherwise admissible. n13

2. Prior Consistent Statement by Witness.

A statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and the declarant testifies as a witness at the trial or hearing and is subject to cross-examination concerning the statement. n14

3. Statement of Identification.

A statement is not hearsay if it is one of identification of a person made after perceiving the person. n15 If such an identification statement doesn't violate any other rules of evidence, it is admissible as substantive evidence. n16

4. Admissions by Party Opponent.

a. Party's Own Statement.

A statement is not hearsay if it is offered against a party and is the party's own statement, in either an individual or a representative capacity. n17

b. Party's Adopted Statement.

A statement is not hearsay if it is offered against a party and the party has manifested an adoption or belief in the truth of the statement. n18

c. Statement Made Under Authority of Party.

A statement is not hearsay if it is offered against a party and is made by a person authorized by the party to make a statement concerning the subject. n19 The contents of the statement must be considered, but are not alone sufficient, to establish the declarant's authority. n20

d. Statement by Party's Agent or Employee.

A statement is not hearsay if it is offered against a party and is made by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship. n21 The contents of the statement must be considered, but are not alone sufficient, to establish the agency or employment relationship. n22

e. Statement Made by Party's Coconspiritor.

A statement is not hearsay if it is offered against a party and is made by a coconspirator of the party during the course and in furtherance of the conspiracy. n23 The contents of the statement must be considered, but are not alone sufficient, to establish the conspiracy and the participation in the conspiracy of the declarant and other alleged conspirators. n24

[2] Rule of Inadmissibility of Hearsay

Hearsay is not admissible except as provided by the Federal Rules of Evidence or by other rules prescribed by the Supreme Court pursuant to statutory authority or act of Congress. n1 The trial court has considerable discretion to make hearsay determinations, including whether a statement constitutes hearsay and whether an exception to the rule is applicable. n2 However, if the court finds that an exception is applicable, the statement must generally be admitted.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in the Federal Rules of Evidence. n3 The same result could be achieved in the absence of this explicit rule in Evidence Rule 805, but the explicit statement was used by the drafters to focus the attention of the courts on the issue of hearsay within hearsay, which the courts have sometimes failed to analyze adequately. n4

[3] Exceptions to Hearsay Rule

A. Applicability of Exceptions May Depend on Availability of Declarant's Testimony.

1. Exceptions Categorized by Availability of Declarant.

There are many exceptions to the hearsay rule. Some of the exceptions are deemed such powerful indicators of trustworthiness that they are applicable even if the declarant is available. n1 However, some of the exceptions are available only if the declarant is unavailable. n2

2. Circumstances of Unavailability.

A declarant is deemed to be available to testify, except in any of the following listed situations. A declarant is unavailable when the declarant: n3 (1) is exempted by the court's ruling of privilege from testifying concerning the subject matter of the declarant's statement; n4 (2) persists in refusing to testify concerning the subject matter of the declarant's statement, despite court order; n5 (3) testifies to a lack of memory of the subject matter of the declarant's statement; n6 (4) is unable to be present or to testify at the hearing because of death or physical or mental illness or infirmity existing at the time of the hearing; n7 or (5) is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. n8

On the other hand a declarant is deemed available as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. n9

B. Exceptions Applicable Even When Declarant is Available.

1. Present Sense Impression.

A statement describing or explaining an event or condition made at the time the declarant was perceiving the event or condition, or immediately after the event or condition. n10

2. Excited Utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. n11

3. Contemporaneous Mental, Emotional, or Physical Condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. n12

4. Statement to Obtain Medical Diagnosis or Treatment.

A statement made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source of symptoms, pain, or sensations, to the extent reasonably pertinent to diagnosis or treatment. n13

5. Recorded Recollection.

A record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. n14

6. Records of Regularly Conducted Activity.

Records in any form of acts, events, conditions, opinions, or diagnoses, made at or near the time by a person with knowledge, or from information transmitted by such a person, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the record, provided that the record is shown by the testimony of the custodian or other qualified witness, or by appropriate certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. n15

7. Absence of Entry in Records of Regularly Conducted Activity.

Evidence that a matter is not included in the records kept in accordance with the provisions of paragraph 6, *above*, when used to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a record was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. n16

8. Public Records and Reports.

Records in any form of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. n17

9. Records of Vital Statistics.

Records or data compilations in any form, of births, fetal deaths, deaths, or marriages, if the report of the record was made to a public office pursuant to requirements of law. n18

10. Absence of Public Record or Entry.

To prove the absence of a record in any form, or the nonoccurrence or nonexistence of a matter of which a record in any

form, was regularly made and preserved by a public office or agency, evidence in the form of a certification or testimony, that diligent search failed to disclose the record. n19

11. Records of Religious Organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. n20

12. Marriage, Baptismal, and Similar Certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time after the act. n21

13. Family Records.

Statements of fact concerning personal or family history contained in family books and documents, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or similar items. n22

14. Records of Documents Affecting an Interest in Property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office. n23

15. Statements in Documents Affecting an Interest in Property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. n24

16. Statements in Ancient Documents.

Statements in a document in existence twenty years or more, if the authenticity of the document is established. n25

17. Market Reports and Commercial Publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied on by the public or by persons in particular occupations. n26

18. Learned treatises.

To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. n27

19. Reputation Concerning Personal or Family History.

Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history. n28

20. Reputation Concerning Boundaries or General History.

Reputation in a community, arising before the occurrence in the current controversy, regarding boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community, state, or nation in which located. n29

21. Reputation Concerning Character.

Reputation of a person's character among associates or in the community. n30

22. Judgment of Previous Conviction.

Evidence of a final judgment, entered after a trial or on a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. The pendency of an appeal may be shown but does not affect admissibility. n31

23. Judgment as to Personal, Family, or General History or Boundaries.

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation. n32

C. Exceptions Applicable Only When Declarant is Unavailable.

1. Former Testimony.

If the declarant is unavailable as a witness, testimony is not excluded under the hearsay rule if the testimony was given by the declarant as a witness at another hearing of the same or a different proceeding, or in a lawful deposition in the course of the same or another proceeding, provided that the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. n33

2. Statement Under Belief of Impending Death.

If the declarant is unavailable as a witness, a statement made by a declarant while believing that the declarant's death was imminent is not excluded under the hearsay rule, provided that the statement concerns the cause or circumstances of what the declarant believed to be impending death. n34

3. Statement Against Interest.

If the declarant is unavailable as a witness, a statement is not excluded under the hearsay rule if a reasonable person in the declarant's position would have made the statement only if the person believed it to be true because, when made, the statement was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. n35

4. Statements Regarding Personal or Family History.

If the declarant is unavailable as a witness, a statement is not excluded under the hearsay rule if it concerns the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or

other similar fact of personal or family history. This is true even if the declarant had no means of acquiring personal knowledge of the matter stated. n36 If the declarant makes such a statement or also a statement of death of another person, that statement is also not excluded under the hearsay rule, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared in the statement. n37

5. Forfeiture by Wrongdoing.

If the declarant is unavailable as a witness, a statement by the declarant is not excluded under the hearsay rule if offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and actually did, procure the unavailability of the declarant as a witness. n38

D. Residual Exception.

Even if a statement is not specifically covered by an exception listed in Rule 803 or 804, and even if the declarant is available, a statement is not excluded by the hearsay rule if all of the following are true: n39

1. The statement has circumstantial guarantees of trustworthiness equivalent to those in Rule 803 or 804; n40

2. The court determines that the statement is offered as evidence of a material fact; n41

3. The court determines that the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; n42

4. The court determines that the general purposes of the Federal Rules of Evidence and the interests of justice will best be served by admission of the statement into evidence; n43 and

5. The proponent of the statement provides notice to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. The notice must indicate the proponent's intention to offer the statement in evidence and the particulars of the statement, including the name and address of the declarant. n44

[4] Attacking and Supporting Credibility of Declarant

If the court has admitted in evidence a hearsay statement or any of certain statements of admission offered against a party, n1 the credibility of the declarant may be attacked. n2 If the credibility of the declarant is attacked it may be supported. The declarant's credibility may be attacked or supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. However, evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayGeneral OverviewEvidenceHearsayRule ComponentsGeneral OverviewEvidenceHearsayRule ComponentsAssertionsEvidenceHearsayRule ComponentsStatementsEvidenceHearsayRule ComponentsTruth of Matter Asserted

FOOTNOTES:

(n1)Footnote *. For a complete discussion of this topic, see 5 *Weinstein's Evidence,* Chs. 801-807 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Fed. R. Evid. 801*, Committee Note; *United States v. Robles-Vertiz, 155 F.3d 725, 730 (5th Cir. 1998)* (hearsay rule seeks to eliminate danger that evidence will lack reliability because faults in perception, memory, or narration of the declarant will not be exposed; *cf. Laramie v. County of Santa Clara, 784 F. Supp. 1492, 1494-1495 (N.D. Cal. 1992)* .

(n3)Footnote 2. *See Fed. R. Evid. 801(a), (b).*

(n4)Footnote 3. *Fed. R. Evid. 801(a).*

(n5)Footnote 4. *See United States v. Singer, 687 F.2d 1135, 1147 (8th Cir. 1982)* (act of mailing letter could constitute assertion if it conveys mailer's belief that addressee lives at certain address).

(n6)Footnote 5. *Fed. R. Evid. 801(b).*

(n7)Footnote 6. *See Fed. R. Evid. 801(a).*

(n8)Footnote 7. *United Phosphorus, Ltd. v. Midland Fumigant, Inc., 21 F. Supp. 2d 1247, 1254 (D. Kan. 1998) , aff'd in part, rev'd in part on other grounds, 205 F.3d 1219 (10th Cir. 2000)* .

(n9)Footnote 8. *Fed. R. Evid. 801(c)*; *see Butters v. Vance Int'l, Inc., 225 F.3d 462, 467 (4th Cir. 2000)* .

(n10)Footnote 9. *Fed. R. Evid. 805.*

(n11)Footnote 10. *Vazquez v. Lopez-Rosario, 134 F.3d 28, 34 (1st Cir. 1998)* .

(n12)Footnote 11. *United States v. David, 96 F.3d 1477, 1481-1482 (D.C. Cir. 1996) , cert. denied, 519 U.S. 1136 (1997)* .

(n13)Footnote 12. *Fed. R. Evid. 801(d)(1)(A).*

(n14)Footnote 13. *See Carson Harbor Village, Ltd. v. Unocal Corp., 227 F.3d 1196, 1204-1205 (9th Cir. 2000)* .

(n15)Footnote 14. *Fed. R. Evid. 801(d)(1)(B)*; *see United States v. Prieto, 232 F.3d 816, 819-821 (11th Cir. 2000)* .

(n16)Footnote 15. *Fed. R. Evid. 801(d)(1)(C).*

(n17)Footnote 16. *See United States v. Davis, 181 F.3d 147, 149 (D.C. Cir. 1999)* .

(n18)Footnote 17. *Fed. R. Evid. 801(d)(2)(A)*; *see United States v. Reed, 227 F.3d 763, 769-770 (7th Cir. 2000)* .

(n19)Footnote 18. *Fed. R. Evid. 801(d)(2)(B)*; *see Vazquez v. Lopez-Rosario, 134 F.3d 28, 35 (1st Cir. 1998)* .

(n20)Footnote 19. *Fed. R. Evid. 801(d)(2)(C)*; *see Kirk v. Raymark Indus., 61 F.3d 147, 163-164 (3d Cir. 1995)* .

(n21)Footnote 20. *Fed. R. Evid. 801(d)(2)(C).*

(n22)Footnote 21. *Fed. R. Evid. 801(d)(2)(D)*; *see Rotec Indus. v. Mitsubishi Corp., 215 F.3d 1246, 1256 (Fed. Cir. 2000)* .

(n23)Footnote 22. *Fed. R. Evid. 801(d)(2)(D).*

(n24)Footnote 23. *Fed. R. Evid. 801(d)(2)(E)*; *see United States v. Irorere, 228 F.3d 816, 824 n.1 (7th Cir. 2000)* .

(n25)Footnote 24. *Fed. R. Evid. 801(d)(2)(E).*

(n26)Footnote 1. *Fed. R. Evid. 802.*

(n27)Footnote 2. *See United States v. Knox, 124 F.3d 1360, 1363 n.1 (10th Cir. 1997)* .

(n28)Footnote 3. *Fed. R. Evid. 805*; *see Vazquez v. Lopez-Rosario, 134 F.3d 28, 34 (1st Cir. 1998)* .

(n29)Footnote 4. *Yates v. Bair Transp., Inc., 249 F. Supp. 681, 686-687 (S.D.N.Y. 1965)* .

(n30)Footnote 1. *Fed. R. Evid. 803*; *see* B, *below.*

(n31)Footnote 2. *Fed. R. Evid. 804(b)*; *see* C, *below*; *see also Walden v. Sears, Roebuck & Co., 654 F.2d 443, 446 (5th Cir. 1981)* .

(n32)Footnote 3. *Fed. R. Evid. 804(a).*

(n33)Footnote 4. *See, e.g., United States v. Reed, 227 F.3d 763, 767-768 (7th Cir. 2000)* .

(n34)Footnote 5. *See, e.g., United States v. Licavoli, 725 F.2d 1040, 1048 (6th Cir. 1984)* .

(n35)Footnote 6. *See, e.g., Bail Bonds by Marvin Nelson, Inc. v. Commissioner, 820 F.2d 1543, 1547 n.5 (9th Cir. 1987)* .

(n36)Footnote 7. *See, e.g., United States v. McClellan, 868 F.2d 210, 214-215 (7th Cir. 1989)* .

(n37)Footnote 8. *See, e.g., United States v. Ochoa, 229 F.3d 631, 637-638 (7th Cir. 2000)* .

(n38)Footnote 9. *Fed. R. Evid. 804(a).*

(n39)Footnote 10. *Fed. R. Evid. 803(1)*; *see In re Cirrus Logic Sec. Litig., 946 F. Supp. 1446, 1469 (N.D. Cal. 1996)* .

(n40)Footnote 11. *Fed. R. Evid. 803(2)*; *see United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999)* , *cert. denied, 530 U.S. 1250 (2000)* (statement made to 911 operator satisfied requirements for excited utterance).

(n41)Footnote 12. *Fed. R. Evid. 803(3)*; *see Mota v. University of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 527 n.46 (5th Cir. 2001)* (email message as evidence of state of mind of sender).

(n42)Footnote 13. *Fed. R. Evid. 803(4)*; *see Olesen v. Class, 962 F. Supp. 1556, 1568-1569 (D.S.D. 1997)* (no distinction between statements made to doctor consulted for treatment and one consulted only for diagnosis).

(n43)Footnote 14. *Fed. R. Evid. 803(5)*; *see Collins v. Kibort, 143 F.3d 331, 338 (7th Cir. 1998)* .

(n44)Footnote 15. *Fed. R. Evid. 803(6)*; *see Chadwell v. Koch Ref. Co., 251 F.3d 727, 732 (8th Cir. 2001)* .

(n45)Footnote 16. *Fed. R. Evid. 803(7)*; *see Kaiser Aluminum & Chem. Corp. v. Illinois Cent. Gulf R.R., 615 F.2d 470, 476-477 (8th Cir. 1980)* , *cert. denied, 449 U.S. 890 (1980)* .

(n46)Footnote 17. *Fed. R. Evid. 803(8)*; *see United States v. Midwest Fireworks Mfg. Co., 248 F.3d 563, 566 (6th*

Cir. 2001) ; *Zeus Enters. v. Alphin Aircraft, Inc., 190 F.3d 238, 241 (4th Cir. 1999)* .

(n47)Footnote 18. *Fed. R. Evid. 803(9)*; *see, e.g., Minyen v. American Home Assurance Co., 443 F.2d 788, 791 (10th Cir. 1971)* (death certificate admissible to show cause of death).

(n48)Footnote 19. *Fed. R. Evid. 803(10)*; *see Wiley v. United States, 20 F.3d 222, 227-229 (6th Cir. 1994)* .

(n49)Footnote 20. *Fed. R. Evid. 803(11)*.

(n50)Footnote 21. *Fed. R. Evid. 803(12)*; *see Martinez v. Ribicoff, 200 F. Supp. 191, 192 (D.P.R. 1961)* .

(n51)Footnote 22. *Fed. R. Evid. 803(13)*.

(n52)Footnote 23. *Fed. R. Evid. 803(14)*; *see, e.g., Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349, 357 (2d Cir. 1977)* (recorded deeds).

(n53)Footnote 24. *Fed. R. Evid. 803(15)*; *see, e.g., Silverstein v. Chase, 260 F.3d 142, 149 (2d Cir. 2001)* .

(n54)Footnote 25. *Fed. R. Evid. 803(16)*; *see, e.g., George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir. 1990)* .

(n55)Footnote 26. *Fed. R. Evid. 803(17)*; *see United States v. Cassiere, 4 F.3d 1006, 1018-1019 (1st Cir. 1993)* .

(n56)Footnote 27. *Fed. R. Evid. 803(18)*; *see Costantino v. Herzog, 203 F.3d 164, 170-171 (2d Cir. 2000)* .

(n57)Footnote 28. *Fed. R. Evid. 803(19)*; *see Blackburn v. UPS, Inc., 179 F.3d 81, 99 (3d Cir. 1999)* .

(n58)Footnote 29. *Fed. R. Evid. 803(20)*; *see Wally v. United States, 148 Ct. Cl. 371, 373-374 (Ct. Cl. 1960)* .

(n59)Footnote 30. *Fed. R. Evid. 803(21)*; *see United States v. Penson, 896 F.2d 1087, 1092-1093 (7th Cir. 1990)* .

(n60)Footnote 31. *Fed. R. Evid. 803(22)*; *see United States v. Robles-Vertiz, 155 F.3d 725, 730 (5th Cir. 1998)* .

(n61)Footnote 32. *Fed. R. Evid. 803(23)*; *see Zeus Enters. v. Alphin Aircraft, Inc., 190 F.3d 238, 242 (4th Cir. 1999)* ; *see also Grant Bros. Constr. Co. v. United States, 232 U.S. 647, 663, 34 S. Ct. 452, 58 L. Ed. 776 (1914)* .

(n62)Footnote 33. *Fed. R. Evid. 804(b)(1)*; *see Battle v. Memorial Hosp., 228 F.3d 544, 552-553 (5th Cir. 2000)* .

(n63)Footnote 34. *Fed. R. Evid. 804(b)(2)*; *see United States v. Fernandez, 892 F.2d 976, 984 n.5 (11th Cir. 1989)* , *cert. denied, 495 U.S. 944 (1990)* .

(n64)Footnote 35. *Fed. R. Evid. 804(b)(3)(A)*; *see United Techs. Corp. v. Mazer, 556 F.3d 1260, 1279-1280 (11th Cir. 2009)* .

(n65)Footnote 36. *Fed. R. Evid. 804(b)(4)(A)*; *see United States v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997)* , *cert. denied, 522 U.S. 890 (1997)* .

(n66)Footnote 37. *Fed. R. Evid. 804(b)(4)*; *see Brown ex rel. Brown v. Bowen, 668 F. Supp. 146, 150 (E.D.N.Y. 1987)* .

(n67)Footnote 38. *Fed. R. Evid. 804(b)(6)*; *see Brown ex rel. Brown v. Bowen, 668 F. Supp. 146, 150 (E.D.N.Y. 1987)* .

(n68)Footnote 39. *Fed. R. Evid. 807*; *see Silverstein v. Chase, 260 F.3d 142, 149 (2d Cir. 2001)* .

(n69)Footnote 40. *See Barry v. Trs. of the Int'l Ass'n Full-Time Salaried Officers & Emples. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan, 467 F. Supp. 2d 91, 103 (D.D.C. 2006)* .

(n70)Footnote 41. *Fed. R. Evid. 807(A).*

(n71)Footnote 42. *Fed. R. Evid. 807(B)*; *see Bouygues Telecom, S.A. v. Tekelec, 473 F. Supp. 2d 692, 697 (E.D.N.C. 2007)* .

(n72)Footnote 43. *Fed. R. Evid. 807(C).*

(n73)Footnote 44. *Fed. R. Evid. 807.*

(n74)Footnote 1. *See Fed. R. Evid. 801(d)(2)(C)*, *(D)*, or *(E).*

(n75)Footnote 2. *Fed. R. Evid. 806.*

(n76)Footnote 3. *Fed. R. Evid. 806*; *see United States v. Graham, 858 F.2d 986, 989-990 (5th Cir. 1988)* , *cert. denied, 489 U.S. 1020 (1989)* .

Moore's Manual--Federal Practice and Procedure

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.12

§ 4.12 Authentication and Identification of Evidencen*

[1] Requirements for Authentication or Identification

A. Necessity and Method for Authentication or Identification.

At common law, a condition precedent to the admissibility of documents and other types of real evidence was their authentication or identification. n1 TheFederal Rules of Evidence provide that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. n2 By way of illustration only, the Rules provide nonexclusive examples of evidence that is sufficient to support a finding that the matter in question is what its proponent claims. These examples are listed in B, *below*.

The rules also provide that in specified circumstances an item of real evidence is self authenticating. n3

B. Nonexclusive Illustrations of Authenticating Evidence

1. Testimony of Witness Wth Knowledge.

Real evidence may be authenticated by testimony of a witness with knowledge that the real evidence is what it is claimed to be. n4

2. Nonexpert Opinion on Handwriting.

Handwriting may be authenticated by nonexpert opinion as to its genuineness, provided the opinion is based on familiarity not acquired for purposes of the litigation. n5

3. Comparison by Trier or Expert Witness.

A specimen may be authenticated by comparison by the trier of fact or by expert witnesses with other specimens that have already been authenticated. n6

4. Distinctive Characteristics.

An item of real evidence, including a document, may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. n7

5. Voice Identification.

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, may be made by opinion based on the witness hearing the voice at any time under circumstances connecting it with the asserted speaker. n8

6. Telephone Conversation.

a. Personal Telephone Calls.

A telephone conversation other than a business conversation may be authenticated by evidence that the call was made to the number assigned at that time by the telephone company to a particular person and that circumstances, such as self-identification, show that the person answering the telephone was the person called. n9

b. Business Telephone Calls.

A telephone call made to a business may be authenticated by evidence that the call was made to a place of business and that the conversation related to business reasonably transacted over the telephone. n10

7. Public Records or Reports.

Public records or reports may be authenticated by evidence that a writing was authorized by law to be recorded or filed and in fact was recorded or filed in a public office, or by evidence that a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. n11

8. Ancient Documents or Data Compilation.

A document or data compilation in any form may be authenticated by evidence that the document or compilation is in such condition as to create no suspicion concerning its authenticity, was in a place where it would likely be if authentic, and has been in existence 20 years or more at the time it is offered. n12

9. Process or System.

A process or system used to produce a result may be authenticated by evidence describing the process or system and by evidence which shows that the process or system produces an accurate result. n13

10. Method Provided by Statute or Rule.

Real evidence may be proved by any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority. n14

[2] Self Authentication of Evidence

A. Self Authentication Obviates Necessity of Extrinsic Evidence of Authenticity.

The Federal Rules of Evidence provide that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to specified trustworthy documents, records, and items. n1 Essentially, self authentication

means that the requirement of Evidence Rule 901 that the proponent of an item of real evidence must show that the item is what it purports to be is automatically met if the proffered item meets the requirements of any of the categories, n2 as specified in B, *below*.

B. List of Self Authenticating Documents and Items.

1. Domestic Public Document Under Seal.

A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, including also political subdivisions, departments, officers, and agencies of any such governmental agency, and also bearing a signature purporting to be an attestation or execution. n3

2. Domestic Public Document Not Under Seal.

A document purporting to bear the signature in the official capacity of an officer or employee of any governmental entity specified in paragraph 1, *above*, even if it has no seal, provided the public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. n4

3. Foreign Public Document.

Certain documents purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, when accompanied by a final certification performed by a specified person as to the genuineness of the signature and official position. n5

4. Certified Copy of Public Record.

A certified copy of a public record, which is a copy of any of the following: (1) an official record, (2) an official report, (3) an entry in an official record or report, or (4) a document authorized by law to be recorded or filed and actually recorded or filed in a public office. The certification must comply with the requirements of paragraph 1, 2, or 3, *above*. n6

5. Official Publication.

Books, pamphlets, or other publications purporting to be issued by public authority. n7

6. Newspapers and Periodicals.

Printed materials purporting to be newspapers or periodicals. n8

7. Trade Inscriptions and Similar Items.

Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin. n9

8. Acknowledged Documents.

Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments. n10

9. Commercial Paper and Related Documents.

Commercial paper, signatures, and related documents to the extent provided by general commercial law. n11

10. Presumptions Under Acts of Congress.

Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic. n12

11. Certified Domestic Records of Regularly Conducted Activity.

The original or a duplicate of a domestic record of a regularly conducted activity that would be admissible under Evidence Rule 803(6), provided it is accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court. The declaration must certify that the record: (A) was made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in thecourse of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. n13

A party intending to offer a record into evidence under this self authentication provision must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of the offer to provide the adverse party with a fair opportunity to challenge the record and declaration. n14

12. Certified Foreign Records of Regularly Conducted Activity.

In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Evidence Rule 803(6), provided it is accompanied by a written declaration of its custodian or other qualified person certifying that the record: (A) was made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. n15

A party intending to offer a foreign record into evidence under this self authentication provision must provide written notice of that intention to all adverse parties and must make the record and declaration available for inspection sufficiently in advance of the offer to provide the adverse party with a fair opportunity to challenge the record and declaration. n16

[3] Testimony of Subscribing Witness Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. n1 The testimony of a subscribing witness is required in some states under the substantive law of wills and in some states for marriage contracts. The burden of proof is on the party challenging the admission of a writing to show that the originating state requires testimony of the subscribing witness. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceAuthenticationSelf-AuthenticationEvidenceAuthenticationChain of Custody

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 5 *Weinstein's Evidence,* Chs. 901-903 (Matthew Bender 2d

ed.).

(n2)Footnote 1. *See Cook v. Hoppin, 783 F.2d 684, 688-689 (7th Cir. 1986)* .

(n3)Footnote 2. *Fed. R. Evid. 901(a)*; *see Threadgill v. Armstrong World Indus., 928 F.2d 1366 (3d Cir. 1991)* .

(n4)Footnote 3. *Fed. R. Evid. 902*; *see* [2], *below*.

(n5)Footnote 4. *Fed. R. Evid. 901(b)(1)*; *see United States v. Tank, 200 F.3d 627, 630-631 (9th Cir. 2000)* .

(n6)Footnote 5. *Fed. R. Evid. 901(b)(2)*; *see Paccon, Inc. v. United States, 399 F.2d 162, 173-174 (Ct. Cl. 1968)* .

(n7)Footnote 6. *Fed. R. Evid. 901(b)(3)*; *see Scharfenberger v. Wingo, 542 F.2d 328, 336-337 (6th Cir. 1976)* .

(n8)Footnote 7. *Fed. R. Evid. 901(b)(4)*; *see Baulch v. Johns, 70 F.3d 813, 816 (5th Cir. 1995)* .

(n9)Footnote 8. *Fed. R. Evid. 901(b)(5)*; *see United States v. Capers, 61 F.3d 1100, 1106 (4th Cir. 1995)* , *cert. denied, 517 U.S. 1211 (1996)* .

(n10)Footnote 9. *Fed. R. Evid. 901(b)(6)(A)*; *see United States v. Garrison, 168 F.3d 1089, 1093 (8th Cir. 1999)* .

(n11)Footnote 10. *Fed. R. Evid. 901(b)(6)(B)*; *see Ciferni v. Standard Oil Corp., 715 F. Supp. 121, 124 (E.D. Pa. 1989)* .

(n12)Footnote 11. *Fed. R. Evid. 901(b)(7)*; *see Amoco Prod. Co. v. United States, 619 F.2d 1383, 1391 (10th Cir. 1980)* .

(n13)Footnote 12. *Fed. R. Evid. 901(b)(8)*; *see Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 661 (6th Cir. 2000)* .

(n14)Footnote 13. *Fed. R. Evid. 901(b)(9)*; *see Zayre Corp. v. S.M. & R. Co., 882 F.2d 1145, 1150 (7th Cir. 1989)* (authenticating witness must understand system).

(n15)Footnote 14. *Fed. R. Evid. 901(b)(10)*; *see 28 U.S.C. § 1733(a)* (books or records of account of department or agency of United States admissible to prove transactions recorded in them).

(n16)Footnote 1. *See Fed. R. Evid. 902*.

(n17)Footnote 2. *United States v. McIntosh, 200 F.3d 1168, 1169 (8th Cir. 2000)* .

(n18)Footnote 3. *Fed. R. Evid. 902(1)*; *see Hughes v. United States, 953 F.2d 531, 540 (9th Cir. 1992)* .

(n19)Footnote 4. *Fed. R. Evid. 902(2)*; *see Nolin v. Douglas County, 903 F.2d 1546, 1552* (11th Cir. 1990.

(n20)Footnote 5. *Fed. R. Evid. 902(3)*; *see United States v. Montemayor, 712 F.2d 104, 109 (5th Cir. 1983)* .

(n21)Footnote 6. *Fed. R. Evid. 902(4)*; *see United States v. Mateo-Mendez, 215 F.3d 1039, 1043-1044 (9th Cir. 2000)* , *cert. denied, 531 U.S. 983 (2000)* .

(n22)Footnote 7. *Fed. R. Evid. 902(5)*; *see California Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1355 n.23 (C.D. Cal. 1983)* .

(n23)Footnote 8. *Fed. R. Evid. 902(6)*; *see Price v. Rochford, 947 F.2d 829, 833 (7th Cir. 1991)* .

(n24)Footnote 9. *Fed. R. Evid. 902(7)*; *see United States v. Alvarez, 972 F.2d 1000, 1004 (9th Cir. 1992)* , *cert. denied, 507 U.S. 977 (1993)* .

(n25)Footnote 10. *Fed. R. Evid. 902(8)*; *see United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981)* .

(n26)Footnote 11. *Fed. R. Evid. 902(9)*; *see In re Baker & Getty Fin. Servs., Inc., 98 B.R. 300, 305 (Bankr. N.D. Ohio 1989)* .

(n27)Footnote 12. *Fed. R. Evid. 902(10)*; *see, e.g., 26 U.S.C. § 6064* (signatures on tax returns).

(n28)Footnote 13. *Fed. R. Evid. 902(11)*.

(n29)Footnote 14. *Fed. R. Evid. 902(11)*; *see Fed. R. Evid. 902(11)*, Committee Note to 2000 Amendments.

(n30)Footnote 15. *Fed. R. Evid. 902(12)*.

(n31)Footnote 16. *Fed. R. Evid. 902(12)*; *see Fed. R. Evid. 902(12)*, Committee Note to 2000 Amendments.

(n32)Footnote 1. *Fed. R. Evid. 903*; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1223 (E.D. Pa. 1980)* .

(n33)Footnote 2. *Barnes v. Barnes, 843 S.W.2d 835, 838 (Ark. 1992)* .

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PART I Judicial Powers; Law Applied; Evidence
CHAPTER 4 FEDERAL EVIDENCE SUMMARY

1-4 Moore's Manual--Federal Practice and Procedure § 4.13

§ 4.13 Contents of Writings, Recordings, and Photographsn*

[1] Definitions Related to Contents of Evidence

A. Writings and Recordings.

"Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. n1 Although "photographs" are defined separately, n2 as stated in B, *below*, it should be noted that the definition of writings and recordings includes the photographic reproduction of letters, words or numbers. n3 Except for symbols that are used as words in languages, symbols are generally not deemed writings or subject to this definition because they are not the equivalent to letters, words, or numbers or their equivalent. n4

B. Photographs.

The term "photographs" includes still photographs, X-ray films, video tapes, and motion pictures. n5 It should be noted that although Congress has expanded this list to include videotapes, and will probably expand it further as the technology of storage media improves to include items such as CD-ROM and DVD disks, the inclusion on this list is for evidentiary purposes of determining the contents of such items and not for other purposes. Thus, it has recently been held that under a statute allowing an award of costs, n6 there is no provision for the recovery of expenses for videotapes of depositions. n7

C. Originals.

An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. n8 An "original" of a photograph includes the negative or any print from the negative. If data are stored in a computer or similar device, any printout or other output readable by sight is an "original" provided that the proponent shows that the output reflects the data accurately. n9

D. Duplicates.

A "duplicate" is: n10 a counterpart produced by the same impression as the original, n11 or from the same matrix, or by

means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, n12 or by chemical reproduction, or by any other equivalent technique that accurately reproduces the original. n13

[2] Requirement of Original

An original of a writing, recording, or photograph is required to prove the content of a writing, recording, or photograph, except as otherwise provided in the Federal Rules of Evidence or by Act of Congress. n1 This rule is referred to as the "best evidence" rule, which provides that at some time every writing, recording, or photograph consists of a decipherable original. The rule is intended to prevent fraud in proving the contents of documents and recordings. n2 However, the fact that the rules recognize that even a photocopy may constitute an original when so intended indicates that there is a recognition that the theory of the original is sometimes outmoded with respect to modern reproduction technology; the possibility of error is substantially reduced when copies are produced by modern methods. However, in certain respects there is also an increase in the capability for fraud. In any event, there still is a preference for the original except in particular exceptions specified in the rules. n3

[3] Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original; n1 or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. n2 Both the issues of authenticity and fairness are determined on a case by case basis. n3

[4] Admissibility of Other Evidence of Contents

A. Use of Other Evidence to Prove Contents.

The Federal Rules of Evidence list several specific situations in which a proponent may introduce evidence other than the original or a duplicate to prove the contents of a writing, recording, or photograph. n1 These situations allow admission of such "secondary evidence" in cases when the original cannot be produced, provided the failure to produce the original is satisfactorily explained. n2 The specific situations are listed in B, *below*.

B. Circumstances Permitting Introduction of Other Evidence.

1. Originals Lost or Destroyed.

Secondary evidence is admissible to prove content if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. n3

2. Proponent Cannot Obtain Original.

The proponent may introduce secondary evidence of contents if no original can be obtained by any available judicial process or procedure. n4

3. Original in Possession of Opponent.

Secondary evidence is admissible to prove content if, at a time when an original was under the control of the party against whom offered, the proponent put that opponent on notice that the contents would be a subject of proof at the hearing, and the opponent does not produce the original at the hearing. n5

4. Secondary Evidence to Prove Collateral Matters.

Secondary evidence is admissible to prove content if the writing, recording, or photograph is not closely related to a controlling issue. n6

[5] Proof of Contents of Public Records

The proponent may prove the contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, by a certified copy that is certified as correct in accordance with Evidence Rule 902 or testified to be correct by a witness who has compared it with the original. If the proponent cannot obtain such a certified copy by the exercise of reasonable diligence, then other evidence of the contents may be given. n1

[6] Proof of Contents of by Summary

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The introducing party must make available the originals or duplicates for examination or copying, or both, by other parties at a reasonable time and place, and the court may order that they be produced in court. n1

[7] Testimony or Written Admission of Party

A party may prove contents of writings, recordings, or photographs by the secondary evidence of the testimony or deposition of an opposition party or by party's written admission, when the evidence is offered against that party. The proponent of the evidence need not account for the nonproduction of the original. n1

[8] Function of Court and Jury Regarding Secondary Evidence

A. Determinations Made by Court.

When the admissibility of other evidence of the contents of writings, recordings, or photographs under these rules depends on the fulfillment of a condition of fact, the court must ordinarily determine the question whether that condition has been satisfied. n1 Thus, for example, whether an original has actually been lost is a question for the court, n2 in contrast to the question of whether a particular item is the original. n3

B. Determinations Made by Trier of Fact.

The trier of fact, rather than the court, must determine the issues of fact whether an asserted writing ever existed, or whether another writing, recording, or photograph produced at the trial is the original, or whether other evidence of contents correctly reflects the contents. n4 Thus, the question of whether a party has offered sufficient secondary evidence to prove the contents of a writing that the court has determined to be lost is a matter for the trier of fact to decide. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDemonstrative EvidencePhotographsEvidenceDemonstrative EvidenceRecordings

FOOTNOTES:
(n1)Footnote *. For a complete discussion of this topic, see 6 *Weinstein's Evidence,* Chs. 1001-1003 (Matthew Bender 2d ed.).

(n2)Footnote 1. *Fed. R. Evid. 1001(1).*

(n3)Footnote 2. *Fed. R. Evid. 1001(2).*

(n4)Footnote 3. *See United States v. Truglio, 731 F.2d 1123, 1128 (4th Cir. 1984) , cert. denied, 469 U.S. 862 (1984) .*

(n5)Footnote 4. *See Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 207 (9th Cir. 1988)* (video games not equivalent to writings).

(n6)Footnote 5. *Fed. R. Evid. 1001(2).*

(n7)Footnote 6. *28 U.S.C. § 1920*(2.

(n8)Footnote 7. *Mota v. University of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 529-530 (5th Cir. 2001) .*

(n9)Footnote 8. *Fed. R. Evid. 1001(3)*; *see United States v. Davis, 1 F.3d 606, 610 (7th Cir. 1993) , cert. denied, 510 U.S. 1176 (1994) .*

(n10)Footnote 9. *Fed. R. Evid. 1001(3).*

(n11)Footnote 10. *Fed. R. Evid. 1001(3).*

(n12)Footnote 11. *See Greater Kan. City Laborers Pension Fund v. Thummel, 738 F.2d 926, 928 (8th Cir. 1984) .*

(n13)Footnote 12. *See, e.g., United States v. Devous, 764 F.2d 1349, 1351-1353 (10th Cir. 1985) .*

(n14)Footnote 13. *See, e.g., United States v. Foley, 598 F.2d 1323, 1338 (4th Cir. 1979) , cert. denied, 444 U.S. 1043 (1980) .*

(n15)Footnote 1. *Fed. R. Evid. 1002.*

(n16)Footnote 2. *United States v. Howard, 953 F.2d 610, 612-613 (11th Cir. 1992) .*

(n17)Footnote 3. *See, e.g., McBeth v. Nissan Motor Corp. U.S.A., 921 F. Supp. 1473, 1480 (D.S.C. 1996)* ; *see* [3], [4], *below.*

(n18)Footnote 1. *Fed. R. Evid. 1003(1)*; *see Buziashvili v. Inman, 106 F.3d 709, 717 (6th Cir. 1997) .*

(n19)Footnote 2. *Fed. R. Evid. 1003(1)*; *see Lozano v. Ashcroft, 258 F.3d 1160, 1166 n.5 (10th Cir. 2001) .*

(n20)Footnote 3. *In re Bobby Boggs, Inc., 819 F.2d 574, 580 (5th Cir. 1987) .*

(n21)Footnote 1. *Fed. R. Evid. 1004.*

(n22)Footnote 2. *Paul Revere Variable Annuity Ins. Co. v. Zang, 248 F.3d 1, 9 (1st Cir. 2001) .*

(n23)Footnote 3. *Fed. R. Evid. 1004(1)*; *see Andrew Crispo Gallery, Inc. v. Commissioner, 16 F.3d 1336, 1343-1344 (2d Cir. 1994) .*

(n24)Footnote 4. *Fed. R. Evid. 1004(2)*; *see Societe Nationale Industrielle Aerospatiale v. District Ct., 482 U.S. 522, 529, 536, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987) .*

(n25)Footnote 5. *Fed. R. Evid. 1004(3)*; *see, e.g., Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972) .*

(n26)Footnote 6. *Fed. R. Evid. 1004(4)*; *see Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1085 (6th Cir. 1994) .*

(n27)Footnote 1. *Fed. R. Evid. 1005*; *see Crossley v. Lieberman, 868 F.2d 566, 568 (3d Cir. 1989)* .

(n28)Footnote 1. *Fed. R. Evid. 1006*; *see United States v. Richardson, 233 F.3d 1285, 1293 (11th Cir. 2000)* ; *Air Safety v. Roman Catholic Archbishop, 94 F.3d 1, 7 n.14 (1st Cir. 1996)* .

(n29)Footnote 1. *Fed. R. Evid. 1007*; *see United States v. Hato Rey Bldg. Co., 660 F. Supp. 1340, 1342 (D.P.R. 1987)* , *aff'd on other grounds, 886 F.2d 448 (1st Cir. 1989)* .

(n30)Footnote 1. *Fed. R. Evid. 1008*.

(n31)Footnote 2. *Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1426 (D. Del. 1992)* .

(n32)Footnote 3. *See Fed. R. Evid. 1008*.

(n33)Footnote 4. *Fed. R. Evid. 1008*.

(n34)Footnote 5. *Servants of the Paraclete, Inc. v. Great Am. Ins. Co., 857 F. Supp. 822, 829 (D.N.M. 1994)* , *amended, 866 F. Supp. 1560 (D.N.M. 1994)* .

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PART I Judicial Powers; Law Applied; Evidence
APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE

1-4 Moore's Manual--Federal Practice and Procedure APPENDIX TO CHAPTER 4: .syn

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Rule 608. Evidence of Character and Conduct of Witness

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1-4 Moore's Manual--Federal Practice and Procedure APPENDIX TO CHAPTER 4:

Scope

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PART I Judicial Powers; Law Applied; Evidence
APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 101

Rule 101. Scope.

These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

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ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 102

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 103

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. --Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.--The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.--In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.--Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

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APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 104

Rule 104. Preliminary Questions

(a) Questions of admissibility generally.--Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.--When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury.--Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused.--The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility.--This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

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APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 105

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

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ARTICLE I. GENERAL PROVISIONS

1-4 Moore's Manual--Federal Practice and Procedure Rule 106

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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PART I Judicial Powers; Law Applied; Evidence
APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
ARTICLE II. JUDICIAL NOTICE

1-4 Moore's Manual--Federal Practice and Procedure Rule 201

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.--A court may take judicial notice, whether requested or not.

(d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.--A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.--Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.--In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

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APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

1-4 Moore's Manual--Federal Practice and Procedure Rule 301

Rule 301. Presumptions in General Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

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ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

1-4 Moore's Manual--Federal Practice and Procedure Rule 302

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 404

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused--In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.--In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.--Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial,

or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 405

Rule 405. Methods of Proving Character

(a) Reputation or opinion.--In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.--In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 406

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 407

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 408

Rule 408. Compromise and Offers to Compromise

(a) --Prohibited uses.--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) --furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) --conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 409

Rule 409. Payment of Medical and Similar Expense

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 410

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 411

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 412

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible.--The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.--

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the

sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.--

(1) A party intending to offer evidence under subdivision (b) must--

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 413

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another

person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

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1-4 Moore's Manual--Federal Practice and Procedure Rule 414

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

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1-4 Moore's Manual--Federal Practice and Procedure Rule 415

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

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ARTICLE V. PRIVILEGES

1-4 Moore's Manual--Federal Practice and Procedure Rule 501

Rule 501. General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

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ARTICLE V. PRIVILEGES

1-4 Moore's Manual--Federal Practice and Procedure Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following *Federal Rule of Civil Procedure 26(b)(5)(B)*.

(c) Disclosure Made in a State Proceeding.--When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect of a Court Order.--A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule.--Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule.--And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.--In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

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ARTICLE VI. WITNESSES

1-4 Moore's Manual--Federal Practice and Procedure Rule 601

Rule 601. General Rule of Competence

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 602

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 603

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 604

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 605

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 606

Rule 606. Competency of Juror as Witness

(a) At the trial.--A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.--Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 607

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 608

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.--The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 609

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.--For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.--Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.--The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 610

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 611

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court.--The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.--Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.--Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 612

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by *section 3500 of title 18, United States Code*, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 613

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.--In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.--Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

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1-4 Moore's Manual--Federal Practice and Procedure Rule 614

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court.--The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court.--The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections.--Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 615

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 701

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 703

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 704

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 705

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 706

Rule 706. Court Appointed Experts

(a) Appointment.--The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.--Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the *fifth amendment*. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.--In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.--Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 801

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.--A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.--A "declarant" is a person who makes a statement.

(c) Hearsay.--"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.--A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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1-4 Moore's Manual--Federal Practice and Procedure Rule 802

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.--A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.--A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.--Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.--A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).--Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.--Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.--Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.--To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.--Statements of births, marriages, divorces, deaths, legitimacy, ancestry,

relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.--Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.--Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.--The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.--A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.--Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.--Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.--To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.--Reputation among members of a person's family by blood,

adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.--Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.--Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction.--Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries.--Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Transferred to Rule 807]

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1-4 Moore's Manual--Federal Practice and Procedure Rule 804

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.--"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.--In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest.--A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of personal or family history.--(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing.--A statement offered against a party that has engaged or acquiesced in wrongdoing that

was intended to, and did, procure the unavailability of the declarant as a witness.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 805

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 806

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 807

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 901

Rule 901. Requirement of Authentication or Identification

(a) General provision.--The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.--By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.--Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting.--Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness.--Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like.--Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification.--Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations.--Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports.--Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation.--Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system.--Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule.--Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 902

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.--A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.--A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.--A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and

accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records.--A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications.--Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.--Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like.--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents.--Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents.--Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.--Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity.--The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.--In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

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PART I Judicial Powers; Law Applied; Evidence
APPENDIX TO CHAPTER 4: FEDERAL RULES OF EVIDENCE
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1-4 Moore's Manual--Federal Practice and Procedure Rule 903

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

1-4 Moore's Manual--Federal Practice and Procedure Rule 1001

Rule 1001. DEFINITION

For purposes of this article the following definitions are applicable:

(1) Writings and recordings.--"Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs.--"Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original.--An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate.--A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1002

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1003

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

1-4 Moore's Manual--Federal Practice and Procedure Rule 1004

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed.--All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable.--No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent.--At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters.--The writing, recording, or photograph is not closely related to a controlling issue.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1005

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1006

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1007

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1008

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

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ARTICLE XI. MISCELLANEOUS RULES

1-4 Moore's Manual--Federal Practice and Procedure Rule 1101

Rule 1101. Applicability of Rules

(a) Courts and judges.--These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to the United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.--These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.--The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.--The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.--The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.--Proceedings before grand juries.

(3) Miscellaneous proceedings.--Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.--In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judge; review of agency actions when the facts are subject to trial de novo under section (2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (*7 U.S.C. 292*), and under section 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (*7 U.S.C. 499f, 499g(c)*); naturalization and revocation of naturalization under sections 310-*318 of the Immigration and Nationality Act* (*8 U.S.C. 1421-1429*); prize proceedings in admiralty under *sections 7651-7681 of title 10, United States Code*; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (*15 U.S.C. 522*); review of orders of petroleum control boards under section 5 of the Act entitled "An act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935 (*15 U.S.C. 715d*); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (*19 U.S.C. 1581-1624*), or under the Anti-Smuggling Act (*19 U.S.C. 1701-1711*); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (*21 U.S.C. 301-392*); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (*22 U.S.C. 256-258*); habeas corpus under *sections 2241-2254 of title 28, United States Code*; motions to vacate, set aside or correct sentence under *section 2255 of title 28, United States Code*; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (*46 U.S.C. 679*); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved March 3, 1925 (*46 U.S.C. 781-790*), as implemented by *section 7730 of title 10, United States Code*.

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ARTICLE XI. MISCELLANEOUS RULES

1-4 Moore's Manual--Federal Practice and Procedure Rule 1102

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in *section 2072 of title 28 of the United States Code*.

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1-4 Moore's Manual--Federal Practice and Procedure Rule 1103

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER

1-5 Moore's Manual--Federal Practice and Procedure 5.syn

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CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART I. BASICS OF SUBJECT MATTER JURISDICTION IN FEDERAL COURT

1-5 Moore's Manual--Federal Practice and Procedure § 5.01

§ 5.01 Nature of Subject Matter Jurisdictionn*

[1] Definition of Subject Matter Jurisdiction

In the federal courts, "subject matter jurisdiction" is a court's statutory or constitutional power to adjudicate a case. n1 Specifically, subject matter jurisdiction is the authority of a federal court to hear a paticular claim for relief. It focuses on the power of the court to take a claim under consideration, rather than the procedure or the manner in which a claim is processed by the court. n2 In other words, subject matter jurisdiction refers to a court's power to hear and determine cases of the general class or category to which the proceedings in question belong; it constitutes the power to deal with the general subject involved in the action. n2.1

It is important to recognize that subject matter jurisdiction generally does not depend on whether the claimant has a valid claim; the claimant need only have an arguable claim of the type that the court has power to hear. Therefore, a federal district court has subject matter jurisdiction if the right of the claimant to recover will be sustained under one construction of the Constitution and laws of the United States and will be defeated under another construction. Only if the claim in the complaint clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or if the claim is wholly insubstantial and frivolous will the court not have power to hear the case. n3

In the federal judicial system, the concepts of subject matter jurisdiction, personal jurisdiction, and venue address different aspects of the limitations on the authority of a court to hear a particular claim. Subject matter jurisdiction is concerned with the kinds of cases the federal district courts are authorized to decide, and the court's authority to hear a given type of case. In contrast, personal jurisdiction is a determination whether the court may adjudicate the rights of particular persons. n3.1 Finally, venue is concerned with the relationshipof the defendants and the events to the particular judicial district in which a case is brought. Like personal jurisdiction, venue relates to location and concerns the particular place where judicial authority may be exercised. n4

Another distinction that is important to the federal litigant regarding a court's capacity to act is the distinction between a court's subject matter jurisdiction and its power to grant relief. Thus, a court has "subject matter jurisdiction" when it has authority to hear the particular type of action; conversely, a court lacks subject matter jurisdiction if it does not have any authority to hear a particular claim for relief. On the other hand a court's "power" to grant relief is its authority,

usually statutory, to order particular types and scopes of remedies in a proceeding when it already has subject matter jurisdiction. n5

[2] Distinction Between Subject Matter and Personal Jurisdiction

Subject matter jurisdiction and personal jurisdiction are both limitations on whether the court may adjudicate a claim. The requirement of subject matter jurisdiction means the constitutional authority of a federal court to hear a particular category of claim; therefore, a court has the duty on its own initiative to assess the issue of subject matter jurisdiction at every stage of the proceeding. n1

By contrast, "personal jurisdiction" is a determination whether the court may adjudicate the rights of particular persons regarding a particular claim, and may bind the persons by its adjudication, based on the persons' contacts with the forum of the court. n2 Service of process is the corollary requirement that creates the court's personal jurisdiction. In other words, a person amenable to the assertion of jurisdiction will not be subject to exercise of that jurisdiction until the person has been properly served. n3

Both that assertion of authority and the subsequent service must be statutorily and constitutionally permissible. Due process requires certain ties or contacts between a defendant and the forum which asserts jurisdiction. n4 Thus, personal jurisdiction exists to protect parties' constitutional rights, and, because that right is personal to the particular defendant, the right may be waived. n5

[3] Distinction Between Subject Matter Jurisdiction and Required Elements of Claim

Many federal statutes contain conditions that require a party to take some action before filing a claim for relief in court. However such conditions are not automatically jurisdictional prerequisites for the court. Rather, some such conditions are part of the elements of the claim to obtain relief. n1 The Supreme Court has stated a test to distinguish between a subject matter jurisdictional prerequisite and an element of a federal claim for relief. If Congress in a statute has not indicated that a statutory restriction on coverage is jurisdictional, the courts must deem the restriction as nonjurisdictional in character and hold that the restriction constitutes a necessary element of the claim for relief under the statute. A statutory restriction is deemed jurisdictional only if the statute clearly indicates that the restriction on a statute's scope is jurisdictional, otherwise speaks in jurisdictional terms, or specifically refers to the jurisdiction of the court. n2 In its determination of whether a condition is jurisdictional, the court's analysis focuses on the "legal character" of the requirement, which the court determines by looking to the condition's text, context, and relevant historical treatment. n3

There are several important ramifications of the determination whether a condition is a required element of a claim or is a jurisdictional prerequisite. If a statutory requirement is merely an element of the substantive adequacy of a party's statutory claim, rather than a jurisdictional requirement, a failure of that element does not nullify the court's authority to hear the claim. Next, while the court must decide facts necessary to establish jurisdiction, a party may have a right to a jury determination of the facts related to elements of the claim. Additionally, the lack of a required element of a claim may not be raised at any stage, but must be asserted before trial on the merits. Finally, failure to establish a required element may be waived by an opposition party if the party does not raise the issue in a timely manner. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewGovernmentsCourtsAuthority to Adjudicate

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, §§ 120.02, 120.11 (Matthew

Bender 3d ed.).

(n2)Footnote 1. *Verizon Md., Inc. v. PSC, 535 U.S. 635, 642-643, 122 S. Ct. 1753, 152 L. Ed. 2d 871, 880 (2002)* ; *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563, 1566-1567, 143 L. Ed. 2d 760 (1999)* .

(n3)Footnote 2. *Kontrick v. Ryan, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867, 881-882 (2004)* .

(n4)Footnote 2.1. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n5)Footnote 3. *Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642,122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)* ; *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ; *Stump v. Barnhart, 387 F. Supp. 2d 686, 689 (E.D. Tex. 2005)* .

(n6)Footnote 3.1. *Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480 (4th Cir. 2005)* ; *see* [2], *below*.

(n7)Footnote 4. *United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864 (2d Cir. 1997)* ; *see* [2], *below* (contrast between subject matter jurisdiction and personal jurisdiction).

(n8)Footnote 5. *Trusted Net Media Holdings, LLC v. Morrison Agency, Inc., 550 F.3d 1035, 1044 (11th Cir. 2008)* .

(n9)Footnote 1. *Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010)* (court is required to consider issue even though parties may have failed to raise issue).

(n10)Footnote 2. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50-51 (1st Cir. 2005)* ; *see Int'l Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* .

(n11)Footnote 3. *See SEC v. Bilzerian, 378 F.3d 1100, 1104 (D.C. Cir. 2005)* .

(n12)Footnote 4. *See United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864-867 (2d Cir. 1997)* .

(n13)Footnote 5. *Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480 (4th Cir. 2005)* .

(n14)Footnote 1. *Reed Elsevier, Inc. v. Muchnick, ___ U.S. ___ , 130 S. Ct. 1237, 176 L. Ed. 2d 18, 30 (2010)* .

(n15)Footnote 2. *Arbaugh v. Y & H Corp., 546 U.S. 500, 515-516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097* .

(n16)Footnote 3. *Reed Elsevier, Inc. v. Muchnick, ___ U.S. ___, 130 S. Ct. 1237, 176 L. Ed. 2d 18, 31 (2010)* .

(n17)Footnote 4. *Arbaugh v. Y & H Corp., 546 U.S. 500, 514-515, 126 S. Ct. 1235, 163 L. Ed. 2d 1097* (citing **Moore's Federal Practice**).

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART I. BASICS OF SUBJECT MATTER JURISDICTION IN FEDERAL COURT

1-5 Moore's Manual--Federal Practice and Procedure § 5.02

§ 5.02 Subject Matter Jurisdiction is Absolute Requirementn*

[1] Subject Matter Jurisdiction Is Prerequisite to Authority of Court to Hear Case

The subject matter jurisdiction of the court must be established as a threshold matter; this requirement is inflexible and without exception. n1 Subject matterjurisdiction is a critical and necessary element of any action brought in a federal court because federal courts are courts of limited subject matter jurisdiction. n2 Because it is an absolute restriction on the courts power to hear a case, federal subject matter jurisdiction is an issue that may not be waived. Furthermore, all courts have an independent obligation to ensure that they have subject matter jurisdiction at all stages of the proceedings, even at late stages, including after a jury verdict has been reached and after judgment. When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety. n3

A party requesting the district court's original jurisdiction has the duty of affirmatively alleging the existence of jurisdiction. n4 If those jurisdictional allegations are properly controverted by an opposing party, the party requesting jurisdiction also has the burden of establishing jurisdiction. n5 If federal subject matter jurisdiction is lacking, jurisdiction may not be created by the consent of the parties, n6 nor through principles of estoppel. n7 The requirement of subject matter jurisdiction is so absolute that even the party who originally requested the federal court's jurisdiction may raise a lack of federal jurisdiction, and even after a trial on the merits. n8 Additionally, nonparties as well as parties to an action have the right to object to the court's jurisdiction.

[2] Court's Determination of Subject Matter Jurisdiction

The district court must generally determine jurisdiction questions first, because they are prerequisites that determine the court's authority to hear the case. n1 Also, the court should decide subject matter jurisdictional issues first before questions of personal jurisdiction. This, however, does not mean that the court need decide the subject matter issue at all, if it is more efficient to dispose of the case on the grounds that it does not have personal jurisdiction. n2 Thus, the district court has discretion to determine personal jurisdiction before subject matter jurisdiction when the personal jurisdiction issue presents no complex question of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question. n3

The question of subject matter jurisdiction may be raised either by motion n4 or in a responsive pleading. n5

Furthermore, the issue may be raised at any stage of the litigation, because under Rule 12(h)(3), whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court must dismiss the complaint in its entirety. n6 Thus, even the circuit court of appeals may examine the basis for federal jurisdiction and dismiss an action on its own motion. n7

[3] Hypothetical Jurisdiction Invalid

The Supreme Court has rejected the doctrine of "hypothetical jurisdiction," n1 which several courts of appeals had used to proceed immediately to determine the merits of a case, despite constitutional jurisdictional objections, at least when the merits question was more readily resolved than the jurisdictional question and when the prevailing party on the merits would be the same as the prevailing party if jurisdiction were denied. n2 The Court stated that the doctrine of hypothetical jurisdiction carries the courts beyond the bounds of authorized judicial action, and offends fundamental separation-of-powers principles. The doctrine is also contradictory to a long line of cases in which the Supreme Court held that without proper jurisdiction a court may not proceed at all but may only note the jurisdictional defect and dismiss the suit. Furthermore, for a court to interpret a law's meaning or constitutionality when it has no jurisdiction to do so is, by definition, an ultra vires act. n3 Because of the constitutional importance of the requirement of subject matter jurisdiction, the Supreme court rejected the doctrine of hypothetical jurisdiction despite the fact that the lower courts had used the doctrine for laudable purposes, such as, to avoid difficult and sweeping jurisdictional questions when it was clear that the claim was without merit. n4

However, some circuits have held that the Supreme Court decision in *Steel Co*. still permits a court to use "hypothetical jurisdiction" when the bypassed jurisdictional question is merely statutory jurisdiction, rather than constitutional Article III jurisdiction, and when its use would allow easy resolution of a case against the party relying on subject matter jurisdiction. n5 It should also be noted that the Supreme Court's rejection of the doctrine of hypothetical jurisdiction does not effect the established principle that the lack of subject matter jurisdiction does not nullify a district court's judicial powerto enforce its own rules and conduct of proceedings, and impose sanctions when appropriate. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewGovernmentsCourtsAuthority to Adjudicate

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17A *Moore's Federal Practice*, §§ 120.02, 120.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563, 1566-1567, 143 L. Ed. 2d 760 (1999)* .

(n3)Footnote 2. *See In re G.T.L. Corp., 211 B.R. 241 (N.D. Ohio. 1997)* ; § 5.03; *see also* Ch. 1, *Federal Courts*.

(n4)Footnote 3. *Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Elliott v. Tilton, 62 F.3d 725, 728 (5th Cir. 1995)* .

(n6)Footnote 5. *Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)* .

(n7)Footnote 6. *Smith v. Salish Kootenai College, 434 F.3d 1127, 1137 (9th Cir. 2006)* .

(n8)Footnote 7. *Amco Constr. Co. v. Mississippi State Bldg. Com., 602 F.2d 730, 732 (5th Cir. 1979)* .

(n9)Footnote 8. *American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S. Ct. 534, 95 L. Ed. 702 (1951)* .

(n10)Footnote 1. *Taylor v. Appleton, 30 F.3d 1365, 1366 (11th Cir. 1994)* (court must first determine whether it has proper subject matter jurisdiction before addressing substantive issues).

(n11)Footnote 2. *Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480-481 (4th Cir. 2005)* .

(n12)Footnote 3. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563, 1570-1572, 143 L. Ed. 2d 760 (1999)* .

(n13)Footnote 4. *Fed. R. Civ. P. 12(b)(1).*

(n14)Footnote 5. *See Fed. R. Civ. P. 8(b)(1)(A).*

(n15)Footnote 6. *Arbaugh v. Y & H Corp., 546 U.S. 500, 506-507, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* .

(n16)Footnote 7. *Smith Barney v. Sarver, 108 F.3d 92, 94-95 (6th Cir. 1997)* .

(n17)Footnote 1. *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* .

(n18)Footnote 2. *See, e.g., SEC v. American Capital Investments, Inc., 98 F.3d 1133, 1139-1142 (9th Cir. 1996)* ; *Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 333 (D.C. Cir. 1991)* .

(n19)Footnote 3. *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ; *see Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563, 1566-1567, 143 L. Ed. 2d 760 (1999)* (no exception to requirement of subject matter jurisdiction).

(n20)Footnote 4. *See Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 156 (2d Cir. 1990)* (court of appeals assumed hypothetical jurisdiction over action because jurisdictional issues were extremely complex and of first impression).

(n21)Footnote 5. *Conyers v. Rossides, 558 F.3d 137, 150 (2d Cir. 2009)* ; *Umsted v. Umsted, 446 F.3d 17, 20 (1st Cir. 2006)* .

(n22)Footnote 6. *Willy v. Coastal Corp., 503 U.S. 131, 112 S. Ct. 1076 (1992)* (Rule 11 sanctions affirmed even in absence of subject matter jurisdiction, because sanctions were not judgment on merits).

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART I. BASICS OF SUBJECT MATTER JURISDICTION IN FEDERAL COURT

1-5 Moore's Manual--Federal Practice and Procedure § 5.03

§ 5.03 Federal Court's Limited Subject Matter Jurisdictionn*

[1] Limited Nature of Federal Court Jurisdiction

Federal courts are courts of limited jurisdiction, rather than general jurisdiction. This means that the jurisdiction of each federal court is only that particular jurisdiction specified in the Constitution or in particular federal statutes. n1 Unlike state courts, which typically have general subject matter jurisdiction, giving each court the authority to adjudicate a broad spectrum of types of cases, n2 n3 Article III of the Constitution, as well as federal statutes, limit federal court jurisdiction to specific applicability. n4

Article III of the Constitution n5 provides for a single Supreme Court n6 and authorizes, but does not require, Congress to create inferior federal courts. n7 Congress has exercised this constitutional authority by creating a system of trial courts known as District Courts n8 and intermediate courts of appeals known as United States Courts of Appeals. n9 These courts are referred to as "Article III" courts, and their jurisdiction as Article III jurisdiction. n10 Many of the more populous states have more than one federal district court, n11 which are divided into geographical regions such as the Southern and Eastern Districts of New York. n12 Additionally, some of the federal district courts have divisions within the district. n13

The original subject matter jurisdiction of federal courts is limited to two types of claims: "federal questions," which are those claims arising under the Constitution, laws, or treaties of the United States, n14 and claims involving an amount in controversy exceeding $75,000 and parties who are not citizens of the same state. n15 These types of jurisdiction are discussed in detail in PART II n16 and Part III of this chapter. n17

In contrast to the federal courts, states courts typically have general subject matter jurisdiction. Thus, state courts have original jurisdiction over actions arising under both the common law and claims created by state statutes, and also have jurisdiction over most kinds of actions arising under federal law. n18 Additionally, state courts are competent to adjudicate federal claims pleaded in a state complaint. n19 Congress, however, has authority to deny state courts jurisdiction over particular, federal question claims, n20 or to allocate jurisdiction between federal and state courts. n21 For a discussion of the jurisdictional issues in the dual federal-state court system--when state courts and federal courts have concurrent subject matter jurisdiction--and when federal courts have exclusive subject matter jurisdiction over

claims or causes of action, see Ch. 1, *Federal Courts*, and Ch. 2, *Concurrent and Conflicting Jurisdiction*.

[2] Original Subject Matter Jurisdiction of Supreme Court

The Supreme Court has original, exclusive jurisdiction over any controversy between two or more states. n1

Although Congress does not have the power to enlarge or reduce the scope of such original jurisdiction expressly conferred on the Supreme Court by the Constitution, n2 Congress may grant original jurisdiction to inferior courts that is concurrent with that of the Supreme Court. n3 Therefore, the United States Supreme Court has original, but not exclusive, jurisdiction over the following actions: n4

1. An action in which an ambassador, public minister, consul, or vice consul of a foreign country is a party. Federal district courts also have original jurisdiction over such cases but not state courts. n5

2. An action between the United States and a state. Federal district courts have concurrent original jurisdiction over such cases. n6

3. Any action or proceeding by a state against a citizen of another state or against an alien. n7

In contrast to original subject matter jurisdiction, the United States Supreme Court generally has appellate jurisdiction over all cases subject to federal judicial power, subject to exceptions made by Congress. n8 Congress has provided for the exercise of the Supreme Court's appellate jurisdiction by means of writ of certiorari, n9 which is a discretionary appeal heard by the Supreme Court when at least four justices vote to grant the writ of certiorari. n10

[3] Original Subject Matter Jurisdiction of Lower Federal Courts

[a] Congressional Grant of Subject Matter Jurisdiction

The Constitution gives federal judicial power to the Supreme Court and to whatever inferior courts Congress may establish. n1 Under the federal system, Congress has authority to limit the jurisdiction of whatever inferior federal courts it decides to establish. n2 A federal statute limiting an inferior court's jurisdiction does not conflict with the Constitution unless it attempts to confer powers not granted by the Constitution. n3

In the exercise of its authority, Congress has provided that the federal "district courts" have original federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction is jurisdiction over actions arising under the Constitution, laws, or treaties of the United States. n4 In addition to the general grant of federal question jurisdiction, particular federal statutes expressly provide that district courts have original jurisdiction over any claims involving or arising under those statutes. n5 For example, one express type of federal question jurisdiction is the district court's jurisdiction over bankruptcy cases. n6 The federal question subject matter jurisdiction of federal district courts is discussed in detail in PART II if this Chapter. n7

Congress has also provided that the federal district courts have jurisdiction over certain civil actions that do not arise under federal law, but that involve citizens of different states, or citizens of the United States and aliens or foreign subjects, provided that the amount in controversy exceeds $75,000. n8 For further discussion of diversity jurisdiction and its requirements, see PART III of this Chapter. n9

Finally, Congress has also provided that a federal district court that has original jurisdiction over a civil action also may exercise "supplemental jurisdiction" of all other claims that are part of the same case or controversy under Article III of the Constitution, including claims involving the joinder or intervention of additional parties. n10 A district court's exercise of supplemental jurisdiction is discretionary, and a district court may decline to exercise supplemental

jurisdiction over a claim if any one of several reasons applies, n11 such as, if a state-law claim substantially predominates over the claim or claims that are the basis for the federal court's original jurisdiction. n12 For further discussion of supplemental jurisdiction and its requirements, see PART IV of this Chapter. n13

In the exercise of its authority, Congress has also created intermediate courts known as "United States Courts of Appeals." n14 The jurisdiction of these courts is limited to appellate jurisdiction, not original review of district court decisions. n15

[b] Court's Abstention From Subject Matter Jurisdiction

In the event that duplicative litigation has been filed in both state and federal court, the federal court in certain circumstances may decline to exercise its jurisdiction, thus permitting the state court to proceed with the litigation. In this regard, "abstention" refers to a group of doctrines by which a federal court may decline to exercise its otherwise valid jurisdiction, and to either stay or dismiss federal litigation, in deference to duplicative state court proceedings.

In summary, the federal courts have a general obligation to exercise the jurisdiction given the courts by Congress, except under the following five recognized abstention doctrines:

1. A federal court may abstain when the case may be disposed of on an interpretation of unclear state law rather than a federal constitutional issue. n16

2. Abstention is permitted when the district court has diversity jurisdiction over a case that presents a difficult question of unsettled state law that bears on policyproblems of substantial public import and whose importance transcends the result in the case. n17

3. A federal court may abstain from a case that involves unsettled state law when federal adjudication would disrupt a state's efforts to establish a rational administrative policy regarding a matter of substantial public concern. This doctrine is usually refereed to as administrative abstention. n18

4. Abstention is allowed when a federal court has jurisdiction over state criminal proceedings or other proceedings that are pending and that involve important state interests, provided that adequate relief is available in the state proceedings. n19

5. Abstention is permissible when there are concurrent state and federal suits, and abstention would promote sound judicial administration, including the conservation of judicial resources and the avoidance of piecemeal litigation. n20

For a detailed discussion of all of the abstention doctrines, see Ch. 2, *Concurrent and Conflicting Jurisdiction*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionConstitutional LawThe JudiciaryJurisdictionGeneral OverviewGovernmentsCourtsCreation & Organization

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice*, § 120.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 397 (2d Cir. 2009)* ; *see Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391*

(1994) .

(n3)Footnote 2. *See Storm v. Storm, 328 F.3d 941, 946 (7th Cir. 2003)* .

(n4)Footnote 3. [Reserved]

(n5)Footnote 4. *Aldinger v. Howard, 427 U.S. 1, 14-15, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976)* (federal courts' jurisdiction particularly specified by Congress).

(n6)Footnote 5. *U.S. Const., Art. III, § 1.*

(n7)Footnote 6. *See* [2], *below.*

(n8)Footnote 7. *See* [3], *below.*

(n9)Footnote 8. *28 U.S.C. § 1330.*

(n10)Footnote 9. *28 U.S.C. §§ 43(a), 1291.*

(n11)Footnote 10. *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95-96, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* .

(n12)Footnote 11. *See, e.g., 28 U.S.C. § 89* (Texas has four districts.

(n13)Footnote 12. *28 U.S.C. § 112.*

(n14)Footnote 13. *See, e.g., 28 U.S.C. § 84(c)* (Central District of California has three divisions).

(n15)Footnote 14. *28 U.S.C. § 1331.*

(n16)Footnote 15. *28 U.S.C. § 1332.*

(n17)Footnote 16. *See § 5.10* et seq.

(n18)Footnote 17. *See § 5.30* et seq.

(n19)Footnote 18. *See Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 931 n.6 (2009)* .

(n20)Footnote 19. *U.S. Const., Art. VI, Cl. 2* (each state court judge bound by Constitution and laws of United States); *Lockerty v. Phillips, 319 U.S. 182, 187, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943)* (noting that Congress could have elected to create no federal trial courts and could have relied on state courts to adjudicate federal law questions).

(n21)Footnote 20. *See, e.g., 28 U.S.C. § 1333(1)* (state courts prohibited from exercising jurisdiction over admiralty and maritime cases).

(n22)Footnote 21. *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* .

(n23)Footnote 1. *U.S. Const., Art. III, § 2, cl. 2*; *28 U.S.C. 1251(a)*; *see Kansas v. Colorado, ___ U.S. ___, 129 S. Ct. 1294, 173 L. Ed. 2d 245, 249-250 (2009)* (court's original jurisdiction as trial court to hear case by one state against another state).

(n24)Footnote 2. *See Marbury v. Madison, 5 U.S. 137, 173-175, 2 L. Ed. 60 (1803)* .

(n25)Footnote 3. *28 U.S.C. § 1251(a).*

(n26)Footnote 4. *28 U.S.C. § 1251(b).*

(n27)Footnote 5. *See 28 U.S.C. § 1351.*

(n28)Footnote 6. *28 U.S.C. §§ 1345, 1346.*

(N29)Footnote 7. *U.S. Const., Amend. XI.*

(n30)Footnote 8. U.S. Const., Art. III, § 2.

(n31)Footnote 9. *28 U.S.C. §§ 1254, 1257, 1258, 1259.*

(n32)Footnote 10. *See Donnelly v. DeChristoforo, 416 U.S. 637, 648, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)* . For a discussion of the appellate jurisdiction of the Supreme Court, see Ch. 29, *Appeal to Supreme Court.*

(n33)Footnote 1. *U.S. Const., Art. III § 1.*

(n34)Footnote 2. *Lockerty v. Phillips, 319 U.S. 182, 187-188, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943)* ; *see U.S. Const., Art. III § 1.*

(n35)Footnote 3. *Sheldon v. Sill, 49 U.S. 441, 448-449, 12 L. Ed. 1147, 8 How. 441 (1850)* .

(n36)Footnote 4. *28 U.S.C. § 1331.*

(n37)Footnote 5. *See, e.g., 28 U.S.C. §§ 1337, 1338, 1340, 1343* (jurisdiction expressly specified in federal statutes as federal question jurisdiction).

(n38)Footnote 6. *28 U.S.C. § 1334.*

(n39)Footnote 7. *See § 5.10* et seq.

(n40)Footnote 8. *28 U.S.C. § 1332.*

(n41)Footnote 9. *See § 5.30* et seq.

(n42)Footnote 10. *28 U.S.C. § 1367(a).*

(n43)Footnote 11. *28 U.S.C. § 1367(c).*

(n44)Footnote 12. *28 U.S.C. § 1367(c)(2).*

(n45)Footnote 13. *See § 5.90* et seq.

(n46)Footnote 14. *28 U.S.C. § 43(a).*

(n47)Footnote 15. *28 U.S.C. §§ 1291, 1292, 1295.*

(n48)Footnote 16. *Railroad Com. of Texas v. Pullman Co., 312 U.S. 496, 501, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* .

(n49)Footnote 17. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* .

(n50)Footnote 18. *Burford v. Sun Oil Co., 319 U.S. 315, 318, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* .

(n51)Footnote 19. *Younger v. Harris, 401 U.S. 37, 44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n52)Footnote 20. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART I. BASICS OF SUBJECT MATTER JURISDICTION IN FEDERAL COURT

1-5 Moore's Manual--Federal Practice and Procedure §§ 5.05through 5.09

[Reserved]

§§ 5.05[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART II. SUBJECT MATTER JURISDICTION BASED ON FEDERAL QUESTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.10

§ 5.10 Nature of Federal Question Jurisdictionn*

[1] Definition of Federal Question Jurisdiction

The federal district courts have original jurisdiction over all civil actions that arise under the Constitution, laws, or treaties of the United States. n1 The Constitution also defines the power of the judiciary; it extends to all cases, in law and equity, arising under the Constitution, the laws of the United States, and any treaties made or to be made in the future, under authority of the United States Constitution or laws. n2 Thus, "federal question jurisdiction" is the original jurisdiction given to the district court by the Constitution and Congress when a federal question is presented on the face of the plaintiff's properly pleaded complaint. n3

[2] Purposes of Federal Question Jurisdiction

There are several purposes for federal question jurisdiction. The primary purpose is to ensure the availability of a forum particularly suited to the vindication of federally created rights and to minimize the danger of hostility toward federally created rights. n1 Additionally, because the selection process for the appointment of federal judges generally ensures a minimum degree of competence, because federal judges are consistently exposed to issues of federal law, and because federal judges may often be more attuned to federal interests than are other judges, it is a widely held view that adjudication of cases arising under federal law is an important aspect of the work of the federal courts. n2

Another purpose of federal question jurisdiction in the dual state-federal system of government is to prevent federal judicial erosion. It allows each system to proceed independently of the other, with ultimate review in the United States Supreme Court of the federal questions raised in either system. The independence of state courts would be compromised if every adverse decision in state court merely "rang the opening bell" for federal litigation on the same issues. n3 A federal forum is also important when substantial federal question of great federal interest are presented, even when raised by a complaint framed in terms of state law, provided that resolution of the federal question is necessary to the resolution of the state-law claim. n4

[3] Federal Question Jurisdiction Not Necessarily Exclusive

Exclusive original federal jurisdiction means that the federal courts alone may hear a case. n1 The mere fact that a court

has federal question jurisdiction does not necessarily mean that jurisdiction is exclusively federal. Actually, the situations in which federal jurisdiction is exclusive are relatively rare. n2

In most cases, federal question jurisdiction is designed to provide the litigants with the option to go to federal court for the adjudication and protection of federal rights--for the plaintiff by means of a suit initiating the court's original jurisdiction under Section 1331 and for the defendant through the option of removal. n3 It is therefore generally the case that absent exclusive federal jurisdiction, a federal question case will be heard in state court only if both parties decline to exercise their option to go to federal court; the plaintiff through filing in federal court originally and the defendant through removal. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleConstitutional LawThe JudiciaryJurisdictionFederal Questions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice*, §§ 120.02, 120.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1331.*

(n3)Footnote 2. *U.S. Const., Art. III, § 2, Cl. 1.*

(n4)Footnote 3. *See Bulen v. Hall-Houston Oil Co., 953 F. Supp. 141, 144 (E.D. La. 1997)* .

(n5)Footnote 1. *Hunter v. United Van Lines, 746 F.2d 635, 647 (9th Cir. 1984)* , *cert. denied, 474 U.S. 863 (1985)* (principal purpose of grant of federal question jurisdiction is to accord plaintiffs forum for vindication of federal rights).

(n6)Footnote 2. *Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)* (issue concerned with competence and function of judiciary in ordering our relationships with members of international community must be treated exclusively as aspect of federal law).

(n7)Footnote 3. *Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000)* .

(n8)Footnote 4. *Long v. Bando Manufacturing of America, Inc., 201 F.3d 754, 759 (6th Cir. 2000)* .

(n9)Footnote 1. *See, e.g., Jamal v. Travelers Lloyds of Texas Ins. Co., 97 F. Supp. 2d 800, 804 (S.D. Tex. 2000)* (when insured homeowner sued insurer in state court after denial of property damage claims filed under both homeowner's and standard flood insurance policies, alleging breach of contract, bad faith, and violation of state statutes, district court held that it had exclusive jurisdiction over action on flood policy claim, pursuant to National Flood Insurance Act; Congress also has the unusual option to provide that state courts have exclusive jurisdiction over a cause of action created by a federal statute, as is the case for claims under Telephone Consumer Protection Act.

(n10)Footnote 2. *Tafflin v. Levitt, 493 U.S. 455, 460, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990)* (exclusive federal jurisdiction over cases arising under federal law has been exception rather than rule).

(n11)Footnote 3. *28 U.S.C. § 1441.*

(n12)Footnote 4. *See Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th Cir. 2000)* .

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PART II Jurisdiction; Venue; Removal
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1-5 Moore's Manual--Federal Practice and Procedure § 5.11

§ 5.11 Sources of Federal Question Jurisdictionn*

Article III of the Constitution provides that the federal courts have judicial power over all cases "arising under" the Constitution, laws, or treaties of the United States. n1 Congress has provided for original federal court jurisdiction over federal questions in extraordinarily similar language under the current federal question statute, which provides that the district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws or treatiesof the United States. n2 However, despite the similarity between the Constitutional language and the statutory language, courts have consistently held that the general federal question statute is considerably narrower than that of the constitutional provision. n3 Therefore, the fact that Congress has the power to grant original jurisdiction does not mean that it has in fact exercised that power, and that exercise must be shown. Furthermore, it is generally acknowledged that Congress did not intend to exercise its full potential in enacting the general federal question statute. n4

In addition to the general grants of federal question jurisdiction made in the constitution and Section 1331, n5 the United States Code contains a number of statutory provisions that make specific grants of power to the federal courts. For example, the district courts have original jurisdiction over any civil action or proceeding arising under any congressional regulations affecting commerce or protecting trade and commerce against restraints and monopolies. n6

The jurisdiction conferred by these provisions may be referred to as special (rather than general) federal question jurisdiction. An action may be controlled by a special federal question jurisdiction statute in three ways: if (1) the plaintiff has filed a complaint for a remedy expressly granted by the particular federal statute; (2) the plaintiff asserts a claim requiring construction of the statute or, (3) the complaint presents a controversy in which a distinctive policy of a particular statute requires that federal principles control the disposition of the claim. n7 For example, in a copyright case, the court of appeals noted that the district court would have federal question jurisdiction over a copyright case in which the dispute concerned ownership by reason of one's status as a co-author of a joint work. Such jurisdiction arises directly from the terms of the Copyright Act itself, and is exclusively federal, unlike a case in which dispute as to copyright ownership arises under a contractual agreement between the parties--the latter case is controlled by state contract law. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionFederal Questions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 103.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. U.S. Const., Art. III, § 2.

(n3)Footnote 2. *28 U.S.C. § 1331(a)*.

(n4)Footnote 3. *Almond v. Capital Properties, Inc., 212 F.3d 20, 23 (1st Cir. 2000)* (although Article III's grant of "arising under" jurisdiction is fairly broad, Section 1331 itself has been read more narrowly); *see also Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506, 20 S. Ct. 726, 44 L. Ed. 864 (1900)* (statute authorized action to settle adverse mining claims in a court of competent jurisdiction).

(n5)Footnote 4. *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494-495, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)* .

(n6)Footnote 5. *28 U.S.C. § 1331(a)*.

(n7)Footnote 6. *28 U.S.C. § 1337(a)*; *see § 5.12[1][b]*.

(n8)Footnote 7. *Merchant v. Levy, 92 F.3d 51, 55 (2d Cir. 1996)* , *cert. denied, 519 U.S. 1108 (1997)* .

(n9)Footnote 8. *Merchant v. Levy, 92 F.3d 51, 56 (2d Cir. 1996)* , *cert. denied, 519 U.S. 1108 (1997)* .

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Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART II. SUBJECT MATTER JURISDICTION BASED ON FEDERAL QUESTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.12

§ 5.12 Requirements for Federal Question Jurisdictionn*

[1] Federal Law for Purposes of Federal Question Jurisdiction

[a] Constitutional Issues

The general federal question jurisdiction statute provides that federal district courts have original jurisdiction over civil actions arising under the Constitution of the United States. n1 A facial challenge to the constitutionality of a federal statute, for example, raises a federal question and gives the district court jurisdiction under Section 1331. n2 Similarly, a claim that a defendant's act or omission has violated the plaintiff's constitutional rights is supported by federal question jurisdiction under Section 1331. n3 In another example, when the Compact Clause of the Constitution n4 was used to federalize an interstate compact among state legislatures, it was held that federal question jurisdiction existed in a suit brought under the interstate compact. n5

All of the "provisions" of the Constitution, however, do not necessarily create a cause of action. The *Full Faith and Credit Clause of the Constitution*, n6 for example, does not give rise to federal-question claims and may not be the basis of federal question jurisdiction. Rather, the clause merely prescribes a rule to instruct the courts in determining what effect to give public acts, records, and judicial proceedings of the states. Therefore, reliance on the rule by a litigant does not establish a federal question arising under the Constitution. n7

[b] Federal Statutes

For purposes of the general federal question jurisdiction statute, "federal laws" include most federal statutes. A statute may create a private right of action that qualifies for federal question jurisdiction under Section 1331 either expressly or by implication. n8

A private cause of action may be implied from a federal statute provided that (1) the plaintiff is a member of the class for whose benefit the statute was enacted,(2) Congress intended to create a private right of action, (3) a private right of action is consistent with the underlying purpose of the legislative scheme, and (4) the matter is not traditionally relegated to state law. n9 Thus, when the statutory language is not explicit, it is presumed that in exercising its regulatory authority, Congress did not intend to shift from the state to the federal courts extensive topics of private

litigation; to rebut the presumption, reasonably reliable evidence must be shown that this was the intention of Congress. n10

Congressional intent is the dominant factor and may be inferred from the language of the statute, the statutory structure, or some other source. n11

Not all federal statutes come within the purview of Section 1331. Thus, general federal question jurisdiction under Section 1331 does not extend to cases of admiralty and maritime jurisdiction, because admiralty and maritime issues are a separate category of federal judicial power granted by Article III, n12 and is entirely distinct from "arising under" jurisdiction. n13 In this regard, many statutes provide their own independent source of original federal subject matter jurisdiction. Most of these special grants of jurisdiction n14 are made in United States Code Title 28, governing the judiciary and judicial procedure. These statutes include original district court jurisdiction for the following cases:

1. Any civil case of admiralty or maritime jurisdiction, including any prize brought into the United States and all proceedings for the condemnation of property taken as prize. n15

2. Bankruptcy cases and all civil proceedings that arise in relation to bankruptcy proceedings. n16

3. Any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. n17

4. Orders of the Interstate Commerce Commission. n18

5. Actions that relate to the postal service. n19

6. Civil actions arising under the federal copyright and patent laws. n20

7. Certain actions relating to internal revenue taxes. n21

Specific grants of jurisdiction also appear in other titles of the Code, such as the Federal Employers' Liability Act, n22 the Jones Act, n23 the Labor Management Relations Act, n24 the Fair Debt Collection Practices Act, n25 and the Employee Retirement Income Security Act (ERISA). n26 The United States contains many other specific grants of jurisdiction, which are too numerous to list in detail. For further discussion of these special federal question jurisdiction statutes, see *Moore's Federal Practice*, Ch. 104, *Specific Grants of Federal Question Jurisdiction* . n27 For a discussion of statutes which grant jurisdiction to the district courts in cases involving the United States as a party, and cases by and against federal officers, n28 see *Moore's Federal Practice*, Ch. 105, *Other Subject Matter Jurisdiction Statutes* . n29

[c] Administrative Acts and Regulations

For purposes of federal question jurisdiction, federal law also includes the acts and regulations of administrative agencies, unless Congress has specifically exempted them from judicial review. n30 There is a strong presumption that Congress intended judicial review of administrative actions unless a contrary intent is clear from the statute or legislative history. n31

Specific procedures for private suits challenging federal agency action or inaction were established by the Administrative Procedure Act, which permits challenge to be brought in the district courts if a private party is adversely affected by final agency action claimed to be contrary to law. n32 Note, however, that aparticular claim need not necessarily be covered by the Administrative Procedure Act for a court to have federal question subject matter jurisdiction on the claim under Section 1331. n33

[d] Federal Common Law

Federal common law is considered a "law of the United States" for purposes of Section 1331. n34 Thus, the word "laws" has been construed to include laws created by federal judicial decisions as well as by congressional legislation. n35

The circumstances in which federal question jurisdiction may be premised on federal common law are limited. Unless a claim presents an issue requiring construction of an act of Congress or unless a distinctive policy of an act of Congress requires that federal principles control the disposition of a claim, there is no independent claim for jurisdiction under Section 1331. n36 Subject to the well-pleaded complaint rule, n37 however, federal common law will provide a jurisdictional basis if the plaintiff's claim will require the interpretation of a federal statute, even if the statute does not specifically provide for the cause of action asserted by the plaintiff. n38

Federal common law qualifies for purposes of Section 1331 essentially in two situations: when a federal rule of decision is necessary to protect uniquely federal interests and when Congress has given the courts the power to develop substantive law. n39"Uniquely federal interests" are present if there is an overriding federal interest in the need for a uniform rule of decision or if the controversy touches basic interests of federalism. n40 These unique federal interests are present only with respect to the rights and obligations of the United States, n41 interstate and international disputes implicating the conflicting rights of states, n42 or in relations with foreign nations. n43

[2] Claim Must Arise Under Federal Law

[a] Two Types of Federal Question Jurisdiction

A court does not have federal question jurisdiction over a claim unless the claim is one "arising under" federal law, n1 and the parties may dispute whether this requirement has been met. There are two tests under which an action may present a federal question. A claim arises under federal law within Section 1331 if it is apparent from the face of the complaint either that: n2 (1) a federal law creates the plaintiff's cause of action; n3 or (2) if a state law creates the cause of action, a federal law is a necessary element of the plaintiff's claim. n4 While the vast majority of federal question cases "arise under" either the Constitution, n5 a statute, n6 a treaty, n7 or federal regulations, n8 federal common law may also form the basis for federal question jurisdiction. n9

[b] Cause of Action Created by Federal Law

The first test to determine federal question jurisdiction asks whether federal law creates the cause of action. If federal law creates a cause of action, whether expressly or by implication, n10 federal question jurisdiction exists. n11 Under thistest, the court has federal question jurisdiction if the claim arises under either a federal statute or federal common law. n12 On the other hand, if a federal statute creates no private cause of action for a particular remedy, the federal courts have no subject matter jurisdiction to hear a case based on that statute. For example, because there is no private cause of action in federal court under the Telephone Consumer Protection Act n13 for receipt of an unsolicited facsimile advertisement, state courts have exclusive jurisdiction in such cases because the statute expressly mentions state court jurisdiction and is silent on the matter of federal jurisdiction. In the case, the Ninth Circuit held that the federal district court lacked federal question subject matter jurisdiction even if there is no private action available in a particular state's courts. n14

Note that mere fact that the action has its origin in federal law is not sufficient to create federal question jurisdiction--the cause of action must really and substantially involve a dispute or controversy respecting the validity, construction or effect of the federal law, on the determination of which the result depends. n15

[c] Cause of Action Created by State Law but Involves Significant Federal Right

The second test, used only when state law creates the cause of action, asks whether such a cause of action presents a substantial federal question. n16 This inquiry is more complicated than the creation test discuss in [b], *above*, n17 and there are several circumstances in which the federal question may arise. For example, if it appears from the plaintiff's pleadings that the right to relief on a state law claim depends on the construction or application of the Constitution or federal law, and that the federal claim is not merely colorable but rests on a reasonable foundation, there is federal question jurisdiction. n18

[3] Federal Question Must Be Substantial

In addition to showing that a suit "arises under" federal law for purposes of the federal question statute, the person invoking federal question jurisdiction must show that the issue of federal is "substantial." This means that the claim of federal law must not be so patently without merit that the allegation could be called insubstantial, implausible, or frivolous. n1 In other words, the suit may be dismissed for lack of federal question jurisdiction if the alleged federal claim clearly appears to be immaterial and made solely for purpose of obtaining jurisdiction, or if it is wholly insubstantial and frivolous. n2 While this requirement has always been deemed a jurisdictional prerequisite, such an inquiry in reality goes to the merits of the allegations in the pleadings. Thus, a dismissal for lack of substantiality is, for all practical purposes, equivalent to a dismissal for failure to state a claim on which relief may be granted. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 103.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1331.*

(n3)Footnote 2. *Action for Children's Television v. F.C.C., 59 F.3d 1249, 1256 (D.C. Cir. 1995)* , *cert. denied, 516 U.S. 1072 (1996)* .

(n4)Footnote 3. *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (cause of action exists against federal officers for direct constitutional torts claims).

(n5)Footnote 4. *Const. Art. I, § 10, cl. 3.*

(n6)Footnote 5. *Waterfront Comm'n of N.Y. Harbor v. Elizabeth-Newark Shipping, Inc., 164 F.3d 177, 180 (3d Cir. 1998)* .

(n7)Footnote 6. *See U.S. Const., Art. IV, § 1.*

(n8)Footnote 7. *Minnesota v. Northern Sec. Co., 194 U.S. 48, 71-72, 24 S. Ct. 598, 48 L. Ed. 870 (1904)* .

(n9)Footnote 8. *Almond v. Capital Properties, Inc., 212 F.3d 20, 23 (1st Cir. 2000)* ; *see Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (Section 1331 applies where federal law creates cause of action).

(n10)Footnote 9. *Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)* .

(n11)Footnote 10. *Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)* .

(n12)Footnote 11. *Karahalios v. National Federation of Federal Employees, 489 U.S. 527, 532-533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989)* (ultimate issue is whether Congress intended to create private cause of action); *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* (when Congress authorized jurisdiction for Telephone Consumer Protection Act over private actions in state courts, without mentioning federal courts, it did not intend to grant jurisdiction over such claims in federal district courts; furthermore, legislative history supported the conclusion that there was no federal jurisdiction, as Congress intended to provide a cost-efficient remedy for unsolicited facsimiles in that private actions under Act should be treated as small claims best resolved in state courts designed to handle them).

(n13)Footnote 12. U.S. Const., Art. III, § 2.

(n14)Footnote 13. *Romero v. International Terminal Operating Co., 358 U.S. 354, 359-380, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959)* . Additionally, any law applicable exclusively to the District of Columbia is not considered a "federal law" under Section 1331 for purposes of determining whether a case arises under federal law. *See 28 U.S.C. § 1343(b)* (in determining federal question jurisdiction, laws applicable to District of Columbia are considered "state laws").

(n15)Footnote 14. *See § 5.11*.

(n16)Footnote 15. *28 U.S.C. § 1333*.

(n17)Footnote 16. *28 U.S.C. § 1334*.

(n18)Footnote 17. *28 U.S.C. § 1337*.

(n19)Footnote 18. *28 U.S.C. § 1336*.

(n20)Footnote 19. *28 U.S.C. § 1339*.

(n21)Footnote 20. *28 U.S.C. § 1338*.

(n22)Footnote 21. *28 U.S.C. § 1346*.

(n23)Footnote 22. *45 U.S.C. § 56*.

(n24)Footnote 23. *46 U.S.C. § 688(a)*.

(n25)Footnote 24. *29 U.S.C. § 185*.

(n26)Footnote 25. *15 U.S.C. § 1692k(d)*.

(n27)Footnote 26. *29 U.S.C. § 1132(e)*.

(n28)Footnote 27. 15 *Moore's Federal Practice, § 104.40 et seq*. (Matthew Bender 3d ed.).

(n29)Footnote 28. *See 28 U.S.C. §§ 1345, 1346*.

(n30)Footnote 29. 16 *Moore's Federal Practice, § 105.01 et seq*. (Matthew Bender 3d ed.).

(n31)Footnote 30. *Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)* (effect of elimination of jurisdictional amount requirement for federal question jurisdiction was to grant jurisdiction to federal courts to review agency action).

(n32)Footnote 31. *Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-674, 106 S. Ct. 2133,*

90 L. Ed. 2d 623 (1986) .

(n33)Footnote 32. *See 5 U.S.C. § 702.*

(n34)Footnote 33. *Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517, 523 n.3, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991)* .

(n35)Footnote 34. *National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 850, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)* ; *Illinois v. City of Milwaukee, 406 U.S. 91, 99, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* .

(n36)Footnote 35. *See Owens-Corning Fiberglas Corp. v. U.S. Air, 853 F. Supp. 656, 662 (E.D.N.Y. 1994)* (interstate carrier's limitation of liability governed by federal common law).

(n37)Footnote 36. *United Automobile, Aerospace & Agricultural Implement Workers of America Local 33 v. R. E. Dietz Co., 996 F.2d 592, 597 (2d Cir. 1993)* (no federal common law right to paid vacation may implied from collective bargaining agreement).

(n38)Footnote 37. *See § 5.13.*

(n39)Footnote 38. *Black Hills Inst. of Geological Research v. United States, Dep't of Justice, 812 F. Supp. 1015, 1018-1019 (D.S.D.) , aff'd in part, rev'd in part on other grounds, 12 F.3d 737 (8th Cir. 1993)* (federal question jurisdiction present because claim involved application and interpretation of various federal statutes concerning Indian trust lands).

(n40)Footnote 39. *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* .

(n41)Footnote 40. *Illinois v. City of Milwaukee, 406 U.S. 91, 105-106 n.6, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* (federal common law of nuisance that governs water pollution disputes and provides "laws" under which such actions may arise within meaning of Section 1331).

(n42)Footnote 41. *United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 42 (1st Cir. 1999)* (when rule of decision must be drawn from federal common law, case presents uniquely federal question comes within original jurisdiction of federal courts); *see Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc., 164 F.3d 123, 126-130 (2d Cir. 1999)* (federal common law did not control suit between subcontractors on defense procurement contract sufficient to establish federal question jurisdiction when government had no immediate interest in dispute).

(n43)Footnote 42. *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* (when uniquely federal interests are present).

(n44)Footnote 43. *See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)* .

(n45)Footnote 1. *28 U.S.C. § 1331.*

(n46)Footnote 2. *Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142-1143 (9th Cir. 2000)* .

(n47)Footnote 3. *See* [b], *below.*

(n48)Footnote 4. *See* [c], *below.*

(n49)Footnote 5. *Saum v. Widnall, 912 F. Supp. 1384, 1387 (D. Colo. 1996)* (subject matter jurisdiction in action

based on constitutional claim of sexual harassment).

(n50)Footnote 6. *Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 582 F.2d 444 (8th Cir. 1978)* , *cert. denied, 439 U.S. 1090 (1979)* (controversy between public transit agency and labor union involving a claim for breach of an agreement pursuant to Urban Mass Transportation Act).

(n51)Footnote 7. *Fouke Co. v. Mandel, 386 F. Supp. 1341 1343 (D. Md. 1974)* (federal wildlife protection treaty); *cf. Torres v. Southern Peru Copper Corp., 113 F.3d 540, -- (5th Cir. 2000), 113 F.3d 540* .

(n52)Footnote 8. *Saum v. Widnall, 912 F. Supp. 1384 (D. Colo. 1996)* (subject matter jurisdiction in action based on failure of defendant to comply with regulatory duties owed plaintiff).

(n53)Footnote 9. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 929 (5th Cir. 1997)* ; *see* [1], *above*.

(n54)Footnote 10. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (Section 1331 applies where federal law creates cause of action).

(n55)Footnote 11. *West 14th St. Comm. Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 192 (2d Cir. 1987)* , *cert. denied, 484 U.S. 850 (1987)* .

(n56)Footnote 12. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 929 (5th Cir. 1997)* (federal common law provides federal cause of action for freight claims against air carriers).

(n57)Footnote 13. *47 U.S.C. § 227*.

(n58)Footnote 14. *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* ; *see also ErieNet, Inc., v. Velocity Net, Inc., 156 F.3d 513, 520 (3d Cir. 1998)* ; *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd., 156 F.3d 432, 438 (2d Cir. 1998)* .

(n59)Footnote 15. *Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1143 (9th Cir. 2000)* (noting that rule applies especially to suits involving rights to land acquired under a law of the United States; otherwise every suit to establish title to land in central and western states would so arise, as all titles in those states are traceable back to federal land grants).

(n60)Footnote 16. *West 14th St. Comm. Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 192 (2d Cir. 1987)* , *cert. denied, 484 U.S. 850 (1987)* .

(n61)Footnote 17. *Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142-1143 (9th Cir. 2000)* .

(n62)Footnote 18. *Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199, 41 S. Ct. 243, 65 L. Ed. 577 (1921)* .

(n63)Footnote 1. *Hagans v. Lavine, 415 U.S. 528, 535, 542-543, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974)* .

(n64)Footnote 2. *Bell v. Hood, 327 U.S. 678, 682-683, 66 S. Ct. 773, 90 L. Ed. 939 (1946)* ; *see Long v. Bando Manufacturing of America, Inc., 201 F.3d 754, 760 (6th Cir. 2000)* (wrongful discharge claim based on federal public policies insufficiently substantial and disputed to invoke federal jurisdiction; some circuits have held that such claims do not belong in federal court): *Campbell v. Aerospace Corp., 123 F.3d 1308, 1315 (9th Cir. 1997)* , *cert. denied, 523 U.S. 1117 (1998)* (finding federal interest to be insufficient, and noting that state law mirrors federal policy at issue); *Willy v. Coastal Corp., 855 F.2d 1160, 1167-1172 (5th Cir. 1988)* (finding the federal element in such claim to be insufficiently substantial and also noting that plaintiff supported his claim with state as well as federal theories).

(n65)Footnote 3. *See Bell v. Hood, 327 U.S. 678, 683, 66 S. Ct. 773, 90 L. Ed. 939 (1946)* .

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PART II Jurisdiction; Venue; Removal
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PART II. SUBJECT MATTER JURISDICTION BASED ON FEDERAL QUESTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.13

§ 5.13 Well-Pleaded Complaint Rulen*

[1] Federal Question Must Appear in Plaintiff's Complaint

The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint" rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. n1 Thus, federal question jurisdiction existed when a well-pleaded complaint presented issues as to whether, under an agreement, a party had an obligation to the United States or the United States had certain rights. n2 The well-pleaded complaint rule means that a federal cause of action or question of federal law supporting federal question jurisdiction must be apparent from the face ofthe well-pleaded complaint and not from a defense or anticipated defense. n2.1 The United States Supreme Court has also held that a counterclaim, which appears as part of the defendant's answer and not as part of the plaintiff's complaint, may not serve as the basis for "arising under" federal question jurisdiction. Both of these corollaries of the rule further the longstanding policies underlying the well-pleaded complaint rule to provide the plaintiff the initial choice of forum and to preserve judicial resources. n3

Under the well-pleaded complaint rule, a plaintiff has the choice to initially avoid federal jurisdiction by relying exclusively on state law. However, the "well-pleaded" phrase in the rule provides that a plaintiff may not defeat federal court jurisdiction by intentionally omitting to plead necessary federal questions, because a defendant may remove a case to federal court if the court determines that the plaintiff has "artfully pleaded" n4 claims in an attempt to preclude federal jurisdiction, even though no federal question appears on the face of the plaintiff's complaint. n5

[2] Purpose of Rule

Until the plaintiff has presented a federal issue in a case, the federal court lacks authority even to require a response from the defendant. Thus, for example, federal jurisdiction may not be made to depend on the plaintiff's mere speculation that the defendant will raise a federal defense, because in so doing, the court may be required to expend resources in a case in which it will ultimately lack jurisdiction. n1 Another purpose of the well-pleaded complaint rule is to prevent the defendant from defeating the plaintiff's choice of forum. As the Supreme Court has said, the presence of a federal question in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by forbearing claims based on federal law, choose to have the cause heard in state

court. A defendant may not, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law. n2

[3] Exceptions to Rule

[a] Two Exceptions

There are two exceptions to the well-pleaded complaint rule: (1) the complete preemption doctrine, which provides that when a statute preempts an area of state law, any claim purportedly based on that pre-empted state law is considered from its inception to arise under federal law; n1 and (2) the artful pleading doctrine, which provides that a plaintiff may not avoid federal court simply by omitting to plead a necessary federal question in the complaint; in the latter case, the necessary federal question will be deemed to be alleged in the complaint, giving the court federal question jurisdiction. n2

It has been said that the complete preemption doctrine is a specific application of the artful pleading doctrine. Both doctrines require the court to examine whether the complaint actually raises a federal issue even though the complaint does not state any federal claims on its face. n3 Thus, absent the exceptions of complete preemption or artful pleading, the plaintiff in a nondiversity action, as master of the complaint, may avoid federal subject matter jurisdiction by relying exclusively on state law. n4

[b] Complete Preemption Exception

The first exception to the well-pleaded complaint rule is the complete preemption doctrine, which provides that when Congress intends the preemptive force of a statute to be so extraordinary that it completely displaces an area of state law, any claim asserted under that pre-empted state law is considered a federal claim from its inception, and therefore actually arises under federal law. n5 Complete preemption applies only in the extremely limited circumstance that Congress intends in a particular area to supersede both the substantive and remedial provisions of state law and create a federal remedy for violation of the law that is exclusive, even when a claimant attempts to rely entirely on state law in state court. To date, the Supreme Court has found only three federal statutes to have this broad preemptive scope: the Labor Management Relations Act, the Employee Retirement Income and Security Act, and the National Bank Act for claims of usury against national banks. n6

Some courts have noted that the label of this exception is not entirely accurate, because the doctrine is not one of preemption, but rather one of federaljurisdiction. n7 n8 Furthermore, removal and preemption are two distinct concepts, and the fact that a claim may be preempted does not necessarily establish that it is covered by federal question jurisdiction. n9 A better term might be "jurisdictional preemption" n10 because it is a doctrine that not only preempts the substantive state law but also supports federal jurisdiction to address the issue regardless of the procedural context in which the matter is brought before the federal court. It should also be noted that a claim of ordinary preemption, as opposed to complete preemption (jurisdictional preemption), is not a defense to the well-pleaded complaint rule. n11"Ordinary preemption" is an affirmative defense to the allegations in a plaintiff's complaint asserting a state law claim claiming that a state law conflicts with, and is overridden by, a federal law. n11.1 On the other hand, complete preemption does not constitute a defense at all. Rather, it is a narrowly drawn jurisdictional rule for assessing federal removal jurisdiction when a complaint purports to raise only state law claims. n11.2 It looks beyond the complaint to determine if the suit is actually and entirely a matter of federal law, even if the state law would provide a cause of action in the absence of the federal law. Therefore, complete preemption creates the federal question jurisdiction requisite to removal of the claim to federal courts. n11.3

[c] Artful Pleading Exception

The second exception to the well-pleaded complaint rule is the artful pleading exception, in which plaintiff seeks to conceal the true federal nature of his or her claim through "artful pleading" that disguises the federal nature of the claim.

n11.4 Under the artful pleading exception, the plaintiff makes a claim, although ostensibly asserted under state law, that is in fact misrepresented in order to defeat defendant's right to a federal forum. n12 When a plaintiff seeks to conceal the true federal nature of its claim through artful pleading, the court will look beyond the complaint to determine whether a federal question persists which precludes remand to the state court. Otherwise, a plaintiff could artfully plead claims to avoid federal jurisdiction even when state law claims are completely preempted by federal law. n13

It should be noted that, under the artful pleading doctrine, federal courts have subject matter jurisdiction over purported state law claims if the plaintiff failed to plead a federal right or immunity that is an essential element of the plaintiff's cause of action. The doctrine does not apply to claims that are in fact state law claims, n13.1 and the court does not have federal jurisdiction over such claims, n14 unless some other theory is applicable, such as supplemental jurisdiction. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 103.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* .

(n3)Footnote 2. *Almond v. Capital Properties, Inc., 212 F.3d 20, 23 (1st Cir. 2000)* (when state governor and state transportation department brought state court action to enjoin owner of parking garage at railroad station from allegedly violating its contractual obligation to seek approval of Federal Railroad Administration before initiating parking rate increases, court of appeals held that action arose under federal law for purpose of federal question jurisdiction).

(n4)Footnote 2.1. *Newton v. Capital Assurance Co., 209 F.3d 1302, 1304 (11th Cir. 2000)* .

(n5)Footnote 3. *The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13, 20-21 (2002)* .

(n6)Footnote 4. *See* [3], *below*.

(n7)Footnote 5. *Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* .

(n8)Footnote 1. *Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th Cir. 2000)* .

(n9)Footnote 2. *Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-399, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* .

(n10)Footnote 1. *See* [b], *below*.

(n11)Footnote 2. *See* [c], *below*.

(n12)Footnote 3. *Hyzer v. Cigna Property Cas. Ins. Co., 884 F. Supp. 1146, 1149 (E.D. Mich. 1995)* .

(n13)Footnote 4. *Ahearn v. Charter Township of Bloomfield, 100 F.3d 451, 456 (6th Cir. 1996)* .

(n14)Footnote 5. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 123 S. Ct. 2058, 2062, 156 L. Ed. 2d 1 (2003)* ; *Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107 (9th Cir. 2000)* .

(n15)Footnote 6. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 123 S. Ct. 2058, 2062-2064, 156 L. Ed. 2d 1 (2003)* .

(n16)Footnote 7. [Reserved]

(n17)Footnote 8. *Lister v. Stark, 890 F.2d 941, 943 (7th Cir. 1989)* , *cert. denied, 498 U.S. 1011 (1990)* .

(n18)Footnote 9. *Murphey v. Lanier, 204 F.3d 911, 912-913 (9th Cir. 2000)* (federal district court lacked federal question subject matter jurisdiction to hear federal Telephone Consumer Protection Act cases, because jurisdiction explicitly given to state courts); *see also Caterpillar, Inc. v. Williams, 482 U.S. 386, 398, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (fact that defendant may ultimately prove that plaintiff's claims are preempted does not establish that they are removable to federal court).

(n19)Footnote 10. *See Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107 (9th Cir. 2000)* .

(n20)Footnote 11. *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)* .

(n21)Footnote 11.1. *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)* ; *see Stern v. IBM, 326 F.3d 1367, 1371 (11th Cir. 2003)* (ordinary preemption may be asserted as affirmative defense in either state or federal court).

(n22)Footnote 11.2. *Hobbs v. Blue Cross Blue Shield, 276 F.3d 1236, 1240 (11th Cir. 2001)* .

(n23)Footnote 11.3. *Beneficial Nat'l Bank v. Anderson,539 U.S. 1, 123 S. Ct. 2058, 2062-2064, 156 L. Ed. 2d 1 (2003)* ; *Stern v. IBM, 326 F.3d 1367, 1371 (11th Cir. 2003)* .

(n24)Footnote 11.4. *Graham v. W. Va. Div. of Highways, 245 F. Supp. 2d 836, 839 (S.D. W. Va. 2003)* (citing **Moore's Federal Practice** for proposition that court will look beyond "artfully pleaded" complaint to determine whether actual federal question exists, precluding remand of removed claim).

(n25)Footnote 12. *Spaulding v. Mingo County Bd. of Educ., 897 F. Supp. 284, 288 (S.D. W.Va. 1995)* ; *see, e.g., Burda v. M. Ecker Co., 954 F.2d 434, 438 (7th Cir. 1992)* (plaintiff's state law complaint against insurer for failure to pay workers' compensation benefits was actually artfully pleaded effort to litigate substantive rule of federal tax law).

(n26)Footnote 13. *Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* .

(n27)Footnote 13.1. *Botsford v. Blue Cross & Blue Shield of Mont., Inc., 314 F.3d 390, 393 (9th Cir. 2002)* (plaintiff has right to assert only state law claims).

(n28)Footnote 14. *Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1109 n.4 (8th Cir. 1999)* , *cert. denied, 527 U.S. 1039 (1999)* .

(n29)Footnote 15. *See § 5.90* et seq.

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART II. SUBJECT MATTER JURISDICTION BASED ON FEDERAL QUESTION

1-5 Moore's Manual--Federal Practice and Procedure §§ 5.14through 5.29

[Reserved]

§§ 5.14[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART III. DIVERSITY OF CITIZENSHIP JURISDICTION
A. NATURE OF AND AUTHORITY FOR DIVERSITY OF CITIZENSHIP

1-5 Moore's Manual--Federal Practice and Procedure § 5.30

§ 5.30 Nature of Diversity Jurisdictionn*

As part of its authority to oversee the jurisdiction of federal courts, Congress has provided a federal forum for disputes between citizens of different states. n1 The purpose of the forum, known as diversity jurisdiction, is to provide a neutral forum for out-of-state parties who believe that they will be subjected to local prejudice if forced to litigate as strangers in a state court. n2 Thus, diversity jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states. n3

There are, however, qualifications to the concept of diversity jurisdiction; the most notable is that the federal court in a diversity case must apply the substantive law of the state in which it sits. n4 State law often involves issues about which federal judges lack expertise and over which they have no ultimate control. It could be argued that decisions in some diversity cases serve little purpose and could actually be counterproductive to the interests of federalism. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory Sources

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1332(a)(1).*

(n3)Footnote 2. *Vasura v. Acands, 84 F. Supp. 2d 531, 538 (S.D.N.Y. 2000)* .

(n4)Footnote 3. *Brown v. Flowers Indus., 688 F.2d 328, 330 (5th Cir. 1982)* , *cert. denied, 460 U.S. 1023 (1983)* (diversity jurisdiction permits nonresident to seek federal forum to avoid partisanship that state courts might show in favor of their own citizens).

(n5)Footnote 4. *Erie R.R. v. Tompkins, 304 U.S. 64, 69-78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n6)Footnote 5. *Cf. New Orleans Pub. Serv., Inc. v. City of New Orleans, 798 F.2d 858, 862 (5th Cir. 1986)* , *cert. denied, 481 U.S. 1023 (1987)* (although plaintiff's claims were based on federal law, regulation of local utility rates was matter of local regulatory expertise).

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1-5 Moore's Manual--Federal Practice and Procedure § 5.31

§ 5.31 Authority for Diversity Jurisdictionn*

The federal courts may adjudicate diversity cases only because Article III, Section 2, of the Constitution extends federal judicial power to controversies between citizens of different states and to controversies between citizens of a state and foreign states, citizens, or subjects. n1 Because federal courts are courts of limited jurisdiction, jurisdiction is presumed not to exist absent proof by the party asserting it that it does. n2 Furthermore, diversity of citizenship must be "complete" with respect to the plaintiffs on the one hand and defendants on the other. n3 When challenged, this complete diversity must be proven by the facts as of the date an action is filed and by a preponderance of the evidence. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesConstitutional Sources

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. U.S. Const., Art. III, § 2.

(n3)Footnote 2. *Penteco Corp. v. Union Gas Sys., Inc., 929 F.2d 1519, 1522, n.2 (10th Cir. 1991)* .

(n4)Footnote 3. *Bair v. Peck, 738 F. Supp. 1354, 1356-1358 (D. Kan. 1990)* (Kansas native who had moved to Colorado to attend college proved Colorado citizenship for purposes of diversity jurisdiction in medical malpractice action filed against Kansas physician in Kansas district court).

(n5)Footnote 4. *Sheehan v. Gustafson, 967 F.2d 1214, 1215 (8th Cir. 1992)* .

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PART II Jurisdiction; Venue; Removal
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A. NATURE OF AND AUTHORITY FOR DIVERSITY OF CITIZENSHIP

1-5 Moore's Manual--Federal Practice and Procedure § 5.32

§ 5.32 Two Components Necessary for Diversity Jurisdictionn*

Before a court may exercise diversity jurisdiction two components must exist. First, the citizenship of all of the parties on one side of the lawsuit must be different from the citizenship of all of the parties on the opposite side. n1 This required component is known as diversity of citizenship n2 and is discussed in Part B, below. n3 The second requirement is that there must be a minimum amount in controversy in the suit, which is currently $75,000. n4 This required component is discussed in Part C, below. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1332(a)(1)-(4).*

(n3)Footnote 2. *Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) .*

(n4)Footnote 3. *See § 5.50* et seq.

(n5)Footnote 4. *28 U.S.C. § 1332(a).*

(n6)Footnote 5. *See § 5.70* et seq.

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1-5 Moore's Manual--Federal Practice and Procedure §§ 5.33through 5.49

[Reserved]

§§ 5.33[Reserved]

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PART II Jurisdiction; Venue; Removal
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B. DIVERSITY OF CITIZENSHIP

1-5 Moore's Manual--Federal Practice and Procedure § 5.50

§ 5.50 Requirements for Diversity of Citizenshipn*

[1] General Requirements

The state courts have a right to decide their own controversies--thus, the diversity statute must be strictly construed. n1 Any doubts are therefore resolved against finding diversity jurisdiction n2 and when the case has been removed to federal court, in favor of remand to the state court. n3 Because the parties may never waive limits on subject matter jurisdiction, a party does not waive the requirement of diversity jurisdiction by failing to challenge jurisdiction in theproceedings. n4 Similarly, all trial or appellate courts are required to raise lack of subject matter jurisdiction on their own motion. n5 The court must examine the status of the parties and make its own determination on the issue. n6

Because of the strict construction of the diversity statute, n7 the burden of proving all jurisdictional facts is on the party asserting federal court jurisdiction, n8 including the burden of proving that all of the requirements of complete diversity have been met at the time of the filing of the action. Therefore, when the opposition challenges diversity jurisdiction, the party invoking federal court jurisdiction must establish the citizenship of each real party in interest by factual allegations showing a preponderance of the evidence. A party's mere allegation of diversity does not satisfy its burden of establishing the district court's jurisdiction. To determine whether a party has adequately presented facts sufficient to establish federal diversity jurisdiction, the courts must look to the facts alleged in the complaint and ignore mere conclusory allegations of jurisdiction. n9

[2] Complete Diversity

Under the diversity statute, Congress has granted the district courts original jurisdiction for all civil actions in which the matter in controversy exceeds the of $75,000 and which is between the following parties: (1) citizens of different states; n1 (2) citizens of a state and citizens or subjects of a foreign state; n2 (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; n3 and (4) a foreign state as plaintiff and citizens of a state or different states. n4 For purposes of diversity jurisdiction, the term "states" includes the territories, the District of Columbia, and the Commonwealth of Puerto Rico. n5

Diversity jurisdiction requires complete diversity of citizenship, n6 which means that citizenship must be different

between all plaintiffs, on the one hand, and all defendants, on the other hand, n7 as opposed to minimal diversity, which would require that only one plaintiff be a citizen of a different state from that of at least one defendant. n8 Parties may not waive the complete diversity requirement, either by formal waiver or by failing to object to its absence; waiver may not create diversity jurisdiction that is not otherwise present. n9

A complaint that includes some claims that fall within diversity jurisdiction and other claims that do not fall within diversity jurisdiction may not be removed to federal court by the defendant. Diversity is destroyed if any plaintiff has the same citizenship as any defendant. n10 Thus, a plaintiff may prevent removal simply by joining to the suit a defendant sharing the same state citizenship. The plaintiff may not, however, fraudulently join a non-diverse party by filing a frivolous or otherwise illegitimate claim against a nondiverse defendant solely to prevent removal. n11 For a complete discussion of removal, see Ch. 8, *Removal From State Court*.

[3] Party Requirements

[a] Real Parties Considered to Determine Diversity

Much of the litigation involving diversity jurisdiction relates to the citizenship of parties as individuals and as entities. For a discussion of the citizenship of individuals, see *§ 5.54*. For a discussion of the citizenship of corporations and other entities, see *§ 5.55*. In determining the existence of diversity of citizenship, the district court must disregard nominal n1 and formal parties, n2 and determine jurisdiction only with respect to the citizenship of real parties to the controversy. n3 In other words, a plaintiff must base diversity jurisdiction on the citizenship of real and substantial parties to the controversy. n4 A real party in interest is one who, according to applicable substantive law, has a right or duty sought to be enforced or enjoined. n5 In contrast to a real party in interest, a formal or nominal party is one who, in a genuine legal sense, has neither an interest in the result of the suit, nor an actual interest in or control over the subject matter of the litigation. n6

[b] Alignment of Parties

[i] Courts Duty to Determine Correct Alignment of Parties

Under the requirement of complete diversity, all of the parties on the plaintiff's side of a case must be diverse from all of the parties on the defendant's side. n7 However, the alignment designated by the claim or counterclaim is not binding on the court; the court is itself responsible for aligning the parties according to their actual interests in the litigation. In other words, the court does not merely follow the party designations in a complaint or counterclaim; rather, the court analyzes the facts as alleged to determine the proper alignment. The court has jurisdiction if complete diversity exists when the parties are aligned properly. n8 On the other hand, if there is no longer complete diversity after proper alignment or realignment, the action must be dismissed for lack of diversity subject matter jurisdiction. n8.1

Generally, the federal courts must realign the parties according to their real interests in such a way that parties with conflicting interests are on opposite sides. n9 The court must examine the interests of the parties in order to determine if their positions as plaintiffs and defendants conform to their real interests and must realign the parties, if appropriate. The purpose of realignment of parties is to ensure that there is a bona fide controversy between citizens of different states so that the case qualifies for diversity jurisdiction. n10

Once a court has made a determination of alignment and diversity jurisdiction, subsequent events do not deprive a court of jurisdiction over the parties that it had aligned. n11 Any modification of the parties by addition, substitution, or elimination does not divest the court of diversity jurisdiction, provided that the action remains the same and there is no evidence of fraud or collusion to create jurisdiction. n12

[ii] Determination of Alignment Based on Conflict

A case qualifies for diversity jurisdiction only when there is an actual, substantial controversy between citizens of different states. n13 The Supreme Court has directed the lower courts to examine the realities of the record in order to ascertain the real interests of the parties. n14 Whether the necessary conflict of interests is present between parties aligned as adverse must be ascertained from an assessment of the principal purpose of the suit and the primary and controlling matter in dispute. n15

Although the lower courts adhere to this direction, they have given different labels to the test. Under the test labeled "primary purpose" standard, the parties must be realigned if there is no adversity with regard to the primary issue in dispute. n16 Some courts use the "substantial conflict" standard. Under this standard, realignment of parties is not required if there is any actual and substantial conflict between the parties. Realignment is proper only if the court finds that no actual, substantial controversy exists between a party on one side of the dispute and a named opponent. n17 Some courts label the test as the "collision of interests" standard. Under this label, courts require the existence of an actual, substantial controversy, or a collision of interests, but the conflict may, in some cases, concern an issue other than the "primary issue" in dispute. n18

[iii] Alignment of Parties in Shareholder's Derivative Suit

In a shareholder's derivative action, there are three parties conceptually presented in the case: the shareholders who bring the action on behalf of the corporation, the represented corporation itself (i.e., the corporation on whose behalf the suit is initiated), and the defendant third party that has allegedly injured the corporation. n18.1 For diversity purposes, the represented corporation is generally aligned as a defendant, but the court may realign the corporation as a plaintiff when management is not actually adverse to the shareholders. n18.2 The complaint and answer generally determine whether management is, in reality, in conflict with the shareholders. n19 The court should not realign the corporationas a plaintiff if it is hostile to the action. n20 The corporation's management may refuse to act for a number of reasons in these circumstances but, usually, it simply believes that the course of action that it has approved is the correct one. Thus, the directors may have been acting out of purely proper motives. Whenever the management refuses to take action to rescind a business transaction, or whenever it so strongly approves it that any demand to rescind a transaction would be futile, there is evidence of antagonism. n21

[c] Dropping Party to Preserve Diversity

On motion by any party or of its own initiative, a court by order under Rule 21 may drop a party at any stage of the action and on any terms that are just. n22 Furthermore, if a named party to an action is determined by the court to be not indispensable to the action under Rule 19, the court may use Rule 21 to drop a nondiverse party to preserve diversity jurisdiction. n23 In some cases, the statute of limitation will have passed by the time the nondiverse party is dropped, and it may be argued that in such a case, an amendment to the complaint is barred by the statute of limitation. However, if the presence of a dispensable party will deprive a court of jurisdiction, there is a federal policy to allow relation back of amendments dropping parties in order to uphold subject matter jurisdiction. n24 If a plaintiff insists on retaining a particular defendant, the court will not interfere with that decision but must dismiss the case for lack of federal jurisdiction if the court determines that the defendant is nondiverse. n25

It should be noted that, in addition to the district court, the circuit courts of appeal have the authority to dismiss a dispensable nondiverse party in order to preserve federal jurisdiction. n26 A circuit court must use this authority sparingly, after considering the possible prejudicial impact on any of the parties. n27 If the presence of the nondiverse party produces a tactical or procedural advantage for any of the parties, and a factual dispute results, the court of appeals should remand the case to the district court, which is better suited to determine the existence of prejudice under the facts of the individual case. n28

[d] Diversity of Citizenship Must be Free of Collusion by Parties

By statute, a federal district court lacks jurisdiction over a civil action in which any party has been improperly or collusively made or joined for the purpose of invoking the court's jurisdiction, either by assignment or in some other manner. n29 The expression in this statute "improper or collusive" joinder has been construed to include those joinders that confer jurisdiction not justified by the purposes of diversity. n30

The purpose of Congressional enactment of the statute is to ensure that ordinary contract and tort litigation would not be diverted to federal courts by litigants using collusive or improper devices to create the appearance, but not the substance, of federal diversity jurisdiction. n31 The statute prohibits agreement of the parties to confer federal diversity jurisdiction, n32 because such an agreement is essentially a contrivance designed solely to place the litigation within the federal court system and therefore constitutes a prohibited collusive joinder under Section 1359. n33

If the assignment or transfer of a claim has been feigned or is merely colorable, rather than absolute or genuine, and has been made for the sole purpose of creating diversity jurisdiction, the assignment is improper or collusive and does not create federal diversity jurisdiction. n34 This determination is made according to the facts of each case. According to one test, the factors tending to show a collusive assignment include (1) a partial, rather than total, assignment, (2) lack of consideration paid by the assignee to the assignor, (3) a motive on part of assignor to stay out of state court, (4) a lack of interest in the litigation by theassignee before the assignment, and (5) an assignment made shortly before suit was filed. n35

Other federal courts have adopted a two-pronged test for determining whether an assignment or other transfer is collusive or improper under Section 1359: (1) an objective determination as to whether the assignment is of a type that places the nominal plaintiffs in a position to assert the real interest of another; and, if so, (2) a subjective determination as to whether the transaction was manufactured solely to obtain federal diversity jurisdiction or was made for a bona fide business purpose wholly apart from acquiring federal jurisdiction. n36

Because of the close relationship between parent corporations and their wholly owned subsidiaries, assignments between these business entities are subjected to a heightened scrutiny in determining if the assignment is collusive. n37 Similarly, assignments between a corporation and its corporate officers are also subject to a higher level of scrutiny. n38 There is a presumption that both of these types of assignments are made collusively in order to manufacture federal diversity jurisdiction. n39 To establish diversity, the corporation, its subsidiary, or officer must rebut this presumption of collusion by establishing that the assignment was motivated by a bona fide business reason, not simply to manufacture federal jurisdiction. n40

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Matimak Trading Co. v. Khalily, 118 F.3d 76, 87 (2d Cir. 1997) , cert. denied, 522 U.S. 1091 (1998)* (diversity statute must be construed with due regard for the rightful independence of state judiciaries); *Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) , cert. denied, 498 U.S. 1085 (1991) .*

(n3)Footnote 2. *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1303 (N.D. Cal. 1992)* .

(n4)Footnote 3. *In re NASDAQ Market Makers Antitrust Litigation, 929 F. Supp. 174, 178 (S.D.N.Y. 1996)* (removal jurisdiction must be strictly construed, both because federal courts are courts of limited jurisdiction and because removal of case implicates significant federalism concerns); *see* Ch. 8, *Removal From State Court*.

(n5)Footnote 4. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (consent of parties to subject matter jurisdiction is irrelevant, and party does not waive requirement by failing to challenge jurisdiction early in proceedings.

(n6)Footnote 5. *Fed. R. Civ. P. 12(h)(3)*; *United Food Local 919 v. Centermark Properties, 30 F.3d 298, 301 (2d Cir. 1994)* .

(n7)Footnote 6. *United Food Local 919 v. Centermark Properties, 30 F.3d 298, 301 (2d Cir. 1994)* .

(n8)Footnote 7. *See Tanon v. Muniz, 312 F. Supp. 2d 143, 147 (D.P.R. 2004)* .

(n9)Footnote 8. *Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 101 n.12 (3rd Cir. 2004)* .

(n10)Footnote 9. *Roche v. Lincoln Prop. Co., 373 F.3d 610, 617-618 (4th Cir. 2004)* .

(n11)Footnote 1. *28 U.S.C. § 1332(a)(1).*

(n12)Footnote 2. *28 U.S.C. § 1332(a)(2).*

(n13)Footnote 3. *28 U.S.C. § 1332(a)(3).*

(n14)Footnote 4. *28 U.S.C. § 1332(a)(4).*

(n15)Footnote 5. *28 U.S.C. § 1332(d).*

(n16)Footnote 6. *28 U.S.C. 1332(a).*

(n17)Footnote 7. *Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* ; *Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)* .

(n18)Footnote 8. *Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 409 (7th Cir. 2000)* .

(n19)Footnote 9. *Hager v. Gibson, 108 F.3d 35, 41 (4th Cir. 1997)* .

(n20)Footnote 10. *Blasberg v. Oxbow Power Corp., 934 F. Supp. 21, 23 (D. Mass. 1996)* .

(n21)Footnote 11. *Commercial Sav. Bank v. Commercial Fed. Bank, 939 F. Supp. 674, 680 (N.D. Iowa 1996)* .

(n22)Footnote 1. *Martin Sales & Processing v. West Va. Dept. of Energy, 815 F. Supp. 940, 942 (S.D. W. Va. 1993)* .

(n23)Footnote 2. *Hartford Acc. & Indem. v. Costa Lines Cargo Servs., 903 F.2d 352, 358 (5th Cir. 1990)* .

(n24)Footnote 3. *Bumberger v. Insurance Co. of North Am., 952 F.2d 764, 767 (3d Cir. 1991)* .

(n25)Footnote 4. *See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* ; *see also Fed. R. Civ. P. 17* (capacity of parties).

(n26)Footnote 5. *Foslip Pharms., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 903-904 (N.D. Iowa 2000)* .

(n27)Footnote 6. *Rose v. Giamatti, 721 F. Supp. 906, 914 (S.D. Ohio 1989)* ; *see Howell v. Tribune Entertainment Co., 106 F.3d 215, 218-219 (7th Cir. 1997)* (defining nominal party).

(n28)Footnote 7. *See* [2], *above*

(n29)Footnote 8. *Mellon Bank, N.A. v. Poling, 2004 U.S. Dist. LEXIS 12222, at *10-*12 (E.D. Pa. 2004)* .

(n30)Footnote 8.1. *Saylab v. Harford Mut. Ins. Co., 271 F. Supp. 2d 112, 116 (D.D.C. 2003)* .

(n31)Footnote 9. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* .

(n32)Footnote 10. *Smith v. Nelson 86 F. Supp. 2d 787, n.3 (N.D. Ohio 2000)* (court found that realignment of parties in case was not appropriate when bank and trustees had been named as defendants and another defendant had not shown that interests of defendant bank was aligned with those of plaintiffs).

(n33)Footnote 11. *Richmond Steel, Inc. v. Legal & Gen. Assurance Soc., 799 F. Supp. 234, 239 (D.P.R. 1992)* (citing **Moore's Federal Practice** to effect that facts that would form basis for realignment must exist at time action is commenced).

(n34)Footnote 12. *Richmond Steel, Inc. v. Legal & Gen. Assurance Soc., 799 F. Supp. 234, 239 (D.P.R. 1992)* .

(n35)Footnote 13. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* ; *United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992)* .

(n36)Footnote 14. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* .

(n37)Footnote 15. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 74, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* .

(n38)Footnote 16. *See, e.g., Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 n.2 (9th Cir. 1987)* .

(n39)Footnote 17. *Krueger v. Cartwright, 996 F.2d 928, 932 n.5 (7th Cir. 1993)* .

(n40)Footnote 18. *Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir. 1993)* , *cert. denied, 513 U.S. 1052 (1994)* .

(n41)Footnote 18.1. *Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* .

(n42)Footnote 18.2. *General Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 120-121 (4th Cir. 2004)* .

(n43)Footnote 19. *Smith v. Sperling, 354 U.S. 91, 96, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957)* ; *Lewis v. Odell, 503 F.2d 445, 447 (2d Cir. 1974)* .

(n44)Footnote 20. *Smith v. Sperling, 354 U.S. 91, 97, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957)* .

(n45)Footnote 21. *Smith v. Sperling, 354 U.S. 91, 96-97, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957)* .

(n46)Footnote 22. *Fed. R. Civ. P. 21*; *see* Ch. 14, *Multiple Party Practice*.

(n47)Footnote 23. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* ; *see Fed. R. Civ. P. 1*.

(n48)Footnote 24. *Field v. Volkswagenwerk AG, 626 F.2d 293, 296-297 (3d Cir. 1980)* ; *see Fed. R. Civ. P. 21*.

(n49)Footnote 25. *Singletary v. Continental Ill. Nat'l Bank, 9 F.3d 1236, 1238 (7th Cir. 1993)* .

(n50)Footnote 26. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 833, 837-838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* ; *see Kamel v. Hill-Rom Co., 108 F.3d 799, 805-806 (7th Cir. 1997)* (nondiverse dispensable party dismissed to create diversity jurisdiction so that circuit court could affirm district court's dismissal on forum non conveniens grounds).

(n51)Footnote 27. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 905, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n52)Footnote 28. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 905, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (no requirement, however, that district court must make initial determination of prejudice in every case).

(n53)Footnote 29. *28 U.S.C. § 1359*; *see also JMTR Enterprises, L.L.C. v. Duchin, 42 F. Supp. 2d 87, 92 (D. Mass. 1999)* (although there is no parallel statutory authority regarding assignments made to defeat jurisdiction of district court, it is clear that federal district courts have authority and responsibility to examine motives underlying assignment that destroys diversity, and to disregard assignment if it is made for improper purpose).

(n54)Footnote 30. *Toste Farm Corp. v. Hadbury, Inc., 70 F.3d 640, 643 (1st Cir. 1995)* .

(n55)Footnote 31. *Gross v. Hougland, 712 F.2d 1034, 1037 (6th Cir. 1983)* , *cert. denied, 465 U.S. 1025 (1983)* .

(n56)Footnote 32. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 67, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* .

(n57)Footnote 33. *Pratt v. First Hays Banshares, Inc., 682 F. Supp. 1177, 1180 (D. Kan. 1988)* (diversity did not exist in case in which settlement and security agreements permitting diverse plaintiff to bring suit in plaintiff's name were designed only to ensure diversity jurisdiction).

(n58)Footnote 34. *Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 829-830, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969)* .

(n59)Footnote 35. *See Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181, 185 (5th Cir. 1990)* .

(n60)Footnote 36. *See, e.g., Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 476 (2d Cir. 1976)* .

(n61)Footnote 37. *Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 476 (2d Cir. 1976)* .

(n62)Footnote 38. *Yokeno v. Mafnas, 973 F.2d 803, 809 (9th Cir. 1992)* .

(n63)Footnote 39. *Western Farm Credit Bank v. Hamakua Sugar Co., 841 F. Supp. 976, 983 (D. Haw. 1994)* ; *Dweck v. Japan CBM Corp., 877 F.2d 790, 792-793 (9th Cir. 1989)* .

(n64)Footnote 40. *McCulloch v. Velez, 364 F.3d 1, 6 (1st Cir. 2004)* ; *Westinghouse Credit Corp. v. Shelton, 645 F.2d 869, 871 (10th Cir. 1981)* (presumption rebutted by showing that assignment was made four years before suit for commercial purposes).

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PART II Jurisdiction; Venue; Removal
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1-5 Moore's Manual--Federal Practice and Procedure § 5.51

§ 5.51 Time of Determination of Diversityn*

[1] Diversity Generally Determined at Time of Filing of Suit

Diversity of citizenship jurisdiction of a federal court depends on the circumstances that existed at the time an action is brought by the filing of a complaint. This means that all questions regarding diversity of citizenship jurisdiction are determined by the state of facts that existed at the time of filing--whether the diversity jurisdiction is raised shortly after the filing of the action, during or after the trial, or even for the first time on appeal. n1 For purposes of removal from state to federal court, the diversity criteria must exist both when the complaint is filed and when the petition for removal is filed. n2 When an amendment to the complaint is filed that joins new parties, diversity must exist at the time of the amendment. n3 Because the existence of federal jurisdiction depends on facts that exist when the complaint is filed, n4 a person's domicile at the time of filing controls. n5 Subsequent changes in citizenship do not confer or destroy jurisdiction. n6

Once diversity has been established, the occurrence of subsequent events generally does not divest the court of subject matter jurisdiction. Therefore, diversity jurisdiction is not defeated by subsequent changes in the citizenship of the parties. n7 Similarly, if diversity does not exist at the time of the filing of the complaint, a later change in citizenship does not cure the jurisdictional defect. Furthermore, considerations of finality, efficiency, and economy do not create an exception to the rule. n8 However, a change in the nature of the lawsuit or in the parties may affect diversify jurisdiction, in the limited circumstances described in [2], *below*.

[2] Exceptions for Change in Nature of Suit or Parties

If the nature of a lawsuit is altered by order of the court or valid amendment of the pleadings, diversity must be reexamined at the time of the amendment. n1 In addition, a change in the identity of the persons who are parties to the lawsuit may trigger a reexamination of diversity. In this regard, the court may drop a dispensable nondiverse party at any time, provided that the party's interests are severable and the court enters a decree without prejudice to the party's rights. For example, if the court discovers that less than complete diversity has subsisted throughout an action, the court may, even after trial, dismiss a dispensable party to achieve complete diversity between the remaining parties to the final judgment. n2

Realignment of the parties is another exception to the general rule that diversity is determined at the time a lawsuit is commenced. If after realignment there isno longer complete diversity, subject matter jurisdiction is lost. n3 Subsequent events, however, do not deprive a court of jurisdiction over parties who were properly aligned in the first instance. n4 Consolidation of a diverse case with a nondiverse case also does not destroy federal jurisdiction in the diverse case; the two cases retain their separate character for jurisdictional purposes. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.16 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866, 872 (2004)* .

(n3)Footnote 2. *Tylka v. Gerber Products Co., 211 F.3d 445, 447-448 (7th Cir. 2000)* , *cert. denied, 531 U.S. 1002 (2000)* .

(n4)Footnote 3. *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1303 (N.D. Cal. 1992)* .

(n5)Footnote 4. *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 62-63 (2d Cir. 1999)* .

(n6)Footnote 5. *Rodriguez-Diaz v. Sierra-Martinez, 853 F.2d 1027, 1029 (1st Cir. 1988)* .

(n7)Footnote 6. *Faysound, Ltd. v. United Coconut Chem., Inc., 878 F.2d 290, 296 (9th Cir. 1989)* .

(n8)Footnote 7. *In re Shell Oil Co., 966 F.2d 1130, 1133 (7th Cir. 1992)* .

(n9)Footnote 8. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866, 872 (2004)* (even if case has been adjudicated, change in citizenship does not cure lack of diversity as determined at time of filing).

(n10)Footnote 1. *Carlton v. BAWW, Inc., 751 F.2d 781, 785 (5th Cir. 1985)* .

(n11)Footnote 2. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866, 872 (2004)* .

(n12)Footnote 3. *City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 68, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* .

(n13)Footnote 4. *Richmond Steel, Inc. v. Legal & Gen. Assurance Soc., 799 F. Supp. 234, 239 (D.P.R. 1992)* (citing **Moore's Federal Practice** for proposition that facts which would form basis for realignment must exist at time action is commenced).

(n14)Footnote 5. *Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire, 173 F.3d 909, 912-913 (3d Cir. 1999)* ; *see § 5.53*.

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1-5 Moore's Manual--Federal Practice and Procedure § 5.52

§ 5.52 Amendment Permitted for Defective Allegations of Diversityn*

By statute, a party may generally amend a defective allegation of jurisdiction in either the trial or appellate courts on terms required by the court. n1 Section1653's liberal amendment rule permits a party who has not alleged that diversity exists to amend the pleadings even on appeal. If the amended allegations are not contested and nothing bars jurisdiction, the court will accept jurisdiction as proper, despite the plaintiff's usual burden of alleging and proving jurisdiction at the outset of the case. n2 Despite the liberal allowance under the statute, however, attorneys are cautioned to promptly follow the court's directions regarding the need to establish complete diversity of citizenship--failure will result in dismissal for lack of jurisdiction. n3

Furthermore, although Section 1653 permits a party and the court to remedy inadequate jurisdictional allegations, the statute does not permit the party to fabricate jurisdictional facts. In other words, Section 1653 allows amendment if the plaintiff has made an erroneous statement about jurisdictional facts that actually existed, but it does not apply if there are defects in the jurisdictional facts themselves. n4 If there has been no tendered showing that jurisdiction existed under the original or amended complaint, Section 1653 is not applicable, n5 and the statute may not be used to create jurisdiction retroactively if it did not exist at the time when the complaint was filed. n6 Similarly, if diversity of citizenship did not exist when the action was commenced, it may not be created by a later amendment alleging a change of domicile by one of the parties. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.17 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1653*; *see Tylka v. Gerber Products Co., 211 F.3d 445, 447-448 (7th Cir. 2000) , cert.*

denied, 531 U.S. 1002 (2000) (court stated counsel was fortunate that he was able to amend complaint under Section 1653 because case could have been remanded instantly for lack of diversity).

(n3)Footnote 2. *District of Columbia v. Transamerica Ins. Co., 797 F.2d 1041, 1044 (D.C. Cir. 1986)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Held v. Held, 137 F.3d 998, 1000 (7th Cir. 1998)* ; *America's Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1073 (7th Cir. 1992)* .

(n5)Footnote 4. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830-832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (amendment under Section 1653 may not be used to drop party who was not diverse when complaint was filed).

(n6)Footnote 5. *Aetna Cas. & Sur. Co. v. Hillman, 796 F.2d 770, 776 (5th Cir. 1986)* .

(n7)Footnote 6. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n8)Footnote 7. *Oliney v. Gardner, 771 F.2d 856, 859 (5th Cir. 1985)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.53

§ 5.53 Effect of Consolidation of Cases on Diversity of Citizenshipn*

Consolidation does not change the rights of the parties, make those who are parties to one consolidated suit parties to the other, or merge the suits into a single cause. Therefore, a diverse case retains its diverse character despite consolidation with a nondiverse case. n1 Consolidation does not merge two cases into one case for jurisdictional purposes because each case retains its own separate identity, and therefore jurisdiction for each must be evaluated independently. n2 For example, the consolidation of two cases in federal court, one diverse and one not, does not affect the diversity jurisdiction over the diverse case. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.24 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Cella v. Togum Constructeur Ensemleier En Industrie Alimentaire, 173 F.3d 909, 912-913 (3d Cir. 1999)* .

(n3)Footnote 2. *Narragansett Indian Tribe v. Rhode Island, 296 F. Supp. 2d 153, 159 (D.R.I. 2003)* ; *see Fed. R. Civ. P. 42(a)(2).*

(n4)Footnote 3. *Webb v. Just in Time, Inc., 769 F. Supp. 993, 996 (E.D. Mich. 1991)* (court should determine presence or absence of diversity jurisdiction by analyzing consolidated cases separately).

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1-5 Moore's Manual--Federal Practice and Procedure § 5.54

§ 5.54 Determination of Citizenship of United States Individualsn*

[1] Citizenship Described

There is no statutory definition or description of an individual's citizenship for diversity purposes. n1 Under the Constitution, all persons born or naturalized in the United States, and subject to the jurisdiction of the United States, are citizens of the United States and of the state in which they reside. n2 Cases have held that to be a citizen of a state for purposes of the diversity statute, a natural person must be both a citizen of the United States and domiciled within that state. n3 Therefore, citizenship for diversity purposes is a two-part test: whether the person is a citizen of the United States, which is a relatively simple inquiry based on the citizenship statutes, n4 and whether the person is domiciled in a particular state, a far more difficult inquiry. n5

[2] Citizenship Determined at Time of Filing of Complaint

The citizenship of a party is determined as of the time the complaint is filed based on the facts and circumstances as they existed then. n1 Therefore, the court does not consider any facts regarding where citizenship existed at the time the cause of action is alleged to have occurred. n2 Furthermore, the court must disregard facts that are evidence of citizenship if they reflect the situation only before or after the filing of the complaint but not at the time of the filing of the complaint. n3 If diversity jurisdiction is established when the complaint is filed,a subsequent change in citizenship rendering the parties nondiverse does not cause a loss of diversity for purposes of federal jurisdiction. n4 In the same way, if the parties were not diverse at the time of the filing of the complaint, a subsequent change in citizenship does not cure the jurisdictional defect. n5

[3] Court's Determination of Domicile

[a] Domicile Determines Citizenship of a State for Diversity Purposes

Once it is determined that an individual is a citizen of the United states, for purposes of diversity jurisdiction, a natural person is considered to be a citizen of the state in which he or she is domiciled. n1 Therefore, in a diversity context, "citizenship" of a state and "domicile" are synonymous terms. n2 In determining a person's domicile, courts have

analyzed the facts in view of the rationale for diversity jurisdiction, that is, protection of nonresidents from the possible prejudice that they might encounter in local courts. n3 Determination of a litigant's state of domicile for purposes of diversity is controlled by federal common law, not by the law of any state. n4 The determination of a person's domicile is a mixed question of law and fact. n5

[b] Domicile Means Actual Residence in State Plus Intent to Remain

A person's domicile is the place where the person has his or her true, fixed home and principal establishment, and to which he or she has the intention of returning whenever absent. n6 Therefore, domicile generally requires two elements: (1) a voluntary physical presence in a state plus (2) an intent to make that state the person's principal home. n7 Domicile therefore has both a physical and a subjective component and is more than an individual's residence, although the two ordinarily coincide. n8

Citizenship is not necessarily lost by protracted absence from one's residence, if the intention to return remains. A mere mental establishment of citizenship, however, without physical presence, is not sufficient to establish domicile and, thus, citizenship. The fact that a person resides in a particular state is not by itself determinative of citizenship for the purpose of federal court jurisdiction, n9 because one may reside in one place but be domiciled in another if the person intends to return to the residence of domicile. n10 One rule that simplifies the process of determination of domicile for a natural person is that a person is deemed to have a domicile at all times, but only one at a time. n11 Thus, for purposes of diversity of citizenship, a citizen has only one domicile, regardless of the number of residences maintained. n12 In determining which of the person's residences is his or her domicile, the court must focus on the intent of the party, which requires an examination of the entire course of a person's conduct. n13 For a discussion of how that one domicile may be changed, see [c], *below*.

A party who has a change in residence involuntarily or by constraint generally retains the prior domicile; n14 domicile is a voluntary status, and, therefore, a forcible change in a person's state of residence does not alter it. A person may not be said to have acquired a domicile of choice in a place if located there by virtue of physical compulsion. Furthermore, a person may not acquire a domicile of choice by any act done under legal compulsion. n15

[c] Change in Domicile

Every person at birth acquires a domicile determined by the domicile of the person on whom that person is legally dependent, and this domicile is referred to as the "domicile of origin." n16 A person's domicile of origin continues until a new one, a "domicile of choice," is acquired. n16.1 For purposes of diversity, there is a presumption in favor of a person's domicile of origin in the absence of a contrary averment. n17 There is a presumption of continuing domicile that applies every time a person relocates. Once a domicile is established in one state, it is presumed to continue in existence, even if the party leaves that state, until the adoption of a new domicile is established. n18 This presumption addresses theproblem of locating an individual who has clearly abandoned his or her present domicile but either has not arrived at a new one or has arrived without formulating the intent to stay. n19

A person may change domiciles only by taking up residence in a different state either with the intention to remain there indefinitely, n20 or at least without any specific intention to live anywhere else. n21 This requirement has also been described as residence in fact, coupled with the purpose to make the place of residence one's home. n22 The intention and the act must concur to effect the change of domicile. n23 Neither the physical presence nor the intention to change domicile, standing alone, is sufficient to effect the change. n24

A person who is not under a legal restraint, who has reached majority and possesses the requisite mental capacity, may change domiciles at will. n25 An adult may change domiciles by his or her own act; a minor or other dependent individual changes domicile by the act of someone on whom that individual is dependent. n26 Furthermore, there is no durational or minimum period of residence that is required to establish domicile. n27 Once a person has met the

requisite elements of physical presence and intent to remain, a new domicile is established immediately. n28

When a person is taken in legal restraint and becomes incarcerated in prison, that occurrence does not change his or her domicile, because domicile is a voluntary status. n28.1

[d] Factors Considered to Determine Domicile

A court must consider the total evidence relevant to several factors to determine a party's domicile. n29 Under this standard, no single factor is conclusive. n30 When a person has made a change in residence, courts generally look to objective indications of intent. n31 The following three factors arise frequently in determination of domicile:

1. Voting registration and voting practices. n32 The place where a person votes carries considerable weight as an indication that the person intends to remain in the location. Several courts have indicated that voter registration raises a presumption of domicile. n33

2. The party's statements of intent, n33.1 including affidavits of intention. n34 A person's own statements concerning his or her intentions are relevant but are given only limited weight if they conflict with other, objective facts that support a finding of a contrary intent. n35

3. Current residence and familial relationships. Although residence alone is not the equivalent of domicile, the place of residence is prima facie evidence of a party's domicile. n36 Some courts have indicated that there is a presumption of domicile on proof of residency. n37 As an indication of intent to remain, courts have considered the nature of a person's residence in a particular state, for example, whether the person owns or rents a residence and the extent of the permanence of the living arrangement. n38 The court may also consider familial relationships such as marriage and whether a person's spouse and children live in the residence. n39

4. Representation by another person. The domicile and citizenship of a fiduciary generally controls that of the beneficiary. n40 The domicile of a minor is generally determined by reference to the domicile of another person. n41 Any change of domicile must therefore be determined by reference to the domicile of that other person or persons. n42

Generally, a minor's domicile is deemed to be that of the minor's parents. n42.1 That domicile continues in effect after majority until the child establishes a newdomicile of choice, which requires a new residence concurrent with the intent to remain there. n43 A minor who is emancipated has the right to select his or her own domicile. n44

The legal representative of the estate of a decedent is deemed to be a citizen only of the same state as the decedent for purposes of diversity. The legal representative of an infant or incompetent is deemed to be a citizen only of the same state as the infant or incompetent. n45 Thus, if a person who has been adjudged incompetent is placed under the care and control of a guardian, the guardian usually has the authority to change the location of the incompetent's domicile if the guardian finds that the change is in the ward's best interests. n46

Other factors given consideration may include the state of issue of the person's driver's license, n47 automobile registration, n48 location of bank accounts; n49 and the payment of taxes. n50 For a further list of factors, see 15 *Moore's Federal Practice, § 102.36* and *§ 102.37* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991)* .

(n3)Footnote 2. *U.S. Const., Amend. XIV.*

(n4)Footnote 3. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828, 109 S. Ct. 2218, 2219, 104 L. Ed. 2d 893 (1989)* ; *Sadat v. Mertes, 615 F.2d 1176, 1180 (7th Cir. 1980)* .

(n5)Footnote 4. For example, a person born in the United States and subject to its jurisdiction is a citizen of the United States, *8 U.S.C. § 1401(a)*, as is a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *8 U.S.C. § 1401(b)*; *see also Squire v. Capoeman, 351 U.S. 1, 76 S. Ct. 611, 614 (1956)* . For a complete list of Unites states Citizenship statutes, see 15 *Moore's Federal Practice, § 102.33* (Matthew Bender 3d ed.).

(n6)Footnote 5. *Hale v. Mastersoft Int'l Pty., Ltd., 93 F. Supp. 2d 1108, 1112 (D. Colo. 2000)* ; *see* [3], *below.*

(n7)Footnote 1. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866, 872 (2004)* .

(n8)Footnote 2. *Duff v. Beaty, 804 F. Supp. 332, 334 (N.D. Ga. 1992)* .

(n9)Footnote 3. Flynn v. Teak Associated Investments #2, Inc., 98 F. Supp. 2d 1081, 1084-1085 (E.D. Mo. 2000) (citizenship of an inactive corporation at time of filing of underlying suit); *Simmons v. Skyway of Ocala, 592 F. Supp. 356, 359 (S.D. Ga. 1984)* .

(n10)Footnote 4. *Lundquist v. Precision Valley Aviation, Inc., 946 F.2d 8, 10 (1st Cir. 1991)* .

(n11)Footnote 5. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866, 872 (2004)* .

(n12)Footnote 1. *Abbott v. United Venture Capital, Inc., 718 F. Supp. 823, 826 (D. Nev. 1988)* .

(n13)Footnote 2. *Linville v. Price, 572 F. Supp. 345, 347 (S.D. W. Va. 1983)* .

(n14)Footnote 3. *Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991)* .

(n15)Footnote 4. *Linville v. Price, 572 F. Supp. 345, 347 (S.D. W. Va. 1983)* .

(n16)Footnote 5. *Valedon Martinez v. Hospital Presbiteriano, 806 F.2d 1128, 1132 (1st Cir. 1986)* .

(n17)Footnote 6. *Wallace v. Healthone, 79 F. Supp. 2d 1230, 1233 (D. Colo. 2000)* (domicile for purposes of diversity jurisdiction is established by physical presence in state coupled with intent to remain there indefinitely).

(n18)Footnote 7. *Hill v. City of Scranton, 411 F.3d 118, 130 (3d Cir. 2005)* .

(n19)Footnote 8. *National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991)* .

(n20)Footnote 9. *Quinn v. McGraw-Hill Cos., 168 F.3d 331, 333-334 (7th Cir. 1999)* .

(n21)Footnote 10. *Stifel v. Hopkins, 477 F.2d 1116, 1120 (6th Cir. 1973)* ; *see Codagnone v. Perrin, 351 F. Supp. 1126, 1129 (D.R.I. 1972)* (domicile was not place where party was residing temporarily when action was filed).

(n22)Footnote 11. *See Katz v. Goodyear Tire and Rubber Co., 737 F.2d 238, 243 (2d Cir. 1984)* .

(n23)Footnote 12. *Boston Safe Deposit & Trust Co. v. Morse, 779 F. Supp. 347, 348 (S.D.N.Y. 1991)* (citing **Moore's Federal Practice**).

(n24)Footnote 13. *National Artists Management Co., Inc. v. Weaving, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991)* ; *see* [d], *below*.

(n25)Footnote 14. *Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973)* .

(n26)Footnote 15. *Shaffer v. Tepper, 127 F. Supp. 892, 894 (E.D. Ky. 1955)* .

(n27)Footnote 16. *Gregg v. Louisiana Power & Light Co., 626 F.2d 1315, 1317 (5th Cir. 1980)* (domicile of origin of child who is born in state in which parents are domiciled is domicile of parents).

(n28)Footnote 16.1. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 448 (5th Cir. 2003)* .

(n29)Footnote 17. *Gregg v. Louisiana Power & Light Co., 626 F.2d 1315, 1317 (5th Cir. 1980)* .

(n30)Footnote 18. *Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990)* ; *Holmes v. Sopuch, 639 F.2d 431, 434 (8th Cir. 1981)* .

(n31)Footnote 19. *White v. All America Cable & Radio, Inc., 642 F. Supp. 69, 72 (D.P.R. 1986)* .

(n32)Footnote 20. *Clyde v. Ludwig Hardware Store, Inc., 815 F. Supp. 688, 690 (S.D.N.Y. 1993)* .

(n33)Footnote 21. *National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991)* .

(n34)Footnote 22. *Wasson v. Northrup Worldwide Aircraft Serv., Inc., 443 F. Supp. 400, 404 (W.D. Tex. 1978)* .

(n35)Footnote 23. *Garcia v. American Heritage Life Ins. Co., 773 F. Supp. 516, 520 (D.P.R. 1991)* .

(n36)Footnote 24. *Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972)* .

(n37)Footnote 25. *Coppedge v. Clinton, 72 F.2d 531, 534 (10th Cir. 1934)* .

(n38)Footnote 26. *Delaware, L. & W. R. Co. v. Petrowsky, 250 F. 554, 558-559 (2d Cir. 1918)* , *cert. denied, 247 U.S. 508 (1918)* .

(n39)Footnote 27. *Bair v. Peck, 738 F. Supp. 1354, 1355 (D. Kan. 1990)* .

(n40)Footnote 28. *White v. All America Cable & Radio, Inc., 642 F. Supp. 69, 72 (D.P.R. 1986)* (no minimum period of physical presence is required; new domicile is established instantaneously with completion of elements of domicile).

(n41)Footnote 28.1. *Smith v. Cummings, 2006 U.S. App. LEXIS 10793, *13-*14 (10th Cir. 2006)* .

(n42)Footnote 29. *Hicks v. Brophy, 841 F. Supp. 466, 467 (D. Conn. 1994)* .

(n43)Footnote 30. *National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991)* .

(n44)Footnote 31. *Bair v. Peck, 738 F. Supp. 1354, 1356 (D. Kan. 1990)* .

(n45)Footnote 32. *Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986)* .

(n46)Footnote 33. *See, e.g., Lundquist v. Precision Valley Aviation, Inc., 946 F.2d 8, 12 (1st Cir. 1991)* (citing **Moore's Federal Practice**); *but see Boston Safe Deposit & Trust Co. v. Morse, 779 F. Supp. 347, 349 (S.D.N.Y. 1991)* (voting considerations are but one factor and not controlling.

(n47)Footnote 33.1. *Smith v. Cummings, 2006 U.S. App. LEXIS 10793, *12-*14 (10th Cir. 2006)*

(n48)Footnote 34. *Stifel v. Hopkins, 477 F.2d 1116, 1122 (6th Cir. 1973)* .

(n49)Footnote 35. *Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 556 (5th Cir. 1985)* .

(n50)Footnote 36. *Walden v. Broce Constr. Co., 357 F.2d 242, 245 (10th Cir. 1966)* .

(n51)Footnote 37. *Bair v. Peck, 738 F. Supp. 1354, 1356 (D. Kan. 1990)* .

(n52)Footnote 38. *National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991)* .

(n53)Footnote 39. *National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991)* .

(n54)Footnote 40. *O'Brien v. AVCO Corp., 425 F.2d 1030, 1032 (2d Cir. 1969)* .

(n55)Footnote 41. *Dunlap v. Buchanan, 741 F.2d 165, 167 (8th Cir. 1984)* .

(n56)Footnote 42. *Delaware, L. & W. R. Co. v. Petrowsky, 250 F. 554, 558-559 (2d Cir. 1918)* , *cert. denied, 247 U.S. 508 (1918)* .

(n57)Footnote 42.1. *Ribas v. Ponce Yacht & Fishing Club, Inc., 315 F. Supp. 2d 156, 160-161 (D.P.R. 2004)* .

(n58)Footnote 43. *Linville v. Price, 572 F. Supp. 345, 347 (S.D. W. Va. 1983)* .

(n59)Footnote 44. *Hall v. Fall, 235 F. Supp. 631, 634 (W.D.N.C. 1964)* .

(n60)Footnote 45. *28 U.S.C. § 1332(c)(2).*

(n61)Footnote 46. *Rishell v. Jane Phillips Episcopal Memorial Med. Ctr., 12 F.3d 171, 173 (10th Cir. 1993)* .

(n62)Footnote 47. *Stifel v. Hopkins, 477 F.2d 1116, 1122 (6th Cir. 1973)* .

(n63)Footnote 48. *Simmons v. Skyway of Ocala, 592 F. Supp. 356, 359 (S.D. Ga. 1984)* .

(n64)Footnote 49. *Garcia v. American Heritage Life Ins. Co., 773 F. Supp. 516, 520 (D.P.R. 1991)* .

(n65)Footnote 50. *Krasnov v. Dinan, 465 F.2d 1298, 1301 (3d Cir. 1972)* .

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART III. DIVERSITY OF CITIZENSHIP JURISDICTION
B. DIVERSITY OF CITIZENSHIP

1-5 Moore's Manual--Federal Practice and Procedure § 5.55

§ 5.55 Determination of Citizenship of Corporationn*

[1] Dual Citizenship of Corporations

For purposes of diversity jurisdiction, a corporation is deemed to be a citizen of both n1 any state by which it has been incorporated and of the state where it has its principal place of business. n2 For complete diversity to exist, therefore, no adversary of a corporation may be a citizen of any state in which the corporation is incorporated or in which it has its principal place of business. n3 The burden of proof to show diversity is on the party invoking federal court jurisdiction. n4 To determine whether a party has adequately presented facts sufficient to establish federal diversity jurisdiction, the court must look to the face of the complaint n5 and ignore mere conclusory allegations of jurisdiction. n6

It is important to note that the diversity statute does *not* give a plaintiff the option of designating a corporation as a citizen of any state of its incorporation or the state where its principal place of business is located. n7 Rather, the statute states that a corporation is a citizen of all such states, and therefore diversity is destroyed if the plaintiff is also a citizen of any of those states. n8 It should also be noted that a corporation is a citizen of every state in which it is incorporated, meaning that it may have more than one state of citizenship on account of incorporation. n9 In determining a corporation's citizenship for purposes of diversity jurisdiction, the citizenship of the shareholder owners is immaterial. n10

The purpose of the diversity statute is to exclude from the federal diversity jurisdiction cases between a citizen of a state and a corporation whose principal place of business is in the same state, even though it may be incorporated elsewhere. In other words, the "principal place of business" requirement was intended to prevent local businesses from avoiding local trials based solely on foreign incorporation and to reserve diversity jurisdiction for those parties that are sufficiently foreign to have a legitimate fear of local prejudice. n11

[2] State Law Determines Corporate Status

Whether an entity must be regarded as a corporation for diversity purposes must be determined by reference to the law of the state in which it is asserted that the entity is incorporated. n1 For example, when a complaint was filed againstasserted corporate principals in federal court on diversity grounds, the court looked to the law of the state of

incorporation for each corporate defendant to determine whether its corporate entity should be disregarded. n2 This rule has been adopted by the courts because a corporation is purely a creation of state law, and therefore subject to the states' regulations and directives. n3 However, because a federally chartered national bank is not incorporated in any particular state, it is deemed a citizen only of its "home state," which is the state where its main office is located. n4

[3] Multiple Incorporation of One Entity

Under Section 1332(c)(1), a corporation is a citizen of any state by which it has been incorporated. n1 This has been interpreted as meaning that a corporation that is incorporated in more than one state is a citizen of every state in which it has been incorporated. n2 The primary purpose of this interpretation is to effectuate the congressional intent to restrict rather than expand diversity jurisdiction of the federal courts. n3

Under a rule that expands diversity jurisdiction, however, the courts have held that involuntary incorporation is disregarded for diversity purposes. Involuntary incorporation occurs when a state compels a corporation incorporated in another state (known as a foreign corporation) to incorporate in the new state as a condition on the right to do business there. However, for diversity purposes, such involuntary incorporation under state law is not considered as actual incorporation. This rule is based on a constitutional limitation on the states that prohibits their destruction of federal court jurisdiction if the Constitution and the Congress have conferred the existence of jurisdiction. n4

[4] Court's Determination of Corporation's Principal Place of Business

In its determination of whether diversity of citizenship exists, the court must make its own independent identification of the "principal place of business" of a corporation; the determination is not controlled by any designation the corporation may have made itself. n1 If the matter is in dispute, the burden of proving a corporation's principal place of business at the time the claim for relief is filed is on the party asserting the existence of diversity jurisdiction. n2

The Supreme Court has adopted the "nerve center" test as the proper method for a court to identify a corporation's "principal place of business;" the court adopted this rule after careful consideration of various tests that circuits had used previously. n3

Under the Supreme Court's test to determine a corporation's "principal place of business," the court should determine the "nerve center," which is the place where the corporation's directors and officers actually direct, control, and coordinate the corporation's activities. In practice, the principal place of business is normally the place where the corporation maintains its headquarters, provided that the headquarters is the actual center of direction, control, and coordination of the corporation, and not merely an office where the corporation holds its board meetings. n4

[5] Citizenship of Alien Corporations

The rule for corporate state citizenship set forth in Section 1332(c) applies to both domestic and "alien" corporations, that is, corporations that are incorporated under the laws of a foreign country. Thus, if a corporation has its principal place of business in one of the United States and is incorporated under the laws of a foreign state has dual citizenship for purposes of diversity jurisdiction. It is both a citizen of a State and a citizen of an foreign state. n1 Diversity does not exist within the meaning of Sections 1332(a)(2) and (a)(3) when on both sides of the dispute the parties are all foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens. n1.1 An alien corporation's worldwide principal place of business and not merely its principal place of business within the United States, is controlling. Therefore, if the alien corporation is merely doing business in the United States, the alien corporation is subject to diversity of citizenship jurisdiction anywhere the opposition's citizenship is located. n2

It should also be noted that the discussion in the preceding paragraph applies to alien corporations. By contrast, when the corporation is a domestic UnitedStates corporation (that is, incorporated in the United States) but happens to have a

foreign principal place and a principal place of business in the United states, the corporation, for purposes of diversity analysis, is a citizen of the state of its incorporation and of the state where its domestic principal place of business is located. At least one court has held that when a United States corporation is involved, the contacts that a corporation has with foreign countries are excluded from the statutory definition of citizenship and, therefore, are irrelevant in determining the citizenship of the corporation. n3 Therefore, if a corporation incorporated in the United States has its principal place of business abroad, it is solely a citizen of its state of incorporation for diversity purposes. n4

[6] Citizenship Considerations Regarding Particular Corporate Status

[a] Inactive Corporation

If a corporation is inactive or defunct, the circuits take several approaches to determine its citizenship. Some circuits determine citizenship to be only that of the state of incorporation, reasoning that the corporation no longer has a principal place of business. n1 On the other hand some courts have held that an inactive corporation is a citizen of both the state of incorporation and the location of the corporation's last place of business activity. n2 At least one recent case has concluded that it is the final principal place of business, and not state of incorporation, that is the corporation's state of citizenship for diversity purposes. n3 Finally, one circuit has adopted the approach that, to determine the diversity citizenship of an inactive corporation, the court must analyze the facts and circumstances of each case, as of the date that the action was commenced, to ascertain whether a corporation's business activity was sufficient to make it a citizen of a state for diversity jurisdiction purposes. n4 For a complete discussion of the various approaches used by the different circuits, see 15 *Moore's Federal Practice, § 102.56[3]* (Matthew Bender 3d ed.).

If a corporation that has failed to maintain good standing in the state of its incorporation, the corporation remains a citizen of that state, provided that the state has not revoked its corporate charter; this rule stems from the rationale that the language of the diversity statute provides that a corporation shall be deemed a citizen of any state by which it "has been incorporated," and not where it "is incorporated." n5

[b] Nonprofit Corporation

The citizenship of a nonprofit corporation depends on the nature of the allegations regarding who has been wronged or who has committed the wrong. For example, if a nonprofit corporation is the plaintiff and it is alleging a wrong committed against the corporation as an entity (rather than against the shareholders or the members directly), the general rule is that the entity must be regarded as a corporation for diversity purposes. If the wrong is to the members directly (rather than merely to the members as a trickle-down effect of the harm to the corporation), the members of the corporation must be regarded as real parties in interest and their individual citizenships must be considered for diversity purposes. n6

[c] Public Corporation

When created by state law, a public corporation is considered to be a citizen of the state that created it. n7 On the other hand, a federally chartered corporation is not subject to diversity jurisdiction if the United States owns more than half of the stock in the corporation; such a corporation is subject to federal question jurisdiction. n8 Even if the United States owns less than half of its capital stock, a corporation that is organized to conduct business or activities in more than one state is deemed to have only national citizenship; thus, diversity jurisdiction is generally precluded. n9 There are two exceptions to this general bar of diversity. First, a federal court may exercise diversity jurisdiction if the corporation's activities are "localized" in a particular state, which means that the corporation's activities are confined to one particular state; n10 only in such a case is the corporation considered a citizen of the state in which the activities occur. n11

[d] Parent and Subsidiary Corporations

For purposes of diversity jurisdiction, a subsidiary generally must be considered as a separate corporation with separate

citizenship; thus, it does not adoptthe citizenship of its parent corporation. n12 In a suit involving a subsidiary corporation, the court must consider the states of incorporation and principal place of business of the subsidiary entity, rather than those of the parent corporation. n13 Provided that the corporate separation between a parent and subsidiary is actual and carefully maintained, the separate place of business of the subsidiary is recognized in determining jurisdiction, even if the parent corporation maintains a significant degree of control through ownership or otherwise. On the other hand, the subsidiary is considered the alter ego of the parent, and therefore has the same citizenship as the parent if: the parent's control over the subsidiary is so complete that the subsidiary essentially had no separate business supervision or existence of its own, or if the parent's exercise of control over the subsidiary amounted to fraud or an illegal act. n14

Thus, the question of separation is determined by the facts of each case. n14.1 To determine whether the parent and subsidiary are indeed separate, the court should examine factors such as whether: the subsidiary has adequate capitalization and observed corporate formalities; the parent has held itself out as personally liable for certain subsidiary obligations; the parent has diverted funds or other property of the subsidiary for the parent's use; and there is an absence of corporate records. n14.2

In such a case, the court will view the separation between the two corporations as merely a formality and treat the citizenship of the parent corporation and the subsidiary as the same. n15 The alter ego doctrine, however, may be used to increase the number of states of citizenship for the purpose of reducing the reach of diversity jurisdiction but may not be used to extend jurisdiction. n16

[e] Effect of Merger of Corporations

Generally, when separate corporations merge, they lose their distinct legal identities following the merger. After the merger, the citizenship of the surviving corporation determines diversity. n17 It should also be noted that merger for diversity purposes may be de facto as well as formal. A de facto merger occurs when the statutory conditions of a de facto incorporation have been met. However, one corporation's acquisition of another corporation's principal assets does not per se constitute a complete intermingling of the two entities' affairs for purposes of attributing the citizenship of the selling corporation to that of the purchasing one. n18 Furthermore, the citizenship of the surviving corporation does not matter for cases already pending on the date when the merger occurred. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness Entities

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.50 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Ramirez-Suarez v. Foot Locker, Inc., 609 F. Supp. 2d 181, 183 (D.P.R. 2009)* .

(n3)Footnote 2. *28 U.S.C. § 1332(c)(1)*; *Diaz-Rodriguez v. Pep Boys Corp., 410 F.3d 56, 58 (1st Cir. 2005)* ; *see* [4], *below* (principal place of business); *see also* § 55.57 (citizenship of certain insurers).

(n4)Footnote 3. *TIG Ins. Co. v. Reliable Research Co., 334 F.3d 630, 634 (7th Cir. 2003)* .

(n5)Footnote 4. *Roche v. Lincoln Prop. Co., 373 F.3d 610, 616 (4th Cir. 2004)* .

(n6)Footnote 5. *D-Beam, Ltd. P'ship v. Roller Derby Skates, Inc., 366 F.3d 972, 974 n.2 (9th Cir. 2004)* .

(n7)Footnote 6. *Roche v. Lincoln Prop. Co., 373 F.3d 610, 617 (4th Cir. 2004)* .

(n8)Footnote 7. *Johnson v. Advance Am., 549 F.3d 932, 935 (4th Cir. 2008)* (statute's use of the conjunctive gives multiple, not alternative, citizenship to corporation whose principal place of business is in state different from states where it is incorporated).

(n9)Footnote 8. *See Atlantic Mut. Ins. Co. v. Balfour MacLaine Int'l, 85 F.3d 68 (2d Cir. 1996)* .

(n10)Footnote 9. *Industrial Tectonics v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990)* .

(n11)Footnote 10. *CCC Info. Servs. v. American Salvage Pool Ass'n, 230 F.3d 342, 346 (7th Cir. 2000)* .

(n12)Footnote 11. *Bel-Bel Int'l Corp. v. Community Bank, 162 F.3d 1101, 1106-1107 (11th Cir. 1998)* (when there are substantial indications of foreign status, corporation is not type of organization that Congress intended to exclude from federal court).

(n13)Footnote 1. *Mutual Service Cas. Ins. Co. v. Country Life Ins., 859 F.2d 548, 550 (7th Cir. 1988)* ; *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, 710 F.2d 87, 89 (2d Cir. 1983)* .

(n14)Footnote 2. *Autrey v. 22 Texas Services Inc. 79 F. Supp. 2d 735, 740 (S.D. Tex. 2000)* .

(n15)Footnote 3. *Brocki v. American Express Co., 279 F.2d 785, 786 (6th Cir. 1960)* , *cert. denied, 364 U.S. 871 (1960)* .

(n16)Footnote 4. *Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 307, 318, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)* .

(n17)Footnote 1. *28 U.S.C. § 1332(c)(1).*

(n18)Footnote 2. *Rudisill v. Southern Ry. Co., 424 F. Supp. 1102, 1104 (W.D.N.C. 1976)* , *aff'd on other grounds, 548 F.2d 488 (4th Cir. 1977)* (citing **Moore's Federal Practice**).

(n19)Footnote 3. *V-1 Oil Co. v. CC & T, Inc., 658 F. Supp. 886, 888-889 (D. Utah 1987)* .

(n20)Footnote 4. *Rudisill v. Southern Ry. Co., 424 F. Supp. 1102, 1104 (W.D.N.C. 1976)* , *aff'd on other grounds, 548 F.2d 488 (4th Cir. 1977)* .

(n21)Footnote 1. *Media Duplication Services v. HDG Software, 928 F.2d 1228, 1236 (1st Cir. 1991)* .

(n22)Footnote 2. *Hertz Corp. v. Friend, ___ U.S. ___, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1044 (2010)* ; *Sweet Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242, 1248 (11th Cir. 2005)* .

(n23)Footnote 3. *Hertz Corp. v. Friend, ___ U.S. ___, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1041 (2010)* (citing **Moore's Federal Practice** for proposition that various tests courts of appeals have employed tend to overlap and are described in language that is imprecise).

(n24)Footnote 4. *Hertz Corp. v. Friend, ___ U.S. ___, ___, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1043-1044 (2010)* .

(n25)Footnote 1. *Slavchev v. Royal Caribbean Cruises, Ltd., 559 F.3d 251, 254 (4th Cir. 2009)* (claim by alien (Bulgarian) against corporation with the dual citizenship of Florida and a foreign state (Liberia)).

(n26)Footnote 1.1. *Oteng v. Golden Star Res., Ltd., 615 F. Supp. 2d 1228, 1236 (D. Colo. 2009)* .

(n27)Footnote 2. *Bailey v. Grand Trunk Lines New England, 805 F.2d 1097, 1100 (2d Cir. 1986)* , *cert. denied, 484 U.S. 826 (1986)* .

(n28)Footnote 3. *In re Tobacco/Governmental Health Care Costs Litigation, 100 F. Supp. 2d 31, 38-39 (D.D.C. 2000)* (when corporation had one principal place of business in Great Britain, second principal place of business in Kentucky, and was incorporated in Delaware, corporation was citizen of Kentucky and Delaware for purposes of diversity analysis).

(n29)Footnote 4. *Torres v. Southern Peru Copper Corp., 113 F.3d 540, 543-544 (5th Cir. 1997)* .

(n30)Footnote 1. *Midlantic Nat'l Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995)* .

(n31)Footnote 2. *Wm. Passalacqua Builders, Inc., v. Resnick Developers S., Inc., 933 F.2d 131, 141 (2d Cir. 1991)* .

(n32)Footnote 3. *Flynn v. Teak Associated Investments #2, Inc., 98 F. Supp. 2d 1081, 1084-1085 (E.D. Mo. 2000)* .

(n33)Footnote 4. *Athena Automotive, Inc. v. DiGregorio, 166 F.3d 288, 290-292 (4th Cir. 1999)* .

(n34)Footnote 5. *Smith v. Arundel Coop., Inc., 660 F. Supp. 912, 913 (D.D.C. 1987)* .

(n35)Footnote 6. *National Asso. of Realtors v. National Real Estate Asso., 894 F.2d 937, 940 (7th Cir. 1990)* ; *Wallace v. Healthone, 79 F. Supp. 2d 1230, 1230 (D. Colo. 2000)* (indicating that nonprofit defendant has citizenship based on entity when entity is responsible for wrong).

(n36)Footnote 7. *John & Sal's Auto. Service v. Sinclair Refining Co., 165 F. Supp. 518, 522 (S.D.N.Y. 1958)* .

(n37)Footnote 8. *See 28 U.S.C. § 1349*.

(n38)Footnote 9. *Burton v. United States Olympic Comm., 574 F. Supp. 517, 522 (C.D. Cal. 1983)* .

(n39)Footnote 10. *Engelmeyer v. Production Credit Asso. of Midlands, 652 F. Supp. 1235, 1236 (D.S.D. 1987)* .

(n40)Footnote 11. *Feuchtwanger Corp. v. Lake Hiawatha Fed. Credit Union, 272 F.2d 453 (3d Cir. 1959)* .

(n41)Footnote 12. *Morales-Tirado v. Hilton Int'l Co., 783 F. Supp. 722, 723 (D.P.R. 1992)* .

(n42)Footnote 13. *Topp v. CompAir, Inc., 814 F.2d 830, 835 (1st Cir. 1987)* (subsidiary corporation has its own principal place of business).

(n43)Footnote 14. *Corrigan v. U.S. Steel Corp., 478 F.3d 718, 724 (6th Cir. 2007)* .

(n44)Footnote 14.1. *See Estate of Thomson v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008)* ; *Shell Rocky Mt. Prod., LLC v. Ultra Res., Inc., 415 F.3d 1158, 1163 (10th Cir. 2005)* .

(n45)Footnote 14.2. *Corrigan v. U.S. Steel Corp., 478 F.3d 718, 724 (6th Cir. 2007)* .

(n46)Footnote 15. *Danjaq, S.A. v. Pathe Communications Corp., 979 F.2d 772, 775 (9th Cir. 1992)* .

(n47)Footnote 16. *Kuehne & Nagel (AG & Co) v. Geosource, Inc., 874 F.2d 283, 290-291 (5th Cir. 1989)* .

(n48)Footnote 17. *Hoefferle Truck Sales v. Divco-Wayne, 523 F.2d 543, 548 (7th Cir. 1975)* .

(n49)Footnote 18. *John Mohr & Sons v. Apex Terminal Warehouses, Inc., 422 F.2d 638, 642 (7th Cir. 1970)* .

(n50)Footnote 19. *Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 409 (7th Cir. 2000)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.56

§ 5.56 Determination of Citizenship of Entities Other Than Corporationsn*

[1] Unincorporated Associations

An unincorporated association carries the citizenship of each of its members. n1 This results because the Supreme Court has consistently held that corporate citizenship in the diversity statute applies only to incorporated entities. n2 Consequently, all other unincorporated entities are treated by analogy in the same manner as partnerships, n3 and the citizenship of each entity is based on the citizenship of each of its members. n4 Because of this rule, it is unlikely that a nationally organized association will be a party to a diversity jurisdiction action because it is likely that some members will share the same citizenship with a person on the opposite side of the action. n5

[2] Partnerships and Joint Ventures

A general partnership as an entity is not a considered a "citizen" of any state within the meaning of the diversity statute because there is no statutory authority that expressly provides diversity citizenship for partnerships as Section 1332(c) does for corporations. n1 Therefore, a partnership carries the citizenship of each of its members. n1.1

Similarly, the rule applies to limited partnerships. In this regard, the Supreme Court has held that the citizenship of all partners in a limited partnership, rather than only the citizenship of the general partners or the state where the partnership is created, governs the determination of citizenship for jurisdictional purposes. n2 The rule also applies with regard to the citizenship of a joint venture. Thus, a joint venture has the citizenship ofeach member regardless of whether the member has an interest in the suit. n3 Finally, the rule has also been applied to complex partnerships as well, even when there are multiple tiers of partnerships, n4 and to limited liability partnerships. n5 A person's status as a partner or joint venturer is determined under the law of the state that governs the partnership or joint venture agreement. n6

[3] Limited Liability Companies

As is the case with a partnership, n1 the citizenship for diversity purposes of a limited liability company is determined by the citizenship of all of its members, rather than from the citizenship of the company as a entity. n1.1 In applying this

rule, courts have analogized to limited partnerships and limited liability partnerships n1.2 and relied on the principle that members of associations establish citizenship for diversity purposes unless Congress has provided to the contrary. n2 Thus, diversity exits in a suit involving a limited liability company when none of the members of the company has the same citizenship as any party aligned on the opposing side. n3

[4] State and Agency of State

A state of the United States is not considered a "citizen" for the purpose of determining diversity jurisdiction; nor is a state agency, when acting as an alter ego of the state. A state agency is acting as the alter ego of the state when the agency is suing or being sued under statute and where the interest or rights of the state are directly affected; such an action is in fact an action against the state. n0.1 For example, the Commissioner of Labor of North Carolina, as the executive officer of the North Carolina Department of Labor, was in fact the alter ego of the state when representing the state's interest in a lawsuit. n1 If a state agency is not acting as the alter ego of the state, the agency is considered a citizen of that state for diversity purposes. n2 To determine alter ego status, courts primarily consider two factors: (1) the extent of control exercised over the entity by the state; n2.1 and (2) whether the entity has a role that is completely defined by the state, that is, whether the agency is acting in its capacity as agent for the state. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness Entities

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.57 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Indiana Gas Co., Inc. v. Home Ins. Co., 141 F.3d 314, 316 (7th Cir. 1998)* (unincorporated entities treated as citizens of every jurisdiction in which any member is citizen).

(n3)Footnote 2. *Carden v. Arkoma Assoc., 494 U.S. 185, 190, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* .

(n4)Footnote 3. *Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 182 (3d Cir. 2008)* (citing **Moore's Federal Practice**); *see* [2], *below*.

(n5)Footnote 4. *Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1079-1080 (5th Cir. 2008)* .

(n6)Footnote 5. *See Meyerson v. Harrah's E. Chi. Casino, 299 F.3d 616, 617 (7th Cir. 2002)* ; *Aetna Casualty & Sur. Co. v. Iso-Tex, Inc., 75 F.3d 216, 218 (5th Cir. 1996)* .

(n7)Footnote 1. *Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 182 (3d Cir. 2008)* (citing **Moore's Federal Practice**).

(n8)Footnote 1.1. *See Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 585-586, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* .

(n9)Footnote 2. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 585-586, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* ; *Carden v. Arkoma Assoc., 494 U.S. 185, 197, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* .

(n10)Footnote 3. *Schiavone Constr. Co. v. City of New York, 99 F.3d 546, 548 (2d Cir. 1996)* .

(n11)Footnote 4. *Cerberus Partners, L.P. v. Gadsby & Hannah, 976 F. Supp. 119, 121-123 (D.R.I. 1997)* (citizenship determined by all partners, including partners of other partners in multi-tiered structure).

(n12)Footnote 5. *Mudge Rose Guthrie Alexander & Ferdon v. Pickett, 11 F. Supp. 2d 449, 451-452 (S.D.N.Y. 1998)* (for diversity purposes, LLP is citizen of every state of which any partners are citizens; characterization of LLP is federal question).

(n13)Footnote 6. *International Paper Co. v. Denkmann Assocs., 116 F.3d 134, 136-137 (5th Cir. 1997)* .

(n14)Footnote 1. *See* [2], *above*.

(n15)Footnote 1.1. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C., 374 F.3d 1020, 1022 (11th Cir. 2004)* (as in cases of limited partnership, limited liability company is citizen of each state of which member of limited liability company is citizen).

(n16)Footnote 1.2. *Johnson-Brown v. 2200 M St. LLC, 257 F. Supp. 2d 175, 178 (D.D.C. 2003)* .

(n17)Footnote 2. *Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998)* (citizenship of Wisconsin LLC is determined by citizenship of its members).

(n18)Footnote 3. *Handelsman v. Bedford Village Associates Limited Partnership, 213 F.3d 48, 50 (2d Cir. 2000)* ; *South Park Associates, L.L.C. v. Renzulli, 94 F. Supp. 2d 460, 461 (S.D.N.Y. 2000)* .

(n19)Footnote 0.1. *Melder v. Allstate Corp., 404 F.3d 328, 335-336 (5th Cir. 2005)* .

(n20)Footnote 1. *Commissioner of Labor of North Carolina v. Dillard's, Inc., 83 F. Supp. 2d 622, 626-627 (M.D.N.C. 2000)* .

(n21)Footnote 2. *Moor v. County of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)* (agency or political subdivision is citizen of state when not alter ego of state).

(n22)Footnote 2.1. *Melder v. Allstate Corp., 404 F.3d 328, 335-336 (5th Cir. 2005)* (if state agency has its own generally recognized corporate powers, such as hiring and firing powers, agency is not alter ego of state and is citizen of state).

(n23)Footnote 3. *JMB Group Trust v. Pennsylvania Mun. Retirement Sys., 986 F. Supp. 534, 537-538 (N.D. Ill. 1997)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.57

§ 5.57 Determination of Citizenship In Direct Action Against Insurern*

In any direct action against an insurer who has issued a policy or contract of liability insurance and in which the insured is not joined as a party-defendant, the insurer is deemed to be a citizen of the following states: (1) the state of which the insured is a citizen; (2) any state by which the insurer has been incorporated; and (3) the state where the insurer has its principal place of business. n1 Under this statute, a "direct action" is one in which a party who suffered injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining a judgment against the legally responsible party. Unless the cause of action is one that could be brought against the insured, the action is not a direct action for the purpose of the statute. n2

By its terms, the statute applies only to an action against an insurer, that is, when the insurer is a defendant. Thus, it does not apply to a suit initiated by an insurer, even though the suit is initiated from what appears to be a defensive posture. n3 Additionally, it does not apply to a suit by an insured against his or her own insurer, whether the action is based on denial of coverage n4 or bad-faith insurance practices. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewInsurance LawBusiness InsuranceMarine InsuranceDirect Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.58 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1332(c)(1)*; *see Searles v. Cincinnati Ins. Co., 998 F.2d 728, 728-729 (9th Cir. 1993)* ; *Prendergast v. Alliance General Ins. Co., 921 F. Supp. 653, 655 (E.D. Mo. 1996)* .

(n3)Footnote 2. *McGlinchey v. Hartford Accident & Indem. Co., 866 F.2d 651, 653 (3d Cir. 1989)* .

(n4)Footnote 3. *Northbrook Nat'l Ins. Co. v. Brewer, 493 U.S. 6, 9-10, 110 S. Ct. 297, 107 L. Ed. 2d 223 (1989)* ;

Prendergast v. Alliance General Ins. Co., 921 F. Supp. 653, 655 (E.D. Mo. 1996) .

(n5)Footnote 4. *Bowers v. Continental Ins. Co., 753 F.2d 1574, 1576 (11th Cir. 1985)* , *cert. denied, 473 U.S. 906 (1985)* ; *Bodine's, Inc. v. Federal Ins. Co., 601 F. Supp. 47, 50 (N.D. Ill. 1984)* .

(n6)Footnote 5. *Searles v. Cincinnati Ins. Co., 998 F.2d 728, 728-729 (9th Cir. 1993)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.58

§ 5.58 Citizenship of Native American Tribesn*

Generally, courts have determined that a Native American tribe is a stateless personfor diversity purposes, and that because it is a citizen of no state, it does not fall within coverage of the diversity statute. n1 In other words, the presence of a Native American tribe on either side of a legal action generally destroys diversity. n1.1 However, tribes are not "stateless persons" if they have been incorporated, which they may do under the Indian Reorganization Act n2 or their own tribal laws. It has been held that if incorporated, then the rules governing the citizenship of corporations apply to the tribe. n3 Thus, for purposes of diversity jurisdiction, a Native American corporation is a citizen of the state in whose borders the reservation is located. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividualsGovernmentsNative AmericansAuthority & JurisdictionGovernmentsNative AmericansIndian Reorganization Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.56[10] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Victor v. Grand Casino-Coushatta, 359 F.3d 782, 784-785 (5th Cir. 2004)* ; *Akins v. Penobscot Nation, 130 F.3d 482, 485 (1st Cir. 1997)* .

(n3)Footnote 1.1. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829-830, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (stateless person is "jurisdictional spoiler").

(n4)Footnote 2. *25 U.S.C. § 477*; *see Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993)* .

(n5)Footnote 3. *Hatch v. Viejas Group Baron Long Capitan Grande Band of Digueno Mission Indians of the*

Viejas Group Reservation, California, 83 F. Supp. 2d 1155, 1156-1157 (S.D. Cal. 2000) .

(n6)Footnote 4. *See, e.g., Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1226 (9th Cir. 1989)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.59

§ 5.59 Diversity Jurisdiction Involving Aliensn*

[1] Nature of Alienage Jurisdiction

"Alienage diversity jurisdiction" is the term that the courts use to refer to diversity jurisdiction involving parties that are either aliens, foreign countries, or citizens or subjects of foreign countries. n1 The federal diversity jurisdiction statute provides the following three types of alienage jurisdiction:

1. Federal district courts have original jurisdiction over all civil actions in which the minimum amount in controversy requirement is met, as discussed in PART C, n2 and the action is between citizens of a state and citizens or subjects of a foreign state. n3

2. Federal district courts have original jurisdiction over all civil actions in which the amount in controversy requirement is met, the action is between citizens of different states, and citizens or subjects of a foreign state are additional parties. n3.1 This provision establishes a requirement of complete diversity between United States citizens, but permits aliens on either or both sides of the dispute as additional parties. However, case law is divided on whether diversity still exists if there is a citizen on only one side of the lawsuit but aliens on both sides. n4 It should also be noted that the alienage diversity statute provides that when an "alien" has been admitted to the United States for permanent residence, that alien must be deemed for diversity purposes a citizen of the state in which the alien is domiciled. n5

3. Federal district courts have diversity jurisdiction over suits between a foreign state, as plaintiff, and citizens of a state or different states. n6

Alienage jurisdiction is properly considered only as a type of diversity jurisdiction and should not be confused with jurisdiction over an action against a foreign state under the Foreign Sovereign Immunities Act n7 or an action by an alien under the alien tort statute. A court has authority to hear such cases pursuant to federal question jurisdiction, because these actions are within the constitutional "arising under federal law" clause, as discussed in PART II. n8

The purpose of alienage jurisdiction is to provide the federal courts with a form of protective jurisdiction over matters

implicating international relations, in which the national interest is paramount. n9 In other words, alienage jurisdiction was intended to rectify the failure of individual states to protect foreign citizens under international treaties and to avoid controversies with other sovereigns that might result from the failure to treat the legal disputes of aliens on a federal level. n10

[2] Parties Subject to Alienage Jurisdiction

The definition of a "foreign state" for purposes of alienage jurisdiction depends on the context in which it is used in the statutory scheme. In the context of the phrase "citizens or subjects of a foreign state" in Subections 1332(a)(2) and (a)(3), n1 a "foreign state" is any foreign country that the United States formally recognizes, and includes subentities of a formally recognized country, such as colonies and territories, that depend on the formally recognized country for the force of the subentity's laws. For example, the citizens or subjects of the British Virgin Islands are citizens or subjects of a foreign state for purposes of alienage jurisdiction because the British Virgin Islands is a subentity of the United Kingdom, which the United States recognizes. In other words, the United Kingdom exercises pervasive authority over the territory of theBritish Virgin Islands. n2 The "citizen or subjects of a foreign state" alienage rules apply equally to natural persons and juridic persons. The United States Supreme Court has held that because the United Kingdom retains and exercises authority over the British Virgin Islands, a corporation organized in the British Virgin Islands is a citizen or subject of the United Kingdom under Subsection 1332(a) for alienage diversity jurisdiction purposes. n3

Under Subsection 1332(a)(4), a "foreign state" that may be a plaintiff under alienage jurisdiction in a suit against one or more citizens of one or more states of the United States is one defined by a statutory provision that is part of the Foreign Sovereign Immunities Act. n4 Thus, a foreign state that may initiate suit as a plaintiff is the foreign country itself and any political subdivision of the foreign country or any agency or instrumentality of the foreign country. n5 If the majority ownership of any entity is owned by a foreign state, the entity itself is deemed a "foreign state" under Subsection 1332(a)(4) for purposes of diversity jurisdiction, and therefore is not considered a "citizen" or "subject" of a foreign state for diversity purposes of Subections 1332(a)(2) and 1332(a)(3). n6

If a person is a dual citizen of the United States and a foreign country, the person is not considered a citizen of the foreign state for diversity purposes; in other words, only the United States nationality of a dual national is recognized. Therefore, if the person with dual citizenship is living abroad, the person is considered a stateless person, and therefore the person would destroy diversity on either side of a legal action. n7 However, if a person is a citizen only of a foreign country, the fact that the person may be residing in the United States is immaterial, and the person qualifies for alienage jurisdiction, unless the alien has permanent resident status under United States immigration law. n8 An alien admitted in the United States with permanent residence is deemed a citizen of the state in the United States in which the alien is domiciled, rather than any foreign state. n9

Alienage jurisdictional analysis under the laws of the United States is not ultimately governed by the law of the foreign country, whatever that may be. While it is true that every independent nation has the inherent right to determine for itself what classes of persons shall be entitled to its citizenship, a federal court's jurisdictional concern under *28 U.S.C. § 1332(a)(2)* is within the meaning of "citizen" and "subject" as those terms are used in the alienage jurisdiction statute to further the purposes of alienage jurisdiction, as discussed in [1] *above*. n10

[3] Diversity Citizenship of Permanent Resident Aliens

An alien admitted to the United States for permanent residence is deemed a "citizen," for diversity jurisdiction purposes, of the state in which the alien is domiciled. n1 This provision was added to the diversity statute in 1988 in order to eliminate diversity jurisdiction between United States citizens and permanent resident aliens of the same state, which otherwise existed under Section 1332(a)(2). n2 Under this provision, it is possible that an individual might be a citizen or subject of a foreign state, but nevertheless be deemed a "citizen" for diversity jurisdictional purposes of the state in which the permanent alien is domiciled. n3

An alien litigant's official immigration status determines whether the alien is admitted to the United States for permanent residence. Therefore, the permanent resident alien provision applies only to aliens who have received permission from the INS to remain permanently in this country. n4 It should be noted that because Article III, Section 2, of the United States Constitution extends the judicial power of the United States only to cases between a state, or the citizens of a state, and foreign states, citizens, or subjects, there is no constitutional authority for jurisdiction over suits wholly between aliens. Consequently, the consensus is that any interpretation of the permanent resident alien amendment that would provide diversity jurisdiction for a case solely involving aliens would be unconstitutional, although the Supreme Court has not ruled on the issue. n5

[4] Alien on Each Side of Controversy May Destroy Complete Diversity

When a suit is filed in federal court by alien plaintiffs against alien defendants, the complete diversity requirement is not satisfied, and a federal court generally may nothear the case based on diversity jurisdiction. n1 A statutory exception to this rule exists when there are diverse United States citizens on each side of the suit. n2 Thus, diversity jurisdiction does not exist when an alien plaintiff sues an alien defendant and a citizen of a state. n3 However, diversity may exist when there are diverse United States citizens on each side, and the United States citizens need not be the principal adversaries in the suit, because when diverse United States citizens have a legitimate dispute in a case, they may create diversity jurisdiction in their own right, even when the principal suit involves one or more alien parties. n4 However, diversity may be affected if one or more of the aliens have been admitted to permanent residency in the United States. In such a situation, the permanent resident is deemed a citizen of the state in which the alien is domiciled, n5 and then the citizens and the permanent resident aliens on one side of the action must each have complete diversity from those on the other side of the action. n6 In other words, depending on whether he or she has official immigration status as an admitted permanent resident, each alien is categorized as either a "citizen of a state" or as a "citizen or subject of a foreign state," and then the four rules of Section 1332(a) are applied. n7

[5] Pleading Alienage Jurisdiction

To plead alienage jurisdiction, the party invoking jurisdiction need only allege that the parties are citizens or subjects of a foreign country. n1 It is not necessary to allege specifically that those parties are aliens. n2 Furthermore, the party alleging federal jurisdiction is not required to allege that a defendant who is a foreign citizen is not a permanent resident of any state. Thus, the court may assume that the alien is domiciled outside United States and require a party challenging jurisdiction to allege that the foreign party is a permanent resident alien if the party asserts that such status would destroy diversity. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionCitizenshipCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionJurisdictional Requirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.70 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 91-92, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* .

(n3)Footnote 2. *See § 5.70* et seq.

(n4)Footnote 3. *28 U.S.C. § 1332(a)(2).*

(n5)Footnote 3.1. *28 U.S.C. § 1332(a)(3).*

(n6)Footnote 4. *See Gschwind v. Cessna Aircraft Co., 232 F.3d 1342, 1345-1348 (10th Cir. 2000)* , *cert. denied, 533 U.S. 915 (2001)* (although some courts have held that Section 1332(a)(3) requires the presence of at least one United States citizen on each side of case before federal court may exercise jurisdiction over action between foreign citizens, it is arguable that interpretation is incorrect).

(n7)Footnote 5. *28 U.S.C. § 1332(a)*; *see Karazanos v. Madison Two Assocs., 147 F.3d 624, 626-628 (7th Cir. 1998)* .

(n8)Footnote 6. *28 U.S.C. § 1332(a)(4).*

(n9)Footnote 7. *28 U.S.C. § 1330.*

(n10)Footnote 8. *See § 5.10* et seq.

(n11)Footnote 9. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94-95, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* (proclivity of the state courts to disrupt international relations and discourage foreign investment led directly to alienage jurisdiction).

(n12)Footnote 10. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 95, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* ; *Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1242 (7th Cir. 1990)* , *cert. denied, 499 U.S. 947 (1991)* .

(n13)Footnote 1. *See 28 U.S.C. § 1332(a)(2), (3).*

(n14)Footnote 2. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 92-93, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* (corporation organized under laws of British Virgin Islands was "citizen or subject of foreign state" for purposes of alienage diversity jurisdiction under *28 U.S.C. § 1332(a)(2)*; rejecting line of cases that have held that subentities not formally recognized by United States were not "foreign states").

(n15)Footnote 3. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 100, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* .

(n16)Footnote 4. *28 U.S.C. § 1332(a)(4)*; *see 28 U.S.C. § 1603.*

(n17)Footnote 5. *28 U.S.C. § 1603(a), (b).*

(n18)Footnote 6. *Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1542 n.11 (11th Cir. 1993)* .

(n19)Footnote 7. *Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 182 (3d Cir. 2008)* (this rule is based on requirement that citizenship of a state for diversity requires both United States nationality citizenship and domicile in a state).

(n20)Footnote 8. *See* [3], *below.*

(n21)Footnote 9. *28 U.S.C. § 1332(a)*; *see* [3], *below.*

(n22)Footnote 10. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 99-100, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002)* (merely because members of a particular class enjoy fewer rights than others do under the authority of foreign sovereign does not necessarily disqualify them as "citizens or subjects" for purposes of

United States federal alienage jurisdiction law; many societies afford greater rights to some of its members than others without any suggestion that less favored ones have ceased to be citizens or subjects).

(n23)Footnote 1. *28 U.S.C. § 1332(a)*; *see Karazanos v. Madison Two Assocs., 147 F.3d 624, 626-628 (7th Cir. 1998)* .

(n24)Footnote 2. *See Arai v. Tachibana, 778 F. Supp. 1535, 1540 (D. Haw. 1991)* (citing **Moore's Federal Practice**).

(n25)Footnote 3. *Karazanos v. Madison Two Assocs., 147 F.3d 624, 626-628 (7th Cir. 1998)* .

(n26)Footnote 4. *Foy v. Schantz, Schatzman & Aaronson, 108 F.3d 1347, 1349 (11th Cir. 1997)* (diversity jurisdiction existed in suit between alien who lacked green card and Florida law firm).

(n27)Footnote 5. *See Singh v. Daimler-Benz A.G., 9 F.3d 303, 311-312 (3d Cir. 1993)* .

(n28)Footnote 1. *Karazanos v. Madison Two Assocs., 147 F.3d 624, 627 (7th Cir. 1998)* (presence of aliens on two sides of case generally destroys diversity jurisdiction).

(n29)Footnote 2. *28 U.S.C. § 1332(a)(3)*.

(n30)Footnote 3. *Israel Aircraft Indus. Ltd. v. Sanwa Business Credit Corp., 16 F.3d 198, 202 (7th Cir. 1994)* .

(n31)Footnote 4. *Dresser Indus. v. Underwriters at Lloyd's of London, 106 F.3d 494, 496-500 (3d Cir. 1997)* .

(n32)Footnote 5. *28 U.S.C. § 1332(a)*.

(n33)Footnote 6. *28 U.S.C. § 1332(a)(1)*.

(n34)Footnote 7. *Intec USA, LLC v. Engle, 467 F.3d 1038, 1043 (7th Cir. 2006)* .

(n35)Footnote 1. *Hennessy v. Richardson Drug Co., 189 U.S. 25, 34, 23 S. Ct. 532, 47 L. Ed. 697 (1903)* .

(n36)Footnote 2. *Dresser Indus., Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494, 500 (3d Cir. 1997)* (allegations of alienage sufficient); *Karazanos v. Madison Two Assocs., 147 F.3d 624, 627 (7th Cir. 1998)* (diversity statute does not require that pleadings identify foreign state where alien claims citizenship).

(n37)Footnote 3. *Karazanos v. Madison Two Assocs., 147 F.3d 624, 627-628 (7th Cir. 1998)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART III. DIVERSITY OF CITIZENSHIP JURISDICTION
B. DIVERSITY OF CITIZENSHIP

1-5 Moore's Manual--Federal Practice and Procedure §§ 5.60through 5.69

[Reserved]

§§ 5.60[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART III. DIVERSITY OF CITIZENSHIP JURISDICTION
C. MINIMUM AMOUNT IN CONTROVERSY

1-5 Moore's Manual--Federal Practice and Procedure § 5.70

§ 5.70 Nature and Purpose of Jurisdictional Minimum Amount Requirementn*

In addition to establishing that the opposing parties have diversity of citizenship, n1 diversity jurisdiction requires that the amount in controversy in exceed the jurisdictional minimum amount established by Congress. The current minimum is the sum or value of $75,000, exclusive of interest and costs. n2 In thischapter, this required minimum amount in controversy be referred to as the "jurisdictional minimum amount" because Congress has raised the amount several times, most recently from $50,000 to $75,000. n3 Congress has consistently raised the jurisdictional minimum amount to prevent further increases in the number of cases litigated in the federal courts. n4 In other words, Congress has decided to impose the jurisdictional minimum in diversity cases so that the federal judiciary does not expend its limited resources on cases of only limited financial value, in addition to promoting federalism by confining federal courts strictly within the limits of their jurisdiction as prescribed by Congress. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.100 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* PART B, § 5.50 et seq.

(n3)Footnote 2. *28 U.S.C. § 1332(a)*.

(n4)Footnote 3. *See* Pub. L. 104-317, 110 Stat. 3847 (1996); *28 U.S.C. § 1332(a)*. In interpleader actions based on the diversity of the parties, the minimum amount in controversy need be only $500. *28 U.S.C. § 1335*.

(n5)Footnote 4. *Rosenboro v. Kim, 994 F.2d 13, 19 (D.C. Cir. 1993)* .

(n6)Footnote 5. *See* *Healy v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 (1934)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.71

§ 5.71 Controlling Lawn*

The value of the matter in controversy for purposes of the federal jurisdictional minimum amount is determined by application of federal law, because, in establishing the standards for determining the jurisdictional amount, a court is in actuality interpreting the federal diversity jurisdiction statute. n1 The court, however, must also consult state law to determine the nature and extent of the damages to be awarded, because in a diversity case the substantive questions of what constitutes items of damages are purely matters of state law. Therefore, state law will dictate what elements are financially at stake in the case; federal standards will determine whether those items have a value sufficient to satisfy the statutory requirement.

For example, if a party under the applicable state law may recover on a particular claim for recission, constructive trust, and treble damages, the court must include all of those theories in tabulating the jurisdictional minimum amount; however, federal law controls the standard for determining the value of the claim under each theory. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.101 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Luckett v. Delta Airlines, Inc., 171 F.3d 295, 298 (5th Cir. 1999)* .

(n3)Footnote 2. *Rosen v. Chrysler Corp., 205 F.3d 918, 921-922 (6th Cir. 2000)* (finding that under federal law in cases of contract recission, amount in controversy is net figure that does not include counterclaims or offsets).

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1-5 Moore's Manual--Federal Practice and Procedure § 5.72

§ 5.72 Factors Used in Determination of Amountn*

[1] Amount Claimed By Party Controls Absent Bad Faith

[a] Legal Certainty Standard

In diversity cases, the general rule is that the amount claimed by a plaintiff in the complaint determines the amount in controversy, unless it appears to a legal certainty that the claim is for less than the jurisdictional minimum amount. n1 Under this rule, the amount claimed by the plaintiff controls if the claim is apparently made in good faith. n2 Furthermore, a rebuttable presumption exists that the face of the complaint is a good faith representation of the actual amount in controversy. n3 Thus, to justify dismissal it must appear to a legal certainty that the claim is actually for less than the jurisdictional amount. n4

Under the "legal certainty," test the plaintiff need show only that it does not appear to a legal certainty that the claim is below the jurisdictional minimum. Thus, a court must be confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction. n5 On the other hand, a party contesting the amount in controversy is required to support its assertion with "competent proof" and a mere good faith belief on the part of the opponent is not competent proof. The presumption means that a plaintiff is in the best position to know how much the claim is worth; and the plaintiff's request for damages is deemed to have been made in good faith. n6 One court has stated that, under the legal certainty standard, the legal improbability of recovery of the jurisdictional minimum amount must be so certain that it virtually negates the plaintiff's good faith in asserting the claim. Thus, if the right of recovery is uncertain, the doubt should be resolved for jurisdictional purposes in favor of the subjective good faith of the plaintiff. n7

[b] Punitive Damages Are Included in Calculation

A court considers claims of punitive damages in determining whether the amount in controversy exceeds the jurisdictional minimum, n8 and punitive andactual damages may be added together to meet the amount in controversy requirement. n9 The court must make a two-part inquiry when considering punitive damages in order to satisfy the jurisdictional minimum. The first question is whether the claimant may recover punitive damages as a matter of governing substantive law. n10 If so, the court has jurisdiction unless it is clear beyond a legal certainty that the plaintiff

would under no circumstances be entitled to recover the jurisdictional amount. In this second step, the plaintiff must present some factual evidence of entitlement to punitive damages. n11

It is a question of law for the court, rather than a question of fact for the jury, to decide whether a plaintiff has established that punitive damages are available. n12 Courts have held that claims for punitive damages are subject to closer scrutiny than claims for actual damages. n13 This is particularly true if the claim for punitive damages comprises the largest portion of the amount in controversy and may have been asserted solely or primarily for the purpose of conferring jurisdiction. Thus, the plaintiff's good faith in seeking punitive damages is an important consideration in determining entitlement under the "legal certainty" test, discussed in [a], *above*. n14

[c] Probability of Valid Defense Does Not Deprive Court of Jurisdiction

The mere fact that there is likely or even certainly a valid defense to the plaintiff's claim on the merits does not deprive a federal court of jurisdiction on the ground that the requisite amount was never in controversy. n15 Were the rule otherwise, any dismissal of a diversity case would raise a jurisdictional bar based on lack of jurisdictional amount, obscuring the question of whether the dismissal was on the merits, and thus barred by res judicata, or on merely on jurisdictional grounds, which would allow the claim to be brought in state court. n16

[2] Aggregation of Claims

[a] Single Plaintiff May Aggregate All Claims Against Single Defendant

As a general principal under the federal rules, a party asserting a claim for relief as an original claim, counterclaim, crossclaim, or third-party claim, may join as many claims as it has against an opposing party, either as independent or alternative claims. n1 For purposes of calculating the amount in controversy, a single plaintiff may aggregate all claims joined under Rule 18, related and unrelated, against a single defendant. n2 A plaintiff may aggregate otherwise insufficient claims in order to reach the threshold amount in excess of the jurisdictional amount. n3 A single plaintiff may also aggregate claims even if the claims were assigned to the plaintiff by a third party, unless the assignment was made collusively for the purpose of creating federal jurisdiction. n4

[b] Single Plaintiff May Not Aggregate Claims Against Unrelated Defendants

A plaintiff must allege that the amount in controversy is in excess of the jurisdictional amount against each defendant, unless the plaintiff's claims against the defendants are common and undivided to the extent that the defendant's liability is properly characterized as joint and not several. n5 Thus, a plaintiff may not generally aggregate claims against more than one essentially separate and individual defendant to reach the requisite amount in controversy. For example, a person who performed similar services for two companies may not aggregate his or her claims against those defendants if they are essentially separate individual defendants. n6

[c] Multiple Plaintiffs

The federal rules allow plaintiffs to join together if they have claims against a common defendant provided the claims arise from the same transaction or occurrence. n7 Just as the citizenship of each plaintiff must be considered individually, however, each plaintiff must also establish that it satisfies the condition of the diversity statute that requires the minimum amount in controversy. A few courtshave held that the supplemental jurisdiction statute has altered this rule, so that insufficient claims that are joined with at least one sufficient claim are now within the court's supplemental jurisdiction. n8

The Supreme Court has established that claims by multiple plaintiffs may not be aggregated unless the claims are "joint" or "common and undivided." Thus, when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional

amount; however, when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. n9 If several plaintiffs assert claims in a single action against a single defendant that are separate and distinct, rather than joint, the amount involved in each claim must meet the requisite amount in order to be within the jurisdiction of the district court. Those amounts may not be aggregated in order to satisfy jurisdictional requirements. n10 For a discussion of class actions, see [d], *below*. As a practical matter, because very few claims will be considered joint only, multiple plaintiffs will not often be permitted to aggregate their claims. n11

It is sometimes difficult to determine whether plaintiffs are asserting separate rights or a single title or right. Guidelines have been promulgated with respect to certain types of actions. Where, for example, several plaintiffs unite to prosecute claims for damages for personal injuries received in a single accident, the claims are separate and distinct and aggregation for jurisdictional purposes is improper. n12 Also, when several plaintiffs who are joint owners of real estate file suit to quiet title, the right being asserted is a single one and its total value is the amount in controversy. n13

[d] Class Actions

The Supreme Court held many years ago that in class actions, class members may not aggregate their claims in order to reach the requisite amount in controversy unless the rights of the class members are joint. n14 Thus, the rules regarding the aggregation of claims of multiple plaintiffs apply also to claims of persons who compose a class. n15 If a claim is asserted by or against the class jointly, n16 there is but a single right involved, and its value is the one used in computing the amount in controversy. Where the right is held in common or is derivative, n17 the concept of totality is inherent in the claim, and its total value is the value considered for jurisdictional purposes. n18 Where the claims are separate and distinct, however, the aggregation of claims for purposes of jurisdiction is not permitted. n19 The Supreme Court has also extended that holding to prohibit absent class members who individually fail to meet the jurisdictional minimum from attaching their claims to the named plaintiff who does meet the jurisdictional minimum. n20

[3] Consideration of Viewpoint

[a] Description of Viewpoints

The court's determination of whether the amount in controversy exceeds the jurisdictional minimum amount, exclusive of interests and costs, is often a fairly easy task because the amount the plaintiff stands to gain is the same as the amount the defendant stands to lose, as in a claim for damages. However, some cases, such as those involving a request for injunctive or other equitable relief and most class actions, may require a more complex analysis because the amount in controversy may differ depending on the viewpoint from which the matter in controversy is measured. For example, in an action seeking injunctive relief, a plaintiff may not stand to benefit by an amount in excess of the jurisdictional amount; however, the cost of compliance to the defendant might well be in excess of the jurisdictional amount. n1 There is a split among the circuits regarding the viewpoint to take, which also may vary according to the circumstances: (1) the "plaintiff's viewpoint," that is, the amount in controversy as stated in the complaint or the value of the right the plaintiff is asserting; (2) the "defendant's viewpoint," where the complaint seeks injunctive relief, the amount required of the defendant to provide the injunctive relief sought by the plaintiff; (3) the "either party's view" of the value of the controversy or the amount required to provide the relief sought; (4) the entire "viewpoint approach," which utilizes the court's determination of the economic worth of the "object in controversy" or the pecuniaryconsequence to those involved in the litigation. n2 The trial courts must follow the relevant governing precedent for each circuit. n3

A summary of the plaintiff's viewpoint, which is used by the majority of courts is given in [b], *below*. For a complete discussion of the various approaches used by the different circuits, see 15 *Moore's Federal Practice, § 102.109* (Matthew Bender 3d ed.).

[b] Plaintiff's Viewpoint

The majority of federal courts have chosen to use the plaintiff's viewpoint rule. Under this rule, the amount in controversy for jurisdictional purposes should be measured strictly from the plaintiff's perspective, without regard to the amount at stake for any other party. n4 Under this standard, the value of the cause of action or the amount in controversy is determined only on the basis of what the plaintiff will recover or avoid losing if the suit is successful. n5 When this viewpoint is employed, it is generally used regardless of the nature of the action, and therefore it applies both to declaratory and equitable relief actions. n6 Thus, the value of the controversy in injunctive relief actions is determined by reference to the property right that the plaintiff seeks to protect by invocation of an equitable remedy. n7

[4] Interest

The jurisdictional minimum amount in diversity cases is "exclusive of interest and costs." n1 Therefore, by the express words of the statute, interest may not be considered. n2 This language does not mean that no "interest" may be taken into account. The Supreme Court has held that the interest referred to in the statute is "interest as such" and not the interest component used in determining the amount of damages to be awarded on a principal demand when the interest is an integral part of the claimed damages. Thus, interest is includable in computing the jurisdictional amount if the interest is not merely incidental or accessory to the principal amount demanded. n3 Furthermore, if the judgment in an action includes interest, the calculation of the amount in controversy in a suit to enforce the judgment includes the interest. n4

On the other hand, the court may not consider any amount claimed as interest by the plaintiff that is attributable solely to a delay in payment or to a wrongful deprivation of funds. This type of moratory interest, if not an essential ingredient of plaintiff's claim, is interest that has accrued before the filing of the complaint. n5

In deciding whether interest is an integral part of the claim and, therefore, to be included in the amount in controversy, the court should consider whether the interest arose solely because of a delay in payment. n6 Such inclusion would violate the purpose for excluding interest in computing the jurisdictional amount, which is to prevent the plaintiff from intentionally delaying suit until the claim with accrued interest exceeds the statutory minimum. n7

[5] Costs

As a general rule, the jurisdictional minimum amount may not include the amount of costs expended by the party. n1 However, the phrase "exclusive of interest or costs" in the statute refers to interest or costs that could possibly might be awarded in connection with the federal diversity proceedings. Thus, the costs excluded are those that are a reimbursement for some of the expenses imposed by the court for the use of the court's processes. Such costs are excluded from the jurisdictional amount because they must await the outcome of the suit and are uncertain in amount. n2 On the other hand, if a party is making a claim that "costs" were expended as a result of defendant's allegedly wrongful conduct as an element of the damage claim, those costs may be included in determining the amount in controversy. n3 Furthermore, when costs of prior proceedings have been paid and the plaintiff in good faith brings an action to recover them, they are the matter in litigation and their value may be considered in determining the amount in controversy for jurisdictional purposes. n4

[6] Attorney's Fees

Attorney's fees normally may not be included in determining the amount in controversy, because, under American law, the successful party is not as a rule entitled to recover attorney's fees from his or her opponent. n1 However, there are two exceptions to this principle: (1) if the fees are provided for by contract, n2 in which case the attorney fees constitute an element of damages in the request for relief. n3 or (2) if a statute mandates or allows payment of attorney's fees. n4 First, when a plaintiff may in good faith claim a contractual right to recover attorney's fees, even though that right is disputed by the defendant, the amount of the fees may be included in determining the amount in controversy because it is considered a principal part of the relief sought by the plaintiff. n5 Second, the Supreme Court has held that attorney's

fees that are allowed by statute may be included in the jurisdictional sum, even though the statute may refer to them in terms of costs or make them taxable as costs, provided the benefit ultimately accrues to the plaintiff. n6 However, potential attorney's fees in a class action may not be aggregated to satisfy the jurisdictional amount requirement. n7

[7] Statutory Enhancements

The court may include penalties and statutory damages imposed by state law in its calculation of the amount in controversy. For example, the possibility of an award of treble damages under an applicable consumer fraud statute should be included in determining amount in controversy for purposes of diversity jurisdiction. n1 In insurance cases, such statutory penalties and awards may include, in addition to the basic policy limit, punitive damages, interest and costs, and attorney's fees. n2 Thus, when state law imposes statutory damages for failure to timely pay an insurance claim, the amount of the penalty may be included when ascertaining the amount in controversy, provided that the statutory exaction is an element of damages and not interest. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.106 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Rosen v. Chrysler Corp., 205 F.3d 918, 921-922 (6th Cir. 2000)* ; *see St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938)* .

(n3)Footnote 2. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* .

(n4)Footnote 3. *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 63 (2d Cir. 1999)* .

(n5)Footnote 4. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* .

(n6)Footnote 5. *A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 87 (2d Cir. 1991)* .

(n7)Footnote 6. *Hanson v. Drugscan, Inc., 95 F. Supp. 2d 868, 873-874 (N.D. Ill. 2000)* .

(n8)Footnote 7. *McDonald v. Patton, 240 F.2d 424, 426 (4th Cir. 1957)* .

(n9)Footnote 8. *Loss v. Blankenship, 673 F.2d 942, 951 (7th Cir. 1982)* .

(n10)Footnote 9. *Sharp Elec. Corp. v. Copy Plus, Inc., 939 F.2d 513, 515 (7th Cir. 1991)* .

(n11)Footnote 10. *Griffin v. Holmes, 843 F. Supp. 81, 85 (E.D.N.C. 1993)* .

(n12)Footnote 11. *Larkin v. Brown, 41 F.3d 387, 388-389 (8th Cir. 1994)* .

(n13)Footnote 12. *Kenebrew v. Connecticut General Life Ins. Co., 882 F. Supp. 749, 752 (N.D. Ill. 1995)* .

(n14)Footnote 13. *Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994)* .

(n15)Footnote 14. *Anthony v. Security Pacific Financial Services, Inc., 75 F.3d 311, 315-318 (7th Cir. 1996)* .

(n16)Footnote 15. *Work v. U.S. Trade, Inc., 747 F. Supp. 1184, 1186 (E.D. Va. 1990)* ; *see St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938)* (fact that complaint discloses existence of valid defense to claim does not show bad faith or oust jurisdiction).

(n17)Footnote 16. *Valhal Corp. v. Sullivan Assocs., 48 F.3d 760, 762 (3d Cir. 1995)* .

(n18)Footnote 1. *Fed. R. Civ. P. 18(a).*

(n19)Footnote 2. *Klepper v. First Am. Bank, 916 F.2d 337, 341 (6th Cir. 1990)* .

(n20)Footnote 3. *Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995)* .

(n21)Footnote 4. *Tam v. Lo, 968 F. Supp. 1326, 1328 (N.D. Ill. 1997)* .

(n22)Footnote 5. *National Union Fire Ins. Co. v. Wilkins-Lowe & Co., 29 F.3d 337, 339 (7th Cir. 1994)* .

(n23)Footnote 6. *Crouch v. Atlas Van Lines, Inc., 834 F. Supp. 596, 604 (N.D.N.Y. 1993)* .

(n24)Footnote 7. *Fed. R. Civ. P. 20(a).*

(n25)Footnote 8. *In re Abbott Lab., 51 F.3d 524, 529 (5th Cir. 1995)* .

(n26)Footnote 9. *Zahn v. Int'l Paper Co., 414 U.S. 291, 294, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973)* .

(n27)Footnote 10. *Burns v. Massachusetts Mut. Life Ins. Co., 820 F.2d 246, 250 (8th Cir. 1987)* .

(n28)Footnote 11. *Airlines Reporting Corp. v. S and N Travel, Inc., 857 F. Supp. 1043, 1049 (E.D.N.Y. 1995)* (citing **Moore's Federal Practice**).

(n29)Footnote 12. *Rosenboro v. Kim, 994 F.2d 13, 19 (D.C. Cir. 1993)* ; *Budget Rent-A-Car Sys., Inc. v. Stauber, 849 F. Supp. 743, 746 (D. Haw. 1994)* .

(n30)Footnote 13. *Occidental Chemical Corp. v. Bullard, 995 F.2d 1046, 1047 (11th Cir. 1993)* (in action for specific performance of contractual option to purchase real property, amount in controversy was real property's fair market value of $98,350, which satisfied diversity jurisdiction minimum amount).

(n31)Footnote 14. *Snyder v. Harris, 394 U.S. 332, 338, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969)* ; *see* [c], *above*.

(n32)Footnote 15. *See* [c], *above*.

(n33)Footnote 16. *Berman v. Narragansett Racing Asso., 414 F.2d 311, 315 (1st Cir. 1969)* .

(n34)Footnote 17. *Bernstein v. Levenson, 437 F.2d 756, 757 (4th Cir. 1971)* (in stockholders' derivative action corporation, not complaining shareholder, is real party in interest, and jurisdictional amount is measured by damage sustained by corporation).

(n35)Footnote 18. *Black v. Beame, 550 F.2d 815 (2d Cir. 1977)* .

(n36)Footnote 19. *Darden v. Ford Consumer Fin. Co., Inc., 200 F.3d 753, 756-758 (11th Cir. 2000)* (in asserted class action, plaintiffs' shares of potential attorney's fees awarded under Georgia RICO statute could not be aggregated to satisfy amount in controversy requirement because, under state law, purpose of award was compensatory rather than punitive, and each individual plaintiff's interest in award was separate and distinct); *Sellers v. O'Connell, 701 F.2d 575,*

579 (6th Cir. 1983) (aggregation of plaintiffs' claims in class action was not permitted because plaintiffs did not possess common and undivided interest in relief sought; amount of each claim would be unaffected by results obtained by fellow plaintiffs).

(n37)Footnote 20. *Zahn v. Int'l Paper Co., 414 U.S. 291, 301, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973)* .

(n38)Footnote 1. *Bedell v. H.R.C. Ltd., 522 F. Supp. 732, 735 (E.D. Ky. 1981)* (from defendant's viewpoint, permanent injunction halting project would cost $400,000).

(n39)Footnote 2. *Sherwood v. Microsoft Corp., 91 F. Supp. 2d 1196, 1200 (M.D. Tenn. 2000)* .

(n40)Footnote 3. *Sherwood v. Microsoft Corp., 91 F. Supp. 2d 1196, 1201 (M.D. Tenn. 2000)* (amount in controversy requirement for diversity jurisdiction was not satisfied in class action state law antitrust suit in which named plaintiffs claimed less than jurisdictional amount in damages, even if injunctive relief sought would have cost defendant more than jurisdictional amount, because amount would not have exceeded jurisdictional minimum amount for each member of plaintiff class).

(n41)Footnote 4. *McLaughlin, Piven, Vogel v. Nat'l Ass'n of Sec., 733 F. Supp. 694, 698 (S.D.N.Y. 1990)* .

(n42)Footnote 5. *Myers v. Long Island Lighting Co., 623 F. Supp. 1076, 1078 (E.D.N.Y. 1985)* .

(n43)Footnote 6. *Myers v. Long Island Lighting Co., 623 F. Supp. 1076, 1079 (E.D.N.Y. 1985)* .

(n44)Footnote 7. *Rockwell v. SCM Corp., 496 F. Supp. 1123, 1125 (S.D.N.Y. 1980)* .

(n45)Footnote 1. *28 U.S.C. § 1332*.

(n46)Footnote 2. *State Farm Mut. Auto. Ins. v. Narvaez, 149 F.3d 1269, 1271 (10th Cir. 1998)* (amount payable under insurance policy is maximum amount in controversy; interest is not included); *Iguana Co. Ltd. Partnership v. Baltimore Center for the Performing Arts, Inc., 651 F. Supp. 1348, 1350 (D. Md. 1987)* (in theater producer's breach of contract action to recover unpaid box office receipts, lost interest could not be considered in the calculation of the amount in controversy, because lost interest was not an integral part of plaintiff's damages under the contract).

(n47)Footnote 3. *Brown v. Webster, 156 U.S. 328, 330, 15 S. Ct. 377, 39 L. Ed. 440 (1895)* .

(n48)Footnote 4. *Snider v. State Farm Mut. Auto. Ins. Co., 360 F. Supp. 929, 931 (S.D. W. Va. 1973)* .

(n49)Footnote 5. *Principal Mut. Life Ins. Co. v. Juntunen, 838 F.2d 942, 943 (7th Cir. 1988)* (interest accrued on life insurance policy since date of policyholder's death not included in calculation of amount in controversy).

(n50)Footnote 6. *Kline v. Nationsbank of Va., N.A., 886 F. Supp. 1285, 1299 (E.D. Va. 1995)* .

(n51)Footnote 7. *State Farm Mut. Auto. Ins. v. Narvaez, 149 F.3d 1269, 1270-1272 (10th Cir. 1998)* ; *Brainin v. Melikian, 396 F.2d 153, 155 (3d Cir. 1968)* .

(n52)Footnote 1. *28 U.S.C. § 1332*.

(n53)Footnote 2. *Farmers Ins. Co., Inc. v. McClain, 603 F.2d 821, 823 (10th Cir. 1979)* .

(n54)Footnote 3. *Griffin v. Holmes, 843 F. Supp. 81, 84-85 (E.D.N.C. 1993)* (when plaintiff incurred costs in regaining possession of repaired property and in preserving and maintaining plaintiff's possessory interest, such costs were included in calculation of amount in controversy as item of consequential damages).

(n55)Footnote 4. *Schnoor v. Linkiewicz, 397 F.2d 480, 483 (7th Cir. 1968)* .

(n56)Footnote 1. *Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955, 958-959 (7th Cir. 1998)* (anticipated attorney's fees may not be considered in determining required amount in controversy).

(n57)Footnote 2. *Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 724 (5th Cir. 2002)* .

(n58)Footnote 3. *Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1116 (10th Cir. 2009)* (citing **Moore's Federal Practice**).

(n59)Footnote 4. *Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202, 54 S. Ct. 133, 78 L. Ed. 267 (1933)* ; *Louque v. Allstate Ins. Co., 314 F.3d 776, 779 (5th Cir. 2002)* .

(n60)Footnote 5. *Department of Recreation v. World Boxing Ass'n, 942 F.2d 84, 90 (1st Cir. 1991)* (provided fees are reasonable).

(n61)Footnote 6. *Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534 (5th Cir. 1990)* (plaintiff's claim for attorney's fees was supported by state law).

(n62)Footnote 7. *Cohen v. Office Depot, Inc., 204 F.3d 1069, 1079-1080 (11th Cir. 2000)* ; *Darden v. Ford Consumer Fin. Co., Inc., 200 F.3d 753, 756-758 (11th Cir. 2000)* .

(n63)Footnote 1. *Rosen v. Chrysler Corp., 205 F.3d 918, 921-922 (6th Cir. 2000)* .

(n64)Footnote 2. *St. Paul Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998)* (statutory damages under state insurance code be included in calculating amount in controversy).

(n65)Footnote 3. *Buras v. Birmingham Fire Ins. Co. of Pa., 327 F.2d 238, 238-239 (5th Cir. 1964)* (six percent penalty for unjustified failure to pay life insurance claim was penalty that could be included in amount in controversy).

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C. MINIMUM AMOUNT IN CONTROVERSY

1-5 Moore's Manual--Federal Practice and Procedure § 5.73

§ 5.73 Initiation of Determination of Amountn*

The jurisdictional minimum amount is a requirement of federal subject matter jurisdiction and is not subject to waiver by the parties. A lack of the minimum amount in controversy may be raised by either party, or by the court on its own initiative, at any time. n1 Thus, even if the amount in controversy is not raised by a party, the court has its own independent obligation to address questions regarding the amount, and to weigh the evidence to determine whether the jurisdictional minimum amount requirement has been met. n2 In this regard, a court that determines that the jurisdictional minimum amount is questionable may sua sponte issue an order to show cause why the lawsuit should not be dismissed for failure to meet the requirement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.103 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Laughlin v. KMart Corp., 50 F.3d 871, 873 (10th Cir. 1995)* ; *see Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003)* .

(n3)Footnote 2. *Charvat v. GVN Mich., Inc., 561 F.3d 623, 628 (6th Cir. 2009)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Rosen v. Chrysler Corp., 205 F.3d 918, 920 (6th Cir. 2000)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.74

§ 5.74 Time of Determination of Amountn*

[1] Time of Filing of Complaint

The court must determine the amount in controversy as of the commencement of the action, which means that the court should determine whether the jurisdictional minimum amount requirement is satisfied as of the time the complaint is filed. n1 However, even though the court determines the amount in controversy as of the time of the complaint it is not restricted to consideration of the complaint and may consider other pleadings. Thus, when a defendant asserts a compulsory counterclaim in its answer and alleges an insufficient amount in controversy, the counterclaim must be considered in determining the requisite amount in controversy, even if the defendant did not move to dismiss for lack of subject matter jurisdiction. n2

[2] Effect of Subsequent Events

Because jurisdiction is determined at the filing of the complaint, subsequent events that reduce the amount below the jurisdictional minimum amount generally will not divest the court of jurisdiction. n1 For example, the mere fact that the plaintiff ultimatelyrecovers a sum less than the jurisdictional amount will not divest the court of jurisdiction. n2

The Supreme Court has held, however, that a distinction must be drawn between subsequent events that change the amount in controversy, and subsequent revelations that the required amount was not in controversy at the commencement of the action. n3 If a discovery later in the case disclosed that the actual, accurate amount was below the minimum required amount, determined as of the time of the filing of the complaint, the court never had effective subject matter jurisdiction and must dismiss the complaint. n4 In other words, failure to satisfy the jurisdictional amount from the outset, although not recognized until later, is not a subsequent change that the court may ignore. n5

Some circuits have held that the court has discretion to dismiss a diversity case entirely for lack of jurisdiction once the dismissal of one or more individual aggregated claims reduces the possibility of recovery below the jurisdictional requisite. n6 In such cases, the court's discretion must be based on the factors of convenience and fairness to both parties, the interests of judicial economy, and whether the amount claimed in the complaint was made in good faith, or whether the plaintiff was consciously relying on specious grounds in order to fabricate federal jurisdiction. n7 Other

courts have held that if the court determined it had diversity jurisdiction initially, the dismissal of one or more claims neither ousts the court of jurisdiction nor permits discretionary dismissal. Rather, dismissal requires the defendant to show that the plaintiff filed in bad faith to rebut the presumption that the face of the complaint is a good faith representation of the actual amount in controversy. In other words, it must appear to a legal certainty that the claim is really for less than the jurisdictional minimum at the outset. Legal certainty is analyzed based on what appears on the face of the complaint; subsequent events, such as a valid defense or actual recovery of less than the requisite amount, do not automatically establish bad faith or divest jurisdiction. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.106 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000)* ; *St. Paul Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1254-1255 (5th Cir. 1998)* (court must consider complaint and other evidence to determine amount in controversy as of time when complaint was filed).

(n3)Footnote 2. *Spectacor Mgmt. Group v. Brown, 131 F.3d 120, 125 (3d Cir. 1997)* .

(n4)Footnote 1. *Grinnell Mut. Reinsurance Co. v. Shierk, 121 F.3d 1114, 1116-1117 (7th Cir. 1997)* ; *Jones v. Knox Exploration Corp., 2 F.3d 181, 182-183 (6th Cir. 1993)* .

(n5)Footnote 2. *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 62 (2d Cir. 1999)* ; *Angus v. Shiley, 989 F.2d 142, 145 (3d Cir. 1993)* .

(n6)Footnote 3. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n7)Footnote 4. *Tongkook America, Inc. v. Shipton Sportswear Co., 14 F.3d 781, 785-786 (2d Cir. 1994)* (court dismissed after discovering during pretrial discovery insufficient amount in controversy, measured as of time of filing of complaint).

(n8)Footnote 5. *Charvat v. GVN Mich., Inc., 561 F.3d 623, 628 (6th Cir. 2009)* (citing **Moore's Federal Practice**).

(n9)Footnote 6. *Stevenson v. Severs, 158 F.3d 1332, 1334 (D.C. Cir. 1998)* (dismissal of $25,000 claim after $550,000 claim dismissed on summary judgment).

(n10)Footnote 7. *Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995)* .

(n11)Footnote 8. *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 63-65 (2d Cir. 1999)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.75

§ 5.75 Burden of Proof to Establish Amountn*

[1] Burden When Amount is Contested

If the existence of the jurisdictional amount in controversy is disputed, the person asserting jurisdiction bears the burden of proof on the issue. n1 Therefore, a plaintiff who files in federal court bears the burden, n2 and a defendant who seeks removal to federal court bears the burden. n3 A defendant seeking removal bears a heavy burden in this regard, n4 while a plaintiff's burden is not a heavy one. To meet its burden of showing the amount in controversy requirement has been satisfied, the plaintiff need only show that it was not legally impossible, based on the complaint as a whole, that the plaintiff could be awarded more than the minimum statutory amount in damages. n5 If a defendant or the court challenges the plaintiff's allegations concerning the amount in controversy, the plaintiff need only produce sufficient evidence to meet the requirements of the "legal certainty" test by a preponderance of the evidence n6 supported by competent proof. Courts have held that "competent proof" means proof to a reasonable probability that jurisdiction exists. n7 Absolute certainty in valuation of the rights involved is not required if an amount in controversy exceeding the jurisdictional minimum can be ascertained according to a pragmatic formula. n8

[2] Pleading Amount in Controversy

The court must dismiss a complaint if it fails to contain a proper allegation of the amount in controversy. n1 Additionally, when the applicable jurisdictional grant imposes a jurisdictional minimum, a defendant should allege an amount in controversy in its counterclaim. For example, in one case the court ordered the defendant's counterclaim dismissed because it was not sufficiently related to the plaintiff's claims to warrant supplemental jurisdiction; because the defendant had not alleged an amount in controversy, the court determined that it lacked jurisdiction on diversity grounds as well. However, the dismissal was without prejudice and the defendant could refile thecounterclaim if good faith grounds supported the requisite jurisdictional amount. n2 In when making its determination about the existence of diversity jurisdiction, the court may consider matters outside the pleadings in order to broaden the meaning of the complaint's allegations. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.107 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995)* (burden of proof is on party seeking federal forum).

(n3)Footnote 2. *Melkus v. Allstate Ins. Co., 503 F. Supp. 842, 845 n.4 (E.D. Mich. 1980)* .

(n4)Footnote 3. *Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094 (11th Cir. 1994)* (when plaintiff has specifically claimed less than the jurisdictional amount in state court, to establish removal jurisdiction defendant must prove to legal certainty that the plaintiff would not recover less than jurisdictional minimum amount if plaintiff prevailed).

(n5)Footnote 4. *Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994)* .

(n6)Footnote 5. *LM Ins. Corp. v. Spaulding Enters., 533 F.3d 542, 552 (7th Cir. 2008)* .

(n7)Footnote 6. *St. Paul Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998)* .

(n8)Footnote 7. *Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995)* ; *South Park Associates, L.L.C. v. Renzulli, 94 F. Supp. 2d 460, 462-463 (S.D.N.Y. 2000)* .

(n9)Footnote 8. *Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975)* .

(n10)Footnote 1. *Schlesinger v. Councilman, 420 U.S. 738, 744, 744 n.9, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)* .

(n11)Footnote 2. *Iglesias v. Mutual Life Ins. Co. of N.Y., 156 F.3d 237, 242-243 (1st Cir. 1998)* .

(n12)Footnote 3. *Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999)* (when defendant challenges subject matter jurisdiction, district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside pleadings).

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1-5 Moore's Manual--Federal Practice and Procedure § 5.76

§ 5.76 Penalty Against Plaintiff Who Recovers Less Than Jurisdictional Amountn*

Although a court is not divested of jurisdiction if the plaintiff obtains a judgment in an amount less than the jurisdictional minimum amount, n1 the court may impose a penalty on the plaintiff in such a case. The court may, for example, deny costs to the plaintiff or may even award costs to the adversary and impose costs on the plaintiff. n2 The courts have discretion whether to impose the penalty, and a court will generally be more likely to do so if the court has determine that the plaintiff has acted in bad faith. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallenges

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 *Moore's Federal Practice*, § 102.105 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Vu Luong v. Circuit City Stores, Inc., 356 F.3d 1188, 1192 (9th Cir. Cal. 2004)* .

(n3)Footnote 2. *28 U.S.C. § 1332(b)*; *see Kovacs v. Chesley, 406 F.3d 393, 397 (6th Cir. 2005)* .

(n4)Footnote 3. *Kinsey v. Weatherly, 572 F. Supp. 841, 844 (N.D. Ga. 1983)* (court could assess costs when plaintiff acted in bad faith in claiming jurisdictional amount); *see Dr. Franklin Perkins Sch. v. Freeman, 741 F.2d 1503, 1525 (7th Cir. 1984)* (court should not impose costs solely because plaintiff failed to recover jurisdictional amount).

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1-5 Moore's Manual--Federal Practice and Procedure §§ 5.77through 5.89

[Reserved]

§§ 5.77[Reserved]

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1-5 Moore's Manual--Federal Practice and Procedure § 5.90

§ 5.90 Supplemental Jurisdiction Concepts and Termsn*

[1] Scope of Supplemental Jurisdiction

"Supplemental jurisdiction" is a creation of statute n1 which allows a federal court to exercise jurisdiction over claims, even though they are not within the court's original jurisdiction, provided that (1) the claims are related to claims over which the court does have original jurisdiction and (2) the court has made a discretionary determination that the values of judicial economy, convenience, fairness, and comity make it appropriate to exercise jurisdiction over the claims. The purpose of the supplemental jurisdiction statute is to ensure that the court consider and weigh certain factors in each case and, at every stage of the litigation, to determine whether it should continue to exercise supplemental jurisdiction: the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims. n2 Thus, in any civil action in which a district court has original jurisdiction, the district court also has supplemental jurisdiction over all other claims that are so related to claims within that original jurisdiction that they form part of the same case or controversy; supplemental jurisdiction includes claims that involve the joinder or intervention of additional parties. n3

Prior to the enactment of the supplemental jurisdiction statute, the courts by judicial decision had provided for the exercise of this same type of jurisdiction, although the terms used for this jurisdiction were "pendent jurisdiction" and "ancillary jurisdiction." n4

[2] Former Concepts of Pendent and Ancillary Jurisdiction

The supplemental jurisdiction statute, Section 1367, has codified the court-recognized doctrines formerly labeled "pendent" and "ancillary" jurisdiction. n1 These concepts distinguished between two types of claims: (1) the addition of a nonfederal state law claim (pendent claim) which arose from the same operative fact as a federal question claim, and (2) the addition of a nonfederal claim (ancillary claim) which allowed defending parties to protect their interests in the claim in federal court without regard to jurisdiction, when the claim was related to claims over which the federal court did have original jurisdiction. However, the Supreme Court has stated that the terms of Section 1367 do not acknowledge any distinction between pendent and ancillary jurisdiction. Although they developed separately as a historical matter, the Court now recognizes that the doctrines are two species of the same issue. Furthermore, nothing in Section 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction

between these historic jurisdictional categories. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent PartiesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(a).*

(n3)Footnote 2. *City of Chicago v. International College of Surgeons, 522 U.S. 156, 167, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) .*

(n4)Footnote 3. *28 U.S.C. § 1367(a).*

(n5)Footnote 4. *See Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) .*

(n6)Footnote 1. *Williams Elecs. Games, Inc. v. Garrity, 479 F.3d 904, 907 (7th Cir. 2007) .*

(n7)Footnote 2. *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) .*

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1-5 Moore's Manual--Federal Practice and Procedure § 5.91

§ 5.91 Controlling Lawn*

[1] Supplemental Jurisdiction Statute

The former principles of pendent and ancillary jurisdiction have been codified in the supplemental jurisdiction statute, n1 which now specifies all of the circumstances in which a federal court's original subject matter jurisdiction carries with it jurisdiction over state law claims that derive from a common nucleus of operative fact as thefederal claim, such that the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court constitutes one case. n2 The supplemental jurisdiction statute also expressly provides that it controls such claims that involve the joinder or intervention of additional parties. n3

Subsection (a) of the supplemental jurisdiction statute contains the broad grant of supplemental jurisdiction, subject only to limited exceptions provided in subsections (b) and (c), or as expressly provided otherwise by federal statute. It provides that in any civil action in which the district court has original jurisdiction, it also has supplemental jurisdiction over all other claims that are so related to claims in the action within original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution, and that supplemental jurisdiction includes claims that involve the joinder or intervention of additional parties. n4

Subsection (b) of the supplemental jurisdiction statute is an exception to the grant of supplemental jurisdiction and provides that supplemental jurisdiction does not extend to claims in diversity actions under specified joinder procedures. Thus, in any civil action in which the court's original jurisdiction is founded solely on diversity, the court does not have supplemental jurisdiction over claims made under the joinder devices if exercising supplemental jurisdiction over the claim would be inconsistent with the jurisdictional requirements of the diversity statute. n4.1

Subsection (c) is an exception to the grant of supplemental jurisdiction that codifies the discretionary factors that justify a court's refusal to exercise supplemental jurisdiction. The district court may decline to exercise supplemental jurisdiction over a claim under any one of several circumstances. n5

Subsection (d) is a tolling provision that saves certain state law supplemental claims that have been dismissed in federal court, for subsequent assertion in state court. Under this tolling provision, the period of limitation for a supplemental

claim asserted under subsection (a), and for other claims in the same action that are voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), is tolled while the claim is pending and for a period of 30 days after it is dismissed, unless state law provides for a longer tolling period. n6 However, the Supreme Court has stated that this tolling provision does not apply to claims that are constitutionally infirm. Specifically, the Court has held that § 1367(d) does not toll the limitation period for state law claims asserted against nonconsenting state defendants that were dismissed from the federal court on *Eleventh Amendment* immunity grounds. n6.1

[2] Applicability of Supplemental Jurisdiction Doctrine

Questions of the applicability of the doctrine of supplemental jurisdiction have been raised in the following areas of substantive law:

1. Maritime and admiralty law. It has been held that the supplemental jurisdiction statute applies to non-admiralty claims in which the primary claim is within the court's admiralty jurisdiction. n1 Therefore, if an admiralty claim is properly before the court, non-admiralty claims against other parties that arise out of a common nucleus of operative facts with the admiralty claim are within the court's statutory supplemental jurisdiction. n2

2. Bankruptcy. Most courts hold that the supplemental jurisdiction applies to bankruptcy claims, provided that the ordinary requirements of the statute are met. n3 However, some courts have questioned whether the supplemental jurisdiction statute applies to the jurisdiction exercisable by bankruptcy courts. n4

3. Domestic Relations. Courts have consistently held that because of the general exception to federal jurisdiction for any domestic-relations issues a federal court may not exercise supplemental jurisdiction over a state domestic relations claim. n5

4. Civil Rights Claims. The supplemental jurisdiction statute specifically authorizes supplemental jurisdiction except as expressly provided otherwise by federal statute. Because there is nothing in Title VII of the Civil Rights Act that expressly prohibits supplemental jurisdiction, a court may exercise supplemental jurisdiction in a Title VII context in the same manner as any other federal question. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(a)*.

(n3)Footnote 2. *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 580, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* .

(n4)Footnote 3. *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* .

(n5)Footnote 4. *28 U.S.C. § 1367(a)*; *see §§ 5.92-5.94*.

(n6)Footnote 4.1. *28 U.S.C. § 1367(b)*; *see § 5.95*.

(n7)Footnote 5. *28 U.S.C. § 1367(c)*; *see § 5.96*.

(n8)Footnote 6. *28 U.S.C. § 1367(d)*; *see § 5.97*.

(n9)Footnote 6.1. *Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 122 S. Ct. 999, 152* , L. Ed. 2d 27, 37-41 (2002).

(n10)Footnote 1. *Scarborough v. Clemco Indus., 391 F.3d 660, 665 (5th Cir. 2005)* .

(n11)Footnote 2. *Insurance Co. of N. Am. v. S/S "Cape Charles", 843 F. Supp. 893, 895 (S.D.N.Y. 1994)* .

(n12)Footnote 3. *See, e.g., Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194-1195 (9th Cir. 2005)* ; *Allen v. Kuhlman Corp., 322 B.R. 280, 284 (S.D. Miss. 2005)* .

(n13)Footnote 4. *See, e.g., Liberty Mut. Ins. v. Lone Star Indus., 313 B.R. 9, 21 (D. Conn. 2004)* .

(n14)Footnote 5. *See Wasko v. Commonwealth, 185 F. Supp. 2d 136, 142 (D.P.R. 2001)* ; *see also 42 U.S.C. § 13981(e)(4)* (Civil Rights Remedies for Gender-Motivated Violence Act provides that Section 1367 should not be construed to confer on the federal courts jurisdiction over any state law claim seeking divorce, alimony, distribution of marital property, or child custody decree).

(n15)Footnote 6. *See, e.g., Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 200 (6th Cir. 2004)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.92

§ 5.92 Two Articulated Standardsn*

When a federal court has original jurisdiction over any claim, the supplemental jurisdiction statute gives the court discretion to exercise supplemental jurisdiction over all other claims in the action so related to the claim falling within original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. n2 Legislative history indicates that by use of the "same case or controversy" standard in Section 1367, Congress intended to codify the scope of supplemental jurisdiction promulgated by the Supreme Court in *United Mine Workers v. Gibbs*, which used the phrase "common nucleus of operative facts." n3 Case law indicates that if either of these tests is met the court may exercise supplemental jurisdiction. n4 For a discussion of the same case or controversy standard, see *§ 5.93*. For a discussion of the common nucleus of operative facts standard, see *§ 5.94*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 2. *28 U.S.C. § 1367(a)*; *see Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *25-*27 (2005)* .

(n3)Footnote 3. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n4)Footnote 4. *See Fafel v. DiPaola, 399 F.3d 403, 412 (1st Cir. 2004)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.93

§ 5.93 Same Case or Controversy Standardn*

In any civil action over which the district courts have original jurisdiction, the district courts generally have supplemental jurisdiction over all other claims that are so related to claims in the action within the original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. n1 To determine whether a claim satisfies the "same case orcontroversy" test, the court must consider the extent to which the claim involves the same facts, occurrences, witnesses, and evidence as the claim over which the court has original jurisdiction. n2 For example, when the substance of a fourth-party defendant's claims against the original plaintiff were the same as the original defendant's compulsory counterclaims, they were part of same case or controversy, as required to fall within district court's supplemental jurisdiction. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.22 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(a).*

(n3)Footnote 2. *Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 455 (11th Cir. 1996)* ; *Monroe v. Brown, 256 F. Supp. 2d 1292, 1293 (M.D. Ala. 2004)* .

(n4)Footnote 3. *Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 727-728 (2d Cir. 2000)* .

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1-5 Moore's Manual--Federal Practice and Procedure § 5.94

§ 5.94 Common Nucleus Standardn*

A federal court may exercise supplemental jurisdiction over a state claim whenever it is joined with a federal claim and the two claims derive from a common nucleus of operative fact and the plaintiff would ordinarily be expected to try them both in one judicial proceeding. n1 The Supreme Court found the following principles under *Gibbs*:

1. The federal claim has to be substantial enough to vest the district court with subject matter jurisdiction. If it was not, the district court has to dismiss or remand. n2

2. Assuming the substantiality of the federal claim, the district court has jurisdiction over the state law claim if the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case. This is so if the claims, federal and state, "derive from a common nucleus of operative fact" and if "considered without regard to their federal or state character, a plaintiff's claims are such as he would ordinarily be expected to try them all in one judicial proceeding." If these jurisdictional requirements are met, the court has the power to try the entire case. n3

3. The Court emphasized the fact that the existence of the power of supplemental jurisdiction does not require it to be used, because pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. The discretion must be exercised by weighing considerations of judicial economy, convenience, and fairness to litigants. The Court noted that in some cases where the state claims were closely tied to federal policy the arguments for exercise of pendent jurisdiction were particularly strong, such as when there was an issue of federal preemption. n4 But the Court cautioned that both principles of comity and the interests of justice dictated that needless decisions of state law be avoided, and it stated that if the federal claims are dismissed before trial even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. n5

The lower courts have also developed several principles regarding the common nucleus test developed in *Gibbs*: n5.1

1. Several courts have stated that it is insufficient for supplemental jurisdiction merely to establish that "but for" one event, the other would not have happened, if there is otherwise no factual commonality between the two claims. n6 Furthermore, the test is not satisfied if proof of each case would involve entirely different presentations and evidence.

n7

2. When the same conduct or inaction violates parallel federal and state laws, the claims clearly satisfy the common nucleus of operative facts test. n8 For example, if an employer violates parallel state and federal statutes prohibiting discrimination based on the same status, such as sex or age, it is a single case or controversy. n9

3. If one act or omission results in two different kinds of injuries to two different persons, it is nevertheless a result of a common nucleus and is a single case or controversy. For example, conduct that causes personal injury to one and loss of consortium to another involves the same case or controversy. n10 On the other hand, two different legal prohibitions reaching similar conduct do not necessarily form part of the same case or controversy. For example, constitutional challenges to two different statutes or regulations, one under the federal *First Amendment* and the other under the state constitution, do not form part of the same case or controversy merely by the fact that both arguably reach the same conduct. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* ; *Vera-Lozano v. International Broad., 50 F.3d 67, 70 (1st Cir. 1995)* .

(n3)Footnote 2. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n4)Footnote 3. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n5)Footnote 4. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n6)Footnote 5. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n7)Footnote 5.1. *Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 98 (D.D.C. 2003)* (noting that test embodies policy of judicial economy, convenience, and fairness, existence of common issues of proof, and existence of similar witnesses).

(n8)Footnote 6. *Salei v. Boardwalk Regency Corp., 913 F. Supp. 993, 998-1000 (E.D. Mich 1996)* .

(n9)Footnote 7. *Chaney v. City of Chicago, 901 F. Supp. 266, 270 (N.D. Ill. 1995)* .

(n10)Footnote 8. *Lyon v. Whisman, 45 F.3d 758, 761 (3d Cir. 1995)* .

(n11)Footnote 9. *Vreeland v. Ethan Allen, Inc., 828 F. Supp. 14, 15 (S.D.N.Y. 1993)* .

(n12)Footnote 10. *Arnold v. Kimberly Quality Care Nursing Serv., 762 F. Supp. 1182, 1186 (M.D. Pa. 1991)* .

(n13)Footnote 11. *Young v. New York City Transit Auth., 903 F.2d 146, 163-164 (2d Cir. 1990)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART IV. SUPPLEMENTAL JURISDICTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.95

§ 5.95 Supplemental Jurisdiction and Addition of Partiesn*

[1] Generally No Supplemental Jurisdiction in Diversity Cases

The supplemental jurisdiction statute expressly prohibits the extension of supplemental jurisdiction in diversity cases over claims by plaintiffs against persons made parties under *Rules 14*, *19*, *20*, or *24 of the Federal Rules of Civil Procedure*, or over claims by persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24. n1 This means that even though the supplemental jurisdiction statute expressly applies to joinder of claims that are related to federal question claims it is generally available to join nondiverse plaintiffs and defendants in diversity cases. However, nothing in the statute withholds jurisdiction over claims of plaintiffs permissively joined under Rule 20 or certified as class members under Rule 23. n2

[2] Impleader

Because supplemental jurisdiction is excluded under the statute with respect to Rule 14 impleader cases only if impleader is sought by a plaintiff, n1 claims by defendants against impleaded third-party defendants fall within the grant of supplemental jurisdiction in Section 1367(a). n2 Therefore, the statute continues the pre-Section 1367 practice that a federal district court has supplemental jurisdiction over a defendant's proper Rule 14(a) claim against a third-party defendant without regard to whether an independent basis of jurisdiction exists, provided that the court has jurisdiction over the main claim between the original parties. n3

[3] Compulsory Joinder

Rule 19(a) generally provides for the compulsory joinder of certain parties who are subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction. n1 However, the supplemental jurisdiction statute prohibits the assertion of supplemental jurisdiction over claims in diversity cases both by plaintiffs against persons made defending parties under Rule 19 and by other persons proposed to be joined as plaintiffs under Rule 19, when exercising jurisdiction over the claim would be inconsistent with the diversity jurisdictional requirements. n2 The prohibition on plaintiffs' bringing claims against parties joined under Rule 19 is fully consistent with the legislative intent to deter plaintiffs from resorting to diversity jurisdiction. n3

[4] Permissive Joinder

[a] Federal Question Cases

Rule 20 permissive joinder allows all persons to join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. n1 In contrast to the rule for diversity cases, n2 the supplemental jurisdiction statute permits the exercise of supplemental jurisdiction in a federal question case with respect to plaintiffs joined under Rule 20 permissive joinder. n3 Additionally, the supplemental jurisdiction statute explicitly provides that supplemental jurisdiction includes claims that involve the joinder or intervention of additional parties. n4 Consequently, if the court has federal question jurisdiction over one plaintiff's claim against a defendant, a permissively joined plaintiff's state claim against that defendant is supported by supplemental jurisdiction without regard to the diversity of the parties. n5

[b] Diversity Cases

By its terms, the supplemental jurisdiction statute provides that in cases based on diversity, supplemental jurisdiction does not extend to claims by plaintiffs against persons made defending parties under Rule 20. n6 However, the supplemental jurisdiction statute allows supplemental jurisdiction in cases involving Rule 20 joinder of plaintiffs, provided that the requirements of Section 1367(a) have been met, at least if the need for supplemental jurisdiction derives from the failure of the joined party's claim to meet the jurisdictional minimum provided in the diversity jurisdiction statute. On the other hand, supplemental jurisdiction of persons joined as plaintiffs is not allowed if the reason that the court lacks jurisdiction over the joined party's claim is that joinder would destroy complete diversity, rather than because of the failure to meet the jurisdictional minimum. n7

[5] Intervention

Section 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs who seek to intervene pursuant to Rule 24. n1 However, under the supplemental jurisdiction statute, claims against nondiverse parties asserted by persons seeking to intervene as plaintiffs are not supported by supplemental jurisdiction in a diversity action, even if intervention is by right under Rule 24(a). n2 Under the supplemental jurisdiction statute, a person may intervene as a defendant and then assert a counterclaim against a nondiverse plaintiff or a cross claim against a nondiverse party. n3 However, the plaintiff may not respond with a claim against a nondiverse intervenor because it would be a claim made by a plaintiff against a person made a party under Rule 24, a result expressly prohibited by the supplemental jurisdiction statute. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(b).*

(n3)Footnote 2. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *27 (2005) .*

(n4)Footnote 1. *28 U.S.C. § 1367(b).*

(n5)Footnote 2. *Allendale Mut. Ins. Co. v. Triple-S Technologies Co., 851 F. Supp. 277, 279-280 (W.D. Mich. 1993)* .

(n6)Footnote 3. King Fisher Marine Serv., Inc. v. 21st *Phoenix Corp., 893 F.2d 1155, 1161 (10th Cir. 1990)* , *cert. denied, 496 U.S. 912 (1990)* .

(n7)Footnote 1. *Fed. R. Civ. P. 19(a).*

(n8)Footnote 2. *28 U.S.C. § 1367(b)*; *see Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *27 (2005)* .

(n9)Footnote 3. *Cf. Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 728 (2d Cir. 2000)* .

(n10)Footnote 1. *Fed. R. Civ. P. 20(a).*

(n11)Footnote 2. *See* [b], *below*.

(N12)Footnote 3. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *27 (2005)* .

(n13)Footnote 4. *28 U.S.C. § 1367(a).*

(n14)Footnote 5. *Palmer v. Hospital Auth. of Randolph County, 22 F.3d 1559, 1566-1567 (11th Cir. 1994)* .

(n15)Footnote 6. *28 U.S.C. § 1367(b).*

(n16)Footnote 7. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *27 (2005)* .

(n17)Footnote 1. *28 U.S.C. § 1367(b)*; *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *26-*27 (2005)* .

(n18)Footnote 2. *Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 160 n.1 (E.D. Ark. 1993)* (citing **Moore's Federal Practice**).

(n19)Footnote 3. *Development Finance Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156, 160-161 (3d Cir. 1995)* (Section 1367(b) does not extend to defendants' counterclaims)

(n20)Footnote 4. *28 U.S.C. § 1367(b).*

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART IV. SUPPLEMENTAL JURISDICTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.96

§ 5.96 Court's Discretion to Exercise Supplemental Jurisdictionn*

[1] Court Generally Required to Exercise Supplemental Jurisdiction

Although supplemental jurisdiction is not mandatory, n1 courts have held that if the grounds exist, n2 the trial court should exercise supplemental jurisdiction unless one of the exceptions stated in the statute applies. n2.1 In other words, because of the dichotomy between a federal court's power to exercise supplemental jurisdiction under Section 1367(a) and its discretion to decline to exercise such jurisdiction under Section 1367(c), once a district court determines that it has power to exercise supplemental jurisdiction under Section 1367(a), then the court should exercise that jurisdiction unless Section 1367(b) n3 or Section 1367(c) applies to limit that exercise. n4 The exceptions are discussed in [2], below.

[2] Exceptions That Allow Court to Refuse to Exercise Supplemental Jurisdiction

[a] Novel or Complex Issue of State Law

A district court has discretion to decline to exercise supplemental jurisdiction it has over a claim if the claim raises a novel or complex issue of state law. n1 This provision is frequently used to decline jurisdiction in cases in which state law in the area is unsettled. n2 It also may be used to avoid construction of a state constitutional provision in federal court. n3

[b] Supplemental Claim Substantially Predominates

A district court may decline to exercise supplemental jurisdiction it has over a claim if the claim substantially predominates over the claim or claims over which the district court has original jurisdiction. n4 This provision is a codification of one of the factors articulated by the Supreme Court, when it stated that if it appears that the pendent state issues substantially predominate, whether in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution by state tribunals. n5 In answering the question of whether state law predominates, the court should consider the nature of the claims as set forth in the pleading and by determining whether the state law claims are more complex or require more judicial resources to adjudicate or are more pertinent in the case as a whole than the federal law claims. n6 The court should also consider

whether there are methods by which the action might be managed in order to prevent the state law claims from predominating, such as by bifurcating the litigation, certifying a limited class action, or utilizing other case management tools. n6.1

[c] Court Has Dismissed Original Jurisdiction Claims

If the court dismisses all of the claims that formed the basis of its original federal subject matter jurisdiction, the effect of the dismissal on supplemental claims depends on the grounds for dismissal. If the federal claim was dismissed for lack of subject matter jurisdiction, a district court has no discretion to retain the supplemental claims for adjudication. Such a dismissal means that there never was a valid claim within the court's original jurisdiction to which the state claims could be supplemental. Consequently, the district court has no discretion to exceed the scope of its Article III power and must dismiss the state law claims without prejudice. n6.2

However, a district court also has discretion to refuse to exercise supplemental jurisdiction if the district court has dismissed all claims over which it has original jurisdiction. n7 This provision is also a codification of one of the factors articulated by the Supreme Court. n8 It should be noted that dismissal of supplemental claims is not required on dismissal of all federal claims. The district court retains the power to hear a supplemental state claim after dismissal of all federal claims if, on balance, the underlying values indicate that it should be heard. n9

To make this determination, the court must reassess its jurisdiction by making a practical reevaluation under the circumstances of the myriad of considerations that control whether to exercise supplemental jurisdiction in the first instance, n10 including judicial economy, convenience, fairness, and comity. n11

[d] Compelling Reasons Under Exceptional Circumstances

A district court has discretion to decline to exercise supplemental jurisdiction if, in exceptional circumstances, there are other compelling reasons to decline jurisdiction. n12 For example, a court may conclude that declining jurisdiction best accommodates the values of economy, convenience, fairness, and comity. n13 Thus, one court declined for this reason to exercise supplemental jurisdiction over claims that were the subject of a pending state court proceeding. n14 Another exceptional circumstance may be a conflict with a state jurisdiction statute. Thus, in one case it was held that a provision of the Tennessee Governmental Tort Liability Act (TGTLA), giving Tennessee circuit courts exclusive jurisdiction over suits brought under the Act, provided an exceptional circumstance justifying the district court's decision to decline to exercise supplemental jurisdiction over a TGTLA claim asserted against a county jail employee in his official capacity in connection with a Section 1983 action arising from an assault of an inmate at a county jail. n15

[3] Standard of Review for Discretionary Exercise of Supplemental Jurisdiction

A district court's decision whether to exercise or decline supplemental jurisdiction over state law claims is reviewed for abuse of discretion. n1 Furthermore, a party's failure to challenge a court's decision to exercise supplemental jurisdiction over state law claims constitutes waiver in the absence of special circumstances. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Estate of Harshman v. Jackson Hole Mt. Resort Corp., 379 F.3d 1161, 1168 n.3 (10th Cir. 2004)*

(citing **Moore's Federal Practice**).

(n3)Footnote 2. *See § 5.92-5.94*.

(n4)Footnote 2.1. *Arthur Glick Truck Sales, Inc. v. H.O. Penn Mach. Co., 332 F. Supp. 2d 584, 585-586 (S.D.N.Y. 2004)* .

(n5)Footnote 3. *See § 5.94*, regarding prohibitions against additional parties.

(n6)Footnote 4. *Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1352 (11th Cir. 1997)* .

(n7)Footnote 1. *28 U.S.C. § 1367(c)(1)*.

(n8)Footnote 2. *Smith v. Burdette Chrysler Dodge Corp., 774 F. Supp. 380, 382-383 (D. S.C. 1991)* (court declined to exercise supplemental jurisdiction over controlling person of corporation because whether controlling person was liable under state Unfair Trade Practices Act was unsettled point of state law).

(n9)Footnote 3. *Chandler v. Miller, 73 F.3d 1543, 1546 n.3 (11th Cir. 1996)* (refusing to consider whether drug testing of candidates for public office violates Georgia constitution).

(n10)Footnote 4. *28 U.S.C. § 1367(c)(2)*.

(n11)Footnote 5. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n12)Footnote 6. *Diven v. Amalgamated Transit Union Int'l, 38 F.3d 598, 602 (D.C. Cir. 1994)* (weakness of federal claim is factor to be weighed in determining whether state claim substantially predominates).

(n13)Footnote 6.1. *Jones v. Ford Motor Credit Co., 358 F.3d 205, 216 (2d Cir. 2004)* .

(n14)Footnote 6.2. *Estate of Harshman v. Jackson Hole Mt. Resort Corp., 379 F.3d 1161, 1168 n.3 (10th Cir. 2004)* (citing **Moore's Federal Practice**).

(n15)Footnote 7. *28 U.S.C. § 1367(c)(3)*.

(n16)Footnote 8. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n17)Footnote 9. *Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995)* .

(n18)Footnote 10. *Camelio v. American Fed'n, 137 F.3d 666, 672 (1st Cir. 1998)* .

(n19)Footnote 11. *Motorola Credit Corp. v. Uzan, 388 F.3d 39, 47 (2d Cir. 2004)* .

(n20)Footnote 12. *28 U.S.C. § 1367(c)(4)*.

(n21)Footnote 13. *Itar-Tass Russian News Agency v. Russian Kurier, 140 F.3d 442, 448 (2d Cir. 1998)* .

(n22)Footnote 14. *Polaris Pool Sys. v. Letro Prods., Inc., 161 F.R.D. 422, 425 (C.D. Cal. 1995)* (pending state court action constitutes exceptional circumstances under (c)(4)).

(n23)Footnote 15. *Gregory v. Shelby County, 220 F.3d 433, 446 (6th Cir. 2000)* .

(n24)Footnote 1. *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., 215 F.3d 195, 206 (1st Cir. 2000)*

; *see Robertson v. Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998)* (district court's decision to remand state law claims after dismissing federal claims will be reversed only on finding of abuse of the court's "wide" discretion).

(n25)Footnote 2. *New Jersey Turnpike Auth. v. PPG Indus., 197 F.3d 96, 113-114 (3d Cir. 1999)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 5 ORIGINAL JURISDICTION OVER THE SUBJECT MATTER
PART IV. SUPPLEMENTAL JURISDICTION

1-5 Moore's Manual--Federal Practice and Procedure § 5.97

§ 5.97 Statute of Limitationn*

The supplemental jurisdiction statute has a tolling provision to save supplemental claims that have been dismissed in federal court, so that the party may assert them in state court. Under the provision, the period of limitation for any claim asserted under Section 1367(a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection Section 1367(a), is tolled while the claim is pending and for a period of 30 days after it is dismissed, unless state law provides for a longer tolling period. n1

However, this tolling provision does not apply to any claim irrespective of the reason for its dismissal. Thus, the Supreme Court has stated that this tolling provision does not apply to preserve state law claims that are constitutionally infirm. Specifically, the Supreme Court has held that § 1367(d) does not toll the limitation period for state law claims asserted against nonconsenting statedefendants, when the federal court dismissed the claim on constitutional, *Eleventh Amendment* immunity grounds. n1.1

Before enactment of the supplemental jurisdiction statute, courts of appeals frequently considered it an abuse of discretion to fail to retain jurisdiction over a pendent state claim if a state statute of limitation expired before dismissal of the anchor federal claim. n2 The statute allows supplemental state claims to be heard in state court if the jurisdiction-conferring claim is dismissed and provides a brief window of opportunity for the plaintiff to file in state court without giving the opposition a limitation defense. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 106.66 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(d)*; *see Jinks v. Richland County, 538 U.S. 456, 458-459, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)* (to prevent limitation period on supplemental claim from expiring while plaintiff fruitlessly pursues it in federal court, § 1367(d) provides tolling rule that must be applied by state courts).

(n3)Footnote 1.1. *Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27, 37-41 (2002)* (claims were barred by applicable state statute of limitations, and federal supplemental jurisdiction statute did not toll limitation period on those claims because of state defendant's *Eleventh Amendment* immunity); *but see Jinks v. Richland County, 538 U.S. 456, 464-466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)* (state court must apply § 1367(d) tolling rule to claim that is brought against state's political subdivisions, such as a municipality, as opposed to the state itself).

(n4)Footnote 2. *Edwards v. Okaloosa County, 5 F.3d 1431, 1433-1434 (11th Cir. 1993)* .

(n5)Footnote 3. *See Hedges v. Musco, 204 F.3d 109, 123-124 (3d Cir. 2000)* ; *Edwards v. Okaloosa County, 5 F.3d 1431, 1433 n.1 (11th Cir. 1993)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure 6.syn

§ 6.syn Synopsis to Chapter 6: PERSONAL JURISDICTION AND SERVICE OF PROCESS

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Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

-6 Moore's Manual--Federal Practice and Procedure § 6.01

§ 6.01 Nature of Personal Jurisdictionn*

[1] Definition of Personal Jurisdiction

"Personal jurisdiction" for a federal court is the courts' statutory or constitutional authority to hear a case based on the relationship of a given defendant to the particular geographic area in which a case is brought. Thus, personal jurisdiction refers to the court's ability to assert judicial authority over the parties and bind them by its adjudication. Service of process is the usual method for creating a court's personal jurisdiction. In this regard, a person amenable to an assertion of subject-matter jurisdiction is not subject to exercise of that jurisdiction in a particular case until the person has been properly served. Both the assertion of authority and the subsequent service must be statutorily and constitutionally permissible. Due process requires certain ties or contacts between a defendant and the forum which asserts jurisdiction. n1

Personal jurisdiction is required when the claimant wants to obtain a personal money judgment or an injunction against the defendant. The type of connection or relationship between the defendant and the forum determines the type of jurisdiction a court may exercise and the type of judgment it may render. If the defendant personally has an appropriate connection with the forum, the court may exercise personal jurisdiction over the defendant. n2 Personal jurisdiction is necessary to enable a court to render a judgment in personam. A judgment "in personam" is a judgment that determines whether the defendant must do or refrain from doing some specific act or pay the plaintiff a sum of money. n3

A court usually obtains jurisdiction over the person or the property that is the subject of the suit through the procedure of "service of a summons" pursuant to Rule 4. n4 Note, however, that proper service by itself does not establish personal jurisdiction. The procedure of invoking jurisdiction by service of process is distinct from the requirement of a jurisdictional basis, and a defendant must still have the required contacts with the state. n5 Conversely, even if a proper jurisdictional basis exists, service of process that does not meet due process and statutory requirements will impair jurisdiction. n6 The traditional territorial power theory is likely responsible for any confusion between the basis and the procedure requirements for jurisdiction, because, according to early theory, personal service of process within the forum state was the only adequate basis for personal jurisdiction over a non-consenting nonresident defendant.

There are two categories of personal jurisdiction: specific and general. Specific personal jurisdiction is exercised by the

court when the matter before the court arises out of or relates to the nonresident defendant's contacts with the forum. General personal jurisdiction is exercised when the matter is not one arising out of or related to the nonresident defendant's contacts with a particular forum. n7

[2] Categories of Personal Jurisdiction

[a] Specific Personal Jurisdiction

Personal jurisdiction is categorized in two ways: specific and general. A court has specific personal jurisdiction over a matter before the court when the matter arises out of or relates to the nonresident defendant's contacts with the forum. n1 General personal jurisdiction is exercised where the matter is not one arising out of or related to the nonresident defendant's contacts with a particular forum. n2 The primary characteristic of specific personal jurisdiction it that it may be based on less significant contacts, while general personal jurisdiction requires more substantial contacts. n3

To satisfy due process in the exercise of specific personal jurisdiction, the nature and quality of the nonresident defendant's contacts with the forum must be significant in relation to the specific cause of action. This requires a showing that the defendant purposefully directed his or her activities at residents of the forum, and by doing so, availed himself or herself of the privilege of conducting activities in forum, and invoking the benefits and protections of the forum's laws. n4 Thus, even if a nonresident defendant's contacts with the forum state could not be characterized as "substantial, continuous, and systematic" in order to support general jurisdiction, n5 a defendant may still be subject to specific jurisdiction for claims arising from or related to any of its specific activities within the state.

The Ninth Circuit has a three-part test for specific jurisdiction: (1) the defendant must act in way or consummate some transaction amounting to purposeful availment of privilege of conducting activities in forum state; (2) the claim must arise out of or result from defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. n6 If the plaintiff is able to make that showing, the defendant will have the burden of showing, from a balance of interest factors, that the state's exercise of specific jurisdiction would be unfair. n7

[b] General Personal Jurisdiction

"General personal jurisdiction" is jurisdiction that the court may exercised even though the matter before the court is not one arising out of or related to the nonresident defendant's contacts with a particular forum. Thus, general personal jurisdiction arises from a defendant's contacts with the forum that are unrelated to particular cause of action being litigated. The due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction and require a showing of continuous and systematic general contacts between the defendant and the forum state. n8 Thus, only if a defendant's activities within the forum state are either "continuous and systematic" or are "substantial," will the state have a sufficient relationship with the defendant to assert general jurisdiction. n9 Conversely, if a defendant's forum activities are continuing and systematic, jurisdiction may be proper without a relationship between a defendant's particular act and cause of action. n10

[3] Personal Jurisdiction Contrasted with Jurisdiction Over Property

A federal district court may assert in personam jurisdiction based on state law, n1 and a state has the authority to assert its jurisdictional power over any property within its borders. By virtue of its jurisdiction over property, a court may entertain an action "in rem" or "quasi-in-rem." However, a judgment in an action in rem is effective to determine interests of persons in specific property, but it does not impose any personal obligation on the defendant, unlike a judgment in personam. Although jurisdiction over property is subject to the same constitutional restrictions that govern personal jurisdiction, n2 the only type of judgment a court may render by virtue of its jurisdiction over property is one that affects that particular item alone of the defendant's property. n3 Jurisdiction over property is necessary to enable a court to render a judgment in rem or quasi-in-rem. Personal jurisdiction, by contrast, is necessary to enable a court to render a judgment in personam. n4

[4] Personal Jurisdiction Contrasted With Subject-Matter Jurisdiction

The fact that the word "jurisdiction" has several meanings depending on the context in which it is used is perhaps best illustrated by the differences between subject-matter jurisdiction and personal jurisdiction, both of which are encompassed by a reference to the term "jurisdiction." The requirement of subject-matter jurisdiction is based in the constitutional authority of a federal court to hear a cause of action--therefore the question of subject-matter jurisdiction is always open and courts at every stage of a proceeding are required to consider the issue even though the parties have failed to raise it or have even consented to subject-matter jurisdiction. n1

On the other hand, personal jurisdiction is concerned with the relationship of a given defendant to the particular geographic area in which a case is brought. n2 It refers to the court's ability to assert judicial authority over the particular parties and bind them by its adjudication. Furthermore, a person amenable to the assertion of jurisdiction may not be subject to exercise of that jurisdiction until the person has been properly served. Both that assertion of authority and the subsequent service must be statutorily and constitutionally permissible. n3 Because personal jurisdiction exists to protect parties' constitutional rights only, it is subject to waiver and procedural default. n4

[5] Personal Jurisdiction Contrasted With Venue

Personal jurisdiction is the authority of a court to hear a case regarding a particular defendant; any court within that territory may be able to exercise personal jurisdiction over the defendant. Venue, on the other hand, is the designation of which of those courts is the proper court to hear the particular claim or action. Venue rules generally provide that the action be brought in the county or district where the defendant lives, where the cause of action arose, or where the property is located. n1 Although both venue and personal jurisdiction rules are concerned with the convenience of the parties and witnesses, venue differs from both personal and subject-matter jurisdiction. Venue is concerned with the relationship of the defendants and the events to the particular judicial district in which a case is brought. Like personal jurisdiction, venue relates to location, and concerns the particular place where judicial authority may be exercised. n2

Rules of venue give the defendant a privilege not to be sued in a forum other than one designated as proper; they do not affect the court's power over the particular person or property in question or the court's competence. n3

Like lack of personal jurisdiction, improper venue also may be waived. n4 However, a defendant may challenge personal jurisdiction in a collateral attack but may not raise a venue objection in a separate proceeding. n5

If a case is brought in a court of improper venue, and a timely objection is made by the defendant, the case may be dismissed, or it may be transferred to a court of proper venue. n6 On the other hand, if a court lacks personal jurisdiction, a state court will have to dismiss the case, but a federal court may be able to transfer the case to a court where personal jurisdiction is proper. n7

[6] Personal Jurisdiction Subject to Waiver

A court must always have jurisdiction over the subject matter of an action. The court must also have jurisdiction over the defendant or, if the action is in rem, over the property that is the subject of the action. Thus, even if the court has subject-matter jurisdiction, it may not render a valid decision unless it has jurisdiction over the person or the property that is specified in the claim for relief made to the court. n1 Personal jurisdiction exists primarily to protect parties' constitutional rights, and it is therefore subject to the normal rules of waiver and procedural default; this is in contrast to subject-matter jurisdiction which may not be waived in any case. n2 Because personal jurisdiction represents a restriction on judicial power as a matter of individual liberty, any party may insist that the requirement be observed, or any party may waive that right, effectively consenting to the court's exercise of adjudicatory authority. n3

Unlike subject matter jurisdiction, a party that is named as a defendant in a claim for relief may waive the defense of

lack of personal jurisdiction. n4 A person may waive personal jurisdiction either expressly, by consenting to jurisdiction, or impliedly by failing to object in a timely manner or by failing to use the proper procedure. If the defendant gives no indication that it is objecting to lack of personal jurisdiction, the court should not raise it on its own motion, because the defendant's consent is sufficient to give the court jurisdiction over the defendant's person. n5

Once a party has waived the defense of lack of personal jurisdiction, the court may not raise or revive the issue on the court's own initiative. Personal jurisdiction is a defense that is particularly subject to waiver because the court may acquire personal jurisdiction through a party's voluntary appearance. Thus, a party that does not assert the defense in a timely fashion voluntarily appears and confers personal jurisdiction on the court. If a party consents to personal jurisdiction by failing to raise the issue in a timely manner, the district court is not free to nullify that consent. n5.1

[7] Effect of Lack of Personal Jurisdiction

Unless it has been waived, n1 a court without personal jurisdiction or in rem jurisdiction has no authority over the particular person or property before it. If the court proceeds to hear the action, its judgment is not valid. n2 Consequently, the court may not impose personal liability on the defendant or affect the defendant's property rights. n3

If a court lacks personal jurisdiction, it also means that a subsequent federal court or the court of another state is not required to enforce the judgment. If the first court has made an error in exercising personal jurisdiction, the error may be challenged either in the court in which the action is originally brought, or, if no such challenge is made in the first court and the error in jurisdiction is not waived, in a later proceeding in a second court. The former challenge is called a direct attack; the latter is called a collateral attack. The assertion of lack of jurisdiction of the first court as a defense in a subsequent proceeding to enforce the judgment in the second court is a typical example of a collateral attack. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.02 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864-867 (2d Cir. 1997)* .

(n3)Footnote 2. *Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000)* .

(n4)Footnote 3. *Kobill Airways Ltd. v. National Flight Services, Inc., 92 F. Supp. 2d 689, 691-692* (N.D. Ohio 2000.

(n5)Footnote 4. *Lampe v. Xouth, Inc. 952 F.2d 697, 701 (3d Cir. 1991)* (federal district court obtains personal jurisdiction over defendant when defendant served in accordance with Rule 4); *see Fed. R. Civ. P. 4*; *see also* PART II.

(n6)Footnote 5. *Greenspun v. Del E. Webb Corp., 634 F.2d 1204, 1207 (9th Cir. 1980)* .

(n7)Footnote 6. *See Overton v. United States, 925 F.2d 1282, 1284 (10th Cir. 1991)* (statute providing that service on federal defendants be by certified mail beyond territorial limits of district court in which suit was instituted held to be venue statute and not grant of nationwide in personam jurisdiction).

(n8)Footnote 7. *Helicopteros Nacionales de Colombia, SA, v. Hall, 466 U.S. 408, 414 n. 8, 415 n. 9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* ; *see* [2], *below*.

(n9)Footnote 1. *Helicopteros Nacionales de Colombia, SA, v. Hall, 466 U.S. 408, 414 n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* ; *see § 6.03*.

(n10)Footnote 2. *See* [b], *below*.

(n11)Footnote 3. *Helicopteros Nacionales de Colombia, SA, v. Hall, 466 U.S. 408, 415 n. 9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* ; *Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000)* ; *see* [b], *below*.

(n12)Footnote 4. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n13)Footnote 5. *See* [b], *below*.

(n14)Footnote 6. *Doe v. American Nat'l Red Cross, 112 F.3d 1048, 1051 (9th Cir. 1997)* .

(n15)Footnote 7. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n16)Footnote 8. *Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000)* ; *see, e.g., Access Telecomm., Inc. v. MCI Telcomms. Corp., 197 F.3d 694, 716-718 (5th Cir. 1999)* (general jurisdiction was not shown even on prima facie basis when defendant conducted considerable business with forum state but virtually no business actually in that state).

(n17)Footnote 9. *Lake v. Lake, 817 F.2d 1416, 1420 (9th Cir. 1987)* .

(n18)Footnote 10. *Jones v. Petty-Ray Geophysical, Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir. 1992)* , *cert. denied, 506 U.S. 867 (1992)* .

(n19)Footnote 1. *Fed. R. Civ. P. 4(k)(1)(A)* (federal district court has jurisdiction over any person who could be subjected to jurisdiction of court of general jurisdiction in state in which district court is located).

(n20)Footnote 2. *Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* (jurisdiction over property requires adequate relation between defendant, forum, and litigation).

(n21)Footnote 3. *Hanson v. Denckla, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* .

(n22)Footnote 4. *New England Health Care Employees Union, Dist. 1199 v. Fall River Nursing Home, Inc., 802 F. Supp. 674, 678 (D.R.I. 1992)* .

(n23)Footnote 1. *Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313, 65 S. Ct. 289, 89 L. Ed. 260 (1945)* (lack of subject-matter jurisdiction may not be cured by consent of parties).

(n24)Footnote 2. *Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999)* ; *see United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864 (2d Cir. 1997)* .

(n25)Footnote 3. *See United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864-867 (2d Cir. 1997)* .

(n26)Footnote 4. *Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999)* .

(n27)Footnote 1. *28 U.S.C. § 1391* (general federal venue statute).

(n28)Footnote 2. *United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864 (2d Cir. 1997)* .

(n29)Footnote 3. *Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-168, 60 S. Ct. 153, 84 L. Ed. 167 (1939)* (venue rules do not affect court's competence).

(n30)Footnote 4. *Fed. R. Civ. P. 12(b)(3), 12(h)(1).*

(n31)Footnote 5. *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc., 343 F.2d 7, 11 (8th Cir. 1965)* .

(n32)Footnote 6. *28 U.S.C. § 1406(a).*

(n33)Footnote 7. *28 U.S.C. § 1631* (transfer to cure lack of personal jurisdiction).

(n34)Footnote 1. L.B. Harvey Marine, Inc. v. M/V "River Arc," *712 F.2d 458, 459 (11th Cir. 1983)* .

(n35)Footnote 2. *Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999)* ; *see* Ch. 5, *Original Jurisdiction Over the Subject Matter.*

(n36)Footnote 3. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-579, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* .

(n37)Footnote 4. *Fed. R. Civ. P. 12(b)(2), 12(h)(1).*

(n38)Footnote 5. *Fed. R. Civ. P. 12(h)(1).*

(n39)Footnote 5.1. *Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40-41 (1st Cir. 2001)* (district court erred when it raised issue of personal jurisdiction on its own motion after it had been waived by the defendants, because under Rule 12(g) and 12(h) personal jurisdiction is waived if not raised in first Rule 12 motion).

(n40)Footnote 1. *See* [6], *above.*

(n41)Footnote 2. *Burnham v. Superior Court, 495 U.S. 604, 609, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* .

(n42)Footnote 3. *J.O. Alvarez, Inc. v. Rainbow Textiles, Inc., 168 F.R.D. 201, 203 (S.D. Tex. 1996)* .

(n43)Footnote 4. *Sanderford v. Prudential Ins. Co. of America, 902 F.2d 897, 901 (11th Cir. 1990)* (collateral attack based on insufficiency of process failed because third-party defendant was not prejudiced by inadvertent omission of return date from summons).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

-6 Moore's Manual--Federal Practice and Procedure § 6.02

§ 6.02 Personal Jurisdiction Based on Court's Physical Power Over Defendant or Defendant's Propertyn*

[1] Court's Physical Power Based on Presence, Consent, and Domicile

Traditionally, the constitutional exercise of jurisdiction has consistently been permitted based on the physical power of the court over the defendant because of the presence of the defendant or the defendant's property. In addition to the physical power theory, the Supreme Court later identified two additional bases for personal jurisdiction related to the physical power theory: jurisdiction based on consent or voluntary appearance and jurisdiction based on domicile within the forum. Jurisdiction based on appearance or consent is actually a recognition of the physical presence theory.

If a defendant is physically present in court, the defendant is under the court's power. If the defendant consents to jurisdiction, even though not physically present, he or she has submitted to the court's power. Jurisdiction based on domicile within the state also conforms to the physical power theory. Although a defendant is not always physically present within the state where he or she is domiciled, the defendant has a permanent physical connection with the state and is regularly subject to the power of the courts of the state for many purposes, even while temporarily absent. n1 For a discussion of the application of the physical power personal jurisdictional basis by modern courts, see [2], *below*.

[2] Application of Physical Power Theory

[a] Presence

The Supreme Court has unanimously upheld the constitutionality of jurisdiction based on personal service of process on a transient nonresident merely because the person was physically present in the state. In this regard, service of process on a person voluntarily in state suffices to confer personal jurisdiction without regard to whether the defendant was only briefly in the state or whether the cause of action was related to his or her activities. n1 The transient presence of property has also been held sufficient to permit the exercise of long-arm jurisdiction over an insurer that insured such transient property against risks in general. n2

[b] Consent

[i] Express Consent

A defendant may expressly consent by agreement to a court's jurisdiction. Courts generally determine that personal jurisdiction is adequate based on such a contractual consent, even in the absence of other contacts with the forum and even if no official steps are taken to notify the defendant other than those specified in the agreement. n3 Generally, contracts executed before an action are valid to effect personal jurisdiction; however, in some states consent to jurisdiction by agreement is effective only if made after the action has been commenced. n4

There are two types of consent agreements that are typically used. Non-exclusive consent to jurisdiction clauses are fairly common in commercial contracts. These normally include a requirement that one or both parties submit to jurisdiction in a designated court for any action arising out of, or attempting to enforce, the contract and may prescribe a method of notice. Non-exclusive clauses may not contain mandatory provisions and usually do not contain venue language. n5

These clauses have generally been upheld as a constitutionally adequate basis for jurisdiction, n6 unless a clause is deemed not to be part of the actual agreement or is deemed to be part of an adhesion contract. Adhesion contracts, however, are not unreasonable per se but only if fundamentally unfair. n7 Therefore, a non-exclusive consent to jurisdiction clause is not necessarily unenforceable because the agreement is part of a form contract even if the contract is prepared by a corporation and requires an individual to submit to jurisdiction. n8

The second type of consent to jurisdiction clauses are "exclusive" jurisdiction clauses, known as a prorogation clauses, which require the parties to submit to the jurisdiction of a designated court, to the exclusion of all other courts, for any action that may arise from a given transaction or relationship. Although common-law courts historically would not enforce such clauses, the Supreme Court has held that prorogation agreements are prima facie valid and should be enforced, unless the agreement is unreasonable or unjust, was procured by fraud or overreaching, violates the forum's strong public policy, or litigation in the designated forum would be seriously inconvenient. n9

There are limitations on prorogation agreements. A prorogation clause generally binds only the parties to the agreement and, therefore is not binding on third parties, even though the action arises out of the contract or transaction to which the clause relates. n10 Also, while some courts hold that prorogation clauses apply to contract related tort claims, as well as contract claims, unless the language of the agreement compels a contrary conclusion, n11 others take the opposite view, holding that a prorogation clause does not apply to tort claims. n12

In addition, the Supreme Court has held that a prorogation clause will not necessarily preclude a venue transfer to a different, more convenient forum pursuant to federal statute. n13 Federal law, rather than state law, governs the enforcement of prorogation clauses in federal courts both for claims arising under federal law and in diversity cases. n14

[ii] Implied Consent by Appearance

If a nonresident defendant makes a general appearance in an action, the defendant is deemed to have consented to the jurisdiction of the court. n15 The term "appearance" designates an overt act by which a person submits himself or herself to a court's jurisdiction. An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction. n15.1 There are two types of appearances, general or special. In a "general appearance," the person appearing before the court is not making any qualification or limitation on the appearance. n15.2 In a special appearance, the person appearing before the court is making a specific limitation, such as that the appearance is for the sole purpose of raising a lack of jurisdiction. n15.3 The expression "general appearance" is still widely used to describe acts by the defendant sufficient to support jurisdiction, even in discussions of jurisdiction in courts that have adopted the Federal Rules of Civil Procedure. n15.4 Under the federal rules, it is no longer necessary to enter a formal "special appearance" to object to a court's exercise of personal jurisdiction; rather, a defendant should object to defects in personal jurisdiction by attacking the validity of service of process pursuant to Rule 12(b). n15.5 On the other hand, a person is deemed to have

waived objections to personal jurisdiction if the person requests the court to take some affirmative action on behalf of the party. n15.6 It should be noted that any sort of participation by the defendant or the defendant's alter ego other than merely to contest jurisdiction in the action is constitutionally sufficient as a jurisdictional basis. n16 Furthermore, a plaintiff who commences an action in a state that would not otherwise be able to obtain jurisdiction over the plaintiff's person consents to jurisdiction there for any counterclaim. n17

Many state laws preserve the procedure of the special appearance, which is the right to appear to present a jurisdictional challenge without submitting to the court's jurisdiction for any other purposes; in any event, all states allow some kind of device to challenge personal jurisdiction without submitting to jurisdiction for other purposes. n18 The technical requirements for making a special appearance may vary from state to state, as do the types of acts by the defendant that turn an attempted special appearance into a general appearance that constitutes waiver of defects in personal jurisdiction. n19 State law is relevant in such issues because when federal subject jurisdiction is based on diversity, state law determines adequacy of personal jurisdiction. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDomicile

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* §§ 108.20 et seq, 108.50 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565 (1877)* .

(n3)Footnote 1. *Burnham v. Superior Court, 495 U.S. 604, 612, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* .

(n4)Footnote 2. *Armada Supply, Inc. v. Wright, 858 F.2d 842, 849 (2d Cir. 1988)* (contracting to insure property located within forum state, even if presence of property is transitory, subjected foreign marine insurer to jurisdiction under forum state law).

(n5)Footnote 3. *Carnival Cruise Lines, Inc. v. Superior Court, 234 Cal. App. 3d 1019, 1027, 286 Cal. Rptr. 323 (1991)* .

(n6)Footnote 4. *See, e.g., Tex. Civ. Prac. & Rem. Code § 30.001.*

(n7)Footnote 5. *Guy F. Atkinson Constr. v. Ohio Mun. Elec. Generation Agency Joint Venture 5, 943 F. Supp. 626, 628-629 (S.D. W.Va 1996)* .

(n8)Footnote 6. *National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-316, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964)* .

(n9)Footnote 7. *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* .

(n10)Footnote 8. *Generale Bank, NewYork Branch v. Choudhury, 779 F. Supp. 303, 305-306 (S.D.N.Y. 1991)* .

(n11)Footnote 9. *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-16, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* .

(n12)Footnote 10. *Panchal v. Ethen, 648 So. 2d 245, 246 (Fla. Dist. Ct. App. 1994)* .

(n13)Footnote 11. *Vijuk Equip., Inc. v. Otto Hohner KG, 728 F. Supp. 1368, 1371 (N.D. Ill. 1990)* (clause applies to claim for tortiously interfering with contractual relations).

(n14)Footnote 12. *General Envtl. Science Corp. v. Horsfall, 753 F. Supp 664, 668 (N.D. Ohio 1990)* .

(n15)Footnote 13. *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* ; *see 28 U.S.C. § 1404(a).*

(n16)Footnote 14. *See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* .

(n17)Footnote 15. *Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 786 (5th Cir. 1990)* , *cert. denied, 498 U.S. 926 (1990)* (if party affirmatively enters case and makes no objection to jurisdiction, party is deemed to have waived any personal jurisdiction objection).

(n18)Footnote 15.1. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 784 n.3 (2003)* .

(n19)Footnote 15.2. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 784 n.3 (2003)* .

(n20)Footnote 15.3. *See, e.g., Jaffe v. Accredited Sur. & Cas. Co., 294 F.3d 584, 589 (4th Cir. 2002)* .

(n21)Footnote 15.4. *See Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 787 (2003)* .

(n22)Footnote 15.5. *County Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 483 (6th Cir. 2002)* .

(n23)Footnote 15.6. *Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 786 (5th Cir. 1990)* , *cert. denied, 498 U.S. 926 (1990)* .

(n24)Footnote 16. *York v. Texas, 137 U.S. 15, 20-21, 11 S. Ct. 9, 34 L. Ed. 604 (1890)* .

(n25)Footnote 17. *Adam v. Saenger, 303 U.S. 59, 67-68, 58 S. Ct. 454, 82 L. Ed. 649 (1938)* .

(n26)Footnote 18. *See DIRECTV, Inc. v. Meyers, 214 F.R.D. 504, 508 (N.D. Iowa 2003)* (Iowa Rules of Civil Procedure have abolished "special appearance," and defendant may not appear specially for sole purpose of attacking jurisdiction of court; rather, under Iowa law defendant may assert lack of personal jurisdiction by pre-answer motion, in manner similar to current federal rules).

(n27)Footnote 19. *Ruthe v. Dohring (In re Dohring), 245 B.R. 262, 265-266 (N.D. Tex. 2000)* ; *Davis v. Eighth Judicial Dist., 629 P.2d 1209, 1212 (Nev. 1981)* .

(n28)Footnote 20. *Caldwell-Baker Co. v. S. Ill. Railcar Co., 225 F. Supp. 2d 1243, 1259 (D. Kan. 2002)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

-6 Moore's Manual--Federal Practice and Procedure § 6.03

§ 6.03 Personal Jurisdiction Based on Defendant's Contacts with Forumn*

[1] Development of Personal Jurisdiction Based on Contacts

In *International Shoe Co. v. Washington,* the Supreme Court ended exclusive reliance on the physical power theory n1 as the basis for jurisdiction and established the basic principles that have guided more recent developments in personal jurisdiction law. Instead, the Court held that personal jurisdiction rules should focus on a defendant's contacts with the forum state. n2 Historically, the jurisdiction of courts to render judgments in personam had been based on their de facto power over the defendant's person. Hence a defendant's presence within the territorial jurisdiction of a court had been a prerequisite to its rendition of personally binding judgment.

In this case, the Court held that the absolute requirement of presence had given way to personal service of summons or other form of notice; and that if the defendant was not present within the territory of the forum, due process required only that the defendant have certain minimum contacts with it such that the maintenance of the suit did not offend "traditional notions of fair play and substantial justice." Thus, whether a state may constitutionally exercise personal jurisdiction over a nonresident defendant now depends on the "quality and nature" of the defendant's forum-related activities. n3 To determine that the maintenance of the suit did not offend traditional notions of fair play and substantial justice, a state court had to make an "estimate of the inconveniences" to the defendant as a result of a trial away from its home. n4

Under contacts analysis, personal jurisdiction may not be defeated simply because a nonresident defendant did not enter the state. Rather, to satisfy due process the nature and quality of the nonresident defendant's contacts with the forum must be significant in relation to the specific cause of action. This requires a showing that the defendant purposefully directed activities at residents of the forum and by doing so availed himself or herself of the privilege of conducting activities in the forum and invoking the benefits and protections of the forum's laws. As a corollary to this "purposeful availment" requirement, courts consider whether the putative nonresident defendant could reasonably have anticipated being haled into court in the forum state. The "contacts" requirement protects a defendant from being subjected to personal jurisdiction as a result of fortuitous, attenuated or random contacts or as a result of the unilateral activity of another party. n5 Thus, the contacts connecting the defendant to the forum state must be the foreseeable result of the defendant's own purposeful conduct and not simply that of the plaintiff or of third parties. n6

[2] Applicable Test Depends on Classification as Whether Personal Jurisdiction is Specific or General

In its latest test to determine whether a court has personal jurisdiction over a nonresident, the Supreme Court has adopted terminology that distinguishes between "specific" and "general" jurisdiction. n1"Specific jurisdiction" is jurisdiction to adjudicate claims that arise only from the defendant's actual contacts with the forum state. n2 Thus, if a defendant does not have ongoing contacts with a state, and is therefore not amenable to general jurisdiction, the state may exercise jurisdiction over the defendant only for claims that arise out of the defendant's forum contacts.

Specific jurisdiction may be available when the defendant has few contacts, or even a single contact, with the forum state when the claim in issue arises directly from the contacts. n3 A typical example is the exercise of specific jurisdiction over a nonresident defendant who has committed a tort within the state. n4

By contrast, "general jurisdiction" refers to jurisdiction to adjudicate claims that do not necessarily arise from the defendant's contacts with the forum state. n5 Thus, if a defendant is amenable to general jurisdiction in a state, the state may exercise jurisdiction over the defendant based on any claim, including claims unrelated to the defendant's contacts with the state. General jurisdiction ordinarily exists only when the defendant's forum connections are continuous, systematic, and substantial. Therefore, the state has general jurisdiction over natural persons who are domiciliaries of the state and corporations that are incorporated in the state, and the state may also assert general jurisdiction over nonresidents if their forum connections are substantial. Note, however, that the general jurisdiction requirement of presence and service in the state is an independent, adequate basis for personal jurisdiction, even if the defendant has no other forum state contacts. n6 For further discussion of the distinction between specific personal jurisdiction and general personal jurisdiction, see *§ 6.01[2]*

[3] Contacts Test for Specific Personal Jurisdiction

[a] Test Described

If claims directly arise from or relate to the alleged activities of the defendant within a particular state, that state may have personal jurisdiction over the defendant even if the nonresident defendant's contacts with the state are not "substantial, continuous and systematic. This personal jurisdiction, known as "specific personal jurisdiction," n1 requires a showing by the plaintiff that: n2 (1) the plaintiff's cause of action arose out of or is related to the defendant's forum contacts n3 and (2) the nonresident defendant has purposefully established significant contact with the forum state, as opposed to a random, fortuitous, or attenuated contact. n4 Once the plaintiff has made such a showing, the defendant has the burden of showing, from the balance of interest factors, that the state's exercise of specific jurisdiction would be unfair. n5

[b] Nature of Required Contacts

For purposes of personal jurisdiction analysis, the term "contacts" means both acts physically performed in the forum state and acts performed outside the forum state that have an effect within the forum. n6 In other words, personal jurisdiction analysis requires the court to determine whether there were "contacts," and, if so, whether those contacts were purposeful on behalf of the defendant. n7 It should be noted that one purposeful act with effects in forum state may create sufficient contact to support specific personal jurisdiction; and it is sufficient for purposes of due process that the suit was based on a contact that had substantial connection with that state. n8

The Supreme Court has made it clear that the contact must be the result of the defendant's purposeful availment. n9 Thus, when the defendant deliberately has engaged in significant activities within a state or has created 'continuing obligations' between itself and residents of the forum, it manifestly has availed itself of the privilege of conducting business there, and because its activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require the defendant to submit to the burdens of litigation in that forum as well.

Furthermore, contacts must be significant, and not random, fortuitous, or attenuated. n10

As a general rule, each defendant's contacts with the forum state must be assessed individually. n11 However, general rules of vicarious liability still apply for personal jurisdictional determinations. n12 Only if a person would be vicariously liable for the acts or omissions of another would the person be subject to personal jurisdiction on the basis of the other person being subject to personal jurisdiction. n13

For example, because a corporation is a legal entity, whether a corporation has made contacts justifying the exercise of personal jurisdiction is actually a question of whether the contacts made by its agents and employees are sufficient to justify the exercise of jurisdiction. If so, the acts of the corporation's agents and employees will be attributed to the corporation for jurisdictional purposes, provided they were within the course and scope of the agency or employment. n14 On the other hand, because a parent corporation and a subsidiary are separate legal entities, sufficient contacts with the parent do not necessarily ensure personal jurisdiction over the subsidiary, n15 nor, conversely, do sufficient contacts with the subsidiary ensure personal jurisdiction over the parent. n16 Only when the parent corporation has significant control over the subsidiary, n17 or when the separateness is actually a sham, may the contacts of one be imputed to the other. n17.1

Under the "government contacts" exception to the exercise of personal jurisdiction, if a person's contacts with a state or the District of Columbia are not voluntary, but the person is merely contacting the government in that forum, the contacts may not serve as the basis for personal jurisdiction. n17.2 The purpose of the exception is to protect an individual's right to transact business with a federal agency or other entity without being exposed to specific jurisdiction. n18

[c] Requirement of Purposeful Availment

In addition to the requirement that the cause of action must be related to the contact with the forum state, the plaintiff must also show that the contact is properly attributable to the defendant. Thus, it is essential in obtaining personal jurisdiction to establish that there has been some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, and therefore invoked the benefits and protections of the forum's laws. n19 This "purposeful availment" must be considered first, before it is necessary to consider the interest-balancing test. n20 The purposeful availment requirement ensures that the defendant has had fair warning that its action would render it amenable to suit in the forum state. n21 Note, however, that the defendant's physical entry into or presence in the forum state is not required; the absence of physical contacts with the forum state will not defeat jurisdiction if the defendant has purposefully directed its activities toward forum residents. n22

[d] Consideration of Fairness

Once the plaintiff has shown that the defendant has purposefully established minimum contacts within the forum state giving rise to the claim or claims in the action, n23 the defendant may refute specific personal jurisdiction by showing from the balance of several factors that the state's exercise of specific jurisdiction would be unfair. n24 In this analysis, the court must determine whether the nature and quality of the defendant's purposeful contacts would make it fair play and substantial justice to subject the defendant to jurisdiction there, considering the following factors: (1) the extent of the burden imposed on the defendant; n25 (2) the forum state's interest in adjudicating the dispute; n26 (3) the plaintiff's interest in obtaining effective relief; n27 (4) the interstate interest in obtaining the most efficient resolution of controversies; n28 (5) the shared interest of the several states in furthering fundamental substantive policies; n29 and (6) whether there is an alternative forum. n30 The defendant has the burden of showing that the state's exercise of specific personal jurisdiction is unfair or unreasonable. n31

[4] Contacts Test for General Personal Jurisdiction

The Supreme Court has adopted a test which provides that if a defendant has sufficient contacts with a forum state, personal jurisdiction may exist over the defendant for a claim or cause of action even if the claim or cause of action is unrelated to those contacts; this type of jurisdiction is known as general personal jurisdiction. n1 General jurisdiction arises when a defendant maintains continuous and systematic contacts with the forum state even when the cause of action has no relation to those contacts. n1.1 This test appears to be fairly flexible. It generally requires an analysis of the strength and duration of the contacts and the nature of the litigation to determine whether the contacts are sufficiently "substantial." n2 Even if the defendant is engaged in "continuous and systematic" activities within the forum state, due process requires that the exercise of general jurisdiction be reasonable, which means that it must meet an interest-balancing standard. n3 Courts have stated that because the particular claim need not be related to the defendant's conduct, the due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction, and therefore require the showing of continuous and systematic general business contacts between the defendant and the forum state. n4

The Supreme Court has noted that the level of contacts required for general jurisdiction requires a more systematic degree than the level for specific jurisdiction. n5 Consequently, the lower courts must engage in a more rigorous analysis for general jurisdiction and broad constructions of general personal jurisdiction are generally disfavored. n6 For example, a district court has suggested that a court should exercise general jurisdiction when a non-resident defendant's commercial activities are such that the defendant is enough of an "insider" in the forum that the defendant may be safely relegated to the state's political processes. "Insiders" are those individuals and corporations that function within a state as if they were local. n6.1 The general jurisdiction requirement of "continuous and systematic" contacts typically requires that the defendant have an office in the forum state, although less contact with the forum state has been found sufficient for general jurisdiction. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsPurposeful AvailmentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsSubstantial Contacts

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.30 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See § 6.02.*

(n3)Footnote 2. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) .*

(n4)Footnote 3. *International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945) .*

(n5)Footnote 4. *International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945) .*

(n6)Footnote 5. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) .*

(n7)Footnote 6. *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) .*

(n8)Footnote 1. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) .*

(n9)Footnote 2. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15, 105 S. Ct. 2174, 85 L. Ed. 2d 528*

(1985) .

(n10)Footnote 3. *See Doe v. American Nat'l Red Cross, 112 F.3d 1048, 1051 (9th Cir. 1997)* .

(n11)Footnote 4. *McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)* (Texas insurance company's issuance of single policy and collection of premiums on policy were sufficient to support California's jurisdiction over insurance company in action to enforce policy).

(n12)Footnote 5. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* .

(n13)Footnote 6. *Burnham v. Superior Court, 495 U.S. 604, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* .

(n14)Footnote 1. *See* [2], *above*.

(n15)Footnote 2. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 486, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n16)Footnote 3. *See* [b], *below*.

(n17)Footnote 4. *See* [c], *below*.

(n18)Footnote 5. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* ; *see* [d], *below*.

(n19)Footnote 6. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* ; *North Am. Van Lines, Inc. v. A. Colonial Moving & Storage Co., 291 F. Supp. 2d 799, 804 (N.D. Ind. 2003)* (citing **Moore's Federal Practice**).

(n20)Footnote 7. Commissariat a l' *Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1320-1321 (Fed. Cir. 2005)* ; *see* [c], *below*.

(n21)Footnote 8. *McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)* (provided that it creates substantial connection with forum state, even single act may support jurisdiction).

(n22)Footnote 9. *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* (sufficient contacts will not exist unless there be some act by which defendant purposefully avails itself of privilege of conducting activities within forum state, thus invoking the benefits and protections of its laws).

(n23)Footnote 10. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n24)Footnote 11. *Calder v. Jones, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)* .

(n25)Footnote 12. *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 969 F. Supp. 1254, 1260-1261 (D. Kan. 1997)* (non-resident general partner is not subject to personal jurisdiction merely because partnership is subject to personal jurisdiction in forum).

(n26)Footnote 13. *Graham v. McGrath, 363 F. Supp. 2d 1030, 1033-1035 (S.D. Ill. 2005)* .

(n27)Footnote 14. *See International Shoe Co. v. Washington, 326 U.S. 310, 316-317, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* .

(n28)Footnote 15. *Pro Axess, Inc. v. Orlux Distrib., 2005 U.S. App. LEXIS 24035, at *11 (10th Cir. 2005)* .

(n29)Footnote 16. *C.R. Bard, Inc. v. Guidant Corp., 997 F. Supp. 556, 560-561 (D. Del. 1998)* .

(n30)Footnote 17. *Pro Axess, Inc. v. Orlux Distrib., 2005 U.S. App. LEXIS 24035, at *11 (10th Cir. 2005)* .

(n31)Footnote 17.1. *Anderson v. Dassault Aviation, 361 F.3d 449, 452 (8th Cir. 2005)* .

(n32)Footnote 17.2. *See Atlantigas Corp. v. Nisource, Inc., 290 F. Supp. 2d 34, 44-45 (D.D.C. 2003)* .

(n33)Footnote 18. *Zeneca Ltd. v. Mylan Pharms., Inc., 968 F. Supp. 268, 275-276 (W.D. Pa. 1997)* (exception based on citizenry's "need for unfettered access to federal departments and agencies").

(n34)Footnote 19. *Helmer v. Doletskaya, 393 F.3d 201, 206 (D.C. Cir. 2004)* .

(n35)Footnote 20. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (after determination is made that defendant purposefully established minimum contacts within forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice").

(n36)Footnote 21. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n37)Footnote 22. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* ; *Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 478-479 (6th Cir. 2003)* , *cert. denied, 124 S. Ct. 399 (2003)* .

(n38)Footnote 23. *See* [b]-[c], *above*.

(n39)Footnote 24. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n40)Footnote 25. *Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)* .

(n41)Footnote 26. *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777-778, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)* .

(n42)Footnote 27. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* .

(n43)Footnote 28. *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777-778, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)* .

(n44)Footnote 29. *Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 115-116, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)* .

(n45)Footnote 30. *Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1490 (9th Cir. 1993)* .

(n46)Footnote 31. *Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 215-216 (5th Cir. 1999)* .

(n47)Footnote 1. *Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-449, 72 S. Ct. 413, 96 L. Ed. 485 (1952)* (substantial nature of defendant's contacts with forum state relied on to uphold general jurisdiction).

(n48)Footnote 1.1. *Trintec Indus. v. Pedre Promotional Prods., 395 F.3d 1275, 1279 (Fed. Cir. 2005)* .

(n49)Footnote 2. *See Roman v. Ashcroft, 340 F.3d 314, 328-329 (6th Cir. 2003)* .

(n50)Footnote 3. *Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 n.2 (9th Cir. 1993)* ; *Allison v. Lomas, 387 F. Supp. 2d 516, 519 (M.D.N.C. 2005)* .

(n51)Footnote 4. *Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000)* ; *Access Telecomm., Inc. v. MCI Telcomms. Corp., 197 F.3d 694, 716-718 (5th Cir. 1999)* .

(n52)Footnote 5. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* .

(n53)Footnote 6. *Allison v. Lomas, 387 F. Supp. 2d 516, 519 (M.D.N.C. 2005)* .

(n54)Footnote 6.1. *Shepherd Invs. Int'l, LTD v. Verizon Communs., Inc., 373 F. Supp. 2d 853, 861-862 (E.D. Wis. 2005)* .

(n55)Footnote 7. *American Int'l Airways, Inc. v. Kitty Hawk Group, Inc., 834 F. Supp. 222, 225 (E.D. Mich. 1993)* (general jurisdiction upheld based on ongoing activities of corporate defendant's subsidiary).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

-6 Moore's Manual--Federal Practice and Procedure § 6.04

§ 6.04 Personal Jurisdiction Based on Internet Contactsn*

[1] Nature of Internet Contacts

The increased use of the Internet has also increased the litigation regarding analysis of personal jurisdictional contacts. An Internet website, requiring a relatively modest expenditure of time or money, is accessible throughout the world, potentially subjecting the person or entity who maintains the website to personal jurisdiction anywhere based on that Internet contact. n0.1 The Supreme Court has recognized that personal jurisdiction need not be based on physical contacts with the forum state; for example, contacts sufficient to support personal jurisdiction may be made through other means of modern communication, such as mail, fax, and telephone. n1

In extending jurisdictional analysis to Internet situations, courts have initially applied traditional principles to determine the nature and quality of commercial activity that an entity conducts over the Internet. n1.1 In this regard, courts have applied a sliding scale to determine whether personal jurisdiction is appropriate. n2 This sliding scale test has almost universally been applied by courts in various forms, when the court is analyzing specific personal jurisdiction in the context of Internet contacts. n3

[2] Sliding Scale Standard

Whether a court may constitutionally exercise personal jurisdiction over a person or entity is directly proportionate to the nature and quality of commercial activity that the person or entity conducts over the Internet. This principal is the basis of the "sliding scale" test that the courts have developed to make a determination of whether an internet operator has contacts with the forum sufficient for the court to exercise personal jurisdiction over the operator. n1 This test establishes three levels of internet contacts on the continuum:

- Operation Engages in Business on Internet Site. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign forum that involve the knowing and repeated transmission of computer files over the Internet, specific personal jurisdiction is proper. n2

- Interactive Internet Sites. In the middle ground, interactive web sites allow an internet user to

exchange information with the host computer. In these cases, the exercise of specific personal jurisdiction is determined by analyzing the level of interactivity and commercial nature of the exchange of information that occurs on the web site. n3

- Passive Internet Site. At the other end of the spectrum, a defendant simply posts information on an internet web site which is accessible to users in foreign forum. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsSubstantial ContactsComputer & Internet LawInternet BusinessGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.44 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *See McBee v. Delica Co., 417 F.3d 107, 124 (1st Cir. 2005)* .

(n3)Footnote 1. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n4)Footnote 1.1. *Shamsuddin v. Vitamin Research Prods., 346 F. Supp. 2d 804, 809 (D. Md. 2004)* (internet activity may rise to level sufficient to constitute purposeful availment, which is basis for personal jurisdiction).

(n5)Footnote 2. *Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336-337 (5th Cir. 1999)* .

(n6)Footnote 3. *See Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452-54 (3d Cir. 2003)* ; *see* [2], *below*.

(n7)Footnote 1. *Lakin v. Prudential Secs., 348 F.3d 704, 710-711 (8th Cir. 2003)* (noting that sliding scale test is improper for cases considering existence of general personal jurisdiction).

(n8)Footnote 2. *Coremetrics, Inc. v. AtomicPark.com, LLC, 370 F. Supp. 2d 1013, 1021-1022 (N.D. Cal. 2005)* .

(n9)Footnote 3. *Lakin v. Prudential Secs., 348 F.3d 704, 712 (8th Cir. 2003)* .

(n10)Footnote 4. *McBee v. Delica Co., 417 F.3d 107, 124 (1st Cir. 2005)* (because of universal accessibility and omnipresence of internet web sites today, personal jurisdiction may not be premised on mere existence of web site that is accessible in forum and that gives information about company or products).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

-6 Moore's Manual--Federal Practice and Procedure § 6.05

§ 6.05 Personal Jurisdiction Based on Long Arm Statutesn*

[1] National Long-Arm Statute

The "national long-arm" statute n0.1 provides a basis for personal jurisdiction over a defendant residing outside the United States when the defendant is not subject to personal jurisdiction in the courts of general jurisdiction of any one state. n0.2 The national long-arm statute permits a court to aggregate the nonresident defendant's contacts with the United States as a whole to allow for service of process provided that two conditions are met: (1) the plaintiff's claims must arise under federal law; and (2) the exercise of jurisdiction must be consistent with the Constitution and laws of the United States. n1 Under the second prong, jurisdiction "consistent with the Constitution and laws of the United States" is that which comports with due process, meaning that a non-resident defendant have certain sufficient contacts with the forum so that the exercise of jurisdiction comports with fair play and substantial justice, n2 depending whether the personal jurisdiction sought is specific or general. n3

[2] State Long-Arm Statutes

The purpose of state long-arm statutes is to effectively make in personam service outside the state. n1 In diversity or federal question cases involving a nonresident defendant, a court must first look to the long-arm statute of the forum state; if exercise of jurisdiction is appropriate under that statute, the court must then decide whether such exercise is also in compliance with the federal constitutional requirements of due process. In other words, the exercise of personal jurisdiction is proper only if the defendants have contacts sufficient to satisfy both the state long-arm statute and the *due process clause of the Fourteenth Amendment*. n2

Thus, personal jurisdiction in federal courts is subject to the requirements of any applicable state long-arm statute and also the constitutional limits on state courts' personal jurisdiction. This rule has been adopted because *Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure* provides that service to bring a defendant in federal court will be effective to confer personal jurisdiction only if the defendant could be subjected to jurisdiction in the courts of the state in which the district court is located. n3

Although there are exceptions to this rule, it applies in most cases, particularly diversity cases based on state law. Consequently, although federal process may be, but is not required to be, served in accordance with state procedure and

may be served anywhere in the United States, n4 federal courts must look to the state long-arm statutes to determine whether the defendant is amenable to jurisdiction in that state. Federal courts must generally apply the relevant state statute even when the cause of action is purely federal. n5 Thus, federal courts must use state long-arm statutes to determine whether there is an appropriate basis for jurisdiction but are not limited by those statutes for the process of invoking jurisdiction. n6

All state long-arm statutes are subject to *Fourteenth Amendment* due process limitations on the process of asserting jurisdiction, including the methods prescribed for giving the defendant notice of the litigation and the opportunity to be heard, although this constitutional issue may not arise if service is found to be defective under the state's long-arm statute, which is the initial inquiry. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm Jurisdiction

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.60 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *See Fed. R. Civ. P. 4(k)(2).*

(n3)Footnote 0.2. *General Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335, 1341 n.2 (S.D. Fla. 2002)* .

(n4)Footnote 1. *Fed. R. Civ. P. 4(k)(2).*

(n5)Footnote 2. *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055, 1057 (11th Cir. 1996)* .

(n6)Footnote 3. *See § 6.03.*

(n7)Footnote 1. *Chaiken v. VV Publ. Corp., 119 F.3d 1018, 1025 (2d Cir. 1997)* , *cert. denied, 522 U.S. 1149 (1998)* (Massachusetts long-arm statute permits exercise of personal jurisdiction over person who regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in Massachusetts).

(n8)Footnote 2. *Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997)* ; *Hill v. Brush Engineered Materials, Inc., 383 F. Supp. 2d 814 (D. Md. 2005)* (district court's exercise of personal jurisdiction over a nonresident defendant must comply with the requirements of both the forum state's long-arm statute and the *Due Process Clause of the Fourteenth Amendment*).

(n9)Footnote 3. *Fed. R. Civ. P. 4(k)(1)(A).*

(n10)Footnote 4. *Fed. R. Civ. P. 4(e)(1), (2).*

(n11)Footnote 5. *Graphic Controls Corp. v. Utah Med. Prods., 149 F.3d 1382, 1385-1386 (Fed. Cir. 1998)* .

(n12)Footnote 6. *In re Fruehauf Trailer Corporation, 250 B.R. 168, 199 (D. Del. 2000)* (rule governing service upon individuals is not limited to service under a state long-arm statute when federal law provides for service of process).

(n13)Footnote 7. *Country Home Prods. v. Schiller-Pfeiffer, Inc., 350 F. Supp. 2d 561, 567 (D. Vt. 2004)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART I. PERSONAL JURISDICTION

1-6 Moore's Manual--Federal Practice and Procedure §§ 6.06through 6.19

[Reserved]

§§ 6.06[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART II. JURISDICTION OVER PROPERTY

1-6 Moore's Manual--Federal Practice and Procedure § 6.20

§ 6.20 Nature of Jurisdiction Over Propertyn*

Courts traditionally have divided jurisdiction over property into "in rem" and "quasi-in-rem" jurisdiction, the latter including attachment and garnishment jurisdiction. In a "true" in rem action, the court determines all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one against all others in the world. The practical effect of such an action is to establish an absolute title to the property because no one may later claim exemption from the effect of the judgment on the ground that the court lacked jurisdiction. True in rem actions are relatively unusual.

One example of a true in rem jurisdiction is a bankruptcy court's in rem jurisdiction to determine all claims that anyone, whether named in the action or not, has regarding the indebtedness in question. n0.1 Another example is an admiralty libel action. n1 In a quasi-in-rem action, the plaintiff claims a pre-existing interest in the property against particularly identified individuals, and the judgment affects only the defendant's claim to the property, rather than the claims of all the world. Typical examples of quasi in rem actions are actions to remove a cloud on title to real property or actions that seek to quiet title against a particular adversary's claim. n1.1

In practice there is little distinction between jurisdiction in rem and quasi-in-rem, unless the quasi-in-rem action, instead of claiming a pre-existing interest in the property, asserts a claim in contract or tort against the defendant and seeks to establish an interest in the defendant's property as a basis for exercising jurisdiction over the defendant when personal jurisdiction is unavailable. In this type of quasi-in-rem action, the plaintiff claims that the defendant owes the plaintiff money, and the plaintiff seeks attachment or garnishment of the defendant's property to satisfy the plaintiff's claim. n2

In each of the three categories of jurisdiction over property, a court may affect the defendant only by terminating the defendant's interests in the particular piece of property over which it has jurisdiction and awarding the plaintiff either the property or the proceeds from the sale of the property. Consequently, jurisdiction over property is usually the plaintiff's second choice, after personal jurisdiction, because if damages exceed the value of the property, an in rem judgment will provide only partial relief; to obtain complete relief, the plaintiff must sue the defendant again, either by obtaining personal jurisdiction or quasi-in-rem jurisdiction with attachment or garnishment over another article of the defendant's property. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsQuasi in Rem ActionsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem Actions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.70 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 1910-1911, 158 L. Ed. 2d 764 (2004)* (citing **Moore's Federal Practice**, and noting that bankruptcy proceeding is one against world).

(n3)Footnote 1. *See Custom Navigation Sys., Inc. v. Pincus, 935 F. Supp. 117, 119 (D. Conn. 1995)* .

(n4)Footnote 1.1. *FleetBoston Fin. Corp. v. FleetBoston Financial, 138 F. Supp. 2d 121, 132 (D. Mass. 2001)* .

(n5)Footnote 2. *See Olympic Capital Corp. v. Newman, 276 F. Supp. 646, 647 (C.D. Cal. 1967)* .

(n6)Footnote 3. *Cf. Olympic Capital Corp. v. Newman, 276 F. Supp. 646, 649 (C.D. Cal. 1967)* .

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CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
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1-6 Moore's Manual--Federal Practice and Procedure § 6.21

§ 6.21 Jurisdiction Over Property In Remn*

The Supreme Court has extended the minimum "contacts" doctrine n1 to in rem and quasi-in-rem actions. Consequently, it is no longer a sufficient basis for the assertion of jurisdiction over an owner of property merely that the property is located within the state and is by such presence subject to the power of the court. n2 To the extent that the landmark case of *Pennoyer v. Neff* n3 could be read to authorize the assertion of jurisdiction over an owner solely by reason of the presence of property within the forum state, that case has been overruled. n4 Every case in which service of process is made outside of the forum state must now be tested by the contacts doctrine whether the jurisdiction asserted is characterized as in personam, in rem, or quasi-in-rem. n5

The test for property based jurisdiction is whether there is a constitutionally sufficient relationship among the defendant, the forum, and the litigation. n6 Under the standard, although the mere presence of the defendant's property in the forum state may not by itself constitute a sufficient contact to support jurisdiction over a nonresident defendant on matters unrelated to the property, n7 the property itself is a contact the court must consider in the balancing test to determine the exercise of jurisdiction. n8

In purely in rem actions, the contact of the property by itself may be a sufficient contact in certain actions for the exercise of jurisdiction. n9 Thus, when a claim to the property itself forms the basis of the underlying dispute between the plaintiff and the defendant, the state where the property is located has sufficient contact to support in rem jurisdiction. n9.1

Furthermore, although the Supreme Court has established that the minimum contacts-purposeful availment doctrine must be applied to the exercise of jurisdiction over property, it has not eliminated quasi-in-rem actions entirely. Therefore, the procedure of attaching property as an alternative to personal jurisdiction in quasi-in-rem cases may still be used if the defendant has contacts satisfying the standard. Furthermore, the Supreme Court indicated six circumstances in which the presence of property alone might support in personam jurisdiction consistently with the requirements of due process. These circumstances are discussed in *§ 6.22, below*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsQuasi in Rem ActionsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem Actions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See § 6.03.*

(n3)Footnote 2. *Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n4)Footnote 3. *Pennoyer v. Neff, 95 U.S. 714, 724, 24 L. Ed. 565 (1877)* .

(n5)Footnote 4. *Shaffer v. Heitner, 433 U.S. 186, 197-206, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n6)Footnote 5. *Shaffer v. Heitner, 433 U.S. 186, 212-215, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n7)Footnote 6. *Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* ; *Chapman v. Vande Bunte, 604 F. Supp. 714, 716-717 (E.D.N.C. 1985)* .

(n8)Footnote 7. *Rush v. Savchuk, 444 U.S. 320, 328-329, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980)* (in action for personal injuries suffered outside forum state, court may not exercise jurisdiction over nonresident defendant based solely on attaching insurer's contractual obligation to defend and indemnify defendant).

(n9)Footnote 8. *Shaffer v. Heitner, 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n10)Footnote 9. *Chapman v. Vande Bunte, 604 F. Supp. 714, 716-717 (E.D.N.C. 1985)* (in true in rem proceeding, in order to subject property to judgment in rem, due process requires only that the property itself have certain minimum contacts with territory of forum state such that mainte nance of proceeding affecting that property, as opposed to resolution of dispute between parties concerning interest in such property, does not offend traditional notions of fair play and substantial justice.").

(n11)Footnote 9.1. *Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293, 302 (2d Cir. 2002)* (in action pursuant to Anticybersquatting Consumer Protection Act, presence of the domain name itself in judicial district in which name registry or registrar is located anchors in rem jurisdiction because name itself is property that is subject of dispute).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.22

§ 6.22 Presence of Property Used to Support Quasi-In-Rem or In Personam Jurisdictionn*

Ordinarily, the mere presence of property alone will not support personal jurisdiction over a person who owns the property. n0.1 However, the Supreme Court has indicated that the presence of property may support in personam jurisdiction consistent with the requirements of due process if one of the following six factors also exists:

1. The plaintiff's claim arises from ownership of the property. The presence alone of property within the forum state by itself is generally a sufficient basis for jurisdiction for claims to determine interests in that property. n1 Furthermore, the Supreme Court has stated that jurisdiction is proper based only on the presence of property when the defendant's ownership of the property is conceded, provided that the cause of action is otherwise related to the rights and duties growing out of that ownership. Thus, presence of property could support quasi-in-rem or even in personam jurisdiction over a defendant in a suit for damages sustained on real property owned by a nonresident defendant. n2

2. The defendant has minimum contacts with the forum state but the state's long-arm statute does not apply to the claim. Some states have not extended their long-arm statutes to the limits of federal due process. Consequently, quasi-in-rem jurisdiction related to attachment or garnishment survives in cases in which the defendant has minimum contacts with the forum state, but the state's personal jurisdiction long-arm statute may not apply to the claim, even though constitutional due process would permit the exercise of jurisdiction. n3

3. An action to enforce a judgment of another state. The presence of property in the forum state is a sufficient basis for jurisdiction in an action to enforce a judgment in a sister state, even if the defendant does not have other contacts with that state. n4

4. The attachment of the defendant's property in one state as security for a judgment sought in another state. The Supreme Court has suggested that a state in which property is located has jurisdiction to attach that property by use of proper procedures as security for a judgment being sought in a forum, provided that the litigation may be maintained consistently with the minimum contacts standard. n5

5. The attachment of real property. In separate concurring opinions, two justices suggested that quasi-in-rem jurisdiction is appropriate when the attached property is property whose situs is indisputably and permanently located within a state,

for example, land. n6

6. No other forum is available. The Supreme Court has left open the possibility that the presence of a defendant's property in the state would be a sufficient basis for quasi-in-rem jurisdiction when no other forum is available to the plaintiff. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsQuasi in Rem Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 213 (4th Cir. 2004)* , *cert. denied, 537 U.S. 822 (2002)* (when property which serves as basis for personal jurisdiction is completely unrelated to plaintiff's cause of action, presence of defendant's property alone will not support jurisdiction).

(n3)Footnote 1. *Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 224-225 (4th Cir. 2002)* ; *see § 6.21.*

(n4)Footnote 2. *Shaffer v. Heitner, 433 U.S. 186, 208, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n5)Footnote 3. *Tampimex Oil Ltd. v. Latina Trading Corp., 558 F. Supp. 1201, 1202 (S.D.N.Y. 1983)* (denying long-arm jurisdiction when defendant has sufficient contacts to support personal jurisdiction).

(n6)Footnote 4. *Shaffer v. Heitner, 433 U.S. 186, 210 n.36, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* (once it has been determined by court of competent jurisdiction that defendant is debtor to plaintiff, there is no unfairness in allowing action to realize on that debt in state where defendant has property, whether or not that state would have jurisdiction to determine existence of debt as original matter).

(n7)Footnote 5. *Shaffer v. Heitner, 433 U.S. 186, 210, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n8)Footnote 6. *Shaffer v. Heitner, 433 U.S. 186, 217, 219, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n9)Footnote 7. *Shaffer v. Heitner, 433 U.S. 186, 211 n.37, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

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1-6 Moore's Manual--Federal Practice and Procedure § 6.23

§ 6.23 Use of In Personam Jurisdiction to Adjudicate Interest in Real Property Outside Forum Staten*

[1] Transfer of Title of Noncompliant Defendant

Many states provide by statute that in an action for specific performance to convey real property, a court may enforce its decree not merely by directing the defendant to comply, or punishing the defendant for contempt, but also by requiring the sheriff to act directly on the real property, by transferring title or interest in land. In such cases, because the court may enforce its decree on real property located within the state by means other than direction to the defendant, its action changes from an action in personam to an action in rem. As a result, any objection to lack of personal jurisdiction is without effect. The court at the situs of the land therefore may base jurisdiction to establish title either on personal jurisdiction over the defendant or quasi-in-rem jurisdiction over the property. n1

[2] In Personam Jurisdiction to Adjudicate Defendant's Interest in Real Property Outside State

A court that has personal jurisdiction over the defendant may adjudicate the defendant's interest in land situated in another state. It may enforce its judgment by ordering the defendant to execute a deed to the foreign land. However, it may not transfer interests in foreign land on the basis of its judgment alone. If it purports to do so, the judgment will not have to be enforced in the state where the land is located. n1 The Supreme Court has stated that the court in the second forum is not required under the *Full Faith and Credit Clause* n2 to give collateral estoppel effect to the judgment of the court in the first forum on issues relating to title to land in the second forum, even as against parties who were subject to personal jurisdiction in the first forum and who actively litigated the questions in the first forum. n3

Many states, however, give collateral estoppel effect to all issues, including land title issues, litigated in a court that is not the situs of the land, provided that the other court had valid jurisdiction over the person. Whether or not they are constitutionally required to do so, courts in these states have recognized foreign judgments affecting land on the basis of either comity n4 or full faith and credit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil

ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.81 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Buzzell v. Edward H. Everett Co., 180 F. Supp. 893, 902 (D. Vt. 1960)* (finding that in rem remedy of judgment of specific performance of conveyance of land could be entered under Vermont law against Ohio corporation over which Vermont court had personal jurisdiction in diversity suit in Vermont to require Ohio corporation to execute quitclaim deed to Vermont realty).

(n3)Footnote 1. *Fall v. Eastin, 215 U.S. 1, 8-12, 30 S. Ct. 3, 54 L. Ed. 65 (1909)* (even though Washington state court had personal jurisdiction over husband and wife, Washington court lacked jurisdiction to affect title to land in Nebraska in divorce action).

(n4)Footnote 2. *U.S. Const. art. IV, § 1.*

(n5)Footnote 3. *Clarke v. Clarke, 178 U.S. 186, 190, 20 S. Ct. 873, 44 L. Ed. 1028 (1900)* (firmly established doctrine that law of state in which land is situated controls and governs its transfer).

(n6)Footnote 4. *Weesner v. Weesner, 168 Neb. 346, 356, 95 N.W.2d 682 (1959) .*

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1-6 Moore's Manual--Federal Practice and Procedure §§ 6.24through 6.39

[Reserved]

§§ 6.24[Reserved]

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PART III. LIMITATIONS ON PERSONAL JURISDICTION AND JURISDICTION OVER PROPERTY

1-6 Moore's Manual--Federal Practice and Procedure § 6.40

§ 6.40 Prerequisite of Notice to Defendant Outside Forum Staten*

[1] Requirement of Notice For Valid Exercise of Jurisdiction

Due Process requires not only adequate personal jurisdictional grounds n1 but also adequate notice to the defendant of the action and an opportunity for the defendant to be heard. n2 The requirement of notice is entirely separate and in addition to the requirement of jurisdictional basis. In other words, if a basis for jurisdiction exists a judgment will be invalid if the defendant is not given adequate notice, n3 although some technical defects of service may be disregarded. n4

Because due process requires both adequate notice and opportunity to be heard, notice must be given sufficiently in advance to enable the defendant to properly prepare a defensive pleading. n5 Federal and state statutes typically allow a nonresident defendant at least 20 days after service in which to answer. n6

[2] Compliance With Method of Statutory Service Reasonably Calculated to Provide Notice

A court may exercise personal jurisdiction over a defendant only if there has been substantial compliance with an officially prescribed process for invoking the court's jurisdiction, that is, using the method of service provided by statute or court rule that when followed is reasonably likely to provide actual notice. Therefore, if the statutory procedures are not followed, jurisdiction may not be invoked over a defendant, even if the defendant somehow receives actual notice. n1 Conversely, actual notice is not required to invoke a court's jurisdiction, provided that the statutory requirements have been followed. On the other hand, lack of adequate notice, as required in the statute, may provide grounds for setting aside or vacating a judgment. n2

When there are technical defects in service of process, the controlling state or federal procedural law determines whether jurisdiction is proper in cases in which the defendant has received actual notice. Some states require strict compliance with the prescribed procedure. n3 Other states permit substantial compliance. n4 Federal courts generally permit substantial compliance, n5 and have liberally construed the federal rule pertaining to service to effectuate residence or domicile service when actual notice of the suit has been received by the defendant. n6 Thus, it has been held that failure to strictly comply with the service requirements of the federal rules did not require dismissal when the party to be served received actual notice, no prejudice to the defendant resulted from the defect in service, there was

justifiable excuse for failure to serve properly, and the plaintiff would be severely prejudiced if the complaint were dismissed. n7

[3] Sufficiency of Notice

Regarding the sufficiency of notice required, the Supreme Court has held that, constitutionally, there is generally no distinction between in personam and in rem actions. n1 Rather, the issue of sufficiency requires the court to determine whether the chosen form of notification is reasonably certain to inform those affected or, if conditions do not permit such notice, whether the chosen form is as likely as other feasible and customary methods to notify the defendant. n2 The case decided by the court involved the adequacy of notice by publication in an action to determine an accounting of a trustee of a common trust fund. The issue was whether notification of the accounting by publication was sufficient for beneficiaries of the constituent trusts, only some of whose interests, names, and addresses were known to the trustee. The court held that notice by publication was adequate for unknown beneficiaries or contingent beneficiaries whose location did not come to the trustee's attention in the normal course of business, but was inadequate for beneficiaries whose names and addresses were known to the trustee or could be ascertained with reasonable diligence. n3

Sufficiency of notice must meet the standard described above in all varieties of actions. n4 For example, the Supreme Court has rejected notice by publication or by publication and posting in state condemnation proceedings, when the property owner's name and address were known. n5 Similarly, notice by publication was insufficient in bankruptcy proceedings affecting known creditors. n6 On the other hand, mailed notice plus publication may be sufficient to satisfy due process when the defendant cannot be found, and the plaintiff has exercised due diligence in its search, because notice by publication, although not likely to reach the defendant, is no less likely to provide actual notice than any other method. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.80 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 6.20* et seq.

(n3)Footnote 2. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* (requirement that defendant's contacts with forum state are such that defendant should reasonably anticipate being haled into court in such state implies that defendant is entitled to some form of notice that it may be subject to suit in that state).

(n4)Footnote 3. *Oklahoma Radio Assocs. v. FDIC, 969 F.2d 940, 943 (10th Cir. 1992)* (one function of service of process is to provide ritual that gives notice of court's assertion of personal jurisdiction over lawsuit); *City of New York v. Chemical Bank, 122 Misc. 2d 104, 106, 470 N.Y.S.2d 280, 283 (1983)* (notice and basis of jurisdiction are two aspects of due process restrictions on state court jurisdiction).

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 5. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* (notice must provide reasonable time for those interested to make their appearance); *see Volkswagenwerk*

Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698, 108 S. Ct. 2104, 2107, 100 L. Ed. 2d 722 (1988) (discussion of timely notice under Hague Convention).

(n7)Footnote 6. *Heathmount A.E. Corp. v. Technodome.com, 2000 U.S. Dist. LEXIS 10591, at *26 (E.D. Va. 2000)* (court found that 20 days was reasonable amount of time to permit defendant to appear or plead under Anti Cybersquatting Consumer Protection Act); *Clay v. Clay, 369 So. 2d 1199, 1201 (La. Ct. App. 1979)* (less than 10 days held inadequate to obtain jurisdiction over nonresident in summary proceedings).

(n8)Footnote 1. *Wuchter v. Pizzutti, 276 U.S. 13, 19, 24, 48 S. Ct. 259, 72 L. Ed. 446 (1928)* .

(n9)Footnote 2. *Thompson v. Kerr, 555 F. Supp. 1090, 1094 (S.D. Ohio 1982)* (service of process on bank directors by certified mail addressed to them at bank's corporate headquarters was denial of due process because notice was not reasonably calculated to provide actual notice to directors).

(n10)Footnote 3. *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc., 172 Ill. App. 3d 993, 527 N.E.2d 693, 697 (Ill. App. Ct. 1988)* (when service of process is not provided in accordance with requirements of statute authorizing service of process, it is invalid, no personal jurisdiction is acquired by court, and any default judgment rendered against defendant is invalid).

(n11)Footnote 4. *Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248, 256 (10th Cir. 1987)* (service of process was valid under Oklahoma statute when return receipt was signed by president of defendant corporation instead of cashier to whom it was addressed but signature appeared to be that of addressee and defendant received actual notice when president signed receipt).

(n12)Footnote 5. *Fed. R. Civ. P. 4(e)(2)*.

(n13)Footnote 6. *Nowell v. Nowell, 384 F.2d 951, 953 (5th Cir. 1968)* , *cert. denied, 390 U.S. 956 (1968)* (service on manager of apartment building was upheld as equivalent to service at defendant's dwelling when notice was actually received by defendant).

(n14)Footnote 7. *Justice v. Lyng, 716 F. Supp. 1567, 1569-1570 (D. Ariz. 1988)* .

(n15)Footnote 1. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

(n16)Footnote 2. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

(n17)Footnote 3. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

(n18)Footnote 4. *Pittman v. Triton Energy Corp., 842 F. Supp. 918, 923 (S.D. Miss. 1994)* .

(n19)Footnote 5. *Schroeder v. City of New York, 371 U.S. 208, 213, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962)* (rejecting publication as adequate notice for known property owners in proceedings to force diversion of river flow).

(n20)Footnote 6. *New York v. New York, N.H.& H.R. Co., 344 U.S. 293, 296, 73 S. Ct. 299, 97 L. Ed. 333 (1953)* .

(n21)Footnote 7. *SEC v. Tome, 833 F.2d 1086, 1094 (2d Cir. 1987)* , *cert. denied, 486 U.S. 1014 (1988)* .

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1-6 Moore's Manual--Federal Practice and Procedure § 6.41

§ 6.41 Due Process Limitations on Attachmentsn*

Rule 4 of the Federal Rules of Civil Procedure does not specifically provide for the attachment of property in quasi-in-rem actions. However, the court may obtain jurisdiction over the defendant's property located within the federal district if authorized by federal statute, provided that notice to claimants of the property must be given as provided in the statute, or by serving a summons under Rule 4. n1

Alternatively, the court may obtain jurisdiction under the circumstances and in the manner provided by the law of the state in which the district court is located. n2 There are limitations to this procedure based on due process concerns. First, the property itself is not a sufficient basis for jurisdiction for claims unrelated to the property. For claims that are unrelated to the property, due process requires that the defendant have contacts with the forum state sufficient to meet the minimum requirement. n3 Second, due process requires a showing of some exigent circumstance to permit attachment of a defendant's property. n4 Third, in order to seize property under Rule 4(n)(2), the property must be located within the court's jurisdiction. n5 Fourth, seizure is allowed only if the defendant cannot be served with summons in any manner authorized by Rule 4. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsQuasi in Rem Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.124 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 4(n)(1)*; *see Fed. R. Civ. P. 4(c).*

(n3)Footnote 2. *Fed. R. Civ. P. 4(n)(2).*

(n4)Footnote 3. *Shaffer v. Heitner, 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) .*

(n5)Footnote 4. *Connecticut v. Doehr, 501 U.S. 1, 18, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991)* .

(n6)Footnote 5. *First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011, 1014-1016 (4th Cir. 1981)* .

(n7)Footnote 6. *Fed. R. Civ. P. 4(n)(2)*; *Citizens & Southern Nat'l Bank v. Auer, 514 F. Supp. 631, 634 (E.D. Tenn. 1977)* .

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1-6 Moore's Manual--Federal Practice and Procedure § 6.42

§ 6.42 Due Process Limitations in Admiralty Casesn*

Personal jurisdiction in admiralty cases n1 may be obtained by service or process in accordance with *Rule 4 of the Federal Rules of Civil Procedure*, including service pursuant to the law of the state in which the district court sits n2 or pursuant to state a long-arm statute. n3 Unless otherwise provided by special statute or rule, the range of jurisdiction of an admiralty court is coextensive with that of the state courts in the state where the court sits and requires that the defendant have minimum contacts with the state sufficient to satisfy the due process requirements of the *Fourteenth Amendment*. Thus, the same rules relating to the basis for jurisdiction and process in civil actions generally also apply to admiralty actions. n4

Some courts, however, have held that *Shaffer v. Heitner* does not apply to maritime attachment suits in admiralty and have, thus, upheld jurisdiction without minimum contacts. n5 Other courts have applied *Shaffer v. Heitner,* but have concluded that contacts with the United States as a whole, rather than contacts with the forum state, determine the constitutionality of jurisdiction in such cases. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional Limits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.126 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* generally *28 U.S.C. § 1333.*

(n3)Footnote 2. *Fed. R. Civ. P. 4(e)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 4(k)(1)(A).*

(n5)Footnote 4. *Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361 (5th Cir. 1990)* (proper exercise of personal

jurisdiction in admiralty case requires that defendant be amenable to service of process under state's long-arm statute and that exercise of jurisdiction comport with *Fourteenth Amendment* due process requirements).

(n6)Footnote 5. *Day v. Temple Drilling Co., 613 F. Supp. 194, 197-198 (S.D. Miss. 1985)* (rule governing maritime attachment does not violate substantive *Due Process Clause of Fifth Amendment* by permitting court to exercise jurisdiction in absence of minimum contacts).

(n7)Footnote 6. *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984)* (because admiralty jurisdiction is federal jurisdiction, due process requires sufficient contacts only with United States as whole).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.43

§ 6.43 Due Process Limitations in Bankruptcy Casesn*

Personal jurisdiction and service of process in bankruptcy cases and proceedings, n1 including suits to recover a debt owed to the bankrupt, are governed by *Rule 7004 of the Federal Bankruptcy Rules*. n2 Rule 7004 incorporates the federal rules pertaining to service of process. n3 Although proceedings related to bankruptcy may be based on state law, courts have consistently held that minimum contacts with the United States as a whole meet the due process requirements if the defendant is served within the United States. n4 A foreign nation defendant that must be served abroad, however, generally must be served in accordance with the long-arm statutes of the state where the federal court sits. n5

Some courts have held that in such a situation the defendant must have minimum contacts with the state where the action is pending and that contacts with the United States as a whole will not satisfy due process. n6 Some courts have held that national contacts will suffice. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsJurisdictionGeneral OverviewBankruptcy LawPractice & ProceedingsJurisdictionFederal District CourtsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional Limits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.127 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* generally *28 U.S.C. § 1334*.

(n3)Footnote 2. *Fed. R. Bankr. 7004*; *see In re Silvio Dohring, 245 B.R. 262, 264-265 (N.D. Tex. 2000)* .

(n4)Footnote 3. *In re International Telemedia Assocs., Inc., 245 B.R. 713, 720-721 (N.D. Ga. 2000)* .

(n5)Footnote 4. *In re Celotex Corp., 124 F.3d 619, 630 (4th Cir. 1997)* (contribution claim against debtor was

related to bankruptcy proceeding so personal jurisdiction existed over entity seeking contribution on basis of entity's national contacts under *Fed. Bankr. R. 7004(f)*, but debtor forfeited jurisdiction issue by failing to raise it).

(n6)Footnote 5. *Fed. R. Bankr. 7004(e).*

(n7)Footnote 6. *In re All American of Ashburn, Inc., 78 B.R. 355, 356-357 (Bankr. N.D. Ga. 1987)* (bankruptcy court did not have jurisdiction over foreign defendant in admiralty proceeding when neither bankruptcy rule nor federal law authorized foreign service of preference complaint, and defendant's only contact with debtor did not constitute transacting business within meaning of state's long-arm statute); *see also In re Pan Am Corp., 166 B.R. 538, 542 (Bankr. S.D.N.Y. 1993)* (bankruptcy court could exercise jurisdiction over preference defendant who had never done any business in United States--by instituting bankruptcy action in federal district court, defendant purposefully availed itself of resources and protections of New York law).

(n8)Footnote 7. *In re Ace Pecan Co., 143 B.R. 696, 701 (Bankr. N.D. Ill. 1992)* (distinguishing service of process from basis for jurisdiction and holding that national contacts sufficient to allow bankruptcy court to exercise jurisdiction over foreign defendant); *see also In re International Telemedia Assocs., Inc., 245 B.R. 713, 720-721 (N.D. Ga. 2000)* (Federal Rules of Civil Procedure, as incorporated by Bankruptcy Rule, authorized bankruptcy court order permitting alternative methods of service, including service by electronic mail, on nonresident who by constantly moving from foreign country to foreign country had made himself "moving target" for service of complaint by trustee directed at his alleged corporate waste).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.44

§ 6.44 Jurisdiction May Not be Based on Fraud or Forcen*

A court may not exercise personal jurisdiction over a defendant if personal service was obtained by fraud or force. n1 Similarly, a court will not exercise jurisdiction in a quasi-in-rem action if the presence of the defendant's property in the forum state is the result of fraud or force. n2 This restriction is less important than it was previously because current long-arm statutes now permit state courts to exercise jurisdiction over nonresident defendants in appropriate circumstances even without service within the forum state.

Note, however, that the Supreme Court's holding that mere transient service is sufficient basis for personal jurisdiction has revived the necessity of a rule that denies jurisdiction when the defendant's presence within the forum state has been obtained by fraud. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.141 (Matthew Bender 3d ed.).

(n2)Footnote 1. *AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996)* (if consideration of parent and subsidiary corporation as separate identities would result in fraud or injustice, court may consider them as single entity so as to support exercise of personal jurisdiction over parent corporation, on showing of prima facie case that there was such unity of interest and ownership that separate personalities of parent and subsidiary no longer existed); *E/M Lubricants, Inc. v. Microfral, S.A.R.L., 91 F.R.D. 235, 237-238 (N.D. Ill. 1981)* (state will not exercise jurisdiction if defendant is tricked into entering state and then served with process).

(n3)Footnote 2. *Commercial Air Charters, Inc. v. Sundorph Aeronautical Corp., 57 F.R.D. 84, 88-89 (D. Conn. 1972)* (court will not exercise jurisdiction over defendant's property when defendant has been deceived into entering jurisdiction for purpose of being served with process).

(n4)Footnote 3. *Burnham v. Superior Court, 495 U.S. 604, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (jurisdiction is valid based on personal service and mere physical presence and is not contrary to due process).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.45

§ 6.45 Lack of Personal Jurisdiction Because of Immunityn*

In some circumstances, a court may find a defendant immune from service of process for policy reasons. For example, if a person has come into a jurisdiction merely for the convenience of a court, the courts of that forum may find the person immune from service of process. n1 The court may also grant a defendant immunity from service on the grounds that the exercise of jurisdiction over the defendant would impede the state's administration of justice. n2

Immunity generally extends only to persons who voluntarily enter the territory for the sole purpose of participating in a trial or a deposition, n3 although, in some states, immunity also extends to persons participating in arbitration or settlement negotiations. n4

Diplomatic representatives from foreign nations generally are generally granted immunity from service of process for reasons of comity. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewInternational LawImmunityGeneral OverviewInternational LawImmunityConsuls & Diplomats

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.142 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Uniroyal, Inc. v. Sperberg, 63 F.R.D. 55, 57 (S.D.N.Y. 1973)* (holding, however, that where party to pending case in federal court in Ohio came to New York to meet with his counsel for purpose of answering interrogatories, party was not acting merely for convenience of court and was not immune from service of process in New York).

(n3)Footnote 2. *Viking Penguin, Inc. v. Janklow, 98 F.R.D. 763, 766-767 (S.D.N.Y. 1983)* (defendant was immune

from service while in New York solely to attend deposition proceeding pending in federal court in South Dakota because defendant's presence in New York benefitted both defendant and federal court in South Dakota).

(n4)Footnote 3. *Sivnksty v. Duffield, 137 W. Va. 112, 71 S.E.2d 113, 114-115 (W. Va. 1952)* (defendant had no immunity from civil service in tort action based on same accident for which he was incarcerated and awaiting trial).

(n5)Footnote 4. *Pavlo v. James, 437 F. Supp. 125, 126-127 (S.D.N.Y. 1977)* (defendant was immune from service while attending arbitration in court outside territorial jurisdiction of defendant's residence).

(n6)Footnote 5. *Cf. Graval v. P.T. Bakrie & Bros., 986 F. Supp. 1326, 1329 (C.D. Cal. 1996)* (plaintiff seeking to serve Indonesian defendants would be required to utilize diplomatic channels by requesting letter rogatory or letter of request from court and to follow directions of Indonesian government provided in response to letter before trial court would consider allowance of service by other means of extraordinary nature).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.46

§ 6.46 Procedures for Asserting Lack of Personal Jurisdiction On Grounds of Immunityn*

In state courts, defendants statutorily have the right to make a special appearance exclusively for the purpose of litigating the court's jurisdiction over them, without making a general appearance. In such an appearance, the defendant is not consenting to the court's exercise of jurisdiction. n1 The technical requirements for making a special appearance vary from state to state, as do the types of acts by the defendant that turn an attempted special appearance into a general appearance. n2

In federal courts, the need for a special appearance has been eliminated by several procedural devises. Defendants may attack the court's jurisdiction over them by filing a motion to dismiss at the filing of the complaint or by including the jurisdictional objection in the answer. n3 Alternatively, the defendant may decline to appear in the action and allow the plaintiff to obtain the judgment by default and then collaterally attack the default judgment for lack of personal jurisdiction. If challenging the sufficiency of process, a defendant must raise the objection to jurisdiction (either by proper pre-pleading motion or in the initial responsive pleading) in order not to waive the defect. n4

If a defendant in a federal court makes a timely and successful objection to personal jurisdiction, it does not necessarily mean the action will be dismissed. By statute, a federal court that lacks personal jurisdiction may transfer the case to a federal court where venue and personal jurisdiction would be proper. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentInternational LawImmunityGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 108.143 (Matthew Bender 3d ed.).

(n2)Footnote 1. *In re Silvio Dohring, 245 B.R. 262, 265-266 (N.D. Tex. 2000)* .

(n3)Footnote 2. *Coto-Ojeda v. Samuel, 642 So. 2d 587, 588 (Fla. Dist. Ct. App. 1994)* (requiring attack on personal jurisdiction to be raised in initial motion).

(n4)Footnote 3. *Fed. R. Civ. P. 12(b).*

(n5)Footnote 4. *Sanderford v. Prudential Ins. Co. of America, 902 F.2d 897, 901 (11th Cir. 1990)* (collateral attack failed because third-party defendant was not prejudiced by inadvertent omission of return date from summons and waived defense of insufficiency of process after receiving actual notice of possible default judgment but remaining silent).

(n6)Footnote 5. *28 U.S.C. § 1406(a)*; *Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962)* (court has power to transfer case in which personal jurisdiction is lacking).

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1-6 Moore's Manual--Federal Practice and Procedure §§ 6.47 through 6.59

[Reserved]

§§ 6.47 [Reserved]

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PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.60

§ 6.60 Nature and Purpose of Service of Processn*

Service of process is one method a court uses to obtain in personam jurisdiction, which is the power of a court over a defendant. n1 Service of process is a statutorily recognized method of providing constitutionally adequate notice that an action has begun, n2 and the primary purpose of the federal rules governing service of process is to give adequate notice of the pendency of an action. Another purpose is to force plaintiffs and their attorneys to be diligent in prosecuting their cause of action. n3

There are several ways of giving constitutionally adequate notice. n4 Personal presentation of the notice to the defendant in the forum state is universally recognized as adequate notice. n5 Courts may also deem as adequate: "substituted service of process," which is personal service outside the state on a domiciliary of the state, n6 service on an authorized agent, n7 or service by leaving copies of the summons and complaint at an individual's residence with a resident of suitable age and discretion. n8 Some jurisdictions allow "constructive service" either by certified mail n9 or by publication. Service by publication is constitutionally permissible to obtain personal jurisdiction if a defendant cannot be reached by some other means more likely to provide actual notice. n10

This Part discusses service of process as the primary means by which a court obtains personal jurisdiction over a defendant. For a complete analysis of the constitutional requirements for establishing personal jurisdiction, see PART I. n11 PART II, n12 and Part III of this chapter. n13 A court may formally establish personal jurisdiction over a defendant by effecting service of process pursuant to the provisions of Rule 4. n14 Therefore, if service of process is deemed defective, the issuing court does not obtain personal jurisdiction over the defendant, unless there is some other basis for personal jurisdiction. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.02 et seq. (Matthew Bender 3d ed.); 16 *Moore's Federal Practice,* § 108.111 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 4(k).*

(n3)Footnote 2. *Oklahoma Radio Associates v. F.D.I.C., 969 F.2d 940, 941 (10th Cir. 1992) .*

(n4)Footnote 3. *McWherter v. CBI Servs., Inc., 153 F.R.D. 161, 163 (D. Ha. 1994) , aff'd on other grounds, 105 F.3d 665 (9th Cir. 1994) .*

(n5)Footnote 4. *See § 6.40.*

(n6)Footnote 5. *Fed. R. Civ. P. 4(c).*

(n7)Footnote 6. *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)* (adequacy of substituted service is dependent on whether or not form of substituted service provided is reasonably calculated to give defendant actual notice of proceedings and opportunity to be heard).

(n8)Footnote 7. *National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-316, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964) .*

(n9)Footnote 8. *Fed. R. Civ. P. 4(e)(2).*

(n10)Footnote 9. *Heredia v. Transport S.A.S., Inc., 101 F. Supp. 2d 158, 160-161 (S.D.N.Y. 2000)* (service by mail by New York plaintiff on Quebec defendant was sufficient under Hague Convention); *see Fed. R. Civ. P. 4(e)(1)* (although mail service was abolished by the 1993 amendments to Rule 4, it is available to federal plaintiff if state in which federal court sits or state where defendant resides allows for mail service).

(n11)Footnote 10. *SEC v. Tome, 833 F.2d 1086, 1093 (2d Cir. 1987) , cert. denied, 486 U.S. 1014 (1988) .*

(n12)Footnote 11. *See § 6.01* et seq.

(n13)Footnote 12. *See § 6.20* et seq.

(n14)Footnote 13. *See § 6.40* et seq.

(n15)Footnote 14. *Lampe v. Xouth, Inc. 952 F.2d 697, 701 (3d Cir. 1991)* (federal district court obtains personal jurisdiction over defendant when defendant is served in accordance with Rule 4); *Fed. R. Civ. P. 4.*

(n16)Footnote 15. *Printed Media Servs. v. Solna Web, Inc., 11 F.3d 838, 843 (8th Cir. 1993)* (when defendant was improperly served, federal court lacked jurisdiction over defendant).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.61

§ 6.61 Overview of Federal Service of Process Proceduresn*

[1] Option for Waiver of Service by Parties

The Federal Rules of Civil Procedure set forth a streamlined process by which the defendant has the option to waive formal service of process on request of the plaintiff, as long as the plaintiff provides notice of the lawsuit. n1 The Rule 4(d) procedure does not purport to create a method of service--rather, it only allows for a request by the plaintiff for waiver of service. n2 Furthermore, requesting a waiver is not mandatory: the rule provides that to avoid costs the plaintiff "may" notify a defendant of the option to waive service. If the plaintiff takes the option to use this procedure, the notice and request must meet the requirements specified in Rule 4(d)(1) n3

If the defendant waives service, no other process is required to invoke the court's jurisdiction; however, waiver of service does not constitute a submission to jurisdiction. The defendant who waives service may still object to the basis for subject matter jurisdiction. n4 Additionally, by waiving service of process, the defendant does not waive the right to object to personal jurisdiction and venue. n5 Because the waiver procedure of Rule 4(d) merely contemplates a request for waiver, n6 it does not obtain personal jurisdiction over the defendant merely on the basis of the plaintiff's mailing. n7 Therefore, receipt of a request for waiver, by itself, does not constitute service on the defendant. Rather, the process element is completed only after the defendant executes the waiver and returns it to the plaintiff. n8 For a further discussion of the waiver provisions, see *§ 6.62*.

[2] Service Procedure Absent Waiver

If the plaintiff requests and the defendant agrees, the parties may dispense with the service of process procedure by complying with *Federal Rule of Civil Procedure 4(d)* n1. When such a waiver consensus is not reached, however, service of process may be accomplished within the United States by any of the following methods:

1. Service pursuant to the law of the state in which the district court is located. n2

2. Service pursuant to the law of the state where service is performed. n2.1

3. Personal delivery of the summons and complaint to an individual defendant. n2.2

4. Deposit of the process at the dwelling house of an individual defendant, with a person of suitable age and discretion residing there. n2.3

5. Personal delivery of a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. n2.4

When the defendant resides in a foreign country and a waiver consensus has not been reached, service of process may be accomplished by any of the following methods: n3

1. Service by an internationally agreed means, typically the Hague Convention. n4

2. If no internationally agreed method exists for the situation, by personal delivery or any form of mail requiring a signed receipt, unless those methods are prohibited by the foreign country's law.

3. If personal delivery or mail is prohibited by the foreign country's law, by any manner prescribed by the foreign country's law or directed by the foreign authority in response to a letter of request.

4. Service directed by the court by any means not prohibited by international agreement.

There is no requirement that a party resort to any of the above methods before using one of the other methods. For example, when the defendant is living in a foreign country, the court has authority to direct service in any means not prohibited by international agreement, as stated in item 4 above, without first requiring service according to the Hague Convention or by personal delivery. n5

For a further discussion of the service of process procedures, see the remaining sections in this Part IV.

[3] Formal Service of Summons and Complaint

Except in the case of a defendant who waives formal service, n1 the plaintiff must ensure that each defendant is served with a copy of both the summons and the complaint. n2 Service of a summons without a complaint renders service of process invalid. n3 Likewise, service of a complaint without a summons constitutes ineffective service of process. n4 The court may permit a summons to be amended. n4.1

If a complaint has properly been amended, service of a summons and only the original complaint is invalid. n5 Service of a summons with both an original complaint and a proposed amendment to that complaint is valid. n6

A summons must be served on each defendant, or a copy of a summons that is addressed to multiple defendants must be served on each of the defendants. n7 Even though the plaintiff must effect service on all defendants named in the action, the plaintiff is not obligated to serve every attorney who appears on behalf of each defendant. It is sufficient for the plaintiff to serve one attorney representing each defendant. n8

[4] Service of Process for Jurisdiction Over Property

[a] Service of Process Regarding Claimants to Property

When a statute of the United States provides that the court may assert jurisdiction over property, notice to the claimants of the property may be sent by the plaintiff in the manner provided by the statute or by service of a summons under Rule 4. n1 The case law and Advisory Committee Notes indicate that this rule was intended to incorporate the provisions of *United States Code Title 28, Section 1655*. n2 That statute provides that in an action in a district court

regarding a lien or cloud on, or title or claim to, real or personal property within the district, when any defendant cannot be served within the state, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a specific date.

Such an order must be served on the absent defendant personally if practicable and also on any person or persons in possession or charge of the property. When personal service is not practicable, the order is to be published as the court may direct. If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the state, but any judgment regarding the absent defendant without appearance may affect only the property that is the subject of the action. Furthermore, any defendant not so personally notified may, at any time within one year after final judgment, enter an appearance, and the court must set aside the judgment and, on payment of such costs as the court deems just, permit the defendant to plead. n3

[b] Court's Jurisdiction Over Assets Belonging to Defendant Not Subject to Personal Jurisdiction

If the plaintiff shows that personal jurisdiction over a defendant cannot be obtained with reasonable efforts by service of summons in any manner authorized by Rule 4 in the district where the action is brought, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located. n4 To avail itself of this rule, the plaintiff must establish that personal service was impracticable by showing diligence in attempting to determine the location of the defendants. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 4(d).*

(n3)Footnote 2. *Fed. R. Civ. P. 4(d)*, Advisory Committee Note to 1993 Amendments.

(n4)Footnote 3. *Fed. R. Civ. P. 4(d)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 12(h)(3).*

(n6)Footnote 5. *Fed. R. Civ. P. 4(d)(5).*

(n7)Footnote 6. *Fed. R. Civ. P. 4(d)(1).*

(n8)Footnote 7. *Morse v. Elmira Country Club, 752 F.2d 35, 39 (2d Cir. 1984)* .

(n9)Footnote 8. *See Fed. R. Civ. P. 4(d)(4).*

(n10)Footnote 1. *See Fed. R. Civ. P. 4(d)*; *see also* [1], *above.*

(n11)Footnote 2. *Fed. R. Civ. P. 4(e)(1).*

(n12)Footnote 2.1. *Fed. R. Civ. P. 4(e)(1).*

(n13)Footnote 2.2. *Fed. R. Civ. P. 4(e)(2)(A).*

(n14)Footnote 2.3. *Fed. R. Civ. P. 4(e)(2)(B).*

(n15)Footnote 2.4. *Fed. R. Civ. P. 4(e)(2)(C).*

(n16)Footnote 3. *Fed. R. Civ. P. 4(f).*

(n17)Footnote 4. *See § 6.64[2].*

(n18)Footnote 5. *Forum Fin. Group, LLC v. President & Fellows of Harvard College, 199 F.R.D. 22, 23-25 (D. Me. 2001)* (court found that nothing in Rule 4(f) or its Committee Notes indicated that court directed service was extraordinary relief or that court directed service was any less favored than other types of service listed in rule); *see Fed. R. Civ. P. 4(f).*

(n19)Footnote 1. *See Fed. R. Civ. P. 4(d)*; *see also § 6.62.*

(n20)Footnote 2. *Fed. R. Civ. P. 4(b), (c)(1).*

(n21)Footnote 3. *Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1345-1346 (5th Cir. 1992)* (mailing of summons and acknowledgment without complaint renders service invalid).

(n22)Footnote 4. *Fed. R. Civ. P. 4(c)(1).*

(n23)Footnote 4.1. *Fed. R. Civ. P. 4(a)(2).*

(n24)Footnote 5. *Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 564 (S.D.N.Y. 1985)* (action dismissed when plaintiff served original complaint after amended complaint filed with clerk); *see also Phillips v. Murchison, 194 F. Supp. 620, 622 (S.D.N.Y. 1961)* (service of superseded complaint with summons not considered proper service of process).

(n25)Footnote 6. *Inter-City Prods. Corp. v. Willey, 149 F.R.D. 563, 569 (M.D. Tenn. 1993) .*

(n26)Footnote 7. *Fed. R. Civ. P. 4(b).*

(n27)Footnote 8. *Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063 (5th Cir. 1990)* (service only on local attorney sufficient absent showing that local attorney could not keep company advised or deliberately misled company).

(n28)Footnote 1. *Fed. R. Civ. P. 4(n)(1).*

(n29)Footnote 2. *Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp. 2d 860 (E.D. Va. 2000)* ; *Fed. R. Civ. P. 4(n)*, Advisory Committee Note to 1993 Amendments.

(n30)Footnote 3. *28 U.S.C. § 1655.*

(n31)Footnote 4. *Fed. R. Civ. P. 4(n)(2)*; *First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011, 1014-1016 (4th Cir. 1981) .*

(n32)Footnote 5. *Citizens & Southern Nat'l Bank v. Auer, 514 F. Supp. 631, 633-634 (E.D. Tenn. 1977) .*

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.62

§ 6.62 Defendant's Waiver of Formal Service of Process on Plaintiff's Requestn*

[1] Plaintiff's Notification of Suit and Request for Waiver

To avoid costs, the Federal Rules of Civil Procedure provide for an expedited process by which the plaintiff may request that the defendant waive formal service of process and provides notice and information on the lawsuit. n1 After such a request, the defendant has the option of waiving process, but if the defendant fails to make a waiver without good cause, the defendant will be liable for costs subsequently incurred in the plaintiff's effecting service on the defendant, n2 and the reasonable expenses including attorney's fees of any motion required to collect those service expenses. n2.1 A plaintiff's request for a waiver is not mandatory--the rule provides that to avoid costs the plaintiff "may" notify a defendant of the option to waive service. n3 If he or she decides to use the waiver procedure, the plaintiff must notify the defendant in writing that an action has commenced and request the defendant to waive service of process. n4

If the defendant waives service, no other service of process is required to invoke the court's jurisdiction. However, waiver of service does not constitute a submission to jurisdiction. The waiving defendant may still object to the basis for subject matter jurisdiction. n4.1 Additionally, by waiving service of process, the defendant does not waive the right to object to personal jurisdiction. n5 and venue. n5.1 Furthermore, the mere mailing of the request and notice does not automatically provide personal jurisdiction over the defendant merely on the basis of the plaintiff's mailing. n6 Also, receipt of a request for waiver by itself does not constitute service on the defendant. Service of process is completed only after the defendant executes the waiver and returns it to the plaintiff and the plaintiff files it with the court. n7

While the waiver option is designed as an inexpensive alternative to formal service, nothing in Rule 4 requires a plaintiff to request or a defendant to execute a waiver of service. If a defendant chooses to exercise the right to be formally served with process, the only potential penalty is an assessment against the defendant of the costs of the formal service. n8

[2] Requirements of Notice and Request

To initiate the waiver option, the plaintiff must complete all of the following steps: n1

1. The notice and request for waiver must be in writing. The plaintiff should inform the defendant, using text prescribed

in Official Form 5, n2 (Notice of Lawsuit and Request for Waiver of Service of Summons), of the consequences of waiving and not waiving service. This form has been promulgated pursuant to the federal rules. n3 The text of the form is mandatory. n4

2. If the defendant is an individual, the formal notice and request for waiver must be addressed directly to the defendant. If the defendant is a corporation, the notice and request must be addressed to the corporation's managing or general agent or any other agent authorized by appointment or law to accept service of process. n5 A request mailed to a corporation without specifying the identity of a proper agent is improper, and corporations are not obligated to inform the plaintiff of the identity of the person appointed to accept service on behalf of the corporation. n6

3. The plaintiff must deliver the request and notice by first-class mail, n7 or by any other reliable means, such as registered or certified mail. n8 Other reliable means include overnight or express mail, facsimile or other electronic means of communication, and delivery by messenger. n9 The notice and request must state the date that the forms are sent to the defendant. n10

4. The notice and request for waiver must be accompanied by a complaint identifying the court where the action has commenced but need not be accompanied by a summons. n11

5. The notice and request for waiver must inform the defendant of the consequences involved in complying and refusing to comply with the request in the language of Official Form 1A. n12

6. The notice and request for waiver must state a reasonable time for defendant to execute the waiver and return it to the plaintiff. The time must be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States. n13 The period of time to return the waiver commences when the notice and request is mailed to the defendant and not at the time when the defendant first discovers that an action has been commenced. n14 Additionally, the period of time given to the defendant to respond to plaintiff's request does not affect the 120-day period within which the plaintiff must serve the defendant after commencing an action, even if the defendant fails to return an executed waiver, the plaintiff must formally serve defendant within that 120-day period, subject to the discretion of the court to grant the plaintiff additional time to serve the defendant. n15

7. The notice and request must be accompanied by a copy of the complaint, two copies of a waiver form, Official Form 5 (Waiver of the Service of Summons), and a prepaid means for the defendant to return the form. n16

Failure of the plaintiff to satisfy any of the requirements listed above, such as a failure to mail an additional copy of the notice and request for waiver, does not in itself warrant dismissal of the action. Rather, such a failure only has the effect of the failure of the plaintiff to make a request; thus, the defendant who fails to take a necessary step regarding a waiver must make formal personal service on the defendant. n17

[3] Defendants Subject to Waiver Provisions

The waiver of service of process option specified in Rule 4(d) is applicable only in actions otherwise requiring service pursuant to Rule 4(e), (f), or (h); therefore, it applies only to service on individuals, corporations, or associations. n1 A notice and request may not, for example, be sent to the United States government because service is effected on the United States under Rule 4(i). n2 Also, the waiver option does not apply to foreign, state, or local governments that are served pursuant to Rule 4(j); those entities are not obligated to waive service of process. Employees of such entities, however, are required to make the waiver election, for example, municipal employees who are subject to Rule 4(d)(2) when sued as individuals. n3

Finally, the waiver option may not be sent to minors and incompetent persons who are served pursuant to Rule 4(g).

Due to their inability to comprehend the nature of a notice and request for waiver and the consequences for failing to comply with the request, infants and incompetent persons generally should be served through their fiduciaries. n4

[4] Defendant's Duty to Reasonably Avoid Costs

[a] Duty That Applies to Defendants in United States

A defendant located within the United States that receives a notice of action and request for waiver from a plaintiff located within the United States has an affirmative duty to avoid unnecessary costs involved with service of process. n1 Foreign defendants have no obligation to establish good cause for failing to comply with the request because the shift of costs provision expressly applies only to defendants located within the United States from United States plaintiffs. n2

[b] Costs Imposed on Defendant for Failure to Waive Without Good Cause

The defendant's duty to avoid unnecessary costs by waiver is mandatory on request and may be fulfilled only by executing the waiver and returning it to the plaintiff. A defendant who compels plaintiff to effect formal service of process by refusing to sign and return the waiver without good cause may be compelled by the court to pay plaintiff for the costs incurred in effecting service n3 and the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses. n3.1 Thus, the court will compel the defendant to pay those costs that may have been avoided had the defendant consented to waiving service. n4 To hold the defendant liable for costs, the plaintiff must offer evidence that defendant was formally served and of the costs incurred in effecting service. n5 Mere evidence that the summons was mailed to defendant is insufficient to show that the defendant was formally served with process. n6 Additionally, if the plaintiff sends defendant a defective waiver form, if the request improperly identifies the defendant or is addressed improperly, the court will not compel defendant to pay for the costs of service. n7

The court may compel the defendant to pay the costs subsequently incurred by the plaintiff in effecting formal service and also any costs and reasonable attorney's fees incurred in making a motion required to collect the costs of service. n8 A defendant who fails to execute and return the request for waiver is obligated to pay only those costs arising after the time for returning the waiver has expired. This provision was included to discourage plaintiffs from proceeding with formal service against defendants before the deadline given to the defendant to return the executed waiver has passed. n9

[c] Defendant May Avoid Costs With Demonstration of Good Cause for Failure To Waive

A defendant who fails to agree to a waiver and to execute and return the waiver may avoid paying for the plaintiff's costs for formal service of process by showing good cause for the failure. n10 For example, a defendant that does not receive the notice and request for waiver or has an inability to comprehend the notice and request in English has good cause for failing to comply with the request. n11 In another case, the party established good cause when it showed that it relied on the incorrect Federal Rule of Civil Procedure, and the reliance was reasonable because of the lack of case precedent regarding the provisions of the rules. n12

On the other hand, a conclusory claim that the plaintiff's allegations are unjust or the court lacks adequate jurisdiction does not constitute good cause for failing to comply with the request and the court is required to shift the costs of service to the defendant. n13

[5] Effect of Plaintiff's Filing of Waiver After Return by Defendant

[a] Formal Service Not Required

The mailing of a notice and request for a waiver of service to the defendant by itself does not accomplish the judicial action of service, because the defendant must return the service, n1 and the plaintiff must file the waiver with the court.

After plaintiff files an executed waiver with the court, the action is treated by the court as if the defendant was served formally and proof of service was filed with the court. n2 Furthermore, the filing of an executed waiver supersedes the obligation to file proof of service with the clerk of the court. n3

[b] Time Extended for Defendant to Answer

As an incentive for the defendant to sign and return the waiver, and save the costs of formal service, the waiver rule provides the defendant with additional time within which to appear to answer the complaint. n4 Ordinarily, a defendant is granted 21 days after service of the summons and complaint to serve an answer on plaintiff and file it with the court. n5 If, however, a defendant residing in the United States returns to the plaintiff an executed waiver within 30 days from the date the notice and request for waiver was sent, the defendant has 60 days after the date the notice and request was sent to answer the complaint. n6

Note that if a plaintiff sends a defendant a notice and request for waiver and later properly makes a formal service of process on the defendant pursuant to any other provision of Rule 4 before the defendant executes and returns the waiver, and prior to the expiration of the 30-day period granted to defendant to return the waiver, the 60-day period under Rule 4(d)(3) is superseded by the 21-day period under Rule 12(a)(1)(A)(i). n7

If a foreign defendant executes and timely returns a waiver within 60 days from the date the notice and request for waiver was sent, the foreign defendant is granted up to 90 days to answer the complaint or assert defenses. n8

[c] Waiver of Service Does Not Constitute Consent to Jurisdiction

When the defendant executes a waiver and returns the waiver to the plaintiff, the defendant is merely waiving the right to receive formal service and does not waive the right to object to venue. Furthermore, by waiving service of process, the defendant does not waive the right to object to personal jurisdiction. n9 Additionally, if a person receives a request for a waiver of service of process, the mere receipt of the request does not confer personal jurisdiction over the defendant. Rather, personal jurisdiction is obtained only after the defendant executes the waiver and returns it to the plaintiff and the plaintiff files it with the court. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessWaiversGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversRequests

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.10 et seq. (Matthew Bender 3d ed.); 16 *Moore's Federal Practice,* § 108.122 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 4(d).*

(n3)Footnote 2. *Fed. R. Civ. P. 4(d)(2)(A).*

(n4)Footnote 2.1. *Fed. R. Civ. P. 4(d)(2)(B).*

(n5)Footnote 3. *Fed. R. Civ. P. 4(d)(1)*

(n6)Footnote 4. *Fed. R. Civ. P. 4(d)(1)(D)*; *see* [2], *below.*

(n7)Footnote 4.1. *Fed. R. Civ. P. 12(h)(3).*

(n8)Footnote 5. *Fed. R. Civ. P. 4(d)(1)*, Advisory Committee Note to 1993 Amendments.

(n9)Footnote 5.1. *Fed. R. Civ. P. 4(d)(5)*.

(n10)Footnote 6. *Morse v. Elmira Country Club, 752 F.2d 35,39 (2d Cir. 1984)* .

(n11)Footnote 7. *Desormeaux v. Wackenhut Servs., 1994 U.S. Dist. LEXIS 15384, at *2-*3 (E.D. La. 1994)* ; *see* [5], *below*.

(n12)Footnote 8. *See Fed. R. Civ. P. 4(d)(2)(G)*; *Troxell v. Fedders of N. Am., Inc., 160 F.3d 381, 382-383 (7th Cir. 1998)* (if defendant refuses to waive service, only penalty is assessment of costs of service).

(n13)Footnote 1. *Larsen v. Mayo Med. Ctr., 218 F.3d 863, 866-867 (8th Cir. 2000)* (provisions of Rule 4(d) must be strictly complied with to perform service by waiver).

(n14)Footnote 2. *Fed. R. Civ. P. 4(d)(1)(D)*.

(n15)Footnote 3. *See Fed. R. Civ. P. 84*.

(n16)Footnote 4. *Fed. R. Civ. P. 4(d)(1)(D)*.

(n17)Footnote 5. *Fed. R. Civ. P. 4(d)(1)(A)*.

(n18)Footnote 6. *Fed. R. Civ. P. 4(d)*, Committee Note to 1993 Amendments (general mail room of large organization may not be required to identify appropriate individual recipient for institutional summons).

(n19)Footnote 7. *Fed. R. Civ. P. 4(d)(1)(G)*.

(n20)Footnote 8. *Sentry Ins. v. Apolinario, 1995 U.S. Dist. LEXIS 2325, at *2 (E.D. Pa. Feb. 24, 1995)* .

(n21)Footnote 9. *Fed. R. Civ. P. 4(d)(2)(B)*, Advisory Committee Note to 1993 Amendments.

(n22)Footnote 10. *Fed. R. Civ. P. 4(d)(1)(E)*.

(n23)Footnote 11. *Fed. R. Civ. P. 4(d)(1)(B)*.

(n24)Footnote 12. *Fed. R. Civ. P. 4(d)(1)(D)*.

(n25)Footnote 13. *Fed. R. Civ. P. 4(d)(1)(F)*.

(n26)Footnote 14. *United States v. First Midwest Bank, 1995 U.S. Dist. LEXIS 10495, at *5-*10 (N.D. Ill. 1995)* .

(n27)Footnote 15. *Prather v. Raymond Constr. Co., 570 F. Supp. 278, 281-282 (N.D. Ga. 1983)* .

(n28)Footnote 16. *Fed. R. Civ. P. 4(d)(1)(C)*.

(n29)Footnote 17. *George v. HEK Am., Inc., 157 F.R.D. 489, 492 (D. Colo. 1994)* (plaintiff's failure to include two copies of notice and acknowledgment forms does not require dismissal).

(n30)Footnote 1. *Fed. R. Civ. P. 4(d)(1)*.

(n31)Footnote 2. *Tuke v. United States, 76 F.3d 155, 156 (7th Cir. 1996)* (waiver of service plays no role in suits against United States government).

(n32)Footnote 3. *Mosley v. Douglas County Correctional Ctr., 192 F.R.D. 282, 283-284 (D. Neb. 2000)* (county

employees sued as individuals were subject to service as individuals and to waiver of service provision); *Whatley v. District of Columbia, 188 F.R.D. 1, 2 (D.D.C. 1999)* (service on government employees who were sued as individuals in their official capacities were governed by Rule 4(e) rather than Rule 4(j), which applies only to government entities; thus, employees were subject to waiver of service of provisions).

(n33)Footnote 4. *Fed. R. Civ. P. 4(d)*, Committee Note to 1993 Amendments.

(n34)Footnote 1. *Fed. R. Civ. P. 4(d)(1)*.

(n35)Footnote 2. *O'Rourke Bros. Inc., v. Nesbitt Burns, Inc., 201 F.3d 948, 951 (7th Cir. 2000)* (Rule 4(d)(2) provides foreign defendants ability to waive service but exempts them from costs for failure to execute waiver).

(n36)Footnote 3. *Fed. R. Civ. P. 4(d)(2)(A)*.

(n37)Footnote 3.1. *Fed. R. Civ. P. 4(d)(2)(B)*.

(n38)Footnote 4. *Fed. R. Civ. P. 4(d)(2)*; *United States v. First Midwest Bank, 1995 U.S. Dist. LEXIS 10495, at *5 (N.D. Ill. 1995)*

(n39)Footnote 5. *Wesley v. Don Stein Buick, Inc., 996 F. Supp. 1299, 1310-1311 (D. Kan. 1998)* .

(n40)Footnote 6. *Wesley v. Don Stein Buick, Inc., 996 F. Supp. 1299, 1311 n.9 (D. Kan. 1998)* .

(n41)Footnote 7. *Spivey v. Board of Church Extension, 160 F.R.D. 660, 662-663 (M.D. Fla. 1995)* .

(n42)Footnote 8. *Fed. R. Civ. P. 4(d)(1)*.

(n43)Footnote 9. *Fed. R. Civ. P. 4(d)*, Committee Note to 1993 Amendments.

(n44)Footnote 10. *Fed. R. Civ. P. 4(d)(1)*.

(n45)Footnote 11. *Fed. R. Civ. P. 4(d)*, Committee Note to 1993 Amendments.

(n46)Footnote 12. *See Mosley v. Douglas County Correctional Ctr., 192 F.R.D. 282, 283-284 (D. Neb. 2000)* .

(n47)Footnote 13. *Fed. R. Civ. P. 4(d)*, Advisory Committee Note to 1993 Amendments.

(n48)Footnote 1. *Larsen v. Mayo Med. Ctr., 218 F.3d 863, 866-867 (8th Cir. 2000)* (provisions of Rule 4(d) must be strictly complied with and if acknowledgment form is not returned by defendant waiver of service has not occurred and formal service must be completed).

(n49)Footnote 2. *Fed. R. Civ. P. 4(d)(4)*; *Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 679-681 n.13 (N.D. Iowa 1995)* (plaintiff effects proper service by filing waiver of service obtained from defendant).

(n50)Footnote 3. *Fed. R. Civ. P. 4(d)(4)*.

(n51)Footnote 4. *Fed. R. Civ. P. 4(d)*, Advisory Committee Note to 1993 Amendments.

(n52)Footnote 5. *Fed. R. Civ. P. 12(a)(1)(A)(i)*.

(n53)Footnote 6. *Fed. R. Civ. P. 4(d)(3)*; *Fed. R. Civ. P. 12(a)(1)(A)(ii)*.

(n54)Footnote 7. *Fed. R. Civ. P. 12(a)(1)(A)(i)*.

(n55)Footnote 8. *Fed. R. Civ. P. 4(d)(1)(F), 4(d)(3).*

(n56)Footnote 9. *Fed. R. Civ. P. 4(d)(1),* Advisory Committee Note to 1993 Amendments.

(n57)Footnote 10. *See Larsen v. Mayo Med. Ctr., 218 F.3d 863, 866-867 (8th Cir. 2000)* (provisions of Rule 4(d) must be strictly complied with before jurisdiction attaches over defendant); *Desormeaux v. Wackenhut Servs., 1994 U.S. Dist. LEXIS 15384, at *2-*3 (E.D. La. 1994)* (return receipt obtained by postal company from defendant does not constitute acknowledgment for waiver of service).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.63

§ 6.63 Summonsn*

[1] Nature of Summons

[a] Function of Summons

A "summons" is the document used to obtain personal jurisdiction over a party. n1 The purpose of service of a summons is to provide notice that the action has been commenced. n2 The summons is also used to instruct the defendant to appear before the issuing court to defend against the claims alleged in the complaint. n3

Even though the purpose of the summons is to provide notice, actual notice to the person served is not required to effect service and establish jurisdiction--all that is necessary is that the plaintiff comply with Rule 4. Conversely, actual notice does not necessarily establish personal jurisdiction, when there has not been compliance with Rule 4. n4 Thus, a defendant's independent knowledge that an action has been commenced is insufficient in the absence of proper service of process. n5 If a defendant is not provided with adequate notice that an action has commenced, the court that issued the summons does not obtain personal jurisdiction over the defendant and may not subsequently render a judgment against the defendant. n6

To comply with the summons content requirements, n7 a plaintiff may draft the summons in conformance with Official Form 3, (Summons) n8 which has been promulgated pursuant to the federal rules. n8.1

[b] Effect of Lack of Proper Service of Summons

If a given defendant is not properly served, any subsequent judicial proceedings with regard to that defendant are invalid unless the defendant has waived a challenge to personal jurisdiction. n9 For example, if service is made of a summons which has not been signed or sealed by the clerk of the court, the service is invalid and inadequate to establish personal jurisdiction over the defendant for the entire duration of the action. n10 However, if the defendant fails to object to defects in the summons in an initial motion to dismiss the complaint, n11 that failure to object may constitute a waiver of personal jurisdiction challenges. n11.1

[c] Court Has Discretion to Disregard Mere Technical Errors in Cases of Substantial Compliance

Under certain circumstances, courts may liberally construe Rule 4 to otherwise recognize service of process, even if the defendant is not served precisely according to the provisions of Rule 4. Courts have discretion to disregard mere technical errors in effecting service. n12 On the other hand, a failure to substantially comply with the requirements of Rule 4 will result in a lack of jurisdiction. For example, in one case, a court held that plaintiff's service of a summons that was not signed, sealed, or issued by the clerk of the court did not constitute substantial compliance with Rule 4 and therefore rendered service invalid. n13

To demonstrate that any defect of service is not merely technical, a plaintiff must establish substantial compliance with the provisions of Rule 4. n14 Service of process that is defective due to mere technical errors may be deemed valid by the court provided that the defendant receives adequate actual notice of the commencement of the action. n15 In other words, a court will not dismiss an action against a defendant who received notice of the action unless the defendant is prejudiced by a defective summons. n16 Thus, a minor defect on the face of the summons, such as a failure to inform defendant of the prescribed time to answer the complaint, does not necessarily deprive the court of personal jurisdiction over defendant. n17

[2] Requirements of Summons

[a] Identification of Court and Parties

The summons must identify the court that will adjudicate the action and the parties to the action. n1 Technical defects in the designation of the names in the summons do not require dismissal of an action if the parties are otherwise identifiable from inclusion of their names in the complaint, if the defendant has failed to demonstrate actual prejudice to a substantial right. n2 A court will not dismiss an action against a defendant unless the defendant demonstrates actual prejudice resulting from the failure of the summons to set forth fundamental information. Thus, when there are numerous defendants, a failure to include the name of each and every defendant does not invalidate the summons, when each name is specified in the complaint. n3 n4

[b] Summons Must Be Directed to Defendant

The summons must be directed to the defendant. n5 If the summons is not directed to a particular person, the court has no jurisdiction over that person. Thus, for example, a foreign corporation could not be bound by a default judgment when the plaintiff failed to direct service against the foreign corporation itself or a domestic corporation that was licensed to do business in the state as agent of the foreign corporation. n6 The "directed to" requirement means that the defendant's name must appear conspicuously on the summons. However, if a summons has a technical defect in that it fails to properly state the defendant's name and thus is not "directed to" the defendant, the summons is not jurisdictionally defective if defendant is not prejudiced by the error. n7

Prejudice does not exist if the defendant receives the summons and therefore has actual notice that an action has commenced, and the plaintiff establishes a justifiable reason for the error--that the error was caused by a technical defect as opposed to a complete failure to effect service of process. n8 However, the plaintiff must subsequently identify the defendant and properly effect service within 120 days after commencement of the action. n9

If the defendant is represented by counsel, the summons must be addressed to the defendant's attorney. If the defendant does not yet have legal representation, the summons must be addressed directly to the defendant. n10

[c] Name of Plaintiff or Plaintiff's Attorney

The summons must state name and address of plaintiff's attorneys, or, if the plaintiff is not represented, the plaintiff's name and address. n11 The primary purpose of this requirement is to inform the defendant of the address to send the defendant's response to the complaint. n12

[d] Time for Defendant to Respond to Summons

The summons must state the time within which the defendant must appear and defend the allegations in the complaint, n13 and notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint. n13.1 However, the plaintiff's failure to properly inform the defendant of the prescribed time period to answer the complaint does not necessarily constitute a jurisdictional defect. n14 In determining whether a jurisdictional defect exists, the court will consider whether a technical defect in the summons prejudiced the defendant. n15 The court must determine prejudice on a case-by-case basis, after reviewing the facts of each particular case to assess whether the defect in the summons caused some harm to the defendant that caused an impediment to the defense of the case. n16

For example, in a case in which the summons erroneously informed defendant that an answer to the complaint was required within 20 days, rather than 30 days, the court ruled that service, nevertheless, was valid because defendant received notice of the action and the opportunity to be heard. n17 Additionally, a plaintiff's failure to correctly inform the defendant of the deadline to answer the complaint before the court is not prejudicial if the defendant has filed a motion to dismiss with the court, because filing of a motion to dismiss extends the time within which defendant must answer the complaint. n18

[e] Signature of Clerk of Court and Seal of Court

The summons must be signed by the clerk of the court and bear the seal of the court. n19 A summons that is not signed and sealed by the clerk of the court is invalid and does not confer personal jurisdiction over the defendant, even if properly served. n19.1 If the defendant raises the matter on proper motion or in a responsive pleading, the court should dismiss the suit. n20 An original signature and seal is not required in all instances. Thus, the plaintiff may serve the defendant with a photographic copy of the summons if there is more than one defendant. n21 The summons may not be signed by the plaintiff or plaintiff's attorney. n22

[f] Issuance by Clerk of Court

On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, must be issued for each defendant that is to be served. n23 If the plaintiff fails to ensure that this requirement is met, the court may order a dismissal with respect to the defendant who receives the defective summons. n24

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.03, 4.30 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)* ; *Day v. Zimmer Inc., 636 F. Supp. 451, 452-453 (N.D.N.Y. 1986)* .

(n3)Footnote 2. *Oklahoma Radio Assocs. v. FDIC, 969 F.2d 940, 943 (10th Cir. 1992)* .

(n4)Footnote 3. *Holbrook v. Cafiero, 18 F.R.D. 218, 219 (D. Md. 1955)* (summons provides notice to defendant to appear before court and defend against allegations in complaint).

(n5)Footnote 4. *Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986)* (without substantial compliance with Rule 4, defendant's actual notice of action does not provide court with personal jurisdiction); *Thompson v. Target Stores, 501 F. Supp. 2d 601, 602-603 (D. Del. 2007)* (actual notice of claim is insufficient to establish personal jurisdiction when clerk has not signed summons).

(n6)Footnote 5. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc., 840 F.2d 685, 688 (9th Cir. 1988)* (party's actual notice of action will not provide jurisdiction without substantial compliance with service of process under Rule 4).

(n7)Footnote 6. *Oklahoma Radio Assocs. v. FDIC, 969 F.2d 940, 943 (10th Cir. 1992)* ; *see* [2], *below*.

(n8)Footnote 7. *See Fed. R. Civ. P. 4(a)(1)*.

(n9)Footnote 8. *See* Fed. R. Civ. P. Appendix, Form 3.

(n10)Footnote 8.1. *Fed. R. Civ. P. 84*.

(n11)Footnote 9. *Select Creations, Inc. v. Paliafito America, Inc., 830 F. Supp. 1223, 1237-1238 (E.D. Wis. 1993)* (failure to properly serve defendant corporation required denial of plaintiff's default motion).

(n12)Footnote 10. *Thompson v. Target Stores, 501 F. Supp. 2d 601, 602-603 (D. Del. 2007)* ; *Macaluso v. New York State Dep't of Environmental Conservation, 115 F.R.D. 16, 17-18 (E.D.N.Y. 1986)* .

(n13)Footnote 11. *See Fed. R. Civ. P. 12(a)(1)(A)(i)*, *12(b)*, *12(h)(1)*.

(n14)Footnote 11.1. *Fed. R. Civ. P. 12(b)*, *12(h)(1)*; *see O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1398-1399 (7th Cir. 1993)* .

(n15)Footnote 12. *In re Barr, 217 B.R. 626, 629 (W.D. Wash. 1998)* (despite technically improper service, court used its discretion to extend deadline for service considering lack of bad faith by plaintiff, actual notice by defendant, and lack of action by defendant despite knowledge of action and improper service).

(n16)Footnote 13. *Macaluso v. New York State Dep't of Environmental Conservation, 115 F.R.D. 16, 17-18 (E.D.N.Y. 1986)* (service of unsigned and unsealed summons which was not issued by clerk did not constitute mere technical defect but was considered to be in complete disregard of Rule 4).

(n17)Footnote 14. *Benny v. Pipes, 799 F.2d 489, 493-494 (9th Cir. 1986)* , *cert. denied, 484 U.S. 870 (1987)* .

(n18)Footnote 15. United Food & Commercial Workers Union, Locals 197, 373, *Etc. v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)* .

(n19)Footnote 16. *In re Silvio Dohring, 245 B.R. 262, 265-266 (N.D. Tex. 2000)* (court would extend time for complainant to secure another summons and properly effectuate service, where there was no allegation that complainant was not acting in good faith or had intentionally engaged in dilatory tactics, where parties had entered into agreed order of continuance, and where no prejudice to opposition was shown by complainant's prior ineffective service); *Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987)* (technical error in service of process did not invalidate process when defendant was aware of allegations, filed answer, and appeared in action).

(n20)Footnote 17. *Sanderford v. Prudential Ins. Co., 902 F.2d 897, 899-901 (11th Cir. 1990)* .

(n21)Footnote 1. *Fed. R. Civ. P. 4(a)(1)(A).*

(n22)Footnote 2. *Federal Deposit Ins. Corp. v. Swager, 773 F. Supp. 1244, 1249-1250 (D. Minn. 1991)* .

(n23)Footnote 3. *Vega Matta v. Alvarez de Choudens, 440 F. Supp. 246, 248-249 (D.P.R. 1977)* , *aff'd without op., 577 F.2d 722 (1st Cir. 1978)* (when all defendants received copies of complaint in addition to their summonses, and captions of complaint included names of all codefendants in action, notice purpose of service of process was accomplished; mere omission of some of defendants' names in captions of summonses did not constitute a jurisdictional defect).

(n24)Footnote 4. [Reserved].

(n25)Footnote 5. *Fed. R. Civ. P. 4(a)(1)(B).*

(n26)Footnote 6. *Le Donne v. Gulf Air, Inc.,700 F. Supp. 1400, 1406 (E.D. Va. 1988)* .

(n27)Footnote 7. *Crane v. Battelle, 127 F.R.D. 174, 177 (S.D. Cal. 1989)* (summons that transposed first and last name of defendant was considered to have technical flaw that did not prejudice defendant).

(n28)Footnote 8. *Van Manen v. United States, 838 F. Supp. 335, 337 (W.D. Mich. 1993)* (when defendant had actual notice of action, that is, receipt of summons, pro se plaintiff who directed service to "Attorney General, Tax Division," rather than the United States Attorney General committed technical defect that did not prejudice defendant).

(n29)Footnote 9. *Aviles v. Village of Bedford Park, 160 F.R.D. 565, 566-567 (N.D. Ill. 1995)* (naming of "John Doe" defendant permitted when defendant's identity unknown, provided that plaintiff subsequently identify and serve defendant within 120 days of commencement of action).

(n30)Footnote 10. *Rhyne v. Pigott, 122 F. Supp. 774, 775 (W.D.N.Y. 1954)* (defendant's failure to designate counsel obligated plaintiff to address summons directly to defendant).

(n31)Footnote 11. *Fed. R. Civ. P. 4(a)(1)(C).*

(n32)Footnote 12. *Perkin Elmer (Computer Systems Div.) v. Trans Mediterranean Airways, S.A.L., 107 F.R.D. 55, 57 (E.D.N.Y. 1985)* (document sent to plaintiff's attorney by defendant's claims clerk in prepaid envelope that plaintiff's attorneys had provided for purposes of acknowledging service was "acknowledgment of service" for purposes of Rule 4).

(n33)Footnote 13. *Fed. R. Civ. P. 4(a)(1)(D).*

(n34)Footnote 13.1. *Fed. R. Civ. P. 4(a)(1)(E).*

(n35)Footnote 14. United Food & Commercial Workers Union, Locals 197, 373, *Etc. v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)* (summons erroneously specifying 10 days for defendant to answer complaint rather than 20 days considered technical defect not warranting dismissal).

(n36)Footnote 15. *Chan v. Society Expeditions, 39 F.3d 1398, 1404 (9th Cir. 1994)* , *cert. denied, 514 U.S. 1004 (1995)* (no prejudice suffered by foreign defendant corporation by failure of summons to describe corporation's officer in numerous capacities when defendant had sufficient notice of action); *Sanderford v. Prudential Ins. Co., 902 F.2d 897, 899-901 (11th Cir. 1990)* (third-party defendant was not prejudiced by inadvertent omission of return date from summons when third-party defendant was recipient of multitude of notices of possible default judgment but chose to remain silent).

(n37)Footnote 16. *Fountain Valley Corp. v. Wells, 98 F.R.D. 679, 685-687 (D.V.I. 1983)* , *aff'd on other grounds*

sub nom. Wells v. Rockefeller, 728 F.2d 209 (3d Cir. 1984) (failure to include prescribed time to answer complaint did not invalidate service of process).

(n38)Footnote 17. *Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 468, 470 (D.P.R. 1992)* (clerical error that incorrectly indicated prescribed time to answer complaint was not prejudicial, and did not render service invalid).

(n39)Footnote 18. *Inter-City Products Corp. v. Willey, 149 F.R.D. 563, 569 (M.D. Tenn. 1993)* (even if summons received by defendants did not correctly inform defendants when they were required to respond, lack of deadline in summons would not cause process to be insufficient, because several motions to dismiss were pending which effectively postponed requirement that answer be filed).

(n40)Footnote 19. *Fed. R. Civ. P. 4(a)(1)(F), (G).*

(n41)Footnote 19.1. *Thompson v. Target Stores, 501 F. Supp. 2d 601, 602-603 (D. Del. 2007)* .

(n42)Footnote 20. *Ayres v. Jacobs & Crumplar, 99 F.3d 565, 568 (3d Cir. 1996)* ; *Macaluso v. New York State Dep't of Environmental Conservation, 115 F.R.D. 16, 17-18 (E.D.N.Y. 1986)* (service of unsigned, unsealed summons not issued by clerk considered more than mere technical defect and in valid as disregarding Rule 4).

(n43)Footnote 21. *Fed. R. Civ. P. 4(b)*; *see Kramer v. Scientific Control Corp., 365 F. Supp. 780, 788 (E.D. Pa. 1973)* (citing **Moore's Federal Practice**).

(n44)Footnote 22. *Kramer v. Scientific Control Corp., 365 F. Supp. 780, 788 (E.D. Pa. 1973)* (one purpose of Rule 4 is to ensure that summons is issued by clerk of court, not plaintiff or plaintiff's attorney).

(n45)Footnote 23. *Fed. R. Civ. P. 4(b).*

(n46)Footnote 24. *Barrett v. City of Allentown, 152 F.R.D. 46, 48-49 (E.D. Pa. 1993)* (service of unsigned summons considered substantive defect that could not be disregarded by court).

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.64

§ 6.64 Persons and Entities Subject to Servicen*

[1] Individuals Within United States

Service of process may be made on an individual, other than a minor, an incompetent person, or a person who has filed a waiver, in any one of four ways: (1) by following state law for serving a summons in an action brought in a court of general jurisdiction in the state where the district court is located or where service is made; n1 (2) by delivering a copy of the summons and complaint to the individual personally; n2 (3) by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; n2.1 or (4) by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. n2.2 Unless a defendant voluntarily makes an appearance or waives service, a federal court is therefore without jurisdiction to render a personal judgment against the individual unless service of process is made in accordance with the applicable federal or state statutory requirements, notwithstanding any actual notice the individual may have of the legal action against him or her. n3

[2] Individuals in Foreign Nation

[a] Service Pursuant to International Treaty

Service of process outside the United States or made by a foreign plaintiff within the United States may be made pursuant to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, n1 provided that the countries where service originates and is sought are signatories. n2 The Hague Convention applies to judicial and extrajudicial documents in a civil or commercial matter commenced in one country and requiring service in a foreign country. n3 Service abroad effected pursuant to the Hague Convention supersedes requirements of Rule 4 and applicable state rules. n4 The United States federal courts have consistently construed the Hague Convention in a liberal manner to promote its purpose of facilitating international service of judicial documents through cooperation by member countries. For example, it has been held that service by mail is permitted under the Convention. n4.1

Under the Hague Convention, each signatory state must designate a "Central Authority," whose purpose is to accept requests for service from other signatory states. n5 Documents that are to be served in a foreign country must be

attached to a formal request form (model forms are annexed to the Hague Convention) and must be sent, in duplicate, to the central authority of the country where service is sought. n6 If the documents are completed properly, the central authority will, in turn, serve the documents on the named defendant pursuant to its own internal laws n6.1 or by a method requested by the plaintiff, provided that the latter does not contradict the laws and rules of the recipient state. n7 After service is complete, the central authority of the recipient state must prepare an official certificate form (the form is annexed to the Hague Convention) indicating the method, time, and place of service and to whom the documents were served. If service is not complete, the certificate must indicate an explanation. n8 The Hague Convention requires that all documents to be served be written in English, French, or an official language of the country where service originates. n9

In addition to the Hague Convention, service of process may be effected under the Inter-American Convention on Letters Rogatory. n9.1 The Inter-American Convention applies to civil or commercial matters and provides for service of process by means of letters rogatory, which are essentially formal documents from a domestic court that request action, such as service or discovery, by a foreign court. n9.2 The forms for the letters rogatory must be translated into the official language of the recipient country and accompanied by an authenticated copy of the complaint and accompanying documents. Furthermore, the Inter-American Convention does not preempt other methods of service of process. n10

[b] Alternate International Service

If an international agreement permits additional methods of service or does not apply, service of process may be effected pursuant to the laws of the country where the person seeks service of process. n11 In other words, the United States does not object to permitting service by means other than those set forth by the Hague Convention or by the Inter-American Convention on Letters Rogatory. n11.1 Any means of service permissible pursuant to the Federal Rules of Civil Procedure are available to foreign plaintiffs for service on a defendant located within the United States. n12 If the plaintiff fails to abide by the rules of the foreign country, service of process on a defendant in that country will be invalid. n13

When international agreements permit additional methods of service or do not apply in the country where service is to be effected, service of process may be effected pursuant to instructions set forth by the foreign country in response to letters rogatory or a letter of request. n14 Service of process may also be made by personal service of a copy of the summons and complaint on the defendant, n15 or may be effected by mail. n16 Additionally, service on an individual in a foreign country may effected by any other means directed by the court provided the means is not prohibited by international agreement. n17

In general, the 120-day period to effect service specified in Rule 4(m) n18 does not apply to service of process effected outside the United States. n19 However, the plaintiff must actually attempt to effect service in a foreign country in order to benefit from the exemption to the 120-day rule. n20

[3] Corporations

[a] Officers

Unless it has waived formal service, service of process on a domestic or foreign corporation may be effected pursuant to the laws of the state where the court is located or where service is sought, n1 or by personal delivery of the summons and complaint to an officer of the corporation. n2 If a plaintiff makes service of process on a corporate owner who is not an officer of the corporation, the service generally is insufficient to obtain jurisdiction over that corporation. n3

[b] Managing Agent or General Agent

Service of process on a corporation may be effected by personal delivery of the summons and complaint to the

managing or general agent of the corporation. n4 Service of process on a domestic or foreign corporation may be made by personal delivery of the summons and complaint on any corporate agent authorized by express or implied appointment to receive service of process. n5 Regardless of whether the appointment is express or implied, the purported agent must have actual authority to behave as an agent for the corporation. n6 Thus, service of process on a corporate employee who lacks authority to accept service on behalf of the corporation renders service invalid. n7

In this regard, even if an employee has a power of attorney to act on behalf of a corporation, that power without more is not sufficient to establish that the person with the power is a managing agent for service. n8 Furthermore, the mere claim by a person receiving service of process that he or she is an authorized agent to accept service does not, without more, confer authority on that person to act as an agent. n9 In making a determination whether a particular person is an agent authorized to accept service for a corporation, a court will consider the level of authority granted to that individual within the corporation. n10

Personal delivery may be made to an agent authorized by statute to accept service of process. If service is made on an authorized agent, plaintiff must mail a copy of the summons and complaint directly to the defendant if required by statute. n11 A parent corporation may be served to effect service on a subsidiary corporation, and vice versa, provided that the parent corporation acts as an agent for its subsidiary and the corporations are not completely separate entities. n12 In determining whether parent and subsidiary corporations are separate entities, a court should consider the degree to which the business affairs of both corporations are intertwined. n13 Additionally, the court may allow such service when an objection is not raised; for example, service on a wholly owned subsidiary of a defendant corporation was permitted because the parent corporation did not raise a jurisdictional objection. n14

[c] Corporation Located Outside United States

If service is to be effected on a domestic or foreign corporation in any place not within any judicial district of the United States, the service may be effected in the same manner as prescribed for individuals located outside the United States, n15 except that such service may not be effected by personal delivery as specified in Rule 4(f)(2)(C)(i) n16 For example, in one case it was held that service of an employment discrimination summons and complaint on an Italian corporate defendant through the mail complied with Rule 4(f)(1), which authorized service by any internationally agreed means reasonably calculated to give notice, such as, means authorized the by Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, because an article of the Hague Convention, to which Italy was a signatory, allowed the sending of judicial documents by mail directly to persons abroad. n17

[4] Partnership or Unincorporated Association

A plaintiff may serve process on a partnership or other unincorporated association, n1 provided that the partnership or unincorporated association has the capacity to be sued under a common name. n2 The same requirements for service on corporations apply to service an a partnership or other unincorporated association. n3 Therefore, service may be effected pursuant to the laws of the state where the district court is located or where service is sought. n4 In the alternative, service may be effected by delivery of the summons and complaint to an officer, managing or general agent, or any other agent authorized by appointment or law to receive service. n5 If service is effected on an agent authorized by statute to accept service, the plaintiff must mail an additional copy of the summons and complaint to the defendant if also required by statute. n6

[5] Minor or Incompetent

A claimant must make service of process on a minor or incompetent person pursuant to the rules of the state where service is sought to be effected. n1 If the claimant fails to comply with state service requirements, the court does not obtain personal jurisdiction over the minor or incompetent, and a subsequent judgment is invalid. n2

Outside of the United States, a plaintiff must effect service on a minor or incompetent person pursuant to the law of the foreign country in which the action will be adjudicated. n3 Thus, service of process on a minor or incompetent person in a foreign country may be made pursuant to the rules set forth by the foreign country as determined by use of letters rogatory or letters of request. n4 Service of process on a minor or incompetent person in a foreign country may be made pursuant to any method approved by a United State district court. n5

Defects in service of process may be waived by a minor or incompetent if he or she submits to the jurisdiction of a court through the appearance of a representative or through a personal appearance and the appointment by the court of a guardian ad litem. n6

[6] United States as Entity

[a] Service Always Requires Notice to Attorney General

To effect service in any action against the United States, the plaintiff must always send a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. n1 Service of process on the Attorney General becomes effective when the summons and complaint are received by the Attorney General, and not when mailed. n2

Ordinarily, failure to serve the Attorney General with a copy of summons and complaint warrants dismissal of the United States from the action. n3 Under certain circumstances, however, the court has discretion to merely quash service of process rather than dismiss. One court has specified a four-prong test to determine whether dismissal is warranted: whether the necessary parties within the United States government have actual notice that an action has commenced; whether a technical defect in the service of the summons prejudices the government; whether the plaintiff asserts a justifiable excuse for defective service; and whether the plaintiff would be prejudiced by dismissal. n4 The plaintiff is obligated to mail a copy of the summons and complaint to the Attorney General even if the Attorney General otherwise receives actual notice of the action. n5

[b] Types of Service

Assuming that the Attorney General has been properly served with a copy of the summons and complaint, n5.1 a plaintiff in a civil action must use one of the three methods listed below to complete service on the United States as an entity. The designated government attorney or official must be served. The fact that the Attorney General has received a copy of the summons and complaint, and that the local attorney or official has actual knowledge of the complaint is not enough. n6

1. By personally delivering a copy of the summons and complaint to the United States Attorney of the district where the action was commenced. n7 If service is properly made on a United States Attorney, failing to properly identify the United States as the defendant by naming instead the organization of the United States government being sued will not invalidate the service. n8

2. By delivery of the summons and complaint to an Assistant United States Attorney or to a clerical assistant who is designated by a United States Attorney to accept service, provided the designation is in writing and is filed with the clerk of court. n9 Failure to properly serve the assistant United States Attorney or clerical assistant may warrant the dismissal against the United States. n10

3. By mailing the summons and complaint by registered or certified mail to the civil process clerk at the office of the United States Attorney. n11 The mail must be addressed specifically to the civil process clerk to assure proper handling. n12

[c] Service in Action Challenging Order of Officer or Agency of United States

If an action is one challenging an order of an officer or agency of the United States, and the officer or agency is not a party to the action, service of process must satisfy requirements of service on the United States generally, as discussed in [b], *above*, and, in addition, the mailing by certified or registered mail of a copy of the summons and complaint to the officer or agency. n13

[d] Reasonable Time to Cure Any Defects in Service Involving Service of Multiple Government Entities

If the plaintiff attempts but fails to properly effect service on multiple officers, agencies, or corporations of the United States, the court must grant the plaintiff a reasonable time to cure any defects in the service as long as the plaintiff has effected service on either the United States attorney or the Attorney General. n14 For example, after the plaintiff in one case erroneously sent service which was accepted by the Department of Housing and Urban Development, the plaintiff was permitted to cure the defect in service by properly serving the United States Attorney General. n15

[7] Officer, Agency, or Corporation of United States

A claimant may serve process on an officer, agency, or corporation of the United States in the same manner as service may be effected on the United States, as discussed in [6], *above*, n1 provided that the defendant must deliver an additional copy of the summons and complaint by certified or registered mail to the officer, agency, or corporation named in the action. n2 Failure to serve an officer, agency, or corporation of the United States with a copy of the summons and complaint warrants dismissal of the action against that defendant. n3 An officer or agent of the United States who is sued in that person's individual capacity n4 must be served in accordance with the requirements of Rule 4 involving service on an individual. In such a case, the plaintiff need not serve the government as well as the individual defendants, because the government is not a defendant, and the agents are not sued in their official capacities. n5

[8] Service Related to Foreign States

[a] Foreign State or Political Subdivision of Foreign State

The plaintiff may effect service of process on a foreign state or political subdivision by one of the four following methods, whether the action is filed in federal or state court. n1

1. Service made pursuant to an agreement between the plaintiff and the foreign state defendant, in accordance with a special arrangement.

2. If no special arrangement exists, service of process may be effected pursuant to an international convention or treaty, provided that the United States and the foreign state or political subdivision are signatories to the convention or treaty.

3. If the above two methods are not practicable, service of process may be effected by mailing a copy of the summons and complaint and notice of the action, in English and the official language of the foreign country, to the head of the ministry of foreign affairs of the country where service is sought. To be effective, the mailing must require the recipient to sign for the package on receipt and must be addressed and sent by the clerk of the court.

4. If service of process is not possible under the three methods listed above, and 30 days has lapsed since service of process was attempted by mail, the plaintiff may make service by mailing two copies of the summons and complaint and a notice of suit, in English and the official language of the foreign country, by any form of mail that requires the recipient to sign for the package on receipt. The documents must be addressed and sent by the clerk of the court to the United States Secretary of State in Washington, D.C., specifically to the attention of the Director of Special Consular Services. The Secretary of State will then

transmit one copy of the summons, complaint, and notice of suit through diplomatic channels to the foreign state and send to the clerk of the court a certified copy of the diplomatic note, which provides proof that the papers were transmitted. Service of process made by this method is deemed complete as of the date of transmittal set forth on the diplomatic note. n2

[b] Agency or Instrumentality of Foreign State

The plaintiff may effect service of process on a agency or instrumentality of a foreign state by one of the following three methods, whether the action is filed in federal or state court: n3

1. The plaintiff and the foreign state agency or instrumentality may make a special arrangement for the delivery of the summons and complaint.

2. If the parties are unwilling to make a special arrangement, the plaintiff may deliver the summons and complaint to an officer, managing or general agent, or any other agent authorized by appointment or law to accept service of process within the United States. Additionally, service of process may be made pursuant to an international convention or treaty.

3. If service of process is not possible under the above two methods, the plaintiff may deliver a copy of the summons and complaint, in English and in the official language of the foreign state, to either (a) a person specifically authorized in an official response to letters rogatory, (b) the agency or instrumentality by mail requiring a return receipt, addressed and sent by the clerk of the court, or (c) a person, agency, or instrumentality specified in a court order that conforms to the law of the foreign state where service is sought to be effected.

[9] State, Municipal, or Other Governmental Organization

A plaintiff may effect service of process on a state, municipal corporation, or other government organization in one of two ways. n1 First, the plaintiff may deliver a copy of the summons and complaint to the chief executive officer of the organization. n2 The summons and complaint must be personally delivered to the chief executive officer, n3 and if the plaintiff fails to do so, the court may dismiss the action if service of process was not otherwise properly effected. n4 Second, the plaintiff may serve process on a state, municipal corporation, or other governmental organization pursuant to the laws of the state where service is sought. n5 If the plaintiff elects this method, service is ineffective unless all of the state law service requirements are met. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsForeign ServiceGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.50 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 4(e)(1)(E)*; *see Goktepe v. Lawrence, 220 F.R.D. 8, 12 (D. Conn. 2004)* (emphasizing that service pursuant to state law is alternative to, and not additional requirement of, other means for service specified in Rule 4(e)(2).

(n3)Footnote 2. *Fed. R. Civ. P. 4(e)(2)(A).*

(n4)Footnote 2.1. *Fed. R. Civ. P. 4(e)(2)(B).*

(n5)Footnote 2.2. *Fed. R. Civ. P. 4(e)(2)(C).*

(n6)Footnote 3. *Robinson v. Turner, 15 F.3d 82, 84 (7th Cir. 1994)* ; *Sieg v. Karnes, 693 F.2d 803, 806 (8th Cir. 1982)* .

(n7)Footnote 1. 20 U.S.T. 361, reprinted in *Fed. R. Civ. P. 4*, note. This convention is referred to in this chapter as the "Hague Convention."

(n8)Footnote 2. *Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004)* (when service of process is attempted abroad in country that is signatory, validity of that service is controlled by the Hague Convention to extent that Convention applies; citing **Moore's Federal Practice**); *Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp. 2d 860, 868 (E.D. Va. 2000)* (Rule 4(f) recognizes service on foreign individuals by any internationally agreed means reasonably calculated to give notice such as those means authorized by the Hague Convention).

(n9)Footnote 3. *Chilean Nitrate Corp. v. M/V Hans Leonhardt, 810 F. Supp. 732, 734 (E.D. La. 1992)* (Hague Convention governs in civil and commercial cases in which party transmits judicial and extrajudicial documents for service abroad).

(n10)Footnote 4. *Taft v. Moreau, 177 F.R.D. 201, 204 (D. Vt. 1997)* (finding that Hague Convention applies in Vermont personal injury action where defendants, citizens of Quebec, received summons and complaint in Quebec).

(n11)Footnote 4.1. *Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004)* .

(n12)Footnote 5. Hague Convention, Art. 2.

(n13)Footnote 6. Hague Convention, Art. 3.

(n14)Footnote 6.1. *Paracelsus Healthcare Corp. v. Philips Med. Sys., 384 F.3d 492* .

(n15)Footnote 7. Hague Convention, Arts. 4 and 5.

(n16)Footnote 8. Hague Convention, Art. 6.

(n17)Footnote 9. Hague Convention, Art. 7.

(n18)Footnote 9.1. *See 28 U.S.C. § 1781.*

(n19)Footnote 9.2. *See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 2473, 159 L. Ed. 2d 355 (2004)* .

(n20)Footnote 10. *See Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 639-644 (5th Cir. 1994)* , *cert. denied, 513 U.S. 1016 (1994)* .

(n21)Footnote 11. *Fed. R. Civ. P. 4(f)(2)(A).*

(n22)Footnote 11.1. *Prewitt Enters. v. OPEC, 353 F.3d 916, 926-927 (11th Cir. 2004)* .

(n23)Footnote 12. *See Ackermann v. Levine, 788 F.2d 830, 838-840 (2d Cir. 1986)* .

(n24)Footnote 13. *In re Hunt's Pier Assoc's, 156 B.R. 464, 470-473 (Bankr. E.D. Pa. 1993)* .

(n25)Footnote 14. *General Environmental Science Corp. v. Horsfall, 753 F. Supp. 664, 672-673 (N.D. Ohio 1990)*

(service in Switzerland by means of letters rogatory considered valid).

(n26)Footnote 15. *Fed. R. Civ. P. 4(f)(2)(C)(i).*

(n27)Footnote 16. *Curcuruto v. Cheshire, 864 F. Supp. 1410, 1411-1413 (S.D. Ga. 1994)* .

(n28)Footnote 17. *Fed. R. Civ. P. 4(f)(3)*; *see also In re International Telemedia Assocs., Inc., 245 B.R. 713, 720-721 (N.D. Ga. 2000)* (Federal Rules of Civil Procedure, as incorporated by Bankruptcy Rules, authorized order permitting alternative methods of service, including service by electronic mail, on nonresident who by constantly moving from foreign country to foreign country had made himself "moving target").

(n29)Footnote 18. *Fed. R. Civ. P. 4(m).*

(n30)Footnote 19. *Frederick v. Hydro-Aluminum S.A., 153 F.R.D. 120, 124-126 (E.D. Mich. 1994)* .

(n31)Footnote 20. *O'Rourke Bros. Inc., v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000)* (if delay in obtaining service over foreign defendant has been so long that it signifies failure to prosecute, or if the delay entails disobedience to an order of the court, then dismissal may be with prejudice under Rule 41(b)); *Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 740-742 (2d Cir. 1985)* (dismissal of foreign corporation as third-party defendant in products liability action for failure of original defendant to comply with 120-day rule proper because no attempt to serve in foreign country was demonstrated).

(n32)Footnote 1. *Fed. R. Civ. P. 4(h)(1)(A)*; *see Fed. R. Civ. P. 4(e)(1).*

(n33)Footnote 2. *Fed. R. Civ. P. 4(h)(1)(B).*

(n34)Footnote 3. *Chan v. Society Expeditions, 39 F.3d 1398, 1404 n.8 (9th Cir. 1994)* , *cert. denied, 514 U.S. 1004 (1995)* .

(n35)Footnote 4. *Fed. R. Civ. P. 4(h)(1).*

(n36)Footnote 5. *Fed. R. Civ. P. 4(h)(1)*; *AICPA v. Affinity Card, 8 F. Supp. 2d 372, 376 (S.D.N.Y. 1998)* (burden is on plaintiff to establish that defendant has authorized particular person to accept service of process on its behalf).

(n37)Footnote 6. *Printed Media Servs. v. Solna Web, Inc., 11 F.3d 838, 842 (8th Cir. 1993)* (registered agent not implied agent for service of process because agent did not have actual authority to receive service).

(n38)Footnote 7. *Boltes v. Entex, 158 F.R.D. 110, 111-113 (S.D. Tex. 1994)* (service ineffective when made on security guard employed by defendant).

(n39)Footnote 8. *Dodco, Inc. v. American Bonding Co., 7 F.3d 1387, 1388-1389 (8th Cir. 1993)* .

(n40)Footnote 9. *Rivera v. Bank One, 145 F.R.D. 614, 626 (D.P.R. 1993)* .

(n41)Footnote 10. *Gottlieb v. Sandia American Corp., 452 F.2d 510, 513-514 (3d Cir. 1971)* , *cert. denied sub nom. Wechsler v. Gottlieb, 404 U.S. 938 (1971)* .

(n42)Footnote 11. *Fed. R. Civ. P. 4(h)(1).*

(n43)Footnote 12. *Allan v. Brown & Root, Inc., 491 F. Supp. 398, 403-404 (S.D. Tex. 1980)* .

(n44)Footnote 13. *Orefice v. Laurelview Convalescent Ctr., Inc., 66 F.R.D. 136, 142 (E.D. Pa. 1975)* ; *see Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 885 (8th Cir. 1996)* (absent probative evidence that two corporations are not independently operated, service on officer of a subsidiary did not effect service on the parent

corporation).

(n45)Footnote 14. *Bielicki v. Empire Stevedoring Co., 765 F. Supp. 991, 994-995 (D. Minn. 1990)* (plaintiff granted leave to re-serve because defendant delayed in raising defense of insufficiency of service).

(n46)Footnote 15. *See Fed. R. Civ. P. 4(f)*; *see* [2], *above*.

(n47)Footnote 16. *Fed. R. Civ. P. 4(h)(2)*; *see Fed. R. Civ. P. 4(f)(2)(C)(i)*.

(n48)Footnote 17. *Robins v. Max Mara, U.S.A., Inc., 923 F. Supp. 460, 469 (S.D.N.Y. 1996)* .

(n49)Footnote 1. *Fed. R. Civ. P. 4(h)*; *Shaheen Sports, Inc. v. Asia Ins. Co., 89 F. Supp. 2d 500, 504-505 (S.D.N.Y. 2000)* ; *Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 53-54 (2d Cir. 1991)* (for claim governed by federal law, service on Palestinian Liberation Organization's managing or general agent proper under Rule 4).

(n50)Footnote 2. *Fed. R. Civ. P. 4(h)*; *Jaser v. New York Property Ins. Underwriting Ass'n, 815 F.2d 240, 243-244 (2d Cir. 1987)* (service on agent of unincorporated association that sues and is sued in common name at association's New York headquarters constituted valid service).

(n51)Footnote 3. *Fed. R. Civ. P. 4(h)*.

(n52)Footnote 4. *Fed. R. Civ. P. 4(h)(1)*; *see Fed. R. Civ. P. 4(e)(1)*; *see Shaheen Sports, Inc. v. Asia Ins. Co., 89 F. Supp. 2d 500, 504-505 (S.D.N.Y. 2000)* (in case of foreign partnership doing business in New York by virtue of activities of its local agent, proper service of process on that agent is considered valid service on foreign defendant; under New York law, service of process on Pakistan insurer's American claims agent was adequate to constitute service on insurer, because agent's activities made insurer present in New York for jurisdictional purposes).

(n53)Footnote 5. *Fed. R. Civ. P. 4(h)(1)*; *see United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F. Supp. 1200, 1214-1215 (D. Minn. 1985)* (service on managing agent of partnership valid under Rule 4).

(n54)Footnote 6. *Fed. R. Civ. P. 4(h)(1)*.

(n55)Footnote 1. *Fed. R. Civ. P. 4(g)*; *see Triad Energy Corp. v. McNell, 110 F.R.D. 382, 385-386 (S.D.N.Y. 1986)* (judgment was invalid against minor because plaintiff failed to serve 15 year old defendant personally, as required by New York State law).

(n56)Footnote 2. *Waters v. Farmers Texas County Mut. Ins. Co., 9 F.3d 397, 401 (5th Cir. 1993)* (government's mailing of cross claim directly to person whom government knew to be minor, rather than to parents or guardians or next friend, was insufficient to provide effective service of cross claim even if government believed minor was party in default for failure to appear).

(n57)Footnote 3. *Fed. R. Civ. P. 4(g)*; *see Fed. R. Civ. P. 4(f)(2)(A)*.

(n58)Footnote 4. *Fed. R. Civ. P. 4(g)*; *see Fed. R. Civ. P. 4(f)(2)(B)*.

(n59)Footnote 5. *Fed. R. Civ. P. 4(g)*.

(n60)Footnote 6. *First Nat'l City Bank v. Gonzalez & Co., 308 F. Supp. 596, 599 (D.C. P.R. 1970)* ; *see O'Connor v. Western Freight Ass'n, 202 F. Supp. 561, 564 (S.D.N.Y. 1962)* (even though defendant was under age 21 when service of summons and complaint was made on him, and service was therefore not sufficient under applicable federal rules of procedure and under applicable New York law, subsequent appearance by defendant through his attorney and participation by defendant during trial after he attained his majority was sufficient to confer jurisdiction).

(n61)Footnote 1. *Fed. R. Civ. P. 4(i)(1)(B)*; *Blaney v. West, 209 F.3d 1027, 1029-1030 (7th Cir. 2000)* .

(n62)Footnote 2. *Klein v. Williams, 144 F.R.D. 16, 19-20 (E.D.N.Y. 1992)* (120-day rule violated even though service mailed four days before end of 120-day period because process was not received by Attorney General until 122nd day).

(n63)Footnote 3. *Blaney v. West, 209 F.3d 1027, 1029-1030 (7th Cir. 2000)* .

(n64)Footnote 4. *Jordan v. United States, 694 F.2d 833, 836-837 (D.C. Cir. 1982)* (Rule 4 should not be construed rigidly in situations in which government had actual notice and suffered no prejudice from a technical defect and a justifiable excuse exists); *see Jordan v. United States, 694 F.2d 833, 836-837 (D.C. Cir. 1982)* (Rule 4(i) should not be construed rigidly in situations in which government had actual notice and suffered no prejudice from a technical defect and a justifiable excuse exists).

(n65)Footnote 5. *Hegmann v. United States, 745 F. Supp. 886, 889-891 (E.D.N.Y. 1990)* .

(n66)Footnote 5.1. *See* [a], *above*.

(n67)Footnote 6. *McMasters v. United States, 260 F.3d 814, 817-818 (7th Cir. 2001)* (even though plaintiff served the government agencies involved and United States Attorney General, service was improper because plaintiff failed to serve United States Attorney for district where action was commenced, and district court had no authority to excuse service); *see Fed. R. Civ. P. 4(i)(1)(A)*.

(n68)Footnote 7. *Fed. R. Civ. P. 4(i)(1)(A)*; *see Dowdy v. Sullivan, 138 F.R.D. 99, 100-101 (W.D. Tenn. 1991)* .

(n69)Footnote 8. *Husek v. IRS, 778 F. Supp. 598, 600-601 (N.D.N.Y. 1991)* (complaint improperly naming IRS as defendant treated as though United States properly named because service on Attorney General properly effected).

(n70)Footnote 9. *Fed. R. Civ. P. 4(i)(1)(A)*.

(n71)Footnote 10. *Sanchez-Mariani v. Ellingwood, 691 F.2d 592, 594-595 (1st Cir. 1982)* (suit dismissed for lack of jurisdiction because of failure to serve either United States Attorney, assistant United States Attorney, or clerical employees designated to accept service).

(n72)Footnote 11. *Fed. R. Civ. P. 4(i)(1)(A)*.

(n73)Footnote 12. *Fed. R. Civ. P. 4(i)(1)(A)*, Advisory Committee Note to 1993 Amendments.

(n74)Footnote 13. *Fed. R. Civ. P. 4(i)(1)(C)*.

(n75)Footnote 14. *Fed. R. Civ. P. 4(i)(3)*.

(n76)Footnote 15. *Vazquez v. Kemp, 764 F. Supp. 694, 697 (D.P.R. 1991)* ; *see Flores v. Secretary of Navy, 159 F.R.D. 472, 473 (S.D. Tex. 1994)* (plaintiff not permitted to cure defect in service because neither United States Attorney nor Attorney General served).

(n77)Footnote 1. *Fed. R. Civ. P. 4(i)(2)*.

(n78)Footnote 2. *Fed. R. Civ. P. 4(i)(2)*; *Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1438 (10th Cir. 1994)* (service on Bureau of Alcohol, Tobacco, and Firearms not sufficient for service on ATF agents themselves).

(n79)Footnote 3. *Bolivar v. Director of the FBI, 846 F. Supp. 163, 166 (D.P.R. 1994) , aff'd without op., 45 F.3d 423 (1st Cir. 1995)* (failure to serve Federal Bureau of Investigation's supervisory employees with copy of summons

and complaint warranted employees' dismissal from action).

(n80)Footnote 4. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* .

(n81)Footnote 5. *Vaccaro v. Dobre, 81 F.3d 854, 855 (9th Cir. 1996)* (prison inmate bringing *Bivens* claim against correctional officers need not serve U.S. government); *Armstrong v. Sears, 33 F.3d 182, 187-188 (2d Cir. 1994)* (because action was against federal officials in individual capacities only, it was not action against government).

(n82)Footnote 1. *28 U.S.C. § 1608(a)(1)-(4).*

(n83)Footnote 2. *See 28 U.S.C. § 1608(c)(1).*

(n84)Footnote 3. *28 U.S.C. § 1608(b)(1)-(3).*

(n85)Footnote 1. *Fed. R. Civ. P. 4(j)(2).*

(n86)Footnote 2. *Fed. R. Civ. P. 4(j)(2)(A); Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932, 934 (7th Cir. 2002)* .

(n87)Footnote 3. *Barrett v. City of Allentown, 152 F.R.D. 46, 48-49 (E.D. Pa. 1993)* (service by mailing copies of complaint to city solicitor insufficient).

(n88)Footnote 4. *Way v. Mueller Brass Co., 840 F.2d 303, 305-306 (5th Cir. 1988)* .

(n89)Footnote 5. *Fed. R. Civ. P. 4(j)(2)(B); Amen v. City of Dearborn, 532 F.2d 554, 557-558 (6th Cir. 1976)* (service of process in compliance with Michigan law held proper).

(n90)Footnote 6. *Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932, 934 (7th Cir. 2002)* (Wisconsin law is explicit that complaint and summons must be served on both board president and superintendent of schools, and when both were not served, service was not effective in federal district court litigation).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.65

§ 6.65 Persons Immune From Servicen*

Certain persons are granted immunity for at least some periods of time from service of process. The most common example of immunity from service are persons who enter a jurisdiction for the limited purpose of contesting jurisdiction. n1 Persons who enter a jurisdiction for the purpose of appearing before the court for another action are also granted immunity from service of process for the period of time that they are appearing. n2 Also, if the plaintiff lures the defendant into the court's jurisdiction under a false pretense, service of process on the defendant while the defendant is in the jurisdiction is invalid. n3 However, if a party voluntarily enters a jurisdiction to appear before the court for an action that involves the same subject matter as the case in which service is sought, the person does not have service immunity. n4

In addition to potential parties to an action, other persons may be entitled to service immunity. For example, witnesses who appear before a court or for some other judicial proceeding, such as a deposition are immune from service of process, provided that the matter for which they appear is unrelated to the case for which service is sought. n5 In another example, non-resident attorneys who appear before a court or for some other judicial proceeding are granted immunity from service of process provided that the action for which they appear is unrelated to the action for which service is sought. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.59 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See In re Love, 232 B.R. 373, 379 (E.D. Tenn. 1999)* (defendant filed a special appearance for the limited purpose of challenging personal jurisdiction).

(n3)Footnote 2. *Pointer v. Ghavam, 107 F.R.D. 262, 265-266 (E.D. Ark. 1985)* ; *Uniroyal, Inc. v. Sperberg, 63*

F.R.D. 55, 57 (S.D.N.Y. 1973) .

(n4)Footnote 3. *Coyne v. Grupo Industrial Trieme, S.A. de C.V., 105 F.R.D. 627, 629-630 (D.D.C. 1985)* (service of process quashed because plaintiff invited defendant into jurisdiction for settlement talks without informing defendant that service would be effected).

(n5)Footnote 4. *ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1459-1460 (10th Cir. 1995)* (defendant was not immune from service in federal court action while attending arbitration disposition involving same subject matter).

(n6)Footnote 5. NASL Marketing, Inc. v. de *Vries, 94 F.R.D. 309, 310 (S.D.N.Y. 1982)* .

(n7)Footnote 6. *LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 994-995 (N.D. Ohio 1994)* (attorney denied immunity because action for which counsel appeared in federal court related to action for which attorney was served).

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1-6 Moore's Manual--Federal Practice and Procedure § 6.66

§ 6.66 Persons With Authority to Effect Service of Processn*

[1] General Requirements

Service of process may be accomplished by any person at least 18 years of age who is not a party to the action. n1 For purposes of party status, the term "non-party" under Rule 4 includes the plaintiff's attorney, regardless of whether the attorney could be classified as a party's agent or interested person in the case. n2 Age and non-party status are the only requirements for a process server, and even felons and incarcerated persons may serve process. For example, in a civil rights action commenced by a prison inmate, incarcerated prisoners who were over 18 years of age validly effected service of process on prison guards. n3

[2] Court Appointment of Process Server

A plaintiff may request the court to order that service be effected by a United States marshal or Deputy United States marshal, or by some other particular person. n1 Generally, such a request will not be granted by the court unless the plaintiff has first attempted to serve the defendant by some other means. n2 For example, it is a common practice that prisoners proceeding in forma pauperis obtain the assistance of United States marshals in effecting service. n3 In this regard, the court must make such an appointment in two circumstances: n4 when the plaintiff is authorized in the United States Code to proceed in forma pauperis n5 or is authorized to proceed as a seaman. n6 Seamen are permitted to commence civil actions involving wages or enforcement of a statute enacted for their safety without paying court fees and costs. n7 Generally, "seamen" are those persons who engage in work normally associated with work on any ocean vessel. n8

If the court specifically appoints a person to effect service, that person may not use an agent to complete the court's instructions, n9 unless the order signed by district court expressly provides for service by the certain person or by his or her designee. n10 In some district courts, local rules either expressly designate who the specific process server is or provide the clerk with authority to grant motions for appointment of special process servers. The Federal Rules allow the clerk to grant such motions. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsSpecial Court Orders

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.59 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 4(c)(2)*; *see Browne v. N.Y.S. Court System, 599 F. Supp. 36, 38 (E.D.N.Y. 1984)* (service effected directly by plaintiff not valid to confer personal jurisdiction on court).

(n3)Footnote 2. *Jugolinija v. Blue Heaven Mills, Inc., 115 F.R.D. 13, 15 (S.D. Ga. 1986)* .

(n4)Footnote 3. *Benny v. Pipes, 799 F.2d 489, 493-494 (9th Cir. 1986)* , *amended, 807 F.2d 1514 (9th Cir. 1987)* .

(n5)Footnote 1. *Fed. R. Civ. P. 4(c)(3)*; *see Nagy v. Dwyer, 507 F.3d 161 (2d Cir. 2007)* (plaintiff must request court for order of service by marshall or other person; court will not automatically order such service even in cases in forma pauperis).

(n6)Footnote 2. *Fed. R. Civ. P. 4(c)(3)*, Committee Note to 1993 Amendments.

(n7)Footnote 3. *Graham v. Satkoski, 51 F.3d 710, 712-713 (7th Cir. 1995)* (inmate in forma pauperis action entitled to assistance of United States marshal in effecting service); *Boudette v. Barnette, 923 F.2d 754, 756-757 (9th Cir. 1991)* (in forma pauperis plaintiff must request service by United States marshal before marshal becomes responsible for effecting service).

(n8)Footnote 4. *Fed. R. Civ. P. 4(c)(3)*.

(n9)Footnote 5. *28 U.S.C. § 1915* (plaintiff who cannot afford to pay court costs and fees may with permission of court commence action without paying costs and fees); *see § 6.70*.

(n10)Footnote 6. *28 U.S.C. § 1916*.

(n11)Footnote 7. *28 U.S.C. § 1916*.

(n12)Footnote 8. *Godfrey v. United States, 248 F. Supp. 273, 275 (S.D. Cal. 1965)* .

(n13)Footnote 9. *Burroughs Corp. v. Carsan Leasing Co., 99 F.R.D. 528, 531 (D.N.J. 1983)* (use of agent by person specifically appointed by court to effect service rendered service invalid).

(n14)Footnote 10. *Heritage House Frame & Moulding Co., Inc. v. Boyce Highlands Furniture Co., 88 F.R.D. 172, 174 (E.D.N.Y. 1980)* .

(n15)Footnote 11. *Fed. R. Civ. P. 4(c)(2)*; *Fed. R. Civ. P. 77(c)*.

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.67

§ 6.67 Time Requirements for Service of Processn*

[1] Deadline for Effecting Service

The plaintiff must effect proper service against the defendant within 120 days of the commencement of the action, which occurs with the filing of the complaint. If the plaintiff fails to do so, the court must either dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time. n1 If the plaintiff files an amended complaint naming additional defendants to the lawsuit, the 120-day period for service on the new defendants begins to run from the date of the filing of the amendment. The time for service on the defendants named in the original complaint is not extended by the amendment. n2

Although some local rules have attempted to encourage practitioners to ensure that service is made sooner than 120 days after filing the complaint as permitted in Rule 4, the Supreme Court has held that Rule 4 prohibits dismissal of a complaint if properly served within 120 days or within such additional time as the court may allow. The Court concluded that the 120-day provision operates not as an outer limit that is subject to reduction, but as an allowance that may be extended but not reduced. n3

[2] Court's Dismissal of Defendant on Plaintiff's Failure to Meet Deadline

[a] Dismissal After Notice to Plaintiff

If the plaintiff fails to properly serve the defendant within 120 days of commencing an action, the court may dismiss the defendant from the action. n1 The court may order dismissal following a motion for dismissal initiated either by the defendant or by the court, provided that the plaintiff receives notice of the motion prior to dismissal. n2 A defense of lack of service of process within the 120-day period may be waived, however, if the defendant does not raise the defense in the first responsive pleading or the first Rule 12(b) motion to dismiss. n3 Courts have consistently held that an order for dismissal against a plaintiff solely for failure to timely effect service under Rule 4(m) must be without prejudice to the plaintiff refiling the claim against the same defendant. n4 However, this rule does not prevent the court from entering a judgment with prejudice against a plaintiff when a Rule 4(m) motion is pending, when the judgment with prejudice is based on another rule, such as Rule 41(b). n4.1

The 120-day period to effect service does not apply to service of process effected outside the United States, because Rule 4(m) does not provide for a limitation period to effect service outside the United States. n5 The plaintiff must actually attempt to effect service in a foreign country, however, in order to benefit from the foreign service exemption to the 120-day rule. n6

[b] Extension of Time for Good Cause

[i] Extension Mandatory On Showing of Good Cause

A court must grant an extension of time for the plaintiff to complete service if the plaintiff demonstrates good cause for failing to serve defendant within the 120-day period. n7 The plaintiff has the burden to prove that the delay in effecting service was based on good cause. n8 If good cause is shown for the failure, the court is required to grant an extension and abuses its discretion if it fails to grant additional time. n9 Furthermore, even without a showing of good cause, courts have discretion to grant additional time to complete service. n10 That is because the courts have held that Rule 4(m) requires two inquiries regarding whether the failure to effect service requires a dismissal. First, the court must determine whether the plaintiff has shown good cause for the failure to timely effect service; if good cause is shown, plaintiff is entitled to a mandatory extension of time; but even if the plaintiff fails to show good cause, the court must still consider whether or not to grant a permissive extension based on excusable neglect. n10.1 At that point, the court may in its discretion either dismiss case without prejudice or extend the time for service. n11

[ii] Determination of Good Cause

Whether good cause exists to justify a mandatory extension of time depends on an examination of all of the circumstances regarding service in the particular case, including any attempts that were made to accomplish service. n11.1 At least one circuit has formulated a good cause test: the court should consider the following factors in its determination of whether there is good cause for a failure to serve within the 120-day time period: (1) whether the party to be served received actual notice of the lawsuit; (2) whether the defendant would suffer prejudice; and (3) whether the plaintiff would be severely prejudiced if the complaint were dismissed. n11.2

Although it may be grounds for a permissive extension of time, n11.3 excusable neglect, such as an inadvertent failure to effect service within the 120 days, does not constitute good cause sufficient to extend the time of service, n12 nor does ignorance of the law. n13 On the other hand, a sincere but technically insufficient attempt by the plaintiff to effect proper service, may suffice as good cause, n14 provided the plaintiff demonstrates some form of diligence in attempting service. n15 For example, a plaintiff's repeated but unsuccessful efforts to determine the defendant's address demonstrates diligence in attempting service sufficient to constitute good cause. n16 On the other hand, the court may determine that an inordinate lapse of time in effecting service after the 120-day period ended may outweigh any good faith attempts to properly and timely effect service. n17

Although it may be one of the factors a court considers in its determination of "good cause," n17.1 the fact that a plaintiff will be barred by the statute of limitation from pursuing a new action if the case is dismissed does not alone establish good cause. The plaintiff must establish good cause for failing to comply with the 120-day requirement. n18

In cases involving pro se plaintiffs, courts have discretion to liberally construe the good cause requirement. n19 For example, a plaintiff's reliance on the advice of the local court's pro se office constituted good cause when such reliance caused delay in the service of process. n20 In addition, courts may liberally enforce the 120-day period in cases involving pro se plaintiffs who cannot otherwise effect service on their own and are required to rely on a United States marshal to effect service. n21

[c] Extension of Time Without Good Cause

Even if a plaintiff is unable to establish good cause for failing to complete service of process within the 120-day time

period, n21.1 the court may nevertheless grant an extension of time to the plaintiff to serve the defendant if the plaintiff can show excusable neglect. n21.2 Thus, if the plaintiff fails to show good cause, extension of time to serve is not mandatory, but the court must still consider whether a permissive extension of time should be allowed. At that point, the court may in its discretion either dismiss the case without prejudice or extend the time for service. n22 The determination of whether the court should grant a permissive extension of time depends on the equities of the case. n23 For example, the court may extend the time if the applicable statute of limitation would bar a refiled action, n24 or if the defendant has been evading service or has concealed a defect in attempted service. The court may also allow a pro se plaintiff an extension due to confusion or delay attending the resolution of an in forma pauperis petition. n25

In any event, the decision whether to extend the time period when no good cause has been shown is within the discretion of the district court, and when the district court properly relies on the relevant law and makes no factual findings that are clearly erroneous, an abuse of discretion exists regarding a permissive extension only if its decision was arbitrary or unreasonable. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 4(m)*; *Larsen v. Mayo Med. Ctr., 218 F.3d 863, 867 (8th Cir. 2000)* (Rule 4(m) is only a time restriction that requires summons and complaint to be served within 120 days of filing of complaint and does not address how or when lawsuit is properly commenced).

(n3)Footnote 2. *Bolden v. City of Topeka, 441 F.3d 1129, 1148 (10th Cir. 2005)* (this construction prevents the plaintiff from repeatedly filing amended complaints to extend the time for service indefinitely; citing **Moore's Federal Practice**).

(n4)Footnote 3. *Henderson v. United States, 517 U.S. 654, 661-662, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996)* .

(n5)Footnote 1. *Fed. R. Civ. P. 4(m)*; *Forest v. Holland Distribs., Inc., 824 F. Supp. 87, 88 (M.D. La. 1993)* .

(n6)Footnote 2. *Fed. R. Civ. P. 4(m)*; *Ruiz Varela v. Sanchez Velez, 814 F.2d 821, 823 (1st Cir. 1987)* (Rule 4 requires district court to provide notice of impending dismissal before actually dismissing action by motion of court).

(n7)Footnote 3. *McCurdy v. American Bd. of Plastic Surgery, 157 F.3d 191, 194 (3d Cir. 1998)* (defense that service of process was untimely under Rule 4(m) is subject to Rule 12's waiver provisions); *see Fed. R. Civ. P. 12(b).*

(n8)Footnote 4. *Fed. R. Civ. P. 4(m)*; *see Bann v. Ingram Micro, Inc., 108 F.3d 625, 626 (5th Cir. 1997)* (Rule 4(m) does not permit dismissal with prejudice).

(n9)Footnote 4.1. *Bowling v. Hasbro, Inc., 403 F.3d 1373, 1376 (Fed. Cir. 2005)* .

(n10)Footnote 5. *Fed. R. Civ. P. 4(m)*; *see Lucas v. Natoli, 936 F.2d 432, 432-433 (9th Cir. 1991)* , *cert. denied, 502 U.S. 1073 (1992)* .

(n11)Footnote 6. *O'Rourke Bros. Inc., v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000)* (if delay in

obtaining service over foreign defendant has been so long that it signifies failure to prosecute, dismissal may be with prejudice under Rule 41(b)); *Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 740-742 (2d Cir. 1985)* (dismissal of foreign corporation as third party defendant because original defendant made no attempt to serve third party defendant in foreign country).

(n12)Footnote 7. *Fed. R. Civ. P. 4(m).*

(n13)Footnote 8. *Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 645-646 (5th Cir. 1994)* , *cert. denied, 513 U.S. 1016 (1994)* .

(n14)Footnote 9. *De Tie v. Orange County, 152 F.3d 1109, 1111-1112 (9th Cir. 1998)* (when good cause is shown, the court has no choice but to extend the time for service).

(n15)Footnote 10. *See* [c], *below*.

(n16)Footnote 10.1. *Mann v. American Airlines, 324 F.3d 1088, 1089 n.2 (9th Cir. 2003)* (if party requesting extension establishes good cause, extension to serve process is mandatory; if party does not show good cause, court still has discretion to grant extension to serve process); *Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932, 934 (7th Cir. 2002)* (in first case, that of good cause, extension is mandatory; in second case, that of excusable neglect, it is permissive, and lower court will be reversed only if court abused its discretion by acting unreasonably in deciding whether plaintiff's delay was excusable); *see* [c], *below*.

(n17)Footnote 11. *Scott v. Hern, 216 F.3d 897, 912 (10th Cir. 2000)* ; *see* [c], *below*.

(n18)Footnote 11.1. *See Bachenski v. Malnati, 11 F.3d 1371, 1376-1377 (7th Cir. 1993)* (even though plaintiff made several attempts to serve defendant by mail, good cause not established when plaintiff neglected to employ competent process server).

(n19)Footnote 11.2. *In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001)* .

(n20)Footnote 11.3. *See* [c], *below*.

(n21)Footnote 12. *Gabriel v. United States, 30 F.3d 75, 77 (7th Cir. 1994)* (good cause not established by counsel's reliance on erroneous advice of court clerk).

(n22)Footnote 13. *Townsel v. County of Contra Costa, 820 F.2d 319, 320 (9th Cir. 1987)* .

(n23)Footnote 14. *Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir. 1996)* .

(n24)Footnote 15. *Gambino v. Village of Oakbrook, 164 F.R.D. 271, 274-275 (D.C. Fla. 1995)* (good cause shown by plaintiff's attempts to settle the case with insurance company representing one defendant before expiration of 120 days, and then attempting to serve defendant after settlement could not be attained).

(n25)Footnote 16. *Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 661 (D. Md. 1986)* .

(n26)Footnote 17. *Bachenski v. Malnati, 11 F.3d 1371, 1376-1377 (7th Cir. 1993)* (repeated attempts to serve defendant by mail insufficient to establish good cause because court warned plaintiff of impending end of 120-day period and plaintiff failed to hire competent process server).

(n27)Footnote 17.1. *Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932, 934 (7th Cir. 2002)* .

(n28)Footnote 18. *Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1306 (3d Cir. 1995)* (court dismissed action even after considering expiration of statute of limitation); *Mendez v. Elliot, 45 F.3d 75, 78 (4th Cir. 1995)* (expiration

of statute of limitation alone is insufficient to serve as good cause).

(n29)Footnote 19. *Graham v. Satkoski, 51 F.3d 710, 712-713 (7th Cir. 1995)* .

(n30)Footnote 20. *Vance v. United States, 126 F.R.D. 14, 15-16 (E.D.N.Y. 1989)* (plaintiff's reliance on erroneous instructions from U.S. government pro se office regarding service of process on United States Attorney's Office constituted good cause).

(n31)Footnote 21. *Sellers v. United States, 902 F.2d 598, 602-603 (7th Cir. 1990)* (good cause for plaintiff's failure to effect service established because plaintiff provided United States marshal with sufficient information to identify, locate, and serve defendants).

(n32)Footnote 21.1. *See* [2], *above*.

(n33)Footnote 21.2. *Mann v. American Airlines, 324 F.3d 1088, 1089 n.2 (9th Cir. 2003)* (if good cause is shown, extension to serve process is mandatary; if no good cause is shown, extension to serve process is discretionary for court, based on equity); *Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932, 934 (7th Cir. 2002)* .

(n34)Footnote 22. *Scott v. Hern, 216 F.3d 897, 912 (10th Cir. 2000)* ; *Vergis v. Grand Victoria Casino & Resort, 199 F.R.D. 216, 217-218 (S.D. Ohio 2000)* .

(n35)Footnote 23. *Blaney v. West, 209 F.3d 1027, 1030-1031 (7th Cir. 2000)* ; *see In re Sheehan, 253 F.3d 507, 512-513 (9th Cir. 2001)* (court did not abuse its discretion in refusing to extend the 120-day period when plaintiff's justification for late service was attorney's busy schedule and illness of attorney's secretary); *Vergis v. Grand Victoria Casino & Resort, 199 F.R.D. 216, 217-218 (S.D. Ohio 2000)* (even though plaintiff was unable to show good cause for failure to serve defendant within allotted time, district court nevertheless properly granted extension of time for excusable neglect when it found that action would be barred by statute of limitations if dismissed and that defendant had actual notice of suit within original service period).

(n36)Footnote 24. *Mann v. American Airlines, 324 F.3d 1088, 1090-1091 (9th Cir. 2003)* (if party has not shown good cause for extension of time to serve, fact that statute of limitation would bar re-filing of suit if district court decided to dismiss case instead of grant extension is factor court may use in deciding equity of whether to grant extension); *De Tie v. Orange County, 152 F.3d 1109, 1111 n.5 (9th Cir. 1998)* .

(n37)Footnote 25. *Fed. R. Civ. P. 4(m)*, Advisory Committee Note to 1993 Amendments.

(n38)Footnote 26. *Troxell v. Fedders of N. Am., Inc., 160 F.3d 381, 382-383 (7th Cir. 1998)* (abuse of discretion in determining whether to grant extension exists only if court's decision was arbitrary or unreasonable; therefore, it is difficult standard to overcome).

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.68

§ 6.68 Methods of Service of Processn*

[1] Summary of Methods of Service

A plaintiff has all of the following options to serve process on a defendant located in the United States. n1

1. Service pursuant to the law of the state in which the district court is located. n2

2. Service pursuant to the law of the state where the service is to be effected. n3

3. Personal delivery of the summons and complaint to an individual defendant. n4

4. Personal delivery of the summons and complaint to an agent authorized by the defendant to receive service of process. n5

5. Personal delivery of the summons and complaint to an agent authorized by law to receive service of process. n6

6. Deposit of the process at the dwelling house of an individual defendant, with a person of suitable age and discretion residing there. n7

[2] Service According to State Law

A plaintiff in federal court may serve process pursuant to the law of the state where the service is to be effected n1 or pursuant to the law of the forum state where the action will be adjudicated. n2 For example, when a complaint has been filed in a federal court located in Texas, the plaintiff may serve process pursuant to the Texas long-arm statute and the court will have personal jurisdiction over the defendant even though located in another state. n3 Some districts have local rules that specifically refer to a state law and the procedure under the state law. Attorneys who are unfamiliar with the details of a particular state's practice should refer to such local rules. Even if the plaintiff fails technically to serve a defendant according to the requirements set forth under a state law, substantial compliance with the state requirements may render service valid or may allow the plaintiff to cure the defect. n4

[3] Personal Delivery of Summons and Complaint

The plaintiff may effect service of process by personal delivery of the summons and complaint to the defendant. n1 It should be noted that personal delivery does not necessarily entail placing the summons and complaint in defendant's hand or physical possession. Thus, personal delivery may include acts such as placing the summons and complaint through a slot in a door to a room where the defendant is located, n2 or throwing the papers over the fence onto a lawn after having first tried unsuccessfully to the serve defendant's representatives personally. n3 Personal delivery has generally been viewed as the server placing the documents in the physical proximity of the defendant, as opposed to having them delivered to an address, such as by mailing. n4

[4] Personal Delivery To Agent Authorized by Defendant

The plaintiff may serve process on an agent appointed by the defendant to receive service of process. n1 It should be noted, however, that an agency relationship between parties for one purpose does not necessarily extend to an agency relationship for the purpose of service of process. For example, an attorney representing a defendant in one case is not necessarily the defendant's agent for service of process regarding a different matter. An attorney accepting service on behalf of a defendant, like any other agent, must be specifically appointed for the purpose of accepting service in that case in order for service to be valid. n2 Similarly, for purposes of service of process, a building manager is not necessarily an agent for a landlord. n3

The defendant may have the summons quashed if service of process is made on a purported agent who is not actually authorized by the defendant to accept service. n4

[5] Personal Delivery To Agent Authorized by Law

Service of process may be made to an agent authorized by federal or state law to accept service. n0.1 The plaintiff may serve process on an agent authorized to accept service by a particular federal law. n1 For example, in a patent infringement action commenced in a district where the defendant is not a resident but has a regular and established place of business, service of process on the defendant may be made on the defendant's agent or agents conducting that business. n2

With respect to state law, service of process outside of a state may be effected on defendant's non-resident agent if that agent is authorized to accept such service pursuant to the state laws. n3 It should be noted that an agency relationship in one capacity authorized by state law does not necessarily confer an agency relationship for purposes of service of process. n4

[6] Leaving Summons and Complaint at Defendant's Dwelling House or Usual Place of Abode

[a] Two Criteria for Valid Service

A plaintiff may serve process by leaving a copy of the summons and complaint at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion residing at that dwelling or abode. n1 The court will accept such service as valid only if both of the following elements are satisfied, determined on the circumstances of each case: n2

1. Whether the particular place constitutes a party's "dwelling house or usual place of abode" within the meaning of the rule. n3

2. Whether the particular person the summons and complaint is left with is of "suitable age and discretion." n4

[b] Dwelling House or Usual Place of Abode Is Where Person Resides

A plaintiff using this method of service has the burden to prove that service was effected at defendant's dwelling house or usual place of abode. Although Rule 4 does not define "dwelling house or usual place of abode," n4.1 the courts have generally held that it is the place where a person lives, his or her current residence. n5 A former residence is inadequate for purposes of effecting service, even if defendant receives actual notice of service. n6 A defendant may have multiple dwelling houses for purposes of effecting service of process. n7 A person need not live at one place continuously for it to be considered a dwelling or usual place of abode for purposes of effecting service. n8

Because service on a person of suitable age and discretion must be made at defendant's dwelling house or usual place of abode, service of process at defendant's place of business is improper under this category. n9

[c] Person of Suitable Age and Discretion

Under this method of service, the summons and complaint may be served by leaving it with a person of "suitable age and discretion." n10 The trial court must determine on a case-by-case basis whether the person served with process is of suitable age and discretion. n11 Certain types of individuals have consistently been held as of suitable age and discretion. For example, a spouse of a defendant is generally considered a person of suitable age and discretion. n12 Other adult family members also are typically considered persons of suitable age and discretion. n13

Domestic employees may also qualify as persons of suitable age and discretion, provided they live at the defendant's residence, n14 because the rule provides that the person of suitable age and discretion who accepts service must reside at defendant's residence at the time of service. n15 Note, however, that even a nonresident employee may be a proper recipient of service as an agent of the served person under Rule 4(e)(2)(C). n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsResidential ServiceCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon Agents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.90 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 4(e).*

(n3)Footnote 2. *See* [2], *below.*

(n4)Footnote 3. *See* [2], *below.*

(n5)Footnote 4. *See* [3], *below.*

(n6)Footnote 5. *See* [4], *below.*

(n7)Footnote 6. *See* [5], *below.*

(n8)Footnote 7. *See* [6], *below.*

(n9)Footnote 1. *Shaheen Sports, Inc. v. Asia Ins. Co., 89 F. Supp. 2d 500, 504 (S.D.N.Y. 2000)* (court looked to New York law to determine proper methods of service and determined that pursuant to New York law service on foreign corporation could be made by delivery to an officer, director, managing or general agent, or to any other agent

authorized by appointment or by law to receive service).

(n10)Footnote 2. *Fed. R. Civ. P. 4(e)(1).*

(n11)Footnote 3. *Deininger v. Deininger, 677 F. Supp. 486, 490 (N.D. Tex. 1988)* .

(n12)Footnote 4. *Nikwei v. Ross School of Aviation, Inc. 822 F.2d 939, 943-945 (10th Cir. 1987)* .

(n13)Footnote 1. *Fed. R. Civ. P. 4(e)(2)(A).*

(n14)Footnote 2. *Errion v. Connell, 236 F.2d 447, 457 (9th Cir. 1956)* .

(n15)Footnote 3. *International Controls Corp. v. Vesco, 593 F.2d 166, 180-181 (2d Cir. 1979)* , *cert. denied, 442 U.S. 941 (1979)* .

(n16)Footnote 4. *Larsen v. Mayo Med. Ctr., 218 F.3d 863, 867-868 (8th Cir. 2000)* .

(n17)Footnote 1. *Fed. R. Civ. P. 4(e)(2)(C)*; *Durbin Paper Stock Co. v. Hossain, 97 F.R.D. 639, 639-640 (S.D. Fla. 1982)* (service on attorney proper when defendant represented that all arrangements should be made through his attorney).

(n18)Footnote 2. *Schwarz v. Thomas, 222 F.2d 305, 307-309 (D.C. Cir. 1955)* (representation of defendant in unrelated matter does not render attorney agent authorized by appointment).

(n19)Footnote 3. *Nelson v. Swift, 271 F.2d 504, 505 (D.C. Cir. 1959)* .

(n20)Footnote 4. *Whisman v. Robbins, 712 F. Supp. 632, 635-636 (S.D. Ohio 1988)* (service of process invalid when made on person not appointed by defendant to act as agent); *Babb v. Bridgestone/Firestone, 861 F. Supp. 50, 51-52 (M.D. Tenn. 1993)* (service on receptionist who was not appointed agent at defendant's place of business held invalid).

(n21)Footnote 0.1. *Fed. R. Civ. P. 4(e)(2)(C).*

(n22)Footnote 1. *Fed. R. Civ. P. 4(e)(2).*

(n23)Footnote 2. *28 U.S.C. § 1694.*

(n24)Footnote 3. *United States ex rel. Thomas v. Rundle, 371 F. Supp. 252, 253-254 (E.D. Pa. 1974)* (service was proper on records officer at correctional facility where defendant worked because, by law, officer was agent for service on defendant).

(n25)Footnote 4. *Ransom v. Brennan, 437 F.2d 513, 518-519 (5th Cir. 1971)* , *cert. denied, 403 U.S. 904 (1971)* (attorney for non-resident executrix not authorized by state law to accept service of process on behalf of executrix).

(n26)Footnote 1. *Fed. R. Civ. P. 4(e)(2)(B).*

(n27)Footnote 2. *Nowell v. Nowell, 384 F.2d 951, 953 (5th Cir.)* , *cert. denied, 390 U.S. 956 (1968)* .

(n28)Footnote 3. *See* [b], *below.*

(n29)Footnote 4. *See* [c], *below.*

(n30)Footnote 4.1. *Fed. R. Civ. P. 4(e)(2)(B).*

(n31)Footnote 5. *Fairman v. Hurley, 373 F. Supp. 2d 227, 231 (W.D.N.Y. 2005)* .

(n32)Footnote 6. *Cox v. Quigley, 141 F.R.D. 222, 224-226 (D. Me. 1992)* (home of defendant's parents not considered dwelling house or usual place of abode because defendant graduated from school and had moved).

(n33)Footnote 7. *National Dev. Co. v. Triad Holding Corp., 930 F.2d 253, 257-258 (2d Cir. 1991)* , *cert. denied, 502 U.S. 968 (1991)* (New York apartment, which was one of 12 residences of defendant, satisfied requirement, because defendant furnished and remodeled apartment, listed it as residence, and actually was living there at time of service).

(n34)Footnote 8. *Capitol Life Ins. Co. v. Rosen, 69 F.R.D. 83, 87-88 (E.D. Pa. 1975))* (home of defendant's brother, where defendant had room where he sometimes stayed, paid rent, and kept personal effects for several years, constituted usual place of abode).

(n35)Footnote 9. *West v. Paige, 835 F. Supp. 20, 22 (D. Me. 1993)* (service on secretary at defendant's place of business held invalid); *Martin v. Coca-Cola Co., 785 F. Supp. 3, 4 (D.C. Cir. 1992)* (leaving copies of summons and complaint at defendant's office insufficient to effect service on individual defendant).

(n36)Footnote 10. *Fed. R. Civ. P. 4(e)(2)(B).*

(n37)Footnote 11. *Smith v. Van Dyk, 2007 U.S. Dist. LEXIS 94505, at *7 (E.D. Cal. 2007)* (party serving process must establish that recipient is of suitable age and discretion under circumstances).

(n38)Footnote 12. *Resolution Trust Corp. v. Polmar Realty, Inc., 780 F. Supp. 177, 180 (S.D.N.Y. 1991)* .

(n39)Footnote 13. *Azuma N.V. v. Sinks, 646 F. Supp. 122, 124 (S.D.N.Y. 1986)* (service on defendant's 18-year-old son at defendant's residence held proper).

(n40)Footnote 14. *Hartford Fire Ins. Co. v. Perinovic, 152 F.R.D. 128, 130-132 (N.D. Ill. 1993)* .

(n41)Footnote 15. *Fed. R. Civ. P. 4(e)(2)(B)*; *see Edes v. Fredson, 344 F. Supp. 2d 209, 211 (D. Maine 2004)* (stating that domestic employee of defendant who spent only his working hours at defendant's premises would not qualify to receive service).

(n42)Footnote 16. *Boston Safe Deposit & Trust Co. v. Morse, 779 F. Supp. 347, 350-351 (S.D.N.Y. 1991)* ; service on agent is discussed in [4] and [5] *above*.

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PART II Jurisdiction; Venue; Removal
CHAPTER 6 PERSONAL JURISDICTION AND SERVICE OF PROCESS
PART IV. SERVICE OF PROCESS

1-6 Moore's Manual--Federal Practice and Procedure § 6.69

§ 6.69 Proof of Service of Processn*

[1] Method of Proof of Service in United States

A party that is required to make service of process in the United States must file proof of the service with the court. n1 Except when service has been made by a United States marshal or deputy marshal, n2 the serving party must make proof of service by filing the server's affidavit that service has been completed in the prescribed manner. n3 The plaintiff bears the initial burden of proving that service of process was properly effected. n4 Once the plaintiff meets that burden, a mere allegation by the defendant that process has not been served, without some additional evidence, is insufficient to refute the validity of an affidavit of service. Thus, after plaintiff files proof of service, a defendant refuting the validity of service bears the burden of proof to overcome prima facie evidence of proper service. n5

[2] Method of Proof of Service Outside United States

A plaintiff making service of process outside the United States pursuant to the provisions of an international treaty or convention must make proof of service pursuant to the provisions of the treaty or convention. n1 If service is made outside of the United States by permissible means not specifically set forth in an international treaty or convention, n2 or as directed by the court, n3 proof of service must be made by a receipt signed by the addressee, or by other evidence that satisfies the court that the summons and complaint were delivered to the addressee. n4

[3] Requirements of Proof of Service

The party initiating service of process must file with the court proof that service was properly effected in all cases except when formal service of process has been waived by the defendant. n1 If the process server submits proof of service in writing, the submission establishes prima facie evidence that service was properly effected. n2 If the server is not a United States marshall, the server must submit an affidavit of service, which must be signed by the person effecting service. n3

The affidavit of service or any other proof of service must indicate the date service was effected. Proof of service must also indicate that service was effected within 120 days after plaintiff filed the complaint n4 and the location where the summons was served and the identity of the person served. n5 If the plaintiff has not met all of the requirements of

proof of service, the plaintiff may amend the proof of service to cure technical defects raised by the defendant, provided that the defendant is not prejudiced. n6

[4] Effect of Failure to File Proof of Service

If service of process has been properly executed, it will not be rendered defective by plaintiff's failure to file proof of service with the court. n1 Rather, failure to file proof of service merely deprives plaintiff of prima facie evidence that service has properly been effected. n2 Failure to provide proof of service may justify dismissal without prejudice only when the defendant was prejudiced n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofAmendmentsCivil ProcedurePleading & PracticeService of ProcessProofCertificates

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.100 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 4(l)*(1) (proof of service must be made unless service is waived).

(n3)Footnote 2. *See Fed. R. Civ. P. 4(c)(3).*

(n4)Footnote 3. *Fed. R. Civ. P. 4(l)*(1).

(n5)Footnote 4. *Grand Entertainment Group v. Star Media Sales, Inc., 988 F.2d 476, 486-491 (3d Cir. 1993)* (serving party had burden to establish that it served foreign defendants in accordance with foreign law).

(n6)Footnote 5. *Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 52 (N.D. Ill. 1989)* (return of service executed by plaintiff's attorney considered prima facie evidence of valid service).

(n7)Footnote 1. *Fed. R. Civ. P. 4(l)*(2)(A); *see Fed. R. Civ. P. 4(f)(1)*; *see also Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 748 (7th Cir. 2007)* .

(n8)Footnote 2. *See Fed. R. Civ. P. 4(f)(2).*

(n9)Footnote 3. *See Fed. R. Civ. P. 4(f)(3).*

(n10)Footnote 4. *Fed. R. Civ. P. 4(l)*(2)(B).

(n11)Footnote 1. *Fed. R. Civ. P. 4(l)*(1).

(n12)Footnote 2. *In re City of Philadelphia Litigation, 123 F.R.D. 512, 514 (E.D. Pa. 1988)* (written affidavit of service constitutes evidence that service was effected).

(n13)Footnote 3. *O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1398 (7th Cir. 1993)* .

(n14)Footnote 4. *United States ex rel. Henry S. Wolkins Co. v. Dimen-Pascua Constr. Co., 123 F.R.D. 413, 414 (D. Mass 1988)* .

(n15)Footnote 5. *See Robinson v. United States, 551 F. Supp. 1120, 1121 (M.D. La. 1982)* .

(n16)Footnote 6. *Fed. R. Civ. P. 4*(*l*)(3); *see United States v. Islip, 18 F. Supp. 2d 1047, 1059 (Ct. Intl. Trade 1998)* (court may liberally permit amendment of proof of service).

(n17)Footnote 1. *Fed. R. Civ. P. 4(l)(3).*

(n18)Footnote 2. *Hickey v. City of New York, 241 F.R.D. 150, 152-153 (S.D.N.Y. 2006)* ; *see Fed. R. Civ. P. 4*(*l*)(3) (failure to prove service does not affect validity of service).

(n19)Footnote 3. *Pocahontas First Corp. v. Venture Planning Group, Inc., 572 F. Supp. 503, 505 (D. Nev. 1983)* .

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PART II Jurisdiction; Venue; Removal
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1-6 Moore's Manual--Federal Practice and Procedure § 6.70

§ 6.70 Dispensation With Service Fee Payment for Indigent Plaintiffn*

If a plaintiff cannot afford to pay court costs and fees, the plaintiff may with the permission of the court commence an action without paying the costs and fees, n1 including the costs of service of process. Thus, when the plaintiff commences an action in forma pauperis, the court clerk must issue a summons and court officers must assist the plaintiff in serving process without a fee. n2

Congress has made several amendments to the in forma pauperis statute for the express purpose of curbing perceived abuses in civil litigation by inmates. n3 The amended statute includes several additional requirements that apply only to prisoners, n4 including the requirement that, although an indigent prisoner may defer prepayment of filing fees, the prisoner must ultimately repay the fees. n5 Additionally, a prisoner is barred from bringing a civil action in forma pauperis if he or she has brought three or more prior actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim. n6

For further discussion of these requirements, see Ch. 25, *Judgment*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 4.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1915(a)(1)*; *see Floyd v. United States Postal Service, 105 F.3d 274, 275 (6th Cir. 1997)* (typographical error in *28 U.S.C. § 1915(a)(1)* regarding "prisoners" does not preclude any indigent from proceeding in forma pauperis).

(n3)Footnote 2. *28 U.S.C. § 1915(d)*; *Moore v. Jackson, 123 F.3d 1082, 1085-1086 (8th Cir. 1997)* .

(n4)Footnote 3. *Leonard v. Lacy, 88 F.3d 181, 185 (2d Cir. 1996)* .

(n5)Footnote 4. *LaFontant v. INS, 135 F.3d 158, 165 (D.C. Cir. 1998)* .

(n6)Footnote 5. *See 28 U.S.C. § 1915(b)*; *see also Hatchet v. Unknown Nettles, 201 F.3d 651, 652-654 (5th Cir. 2000)* (dismissal of prisoner's in forma pauperis action for failure to pay initial partial filing fee was abuse of discretion when prisoner lacked funds to pay fee; however, prisoner could subsequently be ordered to pay fee when prisoner had funds).

(n7)Footnote 6. *28 U.S.C. § 1915(g)*; *Mapp v. Dovala, 138 F.3d 1335, 1337 (10th Cir. 1998)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE

1-7 Moore's Manual--Federal Practice and Procedure 7.syn

§ 7.syn Synopsis to Chapter 7: VENUE

§ 7.01 Nature of Venue

[1] Definition of Venue

[2] Distinction Between Subject Matter Jurisdiction and Venue

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§ 7.02 Law Controlling Venue of Actions

[1] Federal Statutes Control Transitory Actions

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PART II Jurisdiction; Venue; Removal
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1-7 Moore's Manual--Federal Practice and Procedure § 7.01

§ 7.01 Nature of Venuen*

[1] Definition of Venue

"Venue" in the federal court system is the court's determination of the location of the district court or courts where it is proper to hear a particular claim or action. n1 A statute prescribes the general rule for the proper district: where the defendant lives, where the cause of action arose, or where the property is located. n2 The purpose of this statutorily defined venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient location for trial. n3 However, the principle of venue does not restrict a court's power over a particular person or property, or the court's competence to adjudicate a particular matter. n4 Venue statutes are primarily concerned with the convenience of the parties, n5 and are designed to direct claims to the appropriately convenient court based on the subject matter of the claim and the parties involved in an action. n6

Venue rules do not involve the court's power either to decide a particular type of case, as do subject matter jurisdiction rules, or the power to bind the parties before the court, as personal jurisdiction rules do; n7 therefore, no constitutional rights are implicated by the venue statutes; and consequently, any rights conferred by the federal venue statutes may be waived by the parties. n8

[2] Distinction Between Subject Matter Jurisdiction and Venue

The attorney for a defending party should ensure that objections to the location of trial are properly and distinctly made because an objection to subject matter jurisdiction does not necessarily preserve an objection, for venue purposes, to the location of the court. n1 Subject matter jurisdiction statutes require a court to determine whether that court has the ultimate constitutional or statutory power to adjudicate a particular type of claim. n2 On the other hand, the essence of venueis a matter of litigational convenience regarding the location of the proceedings; accordingly, venue is waived if not timely raised. Because subject-matter jurisdiction concerns a court's competence to adjudicate a particular category of cases, it is a matter far weightier than venue, and subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection. n3

[3] Distinction Between Personal Jurisdiction and Venue

Personal jurisdiction is the authority of a court to hear a case regarding a particular defendant--any court within that territory may be able to exercise personal jurisdiction over the defendant. n1 Venue, on the other hand, is the designation of which court is the proper court to hear a particular claim or action. Venue rules generally provide that the action be brought in the county or district where the defendant lives, where the cause of action arose, or where the property is located. n2 Thus, although personal jurisdiction answers the question of who (or what property) is subject to adjudication of the court, venue answers the question of where is it proper for the case to be heard. n3

Both personal jurisdiction and lack of venue may be waived. n4 This is important because an objection to venue will not preserve an objection to a personal jurisdiction defect, and vice versa. n5 Furthermore, while a defendant may challenge personal jurisdiction in a separate proceeding known as a collateral attack, a defendant may not object to venue in a separate proceeding. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 17 *Moore's Federal Practice,* § 110.01 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 432 (2d Cir. 2005)* ; *United States v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864 (2d Cir. 1997)* .

(n3)Footnote 2. *28 U.S.C. § 1391* (general federal venue statute).

(n4)Footnote 3. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 432 (2d Cir. 2005)* .

(n5)Footnote 4. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 433 (2d Cir. 2005)* .

(n6)Footnote 5. *NLRB v. Line, 50 F.3d 311, 314, 149 L.R.R.M. (BNA) 2017 (5th Cir. 1995)* .

(n7)Footnote 6. *Leroy v. Great Western United Corp., 443 U.S. 173, 185, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* .

(n8)Footnote 7. *See* [2], *below*.

(n9)Footnote 8. *Leroy v. Great Western United Corp., 443 U.S. 173, 183-187, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* .

(n10)Footnote 1. *Moore v. Olson, 368 F.3d 757, 759-760 (7th Cir. 2004)* .

(n11)Footnote 2. *Planned Parenthood of Houston & Southeast Tex. v. Sanchez, 403 F.3d 324, 331-332 (5th Cir. 2005)* .

(n12)Footnote 3. *Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 126 S. Ct. 941, 163 L. Ed. 2d 797, 2006 U.S. LEXIS 766, *25-*26 (2006)* .

(n13)Footnote 1. *See Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000)* .

(n14)Footnote 2. *28 U.S.C. § 1391* (general federal venue statute).

(n15)Footnote 3. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 432* (25 Cir. 2005).

(n16)Footnote 4. *Fed. R. Civ. P. 12(h)(1),(3)*; *see Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 350-351 (S.D.N.Y. 2005)* .

(n17)Footnote 5. *Palmer v. Braun, 376 F.3d 1254, 1259-1260 (11th Cir. 2005)* .

(n18)Footnote 6. *In re AP Industries, Inc., 117 B.R. 789, 797 (S.D.N.Y. 1990)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.02

§ 7.02 Law Controlling Venue of Actionsn*

[1] Federal Statutes Control Transitory Actions

Venue is a procedural matter; therefore, pursuant to the *Erie* Doctrine, federal law controls venue even in diversity cases in which substantive matters are generally governed by state law. Federal venue statutes n1 control venue of "transitory actions" in the federal courts, which are actions that historically had their venue determined by residence of parties rather than location of property. "Local actions" are those that involved the protection or recovery of real property or an estate in real property; if the action centers on real property, it is a local action, which must be brought in the district where the realty is located. n2 Thus, the traditional distinction between transitory actions and local actions is the same as the distinction between in personam and in rem jurisdiction, because to provide in rem relief, the court must have jurisdiction over the real property at issue, and a local action must therefore be brought in the jurisdiction in which that real property is located. n3 On the other hand, the action is transitory, even though it may affect land, if the type of relief requested is personal in nature so that the court acts on the defendant's person or personal property and requires only in personam jurisdiction over the defendant. n4

Although there have been conflicting case decisions regarding the question of whether to apply state or federal law to determine if an action is local, n5 the current view is that federal law controls, because of the overriding doctrine that procedural matters in the federal courts are governed solely by federal law. n6

[2] General Venue Statute Controls for Most Kinds of Actions

The federal venue statutes are of two kinds. A "general venue statute" n1 is applicable to all types of actions unless a "special venue statute" specifies that the special statute controls for an action of a particular subject matter specified in the statute. n2 The general venue statute governs venue of actions in federal court, including federal question and diversity actions, except as otherwise provided by law. In other words, the general venue statute applies except when it is superseded by a venue statute which has been enacted to control a particular type of action. n3 The types of special venue statute are discussed in [3], *below*.

[3] Special Venue Statute May Be Exclusive or Supplemental

Special venue statutes apply to many different types of action, such as copyright cases, n1 government contract disputes, n2 and employee retirement income security cases. n3 For a complete list of venue statutes, see 17 *Moore's Federal Practice, § 110.60* (Matthew Bender 3d ed.). Each special venue statute may be categorized as either exclusive or supplemental to the general venue statute provisions. An exclusive special venue statute is the sole provision governing venue for the type of action covered by that statute--the provisions of the general venue statute do not also apply to such action. n3.1 For example the Supreme Court has held that for patent infringement actions, the special venue statute n4 is the sole and exclusive provision governing venue in such actions. n5 On the other hand, when a special venue statute is supplemental, it expands venue choices in addition to those existing under the general venue statute. n6

The resolution of the question of whether a special venue statute applies depends on analysis of the precise language of the statute and whether the history and function of the statute indicate a congressional intent to either expand or to limit venue choice under the statute. Generally, special venue statutes have been considered to be supplemental, rather than exclusive, if the statute is read as originally intended to expand rather than contract venue. n7 In the area of antitrust, for example, the courts have read the special venue provisions applicable to antitrust as supplementing the general venue statutes. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.01 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 1391 et seq.*

(n3)Footnote 2. *Raphael J. Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 505-506 (7th Cir. 1984)* ; *see*; *Alexander-Schauss v. Lew, 351 F. Supp. 2d 635, 640 (E.D. Mich. 2004)* ; *Vogt-Nem, Inc. v. M/V Tramper, 263 F. Supp. 2d 1226, 1230 (N.D. Cal. 2002)* . *Citizens & S. Natl. Bank v. Bougas, 434 U.S. 35, 38, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977)* .

(n4)Footnote 3. *Sherrill v. McShan, 356 F.2d 607, 610 (9th Cir. 1966)* .

(n5)Footnote 4. *See In re School Asbestos Litigation, 921 F.2d 1310, 1319 (3d Cir. 1990)* .

(n6)Footnote 5. *See Pasos v. Pan American Airways, Inc., 229 F.2d 271, 272 (2d Cir. 1956)* (federal law should be applied); *Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1149-1150 (5th Cir. 1992)* (precedent required court to apply state law).

(n7)Footnote 6. *See Hallaba v. Worldcom Network Servs., 196 F.R.D. 630, 646 (N.D. Okla. 2000)* (citing **Moore's Federal Practice**).

(n8)Footnote 1. *See 28 U.S.C. § 1391(a),(b).*

(n9)Footnote 2. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 202-203, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* .

(n10)Footnote 3. *City of Waco v. Schouten, 385 F. Supp. 2d 595, 600 (W.D. Tex. 2005)* .

(n11)Footnote 1. *See 28 U.S.C. § 1400(a).*

(n12)Footnote 2. *See* 41 U.S.C. §§ 321, 322.

(n13)Footnote 3. *29 U.S.C. §§ 1342, 1370, 1451.*

(n14)Footnote 3.1. *Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1108-1109 (C.D. Cal. 2001)* .

(n15)Footnote 4. *28 U.S.C. § 1400(b)* (any civil action for patent infringement may be brought in judicial district where defendant resides or where defendant has committed acts of infringement and has a regular and established place of business).

(n16)Footnote 5. *Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 229, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957)* ; *see Nutrition Physiology Corp. v. Enviros Ltd., 87 F. Supp. 2d 648, 652 (N.D. Tex. 2000)* .

(n17)Footnote 6. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 202-203, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* (venue provisions of Federal Arbitration Act are permissive).

(n18)Footnote 7. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 202-203, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* (liberalizing effect of Federal Arbitration Act special venue statute provisions in day of their enactment was meant to endure through treating them as permitting and not limiting venue choice).

(n19)Footnote 8. *See In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 296 (3d Cir. 2005)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.03

§ 7.03 Plaintiff Has Initial Choice of Venue of Actionn*

In the typical case, there is more than one proper venue available under the applicable venue statute, including the general venue statute. n1 In such circumstances, the plaintiff is generally entitled to choose the location in which to file the action, n2 provided the choice meets the minimum criteria specified in the venue statute. n3 However, the plaintiff's initial choice of forum may be denied based on several considerations that further the purposes of the venue statutes, which are to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient location for trial, n4 and to protect the defendant from being forced to defend lawsuits in a court remote from the defendant's residence or from where the acts underlying the controversy occurred. n5

A plaintiff even has a right to choose a relatively inconvenient forum for strategic reasons provided that the venue choice was otherwise proper under the standards of the applicable venue rule. The plaintiff may initiate an action in a proper venue without fear that sanctions will be imposed, regardless of the plaintiff's motivation for filing there; however, the plaintiff's motivations may be considered in whether the court gives deference to the plaintiff's choice. n5.1 Furthermore, if the plaintiff chooses an inconvenient forum, the defendant may be able to have the action transferred to a more convenient forum under the transfer statute, n6 or dismissal under the forum non conveniens doctrine. n7 These topics are discussed in Part IV, Change of Venue. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferChoice of Forum

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.01 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 1391(a),(b).*

(n3)Footnote 2. *See Samsung Elecs. Co. v. Rambus Inc., 386 F. Supp. 2d 708, 716 (E.D. Va. 2005) .*

(n4)Footnote 3. *In re Horseshoe Entm't, 337 F.3d 429, 434-435 (5th Cir. 2003) .*

(n5)Footnote 4. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 2005 U.S. App. LEXIS 21708, at *56* (25 Cir. 2005).

(n6)Footnote 5. *Hoover Group, Inc. v. Custom Metalcraft, Inc., 84 F.3d 1408, 1410 (Fed. Cir. 1996)* ; *City of New York v. Cyco.net, Inc., 383 F. Supp. 2d 526, 543 (S.D.N.Y. 2005)* .

(n7)Footnote 5.1. *See Iragorri v. United Technologies Corp., 274 F.3d 65, 74 (2d Cir. 2001)* .

(n8)Footnote 6. *See 28 U.S.C. § 1404*.

(n9)Footnote 7. *Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 50-51 (D.D.C. 2000)* (statutory transfer of venue contrasted with forum non conveniens).

(n10)Footnote 8. *See § 7.80* et seq.

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1-7 Moore's Manual--Federal Practice and Procedure § 7.04

§ 7.04 Forum Selection Clausesn*

The parties to an agreement may include a provision, known as a forum selection clause, which specifies the forum in the event litigation arises regarding the agreement. n1 When litigation does result regarding the agreement, two scenarios may arise. First, a plaintiff may file an action in a district specified in the forum selection clause although that district is not a proper venue under the applicable venue statute. Courts will generally enforce a forum selection clause provided for in an agreement freely negotiated by the parties because the clause constitutes a waiver of the protection of the venue statute. n2 However, there are exceptions to this rule: courts will not enforce the clause if it is establishedthat enforcement would be unjust or unreasonable, the provision is contrary to public policy, the provision is invalid for some reason, such as fraud or undue influence, n3 or the agreed forum is so inconvenient as to deprive the party of his or her day in court. n4

The second scenario occurs when the defendant moves to enforce a forum selection clause after the plaintiff has chosen a different, but otherwise proper, forum under the applicable venue statute. When raised in the context of a motion to transfer, the court must consider the existence of the clause as only one factor in the many factors related to convenience enumerated in the transfer statutes. n5 However, if the issue of the forum selection clause is raised in a motion to dismiss it becomes a matter of contract law and the appropriate federal or state law will apply. If the federal or state law generally upholds such clauses, the action should be dismissed when the plaintiff brings the action in a venue other than specified in the clause, even if in a proper venue under the statute. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.01 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 200, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000) .*

(n3)Footnote 2. *Carnival Cruise Lines v. Shute, 499 U.S. 585, 590-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* .

(n4)Footnote 3. *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1973)* ; *Koninklijke Philips Elecs v. Digital Works, Inc., 358 F. Supp. 2d 328, 332 (S.D.N.Y. 2005)* .

(n5)Footnote 4. *See Park Inn Int'l, L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 373 (D.N.J. 2000)* .

(n6)Footnote 5. *BHP International Investment, Inc., v. Online Exchange, Inc., 105 F. Supp. 2d 493, 495-497 (E.D. Va. 2000)* (venue properly transferred from Virginia to Missouri, after consideration of importance of Missouri law and of contractual forum selection clause specifying Missouri as litigation forum); *see Stewart v. Ricoh Corp., 487 U.S. 22, 28-32, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* (federal law controls motion to transfer action to venue provided in contractual forum selection clause).

(n7)Footnote 6. *Faur v. Sirius Int'l Ins. Corp., 2005 U.S. Dist. LEXIS 9510, at *13-*16 (N.D. Ill. 2005)* (citing **Moore's Federal Practice**).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.05

§ 7.05 Pleading and Burden of Proofn*

Unlike the case with subject matter jurisdiction, the plaintiff does not have to plead the basis for filing an action in a particular district court. Venue is not a matter that must be raised by the proponent of the forum because venue involves a privilege personal to the defendant, and the purpose of venue statutes is to prevent litigation from being conducted in a forum that is inconvenient to the defendant or unfair because the forum lacks a sufficient connection with the events giving rise to the claim. n1 Therefore, a defendant that fails to make a timely objection to venue waives the objection. n2 However, if the defendant challenges venue in a timely manner, the plaintiff bears the burden of establishing that venue is proper. n3 Then, on a motion to transfer venue based on convenience of the parties, the burden shifts back to the defendant to show that the applicable factors favor the transfer of venue. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.01 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Leroy v. Great Western United Corp., 443 U.S. 173, 183-184, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* .

(n3)Footnote 2. *Tri-State Empl. Servs., Inc. v. Mountbatten Sur. Co., 295 F.3d 256, 261 (2d Cir. 2002)* .

(n4)Footnote 3. *Flag Co. v. Maynard, 376 F. Supp. 2d 849, 857 (E.D. Ill. 2005)* .

(n5)Footnote 4. *FMC Corp. v. AMVAC Chem. Corp., 379 F. Supp. 2d 733, 751 (E.D. Pa. 2005)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.06

§ 7.06 Effect of Joinder on Venuen*

[1] Joinder of Claims

When multiple claims are joined in an action, venue must technically be proper for each separate claim. n1 This requirement is not strictly enforced, however, because courts have interpreted the meaning of "claim for relief" and "cause of action" broadly, and because courts have allowed liberal venue over joined claims by relying on a theory of "pendent venue" analogous to the pendent jurisdiction doctrine, n2 now referred to supplemental jurisdiction. n3 Whether to apply the principle of pendent venue in any given case thus depends on whether the court may exercise supplemental jurisdiction, n4 which in turn depends on whether the claims arise out of a common nucleus of operative fact. When determining whether to permit "pendent venue," courts traditionally also have considered whether the exercise of jurisdiction furthers the goals of judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the parties. n5 It remains to be seen whether the district court's power to decline to exercise "pendent venue" has been limited by the supplemental jurisdiction statute, and what impact the supplemental jurisdiction statute may have over how courts determine whether "pendent venue" should be allowed. n6

[2] Joinder of Parties

The venue statutes control the initial location of the court at the time the suit is filed by the plaintiff. It has been held that the venue statutes have no application to new claims against existing parties, including counterclaims, cross-claims, or claims in intervention. This interpretation is based on the language of the venue statutes, which commonly use the expression of where an action "may be brought." n1 In a similar way, when a third-party claim joins new parties, the newparties do not need to meet venue requirements because they are regarded as ancillary to the existing suit. n2 If the plaintiff files an amended complaint which adds additional parties, however, venue rules must be satisfied for that amended complaint. An amended complaint is treated as a new action, except under the relation back doctrine in some cases for statute of limitation purposes, and therefore a determination must be made as to whether the chosen district is one where the action "may be brought." n3

For class actions, the court must determine venue under the statutes in the same manner that would apply if the action were not a class action, according to an application of the statutory requirements to the named parties. Members of the class other than the named representative party or parties should not be considered. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultiparty LitigationCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.05 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Beattie v. United States, 756 F.2d 91, 100 (D.C. Cir. 1984)* .

(n3)Footnote 2. *Johnson v. Washington Gas Light Co., 89 F. Supp. 2d 45, 47 (D.D.C. 2000)* .

(n4)Footnote 3. *See Travis v. Anthes Imperial Ltd., 473 F.2d 515, 528-529 (8th Cir. 1973)* (when venue is proper on federal claims, it is also proper on pendent state claims).

(n5)Footnote 4. *Washington v. General Electric Corp., 686 F. Supp. 361, 362 (D.D.C. 1988)* .

(n6)Footnote 5. *Beattie v. United States, 756 F.2d 91, 103 (D.C. Cir. 1984)* (whether claims derive from common nucleus of operative fact bears on judicial economy, convenience, and fairness).

(n7)Footnote 6. *See 28 U.S.C. § 1367.*

(n8)Footnote 1. *General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433-435, 53 S. Ct. 202, 77 L. Ed. 408 (1932)* (patent venue statute was not intended to modify rules governing counterclaims).

(n9)Footnote 2. *Lone Star Package Car Co. v. Baltimore & O. R. Co., 212 F.2d 147, 152 (5th Cir. 1954)* (citing **Moore's Federal Practice**).

(n10)Footnote 3. *See 28 U.S.C. § 1391.*

(n11)Footnote 4. *United States v. Preiser, 506 F.2d 1115, 1129 (2d Cir. 1974) , cert. denied, 421 U.S. 921 (1975)* (citing **Moore's Federal Practice,** and noting that same need for consistency, fairness and economy which dictated a common-sense construction of jurisdictional provisions applies as well to those determining venue).

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART I. FUNDAMENTALS GOVERNING VENUE

1-7 Moore's Manual--Federal Practice and Procedure § 7.07

§ 7.07 Effect of Removal on Venuen*

When an action is removed from a state court, on the grounds that original jurisdiction over the action exists in the federal district courts, it must be removed by the defendant or defendants to the federal district court for the district and division embracing the place where the state action is pending. n1 Thus, the removal statute itself contains a venue provision, and the venue statutes that would have applied if the action been brought originally in federal court are not applicable. n2

Because there is only one federal venue into which the state court action may be removed, the defendant may challenge venue if it was removed to any other district. n2.1 Thus, after removal, the defendant may challenge whether venue was proper in the state court, because the right to challenge state court venue is not waived by the removal. n3 Furthermore, the defendant may challenge removal in the federal district court when the defendant asserts removal was incorrectly brought by making a motion for transfer of venue to the district where removal should have occurred. However, when a defendant asserts improper removal venue, the defendant may not challenge venue in the court where removal should have occurred, nor in the district court where venue would be brought if the case had originally been brought in federal court, rather than removed to federal court. n4 Finally, if the plaintiff files an amended complaint in federal court adding new claims or new defendants after removal, venue must be proper with respect to the new claims or new defendants under the applicable general or special venue provision, because an amended complaint is considered a new action, and if appropriate the defendant may make a motion for a discretionary transfer to that district court forum under the transfer provision. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.08 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *BHP International Investment, Inc., v. Online Exchange, Inc., 105 F. Supp. 2d 493, 495-497 (E.D. Va. 2000)* .

(n4)Footnote 2.1. *Kerobo v. Southwestern Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002)* .

(n5)Footnote 3. *PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 72-73 (2d Cir. 1998)* (party removing action does not waive defense of improper venue regarding state court action).

(n6)Footnote 4. *Kerobo v. Southwestern Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002)* .

(n7)Footnote 5. *Freeman v. Bee Machine Co., 319 U.S. 448, 457, 63 S. Ct. 1146, 87 L. Ed. 1509 (1943)* .

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1-7 Moore's Manual--Federal Practice and Procedure §§ 7.08through 7.19

[Reserved]

§§ 7.08[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART II. DETERMINATION OF VENUE UNDER GENERAL VENUE STATUTE

1-7 Moore's Manual--Federal Practice and Procedure § 7.20

§ 7.20 General Venue Statute Controls Both Federal Question and Diversity Casesn*

The general venue statute n1 has been given that designation by the courts because it generally governs venue of actions in federal court, including federal question and diversity actions, n2 except as otherwise provided by law. The general venue statute applies unless it is superseded by a venue statute that has been enacted to control a particular type of action. n2.1 The latter type of statute is referred to as a "special venue statute," n3 and is discussed in *§ 7.40* et seq.

Unless another federal statute provides otherwise, the general venue statute provides that a civil action based on diversity of citizenship jurisdiction may be brought only in a judicial district in which (1) any defendant resides, if all defendants reside in the same state, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no other district in which the action may be brought. n4 A civil action that is based on a federal question (not founded solely on diversity of citizenship) may be brought only in a judicial district in which (1) any defendant resides, if all defendants reside in the same state, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) any defendant may be found, if there is no district in which the action may otherwise be brought. n5 Thus, the general venue statute treats diversity cases and non-diversity cases differently, in that Section 1391(a) prescribes venue for actions based solely on diversity, and Section 1391(b) prescribes those cases involving any other kind of case within federal jurisdiction, such as federal question cases, except for cases for which Congress has specially provided venue. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1391.*

(n3)Footnote 2. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 202-203, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* .

(n4)Footnote 2.1. *Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1177-1178 (9th Cir. 2004)* (unless special venue statute specifies otherwise, special venue statute supplements, rather than supercedes general venue statute).

(n5)Footnote 3. *See Catholic Order v. U.S. Bancorp Piper Jaffray, Inc., 337 F. Supp. 2d 1148, 1154-1155 (N.D. Iowa 2004)* .

(n6)Footnote 4. *28 U.S.C. § 1391(a)*.

(n7)Footnote 5. *28 U.S.C. § 1391(b)*.

(n8)Footnote 6. *See § 7.02[2],[3]*.

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1-7 Moore's Manual--Federal Practice and Procedure § 7.21

§ 7.21 Possible Venue Under General Venue Statuten*

Both subsections of the general venue statute, which govern diversity and nondiversity actions, respectively, have three clauses. The first two clauses are identical, but the third has minor differences. n1 When read together, n1.1 the two general venue statute provisions provide that venue is proper only in the following places:

1. Whether jurisdiction is founded on diversity or federal question jurisdiction, an action may be brought in a judicial district where any defendant resides, if all defendants reside in the same state. n2

2. Whether jurisdiction is founded on diversity or federal question jurisdiction, an action may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated. n3

3. In cases in which jurisdiction is founded only on diversity of citizenship, if there is no district in which the action may otherwise be brought under items (1) or (2), *above*, venue is proper in a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced. n4 This provision is a "fall-back" venue provision only. Consequently, the court should not consider the terms of this provision unless it has determined that venue is not proper under paragraph 1 and 2, above. n4.1

4. In cases in which jurisdiction is founded on a federal question, if there is no district in which the action may otherwise be brought under items (1) or (2), *above*, venue is proper in a judicial district in which any defendant may be found. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual Defendants

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1391(a),(b).*

(n3)Footnote 1.1. *See Burkitt v. Flawless Records, Inc., 2005 U.S. Dist. LEXIS 11986, at *22-*25 (E.D. La. 2005)* .

(n4)Footnote 2. *28 U.S.C. § 1391(a)(1),(b)(1).*

(n5)Footnote 3. *28 U.S.C. § 1391(a)(2),(b)(2).*

(n6)Footnote 4. *28 U.S.C. § 1391(a)(3).*

(n7)Footnote 4.1. *Algodonera De Las Cabezas, S.A. v. Am. Suisse Capital, Inc., 432 F.3d 1343, 1345 (11th Cir. 2005)* (citing **Moore's Federal Practice**).

(n8)Footnote 5. *28 U.S.C. § 1391(b)(3).*

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PART II. DETERMINATION OF VENUE UNDER GENERAL VENUE STATUTE

1-7 Moore's Manual--Federal Practice and Procedure § 7.22

§ 7.22 Residence of Defendantn*

[1] Residence of Party Based on Status

The general venue statute provides that venue is proper in both diversity or federal question jurisdiction actions where any defendant resides, if all defendants reside in the same state. n1 Thus, for example, under Section 1391(a)(1) or (b)(1),venue would be proper in the judicial district of the United States District Court for the Western District of Washington when all defendants reside in the State of Washington and at least one resides in the judicial district judicial district ofthe Western District of Washington. n2 The issue of where a party resides is dependent on the status of the party, as discussed in [2]-[6], *below*. The residence of a party is determined according to the facts as they exist at the time the action is commenced. n3 Therefore, a change in residence after filing does not affect venue. n4 However, if a party is added or joined after the action is originally filed, the party's residence must be determined as to that defendant as of the time the party is joined. n5

[2] Individuals

For all venue purposes, the residence of an individual is deemed to be the person's permanent residence or legal domicile. n1 Therefore, an individual's mere current residence in a location is not enough for purposes of establishing the propriety of venue there. n2 A person's domicile is the place of the person's fixed and permanent home, and to which the person has the intention of returning in the future when presently absent from that place. Domicile thus contains a physical element and an element of the subjective factor of intent. n3 Determination of domicile is a question for the trier of fact. n4

Domicile has also been equated with citizenship for diversity of citizenship jurisdiction purposes, and diversity cases discussing domicile may be used as precedent to determine domicile for venue purposes. In other words, courts consider the same factors to ascertain domicile when determining "residence" for purposes of venue as they do when determing "citizenship" for purposes of jurisdiction. n5

[3] Corporations

[a] Residence Generally Based on Amenability to Personal Jurisdiction

For purposes of determinations under the general, and most special, venue statutes, a corporate defendant is a resident of any district where it is subject to personal jurisdiction at the time the action is commenced. n1 This means that a corporation is a resident for venue purposes of each federal district within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state. n1.1 Thus, a corporation's residence is determined with reference to the minimum contacts due process analysis developed under *International Shoe* and its progeny. n1.2 Generally, this definition of corporate residence applies to defendants in all of the types of actions specified in Title 28, Sections 1391-1412, n2 and has also been held to apply to some other special venue provisions, such as the venue provisions governing Jones Act cases. n3 If a court finds that a corporation is not covered by one of these statutes, the residence of a corporation for venue purposes is limited to the state or states of its incorporation, which is the common law concept of corporate residence for venue purposes. n4

[b] Corporate Residence in Multidistrict States

When a state has more than one federal judicial district, a corporation is a resident for venue purposes of each district within which it has contacts that would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no such district, but the corporation is subject to personal jurisdiction in the state as a whole, the corporation's residence is in the district in the state within which it has the most significant contacts. n5

[4] Unincorporated Associations

The residence of unincorporated associations such as partnerships have not been expressly defined in the general venue statutes. n1 In the absence of the express statutory directive, courts have most often treated unincorporated associations as analogous to corporations for the purposes of venue, and havedetermined proper venue according to the applicable statutory provision pertaining to residence of corporations. n2 Courts have given this treatment to various types of unincorporated associations, including labor unions, partnerships, limited partnerships, joint ventures, and trusts. n3 Therefore, it appears that unincorporated associations by analogy should also be treated as corporations pursuant to Section 1391(c), and therefore reside for venue purposes anywhere they are subject to personal jurisdiction. n4 Other courts courts take a different approach and look to where the individual members or partners reside, as well as where the unincorporated association does business. n4.1 Residence of corporations under Section 1391(c) is discussed further in [2], *above*.

In contrast to the general venue statute, some special venue statutes, do establish where venue is proper against unincorporated associations in the actions governed by the special statutes. For example, the Labor Management Relations Act provides that actions against labor unions governed by the Act may be brought in any district court having jurisdiction over the parties; that is, any district where the union maintains its principal office or in which its duly authorized officers or agents are engaged in representing or acting for employee members. However, residence is not a standard under this statute. n5

[5] Aliens

The general venue statute provides that an alien may be sued in any district. n1 The general venue statute does not refer to the residence of an alien because the venue statutes are based on a concept of residence dependent on citizenship, and because an alien is not considered a resident of a state or a judicial district in a state, and is not a citizen of a state. Therefore, even if an alien actually lives in a state or district, the alien is not considered a resident there for venue purposes. n2 Furthermore, nonresident aliens, clearly do not reside in any district. n3

[6] Public Officials

When a public official is sued in an official capacity, rather than as an individual, the public official is deemed to be a resident for venue purposes in the district of his or her official residence, which means where he or she performs his or

her official duties. n1 This rule applies to state as well as federal officials, and an official may have more than one residence under this rule. n2 The residence of an official is significant because when sued in his or official capacity, the action may be brought in any judicial district in which the official defendant in the action resides. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePartnershipsCivil ProcedureVenuePublic Officials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(a)(1),(b)(1).*

(n3)Footnote 2. *Overland, Inc. v. Taylor, 79 F. Supp. 2d 809, 812 (E.D. Mich. 2000)* .

(n4)Footnote 3. *Hoffman v. Blaski, 363 U.S. 335, 342-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ; *Koh v. Microtek Int'l, Inc., 250 F. Supp. 2d 627, 631 (E.D. Va. 2003)* .

(n5)Footnote 4. *Flowers Indus., Inc., v. Federal Trade Commission, 835 F.2d 775, 776 n.1 (11th Cir. 1987)* (although defendant had begun process of changing its incorporation to Georgia while case was pending, court could not consider change because venue must be determined based on facts at time of filing).

(n6)Footnote 5. *Sutain v. Shapiro and Lieberman, 678 F.2d 115, 117 (9th Cir. 1982)* .

(n7)Footnote 1. *Holmes v. United States Bd. of Parole, 541 F.2d 1243, 1248-1249 (7th Cir. 1976)* ; *Loeb v. Bank of Am., 254 F. Supp. 2d 581, 586 (E.D. Pa. 2003)* .

(n8)Footnote 2. *See Manley v. Engram, 755 F.2d 1463, 1466 n.3 (11th Cir. 1985)* ; *Koh v. Microtek Int'l, Inc., 250 F. Supp. 2d 627, 634 (E.D. Va. 2003)* (residence does not arise out of place of occasional work or transitory abode).

(n9)Footnote 3. *See Greenblatt v. Gluck, 265 F. Supp. 2d 346, 351 (S.D.N.Y. 2003)* .

(n10)Footnote 4. *See HSBC Bank USA v. Handel, 253 B.R. 308, 311 (1st Cir. 2000)* .

(n11)Footnote 5. *Compare Greenblatt v. Gluck, 265 F. Supp. 2d 346, 351 (S.D.N.Y. 2003) with Wallace v. Healthone, 79 F. Supp. 2d 1230, 1233 (D. Colo. 2000)* .

(n12)Footnote 1. *28 U.S.C. § 1391(c).*

(n13)Footnote 1.1. *28 U.S.C. § 1391(c)*; *see Horizon Mktg. v. Kingdom Int'l, Ltd., 244 F. Supp. 2d 131, 137-138 (E.D.N.Y. 2003)* ; *see also* [b], *below.*

(n14)Footnote 1.2. *See Koh v. Microtek Int'l, Inc., 250 F. Supp. 2d 627, 631 (E.D. Va. 2003)* .

(n15)Footnote 2. *Overland, Inc. v. John Taylor, 79 F. Supp. 2d 809, 812 (E.D. Mich. 2000)* .

(n16)Footnote 3. *Pure Oil Co. v. Suarez, 384 U.S. 202, 207, 86 S. Ct. 1394, 16 L. Ed. 2d 474 (1966)* .

(n17)Footnote 4. *Dual Mfg. and Eng., Inc. v. Burris Indus., Inc., 531 F.2d 1382, 1385 (7th Cir. 1976)* (in case of corporation not subject to Section 1391(c), corporation is resident of only state of its incorporation for venue purposes).

(n18)Footnote 5. *28 U.S.C. § 1391(c).*

(n19)Footnote 1. *See 28 U.S.C. § 1391(c).*

(n20)Footnote 2. *Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 562, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967)* ; *World Skating Fed'n v. Int'l Skating Union, 357 F. Supp. 2d 661, 664 n.4 (S.D.N.Y. 2005)* .

(n21)Footnote 3. *See Reading Metal Craft Co. v. Hopf Drive Assocs., 694 F. Supp. 98, 101 (E.D. Pa. 1988)* .

(n22)Footnote 4. *MacCallum v. New York Yankees P'ship, 2005 U.S. Dist. LEXIS 12705, at *8-*9 (D. Conn. 2005)* .

(n23)Footnote 4.1. *Burkitt v. Flawless Records, Inc., 2005 U.S. Dist. LEXIS 11986, at *19 (E.D. La. 2005)* .

(n24)Footnote 5. *See 29 U. S. C. § 185.*

(n25)Footnote 1. *28 U.S.C. § 1391(d).*

(n26)Footnote 2. *McRae's, Inc. v. Hussain, 105 F. Supp. 2d 594 (S.D. Miss. 2000), 105 F. Supp. 2d 594* (in suit by trademark owner against alleged cybersquatter, claiming infringement and dilution, defendant moved to dismiss for lack of jurisdiction or venue, district court held that venue was proper against alien in any district, regardless of fact that defendant had residence in New Jersey).

(n27)Footnote 3. *Brunette Mach. Works, Ltd., v. Kockum Indus., Inc., 406 U.S. 706, 709-710, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* .

(n28)Footnote 1. *O'Neill v. Battisti, 472 F.2d 789, 791 (6th Cir. 1972)* , *cert. denied, 411 U.S. 964 (1973)* .

(n29)Footnote 2. *Florida Nursing Home Asso. v. Page, 616 F.2d 1355, 1360 (5th Cir. 1980)* , rev., o.g., *450 U.S. 147 (1981)* (state official may have more than one official residence).

(n30)Footnote 3. *28 U.S.C. § 1391(e).*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.23

§ 7.23 Determination of District Where Substantial Part of Events or Omissions Occurredn*

Pursuant to the general venue statute, venue is proper in any district in which a substantial part of the events or omissions giving rise to the claim occurred. n1 This determination is a federal issue whose answer depends on federal law. n2 Substantiality for venue purposes is more a qualitative than a quantitative inquiry, determined by assessing the overall nature of the plaintiff's claims and the nature of the specific defendant's events or omissions in the forum, and not by simply adding up the number of contacts. If material acts or omissions within the forum bear a close nexus to the claims, they are properly considered substantial. n3

Under this standard, the court must determine the location of a substantial part of the events or omissions based on only those facts related to the claim n4 and must make the determination based on the activities of the defendant, not the plaintiff. n5

In making its "substantial part" determination, a court does not need to find that a "majority" of the events take place in the forum, or that the challenged forum is the best forum for the lawsuit to be venued, because the statute only requires a substantial part of the events to have occurred in the forum. n6 Thus,the statute does not restrict venue to the district in which the "most substantial" events or omissions giving rise to a claim occurred. Rather, the statute contemplates that venue may be appropriate in more than one district and permits venue in multiple judicial districts, provided that a "substantial part" of the underlying events took place in those districts. However, the substantial events or omissions requirement does limit the forums available to plaintiffs, because the purpose of statutorily defined venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(a)(2),(b)(2).*

(n3)Footnote 2. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* .

(n4)Footnote 3. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 2005 U.S. App. LEXIS 21708, 59-60 (2d Cir. 2005)* .

(n5)Footnote 4. *I.M.D. USA, Inc. v. Shalit, 92 F. Supp. 2d 315, 317 (S.D.N.Y. 2000)* (whether event or omission constitutes substantial part is analogous to that of proximate causation in law of torts).

(n6)Footnote 5. *See Multi-Media Int'l, LLC v. Promag Retail Servs., 343 F. Supp. 2d 1024, 1033 (S.D.N.Y. 2004)* .

(n7)Footnote 6. *Cottman Transmission Sys. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994)* .

(n8)Footnote 7. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 2005 U.S. App. LEXIS 21708, 56-57 (2d Cir. 2005)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.24

§ 7.24 Determination of District Where Defendant May be Foundn*

In a federal question case controlled by the general venue statute, if venue may not be based either on the residence of the defendant, a place where a substantial part of the events or omissions giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is situated, venue is proper in any judicial district in which any defendant may be found. n1 The courts have interpreted the phrase "in which any defendant may be found" to mean a location where the defendant is subject to personal jurisdiction, n1.1 including jurisdiction pursuant to long-arm statutes. For example, in one copyright case, the defendant was "found" in the district where he was subject to personal jurisdiction under the Wisconsin long-arm statute. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual Defendants

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.02[2][d] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(b)(3).*

(n3)Footnote 1.1. *See Flag Co. v. Maynard, 376 F. Supp. 2d 849, 857 (E.D. Ill. 2005)* .

(n4)Footnote 2. *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., 8 F.3d 441, 445 (7th Cir. 1993)* ; *see also Gatz v. Ponsoldt, 271 F. Supp. 2d 1143, 1155, 1161 (D. Neb. 2003)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART II. DETERMINATION OF VENUE UNDER GENERAL VENUE STATUTE

1-7 Moore's Manual--Federal Practice and Procedure §§ 7.25through 7.39

[Reserved]

§§ 7.25[Reserved]

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1-7 Moore's Manual--Federal Practice and Procedure § 7.40

§ 7.40 Admiralty and Maritime Suitsn*

[1] Admiralty Claims in General

An admiralty or maritime claim may not be considered a civil action for the purposes of the general venue statute. n1 Some special venue statutes control certain types of admiralty actions, such as actions under the Limitation of Liability Act, n2 proceedings to enforce fines, penalties, and forfeitures, n3 and actions against the United States under the Suits in Admiralty Act and the Public Vessels Act. n4 However, when no special statute is applicable, venue is proper for admiralty or maritime claims in any district in which the court has jurisdiction over the defendant or subject matter of the claim. n5 It has been held that Rule 82, which provides that Sections 1391 and 1392 do not govern admiralty actions, does not refer to the venue transfer provisions, Sections 1404 and 1406. Therefore, admiralty actions may be transferred in the same manner as other actions. n6

[2] Suit by Seaman for Personal Injury or Death

The Jones Act provides for an action by a seaman against an employer for personal injury or death, as an alternative to an action brought under general maritime law. A seaman may bring a Jones Act lawsuit in the district in which the employer resides or in which the employer's principal office is located. n1 When the employer is a corporation, the residence of the corporate employer is in any district in which it is subject to personal jurisdiction at the time the action is commenced. n2 Thus, when the employer is a corporation, the second part of the Jones Act provision, referring to where "the employer's principal office is located" has no application. n3 3 Partnerships and other unincorporated associations are treated in the same manner as corporations. n4 Residence of corporations and associations under Section 1391(c) is discussed in *§ 7.22[3],[4]*. If the employer is an individual, he or she resides where domiciled n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureVenueCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* §§ 110.44, 110.46 (Matthew Bender

3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 82*; *see Fluor Corp. v. S/S President Coolidge, 52 F.R.D. 538, 539 (S.D.N.Y. 1971)* (admiralty venue not limited by rules governing venue in civil actions).

(n3)Footnote 2. Fed. R. Civ. P. Supplemental Rule F(9) (complaint generally proper in any district in which vessel has been attached or arrested to answer for any claim for which plaintiff seeks to limit liability; or, if vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim).

(n4)Footnote 3. *28 U.S.C. § 1395(d)* (venue proper for proceeding in admiralty for enforcement of fines, penalties, and forfeitures against vessel in district in which vessel is arrested).

(n5)Footnote 4. *46 U.S.C. § 782*.

(n6)Footnote 5. *Davis v. Hill Engr., Inc., 549 F.2d 314, 324, 1977 A.M.C. 1090 (5th Cir. 1977)* ; *Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 515 (4th Cir. 1955)* .

(n7)Footnote 6. *Sunbelt Corp. v. Noble, Denton & Associates, Inc., 5 F.3d 28, 30-33 (3d Cir. 1993)* .

(n8)Footnote 1. *46 U.S.C. Appendix § 688*; *Pure Oil Co. v. Suarez, 384 U.S. 202, 203, 86 S. Ct. 1394, 16 L. Ed. 2d 474 (1966)* .

(n9)Footnote 2. *28 U.S.C. § 1391(c)*; *see Sanders v. Seal Fleet, Inc., 998 F. Supp. 729, 733-736 (E.D. Tex. 1998)* (venue is proper only in districts in which defendant has contacts sufficient to create personal jurisdiction in that district).

(n10)Footnote 3. *Pure Oil Co. v. Suarez, 384 U.S. 202, 205 n.5, 86 S. Ct. 1394, 16 L. Ed. 2d 474 (1966)* .

(n11)Footnote 4. *Penrod Drilling Co. v. Johnson, 414 F.2d 1217, 1222-1224 (5th Cir. 1969)* , *cert. denied, 396 U.S. 1003 (1970)* .

(n12)Footnote 5. *See § 7.22[2]*.

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1-7 Moore's Manual--Federal Practice and Procedure § 7.41

§ 7.41 Suits Against Aliensn*

By statute an alien may be sued in any district. n1 This statute is a codification of the historical rule followed in the federal courts that suits against aliens are not subject to the general or special venue statutes. n2 The statute applies to both alien corporations as well as alien individuals. n3 It should be noted the statute by its terms applies only to suits against alien defendants; venue in suits brought by aliens are governed by the general venue statute or other applicable statutes. n4 Although contained in the general venue statute, the alien rule is not a restriction or adjustment of the general venue rules, but a broad, independent principle that takes precedence over venue statutes that otherwise might apply to actions against aliens because of the subject matter of the action. Therefore, suits against aliens are generally free from venue restrictions, and subject only to the requirements of service of process. n5 However, if a plaintiff relies on a special statute for liberalized service, such as worldwide service of process under the Clayton Act, n6 the plaintiff must also rely on that special statute for venue restrictions. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.45 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(d).*

(n3)Footnote 2. *Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1409-1410 (9th Cir. 1989) .*

(n4)Footnote 3. *Brunette Mach. Works, Ltd., v. Kockum Indus., Inc., 406 U.S. 706, 708, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972) .*

(n5)Footnote 4. *Arevalo-Franco v. United States Immigration and Naturalization Serv., 889 F.2d 589, 591 (5th Cir. 1989)* (Freedom of Information Act Complaint may be filed in district where complainant, whether a citizen or an alien, in fact resides.

(n6)Footnote 5. *Brunette Mach. Works, Ltd., v. Kockum Indus., Inc., 406 U.S. 706, 708, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* .

(n7)Footnote 6. *See 15 U.S.C. § 22.*

(n8)Footnote 7. *In re Vitamins Antitrust Litig., 94 F. Supp. 2d 26, 30-31 (D.D.C. 2000)* (nationwide service of process under Clayton Act is proper only when action is brought in district where defendant resides, is found, or transacts business, even if defendant is alien).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.42

§ 7.42 Antitrust Suitsn*

Venue is proper for actions under the federal antitrust laws in any district in which the defendant resides or is found or has an agent. n1 If the defendant is acorporation, the plaintiff may bring an antitrust action against the corporate defendant not only in the judicial district where it is incorporated, but also in any district in which it may be found or transacts business. n2 Furthermore, these special venue statutes are considered non-exclusive; therefore, an antitrust action may also be brought under the general venue statute. n3 The Clayton Act also provides for nationwide or worldwide service of process on corporations in antitrust cases. n4 However, an antitrust plaintiff relying on the worldwide service of process provisions of the Clayton Act must also meet the venue provisions of that statute. Thus, a party seeking to take advantage of the liberalized service provisions of the Clayton Act is restricted to following the dictates of the venue provisions of the Clayton Act. Therefore, an antitrust plaintiff may not use the venue provisions of Section 1391(b), (c), or (d) when relying on the Clayton Act's worldwide service of process provision. n5 For example, if a plaintiff relies on nationwide service of process under the Clayton Act, the action only may be brought in the district where the defendant resides, is found, or transacts business, even if the defendant is an alien. The plaintiff is not allowed to rely on the provisions of § 1391(d), which ordinarily allows venue against an alien in any district. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawGeneral OverviewAntitrust & Trade LawSherman ActGeneral OverviewCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.45 (Matthew Bender 3d ed.).

(n2)Footnote 1. *15 U.S.C. § 15(a).*

(n3)Footnote 2. *15 U.S.C. § 22.*

(n4)Footnote 3. *Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 855 (11th Cir. 1988) , cert. denied, 494 U.S. 1081 (1990)* ; *Kingsepp v. Wesleyan Univ., 763 F. Supp. 22, 27-28 (S.D.N.Y. 1991) .*

(n5)Footnote 4. *15 U.S.C. § 22*.

(n6)Footnote 5. *GTE New Media Services, Inc. v. BellSouth Corp., et al., 199 F.3d 1343, (D.C. Cir. 2000)* .

(n7)Footnote 6. *In re Vitamins Antitrust Litig., 94 F. Supp. 2d 26, 30-31 (D.D.C. 2000)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.43

§ 7.43 Arbitration Suitsn*

Under the Federal Arbitration Act, n1 a party may bring a motion or other proceeding to confirm, vacate, or modify an arbitration award in the United States District Court for the judicial district in which the arbitration award was made. n2 The Supreme Court has expressly held that this special venue statute only supplements, and does not supercede, the general venue statute, and therefore the moving party may bring such a proceeding under any district available under the special or general venue statute. The court's conclusion was based on the fact that the special Federal Arbitration Act provisions consistently use the permissive word "may" in establishing venue in the district court for the judicial district in which the award was made. In its decision, the court noted that the special venue provisions in the Act had an obviously liberalizing effect, free of any suggestion that Congress intended to foreclose the district where the defendant resided as a proper venue. The Court concluded that attention to practical consequences thus pointed away from a restrictive reading of the venue provisions of the Act, and confirmed the view that the liberalizing effect of the provisions required treating them as permitting and not limiting venue choice. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.48 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 9 U.S.C. § 1.*

(n3)Footnote 2. *9 U.S.C. §§ 9-11.*

(n4)Footnote 3. *Cortez Bird Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 120 S. Ct. 1331, 1334, 1337, 146 L. Ed. 2d 171 (2000) .*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.44

§ 7.44 Bankruptcy Suitsn*

[1] Venue in General

The federal district courts have exclusive jurisdiction of all bankruptcy cases, n1 and venue of bankruptcy cases is governed by special venue statutes in Title 11, Sections 1408 through 1412. n2 Therefore, a debtor may commence a bankruptcy case in the district in which the debtor's domicile, residence, or principal place of business in the United States has been located for the 180 days prior to commencement of the proceeding, or in the district in which the debtor's principal assets in the United States have been located during the 180 day period. If the debtor has moved his or her domicile, residence, principal place of business, or location of principal assets during the 180-day period, the longer period during the 180 days controls. n3

For venue purposes, a corporation's residence is its place of incorporation. n4 For partnerships and unincorporated associations, venue is controlled by the principal place of business or location of principal assets. n5 Venue will always be proper in some district, because bankruptcy may be filed only by a person who resides or has a domicile, a place of business, or property in the United States. n6

The location of a debtor's principal place of business for purposes of venue in bankruptcy cases is a question of fact to be resolved by the bankruptcy court after considering all the relevant facts and circumstances. In this regard, the principal place of business is the most important, consequential, or influential place where the entity conducts business. This is typically the place where the entity's management decisions are made but in some cases may be where day-to-day operations are conducted. n7

[2] Venue of Related Proceedings

A proceeding arising in or related to a bankruptcy case may be commenced in the district court in which the main case is pending. n1 Furthermore, a trustee in a bankruptcy case may bring a proceeding as statutory successor to the debtor or creditors in the district where the debtor or creditors, as the case may be, could have brought such an action under applicable nonbankruptcy venue provisions. n2 A proceeding based on a claim arising from the operation of the debtor's business after the commencement of the bankruptcy case may be brought against the representative of the estate in the district where the party commencing the suit could have brought such a claim under applicable nonbankruptcy venue

provisions. n3

The bankruptcy laws also permit the commencement of a proceeding ancillary to a foreign proceeding to have the United States court enjoin certain types of conduct regarding the property that is the subject of the foreign proceeding. n4 A case to enjoin the commencement or continuation of an action or proceeding in a state or federal court, or the enforcement of a judgment, may be commenced only in the district court for the district where the state or federal court sits in which the action is pending against which the injunction is sought. A case to enjoin the enforcement of a lien against property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which the property is found. Any other cases may be commenced only in the district court for the district where the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of the case is located. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsVenueGeneral OverviewBankruptcy LawPractice & ProceedingsVenueChange of VenueBankruptcy LawPractice & ProceedingsVenueProper VenueCivil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.43 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1334.*

(n3)Footnote 2. *See* 11 U.S.C. § 1408 et seq.

(n4)Footnote 3. *See* 11 U.S.C. § 1408.

(n5)Footnote 4. *Dual Mfg. and Engr., Inc. v. Burris Indus., Inc., 531 F.2d 1382, 1385 (7th Cir. 1976)* .

(n6)Footnote 5. *In re Peachtree Lane Assocs., Ltd., 150 F.3d 788, 792 (7th Cir. 1998)* (venue for partnerships controlled by principal place of business, because partnerships have no residence or domicile for venue purposes).

(n7)Footnote 6. *11 U.S.C. § 109(a).*

(n8)Footnote 7. *In re Peachtree Lane Assocs., Ltd., 150 F.3d 788, 794 (7th Cir. 1998)* .

(n9)Footnote 1. *28 U.S.C. § 1409(a)*; *see 28 U.S.C. § 1408(2)* (bankruptcy case may be commenced in district in which bankruptcy case is pending concerning debtor's affiliate, general partner, or partnership).

(n10)Footnote 2. *28 U.S.C. § 1409(c).*

(n11)Footnote 3. *28 U.S.C. § 1409(e).*

(n12)Footnote 4. *11 U.S.C. § 304.*

(n13)Footnote 5. *28 U.S.C. § 1410.*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.45

§ 7.45 Suits Involving National Banksn*

Most actions by or against national banks *28 U.S.C. § 1348*, are governed by the general venue statute. However, an action against a national bank for which the FDIC has been appointed a receiver, or an action directly against the FDIC as receiver for the bank, must be brought in the district in which the bank has its principal place of business. State court proceedings against these parties must also be brought where the bank has its principal place of business. n1 It has been held that this special venue statute is mandatory and controls over other, more general venue statutes, although like other venue provisions it may be waived. n2

When a national banking association commences a civil action to enjoin the Comptroller of the Currency, it may be commenced in the district where the association is located. n3 It appears from the permissive language ("may") and from the history of the statute that it is intended to supplement the general venue statute, and that it is not exclusive. Therefore, a much wider choice of venue in suits to enjoin the Comptroller will be available under Title 28, Section 1391(e), governing actions against U.S. officials in their official capacity. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.33 (Matthew Bender 3d ed.).

(n2)Footnote 1. *12 U.S.C. § 94.*

(n3)Footnote 2. *National Union Fire Ins. Co. v. Continental Ill., Corp., 640 F. Supp. 182, 183 (N.D. Ill. 1986)* (absent waiver by FDIC, Section 94 is both mandatory and exclusive).

(n4)Footnote 3. *28 U.S.C. § 1394.*

(n5)Footnote 4. *28 U.S.C. § 1391(e)*.

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1-7 Moore's Manual--Federal Practice and Procedure § 7.46

§ 7.46 Suits for Civil Fine, Penalty, or Forfeituren*

[1] Venue in General

The district courts have original jurisdiction over suits or proceedings to recover or enforce any fine, penalty, or forfeiture incurred under any federal statute, n1 with the exception of matters within the jurisdiction of the Court of International Trade. n2 A civil proceeding for the recovery of a pecuniary fine, penalty, or forfeiture may be brought in the district where the fine, penalty, or forfeiture accrues or where the defendant is found. n3 Additional venue possibilities are available in forfeiture proceedings, as discussed in [2], *below*. Furthermore, a proceeding in admiralty for the enforcement of fines, penalties, and forfeitures against a vessel may be brought in any district in which the vessel is arrested. n4

A fine, penalty, or forfeiture accrues in the district where the actions took place on which the fine, penalty or forfeiture is based. Thus, the accrual takes place when the act or omission constituting the violation takes place. n5 For purposes of the statute, a defendant is generally considered to be "found" where he or she is subject to personal jurisdiction. n6

[2] Additional Venues in Cases of Forfeiture

The statute providing for subject matter jurisdiction over forfeitures, n1 also has a venue provision which states that venue is allowed where any of the acts oromissions giving rise to the forfeiture occurred. n2 A civil proceeding for the forfeiture of property may also be prosecuted in any district where the property is found (that is, seized) or, if the property was seized outside any judicial district, in any district into which the property is brought. n3 When property subject to forfeiture is located in a foreign country or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought in the District of Columbia. n4 Finally, property related to or involved in certain criminal offenses is subject to civil forfeiture, and such a forfeiture proceeding may be brought in the judicial district in which the defendant owning the property is found or in the judicial district in which the criminal prosecution is brought. These venue provisions explicitly apply in addition to any other applicable venue statutes. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1355(a).*

(n3)Footnote 2. *28 U.S.C. § 1582.*

(n4)Footnote 3. *28 U.S.C. § 1395(a).*

(n5)Footnote 4. *28 U.S.C. § 1395(d).*

(n6)Footnote 5. *United States v. Abernathy, 757 F.2d 1012, 1014-1015 (9th Cir. 1985) , cert. denied, 474 U.S. 854 (1985) .*

(n7)Footnote 6. *PKWare, Inc. v. Meade & Ascent Solutions, 79 F. Supp. 2d 1007, 1017 (E.D. Wis. 2000) .*

(n8)Footnote 1. *28 U.S.C. § 1355(a).*

(n9)Footnote 2. *See 28 U.S.C. § 1355(a); see also United States v. Account No. 2033301, 831 F. Supp. 337, 339 (S.D.N.Y. 1993)* (provision was intended to extend venue and subject matter jurisdiction so that proceedings could be brought in district other than one in which property was found).

(n10)Footnote 3. *28 U.S.C. § 1395(b), (c).*

(n11)Footnote 4. *28 U.S.C. § 1355(b)(2).*

(n12)Footnote 5. 18 U.S.C. § 881(j); *18 U.S.C. § 981(h).*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.47

§ 7.47 Civil Rights Suitsn*

The Civil Rights Act known as Title VII provides for suits to redress racial or sexual discrimination in employment and contains its own venue provision for actions brought under the Act. Under Title VII, venue may be laid only: n1

1. Where the unlawful employment practice is alleged to have been committed.

2. Where the employment records relevant to such practice are maintained and administered; n2

3. Where the aggrieved person would have worked but for the alleged unlawful employment practice.

4. If the defendant is not found in any of the places specified in items 1 through 3, an action may be brought within the judicial district in which the defendant has his or her principal office.

It has been held that the special venue statute contained in Title VII is the exclusive venue provision applicable to suits under the Act. Therefore, the provisions of the general venue statute are not applicable. The Act shows a congressional intent that venue be limited to district courts with a connection to the alleged discrimination. n3 If the defendant is an officer, employee, or agency of the United States, however, venue may also be proper under Section 1391(e), governing actions against U.S. officials in their official capacity. n4

The Title VII special venue provision is not applicable to claims under other federal statutes regardless of the similarity of language or purpose. For example, the Title VII provision is not applicable to the Age Discrimination in Employment Act. Because the ADEA contains no venue provision, the general venue statute governs. n5 It has been held, however, that when a Title VII action is joined with claims under another type of action, which are governed by the general venue statute, the more restrictive special Title VII venue statute will control, unless the doctrine of "pendent venue" is inapplicable. n6

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.47 (Matthew Bender 3d ed.).

(n2)Footnote 1. *42 U.S.C. § 2000e-5(f)(3)*; *see Johnson v. Washington Gas Light Co., 89 F. Supp. 2d 45, 47 (D.D.C. 2000)* .

(n3)Footnote 2. *See Archuleta v. Sullivan, 725 F. Supp. 602, 604-605 (D.D.C. 1989)* .

(n4)Footnote 3. *Johnson v. Payless Drug Stores N.W., Inc., 950 F.2d 586, 587-588 (9th Cir. 1991)* , *cert. denied, 505 U.S. 1225 (1991)* .

(n5)Footnote 4. *See Archuleta v. Sullivan, 725 F. Supp. 602, 604-605 (D.D.C. 1989)* .

(n6)Footnote 5. *Johnson v. Washington Gas Light Co., 89 F. Supp. 2d 45, 47 (D.D.C. 2000)* ; *Rebar v. Marsh, 959 F.2d 216, 217-219 (11th Cir. 1992)* .

(n7)Footnote 6. *Johnson v. Washington Gas Light Co., 89 F. Supp. 2d 45, 47 (D.D.C. 2000)* ; *Hayes v. RCA Serv. Co., 546 F. Supp. 661, 664-665 (D.D.C. 1982)* ; *see § 7.06[1]* (discussion of pendant venue).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.48

§ 7.48 Intellectual Property Suitsn*

[1] Copyright

If a plaintiff institutes a civil action or proceeding arising under any federal statute relating to copyrights or exclusive rights in mask works or designs the suit may be instituted in the district in which the defendant or the defendant's agent resides or may be found. n1 For purposes of venue, an individual defendant "resides" in the district of his or her domicile. n2 A corporate defendant, under Section 1391(c), resides in any district where it is subject to personal jurisdiction at the time the action is commenced. n3 which applies under the copyright special venue statute. n4 For a discussion of corporate residence as defined by Section 1391(c), see *§ 7.22[3]* For venue purposes, an individual or corporate defendant is "found" where it is subject to personal jurisdiction, including jurisdiction under applicable state long-arm statutes. n5 Some courts have extended this rule by holding that for venue purposes a defendant is "found" in any district in which jurisdiction may be exercised under minimum contacts standards, even though the state long-arm statute does not extend to the full constitutional limits. n6 Under either the "resides" or "may be found" language, the issue is essentially the same: whether the defendant is subject to personal jurisdiction in the district. Thisdetermination for venue purposes differs from the usual jurisdictional analysis in that in multidistrict states it must be made with respect to the district, not with respect to the state as a whole. n7 To determine where a defendant "may be found," a court must focus on contacts with the particular federal judicial district in which the copyright action has been filed. For venue purposes, it is irrelevant that the individual defendant would be subject to personal jurisdiction under the state long-arm statute by virtue of contacts with another district in that state. n8

[2] Patent

Venue for a patent suit depends on the nature of the suit. Patent infringement actions are governed by Section 1400(b), which provides that any civil action for patent infringement may be brought in the district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. n1 This special venue statute applies only to infringement actions, not to other actions arising under the patent laws or to related actions under state law. n2 Section 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and not the general venue statute. n3

An individual defendant is considered to reside for venue purposes in the district in which he or she is domiciled. n4 A

corporate defendant resides in any district where it is subject to personal jurisdiction at the time the action is commenced. n5 It has been held that this definition of "where the defendant resides" in § 1400(b) must be determined according to the guidelines set out in Section 1391(c), which provides that a corporate defendant shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Therefore, a district court should find that venue is proper if it finds it properly maintains personal jurisdiction over a corporate defendant in a patent infringement suit. n6

Only actions for patent infringement are governed by Section 1400(b). A declaratory judgment action alleging that a patent is invalid is governed by the general venue statute, not by Section 1400(b), even though it is the mirror-image of a patent infringement suit and involves the same questions of law and fact. n7 Similarly, a patent interference suit is governed by the general venue statute. Such an action is brought to determine the priority of invention with respect to conflicting patents or applications and may be brought against the real parties in interest. n8 If there are defendants residing in districts not embraced within the same state, or an adverse party resides in a foreign country, the district court for the District of Columbia has jurisdiction and may issue summons against the adverse parties directed to the marshal of any district in which any adverse party resides. Summons against adverse parties residing in foreign countries may be served by publication or otherwise as the court directs. n9

Finally, if an applicant for a patent is dissatisfied with the decision of the Board of Patent Appeals and Interferences, the applicant may bring a civil action against the Commissioner of Patents in the district court for the District of Columbia. n10

[3] Trademark

The district courts have original jurisdiction, concurrent with the state courts, over trademark cases arising under federal law. n1 There is no special venue statute for trademark cases tried in the federal courts. Therefore, the general venue statute applies. n2 Because a trademark suit is a federal question action, this means that in a trademark suit venue is proper in a judicial district in which: n3 (1) any defendant resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) the defendants are subject to personal jurisdiction, if there is no other district in which the action could be brought. For example, pursuant to Section 1391(b)(3), it was held that venue for a trademark infringement suit arising out of the defendant's Internet domain name was proper in the Central District of California, when the plaintiff's principal place of business was located in that district. n4 The general provisions of Section 1391(c) (regarding residence of corporations) n5 and 1391(d) (regarding venue involving aliens) n6 are also applicable to trademark suits. In a suit by a trademark owner against a cybersquatter alleging infringement and dilution, for example, venue was properunder section 1391(d) in any district because the defendant was an alien, regardless of the fact that the defendant had a residence in New Jersey. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueCopyright LawCivil Infringement ActionsJurisdiction & VenueVenuePatent LawJurisdiction & ReviewPersonal Jurisdiction & VenueGeneral OverviewTrademark LawInfringement ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1400(a).*

(n3)Footnote 2. *See § 7.22[3].*

(n4)Footnote 3. *28 U.S.C. 1391(c).*

(n5)Footnote 4. *VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1584 (Fed. Cir. 1990) , cert. denied, 499 U.S. 922 (1990) .*

(n6)Footnote 5. *PKWare, Inc. v. Meade & Ascent Solutions, 79 F. Supp. 2d 1007, 1017 (E.D. Wis. 2000) .*

(n7)Footnote 6. *Bicicletas Windsor, S.A. v. Bicycle Corp. of America, 783 F. Supp. 781, 785-786 (S.D.N.Y. 1992) .*

(n8)Footnote 7. *28 U.S.C. § 1391(c); 28 U.S.C. § 1400(a).*

(n9)Footnote 8. *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., 8 F.3d 441, 445 (7th Cir. 1993)* (citing **Moore's Federal Practice**).

(n10)Footnote 1. *28 U.S.C. § 1400(b).*

(n11)Footnote 2. *Koratron Co. v. Deering Milliken, Inc., 418 F.2d 1314, 1315-1316 (9th Cir. 1969) , cert. denied, 398 U.S. 909 (1970) .*

(n12)Footnote 3. *Nutrition Physiology Corp. v. Enviros Ltd., 87 F. Supp. 2d 648, 652 (N.D. Tex. 2000) .*

(n13)Footnote 4. *See § 7.22[2].*

(n14)Footnote 5. *28 U.S.C. § 1391(c).*

(n15)Footnote 6. *Nutrition Physiology Corp. v. Enviros Ltd., 87 F. Supp. 2d 648, 652 (N.D. Tex. 2000) .*

(n16)Footnote 7. *Wells' Dairy v. Estate of Richardson, 89 F. Supp. 2d 1042, 1053 (N.D. Iowa 2000) .*

(n17)Footnote 8. *35 U.S.C. §§ 146.*

(n18)Footnote 9. *35 U.S.C. §§ 146, 291; see Minnesota Mining and Mfg. Co. v. Chavannes Indus. Synthetics, Inc., 128 F. Supp. 659, 662 (D. Del. 1955) .*

(n19)Footnote 10. *35 U.S.C. § 145; see Bradley v. United States Dep't of Commerce, Patent & Trademark Office, 598 F. Supp. 38, 39-40, 225 U.S.P.Q. 1071 (N.D. Tex. 1984) , aff'd on other grounds, 750 F.2d 66 (5th Cir. 1984) .*

(n20)Footnote 1. *28 U.S.C. § 1338.*

(n21)Footnote 2. *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, L.P., 34 F.3d 410, 412 (7th Cir. 1994) (28 U.S.C. § 1391* applied in case brought under trademark statutes, *15 U.S.C. 1051 et seq.*).

(n22)Footnote 3. *28 U.S.C. § 1391(b).*

(n23)Footnote 4. *Nissan Motor Co., Ltd. v. Nissan Computer Corporation, 89 F. Supp. 2d 1154, 1161-1162 (C.D. Cal. 2000) .*

(n24)Footnote 5. *See 28 U.S.C. § 1391(c).*

(n25)Footnote 6. *28 U.S.C. § 1391(d).*

(n26)Footnote 7. *McRae's, Inc. v. Hussain, 105 F. Supp. 2d 594, 594 (S.D. Miss. 2000) .*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.49

§ 7.49 Suits in Interpleadern*

Interpleader is a process in which a nominal plaintiff, who may be subject to multiple liability with respect to two or more claimants to the same money or property, joins the claimants in a single suit, deposits the money or property with the court, and allows the claimants to determine their claims with respect to one another. Interpleader is available in the federal courts by two processes: a procedure specified by statute n1 and a procedure by Rule 22. n2 A special venue provision governs interpleader under the statute, providing that the statutory interpleader action may be brought in the judicial district in which one or more of the claimants reside. n3 Residence for purposes of venue statutes is discussed in *§ 7.22*.

Because under Section 1391(c) corporate defendants are deemed to reside where they are subject to personal jurisdiction, and Section 2361 provides for nationwide service of process, it appears that interpleader involving a corporate stakeholder may be filed in any district. n4

In contrast to statutory interpleader, it has been held that the special interpleader venue provision does not apply to Rule 22 interpleader, which is therefore governed by the general venue statute. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultiparty LitigationCivil ProcedureVenueSpecial VenueCivil ProcedurePartiesInterpleadersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.36 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* 18 U.S.C. § 1335.

(n3)Footnote 2. *See Fed. R. Civ. P. 22.*

(n4)Footnote 3. *28 U.S.C. § 1397.*

(n5)Footnote 4. *28 U.S.C. § 1391(c)*; *28 U.S.C. § 2361*.

(n6)Footnote 5. *Lummis v. White, 629 F.2d 397, 400-401 (5th Cir. 1980)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.50

§ 7.50 Civil Suit Involving Order of Interstate Commerce Commissionn*

The Interstate Commerce Commission is an agency of the United States government that may make various orders to regulate interstate commerce, as provided in the Interstate Commerce Act. n1 Unless otherwise provided by statute, the district courts have jurisdiction over any civil action to enforce an order of the Interstate Commerce Commission and to enjoin or suspend any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures. n2 Venue in such a civil action is proper only in a judicial district in which any of the parties bringing the action resides or has its principal office. n3 In the absence of a statute to the contrary, a corporation resides for venue purposes where it is incorporated. n4

When a district court refers a question or issue to the Interstate Commerce Commission for determination, the referring court has exclusive jurisdiction over a civil action to enforce, enjoin, set aside, annul, or suspend any order arising out of the referral, n5 and venue of such an action is proper only in the court that referred the question or issue. n6 Other provisions of the Interstate Commerce Act contain their own venue provisions. n7 Because section 1398 applies "except as otherwise provided by law," it does not apply to actions suits brought pursuant to any section that contains its own venue provision. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueTransportation LawInterstate CommerceGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.37 (Matthew Bender 3d ed.).

(n2)Footnote 1. *49 U.S.C. § 10301 et seq.*

(n3)Footnote 2. *28 U.S.C. § 1336(a).*

(n4)Footnote 3. *28 U.S.C. § 1398(a).*

(n5)Footnote 4. *28 U.S.C. § 1391(c).*

(n6)Footnote 5. *28 U.S.C. § 1336(b).*

(n7)Footnote 6. *28 U.S.C. § 1398(b).*

(n8)Footnote 7. *See, e.g., 49 U.S.C. §§ 11705(d)(1)* (venue of action to enforce Commission order requiring payment of damages by common carrier).

(n9)Footnote 8. *See Interstate Commerce Comm. v. Atlantic Coast Line R. Co., 383 U.S. 576, 583, 86 S. Ct. 1000, 16 L. Ed. 2d 109 (1966)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.51

§ 7.51 Stockholder Derivative Suitsn*

A civil action by a stockholder on behalf of the stockholder's corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants. n1 When, for example, an action was brought in the federal district court in Michigan by three directors and a minority stockholder of a Ohio corporation against five directors and the corporation for a declaration that resolutions adopted at a meeting of the board of directors were void, the suit constituted a stockholder's derivative suit, and venue was proper in Michigan under Section 1401. n2 Section 1401 deals strictly with venue and does not enlarge the subject matter jurisdiction of a district court. Consequently, the statute is of no import unless requisite diversity of citizenship or federal question jurisdiction is found first. n3 Derivative actions on behalf of a corporation are discussed in Ch. 14A, *Class Actions; Derivative Actions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsProceduresCivil ProcedureVenueCorporationsCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.40 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1401.*

(n3)Footnote 2. *Lapides v. Doner, 248 F. Supp. 883, 885 (E.D. Mich. 1965)* .

(n4)Footnote 3. *Van Gelder v. Taylor, 621 F. Supp. 613, 617 (N.D. Ill. 1985)* (phrase "may be brought in any district," as used in Section 1401 has venue rather than jurisdictional connotation).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.52

§ 7.52 Suits Against United Statesn*

[1] Venue Depends on Nature of Claim

In suits against the United States, the venue of the suit generally depends on the nature of the claim. n1 The most common types of suits against the Unitedstates are discussed in [2] and [3], *below*. It should be noted that suits against the United States government are limited by the doctrine of sovereign immunity and may be brought only when the government has expressly waived its sovereign immunity. n2 It should also be noted that the United States, like other defendants, may waive improper venue. n3 For a discussion of tax suits against the United States, see *§ 7.53*. For a discussion of suits against the United States regarding real property, see *§ 7.54*.

[2] Contracts

The district courts have jurisdiction to hear contract claims against the United States, n1 and such an action may be brought only in the judicial district where the plaintiff resides. n2 Generally, a corporate plaintiff resides in the district in which it is incorporated, and an individual plaintiff resides in the district where the individual is domiciled. n3 Courts have held that in actions with multiple plaintiffs, venue must be satisfied with respect to each plaintiff. Thus, plaintiffs residing in different districts must bring separate actions in the districts in which they reside or, if they wish to combine their claims, bring the action in the Court of Federal Claims. n4

[3] Torts

The federal courts are granted jurisdiction to decide tort claims against the United States under the Federal Tort Claims Act. Under the Act, the district courts have exclusive jurisdiction over civil actions or claims against the United States for money damages for injury or loss of property, personal injury, or death, caused by the negligent or wrongful act or omission of any government employee while acting within the scope of office or employment, under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. n1 Venue under the Act is proper only in the district where the plaintiff resides or where the act or omission complained of occurred. n2 Generally, a corporate plaintiff resides in the district in which it is incorporated, and an individual plaintiff resides in the district where the individual is domiciled. n3 The district where "the act or omission complained of occurred" is the district in which the act or omission constituting negligence

allegedly took place, not the district in which the resulting injury occurred. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenuePublic OfficialsCivil ProcedureVenueSpecial VenueGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice*, § 110.35 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1402* (subsections list venue dependent on subject matter).

(n3)Footnote 2. *See Harbert Int'l v. James, 157 F.3d 1271, 1277 (11th Cir. 1998)* .

(n4)Footnote 3. *Upchurch v. Piper Aircraft Corp., 736 F.2d 439, 440 (8th Cir. 1984)* (United States waived venue objection in action under tort claims act by failing to object).

(n5)Footnote 1. *28 U.S.C. § 1346(a)(2)*.

(n6)Footnote 2. *28 U.S.C. § 1402(a)(1)*.

(n7)Footnote 3. *See § 7.22[2], [3]*.

(n8)Footnote 4. *Davila v. Weinberger, 600 F. Supp. 599, 603-604 (D.D.C. 1985)* .

(n9)Footnote 1. *28 U.S.C. 1346(b)*.

(n10)Footnote 2. *28 U.S.C. § 1402(b)*.

(n11)Footnote 3. *See § 7.22[2], [3]*.

(n12)Footnote 4. *Richards v. United States, 369 U.S. 1, 10, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.53

§ 7.53 Tax Suitsn*

Venue in tax cases depends on the type of tax suit involved. Venue in suits by the United States to collect internal revenue taxes may be brought in the district (1) where the tax liability accrues, (2) where the taxpayer resides, or (3) where the return was filed. n1 This venue provision has been drafted broadly to ensure that there will be a convenient forum in which the IRS may bring suit. n2 The first two venue possibilities are substantially the same as those available under the general venue statute. n3 The third choice provides an easily identifiable alternative in cases in which the liability could have arisen in several districts. This venue statute does not proscribe a tax collection action in other than the enumerated districts when a special statute provides an independent basis for venue. n4

A suit by a taxpayer for a refund n5 may be brought in the judicial district where the plaintiff resides if the plaintiff is an individual. n6 An individual resides in the district where he or she is domiciled. n7 A corporation may bring an action for a tax refund under Section 1346(a)(1) in the district in which the principal place of business or principal office or agency of the corporation is located. If the corporation has no principal place of business or principal office or agency in any judicial district, the action may be brought in the judicial district in which the office is located to which the tax return was made. If no return was made, the action may be brought in the judicial district for the District of Columbia. n8

For suits by a taxpayer against the United States to challenge a tax levy, n9 venue is proper only in the district where the property is situated at the time of levy or, if no levy is made, in the judicial district in which the event occurred that gave rise to the cause of action. n10 For challenges to jeopardy levies orassessments, the action may be commenced only in the judicial district described in Section 1402(a)(1) or (2). n11 Thus, venue for such challenges is controlled by Section 1402(a) rather than Section 1402(c), and is the same as for tax refund cases, as discussed above. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueGovernmentsFederal GovernmentClaims By & AgainstTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Jurisdiction & Venue

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* §§ 110.35, 110.41 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1396.*

(n3)Footnote 2. *Dubin v. United States, 380 F.2d 813, 816 (5th Cir. 1967)* .

(n4)Footnote 3. *Cf. 28 U.S.C. § 1391(b).*

(n5)Footnote 4. *Caleshu v. United States, 570 F.2d 711, 713 (8th Cir. 1978)* .

(n6)Footnote 5. *See 28 U.S.C. § 1346(a)(1)* (suit for refund is suit for recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws).

(n7)Footnote 6. *28 U.S.C. § 1402(a).*

(n8)Footnote 7. *Shaw v. United States, 422 F. Supp. 339, 340-342 (S.D.N.Y. 1976)* .

(n9)Footnote 8. *28 U.S.C. § 1402(a).*

(n10)Footnote 9. *28 U.S.C. § 1346(e)*; *see 26 U.S.C. § 7426* (civil actions by persons other than taxpayer challenging tax levy).

(n11)Footnote 10. *28 U.S.C. § 1402(c).*

(n12)Footnote 11. 28 U.S.C. § 7429(e).

(n13)Footnote 12. *Alegria v. United States, 945 F.2d 1523, 1525-1526 (11th Cir. 1991)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.54

§ 7.54 Property Suits Involving Government as Partyn*

[1] Partition Suits

The district courts have original jurisdiction over a civil action by a tenant in common or joint tenant for the partition of real property when the United States is one of the tenants in common or joint tenants. n1 Venue for such an action is proper only in the judicial district where the real property is located. If the real property is located in different districts in the same state, venue is proper in any of those districts. n2

[2] Quiet Title Suits

A civil action to quiet title to an estate or interest in real property in which an interest is claimed by the United States n1 must be brought in the district court of the district where the property is located or, if located in different districts, in any of those districts. n2

[3] Condemnation Suits

The district courts have original jurisdiction over proceedings to condemn real estate for the use of the United States or its departments or agencies, n1 and venue is proper in such suits where the land is located or, if located in different districts in the same state, in any of those districts. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueGovernmentsFederal GovernmentClaims By & AgainstReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* §§ 110.38, 110.41, 110.42 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1347*.

(n3)Footnote 2. *28 U.S.C. § 1399*.

(n4)Footnote 1. *28 U.S.C. § 2409a*.

(n5)Footnote 2. *28 U.S.C. § 1402(d)*.

(n6)Footnote 1. *28 U.S.C. § 1358*.

(n7)Footnote 2. *28 U.S.C. § 1403*; *United States v. 450 Acres of Land, 220 F.2d 353, 356 (5th Cir. 1955)* , *cert. denied, 350 U.S. 826 (1955)* (condemnation proceeding was properly brought in Georgia when land involved was located in Georgia); *Minnesota v. United States, 125 F.2d 636, 639 (8th Cir. 1942)* (statute applied in condemnation proceeding against state).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.55

§ 7.55 Suits Against United States Officials in Their Official Capacityn*

[1] Special Venue Statute Applicable to Suits Against United States Employees Acting in their Official Capacity

A special venue statute applies to civil actions in which a defendant is an officer or employee of the United States or of a U.S. agency acting in an official capacity or under color of legal authority, or is an agency of the United States, or is the United States itself. n1 The purpose of this provision is to make it easier for persons claiming injury because of the acts or omissions of a federal officer to file actions seeking mandamus or injunctive relief to compel the official to perform a legal duty. n2 Therefore, it has been held that this venue provision is not applicable in suits for money damages against a present or former federal officer or employee. n3 This special venue provision is designed to facilitate review by the federal courts of administrative actions. Congress intended this provision to apply solely to the executive branch of the federal government. It does not provide a basis for venue or personal jurisdiction against members of Congress or congressional employees n4 or against the federal judiciary or judicial employees. n5

[2] Proper Venue

A civil action described in [1], *above*, may be brought in any of the following places:

1. A district in which a defendant in the action resides. This provision is different from the general venue provision because it makes venue appropriate in the district where "a defendant" resides, whereas, Section 1391(a)(1) and (b)(1) make venue proper only in the district in which a defendant resides if all the defendants reside in the same state. For purposes of this provision, a federal agency sued in its own name is considered to be a resident of the District of Columbia only. Congress did not intend an expansive definition of residence that would permit suit anywhere the agency might have an office. n1

2. A district where a substantial part of the events or omissions occurred that form the basis of the claim. For discussion of issues involved in determining where a substantial part of the events or omissions giving rise to the claim occurred, see *§ 7.23*.

3. If property is the subject of the action, a district in which a substantial part of the property is situated. n2 Originally,

this portion of the statute applied when property was "involved" in the action, but the provision was amended to apply only when property "is the subject of the action," thus explicitly narrowing the scope of the provision. n3

4. If no real property is involved in the action, a district in which the plaintiff resides. n4 The residence of a corporate plaintiff for purposes of this section is restricted to the place of incorporation. The broad definition of corporate residence provided by Section 1391(c) explicitly applies only to defendant corporations and not plaintiff corporations. n5 Thus, courts have held that the traditional definition of corporate residence (that is, a corporation's residence was only the place of incorporation) applies to this special venue provision, rather than Section 1391(c). n6 An individual defendant resides in his or her place of domicile. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenuePublic OfficialsCivil ProcedureVenueSpecial VenueGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(e).*

(n3)Footnote 2. *Stafford v. Briggs, 444 U.S. 527, 534-535, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980) .*

(n4)Footnote 3. *Holloway v. Gunnell, 685 F.2d 150, 153 n.4 (5th Cir. 1982) .*

(n5)Footnote 4. *Liberation News Serv. v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970) .*

(n6)Footnote 5. *Duplantier v. United States, 606 F.2d 654, 663-664 (5th Cir. 1979) , cert. denied, 449 U.S. 1076 (1981) .*

(n7)Footnote 1. *Reuben H. Donnelley Corp. v. Federal Trade Commission, 580 F.2d 264, 267 (7th Cir. 1978) .*

(n8)Footnote 2. *28 U.S.C. § 1391(e).*

(n9)Footnote 3. *See 28 U.S.C. § 1391(e).*

(n10)Footnote 4. *28 U.S.C. § 1391(e).*

(n11)Footnote 5. *See 28 U.S.C. § 1391(c).*

(n12)Footnote 6. *Reuben H. Donnelley Corp. v. Federal Trade Commission, 580 F.2d 264, 269-270 (7th Cir. 1978) .*

(n13)Footnote 7. *See § 7.22[2].*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.56

§ 7.56 Suits Against Foreign Statesn*

[1] Special Venue Statute Applicable to Suits Against Foreign States

A special venue statute applies to civil suits against a "foreign state," n1 which includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. n2 It must be remembered that as a matter of reciprocity, several federal statutes grant immunity from suit to foreign states. Generally, a foreign state is immune from the jurisdiction of United States courts except under certain conditions set out by statute. n3 For example, the foreign state is not immune when the suit is based on a commercial activity carried on in the United States by the foreign state, or on an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, and that act causes a direct effect in the United States; n4 or when a suit is based on rights in property taken in violation of international law, and that property or any property exchanged for that property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state. n5

[2] Proper Venue

A civil action described in [1], *above* may be brought in any of the following places:

1. A district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated. n1 The language "in which a substantial part of the events or omissions giving rise to the claim occurred" is identical to that used in the general venue statute, Section 1391(a) and (b). n2 This concept is discussed further in § 7.23.

2. A district in which a vessel or cargo of a foreign state is situated, n3 if the claim is asserted under a statute which allows a suit in admiralty brought to enforce a maritime lien against a vessel or cargo of a foreign state, when the maritime lien is based on a commercial activity of the foreign state. n4

3. When a suit is against an agency or instrumentality of a foreign state, a district in which an agency or instrumentality is licensed to do business or is doing business. n5 An "agency or instrumentality of a foreign state" is any entity that (1) is a separate legal person, corporate or otherwise, and (2) is an organ of a foreign state or political subdivision, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3)

is neither a citizen of a U.S. state (that is, is not incorporated in and does not have its principal place of business in any U.S. state), nor created under the laws of any third country. n6

4. The United States District Court for the District of Columbia, when the suit is against a foreign state or political subdivision of a foreign state, rather than against an agency or instrumentality of a foreign state. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 110.32 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1391(e).*

(n3)Footnote 2. *See 28 U.S.C. § 1603(a),(b).*

(n4)Footnote 3. *See 28 U.S.C. §§ 1602-1605.*

(n5)Footnote 4. *See 28 U.S.C. § 1605(a)(2).*

(n6)Footnote 5. *See 28 U.S.C. § 1605(a)(3).*

(n7)Footnote 1. *28 U.S.C. § 1391(f)(1).*

(n8)Footnote 2. *28 U.S.C. § 1391(f)(1).*

(n9)Footnote 3. *28 U.S.C. § 1391(f)(2).*

(n10)Footnote 4. *See 28 U.S.C. § 1605(b).*

(n11)Footnote 5. *28 U.S.C. § 1391(f)(3).*

(n12)Footnote 6. *28 U.S.C. § 1603(a),(b).*

(n13)Footnote 7. *28 U.S.C. § 1391(f)(4).*

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART III. DETERMINATION OF VENUE UNDER SPECIFIC VENUE STATUTES

1-7 Moore's Manual--Federal Practice and Procedure §§ 7.57through 7.69

[Reserved]

§§ 7.57[Reserved]

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PART II Jurisdiction; Venue; Removal
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1-7 Moore's Manual--Federal Practice and Procedure § 7.70

§ 7.70 Types of Transfers or Dismissal Available When Venue is Inconvenient or Impropern*

The courts and parties have several procedural devices to use to rectify the situation when the original venue of an action is inconvenient or improper:

1. Statutory transfer due to inconvenience. The court may transfer an action based on the statutory convenience transfer statute n1 when a plaintiff has chosen to file a civil action in a federal district court in which venue is proper but which is inconvenient to some or all of the parties and witnesses involved. For example, the plaintiff may choose to file an action in a proper but inconvenient federal district court because he or she believes that the result that would be obtained there would be more favorable for choice of law reasons or other considerations. The liberalized provisions in the general venue statute, and even under special venue statutes, usually allow the plaintiff several venue choices. Thus, Congress has provided a statutory convenience-based transfer procedure to use when the plaintiff has chosen an inconvenient venue. n2 Rather than dismiss the action, which would have been the remedy under the common-law doctrine of forum non conveniens, the district court may under the statute grant a motion to transfer the action from the district court in which the action was filed to one in which it might have been brought in the first place. n3 For a discussion of statutory transfer due to inconvenience, see Part IV(B), § 7.80 et seq.

2. Statutory transfer or dismissal because of improper original venue. When an action is brought in a district court in which venue is improper, the court may either dismiss the action or transfer it to a federal district or division in which it could have been brought. n4 The appropriate cure when a plaintiff files in a district court in which venue is improper is within the district court's discretion. n5 For a discussion of statutory transfer due to improper original venue, see Part IV(C), § 7.100 et seq.

3. Statutory transfer because of lack of subject matter jurisdiction. If a plaintiff files in a federal district court that lacks subject matter jurisdiction because a federal statute vests exclusive subject matter jurisdiction over a particular category of cases or appeals in a different federal court, the court may transfer the case to the proper federal court. n6 For a discussion of miscellaneous statutory transfers, see Part IV(D), § 7.120 et seq.

4. Dismissal under the common-law doctrine of forum non conveniens when a forum is available in a foreign venue.

Because of the scope of statutory venue, this doctrine is now applicable only when an alternative forum is located in a foreign sovereign. n7 Under the doctrine, a district court may decline to exercise its jurisdiction, even though the court has the required jurisdiction and proper venue, when the convenience of the parties and the court and the interests of justice indicate that the action should be tried in the foreign forum. n8 Dismissal on forum non conveniens grounds has the practical effect of requiring the plaintiff to file the complaint in a more convenient forum elsewhere. n9 For a discussion of the common-law doctrine of forum non conveniens, see Part IV(E), § 7.140 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedureVenueFederal Venue TransfersJurisdictional TransfersCivil ProcedureVenueForum Non Conveniens

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(a).*

(n3)Footnote 2. *28 U.S.C. § 1404(a)*; *see Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-880 (3d Cir. 1995)* (interests considered in decision whether to allow transfer).

(n4)Footnote 3. *See American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* (if another federal forum is available, dismissal rather than transfer would be improper under Section 1404(a)).

(n5)Footnote 4. *28 U.S.C. § 1406(a).*

(n6)Footnote 5. *Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582, 594 (E.D. Va. 1992)* (transfer in interest of justice to avoid cost and delay that would result from dismissal and refiling).

(n7)Footnote 6. *28 U.S.C. § 1631.*

(n8)Footnote 7. *American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 986 n.2, 127 L. Ed. 2d 285 (1994)* ; *see 28 U.S.C. § 1404(a).*

(n9)Footnote 8. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n10)Footnote 9. *Howe v. Goldcorp. Investments, Ltd., 946 F.2d 944, 947 (1st Cir. 1991)* , *cert. denied, 502 U.S. 1095 (1992)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.71

§ 7.71 Determination of Whether Venue is Inconvenient or Improper Controls Applicability of Statuten*

[1] Applicability of Statute Depends on Propriety of Original Venue

When a party requests a transfer, the court must determine whether venue initially was proper. Although both transfer statutes were broadly designed to allow transfer instead of dismissal, Section 1406(a) provides for transfer from a forum in which venue is wrongly or improperly laid, while Section 1404(a) operates on the premise that the plaintiff has properly exercised the plaintiff's venue privilege. n1

[2] Court's Determination of Whether Venue is Inconvenient or Improper

Section 1404(a), the convenience transfer statute, applies if venue is proper in the original court, n1 while Section 1406(a), the improper venue transfer statute, applies if a district in which the case was filed lays venue in the wrong division or district. n2 The inquiry as to which statute properly applies is simple if venue is technically improper--in other words, if the district in which the plaintiff brought the action does not satisfy the requirements of the general venue statute n3 or a special venue statute if one is applicable. n4 In this situation, Section 1406(a) alone governs, and the court must either dismiss or transfer, if transfer is in the interest of justice. n5 Some courts, however, have held that venue is also "wrong" under Section 1406(a), and therefore section 1404(a) convenience transfer is inapplicable, if a lack of personal jurisdiction over the defendant would prevent the action from proceeding further in that court n6 or if there are other procedural obstacles to the case proceeding in that court. n7 For example, some courts have held that violation of a statute of limitation may make venue "wrong" in a particular court and, therefore, make Section 1406(a) the only proper vehicle for transfer. n8 Additionally, some courts have held that if a plaintiff brings an action in a venue other than the one designated in a valid forum selection clause, venue is "wrong," even if it complies with the requirements of the applicable venue statute. Therefore, these courts use Section 1406(a) analysis to transfer such an action; other courts rely on Section 1404(a), on the ground that only the applicable venue statute, and not a forum selection clause, makes venue proper or not. n9

[3] Importance of Distinction Between Two Primary Types of Statutory Venue Transfer

Depending on whether the court uses Section 1404(a), n1 the convenience transfer statute, or Section 1406(a), the

improper venue transfer statute, n2 many procedures and standards controlling the transfer may differ, including the following important differences:

1. If a transfer is denied under Section 1404(a) (convenience transfer), the court may not generally dismiss the action but must retain the action except in rare circumstances. n3 On the other hand, one of the characteristics of an action under Section 1406(a) (improper venue transfer) is that the court may freely dismiss the action if it denies transfer. n4

2. After the case is transferred, the substantive law that the transferee court will apply may vary depending on which of the two statutes is used to effect the transfer. In general in diversity cases, if the court relies on Section 1404(a) to transfer the action, the transferee court must apply the substantive law, including the choice of law rules, that the transferor court would have applied had the action remained there. n5 On the other hand, if transfer is pursuant to Section 1406(a), the transferee court must apply the law it would have applied had the action been brought there initially. n6

3. The two statutes have different results regarding waiver of the right to move for transfer. Generally, waiver of an objection to improper venue does not preclude a Section 1404(a) motion to transfer for the convenience of the parties and witnesses. n7 On the other hand, a defendant waives the right to obtain a transfer or dismissal of an action for improper venue under Section 1406(a) unless he or she preserves this defense by making a timely and sufficient objection to improper venue and by avoiding conduct that might be considered an implicit waiver. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Van Dusen v. Barrack, 376 U.S. 612, 634, 84 S. Ct. 805, 818, 11 L. Ed. 2d 945 (1964)* ; *Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995)* (§ 1404(a) provides for transfer of case where both original and requested venue are proper; by contrast, § 1406(a) applies where original venue is improper and provides for either transfer or dismissal); *LaVay Corp. v. Dominion Federal Sav. & Loan Assn., 830 F.2d 522, 526 (4th Cir. 1987)* , *cert. denied, 484 U.S. 1065 (1988)* (because venue was improper in transferor court, transfer analysis was required under section 1406(a)).

(n3)Footnote 1. *See 28 U.S.C. § 1404(a).*

(n4)Footnote 2. *See 28 U.S.C. § 1406(a).*

(n5)Footnote 3. *See 28 U.S.C. § 1391.*

(n6)Footnote 4. *See 28 U.S.C. § 1400(a)* (special venue statute for copyright actions). For a complete list of venue statutes, see 17 *Moore's Federal Practice, § 110.60* (Matthew Bender 3d ed.).

(n7)Footnote 5. *Tel-Phonic Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1141-1142, 1992-2 Trade Cas. (CCH) P70014 (5th Cir. 1992)* ; *see 28 U.S.C. § 1406(a).*

(n8)Footnote 6. *Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993)* .

(n9)Footnote 7. *Crase v. Astroworld, Inc., 941 F.2d 265, 267 n.5 (5th Cir. 1991)* .

(n10)Footnote 8. *Porter v. Groat, 840 F.2d 255, 258 (4th Cir. 1988)* .

(n11)Footnote 9. *See* generally *Hugel v. Corp. of Lloyd's, 999 F.2d 206, 207 (7th Cir. 1993)* .

(n12)Footnote 1. *See 28 U.S.C. § 1404(a).*

(n13)Footnote 2. *See* [1] and [2], *above.*

(n14)Footnote 3. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995)* .

(n15)Footnote 4. *First of Michigan Corp. v. Bramlet, 141 F.3d 260, 262 (6th Cir.1998)* (decision to dismiss or transfer case under Section 1406(a) is within district court's sound discretion); *cf. In re Hall, Bayoutree Associates, Ltd., 939 F.2d 802, 805-806 (9th Cir. 1991)* (citing **Moore's Federal Practice,** court held that district court properly dismissed rather than transfer when plaintiff filed in forum lacking proper venue for bad faith reasons).

(n16)Footnote 5. *Ferens v. John Deere Co., 494 U.S. 516, 523, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

(n17)Footnote 6. *Tel-Phonic Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1141, 1992-2 Trade Cas. (CCH) P70014 (5th Cir. 1992)* .

(n18)Footnote 7. *Haskel v. FPR Registry, Inc., 862 F. Supp. 909, 915 (E.D.N.Y. 1994)* (because venue was not proper, court denied motion under Section 1406(a) but still could consider convenience transfer under Section 1404(a)).

(n19)Footnote 8. *Broadcasting Co. v. Flair Broadcasting, 892 F.2d 372, 377 (4th Cir. 1989)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.72

§ 7.72 Procedure for Court on Motion to Transfern*

[1] Determination of Motion

Frequently, a defendant will file a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(1), and in the alternative, a motion to transfer the case to the another district under Section 1404(a), n1 and possibly an additionalalternative motion under Section 1406(a) for dismissal due to improper venue. n2 In such cases, the trial court should proceed, for organizational purposes, as follows: First, the court should decide whether venue is technically proper, that is, whether it satisfies the requirements of the applicable venue statute. If venue is technically improper, Section 1406(a) alone applies, and the court only has the option to dismiss, or if it is in the interest of justice, transfer the action, and may do so without deciding personal jurisdiction. n3 Although the Supreme Court has stated that personal jurisdiction should generally be decided before venue, venue should be decided first when there is a sound prudential reason for doing so, for example, when venue is technically and clearly improper. Such a finding pretermits an unnecessary decision on personal jurisdiction, and is especially useful if a determination of personal jurisdiction issue is difficult. n4 If venue is technically proper, then the court should determine whether or not it has personal jurisdiction, because that determination may dictate either which statute properly applies or, if transfer is permissible under either statute, such a determination may govern the applicable choice of law rules. n5

[2] Court Should State Basis of Determination

When a district court decides a motion regarding transfer or dismissal of an action on venue grounds under 1404(a) and 1406(a), the court should for reasons of judicial economy and facilitation of appellate review explicitly state which of the two statutes is the grounds for its decision. n0.1 If venue is technically improper, Section 1406(a) properly applies, and the inquiry ends there. If venue is technically proper, however, as part of the transfer decision it is advisable for the court to make a further determination as to whether it has personal jurisdiction over the defendant. Although the majority of courts agree that the power to transfer exists under both statutes whether or not the court has personal jurisdiction over the defendant and, therefore, courts may order a transfer without stating this determination, n1 it appears the proper procedure is for the court to articulate its position. Because the question of the substantive law to be applied following transfer often depends on these determinations, if the transferor court has failed to specify which statute it used to effect transfer and whether or not it had personal jurisdiction, the transferee court may be forced to

second-guess the statutory basis for the transfer, n2 or the appellate court must either remand the case so that the lower court may determine whether the transferor court had personal jurisdiction or not, n3 or must itself determine whether the action was transferred under Section 1404(a) or Section 1406(a)--it would be more efficient for the transferor court to make and state these determinations as part of the transfer decision. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Kalamazoo Realty Venture Ltd. Pshp. v. Blockbuster Entertainment Corp., 249 B.R. 879, 883 (N.D. Ill. 2000)* .

(n3)Footnote 2. *Jones v. GNC Franchising, Inc., 211 F.3d 495, 496-497 (9th Cir. 2000)* .

(n4)Footnote 3. *Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371-372 n.3 (2d Cir. 1966)* .

(n5)Footnote 4. *Leroy v. Great W. United Corp., 443 U.S. 173, 180-181, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* , *superseded by statute as stated in Globe Glass & Mirror Co. v. Brown, 888 F. Supp. 768 (E.D. La. 1995)* ; *see Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 488-489 (5th Cir. 2008)* .

(n6)Footnote 5. *See § 7.71.*

(n7)Footnote 0.1. *See Lafferty v. Gito St. Riel, 495 F.3d 72, 76-78 (3d Cir. 2007)* ; *Tel-Phonic Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1141 (5th Cir. 1992)* .

(n8)Footnote 1. *Tomchuck v. Union Trust Co., 875 F. Supp. 242, 243 (S.D.N.Y. 1995)* .

(n9)Footnote 2. *See Leader National Ins. Co. v. Shaw, 901 F. Supp. 316, 319 (W.D. Okla. 1995)* .

(n10)Footnote 3. *Muldoon v. Tropitone Furniture Co., 1 F.3d 964, 966-967 (9th Cir. 1993)* .

(n11)Footnote 4. *See Tel-Phonic Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1141, 1992-2 Trade Cas. (CCH) P70014 (5th Cir. 1992)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.73

§ 7.73 Distinction Between Statutory Convenience Transfer and Common-Law Forum Non Conveniens Dismissaln*

The common-law doctrine of dismissal on forum non conveniens grounds is no longer applicable to cases in federal court except when there is no federal forum to which the action may be transferred and the more convenient forum is in a foreign country, n1 primarily because the common-law doctrine has been substantially replaced by statutory transfer under Section 1404(a). n2 In contrast to the common-law doctrine of forum non conveniens, Section 1404(a) does not provide for the option of dismissal of an action and, instead, authorizes the court to transfer the action to a more convenient federal court. n3 Under the doctrine of forum non conveniens, the district court has the power to dismiss an action, even though the court had jurisdiction and venue, when the plaintiff's choice of forum would cause oppressiveness to a defendant out of all proportion to plaintiff's convenience or when it would impose a heavy burden on the court. n4 The court's dismissal of the action has the practical effect of requiring the plaintiff to refile the action in a more convenient forum in the foreign country. Rules governing subject-matter jurisdiction, personal jurisdiction, and venue, all limit a plaintiff's choice of forum. Furthermore, the rules for allocating burdens of proof usually make the plaintiff's case harder to prove than the defendant's, and the limits on personal jurisdiction often force a plaintiff to litigate on the defendant's home ground. All of these reasons justify the fact that the showing necessary to prove that the forum is indeed non conveniens is considerable greater than that required for obtaining a change of venue from one district court to another under Section 1404(a). n5

Thus, rather than dismissing and requiring a plaintiff to file in a foreign country,Section 1404(a) merely authorizes the district court to transfer the action to a more convenient federal district court forum. n6 Consequently, even though the factors to be considered in deciding whether to transfer an action under Section 1404(a) are generally the same as those previously used to determine whether to dismiss under the doctrine of forum non conveniens; n7 under Section 1404(a), the district court has broader discretion to allow a transfer than it has to dismiss under the forum non conveniens doctrine. Similarly, a lesser showing of inconvenience is required for transfer than is required for a dismissal. n8 Finally, the plaintiff's choice of forum is given less weight under Section 1404(a) than it receives under forum non conveniens analysis. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueForum Non Conveniens

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *American Dredging Co. v. Miller, 510 U.S. 443, 445 n.2, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* (federal doctrine of forum non conveniens has continuing application only in cases where alternative forum is abroad).

(n3)Footnote 2. *In re Joint Eastern & Southern Dist. Asbestos Lit., 22 F.3d 755, 761 (7th Cir. 1994)* ; *see 28 U.S.C. § 1404(a).*

(n4)Footnote 3. *28 U.S.C. § 1404(a).*

(n5)Footnote 4. Koster v. (*American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524, 67 S. Ct. 828, 91 L. Ed. 1067 (1947) .*

(n6)Footnote 5. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* ; *U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 752-753 (7th Cir. 2008)* (citing **Moore's Federal Practice**); *see § 7.140* et seq.

(n7)Footnote 6. *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986) .*

(n8)Footnote 7. *Bacik v. Peek, 888 F. Supp. 1405, 1414 n.3 (N.D. Ohio 1993)* (common-law forum non conveniens analysis provides guidance for determining *28 U.S.C. § 1404(a)* convenience transfers).

(n9)Footnote 8. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) .*

(n10)Footnote 9. *U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 752-753 (7th Cir. 2008)* (citing **Moore's Federal Practice**).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.74

§ 7.74 Transfer or Dismissal Involving Forum Selection Clausen*

A forum selection clause is a provision in a contract that specifies the forum in the event litigation arises regarding the contract. n1 A forum selection clause issue commonly arises when a plaintiff opposes a transfer motion made by the defendant on the ground that the forum in which the action is pending is more convenient, even though the plaintiff brought the action in a forum other that the forum designated in the forum selection clause. When the forum specified in the clause is a federal district, a motion to transfer to the specified district, pursuant to Section 1404(a), is a correct procedural vehicle for the defendant to enforce the forum selection clause. When the issue of a forum selection clause is raised in a motion to transfer, it has generally been held that the district court must utilize the balancing test in Section 1404(a), and the forum selection clause is considered as one factor among the other factors related to convenience specified in the transfer statute. n2

The issue of the forum selection clause also arises when a defendant moves to transfer to an allegedly more convenient federal forum where venue is proper, notwithstanding a forum selection clause that specifies the federal district in which the plaintiff brought the action. n3 Because initial venue is proper in such cases, a motion to transfer to the contractual forum under Section 1404(a), rather than Section 1406(a), is the proper motion to transfer and most courts hold that the defendant should file a motion to transfer and that the case is governed by the standard specified in Section 1404(a). n4

On the other hand, when the plaintiff brings an action in a federal court contrary to a clause specifying a particular state court, or a foreign court, as the exclusive forum, the majority of federal courts hold that the clause renders venue improper and a motion to dismiss for improper venue is the appropriate vehicle to enforce the clause, either under Section 1406(a) or Rule 12(b)(3). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 200, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)* .

(n3)Footnote 2. *Langley v. Prudential Mortg. Capital Co., LLC, 546 F.3d 365, 369-370 (6th Cir. 2008)* .

(n4)Footnote 3. *ZPC 2000, Inc. v. The SCA Group, Inc. 86 F. Supp. 2d 274, 278-279 (S.D.N.Y. 2000)* .

(n5)Footnote 4. *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* .

(n6)Footnote 5. *International Software Systems, Inc. v. Amplicon, Inc., 77 F.3d 112, 114 (5th Cir. 1996)* .

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1-7 Moore's Manual--Federal Practice and Procedure §§ 7.75through 7.79

[Reserved]

§§ 7.75[Reserved]

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PART II Jurisdiction; Venue; Removal
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B. STATUTORY TRANSFER TO NEW VENUE ON GROUNDS OF CONVENIENCE

1-7 Moore's Manual--Federal Practice and Procedure § 7.80

§ 7.80 Purpose of Statutory Transfer Based on Conveniencen*

The purpose of Section 1404(a), which authorizes a district court to transfer a case to any other district where venue is proper for the convenience of the parties and witnesses and the interests of justice, n1 is to avoid wasting time, energy and money and, in addition, to safeguard parties, witnesses and the public against avoidable inconvenience and expense. n2 Congress intended that Section 1404(a) rectify problems caused when the permissive and broad venue provisions in the federal acts result in inconvenient forums, by authorizing simple transfer of actions to a more convenient federal forum. n3

Section 1404(a) allows a district court where a claim for relief has been made to transfer the action to another district court if two basic requirements are met: n3.1

1. The moving party demonstrates the following: (1) that venue is proper in both transferor and transferee court; (2) that transfer is for convenience of parties and witnesses; and (3) that transfer is in interest of justice. n4

2. The proposed transferee district court must be one where the action could have been brought originally under the general or special venue statutes. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of Witnesses

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(a).*

(n3)Footnote 2. *Lexecon Inc., et al. v. Milberg Weiss Bershad Hynes & Lerach, et al., 523 U.S. 26, 33, 118 S. Ct.*

956, 140 L. Ed. 2d 62 (1998) ; *Liggett Group Inc. v. R.J. Reynolds Tobacco Co., 102 F. Supp. 2d 518, 525-526 (D.N.J. 2000)* .

(n4)Footnote 3. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* (§ 1404(a) enacted to permit easy change of venue).

(n5)Footnote 3.1. *Trejo v. Alter Scrap Metal, Inc., 2008 U.S. Dist. LEXIS 95544, at *3 (C.D. Ill. Nov. 24, 2008)* .

(n6)Footnote 4. *Kalamazoo Realty Venture Ltd. Pshp. v. Blockbuster Entertainment Corp., 249 B.R. 879, 888 (N.D. Ill. 2000)* ; *see Van Dusen v. Barrack, 376 U.S. 612, 615, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* ; *see also § 7.80*.

(n7)Footnote 5. *Kalamazoo Realty Venture Limited Partnership v. Blockbuster Entertainment Corp., 249 B.R. 879, 889 (N.D. Ill. 2000)* ; *see § 7.82*.

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART IV. TRANSFER OF CASE TO NEW VENUE
B. STATUTORY TRANSFER TO NEW VENUE ON GROUNDS OF CONVENIENCE

1-7 Moore's Manual--Federal Practice and Procedure § 7.81

§ 7.81 Requirements to Establish Convenience and Interest of Justicen*

[1] Discretion of Court to Transfer After Consideration of Factors

The trial court which has proper venue over a case has wide discretion whether or not to transfer a case to another proper venue for the convenience of the partiesand witnesses and the interest of justice, n1 and the trial court may be reversed on appeal only when there has been an abuse of discretion. When it makes a determination of a transfer motion under Section 1404(a), the court must make a flexible and individualized analysis n2 and must balance a number of case-specific factors to determine whether the proposed transferee district would be a more convenient forum for the litigation. While derived in part from the common-law doctrine of forum non conveniens, a Section 1404(a) transfer is broader and grants district courts more discretion to transfer. n3 In exercising this discretion, a district court must consider certain factors in two groups: n4 those relating to the private convenience of the parties n5 and those affecting the public interest in the fair and efficient administration of justice. n6

[2] Factors Relating to Private Convenience

[a] Summary of Private Factors

In exercising its discretion in determining whether to grant a motion to transfer pursuant to Section 1404(a), the court must consider a number of private and public factors. Private factors include: n1

1. The plaintiff's forum preference. n2

2. The defendant's forum preference. n3

3. The location where the claim arose. n4

4. The convenience of the parties as indicated by their relative physical and financial condition. n5

5. The convenience of the witnesses to the extent that the witnesses may be unavailable for trial in one of the fora. n6

6. The location of evidence, including books and records. n7

7. Any applicable forum selection clause. n8

[b] Plaintiff's Forum Preference

The court should give considerable weight to the plaintiff's original choice of forum--it has been stated that the choice should not be disturbed unless the other factors weigh substantially in favor of transfer. n9 Some courts have stated that the burden of proof rests with a party seeking transfer because there is a strong presumption in favor of the plaintiff's choice of forum. n10 The amount of weight given to the plaintiff's choice of forum ranges from considering it the "paramount" concern, n11 to considering it merely one of the many relevant factors. n12 Courts, however, have consistently held that Section 1404(a) motions to transfer venue although derived from the common-law doctrine of dismissal for forum non conveniens require that less weight be given to the plaintiff's choice of forum than was received under the common-law doctrine. n13 The weight given to a plaintiff's choice of forum may also depend on other circumstances. For example, the plaintiff's choice is given added weight if the plaintiff resides in the chosen forum. n14

[c] Defendant's Forum Preference

Although court's have not given it as great weight as plaintiff's choice, the defendant's choice of forum is entitled to consideration whenever there is a motion for transfer. n15 The defendant's choice of forum is entitled to weight because the court determines a motion to transfer based on the convenience of the parties, not just of the plaintiff. n16

[d] Location Where Claim Arose

An important private interest factor considered by the court in its decision on a motion to transfer is the location of the operative events that form the basisof the lawsuit. If the operative events took place in the district in which the action was originally filed, a motion to transfer to the district in which the events occurred is given considerable weight. n17 This factor overlaps with several of the other factors, and transfer to the place where the operative events occurred is often justified because many of the significant witnesses and the physical evidence is located where the operative events occurred. n18 It should be noted for purposes of the Section 1404(a) analysis that the alleged wrongful acts or omissions may have taken place in more than one district, or it may be impossible to conclude that the operative facts took place in one district as opposed to another. n19 In determining where the operative events took place, the court should consider both the plaintiff's theories of liability and the defendant's defenses. Thus, in a routine tort claim, the site of the accident is likely to be where the operative events took place. n20 On the other hand, in a products liability action alleging negligent design and manufacture, the place where the injury occurred may be relatively unimportant in comparison to the location of the design and manufacture of the product. n21

[e] Relative Convenience of Parties

One of the factors expressly stated in the statute is the convenience of the parties, and courts have considered many aspects related to this factor. n22 Some courts have noted that a logical starting point for analyzing the convenience of the parties is a consideration of their residences in relation to the district chosen by the plaintiff and the proposed transferee district. n23 Residence is such a strong factor that courts presume that the most convenient district for a party to litigate in is the district of or near his or her residence. n24

Thus, when the plaintiff resides in the chosen forum and the defendant resides in the proposed transferee district, one or the other unavoidably will be inconvenienced whether or not the court grants a transfer. In such a case, the weight given to the plaintiff's choice of forum will tip the balance against transfer, unless some other relevant factors, such as the convenience of witnesses or the interest of justice, weigh strongly in favor of transfer. n25 If, on the other hand, the plaintiff does not reside in the district in which he or she brought the action, this fact weighs in favor of a transfer to the

district where the defendant resides, because the plaintiff will be inconvenienced by having to travel whether the action is transferred or not. n26

Similarly, when the defendant seeks transfer to a district other than the one in which he or she resides, the defendant's claim that the proposed transferee district is more convenient for the defendant will probably be disregarded, because travel will be necessary regardless of whether the action is transferred or not. n27 Also, if the defendant moves for transfer to the district in which the plaintiff resides, the plaintiff's claim that this district is inconvenient will probably be disregarded by the court. n28 Finally, when a proposed transferee district is in close proximity to the original district, some courts have denied transfer on the ground that it would not appreciably increase the convenience of the parties or witnesses. n29

Residence and travel distance is not the only aspect of convenience considered by the court. In considering the convenience of the parties, the court may also take into account the relative financial resources of the parties, n30 and other financial considerations such as disruption to a party's business caused by the prolonged absence of key employees having to attend a trial in a district away from the place of business. n31

[f] Convenience of Witnesses

[i] Importance of Factor

Many courts have called the convenience of witnesses the most important factor controlling the decision to transfer a case. n32 In this regard, it has also beensaid that if the witness is a key witness who will likely directly testify to the facts surrounding the occurrence in question, the convenience of the key witnesses is even more important. n33 The convenience of the witnesses is determined by reference to their residence in relation to the district in which the action is pending and to the proposed transferee district. n34 Therefore, when most of both parties' material witnesses are located in the district to which transfer is sought, the court will probably grant the transfer even though the transfer may cause the plaintiff some inconvenience by having to litigate in a forum outside the plaintiff's home district. n35

Conversely, if the majority of key witnesses reside in the district chosen by the plaintiff, transfer likely will be denied. n36 Similarly, if most of the defendant's witnesses are in the proposed transferee district while most of the plaintiff's witnesses are in neither district and, thus, will have to travel regardless, transfer to accommodate the convenience of the defendant's witnesses may be granted. n37 If both parties' witnesses are dispersed throughout states not in either district, or are evenly divided between the two districts, this factor will be considered neutral, and a balancing of other factors will determine the transfer motion. n38 The materiality of the prospective witnesses testimony, and not merely the number of prospective witnesses, will also determine the extent to which their convenience will be weighed. n39

[ii] Weight Accorded Types of Witness

When considering convenience, the court will not give the same weight to all witness. Key witnesses are considered most important. n40 In analyzing the convenience of the witnesses (see [i], *above*), many cases distinguish between party witnesses (and those closely aligned with a party, such as employees), who are presumed to be willing to testify in either forum despite the inconvenience that one of the forums would involve, n41 and non-party witnesses, who may not be willing to testify at all and may not be compelled to do so if they reside more than 100 miles from the court at which the trial is held. n42

Consequently, unwilling non-party witnesses are given more weight in the transfer analysis than party witnesses and their employees. n43 Therefore, the location of the majority of non-party witnesses in one of the two districts may tip the balance in favor of that district, regardless of where the party witnesses and their employees reside. n44 On the other hand, non-party witnesses who do not reside in or near either the transferor or the transferee district (and therefore are not amenable to process in either district) are not given any weight in the transfer analysis. n45

Many courts hold that the residency of expert witnesses does not affect the court's analysis regarding transfer because expert witnesses are paid for their time and are within the control of the party calling them. Thus, this factor weighs neither in favor of transfer nor of retention. n46 Other courts have stated the convenience of expert witnesses is of little or no significance on a motion to transfer. n47 The relative cost of transporting them to the respective districts may be considered, however, in connection with the factor regarding where the action may be tried more inexpensively and expeditiously. Even though this expense may be considered, the use of videotaped testimony of expert witnesses in lieu of live testimony may avoid travel costs. n48

[g] Location of Evidence

One important factor in the transfer convenience analysis is the location of documents and other physical evidence relevant to the dispute. n49 Although thisfactor is usually considered in the context of obtaining documents for trial, it is also relevant in terms of the ease of conducting discovery. n50 The mere location of documents (as opposed to obtaining them) is a relatively less important consideration in the transfer convenience analysis, given the comparatively low cost of transporting documents. n51 If, however, the documents at issue are extensive and numerous, n52 or in the possession of non-party witnesses beyond the reach of the transferor court's subpoena power, n53 transfer to the district in which the documents are located may be appropriate. n54 If a viewing of immovable physical evidence by the fact-finder is necessary, this will weigh in favor of transfer to the forum in which the evidence is located, unless viewing photographs or videotapes of the property is deemed sufficient. n55

[h] Forum Selection Clauses

When considering whether to grant a transfer, the court should place great weight on valid forum-selection clauses, whether the forum selection clause specifies the original venue or the forum that is the subject of the transfer request. While a valid forum-selection clause is not dispositive, it is entitled to substantial consideration. Where the forum selection clause is valid, the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum. n56

The Supreme Court has directly considered the issue of the proper weight to be given a forum selection clause in the context of a Section 1404(a) convenience transfer motion. The Court first noted that the weight to be given a forum selection clause in a diversity case should be determined by federal law, specifically the standards contained in Section 1404(a) itself, using a "flexible and individualized" analysis. Therefore, a valid forum-selection clause that represents the parties' agreement as to the most proper forum must be treated as only one of a number of factors that the district court must weigh in deciding whether a transfer is warranted by considerations of convenience and fairness. Thus, a forum selection is not dispositive. n57

[3] Factors Relating to Public Interest

[a] Summary of Public Interest Factors

In exercising its discretion in determining whether to grant a motion to transfer pursuant to Section 1404(a), the court must consider a number of private and public factors. Public factors include: n1

1. The enforceability of the judgment. n2

2. Practical considerations that could make the trial simple, expeditious, or inexpensive. n3

3. The relative administrative difficulty in the two fora resulting from court congestion. n4

4. The local interest in deciding local controversies at home. n5

5. The public policies of each district. n6

6. The familiarity of the trial judge with the applicable state law in diversity cases. n7

7. Other factors regarding the interest of justice. n8

[b] Enforceability of Judgment

A significant public interest factor that must be considered by the trial court is the relative enforceability of a judgment in the respective forums. n9 This factor was originally taken into account under the common-law doctrine of forum non conveniens, in which the proposed alternative forum often was outside the United States. In such cases, the plaintiff conceivably might have difficulty enforcing a judgment rendered in a foreign forum against a defendant's United States assets. In Section 1404(a) convenience transfers, when both forums are federal district courts, this factor has little relevance because it is unlikely that there would be any significant difference in the difficulty of enforcing a judgment rendered by one federal forum or the other. n10

[c] Practical Considerations That Could Make Trial Expeditious or Inexpensive

A factor commonly considered by the courts is the existence of any practical considerations that could make the trial simple, expeditious, or inexpensive. n11 This factor is separate from the factor of court congestion. For example, a party may argue that a transfer of venue out of one district to a district in another state would result in the party's losing the benefit of an expeditious and cost-efficient manner that the original court had for handling cases, including the advantage of a court's shorter trial track that is well below the average of other courts. n12 This factor may be considered with respect to witnesses, because even when witnesses are willing to travel to distant districts to testify, if transfer would obviate the need for such travel and the attendant expense on the witnesses or the party calling them, courts may weigh this factor in favor of ordering a transfer. n13

The "judicial economy" factor in the convenience transfer analysis may arise when two separate actions involving the same or similar issues and parties are proceeding in different districts. In this regard, most courts find judicial economy is served by having the two actions in the same district (through transfer) even though actual consolidation of the actions may not be possible. n14 The fact that a related action is pending in the proposed transferee district is an important consideration that may override the plaintiff's choice of forum, because transfer of the second action will promote judicial economy and avoid the possibility of inconsistent results. n15 On the other hand, the fact that an action presenting the same or similar legal and factual issues is pending in the district where the action was originally brought weighs against transfer of the second action to a different district. n16

The first-filed rule has also been considered in relation to the transfer issue. Under the "first-filed rule," the first-filed action will be given priority and be allowed to proceed in favor of the later action, n17 unless other special circumstances dictate departure from the rule. n18 The first-filed rule is designed to advance the inherently fair concept that the party who commenced the first suit should generally be the party to attain its choice of venue. However, the courts do not apply the first-filed rule mechanically, n19 and if other convenience factors under Section 1404(a) weigh in favor of the second-filed action, the courts may disregard the first-filed rule. n20

[d] Court Congestion

Another factor that could influence the court in favor or against transfer is whether the court in which the action originally is brought is more congested than the district to which transfer is sought. n21 However, the mere possibility that trial will be held sooner in the original court does not justify denial of transfer when transfer is otherwise supported by the convenience of the parties and the witnesses. n22

[e] Local Interest in Deciding Local Disputes at Home

When an action involves an incident occurring in a particular locale, there is an interest in having the controversy adjudicated in that locale, rather than in a remote forum. n23 Thus, for example, if one of the locations has developed a strong community interest in resolving protracted litigation in the community, this factor favors that locale. n24

[f] Public Policies of Each District

In its determination of a Section 1404(a) transfer issue, the district court may consider the relative importance of any public policies to be advanced in eachforum. n25 For example, in a suit by a California franchisee against a Pennsylvania franchisor, the trial court correctly considered California's strong public policy to provide a protective local forum for local franchisees when it denied a motion to transfer venue to Pennsylvania for the convenience of the parties and witnesses. n26 However, a strong public policy promulgated under state law is not dispositive; a state's public policy is but one factor to consider in a Section 1404(a) analysis, even though it is an important factor. n27

[g] Familiarity of Trial Judge with State Law in Diversity Cases

In diversity actions, federal courts favor adjudication by the court that sits in the state whose substantive laws will govern the case--a court may use this factor in its evaluation of whether to grant a motion to transfer. n28 Therefore, if the choice of law rules of the transferor state dictate that another state's laws apply to the action, this will favor transfer to the federal courts of that state. n29 Conversely, if the transferor state's choice of law rules make its law applicable, this favors the original court's retention of the action. n30 However, if the action does not involve significant or complex analysis of another state's law, this factor will be given little weight in the transfer decision. n31

[h] Interest of Justice

As a catch all factor, the court must consider any other aspects of a proposed transfer that bear on the "interest of justice." n32 In this regard, the court may consider anything related to the efficient administration of the court system, such as, the interest of conserving judicial resources, avoiding overburden to a particular court, and the difficulties of applying another state's law. n33 Thus, the court may consider whether litigating a matter in a particular forum would squander judicial resources or would run the risk of inconsistent judgments. The court may also consider whether one court has already expended substantial time and effort to become familiar with the subject matter and facts of the case, such as, the technology underlying disputed patents and the legal issues related to the patents' alleged validity and infringement, and whether one court is more familiar with the same parties and issues or related issues than other courts. n34

If transfer of an action would eliminate the necessity of having two actions involving the same or similar issues proceeding in different districts, the "interest of justice" will be served by transfer. n35 Similarly, if the issue of whether the transferor court has personal jurisdiction over the defendant is a difficult issue, transfer to a district where jurisdiction is certain may be in the interest of justice because it may conserve judicial resources by allowing the transferor court to avoid addressing the personal jurisdiction issue. n36

It should be noted that some courts do not treat the interest of justice component as a separate factor but, rather, simply consider the aggregate of all the other relevant factors to determine whether the transfer either is or is not in the interest of justice. n37

[4] Burden Is on Movant to Establish Greater Convenience of Other Forum

Because there is a strong presumption in favor of the plaintiff's choice of forum, the burden of proof rests with the party seeking transfer to show that the proposed transferee forum is more convenient than the original forum. n1 The district court may transfer the action only if a balancing of the relevant factors n2 clearly shows that the proposed transferee

forum is more convenient. n3 Thus, if transfer to another district would merely shift the balance of inconvenience to the nonmoving party, rather than eliminate or reduce inconvenience, transfer is not warranted. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureVenueMotions to TransferInterests of Justice

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.13 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(a).*

(n3)Footnote 2. *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988) .*

(n4)Footnote 3. *BHP International Investment, Inc., v. Online Exchange, Inc., 105 F. Supp. 2d 493, 495-497 (E.D. Va. 2000) .*

(n5)Footnote 4. *Park Inn Int'l, L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 376 (D.N.J. 2000) .*

(n6)Footnote 5. *See* [2], *below.*

(n7)Footnote 6. *See* [3], *below.*

(n8)Footnote 1. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) .*

(n9)Footnote 2. *See* [b], *below.*

(n10)Footnote 3. *See* [c], *below.*

(n11)Footnote 4. *See* [d], *below.*

(n12)Footnote 5. *See* [e], *below.*

(n13)Footnote 6. *See* [f], *below.*

(n14)Footnote 7. *See* [g], *below.*

(n15)Footnote 8. *See* [h], *below.*

(n16)Footnote 9. *In re Warrick, 70 F.3d 736, 740 (2d Cir. 1995)* (plaintiff's choice of forum entitled to substantial consideration).

(n17)Footnote 10. *Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000) .*

(n18)Footnote 11. *Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) , cert. denied, 401 U.S. 910 (1971) .*

(n19)Footnote 12. *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1165 (S.D. Tex. 1994) .*

(n20)Footnote 13. *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1165 (S.D. Tex.*

1994) (in Section § 1404(a) motion, the plaintiff's choice of forum is not accorded the decisive weight it enjoyed under the doctrine of forum non conveniens).

(n21)Footnote 14. *Apache Products Co. v. Employer Ins. of Wausau, 154 F.R.D. 650, 653 (S.D. Miss. 1994)* .

(n22)Footnote 15. *Kleinerman v. Luxtron Corp., 107 F. Supp. 2d 122 (D. Mass. 2000)* (although defendant's choice of forum was entitled to weight because defendant's suit for declaration of non-infringement was already pending, plaintiff's choice of forum was entitled to deference when defendant was better able to afford costs of litigating out of state).

(n23)Footnote 16. *28 U.S.C. 1404(a)*; *Park Inn Int'l, L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 376 (D.N.J. 2000)* (transfer of venue of New Jersey franchisor's breach of contract action in federal court against franchisee from New Jersey to New Mexico was not warranted in light of New Jersey forum selection clause in contract and franchisor's choice of its home forum).

(n24)Footnote 17. *Dicken v. United States, 862 F. Supp. 91, 94-95 (D. Md. 1994)* (transfer from plaintiff's home forum to site of accident).

(n25)Footnote 18. *Jewelmasters, Inc. v. May Dep't Stores, 840 F. Supp. 893, 895-897 (S.D. Fla. 1993)* (in action alleging breach of licensing agreement and overcharging in performance of agreement, transfer granted to district where agreement performed because majority of witnesses and documents also located there).

(n26)Footnote 19. *Seagoing Uniform Corp. v. Texaco, Inc., 705 F. Supp. 918, 936 (S.D.N.Y. 1989)* (difficult to determine locus of operative facts in complex securities litigation involving numerous interstate transactions with witnesses and documents located in several states).

(n27)Footnote 20. *Chedid v. Boardwalk Regency Corp., 756 F. Supp. 941, 944 (E.D. Va. 1991)* .

(n28)Footnote 21. *Dwyer v. General Motors Corp., 853 F. Supp. 690, 692-693 (S.D.N.Y. 1994)* (in products liability action, court denied transfer to site of accident because eyewitnesses to accident and jury's need to view accident scene were relatively unimportant compared to witnesses and documents relating to issue of defective design, which were located at place of manufacture).

(n29)Footnote 22. *28 U.S.C. 1404(a)*.

(n30)Footnote 23. *U.S. Fidelity & Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1080 (E.D.N.Y. 1992)* .

(n31)Footnote 24. *Morales v. Navieras de Puerto Rico, 713 F. Supp. 711, 713 (S.D.N.Y. 1989)* .

(n32)Footnote 25. *Icon Indus. Controls Corp. v. Cimetrix, Inc., 921 F. Supp. 375, 384 (W.D. La. 1996)* (court denied transfer from plaintiff's residence to defendant's residence because other factors did not strongly favor transferee forum).

(n33)Footnote 26. *U.S. Fidelity and Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1081 (E.D.N.Y. 1992)* .

(n34)Footnote 27. *Dwyer v. General Motors Corp., 853 F. Supp. 690, 694 (S.D.N.Y. 1994)* .

(n35)Footnote 28. *Morales v. Navieras de Puerto Rico, 713 F. Supp. 711, 713 (S.D.N.Y. 1989)* .

(n36)Footnote 29. *Wellington Computer Graphics, Inc. v. Modell, 315 F. Supp. 24, 28 (S.D.N.Y. 1970)* (denying transfer from S.D.N.Y. to D.N.J.).

(n37)Footnote 30. *Heller Financial, Inc. v. Riverdale Auto Parts, Inc., 713 F. Supp. 1125, 1129 (N.D. Ill. 1989)* .

(n38)Footnote 31. *Burstein v. Applied Extrusion Technologies, Inc., 829 F. Supp. 106, 112 (D. Del. 1992)* (court transferred to district where defendant resided when extended absence of defendant's key employees would cause severe financial hardship to defendant).

(n39)Footnote 32. *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994)* .

(n40)Footnote 33. *Denson v. United States, 99 F. Supp. 2d 792, 795 (S.D. Tex. 2000)* .

(n41)Footnote 34. *Burstein v. Applied Extrusion Technologies, Inc. 829 F. Supp. 106, 111-112 (D. Del. 1992)* .

(n42)Footnote 35. *Dicken v. United States, 862 F. Supp. 91, 93 (D. Md. 1994)* .

(n43)Footnote 36. *State Street Capital Corp. v. Dente, 855 F. Supp. 192, 197-198 (S.D. Tex. 1994)* .

(n44)Footnote 37. *U.S. Fidelity & Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1082 (E.D.N.Y. 1992)* .

(n45)Footnote 38. *See Icon Indus. Controls Corp. v. Cimetrix, Inc., 921 F. Supp. 375, 384 (W.D. La. 1996)* (when original district was more convenient for plaintiff's witnesses and transferee district was more convenient for defendant's witnesses, court denied transfer because defendant failed to show that other factors made transferee district clearly more convenient overall); *see also Denson v. United States, 99 F. Supp. 2d 792, 795 (S.D. Tex. 2000)* (transfer of venue of action under Jones Act and general maritime law from Southern District of Texas to Eastern District of Louisiana was denied when defendant failed to demonstrate how bringing a majority of key witnesses who hailed from Connecticut, Florida, Massachusetts, New York, and Texas to Eastern District of Louisiana was more convenient than bringing them to Texas because Texas was clearly as convenient a venue as Louisiana).

(n46)Footnote 39. *Dwyer v. General Motors Corp., 853 F. Supp. 690, 693 (S.D.N.Y. 1994)* (denying transfer when defendant's out-of-state witnesses were less material than plaintiff's in-state witnesses).

(n47)Footnote 40. *Denson v. United States, 99 F. Supp. 2d 792, 795 (S.D. Tex. 2000)* .

(n48)Footnote 41. *U.S. Fidelity and Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1082 (E.D.N.Y. 1992)* (parties able to obtain trial testimony of each other's employees at either forum).

(n49)Footnote 42. *Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 931 (W.D. Mo. 1985)* ; *see Fed. R. Civ. P. 45(e)*.

(n50)Footnote 43. *Aquatic Amusement Associates, Ltd. v. Walt Disney World Co., 734 F. Supp. 54, 57 (N.D.N.Y. 1990)* (while the convenience of party witnesses is factor to be considered, convenience of non-party witnesses is more important factor).

(n51)Footnote 44. *Apache Products Co. v. Employers Ins. of Wausau, 154 F.R.D. 650, 655 (S.D. Miss. 1994)* .

(n52)Footnote 45. *See Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 931 (W.D. Mo. 1985)* .

(n53)Footnote 46. *See Amoco Oil Co. v. Mobil Oil Corp., 90 F. Supp. 2d 958, 961 (N.D. Ill. 2000)* ; *Karrels v. Adolph Coors Co., 699 F. Supp. 172, 177* (N.D. Ill. 1988.

(n54)Footnote 47. *Dwyer v. General Motors Corp., 853 F. Supp. 690, 693 (S.D.N.Y. 1994)* ; *Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989-990 (E.D.N.Y. 1991)* .

(n55)Footnote 48. *Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (E.D.N.Y. 1991)* .

(n56)Footnote 49. *In re Warrick, 70 F.3d 736, 741 (2d Cir. 1995)* .

(n57)Footnote 50. *Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 (5th Cir. 1994)* .

(n58)Footnote 51. *Pennwalt Corp. v. Purex Industries, Inc., 659 F. Supp. 287, 290 (D. Del. 1986)* .

(n59)Footnote 52. *McEvily v. Sunbeam-Oster Co., Inc., 878 F. Supp. 337, 348 (D. R.I. 1994)* .

(n60)Footnote 53. *Falconwood Financial Corp., v. Griffin, 838 F. Supp. 836, 841 (S.D.N.Y. 1993)* .

(n61)Footnote 54. *Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 (5th Cir. 1994)* .

(n62)Footnote 55. *Dicken v. United States, 862 F. Supp. 91, 94 (D. Md. 1994)* (when "core issue" in tort claim was condition of staircase, actual inspection was preferable to photographs).

(n63)Footnote 56. *Park Inn Int'l, L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 378 (D.N.J. 2000)* (court found that forum selection clause swung balance decisively against transfer).

(n64)Footnote 57. *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-30, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* ; *see BHP International Investment, Inc., v. Online Exchange, Inc., 105 F. Supp. 2d 493, 495-497 (E.D. Va. 2000)* (venue properly transferred from Virginia to Missouri after consideration of all factors, including contractual forum selection clause specifying Missouri as litigation forum).

(n65)Footnote 1. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995)* .

(n66)Footnote 2. *See* [b], *below*.

(n67)Footnote 3. *See* [c], *below*.

(n68)Footnote 4. *See* [d], *below*.

(n69)Footnote 5. *See* [e], *below*.

(n70)Footnote 6. *See* [f], *below*.

(n71)Footnote 7. *See* [g], *below*.

(n72)Footnote 8. *See* [h], *below*.

(n73)Footnote 9. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-880 (3d Cir. 1995)* .

(n74)Footnote 10. *Datasouth Computer Corp. v. Three Dimensional Technologies, Inc., 719 F. Supp. 446, 450 (W.D.N.C. 1989)* .

(n75)Footnote 11. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* ; *Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991)* .

(n76)Footnote 12. *Denson v. United States, 99 F. Supp. 2d 792, 796-797 (S.D. Tex. 2000)* .

(n77)Footnote 13. *Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)* .

(n78)Footnote 14. *Fairfax Dental (Ireland) Ltd. v. S.J. Filhol Ltd., 645 F. Supp. 89, 92 n.2 (E.D.N.Y. 1986)* .

(n79)Footnote 15. *Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 524 (5th Cir. 1988)* .

(n80)Footnote 16. *In re Cuyahoga Equip. Corp., 980 F.2d 110, 116-117 (2d Cir. 1992)* (denial of transfer not abuse of discretion when related claims pending in transferor court).

(n81)Footnote 17. *Church of Scientology v. United States Dep't of Army, 611 F.2d 738, 750 (9th Cir. 1979)* .

(n82)Footnote 18. *Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir.1987)* (one such circumstance is if first-filed action was result of race to courthouse).

(n83)Footnote 19. *Kleinerman v. Luxtron Corp., 107 F. Supp. 2d 122 (D. Mass. 2000)* ("first-filed rule" is not dispositive).

(n84)Footnote 20. *Affinity Memory & Micro v. K&Q Enterprises, 20 F. Supp. 2d 948, 954-955 (E.D. Va. 1998)* .

(n85)Footnote 21. *Parsons v. Chesapeake & O. Ry. Co., 375 U.S. 71, 73, 84 S. Ct. 185, 186, 11 L. Ed. 2d 137 (1963)* (condition of transferor court's docket is legitimate consideration in transfer analysis); *cf. Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000)* (district court denied motion to transfer venue to district where judicial emergency existed in that district had two judicial vacancies, which was not error at least where vacancies would have an impact on the instant case).

(n86)Footnote 22. *Burstein v. Applied Extrusion Technologies, Inc., 829 F. Supp. 106, 114 (D. Del. 1992)* ; *see Diebold, Inc. v. Firstcard Fin. Servs., 104 F. Supp. 2d 758, 764 (N.D. Ohio 2000)* (relative docket congestion for Northern District of Ohio in and of itself did not weigh in favor of transferring action to Eastern District of California when statistical comparison of each district's docket congestion showed total number of civil cases in Northern District of Ohio was 6,833 while Eastern District of California was 4,196, when Ohio court had established schedule that would resolve case at hand within next four months).

(n87)Footnote 23. *In re Eastern Dist. Repetitive Stress Injury Lit., 850 F. Supp. 188, 195 (E.D.N.Y. 1994)* (public interest supports adjudication of controversy in locale of dispute, rather than in remote location where it will be learned of only by report).

(n88)Footnote 24. *Kalamazoo Realty Venture Ltd. Pshp. v. Blockbuster Entertainment Corp., 249 B.R. 879, 890 (N.D. Ill. 2000)* (Although Illinois courts had strong interest in hearing breach-of-contract cases involving Illinois residents, locus of party's past and pending bankruptcy cases gave Delaware strong interest that outweighed Illinois Interests).

(n89)Footnote 25. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-880 (3d Cir. 1995)* .

(n90)Footnote 26. *Jones v. GNC Franchising, Inc., 211 F.3d 495, 496-497 (9th Cir. 2000)* (California statute expressed strong public policy to protect California franchisees from expense, inconvenience, and possible prejudice of litigating in non-California venue).

(n91)Footnote 27. *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28-29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* .

(n92)Footnote 28. *Royal Ins. Co. of Am. v. United States, 998 F. Supp. 351, 355 (S.D.N.Y. 1998)* (relevant concern is other court's familiarity with applicable state law in diversity cases).

(n93)Footnote 29. *Van Dusen v. Barrack, 376 U.S. 612, 645, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (trial in state in which federal judges are more familiar with the governing laws is factor to be considered in motions for transfer).

(n94)Footnote 30. *FUL Inc. v. Unified School Dist. No. 204, 839 F. Supp. 1307, 1313 (N.D. Ill. 1993)* .

(n95)Footnote 31. *Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1992)* (relative simplicity of common-law fraud and breach of contract issues neutralized this factor).

(n96)Footnote 32. *See 28 U.S.C. 1404(a)*; *see also Park Inn Int'l, L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 378 (D.N.J. 2000)* .

(n97)Footnote 33. *Coffey v. Van Dorn, 796 F.2d 217, 220-221 (7th Cir. 1989)* (interest of justice factor relates to efficient administration of court system).

(n98)Footnote 34. *Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 55-56 (D.D.C. 2000)* .

(n99)Footnote 35. *Biggers v. Borden, Inc., 475 F. Supp. 333, 336-337 (E.D. Pa. 1979)* .

(n100)Footnote 36. *Datasouth Computer Corp. v. Three Dimensional Technologies, Inc., 719 F. Supp. 446, 452, (W.D.N.C. 1989)* (interest of justice served by transferring case to district where personal jurisdiction was not thorny issue).

(n101)Footnote 37. *Pilates, Inc. v. Pilates Institute, Inc., 891 F. Supp. 175, 183 (S.D.N.Y. 1995)* (interest of justice determination is based on analysis of totality of circumstances).

(n102)Footnote 1. *Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000)* .

(n103)Footnote 2. *See* [2], *above*.

(n104)Footnote 3. *Van Dusen v. Barrack, 376 U.S. 612, 646, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (§ 1404(a) provides for transfer to more convenient forum only, not to forum likely to prove equally convenient or inconvenient).

(n105)Footnote 4. *Robinson v. Giamarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996)* .

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PART II Jurisdiction; Venue; Removal
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1-7 Moore's Manual--Federal Practice and Procedure § 7.82

§ 7.82 Transferor Court Must Have Subject Matter Jurisdictionn*

A district court's power to transfer an action under Section 1404(a) depends on the existence of subject matter jurisdiction, whether diversity, federal question, or some other basis for federal subject matter jurisdiction over the action. n1 Therefore, if the district court lacks subject matter jurisdiction, it must generally dismiss the action. n2 If the court lacks subject matter jurisdiction because a federal statute vests exclusive jurisdiction over a particular category of action or appeal in another federal court, transfer to that court may be available under another federal transfer statute. n3 In most cases, if there is subject matter jurisdiction in the transferor court, there will also be subject matter jurisdiction in the transferee court. This may not be the case, however, if a special jurisdictional statute applies to confer exclusive jurisdiction in a particular court. n4

While all courts agree that the transferor court needs subject matter jurisdiction, the courts are split regarding whether a district court has the power to transfer an action under Section 1404(a) if the transferor court lacks personal jurisdiction over the defendant. The majority rule is that a Section 1404(a) transfer may be granted absent personal jurisdiction. n5 The courts holding that a Section 1404(a) transfer may be made despite a lack of personal jurisdiction in the transferor court reason that the transferor court's lack of personal jurisdiction over the defendant does not affect its power to transfer. n6 These courts rely by analogy on a Supreme Court decision that when venue in the original court did not comply with the applicable venue statute, the district court had the power to transfer the action under Section 1406(a), the improper venue transfer statute, despite lacking personal jurisdiction over the defendant. n7 Some circuits however, have held that a court may not grant transfer under Section 1404(a) if it does not have personal jurisdiction over the defendant. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Levitt v. Maryland Deposit Ins. Fund Corp., 643 F. Supp. 1485, 1489 (E.D.N.Y. 1986)* (district courts must find existence of subject matter jurisdiction before it may entertain motion to transfer under section 1404(a)).

(n3)Footnote 2. *See Fed. R. Civ. P. 12.*

(n4)Footnote 3. *28 U.S.C. § 1631.*

(n5)Footnote 4. *United States v. Copley, 25 F.3d 660, 662 (8th Cir. 1994)* (transfer unauthorized because transferee court lacked jurisdiction under special jurisdictional statute relating to revocation proceedings).

(n6)Footnote 5. *Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978) .*

(n7)Footnote 6. *Cote v. Wadel, 796 F.2d 981, 984-985 (7th Cir. 1986) .*

(n8)Footnote 7. *See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 916, 8 L. Ed. 2d 39 (1962) .*

(n9)Footnote 8. *Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993) .*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.83

§ 7.83 Requirements for Transferee Courtn*

[1] Transferee Court Must Have Proper Venue and Subject Matter and Personal Jurisdiction

A district court may transfer an action under Section 1404(a) only to any other district or division where it "might have been brought." n1 This means that the proposed transferee district must be one in which the plaintiff properly could have filed the action initially. n2 Consequently, the transferor court may not transfer an action unless it first determines that, at the time the action was originally filed n3 (1) venue would have been proper in the proposed transferee district; n4 (2) the transferee court would have had subject-matter jurisdiction; n5 and (3) the transferee court could have exercised personal jurisdiction over the defendants. n6 With respect to personal jurisdiction, it is not enough that the defendant, as part of defendant's transfer motion, is deemed to have consented to the jurisdiction of the transferee court; rather, the transferee court's right to exercise jurisdiction must exist entirely independent of the defendant's consent. n7

As with the other requisites for convenience transfers, the party seeking transfer has the burden of clearly establishing that the action properly could have been brought in the first instance in the transferee district. n8

[2] Requirements Determined as of Time Action Commenced in Original Court

The court may order a transfer pursuant to Section 1404(a) only if the venue and jurisdictional requirements in the transferee court n1 have been met at the time the action was commenced in the original court. n2 Thus, if there has been a change of circumstances after the action is filed in the original court, such as the defendant's change of residence, a transfer may not be made to that district if the action could not have been filed there originally. n3 Similarly, a defendant maynot obtain transfer over a plaintiff's objection to a district that would not have had proper venue and personal jurisdiction when the plaintiff initially filed the action, by later agreeing as part of the transfer motion to waive any objections to lack of proper venue and personal jurisdiction in the district to which the defendant wants a transfer. n4

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(a).*

(n3)Footnote 2. *Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) .*

(n4)Footnote 3. *See* [2], *below.*

(n5)Footnote 4. *Hoffman v. Blaski, 363 U.S. 335, 343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) .*

(n6)Footnote 5. *Bacik v. Peek, 888 F. Supp. 1405, 1413 (N.D. Ohio 1993) .*

(n7)Footnote 6. *Sunbelt Corp. v. Noble, Denton & Associates, Inc., 5 F.3d 28, 32 (3d Cir. 1993) .*

(n8)Footnote 7. *Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) .*

(n9)Footnote 8. *Shutte v. Armco Steel Corp., 431 F.2d 22, 24-25 (3d Cir. 1970) , cert. denied, 401 U.S. 910 (1971) .*

(n10)Footnote 1. *See* [1], *above.*

(n11)Footnote 2. *In re Nine Mile Ltd., 692 F.2d 56 (8th Cir. 1982)* ; *see Hoffman v. Blaski, 363 U.S. 335, 342-343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) .*

(n12)Footnote 3. *Allegaert v. Chemical Bank, 432 F. Supp. 685, 687 (E.D.N.Y. 1977) .*

(n13)Footnote 4. *Commercial Lighting Prods., Inc. v. U.S. Dist. Court, 537 F.2d 1078, 1079 (9th Cir. 1976)* (defendant's subsequent consent to jurisdiction of proposed transferee district did not allow transfer because jurisdiction would not have existed when action was filed initially).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.84

§ 7.84 Initiation of Motion for Statutory Transfer Based On Conveniencen*

[1] Plaintiff or Defendant May Bring Motion

Either the plaintiff or the defendant may move to transfer venue on convenience grounds under Section 1404(a). n1 Because the plaintiff has the first opportunity to choose the venue initially, however, in most cases it will be the defendant who is seeking a transfer. n2

There are circumstances in which the plaintiff may to want to seek a transfer. Given Section 1404(a)'s broad remedial purpose of allowing simple transfer of venue so that the litigation may proceed in a convenient forum, the plaintiff may choose a proper but inconvenient forum to take advantage of a favorable rule of law that would be applied by that court. The plaintiff may then move to transfer under Section 1404(a), and, if successful, take the favorable rule of law along. n3 Such forum shopping is permissible.

To preclude harassment of defendants and to ensure appropriate use of Section 1404(a) transfers, however, the plaintiff has a higher burden of persuasion in seeking the transfer over the objection of the defendant than would the defendant in the same situation; this higher burden is justified because the plaintiff is seeking a transfer out of a district that he or she has chosen. Some courts even require that a plaintiff show that circumstances have changed since the action was filed. n4

[2] Court May Transfer Sua Sponte

A district court may transfer an action pursuant to Section 1404(a) on its own motion. n1 A sua sponte transfer is especially appropriate when factors weigh heavily in favor of a transfer. n2 Some courts have stated that sua sponte transfers on convenience grounds should be reserved for exceptional circumstances, such as a pending related action in another district with which the transferred action could be consolidated. n3 Most courts, however, follow the ordinary analysis of whether the "convenience" and "interest of justice" factors warrant transfer of the case to a district other than that originally selected by the plaintiff. n4 Before transferring venue on its own motion, the court should give the parties notice and an opportunity to be heard. n5

[3] Parties May Not Stipulate to Transfer

Generally, the district court may not transfer an action under Section 1404(a) based on a stipulation of the parties. However, the court may order a transfer after a stipulation if it makes an independent assessment of the Section 1404(a) factors. n1 The courts have adopted this rule because Section 1404(a) does not expressly permit inter-district transfer by stipulation; by contrast, Section 1404(b) expressly permits inter-division transfer by stipulation. The juxtaposition of the two provisions, one silent on the possibility of transfers by stipulation and the other expressly authorizing transfers by stipulation, strongly implies that the inter-district transfers by stipulation are not permitted. n2 Transfers by stipulation would also contradict a Supreme Court ruling that, prior to a convenience transfer, the district court must make a case-specific determination as to whether a transfer is proper under the statute. n3 Thus, the court's duty to make a pre-transfer weighing of factors other than the mere preference of the parties precludes an interpretation of Section 1404(a) that could accommodate transfers by stipulation. n4 Furthermore, refusing to allow transfers by stipulation is consistent with a Supreme Court decision that a defendant may not waive personal jurisdiction objections to facilitate transfer to a district in which the action could not have been brought in the first place. In the case, the Court held that the parties may not, by agreement modify the statutory requirements. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.16 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Ferens v. John Deere Co., 494 U.S. 516, 524, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* ; *see 28 U.S.C. § 1404(a).*

(n3)Footnote 2. *Anglo American Ins. Group, PLC v. Calfed, Inc., 916 F. Supp. 1324, 1327 (S.D.N.Y. 1996)* .

(n4)Footnote 3. *Ferens v. John Deere Co., 494 U.S. 516, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

(n5)Footnote 4. *Moore v. McKibbon Bros., Inc., 41 F. Supp. 2d 1350, 1356 (N.D. Ga. 1998))* (court granted plaintiffs' motion to transfer when plaintiffs did not know they had choice of forum and only learned through discovery of alternative forum where personal jurisdiction and venue were proper.

(n6)Footnote 1. *Clisham Mgmt. Inc. v. American Steel Bldg. Co., 792 F. Supp. 150, 157 (D. Conn. 1992)* .

(n7)Footnote 2. *Smiths Industries Medical Systems v. Ballard Medical Products, 728 F. Supp. 6, 7 (D.D.C. 1989)* .

(n8)Footnote 3. *In re Scott, 709 F.2d 717, 721 (D.C. Cir. 1983)* .

(n9)Footnote 4. *Clisham Mgmt. v. American Steel Bldg. Co., 792 F. Supp. 150, 157 (D. Conn. 1992)* .

(n10)Footnote 5. *Starnes v. McGuire, 512 F.2d 918, 934 (D.C. Cir. 1974)* .

(n11)Footnote 1. *White v. ABCO Engr. Corp., 199 F.3d 140, 143-144 (3d Cir. 1999)* .

(n12)Footnote 2. *White v. Abco Engineering Corp., 199 F.3d 140, 143 (3d Cir. 1999)* .

(n13)Footnote 3. *Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29-30, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* .

(n14)Footnote 4. *White v. Abco Engineering Corp., 199 F.3d 140, 143-144 (3d Cir. 1999)* .

(n15)Footnote 5. *Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* (statutory language permitting transfers only to districts in which action might originally have been brought may not be read to encompass districts in which defendant will waive objection to personal jurisdiction in transferee court to facilitate motion to transfer).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.85

§ 7.85 Time for Motion for Statutory Transfer Based On Conveniencen*

There is no time limit within which a motion to transfer under Section 1404(a) must be made, n1 and the court may not deny a motion for transfer merely because it is filed some time after the suit has been commenced and some progress has been made on the pre-trial phase of the case. n2 Even the entry of a judgment does not preclude a subsequent transfer of venue. n3

If the defendant was aware of circumstances supporting a change of venue on convenience grounds from the start, however, the motion should be made before or with the defendant's answer. n4 Making such a motion early in the action may save the court and the parties time and judicial resources on a case that belongs in a different forum. Furthermore, making the motion at an early date prevents the party opposing the motion from arguing that a delay should weigh against transfer. Thus, a delay in moving to transfer, although not dispositive by itself, is properly among the variety of factors considered by the court as weighing against transfer. n5 Whether the delay will result in denial of the motion to transfer depends on the particular circumstances of each case, including the following: the length of the delay, n6 whether delay was avoidable, any prejudice to the opposing party, n7 and, most important, the extent to which the other relevant factors weigh in favor of transfer. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.17 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Martin-Trigona v. Meister, 668 F. Supp. 1, 3 (D.D.C. 1987)* .

(n3)Footnote 2. *Blumenthal v. Management Assistance, Inc., 480 F. Supp. 470, 471 (N.D. Ill. 1979)* .

(n4)Footnote 3. *Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991)* .

(n5)Footnote 4. *Vaz Borralho v. Keydril Co., 696 F.2d 379, 386-387 (5th Cir. 1983)* .

(n6)Footnote 5. *Moore v. Telfon Comms. Corp., 589 F.2d 959, 968 (9th Cir. 1978)* .

(n7)Footnote 6. *Pilkington v. United Airlines, Inc., 855 F. Supp. 1248, 1250 (M.D. Fla. 1994)* (transfer denied because motion made two years after action commenced and case close to trial).

(n8)Footnote 7. *Essex Crane Rental Corp. v. Vic Kirsch Constr. Co., 486 F. Supp. 529, 534-536 (S.D.N.Y. 1980)* .

(n9)Footnote 8. *U.S. Fidelity and Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1081 (E.D.N.Y. 1992)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.86

§ 7.86 Court May Not Dismiss Case When Transfer is Deniedn*

The convenience transfer statute under Section 1404(a) does not provide for dismissal by the court but, rather, gives the court discretion only to transfer if venue in the original court is proper but inconvenient, provided there is another proper federal forum to which the action may be transferred. n1 Therefore, since its enactment, courts have held that if venue in the original forum is proper but inconvenient, the remedy is transfer of the action, not dismissal. n2 If the court in its discretion decides that the proposed transferee court is not more convenient or that transfer is inappropriate for some other reason, and therefore denies the Section 1404(a) transfer motion, it must generally deny the motion and retain the action for further litigation. n3

There is an exception, however, to this general rule. Although dismissal of the action generally is not proper under Section 1404(a), the convenience transfer statute, the fact that a transfer motion has been made does not deprive the court of the power or discretion to dismiss on independent grounds, and these sometimes may be related to the transfer motion. For example, the transferor court may dismiss the action if transfer pursuant to Section 1404(a) would be "futile" for other reasons, for example, when the action is time-barred by the applicable statute of limitation that the transferee court must apply to the action following transfer. n4 Furthermore, in some circuits if the transferor court decides that it lacks personal jurisdiction, the court may then dismiss the action under Section 1406(a) if it decides that transfer is not in the "interest of justice" because personal jurisdiction is lacking. n5 The courts reason that a plaintiff should not be rewarded with a transfer when he or she originally chose an obviously improper forum. Similarly, if the party moving for transfer fails to satisfy the other prerequisites for transfer, transfer will be denied and the action will be dismissed for lack of personal jurisdiction. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.19 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(a)*; *American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* .

(n3)Footnote 2. *Clark v. Yellow Freight System, Inc., 715 F. Supp. 1377, 1380 (E.D. Mich. 1989)* .

(n4)Footnote 3. *Usaco Coal Co. v. Carbomin Energy, Inc., 550 F. Supp. 19, 20 (W.D. Ky. 1982)* .

(n5)Footnote 4. *Phelps v. McClellan, 30 F.3d 658, 663 (6th Cir. 1994)* .

(n6)Footnote 5. *Brower v. Flint Ink Corp., 865 F. Supp. 564, 568 n.4 (W.D. Iowa 1994)* .

(n7)Footnote 6. *Volkswagen de Mexico, S.A. v. Germanischer Lloyd, 768 F. Supp. 1023, 1029 (S.D.N.Y. 1991)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.87

§ 7.87 Law Applied Following Statutory Transfer Based On Conveniencen*

[1] Diversity Cases

Following a Section 1404(a) transfer based on convenience or the interest of justice, the general rule is that the transferee court must apply the same state law, including any applicable choice of law rules, that the transferor court would have applied had the action remained in the transferor court. n1 Under the *Erie* doctrine the transferor court generally would have applied the law, including the choice of law rules, of the state in which it is sitting. n2 The Supreme Court's holding regarding the law applicable after transfer was intended to ensure that the plaintiff was not deprived of the law he or she expected to be applied by filing the action in the transferor court. n3 Furthermore, the Court reasoned thata Section 1404(a) convenience transfer should not deprive the plaintiff of the plaintiff's venue privilege, n4 because the statute deals with the placement of litigation in the federal courts and merely authorizes a change of courtrooms, not a change in applicable law. n5

It is important to note that the *Van Dusen* rule does not necessarily result in application of the law of the state in which the transferor court sits. Rather, *Van Dusen* requires the same choice of law analysis that would have been applied in the transferor court to be conducted by the transferee court, which may require the transferee court to apply the law of the state of the transferee court, the law of the state of the transferor court, or some other state's law because the law applied includes the choice of law rules of the transferor state. n6 It should also be noted that the *Erie* doctrine also requires the federal courts in diversity actions to apply the "substantive" law of the state in which it sits but federal "procedural law." n7

[2] Federal Question Cases

Following a Section 1404(a) convenience transfer in a federal question case, the majority of courts and more recent cases hold that the transferee court must apply the law as interpreted by its own circuit--the transferee court is not bound by the precedent of the transferor circuit. n1 These courts have reasoned that the logic behind *Van Dusen* case--reflecting the need to ensure that federal and state courts uniformly apply the same state law to diversity cases regardless of where the cases are tried--does not apply to a case brought under federal law because federal law is supposed to be unitary. n2 In older case, some circuits have held that the law of the transferor court should be applied

even in federal question cases. n3

[3] Transfer Based on Forum Selection Clause

Some courts have held that, after a Section 1404(a) convenience transfer to give effect to a forum selection clause, the transferee court should apply the law of the state in which it sits if the transferor state's law would have required dismissal of the action on the basis of the forum selection clause. In so holding, the court carved out an exception to the *Van Dusen* rule, n1 noting that *Van Dusen* expressly excepted application of the transferor state's law when the state court in the transferor forum would have dismissed the action. n2 On the other hand, if the transferor state would not have dismissed the action, the transferee court must follow the *Van Dusen* rule and apply the law of the transferor state. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of Witnesses

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Van Dusen v. Barrack, 376 U.S. 612, 627, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n3)Footnote 2. *Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n4)Footnote 3. *Ferens v. John Deere Co., 494 U.S. 516, 524-527, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

(n5)Footnote 4. *Van Dusen v. Barrack, 376 U.S. 612, 638, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n6)Footnote 5. *Van Dusen v. Barrack, 376 U.S. 612, 636, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n7)Footnote 6. *Ferens v. John Deere Co., 494 U.S. 516, 517, 527, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

(n8)Footnote 7. *Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n9)Footnote 1. *Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126 (7th Cir. 1993)* , *cert. denied, 510 U.S. 1073 (1994)* (following a § 1404(a) transfer, transferee court normally should use its own best judgment about meaning of federal law when evaluating federal claim).

(n10)Footnote 2. In re Korean Air Lines Disaster of September 1, 1983, *829 F.2d 1171, 1175-1176 (D.C. Cir. 1987)* .

(n11)Footnote 3. *Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 406 (2d Cir. 1975)* .

(n12)Footnote 1. *See* [1], *above*.

(n13)Footnote 2. *See Caribbean Wholesales & Service Corp. v. US JVC Corp., 855 F. Supp. 627, 631 (S.D.N.Y. 1994)* ; *see also Van Dusen v. Barrack, 376 U.S. 612, 627-628, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n14)Footnote 3. *Caribbean Wholesales & Service Corp. v. US JVC Corp., 855 F. Supp. 627, 631 (S.D.N.Y. 1994)* .

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1-7 Moore's Manual--Federal Practice and Procedure §§ 7.88through 7.99

[Reserved]

§§ 7.88[Reserved]

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1-7 Moore's Manual--Federal Practice and Procedure § 7.100

§ 7.100 Purpose of Statute Allowing Transfer When Original Venue Is Impropern*

By statute, a district court may either transfer or dismiss an action when the plaintiff has chosen improper venue, that is, has filed the case in the wrong district. n1 Section 1406(a) was intended to allow the court the option of transferring an action when venue is wrong, rather than requiring the court to automatically dismiss the action, which was the rule under the common-law convenience doctrine. The statute was enacted to avoid the injustice which had often resulted to plaintiffs from dismissal of actions merely because they had made an erroneous guess with regard to the existence of some elusive fact that controls whether venue is proper. Therefore, Section 1406(a) follows the modern purposes and direction of legislative changes affecting federal court procedure to remove obstacles that impede the expeditious and orderly adjudication of cases and controversies on their merits. n2 Prior to the enactment of Section 1406(a), if the plaintiff lay venue in the wrong district, the district court's sole option was to dismiss the action. Although the dismissal was without prejudice, it nevertheless often had the harsh result of precluding the pursuit of the plaintiff's cause of action, if for example, a statute of limitation had expired while venue was being sorted out. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1406(a).*

(n3)Footnote 2. *Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962) .*

(n4)Footnote 3. *Burnett v. New York Central Railroad Co., 380 U.S. 424, 430, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) .*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.101

§ 7.101 Requirements for Transferor or Dismissing Courtn*

[1] Initial Venue is Wrong

The statute expressly provides that a court may not transfer pursuant to Section 1406(a) procedures unless the plaintiff has filed a case laying venue in the wrong division or district. It is clear that venue is wrong for purposes of Section 1406(a) if the case has been filed in a district or division that is not specified in the applicable general or special venue statute. n1 Additionally, some courts define venue as "wrong" in circumstances when, although venue is in the proper location technically under the venue statutes, there is some other impediment to the action from proceeding further in the transferor court, such as a lack of personal jurisdiction over the defendant. n2 Under this view, other examples of "wrong" venue allowing application of section 1406(a) include venue laid where there is a violation of a statute of limitation n3 or a valid forum selection clause. n4

Courts have also held venue to be "wrong" when a defendant mistakenly removes an action filed in state court to the wrong district or division of the federal court. n5 These courts have noted that such an error in the venue of a removed action does not deprive the district court of subject matter jurisdiction requiring remand of the case. Thus, in the interest of justice, the court may transfer the case to the district court of proper venue. n6

[2] Subject Matter Jurisdiction

A district court has no power to transfer an action under Section 1406(a) unless it has subject matter jurisdiction; therefore, it may transfer only if it has diversity jurisdiction, federal question jurisdiction, or some other basis for subject matter jurisdiction over the action. Instead, a court must dismiss the action if jurisdiction is lacking. n1 If, however, the original court lacks subject matter jurisdiction because a federal statute vests exclusive jurisdiction over a particular category of actions or appeals in another federal court, transfer to that court may be available under another transfer statute, such as *28 U.S.C. Section 1631*. n2

[3] Personal Jurisdiction

When venue is wrong in the district in which the plaintiff has originally brought the action, n1 a district court may

transfer the action to another district under Section 1406(a) whether or not the transferor court has personal jurisdiction over the defendant. n2 If, however, the transferor court concludes that the lack of personal jurisdiction over the defendant should have been apparent to the plaintiff, the court may deny transfer as not "in the interest of justice," and may, instead, dismiss the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.32 (Matthew Bender 3d ed.).

(n2)Footnote 1. *LaVay Corp. v. Dominion Federal Sav. & Loan Assn., 830 F.2d 522, 526 (4th Cir. 1987)* , *cert. denied, 484 U.S. 1065 (1988)* (because venue was improper in transferor court, transfer or dismissal of plaintiff's action was required under section 1406(a)); *see* PART II (general venue statute); PART III (special venue statutes).

(n3)Footnote 2. *Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993)* .

(n4)Footnote 3. *Porter v. Groat, 840 F.2d 255, 258 (4th Cir. 1988)* .

(n5)Footnote 4. *See Hugel v. Corp. of Lloyd's, 999 F.2d 206, 207 (7th Cir. 1993)* .

(n6)Footnote 5. *Ullah v. FDIC, 852 F. Supp. 218, 221 (S.D.N.Y. 1994)* (transferring rather than remanding case removed to wrong district); *28 U.S.C. § 1441(a)* (removal statute requires action to be removed to district court for district embracing place where action was pending).

(n7)Footnote 6. *S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 n.3 (5th Cir. 1996)* .

(n8)Footnote 1. *Grand Blanc Board of Education Assn. v. Grand Blanc Board of Education, 624 F.2d 47, 49 (6th Cir. 1980)* ; *White v. Commercial Standard Fire and Marine Co., 450 F.2d 785, 786 (5th Cir. 1971)* .

(n9)Footnote 2. *28 U.S.C. § 1631*; *see § 7.120* et seq.

(n10)Footnote 1. *See* [1], *above*.

(n11)Footnote 2. *Cameron v. Thornburgh, 983 F.2d 253, 257 (D.C. Cir. 1993)* ; *Hapaniewski v. City of Chicago Heights, 883 F.2d 576, 579 (7th Cir. 1989)* , *cert. denied, 493 U.S. 1071 (1990)* .

(n12)Footnote 3. *Way v. Barr, 1995 U.S. Dist. LEXIS 8148 (D. Md. 1995)* ; *see Obermeyer v. Gilliland, 873 F. Supp. 153, 157-158 (C.D. Ill. 1995)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.102

§ 7.102 Transferee Court Must Be One Where Case Could Have Been Broughtn*

When a claimant initially files a case laying venue in the wrong district, if the district court decides transfer is in the interest of justice, the court may transfer the case to any district or division in which it could have been brought. n1 Courts have interpreted the term "in which it could have been brought" to mean that the proposed transferee forum must have been one in which it would have been proper to file the action initially; in other words, the transferee court must have had proper venue, subject matter jurisdiction, and personal jurisdiction over the defendant. n2 This meaning is the same as the meaning attributed to the phrase "might have been brought" in the convenience transfer statute, Section 1404(a). n3

The party moving for transfer (usually the defendant) may not meet these requirements by waiving them. Venue and personal jurisdiction must have been proper in the transferee forum at the time the action was originally filed and not as a result of subsequent actions taken by the defendant as part of the transfer motion. n4 The burden of proving that the proposed transferee district is a districtin which the case "could have been brought" is on the party moving to transfer for improper venue. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.33 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1406(a).*

(n3)Footnote 2. *See Syed v. Housel. 106 F. Supp. 2d 397, 399-400 (D. Conn. 2000)* ; *see also Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)* ; *Harman v. Pauley, 522 F. Supp. 1130, 1133 (S.D. W.Va. 1981)* .

(n4)Footnote 3. *See 28 U.S.C. § 1404(a)*; *see also Bacik v. Peek, 888 F. Supp. 1405, 1414 (N.D. Ohio 1993)* .

(n5)Footnote 4. *Volkswagen de Mexico, S.A., v. Germanischer Lloyd, 768 F. Supp. 1023, 1028-1029 (S.D.N.Y. 1991)* .

(n6)Footnote 5. *Naegler v. Nissan Motor Co., Ltd., 835 F. Supp. 1152, 1158 (W.D. Mo. 1993)* (denying § 1406(a) transfer when plaintiff-movant could not demonstrate that proposed transferee district could exercise personal jurisdiction over defendants).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.103

§ 7.103 Initiator of Motion for Transfer or Dismissal on Improper Venuen*

[1] Defendants

A defendant is typically the party to initiate a motion for transfer or dismissal on the grounds of improper venue. n1 Because venue must be proper as to each defendant, any defendant may object that venue is improper as to that defendant, n2 and the court must either dismiss the action against that defendant or transfer it to a district with proper venue, assuming that the particular defendant has not waived the objection to improper venue. If there are other defendants as to whom venue is proper, the court may retain the action as to these defendants unless the dismissed defendant was an indispensable party. n3

The defense of improper venue is personal to the party to whom it applies. Therefore, a defendant may not move to dismiss or transfer an action under Section 1406(a) on the ground that venue is improper as to another defendant, n4 unless the defendant as to whom venue is improper is an indispensable party. n5 Therefore, if the court dismisses the action against any defendant on the ground of improper venue, it should then determine whether that defendant was an indispensable party; if the dismissed defendant is indispensable, then the court must dismiss or transfer the action with respect to all defendants. n6 Conversely, if the defendant as to whom venue is improper is not an indispensable party, the court should sever the claims against that party n7 and dismiss or transfer them and retain the claims against the defendants with respect to whom venue is proper. n8

[2] Plaintiffs

In general, if a plaintiff brings an action in a district or division where venue is wrong, the plaintiff automatically waives the right to object to improper venue in that district or division. n1 However, if the action was filed in the wrong district or division through no fault of the plaintiff, for example, through a mistake as to the residence of the defendant, the plaintiff has not necessarily waived its right to object to improper venue in the original district and may move to transfer the action under Section 1406(a) when the plaintiff discovers the proper venue, for example, when he or she discovers the defendant's true residence. n2

[3] Court's Own Initiative

The district court may properly raise, sua sponte, the issue of lack of proper venue at any time before the defendant has waived the objection to improper venue n1 and may dismiss or transfer the action on that ground, provided the court first gives the parties adequate notice and an opportunity to be heard on the issue. n2 Additionally, if the defendant moves only to dismiss an action the court on its own initiative may order transfer if it is otherwise appropriate. n3 Some courts, however, have held that the district court should not raise a venue objection sua sponte absent extraordinary circumstances, n4 and if the defendant has already waived the objection to improper venue, the court may not under any circumstances dismiss the action on this ground. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.35 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See, e.g., Diebold, Inc. v. Firstcard Financial Services, Inc., 104 F. Supp. 2d 758, 764 (N.D. Ohio 2000)* .

(n3)Footnote 2. *Eastern Refractories v. Forty Eight Insulations, Inc., 668 F. Supp. 183, 186 (S.D.N.Y. 1987)* .

(n4)Footnote 3. *De La Fuente v. I.C.C., 451 F. Supp. 867, 871-872 (N.D. Ill. 1978)* (defense of improper venue is personal to party to whom it applies and resident defendant may not avail itself of transfer or dismissal as to nonresident unless latter is indispensable party).

(n5)Footnote 4. *Anrig v. Ringsby United, 603 F.2d 1319, 1324 (9th Cir. 1978)* .

(n6)Footnote 5. *King v. Russell, 963 F.2d 1301, 1305-1306 (9th Cir. 1992)* , *cert. denied, 507 U.S. 913 (1993)* .

(n7)Footnote 6. *King v. Russell, 963 F.2d 1301, 1305 (9th Cir. 1992)* .

(n8)Footnote 7. *Fed. R. Civ. P. 21.*

(n9)Footnote 8. *Anrig v. Ringsby United, 603 F.2d 1319, 1324 (9th Cir. 1978)* (district court erred in dismissing entire action without determining whether those defendants as to whom venue was improper were indispensable parties).

(n10)Footnote 1. *Manley v. Engram, 755 F.2d 1463, 1467 (11th Cir. 1985)* ; *see Olberding v. Illinois Central Railway Co., 346 U.S. 338, 340, 74 S. Ct. 83, 98 L. Ed. 39 (1953)* .

(n11)Footnote 2. *Manley v. Engram, 755 F.2d 1463, 1467-1471 (11th Cir. 1985)* (when diligent plaintiff files suit in good faith in district of individual defendant's apparent residence, but later discovers that defendant subjectively considers another state his permanent residence, plaintiff has not automatically waived right to object to venue in original forum or to seek transfer under Section 1406(a)).

(n12)Footnote 1. *Maldonado v. Rogers, 99 F. Supp. 2d 235, 241 n.2 (N.D.N.Y. 2000)* (in cases where action should be dismissed for lack of personal jurisdiction, courts have raised issue of transferring case to another district sua sponte, in interests of judicial economy and to achieve orderly adjudication on merits).

(n13)Footnote 2. *Stjernholm v. Peterson, 83 F.3d 347, 348 (10th Cir. 1996)* , *cert. denied, 519 U.S. 930 (1996)* .

(n14)Footnote 3. *Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 n.3 (2d Cir. 1966)* .

(n15)Footnote 4. *Catz v. Chalker, 142 F.3d 279, 285 (6th Cir. 1998)* .

(n16)Footnote 5. *Stjernholm v. Peterson, 83 F.3d 347, 348 (10th Cir. 1996)* , *cert. denied, 519 U.S. 930 (1996)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.104

§ 7.104 Court's Discretion to Transfer or Dismiss on Improper Venuen*

[1] Transfer Is Preferred Procedure for Improper Venue

When a plaintiff has laid venue improperly in a district court, the court has discretion either to transfer the case or to dismiss it without prejudice. n1 Even if the defendant has moved only for dismissal for improper venue under Section 1406(a), the court may order the action transferred, if transfer is otherwise appropriate. n2 The court may transfer to another court with proper venue whenever the transfer would be in the interest of justice. n3 The "interest of justice" is not a precise standard and is highly discretionary. Transfer will ordinarily be in the interest of justice because dismissal of an action that could be brought elsewhere is time consuming and justice-defeating. The purpose of the improper venue transfer statute is to avoid the harsh result of dismissal of the action merely because the plaintiff made an erroneous guess with regard to the existence of some elusive fact on which venue statutes often turn. Some courts, however, in practice seem to prefer to dismiss rather than transfer, even when a statute of limitation has run and will bar a new action filed in the proper district. n4

[2] Court Has Discretion to Dismiss Without Prejudice

The court may dismiss an action pursuant to a Section 1406(a) when venue is wrong and transfer is not in the interest of justice. n1 It has been held that a transfer would not be in the interest of justice, for example, if the plaintiff brought the action in the wrong district for some improper purpose, such as, in an attempt to circumvent an adverse ruling in a related action pending elsewhere, n2 to harass the defendant with litigation in a remote forum, n3 or if forum shopping was the clear motivation in bringing the action in an improper district in the first instance. n4 It should be noted that the fact that a statute of limitation will bar the refiling of the action in the proper district does not require the conclusion that transfer is in the interest of justice. n5 It should also be noted that once a district court selects the dismissal option, it loses the power to take further action and may not later transfer the case. n6

A dismissal under the Section 1406(a) must be "without prejudice," which means that the dismissal does not bar a subsequent action in the proper forum on the same claim. The courts have adopted this rule because a determination of improper venue does not go to the merits of a case. n7 However, if a statute of limitation has since run on a claim, even a dismissal without prejudice (rather than transfer) will have the effect of barring a subsequent claim. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1406(a)*; *Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)* .

(n3)Footnote 2. *Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371-372 n.3 (2d Cir. 1966)* .

(n4)Footnote 3. *28 U.S.C. § 1406(a)*; *Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515, 1523 (9th Cir. 1983)* , *cert. denied, 465 U.S. 1081 (1984)* .

(n5)Footnote 4. *See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962)* .

(n6)Footnote 1. *28 U.S.C. § 1406(a)*.

(n7)Footnote 2. *In re Hall, Bayoutree Associates, Ltd., 939 F.2d 802, 805-806 (9th Cir. 1991)* (citing **Moore's Federal Practice**).

(n8)Footnote 3. *King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992)* , *cert. denied, 507 U.S. 913 (1993)* .

(n9)Footnote 4. *Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983)* , *cert. denied, 465 U.S. 1081 (1984)* .

(n10)Footnote 5. *Hapaniewski v. City of Chicago Heights, 883 F.2d 576, 580 (7th Cir. 1989)* , *cert. denied, 493 U.S. 1071 (1990)* .

(n11)Footnote 6. *Hollyanne Corp. v. TFT, Inc., 199 F.3d 1304, 1307 (Fed. Cir. 1999)* (once court decided that it lacked proper venue and had dismissed complaint, district court could not properly transfer case).

(n12)Footnote 7. *In re Hall, Bayoutree Associates, Ltd., 939 F.2d 802, 804 (9th Cir. 1991)* .

(n13)Footnote 8. *See, e.g., Diebold, Inc. v. Firstcard Financial Services, Inc., 104 F. Supp. 2d 758, 763 (N.D. Ohio 2000)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.105

§ 7.105 Waiver of Objection to Improper Venuen*

A defendant waives the right to obtain a transfer or dismissal of an action for improper venue under Section 1406(a) unless the defendant makes a timely and sufficient objection to improper venue. n1 The defense of improper venue may be waived in several ways. n2 For example, the defense of improper venue is waived unless it is included in the defendant's first response to the complaint, n3 whether that response is a motion to dismiss, an answer to the complaint, or in an amendment to the answer made under Rule 15(a). n4 Thus, the defense of improper venue is waived if the defendant makes a pre-answer motion to dismiss on any of the other grounds specified in Rule 12(b) and does not specifically raise improper venue as a grounds for dismissal in the same motion. n5

Even if the defendant complies with Rule 12 by including the objection to improper venue in his or her first response to the complaint (see [2], *above*), the objection may still be waived by other conduct that may be viewed as an implicit submission to the court's jurisdiction. n6 Furthermore, if a defendant defaults in an action by not responding to the complaint within the applicable time limits, the objection to improper venue is waived. n7

It should be noted, however, that waiver of improper venue does not preclude a Section 1404(a) motion to transfer on the basis of convenience of the parties or the witnesses. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.36 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Broadcasting Co. v. Flair Broadcasting, 892 F.2d 372, 377 (4th Cir. 1989)* (defendant loses right to dismiss or transfer for improper venue under Section if objection has been waived).

(n3)Footnote 2. *Manley v. Engram, 755 F.2d 1463, 1468 (11th Cir. 1985)* (venue objection may be waived by

express waiver, by conduct amounting to waiver as a matter of law, or by failure to interpose timely and sufficient objection).

(n4)Footnote 3. *See Fed. R. Civ. P. 12(h)(1).*

(n5)Footnote 4. *See Fed. R. Civ. P. 15(a).*

(n6)Footnote 5. *Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-910 (5th Cir. 1993)* .

(n7)Footnote 6. *See Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993)* .

(n8)Footnote 7. *Cottman Transmission Sys., Inc. v. Martino Distrib., Inc., 36 F.3d 291, 296 (3d Cir. 1994)* (defendant waived objection to improper venue by defaulting).

(n9)Footnote 8. *28 U.S.C. § 1404(a).*

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C. STATUTORY TRANSFER WHEN ORIGINAL VENUE IS IMPROPER

1-7 Moore's Manual--Federal Practice and Procedure § 7.106

§ 7.106 Law Applied Following Statutory Transfer Based On Improper Venuen*

Following a transfer under Section 1406(a), the transferee court must apply whatever law it would have applied had the action been properly commenced in the transferee court, n1 including, in diversity cases, the choice of law rules of the state in which the transferee court sits. n2 The rationale for this rule is to preclude improper forum-shopping. If the plaintiff were allowed to benefit by obtaining the law of a forum by filing an action in such forum despite improper venue in that forum, and then moving to transfer to a proper venue, it would allow plaintiffs to forum shop by filing actions wherever state law was most favorable, regardless of whether venue was proper in that district or not. By contrast, the law applied following a Section 1404(a) convenience transfer is that of the transferor court, because in that transfer, the initial venue in the transferor court was proper. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.38 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Schaeffer v. Village of Ossining, 58 F.3d 48, 49 (2d Cir. 1995)* .

(n3)Footnote 2. *Khreativity Unlimited v. Mattel, Inc., 101 F. Supp. 2d 177, 181-182 (S.D.N.Y. 2000)* (because New Jersey district court transferred case to southern District of New York pursuant to Section 1406(a), court must apply law of the Southern District of New York, not District of New Jersey; additionally, because New York transferee court was exercising diversity jurisdiction, transferee court must apply New York's choice-of-law rules).

(n4)Footnote 3. *See § 7.87.*

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1-7 Moore's Manual--Federal Practice and Procedure §§ 7.107through 7.119

[Reserved]

§§ 7.107[Reserved]

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1-7 Moore's Manual--Federal Practice and Procedure § 7.120

§ 7.120 Transfer to Court with Exclusive Subject Matter Jurisdictionn*

[1] Purpose of Statute

Generally, a district court must dismiss an action if it lacks subject matter jurisdiction, based either on diversity, federal question, or some other basis. n1 If, however, the district court lacks subject matter jurisdiction over particular classifications of actions because a federal statute vests exclusive subject matter jurisdiction in a specified court, the district court without subject matter jurisdiction may transfer the action under Section 1631 to the court that does have that specialized subject matter jurisdiction. n2 Section 1631 was enacted to authorize a federal court that determines that there is a lack of jurisdiction regarding a civil action filed with it to transfer the action to any other court in which the action could have been brought at the time it was filed in the original court. n3

Courts routinely transfer actions under Section 1631 to the particular court having exclusive subject matter jurisdiction in a particular area, due primarily to the creation of specialized federal courts to which Congress granted exclusive subject matter jurisdiction over certain actions, such as petitions for habeas corpus, and the types of cases that must be filed in the Court of Federal Claims or bankruptcy courts. n4

There is a split among circuits over whether a particular claim or claims may be transferred or whether the entire action must be transferred under Section 1631. The text of Section 1631 refers to the transfer of an "action" rather than the transfer of a "claim." Consequently, the District of Columbia Circuit takes the view that the entire case must be transferred. n5 Other courts of appeals have found that Section 1631 permits transfer of particular claims. n6

[2] Transfer to Cure Defects Other Than Subject Matter Jurisdiction

Although all courts agree that Section 1631 allows transfer rather than dismissal of an action mistakenly filed in a federal court without subject matter jurisdiction, some courts have held that section 1631 also applies to transfers to cure other defects. Thus, some courts have held transfer under Section 1631 is proper when the transferor court lacked personal jurisdiction, n1 proper venue, n2 or (3) in rem admiralty jurisdiction. n3

These courts' reasoning may be based on various grounds. For example, several courts have concluded that Section

1631 was designed to clear up the courts' confusion over which of the other transfer statutes, Section 1404(a) or Section 1406(a), applied when venue was technically proper in the original court, but when that court lacked personal jurisdiction over the defendant, and which state's law properly applied following transfer in such a situation. n4 Other courts rely on the plain language of Section 1631, which authorizes transfer for "want of jurisdiction" without restricting it to any type of jurisdiction. n5

Other courts disagree, finding that transfer under Section 1631 properly may be used only to correct a lack of subject matter jurisdiction in the transferor court. n6 These courts interpret Section 1631's phrase "want of jurisdiction" to refer only to a lack of subject matter jurisdiction in the transferor court and rely on its legislative history, which refers exclusively to transfer for the express purpose of remedying a lack of subject matter jurisdiction in the original court. n7

[3] Transfer in Interest of Justice

Section 1631 requires the court to make the transfer of the action to the proper court with jurisdiction if the transfer is in the "interest of justice." n1 Transfer rather than dismissal ordinarily will be deemed in the interest of justice n2 unless the action or appeal is frivolous, n3 the action was prematurely filed, n4 the action was untimely filed in the original court, n5 or the party moving for transfer delayed too long before making the motion. n6

The "interest of justice" requirement ordinarily will be satisfied if the statute of limitation has expired after the time of the original filing, so that only transfer rather than dismissal will preserve the plaintiff's cause of action. n7 Even if application of the statute of limitation would not bar the plaintiff from refiling the action in the correct court, transfer rather than dismissal ordinarily is in the interest of justice because it would save the plaintiff the time, expense, and effort of having to refile the action. n8

On the other hand, courts will deny transfer under Section 1631 if the claim will clearly lose in the proposed transferee court which has jurisdiction. In such cases, the court determining the motion for transfer should dismiss the case rather than grant a motion to transfer. Even though the motion to transfer is dependent only on the district court's lack of subject matter jurisdiction over the case, Section 1631 confers on the district court jurisdiction to engage in a limited review of the merits. Because it must determine whether it is in the interest of justice to transfer the case to the federal court with subject matter jurisdiction, the court implicitly also has the power to dismiss the case before it. n9

[4] Law Applied Following Transfer to Court With Exclusive Jurisdiction

Following a transfer due to lack of jurisdiction, the action must proceed as if it had been filed in or noticed for the court to which it is transferred on the date on which it was actually filed in the court from which it is transferred. n1 Courts have interpreted this to mean that even in diversity cases the law of the transferee state, including its choice of law rules, governs the action as of the date the action was filed in the original court. Thus, Section 1631 requires that (1) the transferee court apply the choice of law rules of the transferee state to determine which state's statutes of limitation properly apply and (2) it treat the action as having been filed in the transferee court as of date of the original filing. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureVenueFederal Venue TransfersJurisdictional Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.38 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* Ch. 5, *Original Jurisdiction Over the Subject Matter*.

(n3)Footnote 2. *28 U.S.C. § 1631.*

(n4)Footnote 3. *28 U.S.C. § 1631*; *Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1526 (10th Cir. 1987)* (Congress gave broad authority to permit transfer of action between any two federal courts; § 1631 controls action of federal court when it finds that it lacks jurisdiction but that another federal court has jurisdiction).

(n5)Footnote 4. *United States v. American River Transp., Inc., 150 F.R.D. 587, 591 (C.D. Ill. 1993)* (impetus for § 1631 was jurisdictional confusion caused by the creation of specialized federal courts, such as the Court of Claims, which have jurisdiction over certain matters).

(n6)Footnote 5. *Hill v. U.S. Air Force, 795 F.2d 1067, 1070 (D.C. Cir. 1986)* .

(n7)Footnote 6. *FDIC v. McGlamery, 74 F.3d 218, 221 (10th Cir. 1996)* (when district court severed claim under Rule 21, transfer of severed claims was proper).

(n8)Footnote 1. *See, e.g., Viernow v. Euripides Development Corp., 157 F.3d 785, 793 (10th Cir. 1998)* ; *but see Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 179 n.9 (2d Cir. 2000)* (Tenth Circuit has ruled that authority to transfer for lack of personal jurisdiction is provided by § 1631 but legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction).

(n9)Footnote 2. *Intl. Brotherhood of Electric Workers v. Interstate Commerce Comm., 832 F.2d 91, 92 (7th Cir. 1987)* .

(n10)Footnote 3. *United States v. American River Transp., Inc., 150 F.R.D. 587, 591-592 (C.D. Ill. 1993)* .

(n11)Footnote 4. *Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1527 (10th Cir. 1987)* .

(n12)Footnote 5. *Jaffe v. Julien, 754 F. Supp. 49, 53 (E.D. Pa. 1991)* .

(n13)Footnote 6. *Mortensen v. Wheel Horse Products, Inc., 772 F. Supp. 85, 89-90 (N.D.N.Y. 1991)* .

(n14)Footnote 7. *Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 179 n.9 (2d Cir. 2000)* ; *Mortensen v. Wheel Horse Products, Inc., 772 F. Supp. 85, 87-89 (N.D.N.Y. 1991)* (legislative history makes clear that Section 1631 was intended to apply only to cases in which the transferor court lacks subject matter jurisdiction).

(n15)Footnote 1. 28 U.S.C. § 1601.

(n16)Footnote 2. *Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990)* , *quoting Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467, 82 S. Ct. 913, 916, 8 L. Ed. 2d 39 (1962)* (transfer is in interest of justice because ordinarily dismissal of action that could be brought elsewhere is time-consuming and justice-defeating).

(n17)Footnote 3. *Clark v. Busey, 959 F.2d 808, 812 (9th Cir. 1992)* .

(n18)Footnote 4. *George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1422-1423 (11th Cir. 1993)* (district court correctly decided that it was not in interest of justice to transfer case to appellate court with exclusive jurisdiction to review FAA actions when FAA had not yet taken final action on claim).

(n19)Footnote 5. *Phillips v. Seiter, 173 F.3d 609, 610-611 (7th Cir. 1999)* .

(n20)Footnote 6. *Janicki Logging Co. v. Mateer, 42 F.3d 561, 567 (9th Cir. 1994)* (transfer to Court of Claims was not in interest of justice when plaintiff delayed making motion).

(n21)Footnote 7. *Martin v. Nickles & Dimes, Inc., 804 F. Supp. 83, 85-86 (D. Haw. 1992)* .

(n22)Footnote 8. *Ramos-Velez v. U.S. Dept. of Justice, 826 F. Supp. 615, 616 (D. P.R. 1993)* .

(n23)Footnote 9. *Phillips v. Seiter, 173 F.3d 609, 610-611 (7th Cir. 1999)* .

(n24)Footnote 1. *28 U.S.C. § 1631.*

(n25)Footnote 2. *Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1526-1527 (10th Cir. 1987)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.121

§ 7.121 Transfer Between Divisions of Same Districtn*

[1] Right to Transfer

By statute, a district court in one division of a district has discretion to transfer an action to another division within the same district. n1 It has been held thatbecause Section 1404(b) on its face authorizes only a transfer from one division to another division within the same district, n2 it does not permit a transfer to another district or to a division in another district. n3

Even though Section 1404(b) does not expressly have the same requirement as Section 1404(a) that the transfer must be "for the convenience of the parties and witnesses" and "in the interest of justice," courts have applied these same requirements to Section 1404(b) transfers. n4 Some courts have stated that the showing required under Section 1404(b) with respect the two requirements is less rigorous than that required under Section 1404(a). n5 Therefore, the traditional acquiescence given to plaintiff's choice of forum under Section 1404(a) is correspondingly less under Section 1404(b). n6

[2] Interdivisional Transfer Procedure

The initiation of an interdivisional transfer under Section 1404(b) must be made on motion, consent, or stipulation of all parties. n1 This requirement has been construed as precluding a sua sponte transfer over the objection of any party. n2 The rule is in contrast to the interpretation of Section 1404(a) and Section 1406(a) transfers, which allow the court to order transfers on its own motion. n3 Additionally, while it has been held that under Section 1404(a) the parties may not have an inter-district transfer by stipulation, n4 the statutory language in Section 1404(b) expressly authorizes the parties to transfer a matter between divisions by stipulation. n5

Furthermore, if there is no timely objection to or opposition to a motion to transfer between divisions, the effect is the same as a stipulation. The failure to present a timely objection results in a waiver of the objection and precludes subsequent objections to the transfer. n6 Finally, there may be a stipulated transfer between divisions even if one of the parties, the United States, refuses to consent. The second sentence of Section 1404(b) provides that in rem proceedings brought by or on behalf of the United States may be transferred without the consent of the United States where all other

parties request transfer. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersJurisdictional Transfers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(b)*; *United States v. 23 Gross Jars, 86 F. Supp. 824, 825 (N.D. Ohio 1949)* .

(n3)Footnote 2. *Clinton Foods, Inc. v. United States, 188 F.2d 289, 293 (4th Cir.)* , *cert. denied, 342 U.S. 825 (1951)* .

(n4)Footnote 3. *United States v. $200,000, 805 F. Supp. 585, 588 (N.D. Ill. 1992)* (transfer from Northern District of Illinois to Northern District of Arizona not contemplated under Section 1404(b)).

(n5)Footnote 4. *Weber v. Coney, 642 F.2d 91, 93 (5th Cir. 1981)* ; *Cliff Weil, Inc. v. Bailey, 209 F. Supp. 836, 836 (E.D.S.C. 1962)* .

(n6)Footnote 5. *Hanning v. New England Mut. Life Ins. Co., 710 F. Supp. 213, 215 (S.D. Ohio 1989)* (interdivisional transfer under Section 1404(b) is subject to the same analysis as under § 1404(a) but apparently under a less rigorous standard).

(n7)Footnote 6. *Libby v. Russell, 349 F. Supp. 573, 575 (N.D. Miss. 1972)* .

(n8)Footnote 1. *28 U.S.C. § 1404(b).*

(n9)Footnote 2. *High River P'ship v. Mylan Labs., Inc., 353 F. Supp. 2d 487, 499 (M.D. Pa. 2005)* .

(n10)Footnote 3. *See §§ 7.84[2], 7.103[3].*

(n11)Footnote 4. *White v. Abco Engineering Corp., 199 F.3d 140, 143-144 (3d Cir. 1999)* .

(n12)Footnote 5. *28 U.S.C. § 1404(b).*

(n13)Footnote 6. *Fallbrook Public Util. Dist. v. United States, 202 F.2d 942, 943 (9th Cir. 1953)* .

(n14)Footnote 7. *28 U.S.C. § 1404(b).*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.122

§ 7.122 Transfer Within Single Division Districtn*

By statute, a district court may order any civil action to be tried at any place within the division in which it is pending. n1 If a district has no divisions, it is treated as a district with a single division, and thus Section 1404(c) allows the court to select any location within that district as the place of trial. n2 As for the other subdivisions under Section 1404, the decision to transfer under Section 1404(c) is within the district court's discretion, n3 and even though Section 1404(c) does not expressly provide the requirements, courts have interpreted Section 1404(c) as requiring that the decision to transfer must be further governed by the convenience of the parties and witnesses and the interest of justice. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1404(c).*

(n3)Footnote 2. *El Ranco, Inc. v. First Nat'l Bank, 406 F.2d 1205, 1219 (9th Cir. 1968) , cert. denied, 396 U.S. 875 (1969)* (§ 1404(c) authorizes court to transfer case to another city within district when district is not divided into divisions).

(n4)Footnote 3. *Hancock v. Delta Airlines, Inc., 793 F. Supp. 366, 368 (D. Me. 1992) .*

(n5)Footnote 4. *Aikens v. Lash, 371 F. Supp. 482, 485 (N.D. Ind. 1974)* (transferring site of trial under *28 U.S.C. § 1404(c)* for convenience of parties and witnesses and interest of justice).

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1-7 Moore's Manual--Federal Practice and Procedure §§ 7.123through 7.139

[Reserved]

§§ 7.123[Reserved]

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E. COMMON-LAW DOCTRINE OF FORUM NON CONVENIENS

1-7 Moore's Manual--Federal Practice and Procedure § 7.140

§ 7.140 Nature and Purpose of Doctrinen*

"Forum non conveniens" is a common-law doctrine in federal court which allows the district court discretion to decline to exercise jurisdiction, even though the court has jurisdiction and proper venue, when it appears that the convenience of the parties and the court and the interests of justice would be better served if the action were tried in an alternative, available forum in a foreign country. n1 If a court dismisses an action on forum non conveniens grounds, it has the practical effect of forcing the plaintiff to file the complaint in the more convenient, alternative forum in the foreign country. n2 Although a court typically does not do so, n3 a court may retain some claims in an action and dismiss others on forum non conveniens grounds. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non Conveniens

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.70 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* .

(n3)Footnote 2. *American Dredging Co. v. Miller, 510 U.S. 443, 447-448, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* ; *see U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 753 (7th Cir. 2008)* .

(n4)Footnote 3. *Boosey & Hawkes Music Publishers v. Walt Disney Co., 145 F.3d 481, 491-92 (2d Cir. 1998)* (district court abused discretion in dismissing foreign copyright claims in case in which court adjudicated other claims).

(n5)Footnote 4. *Scottish Air Int'l v. British Caledonian Group, PLC, 81 F.3d 1224, 1234-1235 (2d Cir. 1996)* (although deciding related claims in different courts may often be inconvenient and inefficient, contrary rule would reduce flexibility of doctrine).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.141

§ 7.141 Doctrine Limited to Situations When Alternative Forum is in Foreign Sovereignn*

The Supreme Court has held that the common-law doctrine of forum non conveniens has continuing application in federal courts only in cases where the alternative, more convenient forum is in another country. This principle has developed because, for the federal court system in the United States, Congress has codified the common-law doctrine in Sections 1404(a) and 1406(a). n1 Those statutes provided for transfer, rather than dismissal, in cases when another federal court is the more convenient place for trial of the action than the court where the action is currently pending. n2 In other words, Sections 1404(a) and 1406(a) serve as statutory substitutes for common-law forum non conveniens for application in domestic federal courts; that is, when the alternative forum is within the territory of the United States, rather than abroad. n3

The doctrine of forum non conveniens has been held inapplicable to cases arising under a few federal statutes providing for venue in the district courts of the United States. Thus, it has been held that forum non conveniens dismissal is inapplicable if the language and legislative purpose of the venue statute reveal a Congressional intent to vest in the plaintiff an absolute power to choose a United States forum, and thus implicitly to deprive the court of its discretionary power to defeat the plaintiff's venue choice by application of the doctrine of forum non conveniens. For example, such an intent has been found in actions pursuant to the Federal Employers' Liability Act. n4 For a discussion of the effect of special venue statutes on the doctrine of forum non conveniens, see 17 *Moore's Federal Practice, § 111.76* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueForum Non Conveniens

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.71 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) .*

(n3)Footnote 2. *See 28 U.S.C. §§ 1404(a), 1406(a).*

(n4)Footnote 3. *Duha v. Agrium, Inc., 448 F.3d 867, 883-884 (6th Cir. 2006)* ; *see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n5)Footnote 4. *See Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 699-700 (9th Cir. 1995)* ; *see also 45 U.S.C. § 51.*

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1-7 Moore's Manual--Federal Practice and Procedure § 7.142

§ 7.142 Court Must Apply Federal Law of Forum Non Conveniensn*

When a party files a motion in federal court requesting to dismiss based on forum non conveniens, a determination of the motion is governed by federal law in all cases, n1 and not any state law counterpart. Federal law applies even in a diversity case n2 because the forum non conveniens doctrine is a rule of venue, not a rule of decision. Therefore, the *Erie* doctrine does not require the application of state forum non conveniens rules. n2.1 Additionally, the fact that there are strong federal interests to ensure that a federal court has the ability to manage the decisions before the court, which may have foreign policy implications weigh in favor of applying federal law to the issue of forum non conveniens. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non Conveniens

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.72 (Matthew Bender 3d ed.).

(n2)Footnote 1. *IFC Credit Corp. v. Aliano Bros. Gen. Contrs., Inc., 437 F.3d 606, 609 (7th Cir. 2006)* .

(n3)Footnote 2. *Dtex, LLC v. BBVA Bancomer, S.A., 512 F. Supp. 2d 1012, 1019 (S.D. Tex. 2007)* .

(n4)Footnote 2.1. *Rivendell Forest Prods. v. Canadian Pac. Ltd., 2 F.3d 990, 992 (10th Cir. 1993)* ; *Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 673 (S.D. Tex. 2004)* .

(n5)Footnote 3. *Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2d Cir. 1991)* (it is not court's responsibility to supervise integrity of judicial system of another sovereign nation).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.143

§ 7.143 Dismissal Under Doctrine is Within Discretion of Courtn*

The doctrine of forum non conveniens is a flexible doctrine that gives the court considerable discretion n1 to weigh many factors relating to fairness and convenience, n2 and to decide the motion based on the particular facts of the case. n3 Therefore, theSupreme Court has cautioned the district courts not to place central emphasis on any one factor, otherwise the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable. n4 However, one of the drawbacks of the doctrine for parties is that the doctrine's flexible nature makes uniformity and predictability of outcome difficult. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.73 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 153-155 (2d Cir. 2005)* .

(n3)Footnote 2. *See § 7.144.*

(n4)Footnote 3. *Scottish Air Int'l v. British Caledonian Group, PLC, 81 F.3d 1224, 1234-1235 (2d Cir. 1996)* (flexibility of forum non conveniens doctrine allows district court to dismiss some claims while retaining others).

(n5)Footnote 4. *Piper Aircraft Co. v. Reyno Corp. 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n6)Footnote 5. *American Dredging Co. v. Miller, 510 U.S. 443, 455, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* .

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PART II Jurisdiction; Venue; Removal
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E. COMMON-LAW DOCTRINE OF FORUM NON CONVENIENS

1-7 Moore's Manual--Federal Practice and Procedure § 7.144

§ 7.144 Requirements for Dismissal Under Doctrinen*

[1] Dismissal Requires Two Elements

There are two essential elements that the party moving for forum non conveniens dismissal must demonstrate: n1 (1) the existence of an adequate, alternative forum, n2 and (2) that the balance of certain private and public interest factors favors dismissal. n3

[2] Alternative Foreign Forum Must Be Adequate

[a] Finding of Inadequacy is Rare

When a party makes a motion to dismiss based on forum non conveniens, the court must first decide whether there is an "adequate alternative forum" available to adjudicate the case. n1 If there is no adequate alternative forum available, the court may not dismiss the case but must retain the case for further proceedings. n2 An adequate alternative forum is considered available if all of the claims and all of the parties to the case are capable of adjudication within the subject matter and personal jurisdiction of the alternative forum. n2.1 The Supreme Court has stated that in rare circumstances the alternative forum may not be an adequate alternative if the remedy offered by the other forum is clearly unsatisfactory. n3 A court making a dismissal must articulate the grounds for dismissal and specify the factors that make the alternative forum adequate. n4

[b] Circumstances in Which Alternative Forum is Inadequate

Courts have found inadequacy in the following circumstances:

1. The alternative forum does not permit litigation of the subject matter of the dispute at all. n5 For example, when a foreign forum totally disregard American courts' custody orders, that forum is an inadequate forum for an action alleging custodial interference. n6

2. The plaintiff demonstrates significant legal obstacles to conducting litigation in the alternative forum. These are

obstacles so severe that essentially they deprive the plaintiff of any remedy. n7 Furthermore, significant legal obstacles do not exist merely because there is no identical cause of action in the other forum nor because there are no identical remedies. n7.1

3. Fear of persecution, bias, corruption, or political unrest may make an alternative forum inadequate. n8 However, general allegations of corruption or bias on the part of the foreign forum does not automatically establish inadequacy, n9 nor will political unrest in the foreign jurisdiction, unless it is established that the unrest has an adverse effect on the judicial system there. n10

[c] Circumstances in Which Alternative Forum is Adequate

Courts usually find that the alternative forum is adequate in the following circumstances:

1. The defendants are amenable to service of process in the alternative forum, and it provides some potential avenue for adjudication of the claims. n10.1 The possibility that the foreign tribunal will apply law that is less favorable to the plaintiff or that the damages awarded may be smaller is a consideration but, in itself, does not make a forum inadequate. n10.2 Thus, for example, the possibility that the alternative forum would not recognize a strict liability theory did not make the forum inadequate because the plaintiff would still be able to pursue negligence claims in that forum. n11 Only if all potential recovery is meaningless would the alternative forum be inadequate. n11.1

2. A forum is usually adequate despite less favorable procedural law. Thus, a foreign forum is not rendered inadequate by the unavailability of beneficiallitigation procedures similar to those available in the United States, including federal district courts, n12 such as the lack of jury trial. n13

3. Ordinarily, the alternative forum will be deemed both "available" and "adequate" if all defendants are amenable to process in the other jurisdiction. n14 However, in some circumstances an alternative forum will be held inadequate even despite the fact that the defendants are amenable to process in the forum, n15 for example, if the alternative forum does not permit litigation of the subject matter of the dispute at all. n16

[3] Convenience of Parties and Interests of Justice Served by Dismissal

[a] Discretion of Court to Make Determination Based on Private and Public Factors

The district court has discretion to dismiss an action based on inconvenience and the interests of justice only after considering and balancing n1 any relevant private factors n2 and public factors. n3 The Supreme Court has stated that dismissal is appropriate either when litigation in the original forum would cause oppressiveness and vexation to a defendant out of proportion to the plaintiff's convenience or when considerations affecting the original forum court's own administrative and legal problems make the original forum inappropriate for litigation. n4

[b] Private Factors

The private factors that a court must consider include the following: n5

1. The location of operative events and the relative ease of access to sources of proof. n6

2. The relative availability of compulsory process to secure the attendance of unwilling witnesses. This is considered the most important factor by many courts because the presentation of live testimony often is essential to a fair trial. n7

3. The cost of obtaining attendance of witnesses, assuming that witnesses located in a foreign location are willing to testify at trial in the district court. n8

4. The extent to which a view of the premises at issue in the action is necessary. n9 The adequacy of other alternatives, such as a filmed or videotaped view, may also be considered by the court. n10

5. The enforceability of judgments in the alternative forum, n11 considering especially where the assets of the defendants are located. n12

6. All other factors that render trial of the case expeditious and inexpensive, n12.1 such as, the defendant's inability to implead a necessary third party; n13 the cost of obtaining or translating evidence; n14 and the plaintiff's financial hardship that would be incurred if the action is brought in the alternative forum. n15

[c] Public Factors

The public factors that a court must consider include the following: n16

1. The administrative problems and expense caused by court congestion. n17

2. The unfairness of burdening citizens in an unrelated forum with jury duty. n18

3. The interest in having localized controversies decided at home. n19

4. The interest in trying the case in a forum familiar with the applicable law. n20 Therefore, if there is a strong need for the district court in the United States to analyze and apply the law of a foreign country, that need weighs heavily in favor of dismissal. n20.1

5. The interest in avoiding unnecessary conflicts of laws. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.74 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671 (5th Cir. 2003)* ; *see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n3)Footnote 2. *Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006)* ; *see* [2], below.

(n4)Footnote 3. *Membreno v. Costa Crociere S.P.A., 425 F.3d 932, 937-938 (11th Cir. 2005)* ; *see* [3], below.

(n5)Footnote 1. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1090 (9th Cir. 1999)* ; *El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 676-677 (D.C. Cir. 1996)* .

(n6)Footnote 2. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1225 (3d Cir. 1995)* .

(n7)Footnote 2.1. *Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 157 (2d Cir. 2005)* ; *Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671 (5th Cir. 2003)* .

(n8)Footnote 3. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n9)Footnote 4. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1090 (9th Cir. 1999)* .

(n10)Footnote 5. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1350 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* .

(n11)Footnote 6. *Pittman v. Grayson, 869 F. Supp. 1065, 1075 (S.D.N.Y. 1994)* .

(n12)Footnote 7. *Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006)* .

(n13)Footnote 7.1. *Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 157 (2d Cir. 2005)* .

(n14)Footnote 8. *See Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996)* (finding alternative forum inadequate and denying dismissal when Ghanian plaintiff, who had political asylum status, had well founded fear of persecution if he brought action in Ghanian courts alleging torture by Ghanian officials).

(n15)Footnote 9. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1351 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* (conclusory allegation by female plaintiff of Turkish courts profound bias).

(n16)Footnote 10. *Transunion Corp. v. Pepsico, Inc., 811 F.2d 127, 129 (2d Cir. 1987)* (granting dismissal when no showing was made that political unrest in the Philippines has had an adverse effect on its judicial system there).

(n17)Footnote 10.1. *Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 157 (2d Cir. 2005)* .

(n18)Footnote 10.2. *Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs., 421 F. Supp. 2d 741, 756 n.6 (S.D.N.Y. 2006)* .

(n19)Footnote 11. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 254-255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n20)Footnote 11.1. *Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006)* .

(n21)Footnote 12. *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 835 (5th Cir.)* , *cert. denied, 508 U.S. 973 (1993)* (foreign forum adequate when parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy same benefits as they might receive in U.S. court).

(n22)Footnote 13. *Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991)* .

(n23)Footnote 14. *Jota v. Texaco, Inc., 157 F.3d 153, 158-159 (2d Cir. 1998)* (district court must be satisfied that litigation may be conducted elsewhere against all defendants); *Murray v. British Broadcasting Corp., 81 F.3d 287, 292 (2d Cir. 1996)* .

(n24)Footnote 15. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n25)Footnote 16. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1350 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* .

(n26)Footnote 1. *Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2005)* .

(n27)Footnote 2. *See* [b], *below*.

(n28)Footnote 3. *See* [c], *below*.

(n29)Footnote 4. *American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 985, 127 L. Ed. 2d 285 (1994)* .

(n30)Footnote 5. *Monegro v. Rosa, 211 F.3d 509, 512 (9th Cir. 2000)* .

(n31)Footnote 6. *Iragorri v. International Elevator, Inc., 203 F.3d 8, 16-17 (1st Cir. 2000)* (district court properly dismissed wrongful death action in favor of alternative forum in Colombia, where incident took place and where crucial witnesses lived); *Faber-Plast, GmbH v. Kleinert, 997 F. Supp. 846, 848-849 (E.D. Mich. 1998)* (although plaintiff lived in Michigan and operated several businesses there, private interest factors supported German forum because contract in issue was drafted in Germany, was to be performed in Germany, and concerned German corporation).

(n32)Footnote 7. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1355-1356 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* (fact that only foreign forum could compel live testimony of crucial witness weighed significantly in favor of dismissal because deposition testimony and letters rogatory were not satisfactory substitutes in that they would not allow American fact-finder to evaluate witness' credibility).

(n33)Footnote 8. *Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1001 (2d Cir. 1993)* , *cert. denied, 510 U.S. 945 (1993)* (factor weighed in favor of dismissal when cost of bringing witnesses to the United States for trial would be prohibitive).

(n34)Footnote 9. *Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974. 983 (2d Cir. 1993)* (in contract dispute alleging that defendant wrongfully withheld progress payments for construction project in Venezuela, view of premises to determine progress of construction was essential and therefore supported dismissal).

(n35)Footnote 10. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 703 (9th Cir. 1995)* .

(n36)Footnote 11. *ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 427 (S.D.N.Y. 1998)* .

(n37)Footnote 12. *Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 1001 (2d Cir. 1993)* , *cert. denied, 510 U.S. 945 (1993)* (as part of forum non conveniens analysis, district court properly recognized that any judgment will have to be enforced where defendant's assets are located).

(n38)Footnote 12.1. *Membreno v. Costa Crociere S.P.A., 425 F.3d 932, 937 (11th Cir. 2005)* .

(n39)Footnote 13. *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir. 1993)* , *cert. denied, 508 U.S. 973 (1993)* .

(n40)Footnote 14. *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (5th Cir. 1993)* , *cert. denied, 508 U.S. 973 (1993)* .

(n41)Footnote 15. *Iragorri v. International Elevator, Inc., 203 F.3d 8, 17 (1st Cir. 2000)* (although financial hardship to plaintiff may properly be considered in balancing convenience factors, in this case plaintiff had completely failed to demonstrate any evidence of her financial resources, and thus had failed to demonstrate hardship).

(n42)Footnote 16. *Monegro v. Rosa, 211 F.3d 509, 512 (9th Cir. 2000)* .

(n43)Footnote 17. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* .

(n44)Footnote 18. *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir. 1993)* , *cert. denied, 508 U.S. 973 (1993)* .

(n45)Footnote 19. *Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 953 (1st Cir. 1991)* , *cert. denied, 502 U.S. 1095 (1992)* (except for United states plaintiffs who had purchased shares of Canadian company outside of United States, case had little to do with United States; on the other hand, Canada had greater interest in acting as forum for litigation arising out of alleged misrepresentations made in Canada by Canadian corporation and its directors and officers).

(n46)Footnote 20. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1357 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* (district court properly considered difficulty of applying Turkish law as factor favoring dismissal).

(n47)Footnote 20.1. *Membreno v. Costa Crociere S.P.A., 425 F.3d 932, 938 (11th Cir. 2005)* .

(n48)Footnote 21. *Scottish Air Int'l v. British Caledonian Group, PLC, 81 F.3d 1224, 1234 (2d Cir. 1996)* (public interest factors weigh in favor of dismissal when American court would be required to untangle problems in conflict of laws, and law foreign to itself).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.145

§ 7.145 Preference for Plaintiff's Choice of Forumn*

[1] Courts Give Deference to American Plaintiff's Choice of Forum

When the plaintiff is an American citizen or resident, the court will grant significant deference to the plaintiff's choice of forum, which should rarely be disturbed by dismissal of the action on forum non conveniens grounds. n1 This preference is not some jingoistic attitude on the part of American courts but is based on the recognized principle that there is a strong presumption in favor of a domestic plaintiff's choice of forum. n2 However, an American plaintiff's choice of a United States forum is not immunized against forum non conveniens dismissal when the defendant establishes such oppressiveness and vexation as to be out of all proportion to the plaintiff's convenience. n3 Thus, the burden on the defendant is heightened because of the countervailing public interest in providing a United States forum for an action in which all parties are United States citizens and residents. n4

[2] Courts Give Less Deference to Foreign Plaintiff's Choice of Forum

When a foreign plaintiff is concerned, his or her choice of forum generally is entitled to less deference than an American plaintiff. n1 This rule is not based on a desire to disadvantage foreign plaintiffs but rather on the assumption that a United States forum is not the most convenient forum when a foreign plaintiff is concerned, n2 and also that in comparison to a domestic plaintiff's forum choice, a foreign plaintiff's choice deserves less deference. n3 Furthermore, the court should consider whether a foreign plaintiff's choice of forum springs from disfavored motives, such as a desire to obtain the benefit of more favorable United States law, n4 or to harass the defendant. n5

When the defendant has a substantial presence in the chosen forum, the defendant must still overcome the presumption (although less) in favor of the foreign plaintiff's choice of forum by showing that the balance of convenience favors trial in the foreign forum. n6 Furthermore, some courts have held that a provision found in many United States treaties with foreign nations requires that citizens of such nations be given the same degree of deference that a United States citizen would receive with regard to its choice of a United States forum. n7 Such a provision expressly provides that foreign nationals be given national treatment with respect to access to United states courts or access to our courts on terms no less favorable than those applicable to United States citizens. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferChoice of Forum

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.75 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Guidi v. Inter-Continental Hotels Corp., 203 F.3d 180, 184 (2d Cir. 2000)* (when American plaintiff sues in an American forum, there is preference that court keep case in that forum).

(n3)Footnote 2. *Monegro v. Rosa, 211 F.3d 509, 513 (9th Cir. 2000)* .

(n4)Footnote 3. *Guidi v. Inter-Continental Hotels Corp., 203 F.3d 180, 184 (2d Cir. 2000)* .

(n5)Footnote 4. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1355 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* .

(n6)Footnote 1. *Murray v. British Broadcasting Corp., 81 F.3d 287, 290 (2d Cir. 1996)* ; *see* [1], *above*.

(n7)Footnote 2. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1226 n.4 (3d Cir. 1995)* .

(n8)Footnote 3. *Monegro v. Rosa, 211 F.3d 509, 513 (9th Cir. 2000)* .

(n9)Footnote 4. *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, 955 F.2d 368, 373 (5th Cir. 1992)* .

(n10)Footnote 5. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* .

(n11)Footnote 6. *Slight by and Through Slight v. E.I. Du Pont, 979 F. Supp. 433 (S.D. W. Va. 1997)* (despite reduced weight accorded foreign plaintiffs' choice of forum, defendant failed to show other factors weighed in favor of forum non conveniens dismissal).

(n12)Footnote 7. *Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978)* .

(n13)Footnote 8. *See Murray v. British Broadcasting Corp., 81 F.3d 287, 290-291 (2d Cir. 1996)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.146

§ 7.146 Effect of Forum Selection Clausen*

If the parties' contract has a valid forum selection clause, which is the parties' agreement that any dispute arising out of their contractual relationship will be held in a specified foreign forum, it may alter the analysis governing forum nonconveniens motions. For example, if contrary to a mandatory clause designating a foreign forum, the plaintiff brings the action in a district court in the United States, the defendant may, based on the clause, move to dismiss the action on forum non conveniens grounds. In such a case the usual forum non conveniensanalysis which ordinarily gives strong deference to the plaintiff's choice of forum does not apply. n1 Rather, the forum selection clause controls unless there is a strong showing that it should be set aside and will be enforced unless the plaintiff can clearly show that enforcement would be unreasonable and unjust or that the clause was invalid by reason of fraud or overreaching. n2 In other words, when there is a forum selection clause, the proper analysis begins with each side on an equal footing, n3 rather than with the strong presumption that the plaintiff should be denied its choice of forum only when the factors weigh heavily in favor of dismissal. n4 When the forum selection clause is permissive rather than mandatory, the normal forum non conveniens analysis applies. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferChoice of ForumContracts LawContract Conditions & ProvisionsForum Selection Clauses

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.78 (Matthew Bender 3d ed.).

(n2)Footnote 1. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6, 8-18, *92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* .

(n3)Footnote 2. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6, 8-18, *92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* .

(n4)Footnote 3. *Wong v. PartyGaming, Ltd., 589 F.3d 821, 833 (6th Cir. 2009)* (when considering dismissal for forum non conveniens pursuant to forum selection clause, federal courts generally restrict deference to plaintiff's choice of home forum, and district court would begin its forum non conveniens assessment with a level set of balances, rather than one weighted in favor of plaintiff's choice of forum).

(n5)Footnote 4. *Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505 (2d Cir. 1998)* .

(n6)Footnote 5. *Neo Sack, Ltd. v. Vinmar Impex, Inc., 810 F. Supp. 829, 833 (S.D. Tex. 1993)* .

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1-7 Moore's Manual--Federal Practice and Procedure § 7.147

§ 7.147 Burden of Proofn*

The defendant who is seeking a dismissal has the burden to show that a forum non conveniens dismissal is justified. n1 In other words, the defendant has the burden of persuasion in proving all elements necessary for the court to dismiss a claim based on forum non conveniens: n2 that there is an adequate alternative forum and that in light of the relevant public and private interest factors the balance of convenience tilts strongly in favor of the foreign forum. n3 The amount of factual detail that the defendant must show depends on the particular facts of each case. For example, if it would be an extreme burden for the defendant to obtain the affidavits detailing the witnesses and documents which would be unavailable to the defendant if the action were to proceed in the district court, the court may dispense with the need for such affidavits. The showing of the burden would be sufficient. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.91 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1226, 1230 (3d Cir. 1995)* .

(n3)Footnote 2. *Galustian v. Peter, 591 F.3d 724, 731 (4th Cir. 2010)* .

(n4)Footnote 3. *Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996)* ; *see § 7.144*.

(n5)Footnote 4. Empresa Lineas Maritimas Argentinas v. Schichau-Unterweser, A.G., 955 F.2d 368, 371-372 (5th Cir. 1992).

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1-7 Moore's Manual--Federal Practice and Procedure § 7.148

§ 7.148 Procedural Considerationsn*

[1] Effect of Delay in Making Motion for Dismissal

A defendant's motion to dismiss based on forum non conveniens should be filed in a timely manner, n1 which means that it should be made within a reasonable time after the defendant has become aware of the facts that form the basis for the motion. n2 The court may weigh delay in making a timely motion against granting the dismissal. n3 Even if the defendant has moved in a timely fashion, however, if extensive discovery on the merits has taken place or if the court has expended significant resources on the case, considerations of judicial economy weigh in favor of retaining rather than dismissing the action. n4

[2] Use of Expert Affidavits to Show Adequacy

The most effective way to establish the adequacy or inadequacy of the alternative foreign forum is ordinarily through affidavits or declarations from experts. n1 When the parties have submitted conflicting expert affidavits, the court must decide which expert's opinion to give the greatest weight, based such factors as the expert's experience and comprehensiveness of the affidavit. n2 When evidence is less conclusive than expert evidence, such as newspaper articles or other reports, the court will give the evidence less weight. n3

[3] Effect of Forum Non Conveniens Dismissal

If a court grants a dismissal on forum non conveniens grounds, the plaintiff is barred on claim preclusion grounds from bringing a second action in federal court unless he or she can show some objective facts that materially alter the considerations underlying the previous resolution. n1 However, a state court dismissal on forum non conveniens grounds is not preclusive as to a second forum non conveniens motion if the action was refiled in federal court, because the federal court must apply federal forum non conveniens law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.90 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Baumgart v. Fairchild Aircraft Corp. 981 F.2d 824 (5th Cir. 1993)* , *cert. denied, 508 U.S. 973 (1993)* .

(n3)Footnote 2. *Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 607 (3d Cir. 1991)* .

(n4)Footnote 3. Genpharm Inc. v. Pliva-Lachema a.s., *361 F. Supp. 2d 49, 59 (E.D.N.Y. 2005)* (courts should consider defendant's delay as one of factors when ruling on motion to dismiss on basis of forum non conveniens because it is equitable doctrine).

(n5)Footnote 4. *Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335 (9th Cir. 1984)* , *cert. denied, 471 U.S. 1066 (1985)* (considering as relevant private interest factor in favor of retaining case that parties were ready for trial when lower court dismissed on forum non conveniens grounds).

(n6)Footnote 1. *See Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991)* .

(n7)Footnote 2. *Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1351-1352, 1352 n.5 (1st Cir. 1992)* , *cert. denied, 508 U.S. 912 (1993)* .

(n8)Footnote 3. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1230 n.8 (3d Cir. 1995)* .

(n9)Footnote 1. *Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1497 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1044, 114 S. Ct. 690 (1994)* .

(n10)Footnote 2. *See De Aguilar v. Boeing Co., 11 F.3d 55, 58 (5th Cir. 1993)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART IV. TRANSFER OF CASE TO NEW VENUE
E. COMMON-LAW DOCTRINE OF FORUM NON CONVENIENS

1-7 Moore's Manual--Federal Practice and Procedure §§ 7.149through 7.159

[Reserved]

§§ 7.149[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART IV. TRANSFER OF CASE TO NEW VENUE
F. APPELLATE REVIEW

1-7 Moore's Manual--Federal Practice and Procedure § 7.160

§ 7.160 Appeal of Order Regarding Statutory Transfer of Venuen*

[1] Statutory Transfer Orders Generally Not Immediately Appealable

As a general rule, orders granting or denying transfer under any of the transfer statutes, Section 1404 (transfer of action when venue proper but convenient), Section 1406 (transfer of case in which venue is improper laid), or Section 1631 (transfer when subject matter jurisdiction or personal jurisdiction is lacking), are not immediately appealable because these orders do not ordinarily end the litigation, and therefore are not "final decisions" for the purpose of appellate jurisdiction. n1 Furthermore, orders granting or denying transfer do not fall within the collateral order exception to the final judgment rule, n2 which permits immediate review if the interlocutory order would be "effectively unreviewable" after a final judgment is entered in the case. n3

There is one statutory exception: an order granting or denying a motion to transfer an action to the United States Court of Federal Claims under Section 1631 is immediately appealable. n4 Additionally, the losing party to a motion to transfer venue may request that the district court certify the transfer order as one qualifying for immediate appeal. Although certification has been granted to allow immediate review of transfer orders, n5 it is rare because transfer decisions are discretionary and do not usually involve controlling questions of law; therefore, they are not generally appropriate for certification. n6

[2] Mandamus Review Possible

An appellate court has the authority to grant mandamus relief to review transfer orders. Mandamus is only available when the losing party has no other adequate means of obtaining relief from the adverse order, n1 and in some circumstances mandamus review is available because most courts recognize that it is almost impossible to correct an erroneous transfer order by appellate review after trial, and even if the order ultimately is reversed, the expense and inconvenience of retrying the case would be extremely burdensome. n2 However, because mandamus is considered an extraordinary remedy, the petitioner generally must show an error on the part of the district court of a higher magnitude than "mere error." For example, the order must be a gross abuse of discretion, n3 or at least clearly erroneous n4 or a clear-cut abuse of discretion. n5

[3] Appeal After Final Judgment

A party losing the transfer motion may include it in any appeal after a final judgment, n1 but it is difficult to win on appeal, n2 because the transfer order will be reviewed only for abuse of discretion. n3 Additionally, most appellate courts require a showing that a different result would have been reached, absent the erroneous transfer decision, n4 or that the transfer order prejudiced the losing party. n5

[4] Proper Appellate Court for Appeal

If the motion to transfer is denied, the losing party may seek appellate review by certification or mandamus in the circuit court embracing the district court in which the action is pending. This is generally the same circuit in which any appeal from a final judgment would be taken. n1 If the motion to transfer is granted, and the transfer is to a district court within another circuit, certain steps must be taken to preserve the ability to obtain appellate review. The losing party may file a mandamus petition or seek certification in the transferor circuit, but only in the time period before which the record is physically transferred to the transferee court. This rule applies because generally the transferor court, including the circuit court, loses jurisdiction as soon as the files in the case are transferred and docketed in the transferee court. n2 By statute, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over orders granting or denying transfer to the United States Court of Federal Claims. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1291*; *Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr., LLC (In re Carefirst of Md., Inc.), 305 F.3d 253, 262 (4th Cir. 2002)* ; *FDIC v. McGlamery, 74 F.3d 218, 221 (10th Cir. 1996)* .

(n3)Footnote 2. *In re Joint Eastern & Southern Dists. Asbestos Litigation, 22 F.3d 755, 762 n.14 (7th Cir. 1994)* .

(n4)Footnote 3. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n5)Footnote 4. *See 28 U.S.C. § 1292(d)(4)(A)*; *United States v. D.L. Kaufman, 175 F.3d 970, 972 (Fed. Cir. 1999)* .

(n6)Footnote 5. *28 U.S.C. § 1292(b)*; *Red Bull Associates v. Best Western Intern., Inc., 862 F.2d 963 (2d Cir. 1988)* .

(n7)Footnote 6. *In re Wyoming Tight Sands Antitrust Cases, 715 F. Supp. 307, 309 (D. Kan. 1989)* .

(n8)Footnote 1. *Sunbelt Corp. v. Noble, Denton & Associates, Inc., 5 F.3d 28, 30 (3d Cir. 1993)* .

(n9)Footnote 2. *Sunshine Beauty Supplies v. United States Dist. Court, 872 F.2d 310, 311 (9th Cir. 1989)* .

(n10)Footnote 3. *In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988)* .

(n11)Footnote 4. *In re Zimmer Holdings, Inc., 609 F.3d 1378, 1380-1381 (Fed. Cir. 2010)* .

(n12)Footnote 5. *Carteret Sav. Bank, F.A. v. Shushan, 919 F.2d 225, 233 (3d Cir. 1990)* , *cert. denied, 506 U.S. 817 (1992)* .

(n13)Footnote 1. *Petition of Intl. Precious Metals Corp., 917 F.2d 792, 794 (4th Cir. 1990)* .

(n14)Footnote 2. *Tice v. American Airlines, Inc., 162 F.3d 966, 974 (7th Cir. 1998)* .

(n15)Footnote 3. *Janicki Logging Co. v. Mateer, 42 F.3d 561, 563 (9th Cir. 1994)* ; *Peteet v. Dow Chemical Co., 868 F.2d 1428, 1436 (5th Cir. 1989)* , *cert. denied, 493 U.S. 935 (1989)* .

(n16)Footnote 4. Filmline (Cross-Country) Productions, Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989).

(n17)Footnote 5. *Whittier v. Emmet, 281 F.2d 24, 30-31 (D.C. Cir. 1960)* .

(n18)Footnote 1. *Cottman Transmission Sys., Inc. v. Martino Distrib., Inc., 36 F.3d 291, 296 (3d Cir. 1994)* .

(n19)Footnote 2. *Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A., 43 F.3d 843, 845 n.4 (3d Cir. 1994)* .

(n20)Footnote 3. *28 U.S.C. § 1292(d)(4)(A).*

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PART II Jurisdiction; Venue; Removal
CHAPTER 7 VENUE
PART IV. TRANSFER OF CASE TO NEW VENUE
F. APPELLATE REVIEW

1-7 Moore's Manual--Federal Practice and Procedure § 7.161

§ 7.161 Appeal of Order Regarding Forum Non Conveniensn*

[1] Grant of Dismissal Is Appealable as Final Order

If the court enters an order granting a motion to dismiss on forum non conveniens grounds, the order is appealable as a final judgment. n1 Furthermore, a dismissal is still considered final even if the district court makes the dismissal conditional on the fulfillment by the defendant of certain terms, and therefore retains jurisdiction which could be reasserted in the event that the defendant fails to comply with such conditions. n2

[2] Limited Appeal for Denial of Dismissal

[a] Denial Not Immediately Appealable

A district court's denial of a motion to dismiss on forum non conveniens grounds is not appealable as a final order and does not fall within the collateral order doctrine; therefore it is not immediately appealable. n1 For an interlocutory order to come within the collateral order exception, it must decide an issue that is completely separate from the merits of the action. n2 Because balancing the various factors necessary to determine whether a particular forum is so inconvenient as to warrant dismissal generally entangles the district court in the merits of the underlying dispute, allowing automatic interlocutory review of the denial of the motion would waste judicial resources by requiring repetitive appellate review of substantive questions. n3

[b] Certification

The district court has considerable flexibility in deciding a forum non conveniens motion, and therefore, in certain cases the court may be able to decide that dismissal is appropriate without extensive inquiry into the merits of the underlying dispute. n4 In such a case, immediate review might save both the court and the parties substantial time and expense, and the district court may certify the order for interlocutory review. n5 The court of appeals, in its discretion, may then accept the order for immediate appeal. n6

[c] Mandamus

An appellate court may use mandamus to review the denial of a motion to dismiss on forum non conveniens grounds, although at least one circuit has suggested that it is only available if certification has been denied. n7 Additionally, although mandamus relief theoretically is available, it is difficult to show entitlement to the remedy, because the movant must show a "clear cut" abuse of discretion. n8 However, there have been cases when the writ of mandamus has issued. n9 For example, one circuit granted mandamus when it determined that the court's denial of transfer was a clear abuse of discretion because the court (1) applied too strict of a standard to demonstrate transfer, (2) misconstrued the weight of the plaintiff's choice of venue, (3) treated choice of venue as a § 1404 factor, (4) misapplied the forum non conveniens factors, (5) disregarded circuit precedent, including the 100-mile rule, and (6) disregarded the fact that not a single relevant factor favored the plaintiff's chosen venue. n10

[d] Appeal After Final Judgment

The denial of a forum non conveniens motion may be appealed after a final judgment in the case. However, appellate review of a forum non conveniens decision is subject to an extremely limited standard of review and may be reversed only if the district court has clearly abused its discretion. n11 One court has stated that after a trial has taken place, to establish an abuse of discretion, the defendant must show that he or she was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, for example, by showing that key evidence or witnesses were unavailable at trial or that bias on the part of the forum deprived the defendant of a fair trial. n12

[3] Appellate Review is for Abuse of Discretion

A forum non conveniens determination is based in the sound discretion of the trial court and may be reversed only when there has been a clear abuse of discretion. A district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors. n1 When the district court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. n2 Even though the district court's decision is accorded substantial deference, however, the appellate court must still conduct a meaningful review of the decision based on the standard stated above. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 17 *Moore's Federal Practice,* § 111.95 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Picco v. Global Marine Drilling Co., 900 F.2d 846, 849 n.4 (5th Cir. 1990)* .

(n3)Footnote 2. *Koke v. Phillips Petroleum Co., 730 F.2d 211, 216 (5th Cir. 1984)* .

(n4)Footnote 1. *28 U.S.C. § 1291*; *Van Cauwenberghe v. Biard, 486 U.S. 517, 527-528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* .

(n5)Footnote 2. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-547, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n6)Footnote 3. *Van Cauwenberghe v. Biard, 486 U.S. 517, 528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* .

(n7)Footnote 4. *Van Cauwenberghe v. Biard, 486 U.S. 517, 529, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* .

(n8)Footnote 5. *28 U.S.C. § 1292(b)*; *see UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 214 (5th Cir. 2009)* .

(n9)Footnote 6. *Carlenstolpe v. Merck & Co., Inc., 819 F.2d 33, 37 (2d Cir. 1987)* .

(n10)Footnote 7. *In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1167 (5th Cir. 1987)* , *vacated on other grounds, 490 U.S. 1032 (1989)* ; *see* [b], *above*.

(n11)Footnote 8. *Carlenstolpe v. Merck & Co., Inc., 819 F.2d 33, 35 (2d Cir. 1987)* .

(n12)Footnote 9. *See, e.g., In re TS Tech United States Corp., 551 F.3d 1315, 1322 (Fed. Cir. 2008)* .

(n13)Footnote 10. *In re Volkswagen of Am., Inc., 545 F.3d 304, 318 (5th Cir. 2008)* .

(n14)Footnote 11. *In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1167 (5th Cir. 1987)* , *vacated on other grounds, 490 U.S. 1032 (1989)* ; *see* [3], *below*.

(n15)Footnote 12. *In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1167 (5th Cir. 1987)* , *vacated on other grounds, 490 U.S. 1032 (1989)* ; *see* [3], *below*.

(n16)Footnote 1. *Monegro v. Rosa, 211 F.3d 509, 511 (9th Cir. 2000)* ; *K.V. Mart Co. v. United Food & Commercial Workers Intl. Union, Local 324, 173 F.3d 1221, 1223 (9th Cir. 1999)* .

(n17)Footnote 2. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* .

(n18)Footnote 3. *R. Maganlal & Co., Inc. v. M.G. Chemical Co., Inc., 942 F.2d 164, 169 (2d Cir. 1991)* (despite district court's broad discretion, appellate court must conduct meaningful review to determine whether district court reached an erroneous conclusion on either the facts or the law).

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS

1-8 Moore's Manual--Federal Practice and Procedure 8.syn

§ 8.syn Synopsis to Chapter 8: REMOVAL FROM STATE COURTS

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§ 8.02 State Law May Not Restrict Removal to Federal Court

§ 8.03 Relation of Removal to Original Subject Matter Jurisdiction

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART I. GENERAL PRINCIPLES CONTROLLING REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.01

§ 8.01 Nature of Removaln*

Removal is a federal procedure that allows a party to remove a claim from state to federal court when the federal court would have had original jurisdiction if the case had initially been brought there. n1 The removal procedure changes the forum in which the case will be tried. n2 Thus, in contrast to a transfer of a case from one federal district court to another district court within the federal court system, n3 the removal statutes allow a case to be taken from a proper trial forum in the state judicial system to the federal trial judicial system. n4

The removal statutes are designed to provide defendants with an opportunity similar to that of a plaintiff when filing a claim n5 to have a federal forum litigate the claim when federal subject matter exists. n6 Removal jurisdiction in federal question cases was designed to ensure that the tribunal better informed on questions of federal law will adjudicate the matter. n7 In diversity cases, removal jurisdiction was designed to protect nonresident defendants from any perceived prejudice or preference of the state court regarding the resident plaintiffs. n8

Removal requires that, at the time the notice of removal is filed, the transferee federal court have "original jurisdiction" as if the complaint had been initially filed there; such jurisdiction must consist of either federal question or diversity jurisdiction. n9 Therefore, removal is one of three ways of invoking federal jurisdiction. The other two ways are to initiate an action by filing a complaint in federal court n10 or by appealing a state court judgment in a federal court of appeals. n11 Because it is an invocation of federal jurisdiction, the defending party must establish federal jurisdiction over the suit currently in state court; federal courts, therefore, must resolve close cases against removal. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *King v. Marriott Int'l, Inc., 337 F.3d 421, 424 (4th Cir. 2003)* .

(n3)Footnote 2. *Dahiya v. Talmidge Int'l, Ltd., 371 F.3d 207, 212 (5th Cir. 2004)* .

(n4)Footnote 3. *See* Ch. 7, *Venue*.

(n5)Footnote 4. *See 28 U.S.C. § 1441*; *Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 947 (11th Cir. 2000)* .

(n6)Footnote 5. *King v. Marriott Int'l, Inc., 337 F.3d 421, 424 (4th Cir. 2003)* .

(n7)Footnote 6. *Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1289 (11th Cir. 2004)* .

(n8)Footnote 7. *Chronologic Simulation, Inc. v. Sanguinetti, 892 F. Supp. 318, 321 (D. Mass. 1995)* ; *NGS American, Inc. v. Barnes, 805 F. Supp. 462, 465 (W.D. Tex. 1992)* .

(n9)Footnote 8. *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1304 (N.D. Cal. 1992)* .

(n10)Footnote 9. *Aetna Health Inc. v. Davila, 542 U.S. 200, 207, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)* ; *Halmekangas v. State Farm Fire & Cas. Co., 603 F.3d 290, 293 (5th Cir. 2010)* .

(n11)Footnote 10. *See* Ch. 9, *Pleadings and Motions in General*.

(n12)Footnote 11. *See* Ch. 28, *Appeal to Court of Appeals*.

(n13)Footnote 12. *Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART I. GENERAL PRINCIPLES CONTROLLING REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.02

§ 8.02 State Law May Not Restrict Removal to Federal Courtn*

Although providing a federal forum for the defendant is the primary goal of removal, the ultimate effect of removal is to deprive the state court of an action properly within its jurisdiction, which raises federalism concerns. n1 It has consistently been held, however, that the states may not restrict the right of removal, or either directly or indirectly withhold, condition, or restrict the unfettered exercise of right of removal specified in Section 1441. n2 For example, a state may not condition the issuance of a license to do business in the state on an agreement not to remove any action to federal court. n3 Similarly, when a foreign corporation grants consent to be sued in the courts of a state as a condition on its right to do business in the state, the consent does not operate to deprive such corporation of its right to remove when otherwise appropriate. n4

One exception to the principle that a state may not restrict removal is based on the *Eleventh Amendment*. If a state has consented to suit in its own courts, but not in federal courts, any action brought against the state must be litigated in the state court and may not be removed to federal court under the general removal statute. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995)* ; *Biggs Corp. v. Wilen, 97 F. Supp. 2d 1040, 1045 (D. Nev. 2000)* .

(n3)Footnote 2. *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger, Inc., 4 F.3d 614 (8th Cir. 1993)* ; *see Carson Construction Co. v. Fuller-Webb Const., 198 F. Supp. 464, 468 (D.C. Mont. 1961)* (federal right of removal may not be taken away, restricted, or abridged by any state statute); *Halter v. National Farmers Union Property & Casualty Co., 502 F. Supp. 736 (E.D. Ark. 1980)* (defendant did not lose right to remove suit on filing petition for

removal merely because defendant had failed to comply with state law requiring reply to be filed within 20 days after service of summons and complaint).

(n4)Footnote 3. *Home Ins. Co. v. Morse, 87 U.S. 445, 22 L. Ed. 365 (1874)* .

(n5)Footnote 4. *Sugar Corp. of Puerto Rico v. Environeering, Inc., 520 F. Supp. 996, 998-999 (D.P.R. 1981)* .

(n6)Footnote 5. *Gwinn Area Community Sch. v. Michigan, 741 F.2d 840, 843 (6th Cir. 1984)* (action may not be removed unless state waives its *Eleventh Amendment* immunity and unequivocally expresses its consent to suit in federal court).

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART I. GENERAL PRINCIPLES CONTROLLING REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.03

§ 8.03 Relation of Removal to Original Subject Matter Jurisdictionn*

The right of a party to remove is based entirely on statute. n1 Under the general federal removal statute, n2 an action brought in state court may be removed by the defendant to the federal district court encompassing the state court if that federal district court would have had original jurisdiction over the action. This means that before a case is removed from a state court to federal court the party requesting removal must show the existence of either diversity jurisdiction or federal question jurisdiction at the time the notice of removal is filed. n3 Therefore, removal jurisdiction is considered to be coextensive with federal subject matter jurisdiction to the same extent as if the complaint had originally been filed in federal court. n4

The removing party has the burden of proving the existence of federal subject matter jurisdiction. n5 If the removing party meets this burden, the burden shifts to the plaintiff to show an express exception to removal. n5.1 The following are some of the exceptions that apply to removal jurisdiction:

1. A one-year limit applies to removal of diversity cases, from the date of the commencement of the action. n6

2. Under the statute, n7 a case may not be removed on the basis of diversity jurisdiction if one of the defendants is a resident of the state in which the action was brought. n8

3. If the party seeking to remove to federal court fails to strictly comply with the statutory removal procedure, n9 the court may send the case back to state court by a process known as remand. n10

4. Certain cases involving concurrent jurisdiction are exempt from removal, such as cases arising under the Jones Act. n11

5. A removal to federal court need not always be based on the general removal statutes. Thus, there are several special removal statutes that authorize removal in particular situations that are not dependent on the federal court having original jurisdiction. n12 For example, certain civil rights actions commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place where the action is pending. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemovalGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice*, § 107.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hurt v. Dow Chem. Co., 963 F.2d 1142, 1145 (8th Cir. 1992)* .

(n3)Footnote 2. *28 U.S.C. § 1441(a)*.

(n4)Footnote 3. *Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488, 2494, 159 L. Ed. 2d 312 (2004)* .

(n5)Footnote 4. *Cross Country Bank v. McGraw, 321 F. Supp. 2d 816, 819 fn.3 (S.D. W. Va. 2004)* .

(n6)Footnote 5. *Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004)* .

(n7)Footnote 5.1. *Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 695-698, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* (plaintiff did not meet burden of showing that Fair Labor Standards Act contained express prohibition against removal; citing **Moore's Federal Practice**).

(n8)Footnote 6. *28 U.S.C. § 1446(b)*.

(n9)Footnote 7. *28 U.S.C. § 1441(b)*.

(n10)Footnote 8. *See In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 40 (D. D.C. 2000)* .

(n11)Footnote 9. *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A., 31 F.3d 70, 72 (2d Cir. 1994)* .

(n12)Footnote 10. *28 U.S.C. § 1447(c)*; *Buchner v. Federal Deposit Ins. Corp., 981 F.2d 816, 820 (5th Cir. 1993)* .

(n13)Footnote 11. *Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207 (5th Cir. 1993)* ; *46 U.S.C. § 688*.

(n14)Footnote 12. *See § 8.40* et. seq.

(n15)Footnote 13. *See 28 U.S.C. § 1443*.

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1-8 Moore's Manual--Federal Practice and Procedure § 8.04

§ 8.04 Controlling Lawn*

There was no right to removal from state to federal court under the common law, so the right is entirely dependent on the statutes expressly specifying the procedure. n1 It is important to note in this regard, however, that the statute allows removal based on a "federal question" n2 which in turn may be based on federal common law. n3 Therefore, provided that an action could have originally been filed in federal court because the action was based on federal common law, the action qualifies under the removal statute based on federal question jurisdiction. n4

The primary source of the removal right is the federal "general removal statute," n5 which provides that a civil action brought in state court may be removed by the defendant to the federal district court encompassing the state court if that federal district court would have had original jurisdiction over the action. n6 In addition to the general removal statute, there are several special removal statutes that authorize removal in particular situations that are not dependent on the federal court having original jurisdiction. n7 For example, these statutes provide for the removal of civil rights cases, n8 cases involving federal officers, n9 and bankruptcy cases. n10

Because removal is entirely statutory and because removal statutes and the cases decided under them are intended to have uniform nationwide application, whether an action is removable is governed exclusively by federal law, n11 and state decisions regarding the various parameters of removal are not controlling. n12 For example, the federal courts are not bound by the a state's categorization of the type of state proceeding for purposes of removal, n13 but have looked to the nature of the right asserted to decide whether a proceeding is civil or criminal in nature. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalProceedingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* §§ 107.02, 107.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Willy v. Coastal Corp., 855 F.2d 1160, 1161 (5th Cir. 1988)* .

(n3)Footnote 2. *28 U.S.C. § 1441(a), (b).*

(n4)Footnote 3. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 924-926 (5th Cir. 1997)* .

(n5)Footnote 4. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 928 (5th Cir. 1997)* (because Act deregulating airline industry contained savings clause that had effect of preserving clearly established federal common-law cause of action against air carriers for damage to or lost shipments, federal cause of action continues to survive for freight claims against air carriers, and such actions may be removed to federal court).

(n6)Footnote 5. *28 U.S.C. § 1441.*

(n7)Footnote 6. *Apoian v. American Home Prods., Corp., 108 F. Supp. 2d 454, 455-456 (E.D. Pa. 2000)* .

(n8)Footnote 7. *See § 8.40* et seq.

(n9)Footnote 8. *28 U.S.C. § 1443.*

(n10)Footnote 9. *28 U.S.C. § 1442.*

(n11)Footnote 10. *28 U.S.C. § 1452.*

(n12)Footnote 11. *Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133, 135-136 (5th Cir. 1980)* (uniform construction and application of removal statute does not depend on state procedural law, such as state law governing third-party practice).

(n13)Footnote 12. *United States v. Miami Univ., 294 F.3d 797, 811 (6th Cir. 2002)* ; *Dudley v. Putnam Int'l Equity Fund & Putnam Inv. Mgmt., LLC, 2010 U.S. Dist. LEXIS 43787, at *12 (S.D. Ill. May 5, 2010)* .

(n14)Footnote 13. *New Jersey v. Moriarity, 268 F. Supp. 546, 555-556 (D.N.J. 1967)* .

(n15)Footnote 14. *United States ex rel. Mattson v. Northwest Paper Co., 327 F. Supp. 87, 90 (D. Minn. 1971)* (qui tam action is civil in form, but criminal in nature).

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1-8 Moore's Manual--Federal Practice and Procedure § 8.05

§ 8.05 Strict Construction of Removal Statutesn*

Removal is a procedure created by federal statute that allows defendants in state court actions to move the action to federal court, provided that the plaintiff's action could have been properly filed in federal court if done so initially. n1 The entitlement to removal is very narrowly construed because it is a purely statutory right, n2 and because of the concerns of federalism, n3 a clear congressional intent to limit removal jurisdictional, n4 and the traditional preference to allow a plaintiff to choose the forum for litigation. n5 It is also important to note that the statutes establishing federal question or diversity jurisdiction, on which removal depends, must be strictly construed, and all doubts must be resolved against federal jurisdiction. n6

As a corollary to the principle of strict construction of the removal statutes, there is a presumption against removal jurisdiction in a suit originally filed in state court, n7 and the court must resolve all doubts against removal and in favor of remand to the state court. n8 This presumption is the result of the principle that the courts must enforce Congress's intent to restrict federal jurisdiction in controversies between citizens of different states. n9 Furthermore, because of the presumption against removal jurisdiction, the burden is on the party requesting removal to establish that removal is proper. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalProceedingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* §§ 107.05, 107.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a)*; *see Hanna v. Fleetguard, Inc., 900 F. Supp. 1110, 1115-1116 (N.D. Iowa 1995)* (purpose of removal jurisdiction is to allow defendant to initiate removal from state court to federal district court for district in which state court action is pending, provided federal court would have had original jurisdiction, unless act of Congress expressly provides otherwise).

(n3)Footnote 2. *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* .

(n4)Footnote 3. *Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004)* .

(n5)Footnote 4. *Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 396 (3d Cir. 2004)* .

(n6)Footnote 5. *Yonkers Electric Contr. Corp. v. Local Union No. 3, IBEW, 220 F. Supp. 2d 254, 258 (S.D.N.Y. 2002)* .

(n7)Footnote 6. *Frontier Energy Corp. v. Broda, 882 F. Supp. 82, 85 (N.D. W.Va. 1995)* .

(n8)Footnote 7. *Geographic Expeditions, Inc. v. Estate of Lhotka, 599 F.3d 1102, 1107 (9th Cir. 2010)* (because removal jurisdiction ousts state-court jurisdiction, it must be rejected if there is any doubt as to right of removal; this principle gives rise to a strong presumption against removal jurisdiction; therefore the defendant always has the burden of establishing that removal to federal court is proper.

(n9)Footnote 8. *Cellport Sys. v. Peiker Acustic GmbH & Co. KG, 335 F. Supp. 2d 1131, 1133 (D. Colo. 2004)* .

(n10)Footnote 9. *Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1339 (10th Cir. 1998)* .

(n11)Footnote 10. *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999)* (removing defendant carries burden of proving removal proper); *see § 8.21[3][g][ii]*.

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1-8 Moore's Manual--Federal Practice and Procedure § 8.06

§ 8.06 Actions That May Not Be Removedn*

[1] Types of Actions Not Subject to Removal

Any civil action brought in a state court that is subject to the original jurisdiction of the federal district courts may be removed by the defendant, except as otherwise expressly provided by an act of Congress. n1 The United States Supreme Court has stated that even though the removal statute is strictly construed, n2 this requirement for an "express" exception to the rule means that Congress must at least clearly state in its legislation the circumstances in which removal is not permitted. n3

By statute, Congress has made such an express prohibition against removal in the following circumstances:

1. A civil action in any state court against a railroad, or against its receivers or trustees that arises under the Federal Employers' Liability Act (FELA) may not be removed to any district court of the United States. n4 Furthermore, Jones Act cases are not removable because the Jones Act incorporates the general provisions of the FELA, including the bar on removal. n5 Federal law determines whether an action arises under FELA. n6

2. A civil action in any state court against a common carrier, or against its receivers or trustees, to recover damages for delay, loss, or injury of shipments, arising under federal statutes regulating carriers n7 may not be removed to any federal district court unless the matter in controversy exceeds $10,000, exclusive of interest and costs. n8

3. A civil action in any state court arising under that state's workers' compensation laws may not be removed to any federal district court. n9 This prohibition against removing workers' compensation claims is based on congressional intent that each state may administer its own workers' compensation system. n10 The exclusion precluding the removal of a state court action arising under the workers' compensation laws is a federal jurisdiction statute with nationwide application; consequently, federal law and not the law of the state in which the action is brought governs its interpretation. n11 The exclusion applies only to workers compensation "statutes." Thus, an action against a workers' compensation insurance carrier for breach of its duty of good faith and fair dealing arises under common law, not the state workers' compensation scheme, and is removable. n12 The bar against removal of workers' compensation claims is nonjurisdictional and may be waived because a statutory restriction against removal is not a matter of substantive

jurisdiction, but rather, it is a procedural defect that may be waived. n13

4. A civil action in any state court arising under Section 40302 of the Violence Against Women Act n14 may not be removed to any federal district court. n15 Although the state and federal courts share concurrent jurisdiction over civil actions alleging gender-based violence, the action is expressly nonremovable, so that the plaintiff's choice of forum controls.

5. A civil action arising under the Securities Act of 1933 and brought in any state court of competent jurisdiction may not be removed to any court of the United States. n16

6. A civil action arising under the Interstate Land Sales Full Disclosure Act and brought in any state court of competent jurisdiction may not be removed to any court of the United States, except when the United States or any officer or employee of the United States in his or her official capacity is a party. n17

7. A civil action arising under the Condominium and Cooperative Abuse Relief Act of 1980 and brought in any state court of competent jurisdiction may not be removed to any court of the United States, except when any officer or employee of the United States in his or her official capacity is a party. n18

[2] Plaintiff May Waive Prohibition

The statutory prohibition against removal n1 is not absolute because the courts have held that a removal, despite a statutory prohibition, is a procedural defect and is not jurisdictional. Such a removal may be waived by a defendant. n2 For example, improper removal under the statute may be waived by the plaintiff either by failing to make a motion in the federal district court to remand the case to the state court, or by failing to raise the matter on appeal, provided that the federal district court would have had jurisdiction if the case originally had been filed in the district court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalNonremovable ActionsTortsTransportation TortsRail TransportationFederal Employers' Liability ActWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityJones Act

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.17 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *See In re Briscoe, 448 F.3d 201, 217 (3d Cir. 2006) .*

(n4)Footnote 3. *See Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 693-694, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* (Fair Labor Standards Act brought in state court could be removed to federal court because Act contained no clear statement that removal was prohibited).

(n5)Footnote 4. *28 U.S.C. § 1445(a); Brown v. National R.R. Passenger Corp., 725 F. Supp. 873 (D. Md. 1989) .*

(n6)Footnote 5. *Fields v. Pool Offshore, Inc. 182 F.3d 353, 353 (5th Cir. 1999) , cert. denied, 145 L. Ed. 2d 1073 (2000) .*

(n7)Footnote 6. *Edmonds v. Norfolk & Western Ry. Co., 883 F. Supp. 89, 93 (S.D. W.Va. 1995) .*

(n8)Footnote 7. *49 U.S.C. §§ 11707, 14706.*

(n9)Footnote 8. *28 U.S.C. § 1445(b).*

(n10)Footnote 9. *28 U.S.C. § 1445(c)*; *see Walker v. Health Ben. Management Cost Containment, Inc., 860 F. Supp. 1163, 1166-1170 (N.D. Tex. 1994)* (ban on removal applies to both diversity and federal question cases).

(n11)Footnote 10. *Trevino v. Levi Strauss & Co., 197 F.3d 777, 781 (5th Cir. 1999)* ; *see Vasquez v. North County Transit Dist., 292 F.3d 1049, 1061 n.6 (9th Cir. 2002)* (one rationale for prohibition against removal of workers' compensation cases was concern of Congress that workload of federal courts had greatly increased because of removal of workmen's compensation cases from state courts).

(n12)Footnote 11. *Reed v. The Heil Co., 206 F.3d 1055, 1058 (11th Cir. 2000)* .

(n13)Footnote 12. *Patin v. Allied Signal, Inc., 69 F.3d 1, 5-6 (5th Cir. 1995)* .

(n14)Footnote 13. *Vasquez v. North County Transit Dist., 292 F.3d 1049, 1062 (9th Cir. 2002)* .

(n15)Footnote 14. *See 42 U.S.C. § 13981.*

(n16)Footnote 15. *28 U.S.C. § 1445(d).*

(n17)Footnote 16. *15 U.S.C. § 77v(a)*; *see Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 695-696, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* .

(n18)Footnote 17. *15 U.S.C. § 1719*; *see Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 696, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* .

(n19)Footnote 18. *15 U.S.C. § 3612*; *see Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 695-696, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* .

(n20)Footnote 1. *See* [1], *above.*

(n21)Footnote 2. *Vasquez v. North County Transit Dist., 292 F.3d 1049, 1062 (9th Cir. 2002)* (citing **Moore's Federal Practice** for proposition that statutory prohibition against removal of actions is not matter of federal court's substantive jurisdiction, but rather is characterized as procedural matter); *Albarado v. Southern Pac. Transp. Co., 199 F.3d 762, 765-766 (5th Cir. 1999)* (remand based on statutory restriction against removal is procedural defect, and district court's remand order based on such prohibition is not subject to appellate review).

(n22)Footnote 3. *Feichko v. Denver & Rio Grande Western R.R. Co., 213 F.3d 586, 591-592 (10th Cir. 2000)* , *cert. denied, 531 U.S. 1074 (2001)* (when railroad engineer brought action in state court against railroad, seeking to recover damages for injuries sustained in railroad yard accident under FELA, improper removal of FELA claim was waived by plaintiff failing to raise matter on appeal).

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1-8 Moore's Manual--Federal Practice and Procedure § 8.07

§ 8.07 Waiver by Defendant of Right to Removen*

[1] Conduct or Failure to Act Constituting Waiver

If a defendant takes certain actions in state court or fails to comply with removal procedures in a timely manner, after it is apparent that the case is removable, the defendant waives the right to remove a state court action to federal court. An affirmative act constitutes a waiver if it manifests the defendant's intent to (1) have the case adjudicated in state court and (2) abandon the right to a federal forum, n1 provided it is apparent that the case is removable. n2 The intent to waive the right to remove to federal court and to submit to state court jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove. n3

Thus, the following acts taken by a defendant have been held to constitute a waiver of the defendant's right to remove to federal court:

1. Participating in the state court proceedings when the defendant is not compelled to take the action, such as seeking some form of affirmative relief, such as an injunction n4 or moving in state court to compel arbitration. n5

2. Making a request for a continuance in state court, without notifying the plaintiff or state court of the intention to remove the case in the interim. n6

3. Filing a motion to dismiss the state court complaint. n7

4. Contesting a motion in state court, because removal would operate as an appeal of an adverse state court decision. n8

5. Participating in the state court trial after the time it becomes apparent that the case is removable early in the proceedings. n9

A defendant may also waive the right to remove a state court action to federal court by failing to perform a required act. This type of waiver commonly occurs when all required defendants fail to file the removal notice within the statutory time limits. n10

On the other hand, a waiver occurs only when the defendant's intent to waive the right to remove to federal court and to submit to state court jurisdiction is clear and unequivocal, n11 and the defendant's actions are inconsistent with the right to remove. n12 For example, a defendant does not waive the right to remove by filing a motion for judgment against a third-party defendant in state court, after the defendant has already filed proper removal papers, n13 appointing an agent for service of process in the state where the action is pending, n14 or by filing a motion before it becomes unequivocally apparent that the case is removable. n15 Furthermore, an action taken in state court by one defendant does not constitute a waiver by another defendant of the right to remove the case. n16

[2] Waiver by Forum Selection Clause

[a] Requirements for Waiver

If the parties have executed a valid contractual forum selection clause, n1 which is a clause that specifies a state court in which the parties must litigate a dispute that may arise between them, the clause is enforceable and constitutes a waiver of the defendant's right to remove the suit, n2 provided that the clause is clear and unequivocal n3 and contains mandatory language that requires a particular forum as the exclusive forum for the resolution of any dispute between the parties. n4

Other courts have held that to constitute the predicate for a waiver, a forum selection clause in a contract must explicitly refer to right of removal, and if the clause does not have such a reference, violation of the clause by the defendant does not waive the right to remove. n5

[b] Clause Required to Be Valid and Enforceable

A defendant may waive the right to remove a case from state to federal court by contract only if the "forum selection clause" is valid. n6 Forum selection clauses are prima facie valid and enforceable, but the defendant may rebut the validity by showing that enforcement would be unjust or unreasonable, n7 or that the clause is invalid because of fraud, undue influence, overreaching, or undue negotiation power. n8 In a diversity case, state law governs the enforceability of a contractual forum selection clause with respect to removal jurisdiction; it should be noted that the factors governing whether a forum selection clause controls a motion for change of venue under Section 1404 do not apply. n9

To establish that a forum selection clause is invalid--for example, that it is unreasonable--the party seeking removal has the burden of showing that a trial in the selected forum would be so difficult and inconvenient that the party would effectively be denied a meaningful day in court. n10 Mere allegations of serious inconvenience are insufficient to prevent enforcement of the forum selection clause, if the contract meets the test of fundamental fairness or was freely negotiated in an international commercial transaction. n11 If the defendant does present evidence that the forum selection clause is invalid, the plaintiff alleging waiver has the burden of proof on all material provisions of the agreement containing the form selection clause. n12

[c] Consent to Jurisdiction Clause

A "consent to jurisdiction clause" is also known as a "service of suit clause," and is a clause that specifies that a party agrees to submit to jurisdiction of any court of competent jurisdiction within a particular territory specified by another party. A consent to jurisdiction clause does not in itself constitute a waiver of the right to remove to federal court. n13 Courts have recognized, however, that such a clause with additional language may be sufficient to constitute a waiver n14 if it manifests a clear and unequivocal intent to waive removal rights. n15 Thus, consent to jurisdiction clauses in insurance contracts have been held to waive the insurer's right to remove from the state forum selected by the insured. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalWaivers

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.18 (Matthew Bender 3d ed.).

(n2)Footnote 1. *George v. Al-Saud, 478 F. Supp. 773, 774 (N.D. Cal. 1979)* .

(n3)Footnote 2. *Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998)* (filing of summary judgment motion in state court did not bar defendant from subsequently consenting to removal when motion was filed before it was unequivocally apparent that case was removable).

(n4)Footnote 3. *Bedell v. H.R.C. Ltd., 522 F. Supp. 732, 738 (E.D. Ky. 1981)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Zbranek v. Hofheinz, 727 F. Supp. 324, 325 (E.D. Tex. 1989)* .

(n6)Footnote 5. *McKinnon v. Doctor's Assoc., Inc., 769 F. Supp. 216, 220 (E.D. Mich. 1991)* .

(n7)Footnote 6. *Chicago Title & Trust Co. v. Whitney Stores, Inc., 583 F. Supp. 575, 577 (N.D. Ill. 1984)* .

(n8)Footnote 7. *Scholz v. RDV Sports, Inc., 821 F. Supp. 1469, 1470-1471 (M.D. Fla. 1993)* .

(n9)Footnote 8. *Estate of Krasnow v. Texaco, Inc., 773 F. Supp. 806, 808-809 (E.D. Va. 1991)* .

(n10)Footnote 9. *Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630, 637 (W.D. Tex. 1985)* .

(n11)Footnote 10. *See 28 U.S.C. § 1446(b).*

(n12)Footnote 11. *City of Cleveland v. Ameriquest Mortg. Secs., Inc., 615 F.3d 496, 501 (6th Cir. 2010)* (general principles of contract interpretation apply when determining whether clause explicitly waives right of removal).

(n13)Footnote 12. *Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989)* .

(n14)Footnote 13. *Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998)* .

(n15)Footnote 14. *Wright v. Continental Cas. Co., 456 F. Supp. 1075, 1079 (M.D. Fla. 1978)* .

(n16)Footnote 15. *Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998)* .

(n17)Footnote 16. *Custom Blending Int'l v. E.I. DuPont de Nemours & Co., 958 F. Supp. 288, 289-290 (S.D. Tex. 1997)* (co-defendant's motion to transfer venue and motion for summary judgment were not unequivocal waiver by other defendant).

(n18)Footnote 1. *See* [b], *below.*

(n19)Footnote 2. *Florida Polk County v. Prison Health Servs., Inc., 170 F.3d 1081 (11th Cir. 1999)* .

(n20)Footnote 3. *Alliance Health Group LLC v. Bridging Health Options LLC, 553 F.3d 397, 401 (5th Cir. 2008)* .

(n21)Footnote 4. *Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036-1038 (9th Cir. 1995)* (when clause stated that arbitrator's award was enforceable by filing petition in particular state court, but did not mandate exclusive jurisdiction, clause was not waiver).

(n22)Footnote 5. *Regis Assocs. v. Rank Hotels Ltd., 894 F.2d 193, 194-195 (6th Cir. 1990)* .

(n23)Footnote 6. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279-280 (9th Cir. 1984)* .

(n24)Footnote 7. *Newman/Haas Racing v. Unelko Corp., 813 F. Supp. 1345, 1347 (N.D. Ill. 1993)* .

(n25)Footnote 8. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984)* (clause part of form contract appearing in fine print on reverse side of contract does not constitute overweening bargaining power to prevent enforcement).

(n26)Footnote 9. *Autoridad De Energia Electrica De P.R. v. Ericsson, Inc., 201 F.3d 15, 18 (1st Cir. 2000)* (applying law of Puerto Rico to determine enforceability of forum selection clause).

(n27)Footnote 10. *Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987)* .

(n28)Footnote 11. *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592-593, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* .

(n29)Footnote 12. *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 554 (9th Cir. 1991)* .

(n30)Footnote 13. *City of New Orleans v. Mun. Admin. Servs., 376 F.3d 501, 504 (5th Cir. 2004)* .

(n31)Footnote 14. *SBKC Service Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581-582 (10th Cir. 1997)* (defendant did not waive right to remove suit on promissory note by clause in note that action may be maintained in state court because clause did not confine commencement of litigation exclusively to state court).

(n32)Footnote 15. *Global Satellite Commun. Co. v. Starmill U.K. LTD, 378 F.3d 1269, 1271 (11th Cir. 2004)* ; *B.D. Cooke & Partners Ltd. v. Certain Underwriters at Lloyd's, 606 F. Supp. 2d 420, 426 (S.D.N.Y. 2009)* .

(n33)Footnote 16. *Foster v. Chesapeake Ins. Co. 933 F.2d 1207, 1216-1217 (3d Cir. 1991)* , *cert. denied, 502 U.S. 908 (1991)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART I. GENERAL PRINCIPLES CONTROLLING REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.08

§ 8.08 Effect of Removaln*

[1] Federal Court Assumes Control of Case

[a] Effect of Removal on Filing of Notice of Removal

Removal is automatically effected by the filing of a notice of removal with the district court, the state court, and the parties. n1 The federal court need not issue any specific order to complete removal. n2 After the notice of removal is filed, the federal district court assumes control of the case n3 and may issue all orders necessary to advance the litigation of the removed case. n4 For example, after removal occurs and a party files a renewed summary judgment motion, the federal court may grant the motion for summary judgment, even if it had previously been denied in the state court action. n5

[b] Service of Process After Removal

After the filing of the notice of removal, federal procedural rules control service of process regarding any defendants who were not served in the state court action. n5.1 Service already completed in state court, however, is not invalidated or otherwise affected by the removal. n6 Thus, if one or more of the defendants has not been served with process or the service has not been perfected prior to removal, such process or service must be completed or new process issued in the same manner as in cases originally filed in such district court. n7 For example, any defendants not served with process at the time of removal must be served with process in accordance with the federal rules applicable to cases originally filed in federal court. n8 Therefore, a federal summons must be obtained after removal, n9 and summons must be served within 120 days after the filing of the complaint. n10

[c] Venue After Removal

The general federal venue provisions n11 do not apply to removed cases. Rather, removal venue is determined by the removal statute, n12 which provides that venue is automatically proper when the case is removed to the federal district and division embracing the place where the action is filed in state court. n13 If the case is removed to the wrong district or division, however, the federal court may dismiss or transfer the case to the proper federal district. n14 Also, even after proper removal, a case may be transferred to another district for the convenience of the parties and the witnesses.

n15

Under the transfer statute, the transferee district must be one in which the action "might have been brought." n16 When a case was not originally removable because of lack of diversity, but subsequent events have rendered it removable, courts have held that the diversity determination should by made as of the time of the removal to federal court, and not at the time of the original filing of the case in state court. n17

[d] Pleading After Removal

If a defendant has not answered a claim before removal, the defendant either must answer or must present other defenses or objections under the Civil rules within the longest of any of the following applicable periods: n18

- 21 days after receiving, through service or otherwise, a copy of the initial pleading stating the claim for relief; n19
- 21 days after being served with the summons for an initial pleading already on file at the time of service; n20 or
- 7 days after the notice of removal is filed. n21

Any other pleadings filed after removal are controlled by the usual federal civil rule which specifies content and filing time for that type of pleading. n22

The appropriate time period from the list above may be extended under the provisions of Rule 6(b). For example, even if the time period has already expired, the district court may extend the time for good cause if the party failed to act because of excusable neglect. n23

[e] Effect of Removal on Required Jury Demand

If a party expressly demanded a jury trial in accordance with state law before removal, it need not renew the demand after removal. n24 In determining whether the original state court complaint satisfied state law, the federal court will consider every reasonable interpretation against the waiver of the jury trial right. Thus, even if a complaint did not contain a jury demand that satisfied all technical standards, if the complaint provides sufficient notice to the court and opposing counsel that plaintiff wanted a jury trial on particular claims, the federal court will acknowledge the jury right on those claims. n25 If a case is removed from a state that does not require an express jury demand, no demand is required in federal court unless the federal court directs that an express jury demand will be required. n26

If neither party made a jury demand in the state court proceeding, the party seeking a jury in federal court must file a jury demand under the federal civil rules governing removal in accordance with the Federal Rules of Civil Procedure. n27 and any applicable local rules. n28 Thus, the demand must be in writing and must be served on the other parties. n29 The deadline for filing a jury demand depends on which party is demanding the jury. A defending party must serve a jury demand within 14 days after it files a notice of removal. n30 The party making the claim for relief must serve a jury demand within 14 days after it is served with a notice of removal filed by a defending party. n31

[f] Supplemental Jurisdiction in Removed Cases

Although not expressly provided by the statute, n32 the Supreme Court has ruled that the supplemental jurisdiction statute, which defines the federal district court's supplemental jurisdiction, applies with equal force to cases removed to, and cases initially filed in, the district court. n33 This case agrees with the rationale for supplemental jurisdiction that permits defendants in federal court to assert claims that are not independently supported by federal subject matter

jurisdiction because they are being asserted out of a defensive position and that the assertion of such claims should apply whether the case is brought in federal court originally or removed there. It is logical to apply the statute the same way to defendants in removed cases as in cases originally brought in federal court. As for plaintiffs in removed cases, it is also logical to apply the supplemental jurisdiction statute slightly more expansively in removed cases. n34

[g] Law Applied by Federal Court After Removal

Until the time of removal, the Federal Rules of Civil Procedure do not govern the case, and the prior rulings made under state procedural law remain in effect. n35 However, after the removal becomes effective on the filing of the notice of removal, the Federal Rules of Civil Procedure become effective to govern the procedural aspects of the removed case. n36 Additionally, when the Federal Rules of Civil Procedure grant discretion to the federal courts, a district court may look to state court rules to assist in determining appropriate federal law. n37 If removal jurisdiction is based on diversity of citizenship, however, the substantive legal issues are governed by state law. n38

[2] Effect of Removal on State Court Action

[a] State Court Loses Jurisdiction

After a copy of the notice of removal is filed with the clerk of the state court in which the action is pending, the state court is divested of jurisdiction and must cease and suspend all proceedings unless and until the case is remanded. n1 Any action taken by the state court after the filing of the removal notice is void, even if the case is subsequently remanded because the initial removal was improper. n2 Furthermore, the state court has no authority to act after a federal court dismisses rather than remands a case. n2.1

Despite these restrictions, some cases have held that the "proceed no further" language of the statute does not extend to prohibit state courts from performing ministerial acts that do not affect the merits of the dispute between the parties. If the contrary were true, state courts would be forever prohibited from taking any act regarding a removed case. This bar would include actions such as the routine destruction of obsolete files, allowing parties to justifiably remove evidence and documents for proper legal purposes, or any similar action that requires a court order, n3 for example, to assess and collect accrued court costs after removal from a plaintiff who signed a cost bond, when the state court's action is not inconsistent with the federal statute mandating that the state court proceed no further. n4 However, the state court may not take any action after removal regarding the substance of the litigation between the parties, such as the imposition of sanctions. n4.1

[b] Effect of State Court Orders Prior to Removal

When a case is removed to federal court, the federal district court takes the case on removal precisely as the case stood in state court. n5 Consequently, the state court pleadings, any discovery had, orders entered, or proceedings will be presumed valid by the district court. n6 For example, interlocutory orders for preliminary relief entered by the state court remain in effect, such as injunctions, attachments, and sequestrations. n7 Furthermore, all state court orders remain in effect unless they are modified or superseded by the federal court. n8 Therefore, the district court is free to dissolve or modify the state court orders because state court orders are not considered to be the law of the case in the federal court. n9 Additionally, the validity and enforcement of an existing state orders are governed by federal law after removal. n10 For example, the duration of an ex parte temporary restraining order issued by a state court in effect at the time of removal is governed by federal law. n11

A notice of removal is effective when filed in the respective courts. Consequently, when a defendant files a notice of removal in federal court and sometime thereafter files a notice in state court, the two courts share concurrent jurisdiction until the notice is filed in state court, which divests the state court of jurisdiction. For example, in a case where the state court granted a default judgment in the interim between the filings, the default judgment was a valid state court order that came to federal court on removal. The judgment was, however, subject to a motion to vacate in federal court under

the federal standard. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalPrior State Court Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1446(d).*

(n3)Footnote 2. *Rollwitz v. Burlington N. R.R., 507 F. Supp. 582, 584 (D.C. Mont. 1981)* .

(n4)Footnote 3. *Pacor, Inc. v. Higgins, 743 F.2d 984, 989 n.4 (3d Cir. 1984)* (in cases removed under general removal statute, filing of notice of removal divests state court of jurisdiction to proceed further).

(n5)Footnote 4. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 437, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* ; *see Burroughs v. Palumbo, 871 F. Supp. 870 (E.D. Va. 1994)* (federal court obtains jurisdiction when defendant files removal notice in federal court).

(n6)Footnote 5. *Myers v. Moore Engineering, Inc., 42 F.3d 452, 454-455 (8th Cir. 1994)* .

(n7)Footnote 5.1. *Buller Trucking Co. v. Owner Operator Indep. Driver Risk Retention Group, Inc., 461 F. Supp. 2d 768, 775 (S.D. Ill. 2006)* .

(n8)Footnote 6. *Marshall v. Warwick, 155 F.3d 1027, 1033 (8th Cir. 1998)* .

(n9)Footnote 7. *28 U.S.C. § 1448.*

(n10)Footnote 8. *Beecher v. Wallace, 381 F.2d 372, 373 (9th Cir. 1967)* .

(n11)Footnote 9. *Dean Marketing, Inc. v. AOC International (U.S.A.), Ltd., 610 F. Supp. 149, 151-153 (E.D. Mich. 1985)* .

(n12)Footnote 10. *Fed. R. Civ. P. 4(m).*

(n13)Footnote 11. *See 28 U.S.C. § 1391*; *see also* Ch. 7, *Venue.*

(n14)Footnote 12. *PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 72 (2d Cir. 1998)* (after removal, party may not challenge district court venue as of right, as would be case if suit had originally been brought in federal court).

(n15)Footnote 13. *28 U.S.C. § 1441(a)*; *see PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 72 (2d Cir. 1998)* .

(n16)Footnote 14. *Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 644-645 (5th Cir. 1994)* , *cert. denied, 513 U.S. 1016 (1994)* ; *see 28 U.S.C. §§ 1441(a), 1406(a).*

(n17)Footnote 15. *28 U.S.C. § 1404(a)*; *Hartford Fire Ins. Co. v. Westinghouse Electric Corp., 725 F. Supp. 317, 321-322 (S.D. Miss. 1989)* .

(n18)Footnote 16. *28 U.S.C. § 1404(a).*

(n19)Footnote 17. *See Schechter v. Tauck Tours Inc., 17 F. Supp. 2d 255, 258-260 (S.D.N.Y. 1998)* .

(n20)Footnote 18. *Fed. R. Civ. P. 81(c)(2)*; *see Boyle v. Am. Auto Serv., 571 F.3d 734, 743 n.5 (8th Cir. 2009)* (construing former time periods).

(n21)Footnote 19. *Fed. R. Civ. P. 81(c)(2)(A)*.

(n22)Footnote 20. *Fed. R. Civ. P. 81(c)(2)(B)*.

(n23)Footnote 21. *Fed. R. Civ. P. 81(c)(2)(C)*.

(n24)Footnote 22. *See Fed. R. Civ. P. 8* (federal pleading standard that controls answer); *see also Romo v. Gulf Stream Coach, Inc., 250 F.3d 1119, 1122 (7th Cir. 2001)* .

(n25)Footnote 23. *Fed. R. Civ. P. 6(b)(1)(B)*; *see § 9.46*.

(n26)Footnote 24. *Fed. R. Civ. P. 81(c)(3)(A)*.

(n27)Footnote 25. *Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1064-1065 (9th Cir. 2005)* .

(n28)Footnote 26. *Fed. R. Civ. P. 81(c)(3)(A)*.

(n29)Footnote 27. *Fed. R. Civ. P. 81(c)(3)(B)*; *see Fed. R. Civ. P. 38*.

(n30)Footnote 28. *See Felix-Hernandez v. Am. Airlines, Inc., 539 F. Supp. 2d 511, 511-512 (D.P.R. 2007)* .

(n31)Footnote 29. *Fed. R. Civ. P. 38(b)*.

(n32)Footnote 30. *Fed. R. Civ. P. 81(c)(B)(i)*.

(n33)Footnote 31. *Fed. R. Civ. P. 81(c)(3)(B)(ii)*.

(n34)Footnote 32. *28 U.S.C. § 1367* (supplemental jurisdiction statute applies to cases "commenced" in federal court).

(n35)Footnote 33. *City of Chicago v. International College of Surgeons, 522 U.S. 156, 165-166, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)* (even though case containing claims alleging that local administrative action violated federal law also contained state-law claims that called for deferential review of administrative findings, district court was not deprived of original jurisdiction over federal claims, nor was district court prevented from exercising supplemental jurisdiction over state law claims); *see 28 U.S.C.A. §§ 1367(a), 1441(a)*.

(n36)Footnote 34. *See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* .

(n37)Footnote 35. *Fed. R. Civ. P. 81(c)(1)*.

(n38)Footnote 36. *Fed. R. Civ. P. 81(c)(1)*; *Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 947 (11th Cir. 2000)* ; *see Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* .

(n39)Footnote 37. *Pagel v. Teamsters Local Union 595, 667 F.2d 1275, 1278-1279 (9th Cir. 1982)* (district court could consider state procedural law governing failure to prosecute action to determine appropriate federal law).

(n40)Footnote 38. *Sierminski v. Transouth Financial Corp., 216 F.3d 945, 947 (11th Cir. 2000)* ; *Eastman Chem. Co. v. Niro, Inc., 80 F. Supp. 2d 712, 715 (S.D. Tex. 2000)* .

(n41)Footnote 1. *28 U.S.C. § 1446(d).*

(n42)Footnote 2. *Burroughs v. Palumbo, 871 F. Supp. 870 (E.D. Va. 1994)* .

(n43)Footnote 2.1. *Spain v. Brown & Williamson Tobacco Corp., 230 F.3d 1300, 1304-1305 (11th Cir. 2000)* .

(n44)Footnote 3. *Lawrence v. Chancery Court, 188 F.3d 687, 692-693 (6th Cir. 1999)* (citing **Moore's Federal Practice**).

(n45)Footnote 4. *Pershern v. Fiatallis N. Am., Inc., 834 F.2d 136, 140 (8th Cir. 1987)* (federal statute authorizing awards of costs did not account for state court filing fees).

(n46)Footnote 4.1. *Schmude v. Sheahan, 318 F. Supp. 2d 606, 654-655 (N.D. Ill. 2004)* .

(n47)Footnote 5. *Burroughs v. Palumbo, 871 F. Supp. 870 (E.D. Va. 1994)* (noting that between time that removal notice filed in federal court is subsequently filed in state court, both courts share concurrent jurisdiction).

(n48)Footnote 6. *Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 885 (8th Cir. 1999)* (after removal, state court orders remain in effect).

(n49)Footnote 7. *See 28 U.S.C. § 1450.*

(n50)Footnote 8. *Myers v. Moore Eng., Inc., 42 F.3d 452, 454-455 (8th Cir. 1994)* .

(n51)Footnote 9. *Prime Care of Northeast Kansas, LLC v. Humana Insurance Company, 2006 U.S. App. LEXIS 11775 (2006)* (citing **Moore's Federal Practice** for proposition that state court orders are inherently non-final after removal, and subject to reconsideration in federal court).

(n52)Footnote 10. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 437, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* .

(n53)Footnote 11. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 437, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* .

(n54)Footnote 12. *Burroughs v. Palumbo, 871 F. Supp. 870, 872-873 (E.D. Va. 1994)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART I. GENERAL PRINCIPLES CONTROLLING REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure §§ 8.09through 8.19

[Reserved]

§§ 8.09[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART II. RIGHT TO REMOVAL JURISDICTION UNDER GENERAL REMOVAL STATUTE

1-8 Moore's Manual--Federal Practice and Procedure § 8.20

§ 8.20 Summary of Requirements for Removal Under General Statuten*

The general removal statute provides that any civil action brought in a state court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. n1 When analyzed according to its components, there are four basic requirements for proper removal under the general removal statute: n2

1. The action desired to be removed must be one over which the district courts of the United States have original jurisdiction. n3

2. Only the defendant or the defendants may remove an action. n4

3. Only a "civil action" may be removed, and only if the action has been filed in a state court. n5

4. The action may only be removed to the district court for the district and division embracing the state court action. n6

It should be noted that even if all of these requirements under the general removal statute are not met, a state court action may nevertheless be removed under a special removal statute, which is a statute in which Congress specifies the particular circumstances allowing for removal. n7 For a discussion of these special removal statutes, see *§ 8.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalElementsProper TransferorsCivil ProcedureRemovalElementsRemovability

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *See 28 U.S.C. § 1441(a),(b); see also Palmer v. City Nat'l Bank, 498 F.3d 236, 247-248 (4th Cir. 2007)* .

(n4)Footnote 3. *See § 8.21.*

(n5)Footnote 4. *See § 8.22.*

(n6)Footnote 5. *See § 8.23.*

(n7)Footnote 6. *See § 8.24.*

(n8)Footnote 7. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* (noting special removal statute which expressly provides for removal of tort claim brought in state court when claim arises out of nuclear accident, even if claim is based only on state law).

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART II. RIGHT TO REMOVAL JURISDICTION UNDER GENERAL REMOVAL STATUTE

1-8 Moore's Manual--Federal Practice and Procedure § 8.21

§ 8.21 District Court Must Have Grounds for Original Jurisdiction Over Removed Actionn*

[1] Nature of Original Jurisdiction

An action brought in a state court may be removed to federal court only if the action is one that is subject to the original jurisdiction of the district courts of the United States. n1 This means that an action is removable to federal court only if, had the action originally been brought in federal court, the district court would have had original jurisdiction over the action because either (1) the action was founded on a claim or right arising under the Constitution, treaties, or laws of the United States, including the federal common law, or (2) complete diversity existed between the parties. n2 In other words, a federal court has original jurisdiction over any case for removal purposes provided that Congress has provided for original subject matter jurisdiction for such a case in general. n3 An action is thus removable only if a right or immunity created by the Constitution, treaty, or some other federal law, including the diversity statute or federal common law, is an essential element of the plaintiff's properly pleaded claim for relief. n4 Most removed cases involve federal questions, n5 or diversity of citizenship. n6 Removal may, however, be entirely based on federal common law. n7

Removal is entirely governed by statute, and a party may not remove without compliance with the statutory requirements. The primary requirement is that the court have original jurisdiction over the action in order for it to be removed from a state court. n8 Consequently, the Supreme Court has held that, because the supplemental jurisdiction statute n9 is not a source of original jurisdiction and is not a proper basis for removal, n10 removal may not be based on a supplemental or ancillary claim alone; there must be an independent basis for original jurisdiction. However, when the court has original jurisdiction that supports removal, supplemental claims may be removed with the claim that supports the original jurisdiction n11 and may be heard by the federal court even if the original jurisdiction claim is later dismissed. n12

In the same way that the supplemental jurisdiction statute may not in itself provide the basis for original jurisdiction necessary for removal, the All Writs Act, which provides federal courts with the power to issue all writs necessary to aid their jurisdiction, n13 does not in itself provide an independent basis for removal. n14 A court could not, for example, order removal of a claim over which the court had no original jurisdiction merely because a related state court case might conflict with the federal court's jurisdiction of the related matter. n15

The Supreme Court has indicated that if one claim in an action provides the proposed federal removal court with original jurisdiction, an action based on such a claim may be removed to the federal court, even if any other claims in the action are not jurisdictionally supported in federal court, for example, because of a state's sovereign immunity or if the other claims do not otherwise fit within the original or supplemental jurisdiction of the federal courts. In such circumstances, the action may be removed, but the district courts must dismiss or remand the claims that are not supported by federal jurisdiction and may retain jurisdiction over the claims that are supported by original or supplemental federal jurisdiction. n16

[2] Federal Question Jurisdiction as Basis of Removal

[a] Federal Question Described

The scope of "federal question" jurisdiction necessary for removal under the general removal statute n1 is identical to the scope of federal question jurisdiction under Section 1331. This is because removal jurisdiction is only possible when the federal district court would have had original jurisdiction over the suit and because the "arising under" language of the two statutes is almost identical. n2 Consequently, this chapter describes the highlights of a federal question necessary for removal of an action. For a complete discussion of the nature and requirements of federal question jurisdiction in general, see Ch. 5, *Original Jurisdiction Over the Subject Matter*.

The district courts have original federal question jurisdiction if a civil action arises under the Constitution, laws, or treaties of the United States. n3 If a case involves a federal question, the case is removable without regard to the citizenship of the parties. n4 Any action in which an issue of federal law forms an essential ingredient of the original cause is a case arising under federal law, even if other questions of law are involved in the case. n5 To determine whether the claim arises under federal law, the court must examine the "well pleaded" allegations of the complaint as filed by the plaintiff and must ignore potential defenses. n6

Furthermore, the federal law must be a significant and essential element of the plaintiff's cause of action. Removal is not proper due to the mere presence of a federal issue in a state cause of action. n7 The "arising under" clause gives federal courts jurisdiction over cases governed by state substantive law if necessary to protect important federal interests, and recognizes that federal courts perform an important function in providing expert, impartial, and uniform interpretation of federal law. n8

Federal question jurisdiction is not exclusive: state courts also have jurisdiction to hear federal question cases, n9 except when Congress has specifically denied state courts jurisdiction over particular federal questions. n10 Thus, certain statutes confer exclusive original jurisdiction on federal district courts of actions involving specific federal laws. For example, state courts have no jurisdiction to adjudicate patent cases. n11

[b] Removal and Well-Pleaded Complaint Rule

[i] Statement of Rule

Whether a sufficient federal question exists is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only if a federal question is affirmatively and distinctly presented on the face of the plaintiff's properly pleaded complaint. This rule makes the plaintiff the master of the claim; n12 the plaintiff may avoid federal jurisdiction and ensure that the claims are heard in state court by refraining from making claims based on federal law and by relying exclusively on state law, n13 unless the state law claims have been completely preempted by federal law. n14

The federal law under which a claim arises must be a direct and essential element of the plaintiff's cause of action to establish federal question jurisdiction. n15 Therefore, if a plaintiff's well-pleaded complaint filed in state court does not

allege any federal question, the defendant ordinarily may not remove the case to federal court, even if his or her defense or counterclaim is based on federal law. n16 A plaintiff may not defeat removal, however, simply by omitting to plead a necessary federal question in the complaint, because such a complaint is not "well-pleaded"; in such a situation, the necessary federal question will be deemed to be alleged in the complaint. n17 A case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, n18 even if the defense is anticipated in the plaintiff's complaint and both parties concede that the federal defense is the only dispute actually at issue. n19 Additionally, a case may not be removed to federal court on the basis of a federal question counterclaim; a counterclaim, which appears as part of the defendant's answer and not as part of the plaintiff's complaint, may not serve as the basis for "arising under" federal question jurisdiction. n20

[ii] Complete Preemption Exception

The "complete preemption doctrine" is a narrow exception to the well pleaded complaint rule. The doctrine provides that even a complaint that purports to plead only a state law claim may be removable to federal court when that state law is "completely preempted" by federal law. n21 Whether federal jurisdiction exists for removal purposes depends on the nature and scope of the preemption of state law. n22 To determine whether federal law completely preempts state law to the extent the preemption requires removal of a state court claim to federal court because of a federal defense, the district court must consider whether: (1) Congress intended federal law to occupy the entire regulatory field; n23 (2) the federal judicial power properly extends to actions originally filed in state courts to the extent that they affect that field; and (3) the exercise of federal power does not offend principles of federalism. n24

[c] Plaintiff is Generally Master of Claim

In some cases the plaintiff may have various theories of recovery, some under state law and others under federal law. Subject to the "well-pleaded complaint" rule and the complete preemption doctrine, n25 the plaintiff is the master of the claim and may choose to allege only state law claims, only federal law claims, or both, in state court. n26 If the plaintiff alleges only the state law claims, the action is not removable as a federal question case. If the plaintiff alleges the federal claims, or both federal and state claims, the action is removable. n27 Subject to the restrictions noted above, when a plaintiff selects only a state cause of action, the selection is controlling and the end of the removal inquiry. n28 If the plaintiff amends a state court claim to add a federal claim, the time for removal begins when the defendants receive the amended complaint that contains a federal claim on its face. n29

A plaintiff by "artful pleading" may not avoid federal jurisdiction over the complaint when all the state claims in the complaint are preempted. n30 This means that a federal district court may take removal jurisdiction if the real nature of the claim asserted in the complaint is essentially a federal question in nature, such as when state causes of action are completely preempted by ERISA or the Labor-Management Relations Act, even if by artful pleading the complaint purports to allege no federal causes of action. n31 The artful pleading doctrine may be invoked only in exceptional circumstances, because it raises issues of federalism. n32 Furthermore, the artful pleading doctrine applies only in cases of complete federal preemption. n33

[d] Action Not Removable Based Only on Federal Defense

Removal jurisdiction is not available unless the federal district court has concurrent original jurisdiction over the case with the state court. Consequently, a defendant generally may not remove a nondiverse case in which federal subject-matter basis is lacking, if the federal issue is first raised in the defendant's pleadings. n34 Thus, a defendant may not remove a case to federal court if the removal is based only on a federal counterclaim or a federal defense, including the defense of preemption, n35 even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. n36 As a general rule, in the absence of diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim. For example, even if a defense relies on the preclusive effect of a prior federal judgment, the defense does not in itself provide a basis

for removal, unless a claim has been made by the plaintiff that is based on federal law. n37

[e] Removal Jurisdiction Not Derivative of State Court Jurisdiction

In contrast to prior law, courts now uphold otherwise proper removal jurisdiction even if there was a defect in jurisdiction or venue in the state court. In this regard, Congress has eliminated the doctrine of "derivative jurisdiction" for cases removed under Section 1441. n38 This means that the federal court to which the action is removed under Section 1441 is not precluded from hearing and determining any claim merely because the state court from which the action was removed did not technically correct jurisdiction over that claim. Courts now recognize that jurisdiction is proper in the federal court on removal even though it may not have been proper in the state court in which the action originally was brought, because the defendant is effectively waiving any objection to the state court defect by effecting removal to a proper federal court. n39

[f] Counterclaim by Defendant Generally Not Basis for Removal Jurisdiction

A defendant may not remove to federal court a case brought in state court under state law simply by raising a federal counterclaim. Such a removal would defeat the plaintiff's choice of forum. A counterclaim, which appears as part of the defendant's answer and not as part of the plaintiff's complaint, may not serve as the basis for "arising under" federal question jurisdiction. The basis of this rule is the principle that the plaintiff is the master of the complaint, and that the well-pleaded complaint rule enables the plaintiff to have the cause heard in state court when the plaintiff avoids making any claims based on federal law. n40 On the other hand, if the plaintiff fails to object in a timely manner to an improper removal and the defendant has asserted a federal counterclaim, the district court may not, on its own motion, inquire into the propriety of the removal. n41 Rather, because there is federal jurisdiction over the counterclaim, the court has subject matter jurisdiction and may enter judgment. n42

[3] Diversity Jurisdiction as Basis of Removal

[a] Nature of Diversity Jurisdiction

[i] Removal Diversity Requirements

The general removal statute provides in relevant part that any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant, or the defendants, to the district court of the United States n1 in diversity actions provided that none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought. n2 Diversity jurisdiction for removal purposes is coextensive with ordinary diversity jurisdiction under the general jurisdiction statute, Section 1332. Thus, a case originally filed in state court may be removed to federal court if the traditional requirements of diversity jurisdiction, complete diversity of citizenship between all the parties and an amount in controversy exceeding $75,000, are satisfied. Even if the jurisdictional requirements are met, however, an action is not removable on the basis of diversity unless the defendants overcome an additional hurdle not applicable when a complaint is filed in the first instance in federal court: none of the defendants may be a citizen of the forum state. n3 For a complete discussion of the nature and requirements of federal diversity jurisdiction in general, see Ch. 5, *Original Jurisdiction Over the Subject Matter*.

An action may be removed on the basis of diversity jurisdiction if the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and the action is between any of the following: n4

1. Citizens of different states; n5

2. Citizens of a state and citizens or subjects of a foreign state. n6

3. Citizens of different states, with foreign citizens or subjects as additional parties; n7

4. A foreign state as plaintiff and citizens of a state or of different states as defendants. n8

[ii] Exceptions for Family Law and Probate Suits

The Supreme Court has imposed a prohibition on the federal courts' diversity jurisdiction in two areas that it has determined are appropriate only for state court jurisdiction, rather than federal jurisdiction:

1. Certain domestic relations claims. A federal court may not exercise diversity jurisdiction in a narrow range of domestic relations issues; these issues are divorce, alimony, and child custody. On the other hand, the Supreme Court has held that the federal courts may take domestic relations related claims which allege the commission of torts. n9 For example, this exception does not preclude diversity jurisdiction over an action alleging that a parent's tort against children resulted in damages. Furthermore, the fact that an alleged violation of constitutional rights arises in a domestic relations context does not bar review of those constitutional issues. n10

2. Claims in probate proceedings. A federal court may not exercise diversity jurisdiction to probate a will, annul a will, or administer a decedent's estate. However, the probate exception does not bar federal courts from adjudicating matters such as claims of creditors, legatees, heirs, and other claimants against a decedent's estate provided that the federal court does not interfere with the probate proceedings. n11

[b] Determination of Citizenship

The rules to determine the citizenship of individuals, representative parties, permanent resident aliens, corporations, and partnerships, for diversity purposes n12 are the same for removal jurisdiction as for original federal diversity jurisdiction. n13 The following is a general summary of those rules; the determination of citizenship for diversity purposes is discussed in detail in see Ch. 5, *Original Jurisdiction Over the Subject Matter*.

1. An individual who is a citizen of the United States is a citizen of the state in which he or she is domiciled. n14

2. A corporation is a citizen of any state in which it is incorporated and of the state where its principal place of business is located. n15

3. Partnerships and other unincorporated associations are citizens of each state in which any partner, limited partner, or member resides. n16

4. A trustees' citizenship, rather than that of trust beneficiaries, determines citizenship of a trust for diversity purposes. n17

5. Representative parties, such as executors and conservators, are citizens of the same state as the represented party. n18

6. Permanent resident aliens, that is aliens legally admitted for permanent residence, are deemed citizens of the state in which they are domiciled. n19

The determination of a litigant's state citizenship for diversity purposes is governed by federal law rather than state law. n20 Federal courts may look to state law, however, for guidance in defining terms, formulating concepts, or delineating policies to reach the proper decision. n21

[c] Requirement of Complete Diversity

Removal based on diversity of citizenship is permissible only if there is no plaintiff and no defendant who are citizens of the same state. n22 Thus, diversity jurisdiction requires "complete diversity," n23 which means that none of the defendants may be a citizen of the same state as any of the plaintiffs. n24 If any plaintiff and any defendant share citizenship of the same state, diversity is incomplete and the federal court lacks jurisdiction. n25 The complete diversity requirement applies to each defendant named in the complaint. n26

When the court makes a determination whether complete diversity exists for purposes of removability, the determination is made according to the citizenship of the parties as alleged in the state court complaint. The plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder of necessary parties. n26.1 Consequently, the court should not consider in the diversity determination persons who are merely potential defendants; furthermore, the named defendants are not required to negate the existence of potential defendants who could destroy diversity. n26.2

Diversity must exist as of the time the complaint is filed and removal is effected. If the plaintiff has made mistaken allegations about the citizenship of any named defendants, their actual citizenship controls. Once jurisdiction attaches, a party may not thereafter, by its own change of citizenship, destroy diversity. n27 Diversity is determined regardless of service or non-service on co-defendants. Thus, whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named in the complaint and not from whether or not they have been served. n27.1 Unserved defendants may be disregarded if the complaint fails to state a plausible cause of action against them, or if the plaintiff voluntarily abandons the suit against them. n28 Additionally, the court will disregard the citizenship of defendants sued under fictitious names, such as "Doe" defendants, when the named defendants attempt to remove the case to federal court. n29 The general removal statute was amended to permit removal, even when the citizenship of "Doe" defendants is uncertain, to overrule the decision in a case that had held that the presence of Doe defendants destroys diversity and precludes removal. n30

[d] Removal Not Prevented by Fraudulently Joined Parties

Although removal jurisdiction generally requires that all defendants join in the notice of removal, if the plaintiff has named defendants who are nominal, unknown, sham, or fraudulent, it does not prevent removal, and the existence of such defendants is disregarded for purposes of determining diversity. n31 Fraudulent joinder occurs when a nondiverse party is added by the plaintiff solely for the purpose of depriving the federal courts of jurisdiction. n32 In other words, in determining whether there is diversity of citizenship, the court must disregard nondiverse parties that are fraudulently joined. n33 The term "fraudulent joinder" is slightly misleading, however, because the doctrine requires neither a showing of technical fraud nor technical joinder. n34 Rather, when a party seeking removal alleges fraudulent joinder, the removing party has the burden of proving the intent of the plaintiff to join the defendant solely to defeat jurisdiction. n35

A claim of fraudulent joinder must be pleaded with particularity and supported by clear and convincing evidence. n36 To establish that a defendant has been fraudulently joined, the removing party must show either that (1) there is no possibility that the plaintiff would be able to establish a cause of action against the defendant in state court, or (2) there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. n37 The determination of whether a defendant was fraudulently joined to defeat diversity is a question of law, specifically requiring the court to interpret the underlying state law, and is subject to de novo review. n38

[e] Realignment of Parties

In making a determination of diversity of citizenship for purposes of removal, the designation and alignment of the parties made by the plaintiff when filing the action is not binding on the court. The court itself is responsible for aligning the parties according to their actual, substantive interests in the litigation. n38.1 However, a defendant effecting

removal may bring the issue to the court's attention by requesting that the court preserve diversity, either in a motion to the court for realignment or in the defendant's response to a plaintiff's motion for remand to state court. n38.2 If, after proper alignment or realignment, there is no longer complete diversity, removal is improper for lack of subject matter jurisdiction. n39 A federal court will determine the true interests of the parties to ascertain whether a bona fide controversy exists between citizens of different states. n40 In this regard, in determining whether to realign the parties, federal courts are not bound by the manner in which a plaintiff formally aligns parties in the original pleading. n41 The federal courts must look beyond the pleadings and align the parties according to their respective positions in the dispute. n42 Thus, the realignment of parties should put them in a position so that their rights are the same as they would have been had they not been artificially aligned by the plaintiff as co-defendants. n43 For further discussion of realignment, see Ch. 5, *Original Jurisdiction Over the Subject Matter*.

[f] Removal Prohibited If Any Defendant Is Citizen of State Where Action Was Filed

The court may not allow removal if any of the parties in interest properly joined and served as defendants is a citizen of the state in which the action was filed. n44 Thus, even if complete diversity exists, removal is precluded if a local defendant is served. n45 The rationale for this rule is that because the purpose of diversity jurisdiction is to provide litigants with an unbiased forum by protecting out-of-state litigants from local prejudices, n46 it would not be consistent to allow an in-state defendant to take advantage of the removal procedure. n47 The courts are not in agreement whether the prohibition on local defendants is procedural or jurisdictional, and the Supreme Court has not addressed the issue. n48 Most courts hold that the ban is procedural and, assuming complete diversity, that the defect is waived if the plaintiff fails to move to remand on this ground within 30 days of the notice of removal. n49 Other courts hold that the presence of a local defendant constitutes a jurisdictional defect that may be raised at any time. Construction of the requirement as jurisdictional is consistent with the general principle of strict construction of the right of removal and with the local prejudice justification for diversity jurisdiction. n50

[g] Requirement of Amount in Controversy

[i] Amount Required

Diversity of citizenship jurisdiction exists only if the amount in controversy exceeds $75,000 exclusive of interest and costs. n51 The amount in controversy is determined based on the plaintiff's complaint at the time that the notice of removal is filed. n52 Although the value of the matter in controversy for purposes of federal jurisdiction must generally determined by applying federal standards, n53 in diversity cases the federal court must examine state law to determine the nature and extent of the damages to be awarded. n54

When making the determination of the amount in controversy, the court is not bound by the amount that is ultimately and actually awarded to the plaintiff but only by the amount that is demanded by the plaintiff when the complaint is filed. n55 When the amount in controversy is in doubt, the Supreme Court has drawn a distinction between original jurisdiction and removal jurisdiction. For cases originally brought in federal court, it must appear to a legal certainty that the plaintiff's claim is really for less than the jurisdictional amount to justify dismissal. n56 When, however, a party requests to remove a case instituted in state court, there is a strong presumption that the plaintiff has not claimed an amount large enough to confer jurisdiction on a federal court and that parties have not colluded to obtain federal jurisdiction. n57

Uncertainty as to the amount in controversy may arise, if the state court complaint does not allege the amount of damages sought. Such uncertainty may be eliminated by a determination of damages through discovery. Also, some state courts have jurisdictional limits that preclude a state court from awarding damages greater than specified amounts and that may serve as a basis for ascertaining the maximum amount in controversy for removal purposes. n58

When a suit requests only equitable relief, such as, injunctive relief, it may be difficult to evaluate monetarily its value.

For example, an action for injunctive relief may have far less monetary value to a plaintiff than to a defendant, who may be required to spend in excess of $75,000 to comply with an injunction ultimately imposed by the court. n59 Although there are cases permitting an inquiry from the defendant's point of view, the general rule is that the value of the cause of action or the amount in controversy is determined from the plaintiff's point of view, that is, what the plaintiff will recover or avoid losing if the suit is successful. This rule is consistent with the general principle of strict construction of the right of removal, and it protects the plaintiff's initial choice of forum. n60

[ii] Burden of Proof

The defendants have the burden of establishing that removal is proper, including proving that the amount in controversy requirement is satisfied. n61 Ordinarily, this burden is satisfied if the plaintiff claims a sum greater than the jurisdictional requirement. n62 If the state court complaint is uncertain or silent as to the amount of the plaintiff's claim, however, the defendant bears the burden of actually showing facts to support jurisdiction, including the jurisdictional amount. n63 To determine whether the defendant has satisfied this burden, the court will consider first whether it is facially apparent from the complaint that the jurisdictional amount is in controversy. If it is not, the court may consider facts alleged in the notice of removal, judicial admissions made by the plaintiffs, letters submitted to the court, or other summary judgment evidence that may reveal that the amount in controversy requirement is satisfied. n64 A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied is insufficient to meet the defendant's burden. What the defendant must do is set forth the underlying facts supporting the assertion of the jurisdictional amount. n65 Therefore, when the plaintiff's complaint does not specify the total amount of damages demanded, a defendant seeking removal based on diversity jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the $75,000 jurisdictional requirement. n66 The best practice is for the defendant set forth the jurisdictional facts in the notice of removal or, when necessary, to use affidavits or other documentation similar to that used on motions for summary judgment. n67

In the determination of the amount in controversy for removal purposes, there is a strong presumption that the amount alleged in the complaint is correct, n68 because as officers of the court, attorneys have a duty of candor to the court, and if it is specific and drafted by an attorney, the plaintiff's complaint deserves deference and the presumption of truth. n69 As noted above, a defendant seeking removal has a heavy burden to show that the plaintiff's express claim to an amount less than the jurisdictional minimum amount in controversy is erroneous. n70 However, a defendant is entitled to remain in federal court on removal, despite a contrary amount claimed by the plaintiff, if the defendant can show that the preponderance of evidence shows that the claim has a value worth more than the complaint amount. For example, a defendant may avoid remand by proving that, under the applicable law, judgments in excess of the demanded amount are more likely than not. n71

[h] Time for Determination of Diversity and Amount in Controversy

For removal purposes, the court must generally determine diversity of citizenship at the time that the action is commenced and again at the time of removal. n72 Furthermore, diversity must be maintained throughout the proceeding, because the addition of a nondiverse party after removal may require remand. n73 The Supreme Court has made a narrow exception to the general rule described above, holding that a district court's failure to grant the plaintiff's motion to remand a case improperly removed on diversity grounds is not fatal to the adjudication of the case, provided that federal jurisdictional requirements are satisfied by the time the judgment is entered. n74 With respect to the requirement that the amount in controversy must exceed $75,000, the amount must be determined based on the plaintiff's complaint at the time that the notice of removal is filed. n75

A case that is not removable based on the plaintiff's initial pleading may become removable if the plaintiff takes some voluntary action that changes the nonremovable status of the case, such as by dismissing a nondiverse defendant. n76 For example, an action becomes removable when the plaintiff voluntarily settles the claim against the only nondiverse defendant and amends the complaint accordingly. n77 In this regard, even if a case as stated in an initial pleading is not

removable, it becomes removable if the defendant subsequently receives notice of an amended pleading, motion, or other paper which makes apparent that the case has become removable, provided that the defendant files a notice of removal within 30 days of receipt of such paper. n78 As a practical matter, the effect of the statute is that successive attempts at removal are permissible when the grounds for removal become apparent only later in the litigation, such as after initial discovery. n79 If a defendant has not developed enough information to meet its burden for removal within the 30 day initial period after the filing in state court, the defendant's right to remove is preserved in the event the plaintiff later reveals that it is making a federal claim. n80

However, for diversity jurisdiction cases, there are two limitations to this rule. First, a case may not be removed more than one year after commencement of the action in state court, n81 except for interstate class actions covered by the Class Action Fairness Act. n82 Second, under the "voluntary involuntary rule," when a case is not removable at the time it is filed, but becomes facially removable at a later date because of the dismissal of a non diverse defendant, removal is authorized only if diversity results from a voluntary act of the plaintiff, and not by a defending party. n83

[4] Removal Jurisdiction on Separate and Independent Claims

Whenever a separate and independent claim based on federal question jurisdiction n1 is joined with additional otherwise nonremovable claims or causes of action, the entire case may be removed. n2 Removal of an "entire case" means that all of the claims filed in the state court, including both state law claims and federal law claims, may be heard in the federal court after removal. n3 The district court then has the discretion to either determine all the claims in the removed case or remand any claims in which state law predominates. n4 It is important to note that this authority for removal is expressly limited to cases in which the separate and independent claim forming the basis for removal is a federal question claim, and does not apply to diversity jurisdiction claims. n5

A claim is "separate and independent" from other nonremovable claims if it arose from a different set of acts or omissions, or if it resulted in a different type of harm to the plaintiff. If the plaintiff has incurred only a single type harm which arose from an interrelated series of transactions, there is no separate and independent claim. n6 This means that to be "separate and independent" from the main action the claim (1) must be susceptible of adjudication separate and apart from claims raised in the main action; and (2) could have originally been brought in federal court. n7 In the application of this provision regarding the remand of state-dominated claims, the focus is on the composition of individual claims. Thus the court may remand any one or more claim in which state law predominates, and retain jurisdiction of all the other claims. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalElementsRemovability

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *28 U.S.C. § 1441(a),(b)*; *see Barbour v. Int'l Union, 594 F.3d 315, 326 (4th Cir. 2010)* .

(n4)Footnote 3. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* ; *Halmekangas v. State Farm Fire & Cas. Co., 603 F.3d 290, 294 (5th Cir. 2010)* .

(n5)Footnote 4. *Diaz v. General Sec. Servs. Corp., 93 F. Supp. 2d 129, 133-134 (D. Mass. 2000)* .

(n6)Footnote 5. *See* [2], *below*.

(n7)Footnote 6. *See* [3], *below*.

(n8)Footnote 7. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 924-926 (5th Cir. 1997)* ; *see Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1086 (9th Cir. 2009)* .

(n9)Footnote 8. *28 U.S.C. § 1441(a), (b)*; *see Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* .

(n10)Footnote 9. *28 U.S.C. § 1367*.

(n11)Footnote 10. *Halmekangas v. State Farm Fire & Cas. Co., 603 F.3d 290, 295 (5th Cir. 2010)* (citing **Moore's Federal Practice**).

(n12)Footnote 11. *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33-34, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* .

(n13)Footnote 12. *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 387-388, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* .

(n14)Footnote 13. *See 28 U.S.C. § 1651(a)*; *In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 239 (3d Cir. 2002)* .

(n15)Footnote 14. *Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 413 (2d Cir. 2002)* (All Writs Act creates no independent jurisdictional basis).

(n16)Footnote 15. *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* .

(n17)Footnote 16. *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 387-389, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* ; *Kruse v. Hawaii, 68 F.3d 331, 334, 335 (9th Cir. 1995)* .

(n18)Footnote 1. *28 U.S.C. § 1441(a), (b)*.

(n19)Footnote 2. *Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 757-758 (6th Cir. 2000)* .

(n20)Footnote 3. *28 U.S.C. § 1331*; *Blackburn v. Sundstrand Corp., 115 F.3d 493, 494 (7th Cir. 1997)* .

(n21)Footnote 4. *28 U.S.C. § 1441(b)*.

(n22)Footnote 5. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

(n23)Footnote 6. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11-12, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* ; *see* [b]-[d], *below*.

(n24)Footnote 7. *Maggio-Onorato and Assocs. v. AEGON N.V., 104 F. Supp. 2d 518, 522 (D. Md. 2000)* .

(n25)Footnote 8. *Cf. Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th Cir. 2000)* .

(n26)Footnote 9. *Lockerty v. Phillips, 319 U.S. 182, 187, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943)* .

(n27)Footnote 10. *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784*

(1981) .

(n28)Footnote 11. *28 U.S.C. § 1338(a).*

(n29)Footnote 12. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 12, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* ("arising under" jurisdiction for removal purposes is governed by well pleaded complaint rule).

(n30)Footnote 13. *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* .

(n31)Footnote 14. *Barbour v. Int'l Union, 594 F.3d 315, 327 (4th Cir. 2010)* ; *see* [ii], *below.*

(n32)Footnote 15. *Maggio-Onorato and Assocs. v. AEGON N.V., 104 F. Supp. 2d 518, 522 (D. Md. 2000)* .

(n33)Footnote 16. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 6-12, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

(n34)Footnote 17. *County of St. Charles v. Missouri Family Health Council, 107 F.3d 682, 683-684 (8th Cir. 1997)* .

(n35)Footnote 18. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9, 123 S. Ct. 2058, 2062, 156 L. Ed. 2d 1 (2003)* .

(n36)Footnote 19. *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* ; *Hunter v. Philip Morris USA, 582 F.3d 1039, 1042-1043 (9th Cir. 2009)* .

(n37)Footnote 20. *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)* (defendant may not remove case and defeat plaintiff's choice of forum merely by raising federal counterclaim).

(n38)Footnote 21. *Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* .

(n39)Footnote 22. *Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1243-1244 (9th Cir. 2009)* .

(n40)Footnote 23. *Barbour v. Int'l Union, 594 F.3d 315, 329 (4th Cir. 2010)* ; *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund, 538 F.3d 594, 596 (7th Cir. 2008)* .

(n41)Footnote 24. BIW Deceived v. Local S6, *Indus. Union of Marine & Shipbuilding Workers, 132 F.3d 824, 833-834 (1st Cir. 1997)* ; *Alshrafi v. Am. Airlines, Inc., 321 F. Supp. 2d 150, 156 (D. Mass. 2004)* .

(n42)Footnote 25. *See* [b], *above*; *see also Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* .

(n43)Footnote 26. *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13, 20-21 (2002)* .

(n44)Footnote 27. *See United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 493 (4th Cir. 1998)* .

(n45)Footnote 28. *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)* (plaintiff entitled to assert only state law claim, even if plaintiff could have asserted federal claim).

(n46)Footnote 29. *Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525-526 (5th Cir. 1994)* .

(n47)Footnote 30. *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46-48, 51, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)* .

(n48)Footnote 31. *See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611 (7th Cir. 1997)* (if plaintiff really intends to bring federal suit though failing to cite federal law, his or her intentions should be taken as reality and defendant allowed to remove what is functionally, though not formally, federal suit).

(n49)Footnote 32. *See Clinton v. Acequia, Inc., 94 F.3d 568, 571 (9th Cir. 1996)* ; *see also City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007)* (common application of exception would effectively abrogate well-pleaded complaint rule).

(n50)Footnote 33. *Dudek v. Prudential Secs., Inc., 295 F.3d 875, 879 (8th Cir. 2002)* .

(n51)Footnote 34. *Aetna Health Inc. v. Davila, 542 U.S. 200, 207, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)* ; *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* .

(n52)Footnote 35. *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13, 20 (2002)* (defendant may not remove case brought in state court under state law, thereby defeating a plaintiff's choice of forum, merely by raising federal defense or federal counterclaim).

(n53)Footnote 36. *Farmers Co-Op Elevator v. Doden, 946 F. Supp. 718, 730-734 (N.D. Iowa 1996)* (question of whether hedge contracts were illegal under Commodity Exchange Act was affirmative defense that did not confer federal question jurisdiction on suit by grain elevators against farmers alleging breach of contracts).

(n54)Footnote 37. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* .

(n55)Footnote 38. *Palmer v. City Nat'l Bank, 498 F.3d 236, 239 (4th Cir. 2007)* .

(n56)Footnote 39. *Hollis v. Fla. State Univ., 259 F.3d 1295, 1296 (11th Cir. 2001)* (enactment of Section 1441(e) abrogated theory of derivative jurisdiction).

(n57)Footnote 40. *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 831-832, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)* ; *see Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* .

(n58)Footnote 41. *Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 486-488 (2d Cir. 1998)* .

(n59)Footnote 42. *Mackay v. Uinta Dev. Co., 229 U.S. 173, 176, 33 S. Ct. 638, 57 L. Ed. 1138 (1913)* .

(n60)Footnote 1. *28 U.S.C. § 1441(a).*

(n61)Footnote 2. *28 U.S.C. § 1441(b).*

(n62)Footnote 3. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

(n63)Footnote 4. *28 U.S.C. § 1332(a).*

(n64)Footnote 5. *28 U.S.C. § 1332(a)(1).*

(n65)Footnote 6. *28 U.S.C. § 1332(a)(2).*

(n66)Footnote 7. *28 U.S.C. § 1332(a)(3).*

(n67)Footnote 8. *28 U.S.C. § 1332(a)(4).*

(n68)Footnote 9. *Marshall v. Marshall, 547 U.S. 293, 307-308 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006)* .

(n69)Footnote 10. *See Johnson v. Rodrigues, 226 F.3d 1103, 1109-1112 (10th Cir. 2000)* .

(n70)Footnote 11. *Marshall v. Marshall, 547 U.S. 293, 309-310, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006)* .

(n71)Footnote 12. *See 28 U.S.C. § 1332(c).*

(n72)Footnote 13. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89-90, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* (Supreme Court ascertained citizenship of corporation under general diversity statute to determine that removal was proper under removal statute).

(n73)Footnote 14. *Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983)* ; *Linville v. Price, 572 F. Supp. 345, 347 (S.D. W.Va. 1983)* .

(n74)Footnote 15. *28 U.S.C. § 1332(c)*; *see Koehler v. Bank of Bermuda (N.Y.) Ltd., 209 F.3d 130, 139 (2d Cir. 2000)* ; *see also Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 309-310, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)* (because federally chartered national bank is not incorporated in any particular state, it is deemed citizen only of its "home state," which is state where its main office is located).

(n75)Footnote 16. *United Food and Commercial Workers Union, Local 919 v. Centermark Properties, 30 F.3d 298, 302 (2d Cir. 1994)* ; *Clephas v. Fagelson, Shonberger, Payne & Arthur, 719 F.2d 92, 93 (4th Cir. 1983)* .

(n76)Footnote 17. *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465-466, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* .

(n77)Footnote 18. *Northbrook Litig. Ins. Co. v. Brewer, 493 U.S. 6, 8-9, 12, 110 S. Ct. 297, 107 L. Ed. 2d 223 (1989)* .

(n78)Footnote 19. *28 U.S.C. § 1332(a)*; *see Koehler v. Bank of Bermuda (N.Y.) Ltd., 209 F.3d 130, 139 (2d Cir. 2000)* .

(n79)Footnote 20. *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr., 12 F.3d 171, 173 (10th Cir. 1993)* .

(n80)Footnote 21. *Stifel v. Hopkins, 477 F.2d 1116, 1120 (6th Cir. 1973)* .

(n81)Footnote 22. *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 388, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* .

(n82)Footnote 23. *Midlantic Nat'l Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995)* ; *Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 673 (1st Cir. 1994)* .

(n83)Footnote 24. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

(n84)Footnote 25. *United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992)* ; *Whalen v. Carter, 954 F.2d 1087, 1094 (5th Cir. 1992)* .

(n85)Footnote 26. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n86)Footnote 26.1. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 90-91, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* (citing **Moore's Federal Practice**).

(n87)Footnote 26.2. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84, 91, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

(n88)Footnote 27. *Strotek Corp. v. Air Transp. Ass'n of Am., 300 F.3d 1129, 1132-1133 (9th Cir. 2002)* .

(n89)Footnote 27.1. *New York Life Ins. Co. v. Deshotel, 142 F.3d 873, 883 (5th Cir. 1998)* .

(n90)Footnote 28. *Lopez v. General Motors Corp., 697 F.2d 1328, 1332 (9th Cir. 1983)* .

(n91)Footnote 29. *28 U.S.C. § 1441(a)*.

(n92)Footnote 30. *See Bryant v. Ford Motor Co., 832 F.2d 1080, 1083 (9th Cir. 1987)* (decision under former law, holding that Doe defendants destroy diversity).

(n93)Footnote 31. *Mayes v. Rapoport, 198 F.3d 457, 461-463 (4th Cir. 1999)* ; *Coyne v. American Tobacco Co., 183 F.3d 488, 488, 493 (6th Cir. 1999)* .

(n94)Footnote 32. *Griggs v. State Farm Lloyds, 181 F.3d 694, 699 (5th Cir. 1999)* .

(n95)Footnote 33. *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907-909 (6th Cir. 1999)* .

(n96)Footnote 34. *Mayes v. Rapoport, 198 F.3d 457, 461 n.8 (4th Cir. 1999)* .

(n97)Footnote 35. *See Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998)* (defendant must show, by clear and convincing evidence, either outright fraud in pleadings or that there is no possibility that plaintiff may state cause of action against non-diverse defendant).

(n98)Footnote 36. *Griggs v. State Farm Lloyds, 181 F.3d 694, 699 (5th Cir. 1999)* .

(n99)Footnote 37. *Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)* , *cert. denied, 498 U.S. 1085 (1991)* (citing **Moore's Federal Practice** and holding that joinder is fraudulent when no reasonable basis in fact or colorable ground supporting claim against joined defendant or no good faith intention to seek judgment against joined defendant or joint judgment).

(n100)Footnote 38. *Hart v. Bayer Corp., 199 F.3d 239, 243, 246-247 (5th Cir. 2000)* (possibility that in-state corporate officer could be held individually liable under state law precluded finding of fraudulent joinder and diversity jurisdiction).

(n101)Footnote 38.1. *See Diaz v. Davis (In re Digimarc Corp. Derivative Litig.), 549 F.3d 1223, 1234 (9th Cir. 2008)* .

(n102)Footnote 38.2. *See Mallalieu-Golder Ins. Agency v. Exec. Risk Indem., 254 F. Supp. 2d 521, 523 (M.D. Pa. 2003)* .

(n103)Footnote 39. *Baker v. National Boulevard Bank, 399 F. Supp. 1021, 1023 n.1 (N.D. Ill. 1975)* .

(n104)Footnote 40. *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 n.2 (9th Cir. 1987)* .

(n105)Footnote 41. *Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1177 (5th Cir. 1984)* .

(n106)Footnote 42. *Zurn Indus., Inc. v. Acton Constr. Co., Inc., 847 F.2d 234, 236 (5th Cir. 1988)* .

(n107)Footnote 43. *Tune, Entrekin & White, P.C. v. Magid, 220 F. Supp. 2d 887, 890 (M.D. Tenn. 2002)* .

(n108)Footnote 44. *28 U.S.C. § 1441(b)*; *see Vasura v. Acands, 84 F. Supp. 2d 531, 535 (S.D.N.Y. 2000)* .

(n109)Footnote 45. *See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 90, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

(n110)Footnote 46. *Linnin v. Michielsens, 372 F. Supp. 2d 811, 827 (E.D. Va. 2005)* .

(n111)Footnote 47. *Cf. Vasura v. Acands, 84 F. Supp. 2d 531, 535 (S.D.N.Y. 2000)* .

(n112)Footnote 48. *See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 90 n.6, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

(n113)Footnote 49. *In re Shell Oil Co., 932 F.2d 1518, 1522-1523 (5th Cir. 1991)* ; *Ravens Metal Prods., Inc. v. Wilson, 816 F. Supp. 427, 428-429 (S.D. W.Va. 1993)* .

(n114)Footnote 50. *See Hurt v. Dow Chem. Co., 963 F.2d 1142, 1144-1145 (8th Cir. 1992)* .

(n115)Footnote 51. *28 U.S.C. § 1332(a)*; *see Union Pacific R.R. v. Mower 219 F.3d 1069, 1071 (9th Cir. 2000)* ; *Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995)* .

(n116)Footnote 52. *Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993)* .

(n117)Footnote 53. *Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961)* .

(n118)Footnote 54. *Bassett v. Toyota Motor Credit Corp., 818 F. Supp. 1462, 1464 (S.D. Ala. 1993)* ; *see* Ch. 5, *Original Jurisdiction Over the Subject Matter*.

(n119)Footnote 55. *Watson v. Blankinship, 20 F.3d 383, 387 (10th Cir. 1994)* (jury finding of less than jurisdictional amount does not destroy jurisdiction or necessarily prove bad faith).

(n120)Footnote 56. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (plaintiff in its complaint determines amount in controversy, unless it appears to legal certainty that claim is for less than jurisdictional amount); *see* Ch. 5, *Original Jurisdiction Over the Subject Matter*.

(n121)Footnote 57. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* .

(n122)Footnote 58. *See Rosen Chrysler Corp. 205 F.3d 918, 921 (6th Cir. 2000)* (claim is less than jurisdictional amount when applicable state law bars type of damages sought by plaintiff).

(n123)Footnote 59. *Bedell v. H.R.C. Ltd., 522 F. Supp. 732, 735 (E.D. Ky. 1981)* .

(n124)Footnote 60. *Freeman v. Sports Car Club of America, Inc., 51 F.3d 1358, 1362 (7th Cir. 1995)* .

(n125)Footnote 61. *Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999)* (defendant has burden of proof to establish requisite amount in controversy in removal cases).

(n126)Footnote 62. *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* .

(n127)Footnote 63. *Gaus v. Miles, Inc., 980 F.2d 564, 566-567 (9th Cir. 1992)* (defendant must state underlying facts supporting assertion that amount in controversy exceeds jurisdictional sum; conclusory allegations of amount in controversy insufficient).

(n128)Footnote 64. *Karazanos v. Madison Two Assocs., 147 F.3d 624, 626 (7th Cir. 1998)* (proper for district court to rely on non-sworn letters submitted to court).

(n129)Footnote 65. *Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972-973 (11th Cir. 2002)* .

(n130)Footnote 66. *Tidwell v. Coldwater Covers, Inc., 393 F. Supp. 2d 1257, 1259-1260 (N.D. Ala. 2005)* .

(n131)Footnote 67. *Luckett v. Delta Airlines, Inc., 171 F.3d 295, 298 (5th Cir. 1999)* .

(n132)Footnote 68. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* .

(n133)Footnote 69. *Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094-1095 (11th Cir. 1994)* .

(n134)Footnote 70. *De Aguilar v. Boeing Co., 47 F.3d 1404, 1409, 1412 (5th Cir. 1995)* .

(n135)Footnote 71. *See Forest v. Penn Treaty Am. Corp., 270 F. Supp. 2d 1357, 1361 (M.D. Fla. 2003)* .

(n136)Footnote 72. *Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988)* .

(n137)Footnote 73. *Yniques v. Cabral, 985 F.2d 1031, 1035-1036 (9th Cir. 1993)* (joinder of nondiverse party after removal requires remand, not dismissal).

(n138)Footnote 74. *Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68, 117 S. Ct. 467, 136 L. Ed. 2d 437, 451 n.13 (1996)* .

(n139)Footnote 75. *Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993)* .

(n140)Footnote 76. *In re Iowa Mfg. Co., 747 F.2d 462, 463-464 (8th Cir. 1984)* (removal only after voluntary changes).

(n141)Footnote 77. *Kilpatrick v. Arrow Co., 425 F. Supp. 1378, 1379-1381 (W.D. La. 1977)* .

(n142)Footnote 78. *28 U.S.C. § 1446(b).*

(n143)Footnote 79. *Amoche v. Guar. Trust Life Ins. Co., 556 F.3d 41, 53 (1st Cir. 2009)* ; *see 28 U.S.C. § 1446(b).*

(n144)Footnote 80. *Warthman v. Genoa Twp. Bd. of Trs., 549 F.3d 1055, 1063 (6th Cir. 2008)* .

(n145)Footnote 81. *28 U.S.C. § 1446(b).*

(n146)Footnote 82. *See 28 U.S.C. § 1453(b).*

(n147)Footnote 83. *Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 532 (5th Cir. 2006)* .

(n148)Footnote 1. *28 U.S.C. § 1331.*

(N149)Footnote 2. *28 U.S.C. § 1441(c).*

(n150)Footnote 3. *Carlsbad Tech., Inc. v. HIF Bio, Inc., ___ U.S. ___, 129 S. Ct. 1862, 173 L. Ed. 2d 843, 847 (2009)* .

(n151)Footnote 4. *28 U.S.C. § 1441(c)*; *see Poche v. Tex. Air Corps, 549 F.3d 999, 1005 (5th Cir. 2008)* (court may not remand claims which have component which is conclusively deemed to have arisen under federal law).

(n152)Footnote 5. *28 U.S.C. § 1441(c)*; *see Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc., 368 F.3d 86, 99 n.13 (2d Cir. 2004)* .

(n153)Footnote 6. *American Fire & Casualty v. Finn, 341 U.S. 6, 12-14, 71 S. Ct. 534, 95 L. Ed. 702 (1951)* (no removal allowed when only one fire caused injury); *Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir.*

1994) (suit was properly removed when claim based on federal law was based on grounds entirely different than from state law damage claims).

(n154)Footnote 7. *See Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133, 136 (5th Cir. 1980)* ; *Varco v. Lapsis, 172 F. Supp. 2d 985, 991 (N.D. Ill. 2001)* .

(n155)Footnote 8. *Poche v. Tex. Air Corps, 549 F.3d 999, 1002-1003 (5th Cir. 2008)* .

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART II. RIGHT TO REMOVAL JURISDICTION UNDER GENERAL REMOVAL STATUTE

1-8 Moore's Manual--Federal Practice and Procedure § 8.22

§ 8.22 Defendants Only Entitled to Remove Actionn*

[1] Option of Defendant to Remove

The general removal statute provides for removal by the defendant or the defendants, n1 and the procedure set forth in the statute requires a defendant or defendants to file a notice of removal. n2 Consequently, only a "defendant" or "defendants" are entitled to removal under the statute; no statutory provision permits plaintiffs to remove an action. n3 In restricting the right of removal to those who have no choice in the original selection of a forum. n4 This interpretation coincides with the general purposes of removal jurisdiction which is to allow the defendant an opportunity to initiate removal from state court to federal district court for the district in which the state court action is pending. n5

The plaintiff is generally not entitled to removal, because the removal jurisdiction of federal courts is entirely a creature of statute and is strictly construed. n6 Thus, a plaintiff who originally chose state court jurisdiction when filing the complaint may not subsequently remove the action to federal court, even if a counterclaim would treat the plaintiff as a defendant under state law. n7 Special removal statutes, however, based on either the nature of a party or a specific type of action, may permit plaintiffs to remove actions. For example, federal corporations such as the Resolution Trust Corporation and the Federal Deposit Insurance Corporations may remove counterclaims filed against those entities. n8 In a similar way, any party may remove a bankruptcy claim or cause of action, provided that the federal district court has jurisdiction over the case. n9

[2] Determination of Status of Defendant

The determination whether a party is a defendant is controlled by federal law, which thus prevails over a state court's characterization of the parties or alignment of the parties. n1 As used in the general removal statute, n2 the word "defendant" means the person aligned opposite the original plaintiff. Thus, a party who was not a defendant in the plaintiff's original suit will generally not be recharacterized as a "defendant" by reason of the filing of later claims against that party in answers, third-party complaints, or claims in intervention. Furthermore, as a general rule, parties may not remove based on such multiple party claims. n3 Similarly, a non-party, even one that claims to be a real party in interest, may not remove or participate in the removal of a case. n4

In determining whether a party is a "defendant," the federal courts apply a functional test. Under the test, courts are not

required to look solely to the party which initiates a claim but, instead, must determine which party is attempting to achieve a particular result and which party is resisting that party's claims. n5 For example, if the plaintiff brings an action in state court, but the action has been brought for only some secondary purpose, such as to seek discovery, and the defendant files a counterclaim that is within federal jurisdiction, the plaintiff may remove the action on the theory that the counterclaim is the actual initiation, or mainspring, of the action. n6

Subject to this functionality test, a plaintiff may generally not remove an action based on a counterclaim, even if the plaintiff would be characterized as a defendant under state law. n7 Similarly, a plaintiff defending against a cross-claim by a co-plaintiff is not a "defendant" for removal purposes. Nor is a defendant/third party plaintiff considered a "defendant" for removal purposes, with respect to the original claim. n8 Finally, a plaintiff intervenor may not remove as a "defendant" on the basis of claims it asserts or on the basis of claims asserted against it. n9

[3] All Defendants Must Join in Removal

[a] Defendants Required to Join

Because of the statutory phrase "may be removed by the defendant or defendants," n1 courts have consistently held that when there are multiple defendants in the state court action, the right of removal under the general removal statute is jointly held by all of the defendants, and removal is precluded if one of the defendants does not join in the notice. n2 However, joinder for removal purposes does not mean formal joinder under the federal rules; rather it means consent to the removal, which should be accomplished by an unequivocal written consent directed to the court where the notice of removal is filed. n3 If a notice of removal is filed by fewer than all the named defendants, the petition is defective if it fails to explain the absence or nonjoinder of a codefendant. n4 For example, it has been held that the joining requirement is not satisfied when the agreement to join is filed after the Section 1446(b) 30-day period, even when the delay is based on mistake. n5 The Supreme Court rejected such strict formalities, however, when it held that a defect in subject matter jurisdiction cured prior to entry of judgment did not warrant reversal or remand to state court. n6

All defendants are not required to sign the notice of removal. Defendants who do not sign the notice should submit a written statement to the court stating that they agree to the removal; it is insufficient for the removal notice to state that the codefendants do not oppose removal. n7

There are exceptions to the rule requiring joinder of all defendants. First, the rule of unanimity applies only to the general removal statute and is not required by all of the special removal statutes. n8 Second, because nominal or formal parties are neither necessary nor indispensable, they are not required to join in the notice. n9 For example, persons named as defendants by the plaintiff solely to prevent removal need not join in the removal. n10 Whether a defendant is a nominal party depends on the facts of each case, and the determination typically depends on whether the defendant's role in the lawsuit is that of a depository or stakeholder. n11

Additionally, any defendant that was not served with state court process need not join in the notice of removal. Thus, the rule requiring joinder has been held by some courts to apply only to properly joined and served defendants. n12 This rule appears correct in view of a Supreme Court case holding that a defendant may not be required to take any action in a civil case until proper service has been made. This holding suggests that no procedural burden may be imposed on a defendant unless proper service has been made, including a requirement that the defendant be forced to consider whether to join in the notice of removal. n13

[b] Effect of Failure of All Required Defendants to Join

Because the right of removal is jointly held by all the defendants, the failure of one defendant to join in the notice of removal generally precludes removal. n14 The failure of all defendants to join in the removal notice constitutes a procedural defect rather than a jurisdictional defect; n15 therefore, if the defect is not objected to within 30 days, most

courts hold that the plaintiff has waived the defect. n16 Furthermore, the existence of subject matter jurisdiction at the time of judgment ordinarily cures any defect in removal procedure. n17 When the trial court's judgment must be reversed on the merits and the case remanded to the trial court for further proceedings, the rationale of efficiency, judicial economy, and the interest in finality of judgments that underlies that rule does not apply, and the case should be remanded to state court. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalElementsProper Transferors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *28 U.S.C. § 1446(a).*

(n4)Footnote 3. *See 28 U.S.C. §§ 1441, 1446.*

(n5)Footnote 4. *Smith v. St. Luke's Hospital, 480 F. Supp. 58, 60 (D.S.D. 1979)* .

(n6)Footnote 5. *Hanna v. Fleetguard, Inc., 900 F. Supp. 1110, 1115-1116 (N.D. Iowa 1995)* ; *see also Chronologic Simulation, Inc. v. Sanguinetti, 892 F. Supp. 318, 321 (D. Mass. 1995)* (with respect to diversity jurisdiction, removal statutes are designed to provide defendants with opportunity similar to that of plaintiff when plaintiff is filing its original claim, which is to have a federal forum to litigate federal claims when parties are of diverse citizenship).

(n7)Footnote 6. *See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104-106, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)* (plaintiff may not remove action that plaintiff filed in state court).

(n8)Footnote 7. *Ballard's Serv. Ctr., Inc. v. Transue, 865 F.2d 447, 449 (5th Cir. 1989)* (imposition of Rule 11 sanctions against removing plaintiff).

(n9)Footnote 8. *12 U.S.C. §§ 1441a, 1819.*

(n10)Footnote 9. *28 U.S.C. § 1452.*

(n11)Footnote 1. *Chicago, Rock Island & Pac. R.R. Co. v. Stude, 346 U.S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317 (1954)* (construction of federal removal statute controls, not state statute).

(n12)Footnote 2. *See 28 U.S.C. § 1441(a).*

(n13)Footnote 3. *Palisades Collections LLC v. Shorts, 552 F.3d 327, 333 (4th Cir. 2008)* (counter defendants, cross claim defendants, and third party defendants not entitled to remove action) (citing **Moore's Federal Practice**).

(n14)Footnote 4. *American Home Assurance Co. v. RJR Nabisco Holdings Corp., 70 F. Supp. 2d 296, 298 (S.D.N.Y. 1999)* .

(n15)Footnote 5. *OPNAD Fund, Inc. v. Watson, 863 F. Supp. 328, 331 (S.D. Miss. 1994)* .

(n16)Footnote 6. *General Motors Corp. v. Gunn, 752 F. Supp. 729 (N.D. Miss. 1990)* (after manufacturer of car involved in accident initiated state court suit seeking discovery to inspect owner's car, and then owner of car

counterclaimed for wrongful death, alleging design and manufacturing defects, plaintiff manufacturer was entitled to remove case based on diversity jurisdiction, and to have parties realigned).

(n17)Footnote 7. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)* .

(n18)Footnote 8. *Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 327 & n.22 (5th Cir. 1998)* .

(n19)Footnote 9. *Carlton v. Withers, 609 F. Supp. 146, 148-150 (M.D. La. 1985)* (citing **Moore's Federal Practice**).

(n20)Footnote 1. *28 U.S.C. § 1441(a)*.

(n21)Footnote 2. *See Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc., 368 F.3d 86, 103 (2d Cir. 2004)* ; *Bonadeo v. Lujan, 2009 U.S. Dist. LEXIS 45672, at *14-*15 (D.N.M. Apr. 30, 2009)* (quoting **Moore's Federal Practice**).

(n22)Footnote 3. *Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201-202 (6th Cir. 2004)* ; *Esposito v. Home Depot, U.S.A., Inc., 436 F. Supp. 2d 343, 345 (D.R.I. 2006)* .

(n23)Footnote 4. *Bradwell v. Silk Greenhouse, Inc., 828 F. Supp. 940, 943 (M.D. Fla. 1993)* .

(n24)Footnote 5. *Doe v. Kerwood, 969 F.2d 165, 169 (5th Cir. 1992)* .

(n25)Footnote 6. *Caterpillar Inc. v. Lewis, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)* .

(n26)Footnote 7. *Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994)* .

(n27)Footnote 8. *See Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc., 368 F.3d 86, 103 (2d Cir. 2004)* (removal not required by bankruptcy removal statute).

(n28)Footnote 9. *Hewitt v. City of Stanton, 798 F.2d 1230, 1232-1233 (9th Cir. 1986)* .

(n29)Footnote 10. *Farias v. Bexar County Bd. of Trustees, 925 F.2d 866, 871 (5th Cir. 1991)* .

(n30)Footnote 11. *Tri Cities Newspapers, Inc. v. Tri-Cities P.P. & A. Local 349, 427 F.2d 325, 327 (5th Cir. 1970)* .

(n31)Footnote 12. *Salveson v. Western States Bankcard Asso., 731 F.2d 1423, 1429 (9th Cir. 1984)* .

(n32)Footnote 13. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S.344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* .

(n33)Footnote 14. *Michigan Affiliated Healthcare Sys., Inc. v. CC Sys. Corp., 139 F.3d 546, 548-549 (6th Cir. 1998)* .

(n34)Footnote 15. *Parrino v. FHP, Inc., 146 F.3d 699, 703 (9th Cir. 1998)* .

(n35)Footnote 16. *McMahon v. Bunn O Matic Corp., 150 F.3d 651, 653-654 (7th Cir. 1998)* ; *Allstate Life Ins. Co. v. Hanson, 200 F. Supp. 2d 1012, 1015 (E.D. Wis. 2002)* .

(n36)Footnote 17. *Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972)* .

(n37)Footnote 18. *Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1265-1267 (9th Cir. 1999)* (citing **Moore's Federal Practice**).

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART II. RIGHT TO REMOVAL JURISDICTION UNDER GENERAL REMOVAL STATUTE

1-8 Moore's Manual--Federal Practice and Procedure § 8.23

§ 8.23 Only Civil Actions Originally Filed in State Court Qualify for Removaln*

[1] Nature of Required State Court Proceeding

Under the general removal statute, n1 a defendant may remove to federal court only actions originally filed and pending in a "state court." n2 The term "state court" has a uniform meaning for all provisions of the general removal statute. The statute provides that the term "state court" includes the superior court of the District of Columbia, and the term "state" includes the District of Columbia. n3

Whether a particular state tribunal is a state court for removal purposes depends on the tribunal's function, not on the name of the tribunal. n4 For example, if a tribunal is labeled as an administrative board, but the proceeding before it is judicial in nature, such as a contract action, the proceeding is removable as one from a state court. n5 On the other hand, if the body does not have the attributes of a court and is performing an administrative function in the case, it may not be considered a state court under the federal removal statute. Judicial attributes of a court include disinterestedness, separation from the executive, and legal acumen. n6 Whether the court has limited or general jurisdiction is irrelevant to the question of whether a state judicial body is a state court for removal purposes. For example, a justice of the peace court is a state court. n7 The courts have consistently held that the court must have some connection to a state, however, and the term "state court" must be interpreted strictly and does not mean any and all nonfederal trial courts. n8

[2] Nature of Required Civil Action

A defendant may remove to federal court only those actions that are "civil actions." n1 The term "civil action" as used for removal purposes means a civil lawsuit, as opposed to an administrative body determination that is only concerned with making rules or policy. n2 The characteristics of a civil suit are that the body may provide or deny relief to the litigants, such as make an award of damages or provide equitable relief such as the issuance of an injunction. n3 Federal and not state law determines whether a state court action is a "civil action" within the meaning of the general removal jurisdiction statute. n4 The term "civil action" does not include proceedings that are supplementary or incidental to another action. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc., 368 F.3d 86, 103 (2d Cir. 2004)* .

(n3)Footnote 2. *28 U.S.C. §§ 1441(a), 1446(a).*

(n4)Footnote 3. *28 U.S.C. § 1451.*

(n5)Footnote 4. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38, 43 (1st Cir. 1972)* .

(n6)Footnote 5. *Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979)* .

(n7)Footnote 6. *Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1263-1265 (3d Cir. 1994)* .

(n8)Footnote 7. *Katz v. Herschel Mfg. Co., 150 F. 684 (D. Neb. 1906)* .

(n9)Footnote 8. *DeCoteau v. Sentry Ins. Co., 915 F. Supp. 155 (D.N.D. 1996)* .

(n10)Footnote 1. *28 U.S.C. § 1441(a).*

(n11)Footnote 2. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972)* .

(n12)Footnote 3. *Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1263-1265 (3d Cir. 1994)* (board did not preside over civil action when it could only assess limited fines and lacked judicial characteristics such as disinterestedness, separation from executive, and legal intellect).

(n13)Footnote 4. *See Stewart v. EGNEP, Ltd., 581 F. Supp. 788, 790 (C.D. Ill. 1983)* ; Quinn v. Book Named "Sixty Erotic Drawings From Juliette," *316 F. Supp. 289, 292 (D.C. Mass. 1970)* .

(n14)Footnote 5. *Armistead v. C & M Transp., Inc., 49 F.3d 43, 46 (1st Cir. 1995)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.24

§ 8.24 Location of Removaln*

A civil action in state court may be removed only to the district court of the United States for the district and division embracing the place where the action is pending in the state court. n1 Furthermore, a defendant seeking to remove an action from state court must file a notice of removal in the federal district court for the district and division within which the state action is pending. n2 These statutes are considered venue provisions that specify the proper location for removal of each action. n3 Consequently, the general venue statutes that control venue of actions originally filed in the federal courts n4 have no applicability to removed actions. In other words, whether venue would be proper or improper under the general venue statutes has no bearing on the proper district for removal of an action. n5 On removal, however, any party may seek a transfer under the change of venue statutes. n6

Removal of a case to the wrong district court is a procedural defect that does not deprive the district court of subject matter jurisdiction, and the court may make orders regarding the case if there is no objection from the plaintiff. n7 When the case is removed to the wrong district or division, the federal court may either dismiss the case or transfer the case to the proper federal district. n8 Even in cases when removal has been made to the proper district, a case may be transferred to another district for the convenience of the parties and the witnesses. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsFederal Venue

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.13 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1441(a).*

(n3)Footnote 2. *28 U.S.C. § 1446(a).*

(n4)Footnote 3. *Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665, 73 S. Ct. 900, 902, 97 L. Ed. 1331 (1953) .*

(n5)Footnote 4. *See 28 U.S.C. § 1391.*

(n6)Footnote 5. *Hollis v. Fla. State Univ., 259 F.3d 1295, 1299 (11th Cir. 2001)* ; *Three M Enters. v. Texas D.A.R. Enters., 368 F. Supp. 2d 450, 454 (D. Md. 2005)* ; *see § 8.08[1][c]* (venue after removal).

(n7)Footnote 6. *PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 72 (2d Cir. 1998)* (after removal, party may not challenge district court venue as of right, as would be case if suit had originally been brought in federal court).

(n8)Footnote 7. *Peterson v. BMI Refractories, 124 F.3d 1386, 1388, 1394 (11th Cir. 1997)* .

(n9)Footnote 8. *Hollis v. Fla. State Univ., 259 F.3d 1295, 1300 (11th Cir. 2001)* ; *see 28 U.S.C. §§ 1406(a), 1441(a).*

(n10)Footnote 9. *Langley v. Prudential Mortg. Capital Co., LLC, 546 F.3d 365, 371 (6th Cir. 2008)* ; *see 28 U.S.C. §§ 1404(a), 1441(a).*

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1-8 Moore's Manual--Federal Practice and Procedure §§ 8.25through 8.39

[Reserved]

§§ 8.25[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART III. REMOVAL JURISDICTION PURSUANT TO SPECIAL REMOVAL STATUTES

1-8 Moore's Manual--Federal Practice and Procedure § 8.40

§ 8.40 In Generaln*

Depending on the type of case, or the defendant in the case, removal to federal court is not always based on the general removal statute, Section 1141. There are several special removal statutes authorizing removal in particular situations that are not dependent on the federal court having original jurisdiction. Certain civil rights actions commenced in a state court, for example, may be removed by the defendant to the federal district court for the district and division embracing the place where the action is pending. n1

The primary significance of the special removal statutes is that when a particular requirement of the special removal statute is met, it is not necessary that the requirements of the general removal statute be met. If the person requesting removal qualifies as a "federal officer" under Section 1442, n2 for example, it is irrelevant whether the person qualifies as a "defendant" under the general removal statute, n3 Section 1441(a). n4 Another important distinction is that, while the general removal statute is strictly construed against removal, strict construction does not apply to special removal statutes because for such statutes Congress has created special removal rights to channel cases into federal court. n5

Part III of this chapter will point out the differences in the requirements for the special removal statute and the general removal statute. As an example, the federal statute that grants the court discretion to award costs and expenses incurred in opposing an improper removal applies only to actions removed pursuant to the general removal statute, not to lawsuits removed under the special removal statute based on a party's filing of petition for bankruptcy relief. n6

The discussion in this Part summarizes the removal requirements for the more frequently litigated special removal statutes. for a complete discussion of all special removal statutes, see 16 *Moore's Federal Practice, § 107.15* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisActions Against Foreign StatesCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisClaims Related to BankruptcyCivil ProcedureRemovalBasisForeclosure Actions Against United States

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1443*; *see § 8.42*.

(n3)Footnote 2. *See 28 U.S.C. § 1442*; *see § 8.43*.

(n4)Footnote 3. *See F.D.I.C. v. S & I 85-1, Ltd., 804 F. Supp. 328, 332 (S.D. Fla. 1992)* .

(n5)Footnote 4. *28 U.S.C. § 1441(a)*.

(n6)Footnote 5. *Viator v. Dauterive Contrs., Inc., 638 F. Supp. 2d 641, 645 (E.D. La. 2009)* .

(n7)Footnote 6. *In re Hofmann, 248 B.R. 90, 93-94 (W.D. Tex. 2000)* ; *see 28 U.S.C. § 1452*.

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1-8 Moore's Manual--Federal Practice and Procedure § 8.41

§ 8.41 Claims Related to Bankruptcyn*

[1] Right to Remove of Claims Related to Bankruptcy

If the district court has jurisdiction over a claim or cause of action under the bankruptcy jurisdictional statute, n1 any party may generally remove any other civil action claim in the state court that is related to bankruptcy to the district court for the district in which the civil action is pending. n2 Unlike the general removal statute, which authorizes only defendants to remove, n3 the bankruptcy removal statute authorizes any party to remove. n4

The federal district court has nonexclusive jurisdiction over civil proceedings that arise under the Bankruptcy Code, or arise in or are related to cases under the Bankruptcy Code. n5 The question of whether a case arises under the bankruptcy jurisdiction statute n6 is analogous to the arising under language of the general "federal question" jurisdiction statute. n7 Consequently, the court in a bankruptcy jurisdiction determinations may draw freely from authorities discussing the circumstances under which a case arises under federal law as a federal question. n8

Under the removal statute, a court has bankruptcy removal jurisdiction whether the claim is a *bankruptcy core proceeding claim*, which is a claim that directly arises under or in a bankruptcy claim, or is merely a *claim related to bankruptcy* under Title 11. n9 Courts have traditionally broadly defined when an action involves a *claim related to bankruptcy* under Title 11. n10 An action involves a *claim related to bankruptcy* under Title 11 whenever the outcome of the lawsuit could conceivably have an effect on an estate being administered in bankruptcy. n11

Although the claim that provides the basis for removal does not need to be against the debtor or the property in the debtor's estate, removal must be supported by a description of the manner in which the claim may have an impact on the estate, and not just on the debtor. n12 State law claims against the bankruptcy trustee and the trustee's agents, for example, that are first asserted after the notice of removal are related to conduct inextricably intertwined with the trustee's sale of property belonging to the bankruptcy estate; thus, they constitute core proceedings subject to federal jurisdiction and removal jurisdiction. n13

It should be noted that bankruptcy removal jurisdiction is subject to the well-pleaded complaint rule, which requires that the basis of federal jurisdiction be perceivable from matters alleged in the complaint. n14

If bankruptcy related claims have been removed to federal court, and the underlying bankruptcy case is dismissed after removal, the court has discretion to retain or remand the related claims. Typically, these related claims are remanded. n15 It has been held by some courts, however, that when the underlying bankruptcy case is dismissed, the removal court no longer has jurisdiction, and the related claims must be remanded to state court. n16

[2] Exceptions Regarding Removal of Claims Related to Bankruptcy

There are two exceptions to the rule permitting removal of claims related to bankruptcy described in [1], *above*. First, the rule does not apply to a proceeding before the United States Tax Court, or to a civil action by a governmental unit to enforce that unit's police or regulatory power. n1 Second, the federal court must abstain from exercising its jurisdiction, on timely motion by any party, if all four of the following are shown: n2

1. The state court action is based on a state law claim.

2. That claim is a *claim related to bankruptcy* proceeding but (1) is not a bankruptcy core proceeding and (2) does not arise in a bankruptcy core proceeding. n3

3. The federal courts would not have jurisdiction but for the bankruptcy claim.

4. The matter may be adjudicated in a timely manner in a state court of appropriate jurisdiction.

If all requirements are met, abstention is mandatory, and therefore the federal court lacks removal jurisdiction and must remand the removed case. n4 For example, judicial foreclosure proceedings filed in state court on property in a bankruptcy estate are not core proceedings; these proceedings, although related to bankruptcy, must be remanded under the mandatory abstention rule. n5 If the district court determines that a case must be remanded because it is subject to mandatory abstention as a non-core proceeding, the bankruptcy court still has the power to determine whether to deny relief from the automatic stay provisions of the bankruptcy code. n6

If abstention is not mandatory, the federal court has discretion to abstain in the interest of justice, or in the interest of comity with state courts or respect for state law.

[3] Requirements Regarding Notice of Removal

[a] Contents of Notice of Removal

The party that is initiating the bankruptcy removal must file a verified notice in the bankruptcy court in the district where the civil action is pending. The notice must contain the following: n1

1. A short, plain statement of the facts that entitle the party to remove.

2. A statement of whether the proceeding is a core or non-core proceeding; if the proceeding is merely related to bankruptcy, rather that a bankruptcy core proceeding, whether the applicant consents to the entry of final orders by the bankruptcy judge.

3. A copy of all process and pleadings in the action. Promptly after filing the notice with the district court, the party initialing removal must serve a copy of the notice on all parties and on the state court. n2

[b] Deadline for Filing Notice of Removal

The time for filing a removal notice depends on whether the bankruptcy or the related civil action was filed first. If the

bankruptcy action was filed first, the notice must be filed before the earlier of (1) 30 days after receipt of the initial pleading that contains the civil claim or cause of action that is the subject of the removal; or (2) 30 days after receipt of the summons, if the initial pleading was filed with the court but not served with the summons. n3 If the civil action was filed first, the notice must be filed before the latest of (1) 90 days after the order for relief in the bankruptcy action; (2) 30 days after the order terminating the stay, providing that the civil action was stayed under the Bankruptcy Code; or (3) in a Chapter 11 reorganization, 30 days after a trustee is qualified, but no more than 180 days after the order for relief. n4

[c] Response Permitted to Notice of Removal

Any party, other than the removing party, who has filed a pleading regarding the removed claim or cause of action must file a verified statement within 7 days of the filing of the removal notice with the district court. n5 The statement must (1) admit or deny any allegation in the removal notice as to whether the proceeding is core or non core, and (2) give or withhold consent to the entry of final orders by the bankruptcy judge in non-core proceedings. n6

[4] Discretionary Remand of Claims Related to Bankruptcy

After removal, the district court sitting in bankruptcy has considerable discretion to remand the removed claim or cause of action based on any equitable ground. n1 Furthermore, a federal court has discretion to abstain from hearing the claims and remanding in the interest of justice, or in the interest of comity with state courts or respect for state law. n2 There are many equitable factors that a court may consider in its determination of whether to remand. These factors are based on matters that indicate what is reasonable, fair, or appropriate, n3 and include: to remand include whether remand would prevent duplication or expensive use of judicial resources; the effect of the remand on the administration of the bankruptcy estate; whether the case involves questions of state law better addressed by a state court; comity; efficient utilization of judicial resources; prejudice to involuntarily removed parties; the effect of bifurcating the action, including whether remand will increase or decrease the possibility of inconsistent results; the predominance of state law issues and non-debtor parties; and the expertise of the court in which the action originated. n4 Any party may make a motion for remand to the bankruptcy court. n5 An order granting or denying remand based on bankruptcy removal is not reviewable by appeal or in any other manner. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisClaims Related to Bankruptcy

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.15[8] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1334.*

(n3)Footnote 2. *28 U.S.C. § 1452(a).*

(n4)Footnote 3. *28 U.S.C. § 1441(a).*

(n5)Footnote 4. *28 U.S.C. § 1452(a).*

(n6)Footnote 5. *28 U.S.C. § 1334(b); see 11 U.S.C. § 101 et seq.*

(n7)Footnote 6. *See 28 U.S.C. § 1334(b).*

(n8)Footnote 7. *See 28 U.S.C. § 1331.*

(n9)Footnote 8. *Miles v. Okun (In re Miles), 430 F.3d 1083, 1087-1088 (9th Cir. 2005)* .

(n10)Footnote 9. *See In re Harris Pine Mills, 44 F.3d 1431, 1434-1436 (9th Cir. 1995)* .

(n11)Footnote 10. *In re Dow Corning, 86 F.3d 482, 489-495 (6th Cir. 1996)* , *cert. denied, 117 S. Ct. 718 (1997)* .

(n12)Footnote 11. *Robinson v. Michigan Consol. Gas Co., Inc., 918 F.2d 579, 583 (6th Cir. 1990)* .

(n13)Footnote 12. *In re Emeral Acquisition Corp., 170 B.R. 632, 640 (N.D. Ill. 1994)* .

(n14)Footnote 13. *In re Harris Pine Mills, 44 F.3d 1431, 1438 (9th Cir. 1995)* .

(n15)Footnote 14. *Yangming Marine Transport Corp. v. Electri-Flex Co., 682 F. Supp. 368, 370 (N.D. Ill. 1987)* (no federal jurisdiction when bankruptcy perceivable only from answer).

(n16)Footnote 15. *See Carraher v. Morgan Electronics, Inc., 971 F.2d 327 (9th Cir. 1992)* .

(n17)Footnote 16. *In re Smith, 866 F.2d 576, 580 (3d Cir. 1989)* .

(n18)Footnote 1. *See 28 U.S.C. § 1452(a)*; *California v. Atl. Richfield Co., 488 F.3d 112, 132-133 (2d Cir. 2007)* (analysis of exception for governmental unit enforcement of unit's police or regulatory power).

(n19)Footnote 2. *28 U.S.C. § 1334(c)(2)*.

(n20)Footnote 3. *In re Wood, 825 F.2d 90, 93, 96-97 (5th Cir. 1987)* (claims related to bankruptcy that are not core proceedings). For a discussion of core proceedings and claims related to bankruptcy, see [1], *above*

(n21)Footnote 4. *State Bank of Lombard v. Chart House, Inc., 46 B.R. 468, 470-471 (N.D. Ill. 1985)* .

(n22)Footnote 5. *In re Mill-Craft Bldg. Systems, Inc., 57 B.R. 531, 533-534 (E.D. Wis. 1986)* .

(n23)Footnote 6. *In re Conejo Enterprises, Inc., 96 F.3d 346, 351-354 (9th Cir. 1996)* .

(n24)Footnote 1. *Fed. R. Bankr. P. 9027(a)*.

(n25)Footnote 2. *Fed. R. Bankr. P. 9027(b), (c)*.

(n26)Footnote 3. *Fed. R. Bankr. P. 9027(a)(3)*.

(n27)Footnote 4. *Fed. R. Bankr. P. 9027(a)(2)*.

(n28)Footnote 5. *Fed. R. Bankr. P. 9027(e)(3)*; *see In re Buran, 351 B.R. 300, 304 (W.D.N.Y. 2006)* (based on balancing of equities, failure to file statement may result in waiver of party's right to right to argue that claim was non-core; construing former time periods).

(n29)Footnote 6. *Fed. R. Bankr. P. 9027(e)(3)*.

(n30)Footnote 1. *28 U.S.C. § 1452(b)*; *see In re Duval County Ranch Co., 167 B.R. 848, 849 (Bankr. S.D. Tex. 1994)* .

(n31)Footnote 2. *28 U.S.C. § 1334(c)(1)*.

(n32)Footnote 3. *Geruschat v. Ernst Young LLP, 505 F.3d 237, 245-246 (3d Cir. 2007)* .

(n33)Footnote 4. *River Cement Co. v. Bangert Bros. Constr. Co., 852 F. Supp. 25, 27 (D. Colo. 1994)* .

(n34)Footnote 5. *Fed. R. Bankr. P. 9014, 9027(d).*

(n35)Footnote 6. *28 U.S.C. § 1452(b).*

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PART II Jurisdiction; Venue; Removal
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1-8 Moore's Manual--Federal Practice and Procedure § 8.42

§ 8.42 Civil Rights Claimsn*

[1] Nature of Civil Rights Removal

The civil rights special removal statute provides for removal of two types of cases: (1) a civil or criminal case in a state court against a defendant who is denied or cannot enforce in the courts of the state a right under any law providing for the equal civil rights of a United States citizen; n1 (2) a civil or criminal case in a state court against a defendant based on an alleged act of the defendant under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such an equal rights law. n2

Removal under the special civil rights removal statute was specifically designed to protect persons against state actions instituted to hamper the enforcement of federal civil rights laws. n3 Thus, removal under Section 1443(2) was enacted to provide a federal forum only to state officers who uphold equal protection rights in the face of strong local disapproval. n4 Consequently, removal under the statute is strictly limited to the two types of cases described in the statute. When a complaint underlying a state court action alleges other violations of rights under any federal civil rights laws, however, the defendant still has the option to remove the case under the general removal statute, based on federal question jurisdiction. n5

[2] Cases Against Defendant Who is Denied or Cannot Enforce Civil Rights

A defendant that alleges that he or she has been denied or cannot enforce his or her civil rights in state court under a law providing for the equal rights for United States citizens or persons under United States jurisdiction may remove a state criminal or civil action to the federal district court for the district and division embracing the place where the action is pending. n1 It should be noted that this right of removal is quite restricted. To support removal, the defendant must satisfy a two part test, showing that (1) the right allegedly denied the defendant arises under a federal law providing for specific civil rights stated in terms of racial equality, and (2) the defendant is denied or cannot enforce the specified federal rights in the state court. n2 In other words, it must be apparent that a defendant's civil rights will inevitably be denied by virtue of the defendant's trial in state court, and the civil rights law relied on must be construed to mean a law providing for specific civil rights stated in terms of racial equality. n3 Furthermore, removal is unavailable if the defendant did not rely on the federal civil rights law in performing the act, or if the defendant's conduct is not protected by the federal law. n4

[3] Acts Under Color of Authority Derived From Civil Rights Laws

If a case in state court alleges that a defendant has performed acts under color of authority derived from any civil rights laws, or with refusing to perform an act because it would be inconsistent with civil rights laws, the defendant may remove the state action to the federal district court for the district and division embracing the place where the action is pending. n1 This removal authority is distinct from actions to enforce civil rights n2 because its purpose is to protect officers who are attempting to uphold equal protection rights in the face of strong local disapproval n3 and state actions instituted to hamper the enforcement of federal civil rights laws. n4 Section 1443(2) applies only to federal officers or agents performing their duties under federal civil rights laws, as well as to persons authorized to assist them in affirmatively executing those duties. If the defendant is sued for refusing to act, the section also applies to state officers and those authorized to act under them. n5 Both Section 1443(1) and Section 1443(2), however, are limited to federal laws providing civil rights defined in terms of racial equality. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.15[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1443(1)*; *see* [2], *below*.

(n3)Footnote 2. *28 U.S.C. § 1443(2)*; *see* [3], *below*.

(n4)Footnote 3. *Bridgeport Educ. Ass'n v. Zinner, 415 F. Supp. 715, 722 (D. Conn. 1976)* .

(n5)Footnote 4. *Greenberg v. Veteran, 889 F.2d 418, 421-422 (2d Cir. 1989)* .

(n6)Footnote 5. *See Harris v. Birmingham Bd. of Educ., 817 F.2d 1525, 1526-1527 (11th Cir. 1987)* ; *see also 28 U.S.C. § 1441(a).*

(n7)Footnote 1. *28 U.S.C. § 1443(1).*

(n8)Footnote 2. *Miller v. Lambeth, 443 F.3d 757, 761 (10th Cir. 2009)* .

(n9)Footnote 3. *Neal v. Wilson, 112 F.3d 351, 355 (8th Cir. 1997)* .

(n10)Footnote 4. *See City of Greenwood v. Peacock, 384 U.S. 808, 826-828, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966)* .

(n11)Footnote 1. *28 U.S.C. § 1443(2).*

(n12)Footnote 2. *New York v. Galamison, 342 F.2d 255, 271-272 (2d Cir. 1965)* , *cert. denied, 380 U.S. 977 (1965)* ; *see* [2], *above*.

(n13)Footnote 3. *Greenberg v. Veteran, 889 F.2d 418, 421-422 (2d Cir. 1989)* .

(n14)Footnote 4. *Bridgeport Education Asso. v. Zinner, 415 F. Supp. 715, 722 (D. Conn. 1976)* .

(n15)Footnote 5. *28 U.S.C. § 1443(2).*

(n16)Footnote 6. *Appalachian Volunteers, Inc. v. Clark, 432 F.2d 530, 534-535 (6th Cir. 1970) , cert. denied, 401 U.S. 939 (1971) .*

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART III. REMOVAL JURISDICTION PURSUANT TO SPECIAL REMOVAL STATUTES

1-8 Moore's Manual--Federal Practice and Procedure § 8.43

§ 8.43 United States, Agency, or Officern*

[1] United States Entities and Officers Are Entitled to Removal

The United States, any federal agency, and any officer of the United States or of any federal agency may remove a state civil action or a state prosecution brought against such a defendant. n1 The special removal statute for federal agencies and officers is broader than the general removal statute n2 in two primary ways: first, under the special removal provision, both civil and criminal actions may be removed; and second, there is no requirement that the state action be one that could have been originally filed in the federal courts. n3

The purpose of providing the right of removal to federal entities and agencies, officers of entities and agencies, and those acting under federal officers is primarily to provide them with the protection of a federal forum which is capable of evaluating the complexities of federal officer immunity. Removal also ensures a trial free of any local prejudice against the federal government and its officers. n4 The statute also permits the removal of those actions commenced in state court that could expose a federal official to potential civil liability or criminal penalty for an act performed in an official federal capacity. n5

The removal authority under this provision is available to the United States, any federal agency, any officer of the United States or of a federal agency, and any person acting under such an officer. n6 The right to remove may be exercised in any case in which such agency, officer, or person is sued in an official or individual capacity for any act committed under the color of office or on account of any right, title, or authority claimed under any federal legislation for the apprehension or punishment of criminals or the collection of revenue. n7 The removal authority also extends to a property holder whose title is derived from any federal officer, provided that the state court suit affects the validity of a federal law; n8 any officer of the courts of the United States for any act under color of office; n9 and any officer of Congress for any act in the discharge of the officer's official duty. n10 A court-appointed bankruptcy trustee is considered an officer of the court for removal purposes. n11

With respect to United States officers, Section 1442 requires neither a prior determination of the defendant's employment status as a United States employee by the Executive Branch nor an appearance by the United States Attorney General for a proper removal. Rather, Section 1442 allows direct removal by any person who is in fact an

officer of the United States and who was acting under color of such office, provided the removal is based on a plausible federal defense, such as a substantive immunity defense. n12 This rule is in contrast with some specialty federal removal statutes that provide removal for federal employees, such as the Federally Supported Health Centers Assistance Act, which predicates removal on either an affirmative deeming by the Secretary that the defendant is a federal employee, or the United States Attorney General's failure to appear in the state court case. n13

Under the federal officer removal statute, the entire case is removed to federal court provided that the defendant or some defendants qualify, even if the action involves other defendants that are not "federal agencies or officers," and not otherwise eligible to remove the case. n14 When federal agency or officer removal is proper, the district court generally has discretion to retain jurisdiction and adjudicate the case, even if the federal agency or officer is dismissed. n15 The court will usually exercise its discretion in such circumstances to remand the case to the state court in the absence of compelling reasons to retain the state claims. n16

[2] Persons Acting Under Federal Officers Entitled to Remove

Any person acting under an officer of the United States or of a federal agency may remove a state civil action or a state prosecution against the person for any act committed under color of office. n1 To remove, the person must (1) establish that he or she was acting under the direction of a federal officer, (2) raise a plausible federal defense to the plaintiff's claims, and (3) show a causal nexus between the plaintiff's claims and the acts performed under color of office. n2 This right of removal applies whether the person is sued in an official capacity or in an individual capacity. n3 It is not necessary for removal that the person acting under the federal officer have an employment relationship with the United States, nor that the Attorney General appear in the case. Rather, Section 1442 allows direct removal by any person if the person shows that he or she is in fact acting under an officer of the United States for any act under color of that office, n4 and that the removal is based on some plausible federal defense, such as a substantive immunity defense. n5

The relevant relationship necessary for removal is that of a private person "acting under" a federal officer or agency. The private person must be engaged in some conduct that is lawfully assisting the federal officer in the performance of his or her official duty. Consequently, the fact that a federal regulatory agency closely directs, supervises, and monitors a company's activities in considerable detail does not bring that company within the scope of the relationship required by the statute, and does not permit removal. n6

[3] Requirements for Defendant to Remove

[a] Defendant Must Raise Federal Defense

To qualify for removal, federal officers, federal agencies, and persons acting under federal officers must raise a plausible federal defense to the action that has been filed in state court. The federal agency's or officer's substantive immunity defense or other plausible defense arising under federal law provides the constitutional basis for removal jurisdiction when the civil or criminal case against the defendant rests on state law. n1 Therefore, a state court suit raising only state law claims against a federal officer or agency is not removable unless the officer asserts some plausible federal defense. Once a defendant raises a plausible federal defense, removal is appropriate so that the federal court may resolve that defense. n2

In construing the plausible federal defense requirement, the Supreme Court has expressly rejected a narrow interpretation of the statute, recognizing that one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. Therefore, federal officers need not prove their case regarding a defense before their case is removed. To establish removability, the claim to a federal defense must be colorable but not necessarily ultimately successful on the merits. n3

[b] Defendant's Act Performed Under Color of Law

To qualify a claim for removal, the federal officer must show that the case involves acts committed by the officer, or the person acting for the officer, under color of office. n4 The "under color of office" component requires that the conduct or omission complained of by the plaintiff must have been taken under asserted official federal authority to enforce federal law, n5 and that there be a causal connection between that act and the state lawsuit. The officer need not prove the case but must only show some causal connection. n6

When a defendant federal official removes a state action, the notice of removal must be clear, specific, and positive in alleging the facts providing the bases for removal. This does not mean that the officer must admit the conduct charged by the plaintiff; however, merely alleging that he or she was acting under color of office is insufficient. Therefore, the officer has the burden of alleging that the facts complained of are related to the officer's official duties, and the specificity required depends on whether the removed case is a civil case or criminal case. n7

[4] Federal Jurisdiction Derivative of State Court Jurisdiction

The statutory authorization for removal by federal agencies and officers is independent of general removal jurisdiction and does not require that the federal court have original federal jurisdiction apart from the statute. n1 This removal jurisdiction is derivative of the state court jurisdiction. n2 This means that if the state court lacks jurisdiction, the federal court should dismiss the action against the federal agency or officer n3 and remand any other claims against other defendants. n4 In such circumstances, the federal courts are required to dismiss the claims against the federal officials, rather than remand to the state court and require the officials to move to dismiss there. n5 Additionally, the federal courts refuse to provide relief that the state court could not have provided. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisCases Involving Federal Officers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.15[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1442(a)(1)*; *see Mesa v. California, 489 U.S. 121, 136, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989)* (constitutional basis for removal jurisdiction under Section 1442(a)(1) is federal officer's substantive immunity defense arising under federal law).

(n3)Footnote 2. *See Isaacson v. Dow Chem. Co., 517 F.3d 129, 136 (2d Cir. 2008)* .

(n4)Footnote 3. *Williams v. Brooks, 945 F.2d 1322, 1325 (5th Cir. 1991)* (statute provides independent basis for removal jurisdiction).

(n5)Footnote 4. *Willingham v. Morgan, 395 U.S. 402, 405-407, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969)* , *superseded by statute as stated in Guidry v. Durkin, 834 F.2d 1465 (9th Cir. 1987)* .

(n6)Footnote 5. *Magnin v. Teledyne Continental Motors, 91 F.3d 1424, 1427 (11th Cir. 1996)* .

(n7)Footnote 6. *28 U.S.C. § 1442(a)(1)*; *see* [2], *below*.

(n8)Footnote 7. *28 U.S.C. § 1442(a)(1)*.

(n9)Footnote 8. *28 U.S.C. § 1442(a)(2)*.

(n10)Footnote 9. *28 U.S.C. § 1442(a)(3)*.

(n11)Footnote 10. *28 U.S.C. § 1442(a)(4).*

(n12)Footnote 11. *In re Serrato, 117 F.3d 427, 428 (9th Cir. 1997)* .

(n13)Footnote 12. *Allen v. Christenberry, 327 F.3d 1290, 1296 (11th Cir. 2003)* ; *see* [3], *below.*

(n14)Footnote 13. *See, e.g., 42 U.S.C. § 233(g)-(l).*

(n15)Footnote 14. *Dillon v. Mississippi Military Dep't, 23 F.3d 915, 919 (5th Cir. 1994)* .

(n16)Footnote 15. *Nebraska v. Bentson, 146 F.3d 676, 678 (9th Cir. 1998)* .

(n17)Footnote 16. *New Jersey Dept. of Envtl. Protection v. Gloucester Envtl. Management Services, Inc., 719 F. Supp. 325, 335 (D.N.J. 1989)* .

(n18)Footnote 1. *28 U.S.C. § 1442(a)(1)*; *see Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 396-401 (5th Cir. 1998)* (companies that manufactured agent orange for federal agency could remove products liability suit brought in state court by individual who was allegedly injured in Vietnam).

(n19)Footnote 2. *Mesa v. California, 489 U.S. 121, 124-125, 128, 134-136, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989)* ; *see* [3], *below.*

(n20)Footnote 3. *See 28 U.S.C. § 1442(a)(1).*

(n21)Footnote 4. *Allen v. Christenberry, 327 F.3d 1290, 1296 (11th Cir. 2003)* .

(n22)Footnote 5. *See* [3], *below.*

(n23)Footnote 6. *Watson v. Philip Morris Cos., 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42, 49-50 (2007)* ; *see California v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 488 F.3d 112, 124 (2d Cir. 2007)* (defendant who is not federal officer or agency must satisfy three elements to have suit against it removed under statute: it must be "person" within meaning of statute; it must be acting under federal officer, which requires existence of causal connection between charged conduct and asserted official authority; and it must raise plausible federal defense).

(n24)Footnote 1. *Mesa v. California, 489 U.S. 121, 128, 134-137, 139, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989)* .

(n25)Footnote 2. *Jones & Jones v. Pineda & Pineda, 22 F.3d 391, 396 (1st Cir. 1994)* .

(n26)Footnote 3. *Jefferson County v. Acker, 527 U.S. 423, 431, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999)* .

(n27)Footnote 4. *28 U.S.C. § 1442(a)(1).*

(n28)Footnote 5. *See California v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 488 F.3d 112, 124-125 (2d Cir. 2007)* .

(n29)Footnote 6. *Jefferson County v. Acker, 527 U.S. 423, 431-432, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999)* (judges made adequate threshold showing that suit was for act under color of office).

(n30)Footnote 7. *Willingham v. Morgan, 395 U.S. 402, 408-409, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969)* .

(n31)Footnote 1. *Williams v. Brooks, 945 F.2d 1322, 1325-1327 (5th Cir. 1991)* ; *see* [1], *above.*

(n32)Footnote 2. *Edwards v. United States Dep't of Justice, 43 F.3d 312, 316-317 (7th Cir. 1994)* .

(n33)Footnote 3. *Wamp v. Chattanooga Housing Authority, 527 F.2d 595 (6th Cir. 1975)* , *cert. denied, 425 U.S. 992 (1976)* (citing **Moore's Federal Practice**).

(n34)Footnote 4. *Martinez v. Seaton, 285 F.2d 587, 589-590 (10th Cir. 1961)* , *cert. denied, 366 U.S. 946 (1961)* .

(n35)Footnote 5. *Johnson v. Showers, 747 F.2d 1228, 1229 (8th Cir. 1984)* .

(n36)Footnote 6. *Edwards v. United States Dep't of Justice, 43 F.3d 312, 316-317 (7th Cir. 1994)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.44

§ 8.44 Members of Armed Forcesn*

A member of the armed forces may remove a case based on acts committed under color of office or concerning which he or she claims any right, title, or authority under federal law respecting the armed forces or under the law of war. n1 For example, it was held that a member of the armed services was acting under federal authority when ordered to drive a military truck in a convoy and given specific orders as to route, destination, and time of arrival. n2 On the other hand, if the service person was not driving under direct authority of the military there would be no removal allowed for an action arising from automobile collision. n3 The scope of removal jurisdiction applicable to members of the armed forces is closely analogous to that applicable to federal officers; for discussion of the scope of removal applied to such federal personnel, see *§ 8.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.15[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1442a*.

(n3)Footnote 2. *People of Puerto Rico v. Santos-Marrero, 624 F. Supp. 308, 310-311 (D.P.R. 1985)* .

(n4)Footnote 3. *Ohio v. Dorko, 247 F. Supp. 866, 867 (N.D. Oh. 1965)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.45

§ 8.45 Foreign Statesn1

Ordinarily, because of the principle of sovereign immunity, a private person may not maintain a lawsuit against a foreign state in either state or federal court. However, the Foreign Sovereign Immunities Act of 1976 (FSIA) n2 provides exceptions to sovereign immunity in certain cases, including cases in which rights in property taken in violation of international law are in dispute. No action may be maintained in any district court against a foreign state unless the court determines that one of the exceptions applies. n3 For these excepted case, the FSIA grants federal courts jurisdiction over civil actions against foreign states and contains removal provisions allowing a foreign state defendant to remove a state court action to federal court. n4

A foreign state may remove any civil action brought in a state court against the foreign state to the district court for the district and division embracing the location where the action is pending. n5 The foreign state defendant may remove to federal court regardless of whether any other defendant in the case wants to remain in state court--removal by a foreign state encompasses the entire action, including claims not otherwise removable. n6 After removal, the action must be tried without a jury, n7 even if a right to a jury trial existed in state court. n8

For purposes of this removal provision, an "agency or instrumentality of a foreign state" is also entitled to removal, n9 and includes any entity that (1) is a separate legal person, corporate or otherwise, (2) is an organ of the foreign state or political subdivision, or a majority of whose shares or other ownership interest is owned by the foreign state or political subdivision thereof, and (3) is neither a citizen of a U.S. state nor created under the laws of any third country. n10 For purposes of this definition, the Supreme Court has held that a corporation is an "instrumentality of a foreign state" only if the foreign state has a majority ownership in the corporation; the degree of control that the foreign state has over the foreign corporation is immaterial for the determination of instrumentality status. The Supreme Court also held that instrumentality status must be determined at the time suit is filed. n11

The foreign state removal statute also provides that a defendant who is the alter ego of a foreign country is entitled to remove an action filed against the defendant in state court. n12 The alter ego doctrine provides generally that one entity is deemed to actually take on the identity of another entity when there is such unity between the first and second entities that the separateness of the two has ceased. n13 A defendant entity is deemed the alter ego of a foreign country for purposes of the removal statute when, at the time of the initiation of the suit, the defendant was performing acts

normally within the exclusive province of the foreign country, and the foreign country had a direct financial interest in the defendant. n14

When a defendant is initiating removal based on this special removal statute, the 30-day limitation for filing a notice of removal n15 may be extended for cause shown. n16 Factors to be evaluated include the purpose of the removal statute, the extent of any prior activity of the defendant in state court, likelihood of prejudice to the parties, and the relative equitable circumstances. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisActions Against Foreign States

FOOTNOTES:
(n1)Footnote 1. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.15[4] (Matthew Bender 3d ed.).

(n2)Footnote 2. See *28 U.S.C.S. § 1602 et seq.*

(n3)Footnote 3. *Republic of Aus. v. Altmann, 541 U.S. 677, 681, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)* .

(n4)Footnote 4. *Republic of Aus. v. Altmann, 541 U.S. 677, 681 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)* ; see *28 U.S.C. § 1441(d).*

(n5)Footnote 5. *28 U.S.C. § 1441(d).*

(n6)Footnote 6. *See In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1242-1244 (3d Cir. 1994)* , *cert. denied, 53 U.S. 915 (1994)* .

(n7)Footnote 7. *28 U.S.C. § 1441(d).*

(n8)Footnote 8. *Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 63-64 (3d Cir. 1981)* .

(n9)Footnote 9. *28 U.S.C. § 1441(d).*

(n10)Footnote 10. *See 28 U.S.C. § 1603(a), (b).*

(n11)Footnote 11. *Dole Food Co. v. Patrickson, 538 U.S. 468, 476-478, 123 S. Ct. 1655, 155 L. Ed. 2d 643, 654 (2003)* .

(n12)Footnote 12. *Sugar Corp. of Puerto Rico v. Environeering, Inc., 520 F. Supp. 996, 998-999 (D.P.R. 1981)* .

(n13)Footnote 13. *Kelly v. Syria Shell Petroleum Dev. B.V.,213 F.3d 841, 857 (5th Cir. 2000)* , *cert denied sub nom. Kelly v. Al Furat Petroleum Co., 531 U.S. 979 (2000)* .

(n14)Footnote 14. *Sugar Corp. of Puerto Rico v. Environeering, Inc., 520 F. Supp. 996, 999 (D.P.R. 1981)* .

(n15)Footnote 15. *28 U.S.C. § 1446(b).*

(n16)Footnote 16. *28 U.S.C. § 1441(d).*

(n17)Footnote 17. *See Refco, Inc. v. Galadari, 755 F. Supp. 79, 82-83 (S.D.N.Y. 1991)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.46

§ 8.46 Foreclosure Against United Statesn*

If a private party brings an action in state court that requests quiet title to, foreclosure of a mortgage or other lien on, or partition or condemnation of real or personal property on which the United States claims a mortgage or other lien, the United States may remove the action to federal court. n1 The United States must specifically invoke this statutory authorization for removal in the notice of removal. n2 If the action on the claimed mortgage or lien involves multiple defendants, the United States may seek removal without the consent or joinder of the other defendants. n3 Furthermore, provided that the United States claims a mortgage or lien in the property, such as a tax lien, the United States is entitled to removal regardless of the procedural posture of the case in state court. The United States may remove even if it is not a named defendant, for example, if the case is in state court on an interpleader action by a private party to determine the proper distribution of a surplus pool of money that had been obtained after a foreclosure on a piece of property. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisForeclosure Actions Against United States

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.15[5] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1444*; *see 28 U.S.C. § 2410* (statutory waiver of sovereign immunity for such suits); *see, e.g., Hussain v. Boston Old Colony Ins. Co., 311 F.3d 623, 629 (5th Cir. 2002)* (United States entitled to remove action to federal court when United States claimed interest in fire insurance proceeds, even though United States was merely served with rule to show cause, and not specifically "named party" in original civil action).

(n3)Footnote 2. *Wilkinson v. United States, 724 F. Supp. 1200, 1204 (W.D.N.C. 1989)* .

(n4)Footnote 3. *Hamlin v. Hamlin, 237 F. Supp. 299, 300-301 (N.D. Miss. 1964)* .

(n5)Footnote 4. *Horizon Bank & Trust Co. v. Massachusetts, 391 F.3d 48, 51-52 (1st Cir. 2004)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.47

§ 8.47 Interstate Class Actions May Be Removed to Federal Court Under Class Action Fairness Act

[1] Applicability of Act for Removal From State Court

[a] Removal of Class Actions That Are Not Covered by Class Action Fairness Act

Even before the Class Action Fairness Act of 2005 (the Act) n1 was enacted, a defendant could remove an action from state court to federal court if the action could have been brought in federal court originally, n2 that is, if the defendant could establish the requisite federal question jurisdiction n3 or diversity jurisdiction. n4 Furthermore, removal of class actions has been governed by the same procedures applicable to other civil actions. n5 These provisions are still applicable for removal of a class action that does not meet the jurisdictional requirements of the Act, which are discussed in Ch. 14A, *Class Actions; Derivative Actions*.

[b] Removal of Class Actions That Are Subject to Class Action Fairness Act

The Class Action Fairness Act of 2005 n6 became effective for class actions commenced on or after the date of its enactment, February 18, 2005, n7 which was February 18, 2005. It has been held that the term "commenced" means the initial filing of an action in either a state or federal court. Consequently, if an action is filed in a state court prior to February 18, 2005, the provisions of the Act do not apply, even if the action is refiled or removed to federal court after that date. n8 However, the courts are not in agreement whether an amendment to a pleading made after February 18, 2005, brings the claim within the Act, and therefore allows a defending party to remove based on the Act. The courts have taken three positions for such amendments filed after the effective date of the Act, when the original pleading date was prior to the effective date: (1) an amendment does not affect the pre-Act "commencement" date of the case; (2) the amendment affects the "commencement" date (and thus makes the Act applicable) only if the amendment does not relate back to the time of the original filing; or (3) the amendment affects the "commencement" date (and thus makes the Act applicable) if it either does not relate back or if it adds new defendants to the case. n8.1

The Act has made it easier to remove class actions from state to federal court in two ways. First, the Act makes it easier to establish diversity of citizenship subject matter jurisdiction over class actions, n9 which is a necessity before a defendant may remove a class action under the Act. n10 Second, the Act has made several modifications to the removal procedures themselves that apply particularly to class actions. n11

These new removal provisions under the Act apply generally to any "class action," which is any civil action filed under *Rule 23 of the Federal Rules of Civil Procedure*, or filed under a similar state statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action. n12 The Act specifically excludes certain types of class actions from its removal provisions, however. For instance, the special removal provisions do not apply to certain actions related to securities, intracorporate and business organizations, or the internal affairs or governance of a corporation or other form of business enterprise that arise under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized. n13

[c] Class Action Fairness Act Removal Provisions Apply to Mass Actions

In addition to class actions under Rule 23 and state law, n14 the Class Action Fairness Act provides that the new removal provisions under the Act also apply to any "mass actions," which are considered to be class actions for purposes of the act and are removable in the same manner as a true class action. n15 A "mass action" is any civil action, other than a class action, in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. n16 Whether an action qualifies as a "mass action" is determined as of the time that it is properly removed under all of the jurisdictional requirements. The fact that individual remands to state court bring the action below the 100 plaintiff or $5 million monetary threshold does not deprive the court of mass action jurisdiction. n16.1 Any mass action that is removed to federal court under the provisions of the Act may not later be transferred to another court for consolidated pretrial procedures under Title 28 Section 1407, unless a majority of the plaintiffs in the action request transfer. n17 This anti-transfer provision applies only to mass actions, not to certified class actions or actions proposed for certification. n18

[2] Defendant's Local Citizenship Does Not Preclude Removal

In the ordinary class action that is not subject to the special procedural provisions of the Class Action Fairness Act, the defendants may remove the action from state court to federal court on the basis of diversity of citizenship only if none of the defendants is a citizen of the state in which the action was originally brought. n19 This restriction has been removed with respect to class actions governed by the Class Action Fairness Act, which may be removed to state court without regard to whether any defendant is a citizen of the state in which the action is brought. n20

[3] Any Lone Defendant May Remove Class Action

Class actions covered by the Class Action Fairness Act may be removed by any defendant without the consent of the other defendants. n21 In ordinary class actions not subject to the special procedural provisions of the Class Action Fairness Act, all of the defendants must join in the notice of removal or the case is not removable. n22

[4] One Year Statute of Limitations on Removal Does Not Apply Under the Act

The procedure for removing a class action under the Class Action Fairness Act is essentially the same as for other class actions, but the one-year absolute limitation on removal does not apply. n23 The elimination of the one-year limitation period means that if a class action becomes removable at the later stages of an action, the defendant may still remove the action. Under the proper circumstances, a defendant may remove the action at any time, even several years after commencement, provided that notice of removal is filed within 30 days after receipt of a pleading or other paper from which the defendant first may determine that the action has become removable. n24

[5] Accelerated Appellate Review Available If Court Remands Removed Class Action to State Court

[a] Remand Order is Appealable

If a class action is governed by the Class Action Fairness Act, a court of appeals has discretion to consider an appeal

from an order of a district court which either grants or denies a motion to remand if the defendant makes application to the court of appeals not more than 10 days after entry of the order. n25 In the exercise of its discretion, the court should consider the following factors, which weigh in favor of immediate appeal: the issue is related to an important question regarding the Class Action Fairness Act; the issue presented is unsettled; the issue is consequential to the resolution of the particular case; the issue arises from a decision or order that is sufficiently final to allow intelligent review of the issue; and the balance of relevant harms weighs in favor of the grant of immediate review. n26

If the court of appeals accepts an appeal of a remand order, the appellate court must complete all action on the appeal, including rendering judgment, not later than 60 days after the date on which the appeal was filed, unless an extension is granted. n27

[b] Extension of Time for Judgment On Appeal

The court of appeals may extend the 60-day period to render judgment on the appeal in two circumstances. First, if all the parties to the proceeding agree to an extension the court of appeals may extend the 60-day period for any period of time specified in the agreement. n28 Second, if good cause is shown and if it is in the interests of justice, the court of appeals may extend the 60-day period for an additional period of up to 10 days. n29 If the court fails to render a final judgment on the appeal before the end of the 60-day period, or within the specified period of extension, the appeal is denied automatically by the terms of the statute. n30

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Pub. L. No. 109-2, 119 Stat. 4 (2005); *see 28 U.S.C. § 1453*.

(n2)Footnote 2. *McMaster v. Coca-Cola Bottling Co., 2005 U.S. Dist. LEXIS 5978, at *5-*8 (N.D. Cal. 2005)* ; *see 28 U.S.C. § 1441(a)*.

(n3)Footnote 3. *28 U.S.C. § 1331*; *see § 8.21[2]*.

(n4)Footnote 4. *28 U.S.C. § 1332*; *see § 8.21[3]*.

(n5)Footnote 5. See *28 U.S.C. §§ 1446*, *1447*.

(n6)Footnote 6. Pub. L. No. 109-2, 119 Stat. 4 (2005); *see 28 U.S.C. § 1453*.

(n7)Footnote 7. Pub. L. No. 109-2, § 9; 119 Stat. 4 (2005).

(n8)Footnote 8. *Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1233 (10th Cir. 2005)* .

(n9)Footnote 8.1. *Prime Care of Northeast Kansas, LLC v. Humana Insurance Company, 2006 U.S. App. LEXIS 11775, *5-*7 (2006)* ; *see Fed. R. Civ. P. 15(c)* (requirements for amendment to relate back).

(n10)Footnote 9. Pub. L. No. 109-2, § 4; 119 Stat. 4 (2005); *see also 28 U.S.C. § 1332(d)(2)*.

(n11)Footnote 10. *28 U.S.C. §§ 1332(d)(2)*, *1453*; *see also Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1233-1234 (10th Cir. 2005)* .

(n12)Footnote 11. Pub. L. No. 109-2, § 5; 119 Stat. 4 (2005); *see also 28 U.S.C. § 1453*.

(n13)Footnote 12. *28 U.S.C. § 1332(d)(1)(B).*

(n14)Footnote 13. *See 28 U.S.C. § 1453(d).*

(n15)Footnote 14. *See* [a], *above.*

(n16)Footnote 15. *28 U.S.C. § 1332(d)(11)(A).*

(n17)Footnote 16. *28 U.S.C. § 1332(d)(11)(B)(i).*

(n18)Footnote 16.1. *Abrego v. Dow Chem. Co, 443 F.3d 676, 686-687 (9th Cir. 2005)* .

(n19)Footnote 17. *28 U.S.C. § 1332(d)(11)(C)(i)*; *see 28 U.S.C. § 1407.*

(n20)Footnote 18. *28 U.S.C. § 1332(d)(11)(C)(ii).*

(n21)Footnote 19. *See 28 U.S.C. § 1441(b).*

(n22)Footnote 20. *28 U.S.C. § 1453(b).*

(n23)Footnote 21. *28 U.S.C. § 1453(b).*

(n24)Footnote 22. *See 28 U.S.C. § 1446(b).*

(n25)Footnote 23. *28 U.S.C. § 1453(b).*

(n26)Footnote 24. *See 28 U.S.C. §§ 1446(b), 1453(b).*

(n27)Footnote 25. *28 U.S.C. § 1453(c)(1).*

(n28)Footnote 26. *College of Dental Surgs. of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38-39 (1st Cir. 2009)* .

(n29)Footnote 27. *28 U.S.C. § 1453(c)(2).*

(n30)Footnote 28. *28 U.S.C. § 1453(c)(3)(A)*; *see, e.g., Admiral Ins. Co. v. Abshire, 574 F.3d 267, 272 (5th Cir. 2009)* (all parties agreed to 120 day extension of original 60 day time limit to complete all action on appeal).

(n31)Footnote 29. *28 U.S.C. § 1453(c)(3)(B).*

(n32)Footnote 30. *28 U.S.C. § 1453(c)(4).*

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART III. REMOVAL JURISDICTION PURSUANT TO SPECIAL REMOVAL STATUTES

1-8 Moore's Manual--Federal Practice and Procedure §§ 8.48through 8.59

[Reserved]

§§ 8.48[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART IV. PROCEDURES TO EFFECT REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.60

§ 8.60 Notice Requirementsn*

[1] Notice of Removal

[a] Contents of Notice

A removal does not become effective until proper notice of removal is filed in the federal district court and in the state court where the action is pending, and is served on the adverse parties. n1 The notice of removal must contain a short and plain statement of the grounds for removal. n2 The notice of removal must clearly indicate that the requirements for federal jurisdiction are satisfied. n3 Thus, in a case removed on the basis of diversity jurisdiction, the removal notice must allege complete diversity of citizenship, at the time the case was filed in state court and at the time of removal, n4 and the notice must allege facts showing that the minimum amount in controversy requirement is met. n5 A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied is insufficient to meet the defendant's burden. The defendant must set forth the underlying facts supporting the assertion of the jurisdictional amount. n6 If nondiverse defendants are voluntarily dismissed or abandoned before the filing of the removal notice, however, the notice need only allege diversity as of the filing of the removal notice. n7

In a case removed on the basis of federal question jurisdiction, the removal notice must allege the Constitution, statute, or treaty of the United States that form the basis of federal question jurisdiction, n8 or the federal common-law ground for the federal question jurisdiction, if applicable. n9

Mere technical or typographcal errors do not invalidate a removal notice, provided that it is capable of being understood and contains the required specification of the grounds for removal. Thus, a mistaken citation is not grounds for rejection. n10

[b] Signature Requirement and Written Consent to Removal

The notice of removal must be signed pursuant to Rule 11, n11 which provides that the court may impose sanctions if documents are filed containing statements that are not well grounded in fact and warranted by law. n12 In 1988, the requirement that the removal papers include a verified petition was replaced with the requirement that the notice of removal be signed pursuant to Rule 11. The deterrent effect of the potential for imposition of Rule 11 sanctions was

deemed an adequate substitute for the former requirement of verification. n13

Generally, all defendants must join in the notice of removal, n14 unless the defendants (1) are unknown or nominal parties, n15 (2) have been fraudulently joined, or (3) are nonresidents that have not been served at the time of removal. n16 However, a particular removal statute may provide that not all defendants need join in the notice of removal. For example, one statute provides that a defendant with an independent right of removal, such as a federal agency or officer, may remove the entire case without the consent of other defendants. n17

The phrase "join in removal" means that all defendants must agree to removal. This "rule of unanimity," as it is referred to, does not require all of the defendants to sign the notice of removal; however, it does require that each defendant officially and unambiguously consent to the notice of removal. n18 Some courts require written statement of consent. n19 Other courts have held that, provided that at least one defendant files a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure*, other defendants may join in the removal by expressly consenting to the notice. n20

[c] Notice Must be filed with State Court Documents

The defendant must file with the notice of removal a copy of all process, pleadings, and orders served on the removing defendant in the action. n21 These state court pleadings, orders entered, any discovery completed, and other state court proceeding documents will be presumed valid by the federal district court on removal. n22

[d] Amendment of Notice

The defendant may make any desired amendment to a notice of removal within the 30-day period in which the notice must be filed. Furthermore, a court may allow an amendment after the 30-day period to correct technical defects in the jurisdictional allegations of the notice. However, the court will not allow a party to assert new grounds for removal jurisdiction. For example, a party may not assert diversity jurisdiction in the amendment, after inaccurately asserting federal question jurisdiction in the original notice of removal. n23

[2] Notice to Other Parties and to State Court

Promptly after filing a notice of removal, the defendant or defendants must give written notice of the filing to all adverse parties and must file a copy of the notice of removal with the clerk of the state court where the case was filed. n1 These notice procedures are the final steps necessary to effect the removal of the case; once the state court receives notice that the case has been removed, it may not proceed unless and until the case is remanded. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNotices

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.30[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1446(a)*, *1446(d)*; *see § 8.08*.

(n3)Footnote 2. *28 U.S.C. § 1446(a)*.

(n4)Footnote 3. *Laughlin v. KMart Corp., 50 F.3d 871, 873 (10th Cir. 1995) , cert. denied, 516 U.S. 863 (1995) .*

(n5)Footnote 4. *Hubbard v. Tripp, 611 F. Supp. 895, 896 (E.D. Va. 1985)* (notice must allege citizenship at time

of complaint).

(n6)Footnote 5. *Laughlin v. KMart Corp., 50 F.3d 871, 873 (10th Cir. 1995)* , *cert. denied, 516 U.S. 863* (when neither notice of removal nor complaint set forth amount in controversy, no subject matter jurisdiction).

(n7)Footnote 6. *Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972-973 (11th Cir. 2002)* .

(n8)Footnote 7. *Adams v. Lederle Lab., 569 F. Supp. 234, 243 (W.D. Mo. 1983)* .

(n9)Footnote 8. *28 U.S.C. § 1331*; *Blackburn v. Sundstrand Corp., 115 F.3d 493, 494 (7th Cir. 1997)* .

(n10)Footnote 9. *Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 924-926 (5th Cir. 1997)* .

(n11)Footnote 10. *Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002)* ; *see Bautista v. Star Cruises, 396 F.3d 1289, 1301 (11th Cir. 2005)* (plain statement requirement means notice must have description of grounds for removal, not details or actual documentation of grounds).

(n12)Footnote 11. *28 U.S.C. § 1446(a)*; *see Fed. R. Civ. P. 11.*

(n13)Footnote 12. *Fed. R. Civ. P. 11.*

(n14)Footnote 13. *28 U.S.C. § 1446*, Commentary to 1988 Amendments.

(n15)Footnote 14. *Coyne v. American Tobacco Co., 183 F.3d 488, 488, 493 (6th Cir. 1999)* .

(n16)Footnote 15. *Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002)* (when there are multiple defendants, all must join in petition to remove within 30 days of service, except that nominal defendants, who are persons against whom no real relief is sought, need not join in the petition).

(n17)Footnote 16. *Glendening v. Genuine Parts Co., Inc., 960 F. Supp. 243, 244 (D. Col. 1997)* .

(n18)Footnote 17. *Dillon v. Mississippi Military Dep't, 23 F.3d 915, 918-919 (5th Cir. 1994)* ; *see 28 U.S.C. § 1442(a)(1).*

(n19)Footnote 18. *Miller v. Morocho Brother's Constr., Inc., 2004 U.S. Dist. LEXIS 5443, at *9-*10 (M.D.N.C. 2004)* .

(n20)Footnote 19. *Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994)* .

(n21)Footnote 20. *Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201-202 (6th Cir. 2004)* .

(n22)Footnote 21. *28 U.S.C. § 1446(a).*

(n23)Footnote 22. *Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 885 (8th Cir. 1999)* .

(n24)Footnote 23. *Uppal v. Electric Data Sys., 316 F. Supp. 2d 531, 535-536 (E.D. Mich. 2004)* .

(n25)Footnote 1. *28 U.S.C. § 1446(d).*

(n26)Footnote 2. *See 28 U.S.C. § 1446(d)*; *Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1375 n.4 (5th Cir. 1980)* (citing **Moore's Federal Practice;** all state court proceedings in case subsequent to removal are void); *see § 8.08[2].*

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART IV. PROCEDURES TO EFFECT REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.61

§ 8.61 Time Limitations on Removaln*

[1] Time Limit for Filing Notice of Removal

[a] General Rule

The notice of removal of a civil action or proceeding generally must be filed within 30 days after the earlier of the date that (1) the defendant receives a copy of the initial pleading setting forth the claim for relief (and showing the basis for removal) on which the action or proceeding is based; or (2) the summons is served on the defendant, if the initial pleading has been filed in state court and is not required to be served on the defendant. n1 The 30-day period is strictly construed n2 and may not be extended by the court. n3

If a case involves multiple defendants, traditionally most courts have held that the 30-day removal period begins to run when the first defendant is served, provided that the case is removable at that time. n4 Thus, the failure of the first-served defendant to file a removal notice within 30 days of service prevents all subsequently served defendants from later removing the action unless there is evidence that the plaintiff intentionally delayed naming another defendant in a bad faith attempt to prevent removal. n5 This approach is known as the "unanimity rule," which requires that all served defendants consent to and join in the notice of removal within 30 days. n6 Later served defendants may either accept the removal or exercise their right to choose the state forum by making a motion to remand. n7

Some courts have rejected the "unanimity rule" and liberalized the time limit, on the grounds that the rule would require the court to insert "first" before defendant into the language of the statute. n8

[b] Time Limit When Initial Pleading Does Not Indicate Case Is Removable

[i] Time Period Begins When Document Indicates Case Is Removable

If the case is not removable as stated by the initial pleading, such as the complaint, the defendant may file a notice of removal within 30 days after receipt of a copy of an amended pleading, motion, order, or other paper from which it first may be determined that the case has become removable. n9 For example, this situation could occur if an original defendant who shared citizenship with a plaintiff, which precludes removal, is dropped as a party from the case pursuant

to an agreement between the plaintiff and that defendant. A new 30-day period may commence from the date that the remaining defendant receives the paper indicating that the other defendant is dismissed. n10 The time period may also be affected by voluntary changes in a pleading or circumstances make a case become removable after the first pleading. n11

For purposes of this rule, an initial pleading is deemed not removable even if it is actually removable, if the potential grounds for removal are obscured, omitted, or misstated. n12 The defendant has 30 days from the revelation of grounds for removal to file a notice of removal, even if grounds for removal actually existed when the initial pleading was filed. For example, if the initial complaint fails to mention the plaintiff's citizenship, but the plaintiff's citizenship is subsequently revealed by an amended complaint or answer to an interrogatory, the defendant has 30 days after the receipt of the amended complaint or interrogatory answer in which to remove. n13 Thus, if in fact grounds for removal exist, that is, there is in fact complete diversity, but neither the pleadings nor other papers reveal the citizenship of the parties, the time limit does not begin to run. n14 On the other hand, if grounds for removal actually exist and the defendant had sufficient knowledge of the existence of grounds for removal, the 30-day period begins to run. n15

[ii] Effect of Voluntary Changes That Make Case Removable

A case that is not removable based on the plaintiff's initial pleading may become removable if the plaintiff takes some voluntary action that changes the status of removability, such as by amending a pleading or adding or dismissing parties. n16 The defendant then has 30 days after the voluntary act to file the notice of removal. For example, a voluntary change that provides a basis for removal is the plaintiff's change of residence. When a plaintiff voluntarily changes his or her residence by moving to another state after filing the state court complaint, that move creates diversity. The defendant is entitled to remove within 30 days after receiving notice of the change of residence, n17 provided that the defendant can satisfy the one year overall time rule. n18

If the case is not initially removable, but papers filed in the state court action indicate that the case has become removable, the 30-day period during which the defendant must file a notice of removal begins to run at the time of the voluntary change that creates removability n19 The rationale for permitting removal after a voluntary change by the plaintiff stems from the idea that the plaintiff is the master of the complaint. Subject to limitations such as the artful pleading rule, n20 the plaintiff is entitled to bring an action alleging only state law claims against non-diverse defendants in order to defeat the possibility of removal. According to this rationale, if the plaintiff voluntarily decides to drop non-diverse defendants, or change domicile, for example, the plaintiff presumably is no longer insistent on keeping the action in the state courts and the action is accordingly removable.

[iii] Effect of Involuntary Changes

If the case as stated in the plaintiff's initial pleading was not removable, involuntary changes generally do not change the status of the case to removable. n21 For example, the involuntary dismissal of a nondiverse defendant, by court-ordered dismissal or directed verdict, does not ordinarily create diversity that would allow removal. n22 The judicially created voluntary-involuntary rule is a traditional rule that was developed in diversity cases. n23 The policy favoring a plaintiff's right to determine the removability of a diversity case is consistent with the well-pleaded complaint rule in federal question cases, when the removability of a case depends on an examination of the face of the plaintiff's well-pleaded complaint without consideration of the defendant's federal defenses or claims. n24

There are exceptions to the rule that involuntary changes do not render a case removable. It has been held inapplicable to dismissals based on lack of personal jurisdiction or sovereign immunity, n25 or fraudulently joined nondiverse defendants. n26 The rationale for the exception is consistent with the involuntary-voluntary distinction. A case does not become removable when the involuntary change pertains to the merits of the plaintiff's case. When, however, a case is dismissed because either the court lacks jurisdiction, the defendant is entitled to sovereign immunity, or there was a fraudulent joinder of parties, the court's finding amounts to a determination by the court that the resident defendant was

never properly before the court, rather than a determination that the court had jurisdiction overthat defendant but that the case against him or her, although not frivolous, was not meritorious. n27

[c] One Year Overall Limit for Diversity Cases

Despite the exceptions to the 30-day limit, which allow the defendant to file the notice of removal within 30 days of the filing of a pleading indicating that a case is removable, n28 there is an absolute deadline in diversity cases of one year from the date of commencement of the suit. n29 Thus, under the first paragraph of Section 1446(b), the defendant or defendants must file the notice of removal within 30 days after the receipt of the initial pleading when the pleading shows a jurisdictional basis for removal. Under the second paragraph of Section 1446(b), when the case stated in the initial pleading is not removable, but the defendant receives notice of an amended pleading or other paper that indicates that the case is removable, the defendant or defendants also must file a notice of removal within 30 days of receipt of the notice. The second paragraph also provides that, in any event, a case may not be removed on the basis of diversity jurisdiction more than one year after commencement of the action. n30 Congress added this overall limit to prevent a defendant from removing a case that was not originally removable at any time a non-diverse party was dropped, even years later, and also in conformance with Congress' intent to restrict diversity jurisdiction. n31

[d] Triggering Event for Time Limit

[i] Formal Service Generally Required

If a case is removable from the commencement of the action, the 30-day period during which the defendant must remove begins to run at the earlier of the following times: (1) when the defendant receives, generally through service, a copy of the initial pleading n32 setting forth the claim for relief that underlies the proceeding; or (2) when the summons is served on the defendant, if the initial pleading has been filed in state court but is not required to be served on the defendant. n33

The Supreme Court has specified guidelines regarding service and removal time limits. The court stated that the time for removal is triggered by the simultaneous service of the summons and complaint, or receipt of the complaint after and separate from service of the summons, but not by the mere receipt of the complaint unattended by any formal service. n34 Thus, a defendant has no duty to file the notice of removal on the mere receipt of the complaint unattended by any formal service. The Court reasoned that service of process is fundamental to any procedural imposition on a named defendant. Absent service, or waiver of service by the defendant, a court ordinarily lacks authority over a party named by a complaint as defendant. Accordingly, one becomes a party officially, and is required to take action in that capacity, only on service of a summons or other authority asserting measure stating the time within which the party served must appear and defend. Unless a named defendant agrees to waive service, it is required. The Court then specified four rules that cover the various state provisions for service of the summons and the filing or service of the complaint. In each of the categories, the defendant's period for removal must be at least 30 days from service, and in some categories it must be more, depending on when the complaint is received. n35

1. If the summons and complaint are served together, the 30-day period for removal runs from the date of service.

2. If the defendant is served with the summons but the complaint is furnished to the defendant sometime at some later time, the period for removal runs from the defendant's receipt of the complaint.

3. If the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing.

4. If the complaint is filed in court before any service, the removal period runs from the service of the summons.

[ii] When Case is Not Initially Removable

If the case is not initially removable, the 30-day period during which the defendant must file a notice of removal begins to run at the time of the voluntary change that makes the case removable n36 If the plaintiff amends the complaint and the amended complaint makes the case removable, courts have taken several approaches in calculating the 30-day period for removal. Thus, the time for removal begins to run:

1. When the defendants are served with a motion to amend the complaint. n37

2. From the date of receipt of the proposed order granting leave to amend the complaint. n38

3. When the state court grants a motion to amend the complaint rather than when the motion was made, because the state court might deny the motion. n39

4. On the filing date of the memorandum raising a federal claim supporting a motion for injunction. n40

If the original complaint fails to demand damages that satisfy the requisite amount in controversy, but the plaintiff increases the demand during discovery, the 30-day removal period begins to run when the defendant receives notice of the change. For example, if the plaintiff increases the amount in controversy through responses to interrogatories, the 30-day period begins when the defendant receives those responses. n41

[2] Nature of Initial Pleading That Generally Commences Removal Time Period

A court's determination of what constitutes an "initial pleading" for purposes of the removal time period requirements may be difficult for states where plaintiffs are not required to file a complaint in order to commence an action. Considering that removal statutes must be strictly construed, doubts as to what constitutes an initial pleading should be resolved in favor of an earlier filing of the notice of removal. n1 In any event, the Supreme Court has clarified that in states where the service of the summons commences the action, but the local rules do not require that the complaint or initial pleading be filed or served at that time, the time for removal runs after service of formal process and when the complaint is made available through filing. n2

If a pleading is served before the complaint, such as a motion for a temporary restraining order or other extraordinary relief such as attachment, and it indicates that the action is removable, courts have held that the 30-day removal period commences from receipt of that pleading. n3 Under the Supreme Court rule, assuming that formal service of the pleading or a summons is required with the pleading, the 30-day period runs from such service. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsTime Limitations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.30[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1446(b).*

(n3)Footnote 2. *Ortiz v. General Motors Acceptance Corp., 583 F. Supp. 526, 531 (N.D. Ill. 1984)* (stipulated extension for filing answer does not extend time for removal).

(n4)Footnote 3. *Liebig v. DeJoy, 814 F. Supp. 1074, 1076 (M.D. Fla. 1993)* .

(n5)Footnote 4. *Getty Oil v. Insurance Co. of N. Am., 841 F.2d 1254, 1262-1263 (5th Cir. 1988)* .

(n6)Footnote 5. *Brown v. Demco, Inc., 792 F.2d 478, 481-482 (5th Cir. 1986)* .

(n7)Footnote 6. *Getty Oil v. Insurance Co. of N. Am., 841 F.2d 1254, 1262-1263 (5th Cir. 1988)* .

(n8)Footnote 7. *Lewis v. Rego Co., 757 F.2d 66, 68-69 (3d Cir. 1985)* ; *see 28 U.S.C. § 1448* (unserved defendants may be served after case is removed and may then exercise their right to move to remand case).

(n9)Footnote 8. *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999)* , *cert. denied, 528 U.S. 1076 (2000)* .

(n10)Footnote 9. *28 U.S.C. § 1446(b)*.

(n11)Footnote 10. *28 U.S.C. § 1446*, Commentary to 1988 Amendments.

(n12)Footnote 11. *See* [ii], [iii], *below*.

(n13)Footnote 12. *See Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694-695 (9th Cir. 2005)* (even though actual facts supporting federal jurisdiction remain unaltered from initial pleading, if their existence has been manifested only by later papers, revealing grounds for removal for first time, defendants may remove case for up to 30 days, provided that their discovery of grounds of federal jurisdiction is belated because facts disclosing those grounds were inadequately or mistakenly stated in the complaint).

(n14)Footnote 13. *See Lovern v. General Motors Corp., 121 F.3d 160, 162 (4th Cir. 1997)* .

(n15)Footnote 14. *Patterson v. Intl. Bhd. of Teamsters, 121 F.3d 1345, 1348-1349 (9th Cir. 1997)* .

(n16)Footnote 15. *Cervantez v. Bexar County Civil Serv. Comm., 99 F.3d 730, 733-734 (5th Cir. 1996)* (when complaint stated facts suggesting federal claim and removability, defendants could not remove action after 30 days from notice of that complaint.

(n17)Footnote 16. *Estate of Combas Martinez v. Barros & Carrion, Inc., 668 F. Supp. 2d 334, 339-340 (D.P.R. 2009)* (for case to become removable, court must closely examine motion, order, or other document from which federal jurisdiction is ascertainable).

(n18)Footnote 17. *DeBry v. Transamerica Corp., 601 F.2d 480, 488 (10th Cir. 1979)* .

(n19)Footnote 18. *See* [c], *below*.

(n20)Footnote 19. *See* [iv][B], *below*.

(n21)Footnote 20. *See* § 107.14[2][c][iv].

(n22)Footnote 21. *Self v. General Motors Corp. 588 F.2d 655, 656-659 (9th Cir. 1978)* .

(n23)Footnote 22. *Weems v. Louis Dreyfus Corp., 380 F.2d 545, 546-549 (5th Cir. 1967)* .

(n24)Footnote 23. *Great N. R. Co. v. Alexander, 246 U.S. 276, 38 S. Ct. 237, 62 L. Ed. 713 (1918)* .

(n25)Footnote 24. *Insinga v. LaBella, 845 F.2d 249, 253 (11th Cir. 1988)* .

(n26)Footnote 25. *Insinga v. LaBella, 845 F.2d 249, 253-254 (11th Cir. 1988)* .

(n27)Footnote 26. *Lane v. Champion Int'l Corp., 844 F. Supp. 724, 729-730 (S.D. Ala. 1994)* (citizenship of fraudulently joined defendant is ignored for diversity purposes; removal permissible if otherwise timely).

(n28)Footnote 27. *Insinga v. LaBella, 845 F.2d 249, 253-254 (11th Cir. 1988)* .

(n29)Footnote 28. *See* [b], *above*.

(n30)Footnote 29. *28 U.S.C. § 1446*; *see S.W.S. Erectors v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996)* (maximum one year period for removal after commencement of action); *see also Davis v. Am. Med. Sec., Inc., 334 F. Supp. 2d 1292, 1292-1293 (N.D. Ala. 2004)* .

(n31)Footnote 30. *28 U.S.C. § 1446(b)*; *see Kinabrew v. Emco-Wheaton, Inc., 936 F. Supp. 351, 353 (M.D. La. 1996)* .

(n32)Footnote 31. *See 28 U.S.C. § 1332*.

(n33)Footnote 32. *See* [2], *below*.

(n34)Footnote 33. *McHugh v. Physicians Health Plan, 953 F. Supp. 296, 299-300 (E.D. Mo. 1997)* .

(n35)Footnote 34. *See Bush v. Cheaptickets, Inc., 425 F.3d 683, 688 (9th Cir. 2005)* .

(n36)Footnote 35. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 348-356, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* (unless named defendant agrees to waive service, summons continues to function as prerequisite that directs individual or entity to participate in civil action or forgo procedural or substantive rights).

(n37)Footnote 36. *See § 8.61[1][b][ii]*, *above*; *see also Estate of Combas Martinez v. Barros & Carrion, Inc., 668 F. Supp. 2d 334, 339-340 (D.P.R. 2009)* .

(n38)Footnote 37. *Webster v. Sunnyside Corp., 836 F. Supp. 629, 631 (S.D. Iowa 1993)* .

(n39)Footnote 38. *Hamilton v. Hertz Corp., 607 F. Supp. 1371, 1373-1374 (S.D.N.Y. 1985)* .

(n40)Footnote 39. *Sullivan v. Conway, 157 F.3d 1092, 1094 (7th Cir. 1998)* .

(n41)Footnote 40. *Hubbard v. Union Oil Co. of Cal., 601 F. Supp. 790, 793-794 (S.D. W.Va. 1985)* .

(n42)Footnote 41. *Miller v. Stauffer Chem. Co., 527 F. Supp. 775, 777-778 (D. Kan. 1981)* (citing **Moore's Federal Practice**).

(n43)Footnote 1. *28 U.S.C. § 1446*, Commentary to 1988 Amendments.

(n44)Footnote 2. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 348-356, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* .

(n45)Footnote 3. *Kiddie Rides USA, Inc. v. Elektro-Mobiltechnik GmbH, 579 F. Supp. 1476, 1479 (C.D. Ill. 1984)* (pleading seeking attachment order).

(n46)Footnote 4. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 1326-1330, 143 L. Ed. 2d 448 (1999)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART IV. PROCEDURES TO EFFECT REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.62

§ 8.62 Successive Removalsn*

Circumstances may arise when a defending party is required to remove the same action than once. The statutory removal scheme does not bar such successive removals, n1 provided that there is some changed factual circumstance or law between the time of the two notices of removal. n2 For example, if a district court remands a case to state court because the defendant failed to prove the jurisdictional amount, but the plaintiff after remand discloses that the amount in controversy is greater than the statutory amount in controversy, the defendant may file a second notice of removal. n3 Similarly, if one defendant's removal attempt fails, a later served defendant may file a second notice of removal. n4 However, if circumstances in the case have not changed to justify a second removal, such an attempt may subject the defendant to sanctions, for example, if the second notice is frivolous. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.30[4] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Green v. R. J. Reynolds Tobacco Co., 274 F.3d 263, 266-268 (5th Cir. 2001)* .

(n3)Footnote 2. *In re Mut. Fund Market Timing Litig., 468 F.3d 439, 444 (7th Cir. 2006)* (no block to successive removal if facts or law change after initial remand); *see Mattel, Inc. v. Bryant, 441 F. Supp. 2d 1081, 1089 (C.D. Cal. 2005)* (citing **Moore's Federal Practice**; new evidence may justify second removal notice).

(n4)Footnote 3. *Benson v. SI Handling Sys., Inc., 188 F.3d 780, 782-783 (7th Cir. 1999)* .

(n5)Footnote 4. *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 531-532 (6th Cir. 1999).*

(n6)Footnote 5. *Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457-458 (7th Cir. 2005)* (defense attorney

subject to monetary sanctions when second removal notice was deemed frivolous); *see § 8.84*.

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART IV. PROCEDURES TO EFFECT REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure §§ 8.63through 8.79

[Reserved]

§§ 8.63[Reserved]

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART V. PROCEDURES AFTER REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.80

§ 8.80 Remand of Case to State Courtn*

[1] Nature of Remand

A case is removed by the defendant filing a notice of removal that contains a statement of the grounds for removal. At the time of removal, there has been no ruling or approval of the removal by the court. n1 A motion for remand is a procedure that allows the plaintiff to contest removal, and for the court to either approve the removal or to rule that it is not proper; remand is the procedure the court uses to send the case back to the state court. n2 Remand is a statutory process, which generally provides that if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case must be remanded to the state court. n3

[2] Grounds for Remand

[a] Lack of Subject Matter Jurisdiction

The removal statute provides for remand due to lack of subject matter jurisdiction, and distinguishes such ground from defects in removal procedure, n1 also a ground for remand under the statute. n2 For purposes of remand, the lack of subject matter jurisdiction consists of either a lack of federal question jurisdiction, diversity in citizenship, n3 or other basis for federal jurisdiction, such as supplemental jurisdiction. n4 Lack of subject matter jurisdiction may not be waived, either by the court or by the parties. n5 The primary characteristics of remand for lack of subject matter jurisdiction are that remand is mandatory n6 and the remand order is not subject to appeal. n7

[b] Defect in Removal Procedure

A district court may remand a removed action for any defect in the removal procedure. n8 In general, a defect in removal procedure refers to any defect that concerns any issue other than the issue of whether the case could originally have been filed in federal district court, and the term includes all non-jurisdictional defects existing at the time of removal. n9 For example, a defendant's filing of a notice of removal after the 30-day time period is a procedural defect. n10 Similarly, the failure of all the defendants to join in the removal notice constitutes a procedural defect. n11

A notice of removal is procedurally defective if it alleges diversity in an insufficient manner or fails to explain a

defendant's failure to join in the notice of removal, n12 or if the notice insufficiently pleads the plaintiff's residence n13 or amount in controversy. n14 The defendant may remedy such notice defects by filing a motion to amend the notice of removal. n15 The defendant may not amend the notice of removal after the 30-day filing period to add a new, separate basis for removal. n16

The plaintiff has 30 days after the filing of notice of removal to move for a remand based on a procedural defect, n17 and if the court grants the remand, the remand order is not reviewable by the court of appeals. n18 However, if the plaintiff fails to move for remand based on a defect in the removal procedure within 30 days of removal, the defect is waived. n18.1 Furthermore, if subject matter jurisdiction actually exists at the time of judgment, any procedural defect in removal is deemed cured. n18.2 If the judgment reached by the district court must be reversed and the case remanded to the district court for further proceedings, however, the district court in turn must remand the removed case to the state court, because the factors of efficiency, economy, and the interest in finality no longer require retrial in federal court. n19

[c] Abstention

Abstention is a judicially created doctrine that allows a federal court to decline to exercise its otherwise valid subject matter jurisdiction over a case that is pending or that could be litigated in state court. Although federal courts generally have a strict duty to exercise jurisdiction that is conferred on them by Congress, n20 the rule is not absolute, and federal courts may decline to exercise their jurisdiction in exceptional circumstances, such as when denying a federal forum would clearly serve an important interest. n21

With respect to removal, some courts exercise their discretion to abstain from deciding the federal claim that forms the basis for removal, thus deferring to the resolution of state law issues, provided that the reasons for abstention are sufficiently strong to justify a decision to remand a properly removed case. n22 Usually such a court will retain or dismiss the federal claims rather than remand the federal claims with the state claims. n23

The Supreme Court has held that an abstention based remand after removal is inappropriate in suits at law seeking, among other things, contract and tort damages, because the abstention doctrine is limited to equitable cases. Furthermore, in equitable cases, the court's determination whether to remand or dismiss must balance the federal interests in retaining jurisdiction over a dispute involving federal law with the competing concern for the independence of state action in maintaining uniformity in the treatment of local problems. n24

An abstention-based remand order does not fall into either category of remand order described in Section 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure. Therefore, the restrictions against appellate review do not apply, and a circuit court may review a remand order premised on abstention. n25

[3] Initiation of Remand

[a] Remand on Court's Own Initiative

Whenever the federal district court determines at any time before final judgment that it lacks subject matter jurisdiction over a removed case, the court must remand the case. Not only is this type of remand allowed on the court's own initiative, it is mandatory under the remand statute. n1 On the other hand, if the court has subject matter jurisdiction, and a defect in removal is procedural, the authorities are split on whether district court may remand the case sua sponte. n2

Before an amendment to the statute, a court could remand a removed case at any time before final judgment if it appeared that the case was removed improvidently and without jurisdiction. The amendment significantly changed the rule. Although courts may still remand removed cases on their own motion for lack of subject matter jurisdiction, the statute was amended to state that, with respect to remands grounded on procedural defects, a "motion" to remand must

be made within 30 days after the filing of the notice of removal. n3 Most courts correctly hold that a district court may not remand a removed case on its own motion based on defects in the removal procedure. n4 These courts emphasize that the statute specifically gives the court concern for subject matter jurisdiction issues, which may not be waived, and the parties, by virtue of the inclusion of the word "motion," concern for procedural formalities, which are waivable and do not affect jurisdiction. n5

On the other hand, a few district courts have ruled that (1) the phrase "motion to remand" includes a district court's sua sponte remand; (2) the amendments were not intended to limit a court's power to remand a case sua sponte; and (3) remand orders must be sought within 30 days after the filing of the notice of removal. n6 Thus, some courts have held that district courts may remand sua sponte for procedural defects, but only within the 30-day period for remand motions based on procedural defects, n7 while some courts have held that a sua sponte procedural remand may be made at any time. n8 Finally, some cases hold that a court may remand an action on its own initiative based on abstention grounds. n9

[b] Motion for Remand By Party

If the federal court lacks subject matter jurisdiction, the court, the party making a claim for relief, or the party defending against a claim may request to remand a removed case to state court. n10 Typically, it is a plaintiff who makes a motion to remand, requesting to return to the forum previously selected by the plaintiff by filing the claim, n11 because a defendant is ordinarily the party initiating removal. n12 A removing defendant may make a motion for remand but should be careful because the defendant making such a motion may be subject to sanctions for improper removal. n13 A defendant who was not served before removal and who did not join in the notice of removal may move to remand on any grounds. n14

[4] Time Limit for Making Motion for Remand

[a] When Basis For Remand is Lack of Subject Matter Jurisdiction

The federal district court must remand a case whenever it appears that the district court lacks subject matter jurisdiction, at any time before final judgment. n1 Because a court has an obligation to correct its lack of subject matter jurisdiction for removal at any time, there is no time limit for a remand after removal when the grounds is lack of jurisdiction; n2 the 30-day limit time limit for remand applies only to *procedural* objections, and not to a lack of subject matter jurisdiction. n3 In diversity cases, the crucial time for a jurisdiction determination is at the time of removal. n4 In making a determination of whether diversity jurisdiction actually existed at the time of removal, the district court may consider matters introduced into the record after the case was removed. Such matters may be considered to the extent they reveals the circumstances existed when the case was removed. n5

It should be noted, however, that the district court may not dismiss a removed case if the court lacks subject matter jurisdiction, but rather must remand the case to state court, even when the district court believes that prosecution of the case in state court on the merits would not be successful. n6

[b] When Basis For Remand is Defect in Removal Procedure

A motion to remand a case based on a defect in the removal procedure must be filed within 30 days after the filing of the notice of removal in federal court. n7 This 30-day limit has been strictly construed by the courts. n8 The 30-day period begins on the date that the notice of removal is filed, not from the date the plaintiff is served with the notice. n9 Because the notice is effective on filing and not service, the three days usually added to the time period are not added even if the notice of removal was mailed or sent electronically to the plaintiff. n10 A party that fails to object to a procedural defect in the removal of the case within the 30-day limit waives its right to object. A procedural defect may not be raised after the expiration of the 30-day period, regardless of whether a motion to remand was timely filed within the 30-day period. n11

[c] Waiver Regarding Time Limit

If a plaintiff moves to remand to state court after the applicable time limit, n12 and the defendant does not object to the late motion, the defect is waived and the district court may remand the case. n13 Plaintiffs are also subject to waiver. For example, a plaintiff who fails to move for remand within the 30 days may not complain to the court of appeals that the case should not have been removed because of a lack of subject matter jurisdiction at the time of removal if a ground for subject matter jurisdiction existed at the time of judgment. n14 Furthermore, if a plaintiff takes affirmative action in the federal court prior to making a motion to remand, the plaintiff may waive the right to seek remand even if the 30-day period has not expired; for example, by the plaintiff filing a supplemental complaint in the federal court after the notice of removal is filed. n15 However, a plaintiff does not waive the right to make a motion for remand merely because the plaintiff attacks a notice of removal on one ground, but fails to attack it on another ground. n16

[5] Hearing on Motion to Remand

Once a defendant has filed a notice of removal to remove a case to federal court, the defendant has the burden of establishing federal jurisdiction. n1 A defendant who has removed a case also has the burden of proving the grounds necessary to support removal when the plaintiff attempts to remand the case, n2 including compliance with procedural requirements. n3 At the hearing on the motion, the parties may present the plaintiff's complaint, as it is stated at the time of removal, and the defendant's notice of removal. n4

[6] Determination of Motion to Remand

[a] Discretion of Court

The district court does not have broad discretion when deciding whether to retain or remand an action. n1 The Supreme Court has held that a district court may remand an action only when it lacks subject matter jurisdiction or when there is a procedural defect. n2 The only exception to this general rule is that, in limited circumstances when the case raises claims for equitable relief, the federal court may abstain. n3 Even in such cases, the proper disposition is to stay the federal action rather than remand. n4 When a court makes a determination and order regarding remand, the court should articulate its reasoning, including statutory authority, to facilitate appellate review. If the district court fails to specifically state its reasoning and statutory authority for its remand decision, the appellate court must determine by independent review the actual grounds for remand. n5

[b] Consideration of Personal Jurisdiction

The Supreme Court has held that, when appropriate, district courts have discretion in motions to remand to consider issues of personal jurisdiction before the issue of subject matter jurisdiction. n6 This ruling validates the long-standing practice of many district courts who routinely decided relatively easy motions to dismiss for lack of personal jurisdiction before analyzing the more difficult questions involving subject matter jurisdiction presented by the case. n7 Although federal courts should ordinarily determine subject matter jurisdiction questions first, a court's jurisdiction to determine whether it has jurisdiction encompasses both subject matter and personal jurisdiction. Although a federal court must satisfy itself of its subject matter jurisdiction before considering the merits of a case, that principle does not dictate a sequencing of jurisdictional determinations. Rather, both subject matter jurisdiction and personal jurisdiction are essential to a district court's power to adjudicate a case on the merits. The Court also concluded that removed actions present no special circumstances that require that subject matter jurisdiction be addressed first, and pointed out that issue preclusion could also result from a district court's ruling that it lacked subject matter jurisdiction in a removed case. n8

Similarly, federal courts may make issue-preclusive rulings about state law in the exercise of supplemental jurisdiction. n9 The Supreme Court found that principles of cooperation and comity, essential to the coexistence of federal and state court systems, afford federal courts leeway to exercise discretion in deciding whether to rule on subject matter

jurisdiction or personal jurisdiction, weighing the state's dignitary interest as well as concerns of judicial economy and restraint. Therefore, when concerns of judicial economy and restraint are considerable, such as when a straightforward question of personal jurisdiction turns on settled law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, a federal court does not abuse its discretion by turning directly to personal jurisdiction. n10

[c] Order of Remand

[i] State Court Subject of Remand

When the federal court has decided to remand, it must remand the case to the state court from which the case was removed. n10 Even if an action is transferred after removal to a different federal district court, that court may remand only to the state court from which the case was removed. The transferee federal court may not remand the case to a state court in the transferee's district. n11 Because a court may only remand to the state court from which the case was removed, it is irrelevant that state law provides that venue may be improper in that state court. n12

[ii] Remand of Less Than All Claims

Whenever a separate and independent federal question claim or cause of action is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed, and then the district court may determine all issues removed, or the court has discretion to remand all matters in which state law predominates. n13 However, it is not entirely settled whether a removal under Section 1441(a) permits a court to remand an entire case back to state court, as is the case with a Section 1441(c) removal. Some courts have held that Section 1441(c) may provide the basis for remanding an entire case, even if the removal was based on Section 1441(a). n14 However, some courts have determined that there was no authority for that proposition. n15 These courts note that Section 1441(c) grants the district court only limited authority to remand a case, and a district court exceeds its authority if it remands a case on grounds not expressly permitted by statute. n16

Section 1441(c) grants the district court only limited authority to remand a case; thus, a district court exceeds its authority if it remands a case on grounds not expressly permitted by that provision. Federal question jurisdiction is not discretionary with the court. n17 Another court concluded that the phrase "matters in which State law predominates" in Section 1441(c) does not authorize the remand of claims arising under federal law which are properly removed and which fall within the district court's subject matter jurisdiction. n18

[7] Appeal of Order Regarding Remand

[a] Order Denying Motion to Remand

[i] Order is Not Final

A refusal to remand by itself is not a final order and may not be reviewed unless and until a final judgment is entered. n1 Furthermore, unless the denial of the motion to remand is one of the few instances in which an interlocutory appeal is permissible, a court's decision to deny remand and to retain the case is not subject to interlocutory review. n2 After the case reaches final judgment, the issue of removal is reviewable on appeal from the final judgment. n3

[ii] Order Is Appealable if Certified

The order denying a motion to remand may be immediately reviewable if the order is certified. n4 Whenever a district judge in a civil action issues an order that is not otherwise appealable, and the judge believes that (1) the order involves a controlling question of law as to which substantial grounds exist for a difference of opinion, and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge must so certify in the order. The court of appeals, in its discretion, may permit an immediate appeal if the party seeking remand files an

application within 10 days after the entry of the order denying remand. n5

[iii] Appeal in Conjunction With Other Appealable Orders

The denial of a motion to remand may be appealed when the court has issued another order that is subject to immediate appeal. Thus, if an appeal from an order denying a motion to remand is joined with an appeal from an order granting or denying a motion for preliminary injunction, an appellate court may review the order denying the motion to remand at that time, and need not wait for final judgment or certification. n6 Similarly, the entry of judgment in favor of nondiverse defendants determined to have been fraudulently joined permits review of an order denying remand. n7 The rationale for such a rule is that once an appeal is proper, no good reason prevents the removal issue from being raised in connection with the other appeal, and to do so would prevent waste of judicial resources. n8

[iv] Writ of Mandamus

If a court denies a motion to remand, the court retains the case. The order denying remand is not by itself a final order, but rather an interlocutory order. An interlocutory order may be reviewed before final judgment only in limited circumstances. In the case of an order denying remand, one of the ways a party may request review of the order is by writ of mandamus, n9 but only if the party meets the extremely rigid requirements to obtain the writ. n10 Mandamus is an extraordinary remedy, however, available only in extraordinary situations if the party seeking the writ demonstrates a clear and indisputable right to the writ. n11 For example, a petition for a writ of mandamus must demonstrate that the district court committed a clear error of law in retaining the case, approaching the magnitude of an abuse of judicial power, or a failure to exercise that power when under a duty to do so. n12 A writ of mandamus is appropriate when the denial of immediate review of an order denying remand would render any subsequent review impossible. n13

[b] Order Granting Motion to Remand

[i] When Order is Based on Lack of Subject Matter Jurisdiction

[A] General Rule That Order is Not Appealable

By statute, an order granting a motion to remand a case to the state court from which it was removed is generally not reviewable on appeal or otherwise. n14 This means that any remand order issued on the grounds stated in Section 1447(c) n15 (lack of subject matter jurisdiction or procedural defect in the removal) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court. n16 Thus, whenever a court makes a remand order based on a lack of subject matter jurisdiction or procedural defect, that order is not subject to review, even if the district court does not label those as the grounds for the remand, n17 or cite or refer to Section 1447. n18 Additionally, remand orders based on Section 1447(e) are not reviewable. Section 1447(e) gives the court discretion to join additional defendants whose joinder would destroy subject matter jurisdiction and remand the case to state court. n19 It has been held that such orders fall within general prohibition on review of remand orders provided by Section 1447(d). n20 An appellate court may, however, evaluate the merits of an unreviewable remand order in the context of an immediate appeal of an order awarding attorney's fees and costs under Section 1447(c). n21

[B] Exception for Substantive Decision

The "substantive decision" exception to the general rule that remand orders are not subject to appellate review n22 is an exception that distinguishes between jurisdictional and substantive aspects of the remand order; the exception applies only if the remand order is based on a substantive decision on the merits of a collateral issue, rather than on subject matter jurisdiction. n23 Thus, if a federal district court remands after making a substantive decision on the merits of an issue, other than subject matter jurisdiction, that the court had jurisdiction to examine and the substantive decision is conclusive, the remand is reviewable. n24 An order is conclusive if it has the preclusive effect that it is functionally unreviewable in state court. n25

Two types of collateral matters may be subject to the substantive decision exception:

1. If the issue pertains to the substantive rights of the parties; for example, courts of appeals may review district court decisions on the enforceability of forum selection clauses n26 and that a defendant waived the right to remove. n27

2. Even if intrinsic to the district court's decision to remand, a decision that alters the contours of the remanded action is reviewable. For example, if a district court dismisses a diverse third party and a third-party claim before remand, that substantive decision is reviewable, because it is binding on the parties, conclusive as to the third party, and is separable from the remand order. n28 In the same way, if the district court remands an action on foreign sovereign immunity grounds, the decision is reviewable. The order changes the complexion of the lawsuit because the determination of sovereign immunity would be binding on the state court. n29 If a federal court makes a decision, correctly or incorrectly, that it lacks subject matter jurisdiction and remands on that basis, a court of appeals has no jurisdiction to review. n30 This prohibition against appellate review applies even if the remand order is made by the court on its own motion. n31

[ii] When Order is Based on Procedural Defect

In general, an order granting a motion to remand a case to the state court from which it was removed is not reviewable, either on appeal or otherwise n32 when the remand order is based on grounds stated in Section 1447(c). n33 Thus, remand orders based on a timely raised defect in removal procedure are not subject to review, regardless of whether the remand order is erroneous, and whether the trial court characterizes the grounds as procedural. n34 Thus, a remand order based on a defendant's failure to file the removal notice within the prescribed 30-day time limit is not subject to review. n35 Similarly, a remand order based on the fact that less than all of the defendants joined in the notice of removal within the 30-day limit is not reviewable because it is based on a procedural defect. n36

[iii] When Order is Based on Some Other Grounds

Only remand orders made pursuant to, and specifying the statutory grounds listed in, Section 1447(c) are immune from review. n37 Thus, remand orders based on a lack of subject matter jurisdiction n38 as well as remand orders based on a procedural defect n39 are clearly within the scope of Section 1447(c) and not subject to review. n40 The statutory grounds of lack of subject matter jurisdiction and the existence of procedural defects are not the exclusive grounds on which a district court may remand a removed case, and other grounds are subject to review. n41 Some of these grounds are:

1. A remand order based on the abstention doctrine. n42 or based on the district court's crowded docket. n43

2. A remand order based on a determination that a forum selection clause barred removal. n44

3. A remand order based on a determination that a party waived its removal rights. n45

4. A remand order based on public policy considerations. n46

[iv] Mechanism of Appeal

The Supreme Court has held that abstention-based remand orders are subject to immediate review on direct appeal under the collateral order doctrine. n47 In the case, the Court found that nonstatutory remand orders could constitute final judgments reviewable on appeal, in addition to being reviewed on petition for writ of mandamus or writ of prohibition. n48 Several circuits have interpreted the case broadly to authorize direct appeal of any remand order that is otherwise reviewable. n49

For example, some courts have held that review of a district court's decision to remand supplemental state claims under § 1367(c) is by direct appeal, rather than by petition for writ of mandamus. n50 Other courts have held that a remand order based on an untimely motion to remand for procedural defects or an untimely sua sponte order to remand for procedural defects is reviewable by direct appeal, rather than by mandamus. n51 Before the Supreme Court decision, the courts of appeals had held that both these types of remand orders were reviewable by mandamus. n52

[c] Standard of Review

When an order regarding remand is in one of the limited categories of remand orders that is reviewable, n53 the standard for review is de novo. The de novo standard applies whether the order is a denial of a motion to remand n54 or a grant of a motion to remand. n55 An appeal of a remand order based on the abstention doctrine is also reviewed de novo. n56 On a petition for mandamus, however, the reviewing court will issue the writ only if there has been a usurpation of judicial power or a clear abuse of discretion. n57

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural Defects

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.41[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1446(d)*; *Rollwitz v. Burlington N. R.R., 507 F. Supp. 582, 584 (D.C. Mont. 1981)* (federal court need not issue any specific order to complete removal).

(n3)Footnote 2. *See Apoian v. American Home Prods., Corp., 108 F. Supp. 2d 454, 455-456 (E.D. Pa. 2000)* .

(n4)Footnote 3. *28 U.S.C. § 1447(c)*.

(n5)Footnote 1. *Payne v. Brake, 439 F.3d 198, 203-204 (4th Cir. 2006)* .

(n6)Footnote 2. *28 U.S.C. § 1447*; *see* [b], *below*.

(n7)Footnote 3. In *Re Atlas Van Lines, Inc., 209 F.3d 1064, 1067 (8th Cir. 2000)* (district court's remand based on lack of subject matter jurisdiction).

(n8)Footnote 4. *See City of Chicago v. International College of Surgeons, 522 U.S. 156, 165-166, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)* .

(n9)Footnote 5. *See Berger Levee Dist. v. United States, 128 F.3d 679, 680 (8th Cir. 1997)* .

(n10)Footnote 6. *28 U.S.C. § 1447(c)*; *see Apoian v. American Home Prods., Corp., 108 F. Supp. 2d 454, 455-456 (E.D. Pa. 2000)* .

(n11)Footnote 7. *28 U.S.C. § 1447(d)*; *see Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., 435 F.3d 127, 130-131 (2d Cir. 2006)* .

(n12)Footnote 8. *28 U.S.C. § 1447(c)*.

(n13)Footnote 9. *In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993)* .

(n14)Footnote 10. *Wilson v. General Motors Corp., 888 F.2d 779, 781 (11th Cir. 1989)* .

(n15)Footnote 11. *Payne v. Brake, 439 F.3d 198, 203-204 (4th Cir. 2006)* .

(n16)Footnote 12. *Home Owners Funding Corp. of Am. v. Allison, 756 F. Supp. 290, 291-292 (N.D. Tex. 1991)* .

(n17)Footnote 13. *In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993)* .

(n18)Footnote 14. *Harmon v. Oki Sys., 115 F.3d 477, 478-479 (7th Cir. 1997)* , *cert. denied, 522 U.S. 966 (1997)* .

(n19)Footnote 15. *CBS Inc. v. Snyder, 762 F. Supp. 71, 73-76 (S.D.N.Y. 1991)* .

(n20)Footnote 16. *O'Halloran v. University of Washington, 856 F.2d 1375, 1381 (9th Cir. 1988)* .

(n21)Footnote 17. *28 U.S.C. § 1447(c)*.

(n22)Footnote 18. *28 U.S.C. § 1447(d)*; *see Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., 435 F.3d 127, 130-131 (2d Cir. 2006)* (however, order remanding on procedural grounds made by untimely motion or on courts own initiative more than 30 days after removal is reviewable).

(n23)Footnote 18.1. *McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 653-654 (7th Cir. 1998)* .

(n24)Footnote 18.2. *Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1265-1267 (9th Cir. 1999)* .

(n25)Footnote 19. *Marshall v. Manville Sales Corp., 6 F.3d 229, 231-232 (4th Cir. 1993)* (reversing grant of summary judgment and remanded to district court to remand to state court for wrongful removal).

(n26)Footnote 20. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816-821, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n27)Footnote 21. *See Zwickler v. Koota, 389 U.S. 241, 248, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)* .

(n28)Footnote 22. *Minot v. Eckardt-Minot, 13 F.3d 590, 593 (2d Cir. 1994)* .

(n29)Footnote 23. *Hernandez v. Six Flags Magic Mountain, Inc., 688 F. Supp. 560, 563 (C.D. Cal. 1988)* .

(n30)Footnote 24. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714-715, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* .

(n31)Footnote 25. *See Schexnayder v. Entergy Louisiana, Inc., 394 F.3d 280, 283 (5th Cir. 2004)* .

(n32)Footnote 1. *Apoian v. American Home Prods., Corp., 108 F. Supp. 2d 454, 455-456 (E.D. Pa. 2000)* ; *see 28 U.S.C. § 1447(c)*; *Barbara v. New York Stock Exch., 99 F.3d 49, 53 (1996)* .

(n33)Footnote 2. *Compare Page v. City of Southfield, 45 F.3d 128, 132-134 (6th Cir. 1995) with Maniar v. Federal Deposit Ins. Corp., 979 F.2d 782, 785-786 (9th Cir. 1992)* ; *see also In re Bethesda Mem. Hosp., 123 F.3d 1407, 1410-1411 (11th Cir. 1997)* (assuming without deciding that district court may remand case sua sponte for defects in removal process).

(n34)Footnote 3. *28 U.S.C. § 1447(c)*.

(n35)Footnote 4. *Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 485 (2d Cir. 1998)* .

(n36)Footnote 5. *Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995)* .

(N37)Footnote 6. *Averdick v. Republic Fin. Servs. Inc., 803 F. Supp. 37, 41-42 (E.D. Ky. 1992)* .

(n38)Footnote 7. *Maniar v. Federal Deposit Ins. Corp., 979 F.2d 782, 785-786 (9th Cir. 1992)* .

(n39)Footnote 8. *Averdick v. Republic Fin. Servs. Inc., 803 F. Supp. 37, 41-42 (E.D. Ky. 1992)* .

(n40)Footnote 9. *Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969, 970-971 (9th Cir. 1992)* ; *see* [2][c], *above*.

(n41)Footnote 10. *See 28 U.S.C. § 1447(c)*; *see also Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* ; *Schexnayder v. Entergy La., Inc., 394 F.3d 280, 283-284 (5th Cir. 2004)* (court or any party may seek remand to rectify lack of jurisdiction).

(n42)Footnote 11. *See 28 U.S.C. § 1447(c)*.

(n43)Footnote 12. *See 28 U.S.C. §§ 1441(a), 1446(a)*; *see also Julien v. CCA of Tenn., 268 F. Supp. 2d 19, 21 (D.D.C. 2003)* (for lack of subject matter jurisdiction, removal court must remand case to state court from which defendants originally removed case).

(n44)Footnote 13. *See Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc., 984 F.2d 821, 822 (7th Cir. 1993)* .

(n45)Footnote 14. *Getty Oil v. Insurance Co. of N. Am., 841 F.2d 1254, 1263 (5th Cir. 1988)* .

(n46)Footnote 1. *Schexnayder v. Entergy La., Inc., 394 F.3d 280, 283-284 (5th Cir. 2004)* ; *see 28 U.S.C. § 1447(c)*; *Fed. R. Civ. P. 12(h)(3)*.

(n47)Footnote 2. *See Alvarez v. Uniroyal Tire Co., 508 F.3d 639, 641 (11th Cir. 2007)* .

(n48)Footnote 3. *See 28 U.S.C. § 1447(c)*; *see also* [b], *below*.

(n49)Footnote 4. *Campbell v. Stone Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007)* .

(n50)Footnote 5. *See Adkins v. Ill. Cent. R.R. Co., 326 F.3d 828, 833 (7th Cir. 2003)* .

(n51)Footnote 6. *Bromwell v. Michigan Mut. Ins. Co., 115 F.3d 208, 214 (3d Cir. 1997)* .

(n52)Footnote 7. *28 U.S.C. § 1447(c)*; *see 28 U.S.C. § 1446(a)*.

(n53)Footnote 8. *Air-Shields, Inc. v. Fullam, 891 F.2d 63, 65 (3d Cir. 1989)* .

(n54)Footnote 9. *28 U.S.C. § 1447(c)*.

(n55)Footnote 10. *Fed. R. Civ. P. 6(d)*; *see Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 566 (5th Cir. 1995)* .

(n56)Footnote 11. *See Northern Calif. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995)* .

(n57)Footnote 12. *See* [a], [b], *above*.

(n58)Footnote 13. *Student A v. Metcho, 710 F. Supp. 267, 269 (N.D. Cal. 1989)* .

(n59)Footnote 14. *Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 486-488 (2d Cir. 1998)* .

(n60)Footnote 15. *Koehnen v. Herald Fire Ins. Co., 89 F.3d 525, 528-529 (8th Cir. 1996)* .

(n61)Footnote 16. *See Michigan Affiliated Healthcare Sys. v. CC Sys. Corp., 139 F.3d 546, 549 (6th Cir. 1998)* .

(n62)Footnote 1. *Carpenter v. Wichita Falls Indep. Sch. Dist. 44 F.3d 362, 365-366 (5th Cir. 1995)* .

(n63)Footnote 2. *Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999)* (defendant has burden of proof to establish requisite amount in controversy in removal cases); *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* (when removal notice alleged nondiverse defendant was sham by plaintiff, defendant had burden to prove sham status against remand motion).

(n64)Footnote 3. *Parker v. Brown, 570 F. Supp. 640, 642 (S.D. Ohio 1983)* .

(n65)Footnote 4. *Miller v. Grgurich, 763 F.2d 372 (9th Cir. 1985)* .

(n66)Footnote 1. *Nordan v. Blackwater Sec. Consulting, LLC, 460 F.3d 576, 589 (4th Cir. 2006)* (if district court determines that it lacks subject matter jurisdiction over removed case or there is procedural defect in removal, it must remand).

(n67)Footnote 2. *Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 342, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976)* .

(n68)Footnote 3. *See* [2][c], *above*.

(n69)Footnote 4. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 719, 116 S. Ct. 1712, 135 L. Ed. 2d 1, 15, 22 (1996)* ; *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28, 31, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959)* .

(n70)Footnote 5. *Vincent v. Dakota, Minnesota & E. R.R. Corp., 200 F.3d 580, 581-582 (8th Cir. 2000)* .

(n71)Footnote 6. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-578, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* .

(n72)Footnote 7. *See Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996)* .

(n73)Footnote 8. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-588, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* .

(n74)Footnote 9. *See 28 U.S.C. § 1367*.

(n75)Footnote 10. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 588, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* .

(n76)Footnote 10. *28 U.S.C. § 1447(d)*.

(n77)Footnote 11. *Bloom v. Barry, 755 F.2d 356, 358 (3d Cir. 1985)* .

(n78)Footnote 12. *Petrofsky v. ARA Group, Inc., 878 F. Supp. 85, 86 (S.D. Tex. 1995)* .

(n79)Footnote 13. *28 U.S.C. § 1441(c)*.

(n80)Footnote 14. *See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1196 (9th Cir. 1988)* .

(n81)Footnote 15. *Williams v. Ragnone, 147 F.3d 700, 702-703 (8th Cir. 1998)* .

(n82)Footnote 16. *Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 787 (3d Cir. 1995)* .

(n83)Footnote 17. *Borough of West Mifflin v. Lancaster, 45 F.3d 780, 787 (3d Cir. 1995)* .

(n84)Footnote 18. *Kabealo v. Davis, 829 F. Supp. 923, 926 (S.D. Ohio 1993)* .

(n85)Footnote 1. *Huffman v. Saul Holdings Ltd. Partnership, 194 F.3d 1072, 1076 (10th Cir. 1999)* .

(n86)Footnote 2. *See Neal v. Brown, 980 F.2d 747, 748 (D.C. Cir. 1992)* , *cert. denied, 507 U.S. 1051 (1993)* .

(n87)Footnote 3. *O'Halloran v. University of Washington, 856 F.2d 1375, 1378-1379 (9th Cir. 1988)* .

(n88)Footnote 4. *28 U.S.C. § 1292(b)*; *see Sheeran v. General Electric Co., 593 F.2d 93, 97 (9th Cir. 1979)* , *cert. denied, 444 U.S. 868 (1979)* .

(n89)Footnote 5. *28 U.S.C. § 1292(b)*.

(n90)Footnote 6. *O'Halloran v. University of Washington, 856 F.2d 1375, 1378-1379 (9th Cir. 1988)* .

(n91)Footnote 7. *B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549-550 (5th Cir. 1981)* .

(n92)Footnote 8. *Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985)* .

(n93)Footnote 9. *Goins v. Hitchcock Indep. Sch. Dist., 424 F. Supp. 2d 902, 905 (S.D. Tex. 2003)* , *see 28 U.S.C. 1651(a)*.

(n94)Footnote 10. *In re Briscoe, 448 F.3d 201, 212-213 (3d Cir. 2006)* (discussion of requirements for mandamus to cure denial of removal).

(n95)Footnote 11. *Clorox Co. v. United States Dist. Court for Northern Dist., 779 F.2d 517, 519-520 (9th Cir. 1985)* .

(n96)Footnote 12. *Seedman v. United States Dist. Ct., 837 F.2d 413, 414 (9th Cir. 1988)* (mandamus appropriate when court vacated its sua sponte remand order and granted second removal petition based on same grounds as initial petition, because court lacked jurisdiction to reconsider).

(n97)Footnote 13. *Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 862-863 (7th Cir. 1984)* , *cert. denied, 469 U.S. 890 (1984)* .

(n98)Footnote 14. *28 U.S.C. § 1447(d)*.

(n99)Footnote 15. *28 U.S.C. § 1447(c)*.

(n100)Footnote 16. *Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 231-232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)* .

(n101)Footnote 17. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 641-642, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* ; *see* [ii], *below* (remand on grounds of procedural defect).

(n102)Footnote 18. *Ohio v. Wright, 992 F.2d 616, 616-619 (6th Cir. 1993)* .

(n103)Footnote 19. *28 U.S.C. § 1447(e).*

(n104)Footnote 20. *In re Florida Wire & Cable Co., 102 F.3d 866, 866-868 (7th Cir. 1996)* .

(n105)Footnote 21. *Mints v. Educational Testing Service, 99 F.3d 1253, 1257 1261 (3d Cir. 1996)* .

(n106)Footnote 22. *Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207, 1210-1211 (9th Cir. 1999)* .

(n107)Footnote 23. *Anusbigian v. Trugreen/Chemlawn, Inc., 72 F.3d 1253, 1256-1257 (6th Cir. 1996)* .

(n108)Footnote 24. *In re General Motors Corp., 3 F.3d 980, 983 (6th Cir. 1993)* .

(n109)Footnote 25. *Angelides v. Baylor College of Med., 117 F.3d 833, 836-838 (5th Cir. 1997)* .

(n110)Footnote 26. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 276-277 (9th Cir. 1984)* .

(n111)Footnote 27. *Clorox Co. v. United States District Court, 779 F.2d 517, 520 (9th Cir. 1985)* .

(n112)Footnote 28. *Armstrong v. Alabama Power Co., 667 F.2d 1385, 1387 (11th Cir. 1982)* .

(n113)Footnote 29. *Aquamar v. Del Monte Fresh Produce, 179 F.3d 1279, 1284-1285 (11th Cir. 1999)* .

(n114)Footnote 30. *Van Meter v. State Farm Fire & Casualty Co., 1 F.3d 445, 449 (6th Cir. 1993)* .

(n115)Footnote 31. *Anusbigian v. Trugreen/Chemlawn, Inc., 72 F.3d 1253, 1255-1257 (6th Cir. 1996)* .

(n116)Footnote 32. *28 U.S.C. § 1447(d).*

(n117)Footnote 33. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 641, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* .

(n118)Footnote 34. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 641-642, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* .

(n119)Footnote 35. *In re Uniroyal Goodrich Tire Co., 104 F.3d 322, 324, 325 (11th Cir. 1997)* .

(n120)Footnote 36. *Wilson v. General Motors Corp., 888 F.2d 779, 781 n.1 (11th Cir. 1989)* .

(n121)Footnote 37. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 640, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* .

(n122)Footnote 38. *See* [i], *above.*

(n123)Footnote 39. *See* [ii], *above.*

(n124)Footnote 40. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 640, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* .

(n125)Footnote 41. *Poore v. American-Amicable Life Ins. Co. of Texas, 218 F.3d 1287, 1289 (11th Cir. 2000)* ; *Smith v. Texas Children's Hosp., 172 F.3d 923, 925-927 (5th Cir. 1999)* .

(n126)Footnote 42. *See Schexnayder v. Entergy Louisiana, Inc., 394 F.3d 280, 283 (5th Cir. 2004)* .

(n127)Footnote 43. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 640, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)*

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(n128)Footnote 44. *Snapper, Inc. v. Redan, 171 F.3d 1249, 1260 (11th Cir. 1999)* .

(n129)Footnote 45. *Clorox Co. v. United States Dist. Court for Northern Dist., 779 F.2d 517, 520 (9th Cir. 1985)* .

(n130)Footnote 46. *Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 576 (4th Cir. 1989)* .

(n131)Footnote 47. *28 U.S.C. § 1291*; *see Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 719, 116 S. Ct. 1712, 135 L. Ed. 2d 1, 15, 22 (1996)* .

(n132)Footnote 48. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714-715, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* .

(n133)Footnote 49. *Ariail Drug Co. v. Recomm Int'l Display, 122 F.3d 930, 933 (11th Cir. 1997)* .

(n134)Footnote 50. *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n, 90 F.3d 797, 800-801 (3d Cir. 1996)* ; *see 28 U.S.C. § 1367(c)*.

(n135)Footnote 51. *In re Bethesda Mem. Hosp., 123 F.3d 1407, 1408 (11th Cir. 1997)* .

(n136)Footnote 52. *Executive Software N. Am., Inc. v. United States Dist Court, 24 F.3d 1545, 1548-1550 (9th Cir. 1994)* .

(n137)Footnote 53. *See* [a], [b], *above*.

(n138)Footnote 54. *1994 Exxon Chem. Fire v. Berry, 558 F.3d 378, 384 (5th Cir. 2009)* .

(n139)Footnote 55. *United Steel v. Shell Oil Co., 602 F.3d 1087, 1090 (9th Cir. 2010)* .

(n140)Footnote 56. *Privitera v. California Bd. of Medical Quality Assurance, 926 F.2d 890, 895 (9th Cir. 1991)* .

(n141)Footnote 57. *Schlagenhauf v. Holder, 379 U.S. 104, 110-111, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

Moore's Manual--Federal Practice and Procedure

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
PART V. PROCEDURES AFTER REMOVAL

1-8 Moore's Manual--Federal Practice and Procedure § 8.81

§ 8.81 Procedures Regarding Changes in Case After Removaln*

[1] When District Court Dismisses Federal Claims But State Claims Remain

If the federal claim which formed the basis of federal question jurisdiction in a removed case is dismissed by the district court, the court has discretion to determine whether to retain, remand, or dismiss the supplemental state law claims. n1 If the federal question is dismissed a short time after removal, the court ordinarily should remand rather than dismiss the case. n2 In determining whether to remand or dismiss the state law claim after the dismissal of the federal claim, remand is generally preferable to avoid potential procedural problems, such as the effect of a statute of limitation and the delay and cost of filing new pleadings in state court. n3

An order remanding state claims is subject to appellate review. n4 If the federal question is eliminated soon after removal, retaining the state law claims also may constitute an abuse of discretion. n5 On the other hand, if the district court dismisses the federal claims, and then remands the state law claims under Section 1367(c)(3), but the court of appeals reinstates the federal question claims, the district court may retain and adjudicate the state law claims. n6

[2] When Plaintiff Settles Claim But Third-Party Claims Remain

If the main action on which diversity jurisdiction depends is settled, federal jurisdiction over a third-party claim that existed when the trial began survives that settlement. n1 The general rule in diversity cases is that the jurisdictional requirements are determined at the time the notice of removal is filed, and that subsequent events do not defeat the district court's jurisdiction. n2 Similarly, if the plaintiff settles the federal claim on which jurisdiction is based, the federal court retains supplemental jurisdiction over the surviving third-party complaint. n3

[3] Modification of Amount in Controversy

Removability is generally ascertained as of the date that the notice of removal is filed by the defendant. n1 Therefore, if the plaintiff voluntarily lowers the amount in controversy after the defendant removes the case, that change does not deprive the federal court of jurisdiction, if the amount in controversy exceeded the jurisdictional minimum at the time of removal. n2 Furthermore, because the amount in controversy is determined by the amount demanded in good faith when the complaint is filed, rather than the ultimately sum of liability, n3 federal jurisdiction is not destroyed if the final

judgment is less than the jurisdictional amount. n4 If, however, the state court complaint does not allege a specific amount of damages, a post-removal declaration by the plaintiff that the amount in controversy is less than the jurisdictional requisite is sufficient to show a lack of removal jurisdiction, unless the defendant counters the plaintiff's declaration. n5

[4] Discretion of Court to Allow Joinder of Nondiverse Parties

If the plaintiff seeks to join additional defendants after removal, and the joinder of any additional defendants would destroy subject matter jurisdiction, n1 the court has discretion (1) to deny joinder of the nondiverse defendants and retain the action or (2) to permit joinder and remand the action to state court. n2 Once the plaintiff joins a nondiverse party, Section 1447(e) requires remand of the complaint to state court, because the district court no longer has subject matter jurisdiction. n3 This statute is designed to prevent a plaintiff from forum shopping by waiting until late in the case to join all nondiverse defendants, and then seek remand. n4 When the district court allows the joinder of nondiverse parties, the court of appeals has the power to dismiss those parties to cure defects in diversity jurisdiction. n5

This statutory grant of discretion provides no standards to guide the federal courts in exercising discretion; however, the courts have developed factors to consider, including the following: (1) whether there are any valid claims; (2) whether the person is required to be joined by *Rule 19 of the Federal Rules of Civil Procedure*; (3) whether the statute of limitations precludes naming the party in state court; (4) whether there was unexpected delay in joinder; (5) whether joinder is only for defeating diversity jurisdiction; and (6) whether denial would prejudice plaintiff. n6

[5] Dismissal by Plaintiff of Nondiverse Party

As a general rule, a plaintiff has the option to avoid removal and obtain an order of remand by joining a nondiverse party. If the plaintiff then voluntarily dismisses the nondiverse party, however, either before or after removal, the remaining defendant may remove, provided that the one-year maximum limit has not expired. n1 Although the voluntary dismissal may be through settlement or otherwise, n2 an informal or tentative settlement may be insufficient to create removability. n3 The question arises, however, whether judgment may be entered if the district court erroneously finds that subsequent events, such as settling claims against a non-diverse party, have rendered the case removable. If the jurisdictional defect is never remedied, the judgment will be vacated on appeal. If, however, the jurisdictional defect is remedied by the time the matter is adjudicated and judgment is entered, the Supreme Court has held that the judgment is still viable. n4

[6] Invocation of Federal Jurisdiction by Plaintiff Waives Remand

A plaintiff may not voluntarily invoke and then disclaim federal jurisdiction by the mechanism of a remand motion following removal. In other words, a plaintiff may not take affirmative action in federal court after removal without risking waiving the right to remand, even when the 30-day period has not expired. Thus, for example, when a plaintiff voluntarily amends the complaint in federal court, the plaintiff waives the right to seek remand. n1 This rule, however, does not limit challenges to subject matter jurisdiction, which are not subject to waiver and may be raised at any time. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalProceedingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice, § 107.41[2]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1548-1550 (9th Cir. 1994)* .

(n3)Footnote 2. *Payne v. Churchich, 161 F.3d 1030, 1043 (7th Cir. 1998)* (when district court dismisses all federal claims before trial, usual and preferred course is to remand state claims absent opposing considerations).

(n4)Footnote 3. *Payne v. Churchich, 161 F.3d 1030, 1043 (7th Cir. 1998)* .

(n5)Footnote 4. *Nelson v. Welch (In re Repository Techs., Inc.), 601 F.3d 710, 724-725 (7th Cir. 2010)* (standard is abuse of discretion).

(n6)Footnote 5. Harrell v. 20th *Century Ins. Co., 934 F.2d 203, 205 (9th Cir. 1991)* .

(n7)Footnote 6. *See Payne v. Norwest Corp., 185 F.3d 1068, 1071-1072 (9th Cir. 1999)* .

(n8)Footnote 1. *Hill v. Rolleri, 615 F.2d 886, 888-889 (9th Cir. 1980)* .

(n9)Footnote 2. *Campbell v. Stone Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007)* .

(n10)Footnote 3. *Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959)* ; *see 28 U.S.C. § 1367(c)* (court may decline to exercise its jurisdiction over third-party claim if all claims over which court had original jurisdiction have been dismissed).

(n11)Footnote 1. *Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993)* .

(n12)Footnote 2. *See Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565-566 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1041, 126 L. Ed. 2d 653 (1994)* .

(n13)Footnote 3. *Watson v. Blankinship, 20 F.3d 383, 387 (10th Cir. 1994)* .

(n14)Footnote 4. *Watson v. Blankinship, 20 F.3d 383, 387 (10th Cir. 1994)* .

(n15)Footnote 5. *See Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1041, 126 L. Ed. 2d 653 (1994)* .

(n16)Footnote 1. *Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 759 (7th Cir. 2009)* .

(n17)Footnote 2. *28 U.S.C. § 1447(e)*; *see Casa Office Machines, Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 674 (1st Cir. 1994)* .

(n18)Footnote 3. *Coley v. Dragon Ltd., 138 F.R.D. 460, 467 (E.D. Va. 1990)* .

(n19)Footnote 4. *Le Duc v. Bujake, 777 F. Supp. 10, 12 (E.D. Mo. 1991)* (joinder denied because made shortly before trial scheduled to commence).

(n20)Footnote 5. *Ingram v, CSX Transp., Inc., 146 F.3d 858, 862 (11th Cir. 1998)* .

(n21)Footnote 6. *Bonner v. Fuji Photo Film, 461 F. Supp.2d 1112, 1120 (N.D. Cal. 2006)* ; *see Hawthorne Land Co. v. Occidental Chem. Corp., 431 F.3d 221, 227 (5th Cir. 2005)* .

(n22)Footnote 1. *Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 336-337 (D.S.C. 1979)* .

(n23)Footnote 2. *Rowe v. Johns-Manville Corp., 658 F. Supp. 122, 123-124 (E.D. Pa. 1987)* (voluntary dismissal of all nondiverse defendants makes case removable).

(n24)Footnote 3. *Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689, 693-694 (5th Cir. 1995)* .

(n25)Footnote 4. *Caterpillar, Inc. v. Lewis, 519 U.S. 61, 73, 117 S. Ct. 467, 471, 136 L. Ed. 2d 437 (1996)* .

(n26)Footnote 1. *Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998)* (voluntarily amending complaint to add defendants constitutes waiver of defense of alleged defective removal); *Koehnen v. Herald Fire Ins. Co., 89 F.3d 525, 528-529 (8th Cir. 1996)* (although removal was untimely, plaintiff waived right to seek remand by moving to file supplemental complaint and seeking remand after motion was denied).

(n27)Footnote 2. *Berger Levee Dist. v. United States, 128 F.3d 679, 680 (8th Cir. 1997)* .

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PART II Jurisdiction; Venue; Removal
CHAPTER 8 REMOVAL FROM STATE COURTS
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1-8 Moore's Manual--Federal Practice and Procedure § 8.82

§ 8.82 Costs and Attorney's Feesn*

[1] Award of Costs and Attorney's Fees on Remand

When a federal court enters an order remanding a removed case to state court, the federal court has discretion to order the payment of all just costs and any actual expenses, including attorney's fees, that have been incurred as a result of the removal. n1 This provision for discretionary costs and attorney fees is a "fee shifting statute." Although the American Rule ordinarily requires parties to bear their own expenses, the primary purpose of this statute is to compensate the party opposing removal for the actual expenses of the unjustified and unnecessary removal which has complicated and extended the litigation. n2 When a party has wrongfully taken the opposition into a second judicial system, the wrongdoer must expect to cover the incremental costs. Another purpose of the statute is to deter wrongful removal. n3

"Just costs" include filing fees, process service fees, and similar fees for bringing the motion to remand. n4 Costs and fees "incurred as a result of removal" are limited to those incurred in federal court that would not have been incurred had the case remained in state court. Therefore, a party's costs of opposing removal, seeking remand, and other expenses incurred because of the improper removal may be awarded. n5 The court may award fees and expenses incurred as a result of a removal even if the plaintiff is not required to pay fees or expenses; thus, the court may award fees to attorneys that have taken the case on a contingent fee arrangement or a pro bono basis. n6

On the other hand, the plaintiff may not recover ordinary litigation expenses that would have been incurred had the action remained in state court. n7 Furthermore, the court may award the prevailing plaintiff costs and expenses only if the remand is based on a procedural defect or lack of subject matter jurisdiction. Thus, a plaintiff is not entitled to fees and costs if the remand is based on a non-statutory ground such as a forum selection clause that designates state court as the only proper venue. n8 Furthermore, fees and costs may not be imposed on defendants who are added after the case has been removed to federal court. n9

Even after remand has occurred, the district court retains jurisdiction to award costs and attorney's fees because an award of costs and attorney's fees is a collateral matter, and the district court retains jurisdiction over an award even though the court has otherwise been divested of jurisdiction over the merits of the case. n10

[2] Award of Costs and Fees Against Party Causing Wrongful Removal

The removal procedure statute clearly gives the court discretion to order payment of just costs, actual expenses, and attorney's fees that were incurred by a party as a direct result of a removal. n1 Because the purposes of this fee shifting statute are to compensate the opposition for a wrongful removal and to deter such removals, n2 the typical award is against a defendant. n3 However, courts have discretion to make awards under Section 1447(c) against remanding plaintiffs, especially in the unusual case when both the removal and remand has been caused by a plaintiffs' improper manipulative pleading practices. n4

[3] Court's Discretion to Award Costs and Attorney's Fees Based on Wrongful Removal

The court has considerable discretion in awarding costs and expenses in a remand order, but that discretion is not limited and guided by substantial legal principles. n1 Consequently, the Supreme Court has adopted a "just costs" standard for courts to use in awarding costs and fees in removal cases. Under this standard, the key factor in deciding whether to award fees is the propriety of removal, unless there are unusual circumstances; a court may award expenses and attorney's fees under Section 1447(c) only if the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis existed for the removal, the court should deny fees. n2

In applying the just costs standard, the district court retains discretion to consider whether unusual circumstances warrant a departure from the standard in a given case, while remaining faithful to the purposes of awarding fees, compensation and deterrence. For example, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. n3

Furthermore, a plaintiff is estopped from recovering costs and attorney's fees if the plaintiff's conduct after removal plays a substantial role in causing the case to remain in federal court, such as when the plaintiff improperly pleads the case so that federal jurisdiction appears from the face of the complaint, alleges federal court jurisdiction in subsequent amended complaints, fails to file a motion for remand, and opposes the defendants' motion to dismiss for lack of jurisdiction. n4

[4] Appellate Review of Award of Costs and Attorney's Fees

The court of appeals has jurisdiction to review for abuse of discretion the district court's decision whether to award costs and attorney's fees in a remand order. n1 An award of costs or attorney's fees is reviewable even though the underlying remand order is not subject to appellate review. n2 The propriety of an award of costs and fees is reviewed for abuse of discretion. n3 A district court abuses its discretion if it bases its expense or fee decision on a clearly erroneous finding of fact, an improper application of law to fact, or an erroneous legal standard. n4

An important aspect of appellate review of the propriety of an award of attorney's fees for improper removal is a consideration of the underlying remand order. In this regard, the removal procedure statute expressly prevents appellate court consideration of the merits of a remand order for purposes of invalidating the remand, such as a trial court decision concerning lack of subject matter jurisdiction. However, the appellate court may consider the merits of the remand determination for purposes of determining whether the district court abused its discretion by awarding attorney's fees and costs under Section 1447(c). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.41[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1447(c).*

(n3)Footnote 2. *MR Crescent City, LLC v. Draper (In re Crescent City Estates, LLC), 588 F.3d 822, 828-829 (4th Cir. 2009)* .

(n4)Footnote 3. *Martin v. Franklin Capital Corp., 546 U.S. 132, 140, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* .

(n5)Footnote 4. *Tenner v. Zurek, 168 F.3d 328, 330 (7th Cir. 1999)* (under *28 U.S.C. § 1447(c)*, expenses may be incurred as soon as process of removal is undertaken and until and including process of remand).

(n6)Footnote 5. *Mints v. Educational Testing Serv., 99 F.3d 1253, 1259 (3d Cir. 1996)* .

(n7)Footnote 6. *Gotro v. R & B Realty Group, 69 F.3d 1485, 1486-1488 (9th Cir. 1995)* .

(n8)Footnote 7. *Avitts v. Amoco Prod. Co., 111 F.3d 30, 32 (5th Cir. 1997)* , *cert. denied, 522 U.S. 977 (1997)* .

(n9)Footnote 8. *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 555 (9th Cir. 1991)* .

(n10)Footnote 9. *Avitts v. Amoco Prod. Co., 111 F.3d 30, 32 (5th Cir. 1997)* , *cert. denied, 522 U.S. 977 (1997)* .

(n11)Footnote 10. *Wisconsin v. Hotline Indus., 236 F.3d 363, 365 (7th Cir. 2000)* ; *see Husko v. Geary Elec., Inc., 316 F. Supp. 2d 664, 668 (N.D. Ill. 2004)* (district court retains jurisdiction to consider collateral matters after remand to state court, and attorney's fees may be awarded under separate order from order remanding case).

(n12)Footnote 1. *28 U.S.C. § 1447(c).*

(n13)Footnote 2. *Martin v. Franklin Capital Corp., 546 U.S. 132, 140-141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* .

(n14)Footnote 3. *See Concerned Citizens of Caro v. Mich. Ethanol, L.L.C., 396 F. Supp. 2d 814, 818 (E.D. Mich. 2005)* .

(n15)Footnote 4. *Millar v. Bart Dist., 236 F. Supp. 2d 1110, 1120-1121 (N.D. Cal. 2002)* .

(n16)Footnote 1. *Martin v. Franklin Capital Corp., 546 U.S. 132, 139, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* .

(n17)Footnote 2. *Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* ; *Howard v. St. Germain, 599 F.3d 455, 457 (5th Cir. 2010)* .

(n18)Footnote 3. *Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* .

(n19)Footnote 4. *Bankston v. Burch, 27 F.3d 164, 169 (5th Cir. 1994)* .

(n20)Footnote 1. *Circle Indus. USA, Inc. v. Parke Constr. Group, Inc., 183 F.3d 105, 108-109 (2d Cir. 1999)* .

(n21)Footnote 2. *Legg v. Wyeth, 428 F.3d 1317, 1320 (11th Cir. 2005)* .

(n22)Footnote 3. *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212, 1215 (9th Cir. 2000)* ; *K.V. Mart Co. v. United Food & Commercial Workers Union, 173 F.3d 1221, 1223 (9th Cir. 1999)* .

(n23)Footnote 4. *Bartholomew v. Town of Collierville, 409 F.3d 684, 686 (6th Cir. 2005)* .

(n24)Footnote 5. *Legg v. Wyeth, 428 F.3d 1317, 1320 (11th Cir. 2005)* (even though appellate court may not review decision to remand itself, appellate court must as part of its examination of award of fees, consider objective

validity of removing party's efforts, at the time that party attempted to remove case).

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1-8 Moore's Manual--Federal Practice and Procedure § 8.83

§ 8.83 Sanctionsn*

[1] For Improper Removal

A federal court pursuant to Rule 11 may impose sanctions when papers are filed containing statements that are not well grounded in fact and warranted by law. n1 A federal court is authorized to impose Rule 11 sanctions in the removal context, n2 even if the court determines that removal was improper on the ground that the federal court lacked subject matter jurisdiction. n3 In addition to its power under Rule 11, a federal court has inherent power in the removal context n4 to award attorney's fees as sanctions against a party or an attorney who acts in bad faith or whose conduct constitutes bad faith, n5 or a losing party who has acted vexatiously or for oppressive reasons. n6 Additionally, a court may award attorney's fees against an attorney's who unreasonably extends judicial proceedings under Rule 37, which imposes sanctions for failure to comply with a discovery order. n7

Improper removal does not, in and of itself, constitute bad faith or vexatious conduct; therefore, if the court grants a remand on the basis of improper removal, without additional factors, the order is insufficient to support an award of attorney's fees under Rule 11. n8 If a defendant removes without any objectively reasonable basis, however, the removal subjects the defendant's attorney to the imposition of sanctions; a good-faith belief in the truth of the jurisdictional facts alleged to support removal is insufficient without reasonable inquiry to support the objective reasonableness of that belief. n9 Rule 11 sanctions must be based on conduct in the federal court and may not be based on pleadings filed in state court. n10 However a court may impose sanctions under Rule 11 if a party later continues to advocate a paper in federal court even if that paper containing the misrepresentation was filed earlier in state court. n11

[2] For Frivolous Motion to Remand

Under Rule 11, a federal court may (1) award attorney's fees as sanctions against a party who acts in bad faith or whose conduct is vexatious, and (2) sanction a party who makes a frivolous motion for remand. n1 Additionally, when the district court imposes Rule 11 sanctions on a plaintiff who brings a frivolous suit, the court of appeals may uphold the sanctions even though it ultimately determines that district court lacks subject matter jurisdiction over the suit. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalPostremoval RemandsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.41[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 11(c).*

(n3)Footnote 2. *See McKinney v. Board of Trustees, 955 F.2d 924 (4th Cir.1992) .*

(n4)Footnote 3. *Hernandez v. Conriv Realty Assocs., 116 F.3d 35, 40-41 (2d Cir. 1997) .*

(n5)Footnote 4. *Miller v. Cardinale (In re DeVille), 361 F.3d 539, 546 (9th Cir. 2004) .*

(n6)Footnote 5. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-768, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) .*

(n7)Footnote 6. *Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974) .*

(n8)Footnote 7. *See Fed. R. Civ. P. 37*; *Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-768, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) .*

(n9)Footnote 8. *Schmitt v. Insurance Co. of N. Am., 845 F.2d 1546, 1552 (9th Cir. 1988) .*

(n10)Footnote 9. *Rockwell Intl. Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302, 304-305 (9th Cir. 1987)* (failure to accurately determine citizenship of removing party as grounds for sanctions).

(n11)Footnote 10. *Hurd v. Ralphs Grocery Co., 824 F.2d 806, 806-808 (9th Cir. 1987) .*

(n12)Footnote 11. *Fed. R. Civ. P. 11(b)*; *see Buster v. Greisen, 104 F.3d 1186, 1190 n.4 (9th Cir. 1997) .*

(n13)Footnote 1. *See Fed. R. Civ. P. 11(b), (c)*; *see also Chase v. Shop'N Save Warehouse Foods, Inc., 110 F.3d 424, 430-431 (7th Cir. 1997)* (Rule 11 sanctions imposed on remand motion that was frivolous because court had previously denied same motion in identical prior suit).

(n14)Footnote 2. *Buster v. Greisen, 104 F.3d 1186, 1188 (9th Cir. 1997) , cert. denied, 522 U.S. 981, 118 S. Ct. 441 (1997) .*

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1-8 Moore's Manual--Federal Practice and Procedure § 8.84

§ 8.84 Reconsideration After Order of Remandn*

A district court must remand a case to state court when it determines that the case was improvidently removed because of a lack of subject matter jurisdiction and may remand on the grounds of a defect in the removal procedure. n1 Remand orders based on these statutory grounds are not reviewable on appeal or otherwise. n2 This statutory provision has been construed to preclude not only appellate review but also reconsideration by the district court. n3 Once a district court certifies a remand order to state court, it is divested of jurisdiction and may not take any further action on the case. n4 Thus, if a remand order is based on statutory grounds, a district court has no jurisdiction to correct or vacate a remand order after a certified copy of the remand order is mailed or delivered to the clerk of the state court. n5

However, the federal court may vacate and correct an error prior to the time the remand order is certified to the state court. n6 Furthermore, a district court's remand order does not deprive the court of jurisdiction to consider a subsequent removal petition filed by a later-served defendant who was not involved in the first removal attempt. n7 If a remand order is based on grounds other than those set forth by statute, the district court has jurisdiction to reconsider and correct the order. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalPostremoval RemandsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 16 *Moore's Federal Practice,* § 107.42 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1447(c).*

(n3)Footnote 2. *28 U.S.C. § 1447(d).*

(n4)Footnote 3. *Tipp v. AmSouth Bank, 89 F. Supp. 2d 1304, 1306 (S.D. Ala. 2000)* .

(n5)Footnote 4. *In re Lowe, 102 F.3d 731, 733-736 (4th Cir. 1996)* (district court did not have jurisdiction to grant

defendant's motion for reconsideration of remand after entering remand order, even though no certified copy of order was mailed to state court).

(n6)Footnote 5. *Smith v. Texas Children's Hosp., 172 F.3d 923, 925 (5th Cir. 1999)* .

(n7)Footnote 6. *See Vogel v. United States Office Prods. Co., 258 F.3d 509, 518-519 (6th Cir. Mich. 2001)* .

(n8)Footnote 7. *Brierly v. Alusuisse Flexible Packaging, Inc., 170 F.3d 583, 587-588 (6th Cir. 1999)* .

(n9)Footnote 8. *Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 225-227 (3d Cir. 1995)* .

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1-8 Moore's Manual--Federal Practice and Procedure § 8.85

§ 8.85 State Court Jurisdiction After Remandn*

After the federal court has remanded a case back to state court, and the federal court mails a certified copy of the remand order to the state court, the remand is effected and the state court has jurisdiction to proceed with the case. n1 Generally, the state court must give effect to all pleadings filed in federal court and to all rulings made by the federal court while the case was in federal court. n2 Although the mailing of the copy of the remand order to the state court is automatic, counsel should order certified copies of the entire federal court file for the state court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 16 *Moore's Federal Practice,* § 107.43 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1447(c).*

(n3)Footnote 2. *Laguna Village, Inc. v. Laborers' Int'l Union of North America, 35 Cal. 3d 174, 180-181, 197 Cal. Rptr. 99, 672 P.2d 882 (1983) .*

(n4)Footnote 3. *See Whiddon Farms, Inc. v. Delta and Pine Land Co., 103 F. Supp. 2d 1310, 1314-1315 (S.D. Ala. 2000)* (federal district court loses jurisdiction immediately on entry of remand order).

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PART III Pleading Stage
1 SPECIAL ALERT TO CHAPTER 9

1-1 Moore's Manual--Federal Practice and Procedure Scope

Scope

Editor's Note:

On March 26, 2009, the Supreme Court submitted to Congress an order amending *Federal Rules of Civil Procedure 6*, *12*, *13*, *14*, *15*, *23*, *27*, *32*, *38*, *48*, *50*, *52*, *53*, *54*, *55*, *56*, *59*, *62*, *65*, *68*, *71.1*, *72*, and *81*, adding new Civil Rule 62.1, and amending Illustrative Forms 3, 4 and 60. The proposed changes will take effect on December 1, 2009, barring any Congressional action. Set forth below is a comparison of the amended rules with the rules as they appeared before the amendment. New matter is underlined; matter to be omitted is lined through. The explanatory Advisory Committee Notes are also set forth below.

Rule 6. Computing and Extending Time; Time for Motion Papers.

(a) Computing Time. The material within the following brackets is overstruck in the original. [The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:]

The material within the following brackets is overstruck in the original. [(1)] *The material within the following brackets is overstruck in the original. [Day of the Event Excluded.]* The material within the following brackets is overstruck in the original. [Exclude the day of the act, event, or default that begins the period.]

The material within the following brackets is overstruck in the original. [(2)] *The material within the following brackets is overstruck in the original. [Exclusions from Brief Periods.]* The material within the following brackets is overstruck in the original. [Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.]

The material within the following brackets is overstruck in the original. [(3)] *The material within the following brackets is overstruck in the original. [Last Day.]* The material within the following brackets is overstruck in the original. [Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or -- if the act to be done is filing a paper in court -- a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.]

The material within the following brackets is overstruck in the original. [(4)] *The material within the following brackets is overstruck in the original. ["Legal Holiday" Defined.]* The material within the following brackets is overstruck in the original. [As used in these rules, "legal holiday" means:]

The material within the following brackets is overstruck in the original. [(A)] The material within the following brackets is overstruck in the original. [the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and]

The material within the following brackets is overstruck in the original. [(B)] The material within the following brackets is overstruck in the original. [any other day declared a holiday by the President, Congress, or the state where the district court is located.] The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit*. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours*. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office*. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "*Last Day*"*Defined*. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "*Next Day*" *Defined*. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "*Legal Holiday*" *Defined*. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

* * *

(2) *Exceptions*. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)The material within the following brackets is overstruck in the original. [, except as those rules allow].

(c) Motions, Notices of Hearing, and Affidavits.

(1) *In General*. A written motion and notice of the hearing must be served at least The material within the following brackets is overstruck in the original. [5] 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) *Supporting Affidavit*. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least The material within the following brackets is overstruck in the original. [1] 7 days before the hearing, unless the court permits service at another time.

* * *

Committee Note of 2009

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local

rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc., 427 F.3d 1015, 1016 (6th Cir. 2005)* (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc., 900 F.2d 827, 832 (5th Cir. 1990)* (holding that *Bankruptcy Rule 9006(a)* governs treatment of date certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g., 2 U.S.C. § 394* (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.,* Rule 60(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day--and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005)* .

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days--including intermediate Saturdays, Sundays, and legal holidays--are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.,* Rule 14(a)(1).

Most of the 10 day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14 day period corresponds to the most frequent result of a 10 day period under the former computation method--two Saturdays and two Sundays were excluded, giving 14 days in all. A 14 day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period--the 14th day after a Monday, for example, is a Monday. This advantage of using week long periods led to adopting 7 day periods to replace some of the periods set at less than 10 days, and 21 day periods to replace 20 day periods. Thirty day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in

hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.,* William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure , 135 A.L.R. Fed. 259 (1996)* (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.,* D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941)* . Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rule 59(b) (motion for new trial "must be filed no later than 28 days after entry of the judgment"). A backward-looking

time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction--that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday--no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods--*i.e.*, periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday--no earlier than Tuesday, April 22.

The times set in the former rule at 1 or 5 days have been revised to 7 or 14 days. See the Note to Rule 6.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

(a) Time to Serve a Responsive Pleading.

(1) *In General*. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within The material within the following brackets is overstruck in the original. [20] 21 days after being served

with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within The material within the following brackets is overstruck in the original. [20] 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within The material within the following brackets is overstruck in the original. [20] 21 days after being served with an order to reply, unless the order specifies a different time.

* * *

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within The material within the following brackets is overstruck in the original. [10] 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within The material within the following brackets is overstruck in the original. [10] 14 days after the more definite statement is served.

* * *

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within The material within the following brackets is overstruck in the original. [10] 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within The material within the following brackets is overstruck in the original. [20] 21 days after being served with the pleading.

* * *

Committee Note of 2009

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 13. Counterclaim and Crossclaim.

* * *

(f) The material within the following brackets is overstruck in the original. [Omitted Counterclaim.] The material within the following brackets is overstruck in the original. [The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.] **[Abrogated]**

* * *

Committee Note of 2009

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered--as they should be--according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). *See 6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430 (1990)*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

* * *

Rule 14. Third Party Practice.

(a) When a Defending Party May Bring in a Third Party.

(1) *Timing of the Summons and Complaint*. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than The material within the following

brackets is overstruck in the original. [10] 14 days after serving its original answer.

* * *

Committee Note of 2009

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

* * *

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course within:

(A) The material within the following brackets is overstruck in the original. [before being served with a responsive pleading;] 21 days after serving it, or

(B) The material within the following brackets is overstruck in the original. [within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar] if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond*. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or withinThe material within the following brackets is overstruck in the original. [10] 14 days after service of the amended pleading, whichever is later.

* * *

Committee Note of 2009

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving

a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading.

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Rule 23. Class Actions.

* * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within The material within the following brackets is overstruck in the original. [10] 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * *

Committee Note of 2009

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

* * *

Rule 27. Depositions to Perpetuate Testimony.

(a) Before an Action Is Filed.

* * *

(2) *Notice and Service*. At least The material within the following brackets is overstruck in the original. [20] 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

* * *

Committee Note of 2009

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 32. Using Depositions in Court Proceedings.

(a) Using Depositions.

* * *

(5) *Limitations on Use*.

(A) *Deposition Taken on Short Notice*. A deposition must not be used against a party who, having received less than The material within the following brackets is overstruck in the original. [11] 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

* * *

(d) Waiver of Objections.

* * *

(3) *To the Taking of the Deposition*.

* * *

(C) *Objection to a Written Question*. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross question, within The material within the following brackets is overstruck in the original. [5] 7 days after being served with it.

* * *

Committee Note of 2009

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

* * *

Rule 38. Right to a Jury Trial; Demand.

* * *

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand--which may be included in a pleading--no later than The material within the following brackets is overstruck in the original. [10] 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may--within The material within the following brackets is overstruck in the original. [10] 14 days after being served with the demand or within a shorter time ordered by the court--serve a demand for a jury trial on any other or all factual issues triable by jury.

* * *

Committee Note of 2009

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 48. Number of Jurors; Verdict; Polling.

(a) Number of Jurors. A jury must The material within the following brackets is overstruck in the original. [initially have] begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Committee Note of 2009

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

* * *

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling.

* * *

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than The material within the following brackets is overstruck in the original. [10] 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than The material within the following brackets is overstruck in the original. [10] 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

* * *

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than The material within the following brackets is overstruck in the original. [10] 28 days after the entry of the judgment.

* * *

Committee Note of 2009

Former Rules 50, 52, and 59 adopted 10 day periods for their respective post judgment motions. Rule 6(b) prohibits

any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10 day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28 day period.

* * *

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings.

* * *

(b) Amended or Additional Findings. On a party's motion filed no later than The material within the following brackets is overstruck in the original. [10] 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

* * *

Committee Note of 2009

Former Rules 50, 52, and 59 adopted 10 day periods for their respective post judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10 day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28 day period.

* * *

Rule 53. Masters.

* * *

(f) Action on the Master's Order, Report, or Recommendations.

* * *

(2) *Time to Object or Move to Adopt or Modify*. A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than The material within the following brackets is overstruck in the original. [20] 21 days after a copy is served, unless the court sets a different time.

* * *

Committee Note of 2009

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 54. Judgment; Costs.

* * *

(d) Costs; Attorney's Fees.

(1) *Costs Other Than Attorney's Fees*. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on The material within the following brackets is overstruck in the original. [1 day's] 14 days' notice. On motion served within the next The material within the following brackets is overstruck in the original. [5] 7 days, the court may review the clerk's action.

* * *

Committee Note of 2009

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14 day period provides a better opportunity to prepare and present a response. The former 5 day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

* * *

Rule 55. Default; Default Judgment.

* * *

(b) Entering a Default Judgment.

* * *

(2) *By the Court*. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least The material within the following brackets is overstruck in the original. [3] 7 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:

* * *

Committee Note of 2009

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

Rule 56. Summary Judgment.

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The material within the following brackets is overstruck in the original. [The motion may be filed at any time after:]

The material within the following brackets is overstruck in the original. [(1)] The material within the following brackets is overstruck in the original. [20 days have passed from commencement of the action; or]

The material within the following brackets is overstruck in the original. [(2)] The material within the following brackets is overstruck in the original. [the opposing party serves a motion for summary judgment.]

(b) By a Defending Party. A party against whom relief is sought may move The material within the following brackets is overstruck in the original. [at any time], with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) The material within the following brackets is overstruck in the original. [Serving the] Time for a Motion, Response, and Reply; Proceedings. The material within the following brackets is overstruck in the original. [The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.]

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

* * *

Committee Note of 2009

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages--including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Rule 59. New Trial; Altering or Amending a Judgment.

* * *

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has The material within the following brackets is overstruck in the original. [10] 14 days after being served to file opposing affidavitsThe material within the following brackets is overstruck in the original. [; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation]. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than The material within the following brackets is overstruck in the original. [10] 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than The material within the following brackets is overstruck in the original. [10] 28 days after the entry of the judgment.

Committee Note of 2009

Former Rules 50, 52, and 59 adopted 10 day periods for their respective post judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10 day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28 day period.

Former Rule 59(c) set a 10 day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by stipulation. The apparent 20 day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10 day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until The material within the following brackets is overstruck in the original. [10] 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

* * *

Committee Note of 2009

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

(New) Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal.

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under *Federal Rule of Appellate Procedure 12.1* if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note of 2009

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under *Federal Rule of Appellate Procedure 12.1* if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 65. Injunctions and Restraining Orders.

* * *

(b) Temporary Restraining Order.

* * *

(2) *Contents; Expiration*. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed The material within the following brackets is overstruck in the original. [10] 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

* * *

Committee Note of 2009

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 68. Offer of Judgment.

(a) Making an Offer; Judgment on an Accepted Offer. The material within the following brackets is overstruck in the original. [More than 10] At least 14 days before the date set for trial The material within the following brackets is overstruck in the original. [begins], a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within The material within the following brackets is overstruck in the original. [10] 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

* * *

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least The material within the following brackets is overstruck in the original. [10] 14 days--before the date set for a hearing to determine the extent of liability.

* * *

Committee Note of 2009

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or--if liability has been determined--at least 10 days before a hearing to determine the extent of liability. It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

* * *

Rule 71.1. Condemning Real or Personal Property.

* * *

(d) Process.

* * *

* * *

(2) *Contents of the Notice*.

(A) *Main Contents*. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiffs attorney within The material within the following brackets is overstruck in the original. [20] 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

* * *

(e) Appearance or Answer.

* * *

(2) *Answer*. A defendant that has an objection or defense to the taking must serve an answer within The material within the following brackets is overstruck in the original. [20] 21 days after being served with the notice. The answer must:

* * *

Committee Note of 2009

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Rule 72. Magistrate Judges: Pretrial Order.

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within The material within the following brackets is overstruck in the original. [10] 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

* * *

(2) *Objections*. Within The material within the following brackets is overstruck in the original. [10] 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within The material within the following brackets is overstruck in the original. [10] 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

* * *

Committee Note of 2009

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 81. Applicability of the Rules in General; Removed Actions.

* * *

(c) Removed Actions.

* * *

(2) *Further Pleading*. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) The material within the following brackets is overstruck in the original. [20] 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;

(B) The material within the following brackets is overstruck in the original. [20] 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) The material within the following brackets is overstruck in the original. [5] 7 days after the notice of removal is filed.

(3) *Demand for a Jury Trial*.

* * *

(B) *Under Rule 38*. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within The material within the following brackets is overstruck in the original. [10] 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) *"State Law" Defined*. When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) *The material within the following brackets is overstruck in the original. [District of Columbia] "State" Defined* . The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory. The material within the following brackets is overstruck in the original. [When these rules provide for state law to apply, in the District Court for the District of Columbia:]

The material within the following brackets is overstruck in the original. [(A)] The material within the following brackets is overstruck in the original. [the law applied in the District governs; and (B)]

(3) *"Federal Statute" Defined in the District of Columbia*. In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

Committee Note of 2009

The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See the Note to Rule 6.

Several Rules incorporate local state practice. Rule 81(d) now provides that "the term 'state' includes, where appropriate, the District of Columbia." The definition is expanded to include any commonwealth or territory of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths and territories in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest. Official Forms

Form 3. Summons.

(Caption--See Form 1.)

To *name the defendant:*

A lawsuit has been filed against you.

Within The material within the following brackets is overstruck in the original. [20] 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under *Rule 12 of the Federal Rules of Civil Procedure*.

* * *

Form 4. Summons on a Third-Party Complaint.

(Caption--See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____ , who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____ .

Within The material within the following brackets is overstruck in the original. [20] 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under *Rule 12 of the Federal Rules of Civil Procedure*.

* * *

Form 60. Notice of Condemnation.

(Caption--See Form 1.)

* * *

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within The material within the following brackets is overstruck in the original. [20] 21 days [after being served with this notice][from (*insert the date of the last publication of notice*)]. Send your answer to this address: _____ .

* * *

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Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL

1-9 Moore's Manual--Federal Practice and Procedure 9.syn

§ 9.syn Synopsis to Chapter 9: PLEADINGS AND MOTIONS IN GENERAL

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART I. NATURE OF PLEADINGS AND MOTIONS

1-9 Moore's Manual--Federal Practice and Procedure § 9.01

§ 9.01 Significance and Purpose of Pleadingsn*

[1] Notice of Claims and Assertions

The federal court system uses a "notice pleading" procedure, which is designed to inform the court and all parties of the claims and defenses in the case without the necessity of pleading intricate details of claims and defenses at the outset of a case before discovery is developed. n1 However, it does establish a minimum threshold of factual notice before discovery will be allowed. n2 Thus, notice pleading requires at the minimum that a pleading give the opposition fair notice of the claim or defense pleaded, n3 the factual basis of the claim or defense, n4 and any relief requested. n5 To accomplish its purposes, notice pleading always requires a short and plain statement: from a claiming party, a statement which shows that the pleader is entitled to relief; n6 and from a defending party, which shows its defenses to each claim asserted against it. n7

[2] Elimination of Meritless Claims

In addition to providing notice of claims or defenses to the opposition, pleadings also serve the important purpose of identifying meritless claims or defenses at an early stage in litigation. n1 The federal pleading rules protect parties from undefined assertions and keep federal courts free of claims or defenses that are frivolous on their face. n2 On the other hand, if a claim is plausibly meritorious, a court should not dismiss the claim at least until factual discovery has occurred. Then, the court will grant a motion to dismiss if it appears beyond doubt that the claimant can prove no set of facts in support of the claim that would entitle the claimant to relief. n3 Thus, notice pleadings confine discovery within reasonable bounds and also sharpen issues to be litigated. n4

[3] Specification of Legal Parameters

In a pleading, each litigant states the facts that support the litigant's legal positions or assertions. Consequently, the legal parameters of the case are framed by the pleadings, and those legal parameters may not be expanded by the court on its own initiative. The district court generally may not infer claims that do not plainly appear on the face of the pleadings. n1 The notice pleading standard under Rule 8 is applicable in all civil actions. The foundation of the standard is the requirement that the pleader state facts that support a specified claim or defense, and not mere labels and conclusions of legal theories or a formulaic recitation of the elements of a cause of action. n2 Thus, notice pleading requires that a

pleading at least set forth minimal facts as to who did what to whom, when, and where. n3 However, in circumstances established by statute or rule, a court may impose heightened pleading requirements for a particular claim or defense. For example, there is a requirement in Rule 9(b) that a claiming party must state fraud or mistake with particularity; n4 and a defending party must explicitly state any affirmative defense, such as accord and satisfaction. n5 However, federal courts may not require a heightened pleading standard even though such a standard is required by the procedure or practice of the court in the state in which the federal court is located. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, § 8.09 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n3)Footnote 2. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n4)Footnote 3. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n5)Footnote 4. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* .

(n6)Footnote 5. *See Fed. R. Civ. P. 8(a)* (party making initial claim for relief); *Fed. R. Civ. P. 8(b)(1)(A), 13(a),(b)* (initial defending party's defenses and claims).

(n7)Footnote 6. *Fed. R. Civ. P. 8(a)(2).*

(n8)Footnote 7. *Fed. R. Civ. P. 8(b)(1)(A).*

(n9)Footnote 1. *Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002)* ; *Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 965 (N.D. Tex. 2006)* .

(n10)Footnote 2. *See Ciralsky v. CIA, 355 F.3d 661, 670-671 (D.C. Cir. 2006)* .

(n11)Footnote 3. *Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 228 (6th Cir. 2005)* .

(n12)Footnote 4. *In re Santa Barbara Copyright Infringement Litigation, 94 F.R.D. 105, 108 (D. Nev. 1982)* ; *see* [3] *below.*

(n13)Footnote 1. *GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1369 (11th Cir. 1998)* .

(n14)Footnote 2. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883 (2009)* .

(n15)Footnote 3. *Educadores Puertorriquenos En Accion v. Rey Hernandez, 367 F.3d 61, 66-68 (1st Cir. 2004)* (citing Moore's Federal Practice).

(n16)Footnote 4. *Fed. R. Civ. P. 9(b).*

(n17)Footnote 5. *Fed. R. Civ. P. 9(c)(1).*

(n18)Footnote 6. *Johnson v. Hondo, Inc., 125 F.3d 408, 417 (7th Cir. 1997)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART I. NATURE OF PLEADINGS AND MOTIONS

1-9 Moore's Manual--Federal Practice and Procedure § 9.02

§ 9.02 Comparison of Pleadings to Motions and Other Papersn*

[1] Distinction Between Pleadings, Motions, and Other Papers

There are two significant distinctions between pleadings on one hand and all other papers filed in a case, including motions, on the other hand. n1 The primary distinction under the federal rules between a pleading and any other paper filed in a civil case is the substantive content. A pleading is a particular type of document (such as a complaint) setting forth at least a single claim for relief or a particular type of document (such as an answer to a complaint) setting forth a response on the merits to at least a single claim for relief. n2 On the other hand, a motion is a request or application by a party to the court that the court make a particular order, without stating or defending against a claim for relief. n3

The second significant distinction between pleadings and motions and other papers is the difference in the requirements or formalities that must be fulfilled for a paper to have a legal effect as a pleading or as a motion. Generally, a pleading must be presented in accordance with the requirements for pleadings specified in Rules 8 through 11. n4 When a party presents a motion, it must be in accordance with the requirements for motions prescribed in Rule 7(b). n5 Therefore, for example, while a pleading must be set out in consecutively numbered paragraphs, n6 it is inappropriate for a party to use consecutively numbered paragraphs in a motion because a motion does not set out claims for relief or defenses to such claims. n7 The specific requirements for motions are specified in [2], *below*, and for other papers in [3], *below*. The specific requirements for pleadings are discussed in the sections that follow.

[2] Required Contents of Motions

A motion is an application to a court for an order. There are five requirements for a motion:

1. A motion must be made in writing, unless made at a hearing or at trial. n1

2. A motion must state with particularity the grounds for the motion. n2 If a motion fails to state any grounds for relief, or simply states that there are several grounds for relief without explaining them, the motion is insufficient under Rule 7(b)(1) and will be stricken. n3 The standard for particularity in Rule 7(b)(1) requires a reasonable specification of the factual and legal basis of the motion. n4 To suffice, a motion must provide notice of the grounds for relief to both the court and to the opposing party, n5 and

provide the opposing party with a meaningful opportunity to respond and the court with enough information to process the motion properly. n6 The particularity requirement of Rule 7(b)(1) may be supplemented by local district court rules that require a party to file written motions with attached briefs or memoranda that contain legal argument. n7

3. The motion must state the relief sought; n8 this is not necessarily the legal remedy requested by the motion; rather, it is the action of the court that the party is requesting, such as the grant of a new trial. n9

4. A motion must have a caption and format in the same form as a pleading. n10

5. All written motions must be signed. n11

[3] Other Papers Allowed

In addition to pleadings and motions, the federal rules recognize that there are other types of papers provided for by the rules of civil procedure rules but does not list or precisely define them. n1 The term "other papers" includes papers required by the civil procedure rules to be filed with the court, such as proof of service of process, n2 and notice of appeal. n3 The rules governing captions and other format matters in pleadings apply to other papers. n4 All other papers must also be signed. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, §§ 7.03-7.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Port of Stockton v. W. Bulk Carrier KS, 371 F.3d 1119, 1121 (9th Cir. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 7(a)* (specifying only seven types of pleading); *see Fed. R. Civ. P. 8(a), (b)* (contents of pleadings).

(n4)Footnote 3. *See Fed. R. Civ. P. 7(b)(1)*.

(n5)Footnote 4. *Warnock v. Pecos County, 116 F.3d 776, 779 (5th Cir. 1997)* .

(n6)Footnote 5. *See Fed. R. Civ. P. 7(b)*.

(n7)Footnote 6. *Fed. R. Civ. P. 10(b)*.

(n8)Footnote 7. *Jarzynka v. St. Thomas Univ. Sch. of Law, 310 F. Supp. 2d 1256, 1264-1265 (S.D. Fla. 2004)* .

(n9)Footnote 1. *Fed. R. Civ. P. 7(b)(1)(A)*; *see Taragan v. Eli Lilly & Co., 838 F.2d 1337, 1340-1341, 267 U.S. App. D.C. 387 (D.C. Cir. 1988)* (verbal motion is sufficient when hearing is electronically or stenographically recorded).

(n10)Footnote 2. *Fed. R. Civ. P. 7(b)(1)(B)*.

(n11)Footnote 3. *Allender v. Raytheon Aircraft Co., 439 F.3d 1236, 1240-1241 (10th Cir. 2005)* .

(n12)Footnote 4. *See Intera Corp. v. Henderson, 428 F.3d 605, 613 (6th Cir. 2005)* (citing **Moore's Federal Practice**; local rule may even require legal briefing).

(n13)Footnote 5. *Feldberg v. Quechee Lakes Corp., 463 F.3d 195, 197 (2d Cir. 2006)* .

(n14)Footnote 6. *Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1347 (Fed. Cir. 2005)* , *cert. denied, 126 S. Ct. 1768 (2006)* .

(n15)Footnote 7. *Intera Corp. v. Henderson, 428 F.3d 605, 612-613 (6th Cir. 2005)* (citing **Moore's Federal Practice**).

(n16)Footnote 8. *Fed. R. Civ. P. 7(b)(1)(C).*

(n17)Footnote 9. *Hatten-Gonzales v. Hyde, 579 F.3d 1159, 1166 (10th Cir. 2009)* (motion should have explicitly stated it requested modification or dissolution of injunction).

(n18)Footnote 10. *Fed. R. Civ. P. 7(b)(2).*

(n19)Footnote 11. *Fed. R. Civ. P. 11(a)*; see *§ 9.21.*

(n20)Footnote 1. *Fed. R. Civ. P. 7(b)*; *see Intera Corp. v. Henderson, 428 F.3d 605, 612-613 (6th Cir. 2005)* .

(n21)Footnote 2. *Fed. R. Civ. P. 4(l).*

(n22)Footnote 3. *Fed. R. App. P. 3(c).*

(n23)Footnote 4. *Fed. R. Civ. P. 7(b)(2).*

(n24)Footnote 5. *Fed. R. Civ. P. 11(a)*; *see § 9.21.*

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART I. NATURE OF PLEADINGS AND MOTIONS

1-9 Moore's Manual--Federal Practice and Procedure § 9.03

§ 9.03 Types of Pleadingsn*

[1] Federal Rules Restrict Types of Pleadings Permitted

The following are the only seven types of pleading allowed by the federal rules:

1. Complaint. n1

2. Answer to a complaint. n2

3. Answer to a counterclaim designated as a counterclaim. n3

4. Answer to a crossclaim. n4

5. Third-party complaint. n5

6. Answer to a third-party complaint. n6

7. If the court orders one, a reply to any answer. n7

No document other than those listed above has the effect of a pleading when filed in federal court. Thus, motions and other papers such as legal memos are not pleadings. n8 Whether a paper is a "pleading" within the rules is significant because that designation triggers many of the procedural rights, duties, and deadlines under the federal rules. n9 Pleadings are distinguished from other papers in that pleadings contain either allegations affirmatively stating a claim for relief or allegations stating a response on the merits to such a claim for relief. n10

Pleadings vary in type from one another based on the status of the party filing the pleading and whether the pleading states a claim for relief or is defending against a claim for relief. There are four types of claims that may be made in pleadings: an original claim made in a complaint, a counterclaim which is made against an existing party in an answer, a crossclaim, which is made against a party on the same side of the litigation, and a third-party claim, which is made

against a person not currently part of the litigation. n11 A complaint or third-party complaint usually contains only affirmative allegations of a claim for relief, n12 while any type of reply to an answer contains only allegations responsive to claims. n13 On the other hand, an answer may can contain both affirmative and responsive statements; for example, a defendant's answer to the initial complaint may not only respond to allegations of a claim but also state a counterclaim against the plaintiff. n14

[2] Complaint

A complaint is the initial pleading that commences a civil action. n1 It consists of allegations that state a claim for relief. n2 Thus, the complaint is an affirmative pleading which must provide the opposition with fair notice of what plaintiff's claims for relief are and the grounds on which the claims rest. n3

The text of a complaint must contain a short and plain statement of the grounds for the court's subject matter jurisdiction. Additionally, the complaint must contain a short and plain statement of the claim or claims, a showing that the complainant is entitled to relief, and a demand for judgment. n4 However, even though a plaintiff in a complaint need not state all of the detailed facts which form the basis of a claim, a pleading is insufficient if it offers mere labels and conclusions or a formulaic recitation of the elements of a cause of action. n5 Rather, the complaint must allege enough facts to state a claim to relief that is plausible on its face. n6 For a detailed discussion of the requirements of a complaint, see Ch. 10, *Plaintiff's Pleadings*.

[3] Answer to Complaint

An answer is a responsive pleading that must state allegations that contradict the allegations of the claims for relief stated in a complaint that has been filed by another person to commence a federal civil action. n1 The purpose of the defendant's answer is to notify the plaintiff and any other opposing parties of the allegations in the complaint that the defendant contests n2 and the allegations the defendant admits and will not be at issue in the trial. n3 Therefore, the answer must contain in short and plain terms the responding party's defenses to each claim asserted in the complaint. n4

Unless the court will hear a motion to dismisses the complaint, an answer must be filed within the time specified in the federal rules. n5 If the defendant fails to deny an allegation in a complaint which requires a response, other than the amount of damages, the failure will constitute an admission as to that matter. n6 Thus, if the defendant fails to state in its answer any affirmative defenses or avoidance, that matter will be waived. n7 In addition to responding to the allegations of the complaint, the answer may also state claims for relief by the answering party, such as counterclaims against an opposing party. n8 For a detailed discussion of the requirements and options in filing an answer, see Ch. 11, *Defendant's Response*.

[4] Answer to Counterclaim Designated as Counterclaim

A counterclaim is any affirmative claim for relief against an existing opposition party. Thus, a defendant's claim for relief against a plaintiff is a counterclaim. When a party makes a counterclaim designated as such, the party defending against the claim must respond in an answer. n1 If a party fails to respond to an opposing party's claim designated as a counterclaim, the failure may be considered an admission of the allegations within the counterclaim other than those involving damages. n2 The provision regarding designation of a counterclaim was added because of the difficulty of distinguishing between a counterclaim and certain affirmative defenses. Therefore, if a counterclaim is not designated as such, no answer is required; n3 however, if a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, if justice requires the court must treat the pleading as though it were correctly designated, and may impose terms for doing so. n4 For a detailed discussion of the requirements related to counterclaims and replies, see Ch. 11, *Defendant's Response*, Ch. 12, *Plaintiff's Response*, and Ch. 14, *Multiple Party Practice*.

[5] Answer to Crossclaim

A crossclaim is a claim against a person that is aligned on the same side as a co-party in the litigation, n1 If served with a crossclaim, the co-party must answer the crossclaim because a crossclaim involves a claim for relief that has not been stated in the prior pleadings, even though the claim arises from a transaction or occurrence or property that is the subject matter of the original action. n2 The answer to a crossclaim must itself contain any affirmative claims for relief against the co-party which filed the original claim, including compulsory or permissive counterclaims. n3 In turn, if the answer to a crossclaim contains an affirmative claim for relief, the co-party that is the object of the claim may be required to file a responsive pleading which is referred to as a reply. n4 For a detailed discussion of the requirements regarding crossclaims, see Ch. 14, *Multiple Party Practice*.

[6] Third-party Complaint

If a defending party asserts that a nonparty is or may be liable to it for all or part of a claim against it, the defending party may as "third-party plaintiff" serve a "third-party complaint" n1 on the nonparty, n2 who then becomes the "third-party defendant." n3 An original plaintiff may also file a third-party complaint against a nonparty when a counterclaim has been asserted against the plaintiff. n4 Because it is a defending party, a third-party defendant may in turn file a third-party complaint against another nonparty who is or may be liable to the third-party defendant for all or part of any claim against it. n5 When a third-party defendant comes into the lawsuit, the federal rules provide for the liberal filing of claims among the new parties. Thus, a plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff (original defending party). n6 For its part, the third-party defendant must assert in its answer any affirmative defenses and compulsory counterclaims it has against the party that filed the third-party complaint, and has the option to file crossclaims against other third party defendants and defenses and claims against the plaintiff. n7

For a detailed discussion of the requirements and options related to third-party complaints, see Ch. 14, *Multiple Party Practice*.

[7] Third-party Answer

When a nonparty is brought into litigation because an original defending party has filed a third-party complaint against the nonparty, n1 the former nonparty, now the "third-party defendant," must file a "third-party answer" in response to the third-party complaint. n2 The third-party defendant uses its answer as any defending party would. Therefore, at the risk of waiver for failure to do so, a third-party defendant is *required* to assert any defense against the third-party plaintiff's (original defending party's) claim under Rule 12, and any compulsory counterclaims against the third-party plaintiff under Rule 13(a). n3 In its answer, the third-party defendant also has the option to assert: any permissive counterclaims against the third-party plaintiff; any crossclaim against another third-party defendant; any defense that the third-party plaintiff has to the original plaintiff's claim; and any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff (original defending party). n4

For a detailed discussion of the requirements and options related to third-party answers, see Ch. 14, *Multiple Party Practice*.

[8] Reply to Answer

Whenever, any type of answer has be filed by any defending party, the court has the option, but is not required, to order that the party which has been served with the answer to file a reply in response to the answer. n1 If the answer contains a counterclaim the court will ordinarily allow a reply. Otherwise, the court will not usually order a reply unless there is a clear showing that it is necessary or that there are extraordinary circumstances of a compelling nature. n2

For a detailed discussion of the requirements and options related to a reply to an answer, see Ch. 12, *Plaintiff's Response*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDenialsCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, § 7.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 7(a)(1)*; *see* [2], *below*.

(n3)Footnote 2. *Fed. R. Civ. P. 7(a)(2)*; *see* [3], *below*.

(n4)Footnote 3. *Fed. R. Civ. P. 7(a)(3)*; *see* [4], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 7(a)(4)*; *see* [5], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 7(a)(5)*; *see* [6], *below*.

(n7)Footnote 6. *Fed. R. Civ. P. 7(a)(6)*; *see* [7], *below*.

(n8)Footnote 7. *Fed. R. Civ. P. 7(a)(7)*; *see* [8], *below*.

(n9)Footnote 8. *Mellon Bank v. Ternisky, 999 F.2d 791, 795 (4th Cir. 1993)* ; *Rhea v. Dollar Tree Stores, 395 F. Supp. 2d 696, 702 (W.D. Tenn. 2005)* .

(n10)Footnote 9. *Washington Mut. Bank v. Bellatrix, 2 F. Supp. 2d 1458, 1459 (N.D. Cal. 1997)* ; *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 992 F. Supp. 1218, 1223 (D. Nev. 1998)* (if person who has been served complaint files paper in case that does not constitute "answer," party has not filed "pleading," and may not be held to have waived unpleaded defenses).

(n11)Footnote 10. *Fed. R. Civ. P. 7(a)*; *see Fed. R. Civ. P. 8(a), 8(b)*; *Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 569 (6th Cir. 2003)* .

(n12)Footnote 11. *Del Carmen Montan v. Am. Airlines, Inc, 490 F.3d 99, 108 (2d Cir. 2007)* .

(n13)Footnote 12. *See Fed. R. Civ. P. 8(a)*.

(n14)Footnote 13. *See Fed. R. Civ. P. 7(a)(7)*.

(n15)Footnote 14. *See Fed. R. Civ. P. 13(a), (b)*.

(n16)Footnote 1. *Fed. R. Civ. P. 3*; *see BP Am. Prod. Co. v. Burton, 549 U.S. 84, 127 S. Ct. 638, 166 L. Ed. 2d 494, 503 (2006)* .

(n17)Footnote 2. *Fed. R. Civ. P. 8(a)*; *see W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317, 1328-1329 (M.D. Ala. 1997)* .

(n18)Footnote 3. *Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1227 (4th Cir. 1998)* .

(n19)Footnote 4. *Swierkiewicz v. Sorema, 534 U.S. 506, 512-513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* .

(n20)Footnote 5. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n21)Footnote 6. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883 (2009)* .

(n22)Footnote 1. *Fed. R. Civ. P. 7(a)(2)*; *see Fed. R. Civ. P. 8(b).*

(n23)Footnote 2. *Fed. R. Civ. P. 8(b)(1)(A),(B)*; *see Action Nissan, Inc. v. Hyundai Motor Am., 617 F. Supp. 2d 1177, 1186 (M.D. Fla. 2007)* .

(n24)Footnote 3. *Hargett v. Valley Federal Savings Bank, 60 F.3d 754, 763 (11th Cir. 1995)* .

(n25)Footnote 4. *See Fed. R. Civ. P. 8(b).*

(n26)Footnote 5. *Fed. R. Civ. P. 12(a)* (establishing time limits for answering complaint); *see Finnegan v. University of Rochester, 180 F.R.D. 247, 249 (W.D.N.Y. 1998)* (service of motion to dismiss under Rule 12 suspends movant's time to file answer until 10 days after court's disposition of motion).

(n27)Footnote 6. *Fed. R. Civ. P. 8(b)(6)*; *see § 9.10[4][b].*

(n28)Footnote 7. *See Fed. R. Civ. P. 8(c)(1).*

(n29)Footnote 8. *Fed. R. Civ. P. 13(a)(1).*

(n30)Footnote 1. *Fed. R. Civ. P. 7(a)(3).*

(n31)Footnote 2. *See Fed. R. Civ. P. 8(b)(6)*; *see also § 9.10[4][b].*

(n32)Footnote 3. *Fed. R. Civ. P. 7(a)(3)*; *Fed. R. Civ. P. 8(c).*

(n33)Footnote 4. *Fed. R. Civ. P. 8(c)(2).*

(n34)Footnote 1. *Fed. R. Civ. P. 13(g)*; *see Wake v. United States, 89 F.3d 53, 62-63 (2nd Cir. 1996)* (existing defendants may not assert crossclaim against former defendant).

(n35)Footnote 2. *Fed. R. Civ. P. 7(a)(4), 13(g).*

(n36)Footnote 3. *Fed. R. Civ. P. 13(a), (g).*

(n37)Footnote 4. *See Fed. R. Civ. P. 7(a)(7)* (court may order reply to any answer).

(n38)Footnote 1. *See Fed. R. Civ. P. 7(a)(5).*

(n39)Footnote 2. *Fed. R. Civ. P. 14(a)(1).*

(n40)Footnote 3. *Fed. R. Civ. P. 14(a)(2).*

(n41)Footnote 4. *Fed. R. Civ. P. 14(b).*

(n42)Footnote 5. *Fed. R. Civ. P. 14(a)(5).*

(n43)Footnote 6. *Fed. R. Civ. P. 14(a)(3).*

(n44)Footnote 7. *Fed. R. Civ. P. 14(a)(2)*; *see* [7], *below.*

(n45)Footnote 1. *See* [6], *above*; *see also Fed. R. Civ. P. 7(a)(5).*

(n46)Footnote 2. *Fed. R. Civ. P. 7(a)(6)*; *see Fed. R. Civ. P. 14(a)(2)*.

(n47)Footnote 3. *Fed. R. Civ. P. 14(a)(2)(A), (B)*.

(n48)Footnote 4. *Fed. R. Civ. P. 14(a)(2)(C), (D)*.

(n49)Footnote 1. *Fed. R. Civ. P. 7(a)(7)*; *see Garner v. Morales, 237 F.R.D. 399, 400 (S.D. Tex. 2006)* .

(n50)Footnote 2. *Williams v. Jader Fuel Co., 944 F.2d 1388, 1399 (7th Cir. 1991)* ; *Daniel v. Callet, 2007 U.S. Dist. LEXIS 53065, at *2 (E.D. Mo. 2007)* (citing **Moore's Federal Practice**).

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART I. NATURE OF PLEADINGS AND MOTIONS

1-9 Moore's Manual--Federal Practice and Procedure §§ 9.04through 9.09

[Reserved]

§§ 9.04[Reserved]

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART II. CONTENT AND FORM OF PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.10

§ 9.10 Requirements for All Types of Pleadings

[1] Statement of Subject Matter Jurisdiction n*

[a] Requirement Applicable to Complaint and Any Answer that States Claims for Relief

Any pleading which states a claim for relief must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new ground of jurisdiction to support it. n1 Thus, because a complaint always states a claim for relief, an original plaintiff commencing a civil action in a federal district court must always plead the basis for jurisdiction. n2 Pleadings after the original complaint do not require a statement of the ground for jurisdiction unless they contain claims for relief that require new grounds of jurisdiction to support them. n3 Thus, if a party makes a claim that arises out of the same transaction or occurrence that is the subject matter of the claim in the original claim, the new claim does not require a statement of a separate jurisdictional ground. Such a claim may include a claim in a third-party complaint, n4 a compulsory counterclaim, n5 a crossclaim, n6 or a claim by an intervenor. n7 For these claims, which are filed after the original claim by the plaintiff, the court will have supplemental jurisdiction, provided that the court had federal question (see [c] below) or diversity jurisdiction (see [d] below) over the original claim. n8 For a complete discussion covering the requirements of these types of jurisdiction, see Ch. 5, *Original Jurisdiction over the Subject Matter*.

[b] Pleading Must Allege Subject Matter Jurisdiction

Federal district courts are courts of limited jurisdiction, which means that the court may only adjudicate cases involving particular types of claims; consequently, a party making a claim in federal court must plead that the claim falls within the specified subject matter. The authority of a federal court to resolve a particular category of claim is known as subject-matter jurisdiction. n9 Congress has granted the federal courts exclusive jurisdiction in matters involving admiralty, bankruptcy, patents, copyrights and trademarks, and concurrent jurisdiction with the state courts in federal question and diversity of citizenship cases. n10 Pleading each basis for subject matter jurisdiction will be discussed below. n11

A federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits of a dispute. The jurisdiction of the court must be established as a threshold matter, and this requirement is inflexible and without

exception. n12 Thus, the court must inquire sua sponte whenever a doubt arises as to its existence. The parties may not confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. Consequently, the parties may not waive lack of subject-matter jurisdiction n13 by express consent, by conduct, or even by estoppel. n14 In contrast to subject matter jurisdiction, lack of personal jurisdiction is a defense that a defending party may waive. n15

The claimant may allege subject matter jurisdiction directly or indirectly. Thus, a pleading may directly refer to an appropriate jurisdictional statute, but it need not necessarily do so. The party has the alternative option to file a pleading which contains factual assertions that if proved establish jurisdiction. When a statutory reference is made, the pleading should also contain any factual assertions that are necessary to establish the statutory elements for jurisdiction. n16

[c] Alleging General Diversity Statute Jurisdiction

[i] Amount in Controversy and Citizenship

A claim may be based on diversity of citizenship jurisdiction, which requires the litigant to plead two statements: the amount in controversy and the parties' citizenship. If not based on a federal question, n17 or special jurisdiction statute, n18 a person making a claim for relief must make allegations which establish that the amount in controversy exceeds $ 75,000, exclusive of interest and costs, and also that the matter in controversy is between: n19

1. Citizens of different states;

2. Citizens of a state and citizens or subjects of a foreign state;

3. Citizens of different states when citizens or subjects of a foreign state are additional parties;

4. foreign state as a plaintiff and citizens of a state or of different states.

A party need not explicitly refer to the diversity statute provided that the person pleads facts necessary to establish diversity. n20

[ii] Each Party Must Be of Diverse Citizenship From Opposition

The first allegation of a pleading relying on general diversity jurisdiction must establish that each complaining party is of diverse citizenship from each defending party, which is characterized as the "complete diversity" requirement. Therefore, the allegation should state the citizenship of each party making the claim and each defending party so that the court can confirm the existence of complete diversity. n21

To allege the citizenship of an individual, the pleading should state that the individual is a citizen of a particular state or foreign country. n22 An individual who is a United States citizen may be a citizen of only one state at any time, and citizenship is based on the same criteria used to define domicile for personal jurisdiction purposes. n23

To allege citizenship of a corporation, the pleading should indicate the states of citizenship of the corporation. Unlike an individual, a corporation may have more than one state of citizenship for general diversity purposes. A corporation is deemed a citizen of any state in which it is incorporated and is also a citizen of the state where it has its principal place of business. n24

Allegations of citizenship of a partnership or unincorporated association should specify the particular states of citizenship of each partner or member. Partnerships and unincorporated associations lack their own citizenship for purposes of the general diversity statute. Instead, the citizenship of a partnership or unincorporated association is

dependent on the citizenship of each of the individual members. In a partnership, every partner must be of diverse citizenship from the party or parties opposing the partnership in the litigation. This is so even if state law permits a partnership to sue or be sued in its firm name. n25 Similarly, each member of an unincorporated association must be of citizenship diverse from that of any party or parties opposing the association in the civil action. n26

[iii] Pleading Amount in Controversy

The second allegation of a pleading relying on general diversity jurisdiction must establish that the amount in controversy in the action exceeds $ 75,000, exclusive of interest and costs. n27 Either an adverse party, or the court on its own motion, may challenge an allegation of the jurisdictional amount. Whether the amount in controversy exceeds $ 75,000 is determined from the perspective and pleading of the party invoking jurisdiction, and the amount is determined as of the time subject matter jurisdiction is initially claimed. n28 In general, all that is required is for the claimant to make a good faith allegation that the amount in controversy exceeds the jurisdictional amount. The court may not order dismissal unless it appears to a legal certainty that the claim is for less than the jurisdictional amount. Under this legal certainty test, the court will determine the amount in controversy based on both the specific dollar figure pleaded by the claimant and by the amount that is realistic under the claimant's actual legal claims. n29

[d] Alleging Federal Question Jurisdiction

A federal court has "federal question" subject matter jurisdiction over a civil action if the action arises under the Constitution, laws, or treaties of the United States. n30 Federal question jurisdiction exists only when a claimant's basis for recovery, rather than a defense to a claim for relief, is grounded in federal law. Under the "well pleaded complaint rule" and "artful pleading doctrine," a plaintiff whose claim is grounded in federal law may choose to proceed in state court, but the plaintiff still has a right to remove the case to federal court by removal, even if the plaintiff has used artful pleading to omit discussion of any federal questions that are in fact central to the suit. n31 In other words, these doctrines provide federal courts with subject matter jurisdiction over purported state law claims when the plaintiff has purposefully failed to plead a federal right or immunity that is an essential element of the plaintiff's cause of action; thus, the doctrine does not apply to claims that actually have no federal basis. n32 There is no minimum amount in controversy requirement to establish federal question jurisdiction. n33

The best pleading practice for federal question jurisdiction is to state the federal question explicitly and to include specific references to any particular section of the Constitution, statute, or treaty that supplies the basis for recovery under the federal question, although this is not absolutely required provided that the complaint read as a whole establishes the presence of a federal question. n34 If federal common law is the basis for federal question jurisdiction, the claimant should make a reference to the relevant case establishing the federal common law. n35

[e] Alleging Special Statutory Jurisdiction

If a claim is based on a special jurisdictional statute, the best practice is for the claimant to specify the statute in the first paragraph of the pleading, and to make specific factual allegations in the body of the pleading which demonstrate that the statute applies. Specifically stating a special jurisdictional statute in the allegations illustrates to the court the plaintiff's claim for relief. n36 However, it is not an absolute requirement under Rule 8, and a failure to do so does not deprive the court of jurisdiction, provided that the allegations state facts that enable the court to determine that a claim for relief exists under the statute. n37

Examples of actions based on statutes providing special federal jurisdiction include antitrust actions, n38 federal tax actions, n39 civil rights actions, n40 actions against the United States, n41 and any actions involving patents, copyrights, and trademarks. n42 If a claim for relief is within admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of having special procedural rules for admiralty or maritime claims control the claim. n43

[2] Statement That Claimant is Entitled to Relief n*

[a] Statement Must Be Sufficient to Provide Notice to Opposing Party

Any pleading that contains a claim for relief, including a counterclaim or a crossclaim, must include a short and plain statement showing that the claimant is entitled to relief. n1 This notice pleading standard does not require all of the detailed factual allegations that could be asserted, but it requires more than an unadorned accusation that the defendant unlawfully harmed the plaintiff. n2 A pleading that offers mere labels and conclusions or a formulaic recitation of the elements of a cause of action is not sufficient without an factual enhancement. n3

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true by the court, to state a claim to relief that is plausible on its face. n4 A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alerted. The plausibility standard does not rise to the level of a "probability requirement." Rather, it requires more than a sheer possibility that a defendant has acted unlawfully. When a complaint pleads facts that are merely consistent with a defendant's liability, it does not meet the plausibility requirement of entitlement to relief. n5

The basis of notice pleading is the requirement that the pleader state facts that support a specified claim or defense, and not mere labels and conclusions of legal theories or a formulaic recitation of the elements of a cause of action. n6 To show a violation of the *Equal Protection Clause* by intentional discrimination, the claimant need not fit each factual allegation to each element of a prima facie case, such as "discriminatory intent". Rather, the claimant need only allege the facts which show that it is plausible that there was some discriminatory intent on the part of the defendant. n7 However, when based on statute or federal civil rule, the court may apply a pleading standard higher than specified by Rule 8(a)(2). For example, Rule 9(b) requires that when pleading fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. n8

In the Supreme Court's decision in *Iqbal*, the Court suggested a two pronged approach to evaluate the sufficiency of a complaint. First, the court identifies pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Second the court determines whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief. The plausibility standard is not similar to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. n8.1

Whether a statement of a claim is sufficient to meet the plausibility standard and gives fair notice may depend in part on the complexity of the case. Thus, complex issues require more detail in order to give fair notice of the particular nature of the claim. n9 It is important to recognize that Rule 8(a)(2) does not require a short and plain complaint but rather a short and plain statement showing that the claimant is entitled to prevail. n10 Also, each allegation of a pleading--not each pleading itself--must be simple, concise, and direct n11 Rule 8(d) provides that a party may set out two or more statements of a claim alternatively or hypothetically, either in a single count or in separate ones, and if a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. n12 Furthermore, a party may state as many separate claims or defenses as it has, regardless of consistency. n13

Although Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief, Rule 11 permits a party after reasonable inquiry to set forth allegations that are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. n14 Thus, Rule 8 and Rule 11 taken together permit claimants to allege facts that they believe to be true, even though they lack evidentiary support at the time of pleading, especially when the facts that would support the allegations are within the defendant's knowledge or control. n15

[b] More Particular Statement Required by Other Law

Although Rule 8 sets out the general requirements for rules of pleading, it may be modified or supplemented when

specified by other federal rules of civil procedure or by federal statute. Thus, Rule 9 contains special requirements for pleading lack of capacity, n16 fraud or mistake, n17 failure of a condition precedent, n18 and special damages. n19 Rule 23.1 addresses pleading requirements for shareholders or members pursuing derivative actions. n20

Federal statutory modifications of Rule 8 have also been promulgated by Congress, which retains authority to enact laws on federal civil procedure notwithstanding its broad delegation of rulemaking authority to the United States Supreme Court through the federal rules, and to other Article III federal courts. n21 For example, under an amendment to the Securities Exchange Act, Congress has made the pleading standards in securities fraud cases more rigorous than the standards under Rule 8 and Rule 9(b). Thus, a claimant alleging securities fraud must specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading. n22 Finally, Rule 8 may also be supplemented or modified by state statutory pleading requirements, when the federal court determines under the *Erie* doctrine n23 that the special state pleading requirements are substantive, rather than procedural. n24 Thus, the *Erie* doctrine has been utilized to require those pleading state law claims in federal court to follow certain state statutory directives in product liability and medical malpractice cases. n25

[3] Demand for Judgment n*

Any pleading that sets forth a claim for relief must contain a demand for judgment for the relief the party seeks, including a demand for relief in the alternative or for several different types of relief. n1 The demand for judgment may be stated in general terms. For example, the claimant may demand a single sum of money for an act of negligence that results in physical injury, pain of body and mind, and loss of business. n2 However, the claimant must specify in the complaint the nature of the relief sought, such as a particular amount of money damages n3 an injunction, n4 or declaratory relief. n5 For example, the demand for judgment may request specific performance or, if specific performance is not granted, that the party be awarded a money judgment. n6 Additionally, inconsistent pleading is permitted by Rule 8(e)(2) because when litigants must frame their claims before obtaining discovery, they typically find it necessary to conform their theories to the facts; as the case proceeds, legal theories are allowed to fall or be abandoned. n7

Even though a party must make a demand for relief when making any claim, the court's judgment will not be limited by the monetary amount or the type of relief in the demand, n8 except for default judgments. A default judgment may not be different from the amount requested or the type of relief in the demand. n9 Practitioners should note that a demand for judgment will have a bearing on whether a jury trial will be allowed, because if only equitable relief is demanded, neither party may request a jury trial. n10

[4] Pleading Defenses and Denials n*

[a] Short and Plain Statement Required

A party that is defending against a claim for relief must state in short and plain terms the party's defenses to each claim asserted by the opposition n1 and must admit or deny each allegation of every pleading that presents a claim for relief. n2 Denials must fairly meet the substance of the allegations denied. n3 As is the case for claims for relief, a defending party may make alternative and hypothetical denials. A party may make two or more statements of a defense alternatively or hypothetically either in a single defense or in separate defenses. If a party makes alternative defenses, the pleading is sufficient if any one of them is sufficient. n4

If a party intends in good faith to deny all the allegations of a pleading, including the jurisdictional grounds, the party may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny all designated allegations or generally deny all except those specifically admitted. n5 A general denial of all factual components within a statement of an affirmative pleading, including allegations of jurisdiction, is rarely used because of its very broad nature. However, such a denial may be used to respond to appropriately simple claims for relief. n6

If a party intends in good faith to deny only part of an allegation, the party must admit the part that is true and deny the rest. n7 If a party lacks knowledge or information sufficient to form a belief about the truth of an allegation, the party must state so, and the statement has the effect of a denial. n8

[b] Representations Made in Responsive Pleading

A defending party that makes a responsive pleading represents to the court that the party has made inquiry reasonable under the circumstances and that after the inquiry, to the best of the person's knowledge, information, and belief, the responses are not made for an improper purpose, n9 and: (1) the defenses in the pleading are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; n10 (2) the factual contentions have evidentiary support or, if specifically identified as such, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; n11 and (3) the denials of factual contentions are warranted on the evidence or, if specifically identified as such, are reasonably based on a lack of information or belief. n12

[c] Failure to Deny Allegation as Admission

Generally, if a defending party fails to deny an allegation set forth in a pleading that requires a responsive pleading, the failure is deemed an admission, except for allegations concerning the amount of damages. n13 A person is required to make the following responsive pleadings: an answer to a complaint; n14 an answer to a counterclaim designated as a counterclaim; n15 an answer to a crossclaim; n16 an answer to a third-party complaint; n17 and, if the court orders one, a reply to an answer. n18 In situations in which no responsive pleading is required, allegations in a pleading are considered automatically denied or avoided. n19

[d] Pleading Affirmative Defense

[i] Party Must Plead All Applicable Affirmative Defenses

In its initial responsive pleading, n20 including an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, an answer to a third-party complaint, or a court ordered reply to an answer, n21 a party defending a claim must state affirmatively all defenses specified in the civil rules as matters constituting an avoidance or affirmative defense. n22 An "affirmative defense" is a defendant's assertion raising new facts and arguments different from the opposition's claim for relief, which, if true, will defeat the opponent's claim for relief, even if all the allegations in the pleading are true. n23 An "avoidance" is any matter asserted by the defense that effectively precludes the pleader's ability to recover on the claim. n24 There are 18 affirmative defenses specifically listed in Rule 8: n25

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;

- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitation; and
- waiver.

In addition to the 18 affirmative defenses listed above, the following examples of avoidances not enumerated in Rule 8(c) must be pleaded:

- failure to exhaust state remedies; n26
- failure to mitigate damages; n27
- hindrance of contract; n28
- common-law immunity; n29
- statutory immunity; n30 and
- statutory limitations on damages. n31

The requirement of pleading affirmative defenses and avoidances is to prevent surprise to the opposition and to give the opposition an opportunity to respond. n31.1 If an affirmative defense or avoidance is accepted by the court, it will defeat an otherwise legitimate claim for relief. n32

In some circumstances, an affirmative defense may be raised even before a responsive pleading is presented, for example, in a pre-answer Rule 12(b)(6) motion to dismiss for failure to state a claim n33 or in a Rule 56 motion for summary judgment that is asserted before the answer is filed. n34 However, even though a defending party has the option to raise an affirmative defense in a motion filed prior to its answer or other initial responsive pleading, it is not obligated to do so provided it specifies affirmative defenses in its initial pleading. n35

[ii] Waiver by Failure to Plead

If a party defending a claim fails to set forth any affirmative defenses in its initial responsive pleading, including any answer or court ordered reply, the party is generally deemed to have waived the defense. n36 The Supreme Court has held that the initial responsive pleading required by the rule is the one following the events that give rise to the defense. n37 It should be noted that a party has the right to raise an affirmative defense in a motion filed prior to its initial pleading; however, it is not required to do so and is only required to raise affirmative defenses in its initial pleading. n38

There are several exceptions to the waiver rule, n39 including the following:

1. An affirmative defense waiver does not occur if it is raised in a proper motion filed before the first responsive pleading, for example, if the affirmative defense is raised for the first time by a pre-answer motion to dismiss. n40

2. There is no waiver of an unpleaded affirmative defense if the defense is tried by the express or implied consent of the parties under Rule 15(b). Thus, if a defending party introduces evidence at trial related solely to an unpleaded affirmative defense, and the claimant fails to object, there is no waiver. n41

3. An affirmative defense is not waived if the pretrial order sufficiently informs the parties that the defense is an issue for trial. In this situation, there is no waiver because there is no unfair surprise. n42

4. An unpleaded affirmative defense is not waived if it is included in an amendment to the initial responsive pleading under Rule 15(a), n43 unless the claimant would be unduly prejudiced. n44

5. A defendant may raise an affirmative defense at the summary judgment stage (after filing its answer), provided that the plaintiff does not suffer prejudice. n45

6. An appellate court may consider an affirmative defense even though it was not raised in the district court if consideration of the defense will give the appellate court different or additional grounds on which to affirm the district court. n46

[5] Corporate Disclosure Statement n*

[a] Required Disclosure Statement

Each nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock n1 or (2) states that the corporation has no parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock. n2

The primary purpose of requiring this statement is to enable the district court judge to determine whether he or she has the "financial interest" required to subject the judge to automatic disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges. However, the information required by Rule 7.1 alone does not cover all of the circumstances that may call for other disqualification under the financial interest standard and does not deal at all with other circumstances which may call for disqualification. Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. n3

Some authority indicates that the disclosure statement may be considered by the court for other purposes, such as to determine corporate citizenship in diversity cases. n4

[b] Time for Filing

A nongovernmental corporate party that comes within the rule must file the required disclosure statement in every case. It must file its initial statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. n5 Additionally, a party must supplement its statement whenever the information that must be disclosed under Rule 7.1 changes. n6 For example, if a nongovernmental corporate party to an action in a district court initially had no parent corporation, but was later acquired by a parent corporation, the party would then have to disclose that information in a supplemental disclosure. n7

Although an opposition party may make a motion to compel the filing of a disclosure statement by another party, the court may not impose sanctions for failure to timely file a disclosure, at least unless the disclosing party has purposely delayed filing the disclosure or prejudiced the opposition by the tardy disclosure. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesCapacity of PartiesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, § 8.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 8(a)(1).*

(n3)Footnote 2. *See Swierkiewicz v. Sorema, 534 U.S. 506, 512-513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* .

(n4)Footnote 3. *Fed. R. Civ. P. 8(a)(1).*

(n5)Footnote 4. *See Fed. R. Civ. P. 14(a).*

(n6)Footnote 5. *See Fed. R. Civ. P. 13(a).*

(n7)Footnote 6. See *Fed. R. Civ. P. 13(g).*

(n8)Footnote 7. See *Fed. R. Civ. P. 24(a).*

(n9)Footnote 8. *Kinzer v. Metro. Gov't of Nashville & Davidson County, 451 F. Supp. 2d 931, 934 (M.D. Tenn. 2006)* ; *see 28 U.S.C. § 1367.*

(n10)Footnote 9. *Iglesias v. Mutual Life Ins. Co., 156 F.3d 237, 242 (1st Cir. 1998)* .

(n11)Footnote 10. *See* U.S. Const. Art. III; *28 U.S.C. §§ 1331-1365.*

(n12)Footnote 11. *See* [c], *below* (diversity jurisdiction); [d], *below* (federal question jurisdiction); [e], *below* (special jurisdictional statutes).

(n13)Footnote 12. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-578, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* .

(n14)Footnote 13. *Fed. R. Civ. P. 12(h)(3).*

(n15)Footnote 14. *Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n16)Footnote 15. *Fed. R. Civ. P. 12(h)(1)*; *see Fed. R. Civ. P. 12(b)(2)*.

(n17)Footnote 16. *Lykins v. Pointer Inc., 725 F.2d 645, 646 (11th Cir. 1984)* .

(n18)Footnote 17. *See* [d], *below*.

(n19)Footnote 18. *See* [e], *below*.

(n20)Footnote 19. *28 U.S.C. § 1332(a)*; *see Maher v. GSI Lumonics, Inc, 433 F.3d 123, 126-128 (1st Cir. 2005)* .

(n21)Footnote 20. *Scheuer v. Rhodes, 416 U.S. 232, 234 n.2, 94 S. Ct. 1683, 40 L. Ed. 2d 90, 71 Ohio Op. 2d 474 (1974)* .

(n22)Footnote 21. *Whitemire v. Victus Ltd., 212 F.3d 885, 887 (5th Cir. 2000)* .

(n23)Footnote 22. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(a).

(n24)Footnote 23. Guaranty Nat'l Title Co. v. J.E.G. *Assocs., 101 F.3d 57, 59 (7th Cir. 1996)* (pleading must allege citizenship and not residence).

(n25)Footnote 24. *28 U.S.C. § 1332*.

(n26)Footnote 25. *Carden v. Arkoma Assocs., 494 U.S. 185, 195, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* .

(n27)Footnote 26. *Elliott v. Tilton, 62 F.3d 725, 729 (5th Cir. 1995)* .

(n28)Footnote 27. *28 U.S.C. § 1332(a)*.

(n29)Footnote 28. *St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1254 (5th Cir. 1998)* .

(n30)Footnote 29. *Morgan v. Gay, 471 F.3d 469, 475 (3rd Cir. 2006)* .

(n31)Footnote 30. *28 U.S.C. § 1331*.

(n32)Footnote 31. *Rivet v. Regions Bank, 522 U.S. 470, 474-476, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998)* .

(n33)Footnote 32. *Turgeau v. Admin. Review Bd., 446 F.3d 1052, 1060-1061 (10th Cir. 2006)* .

(n34)Footnote 33. *See 28 U.S.C. § 1331*.

(n35)Footnote 34. *Martin v. Deiriggi, 985 F.2d 129, 135 (4th Cir. 1992)* .

(n36)Footnote 35. *Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* (federal common law applicable when a federal rule of decision is necessary to protect uniquely federal interests).

(n37)Footnote 36. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(b); [2][a], *below*.

(n38)Footnote 37. *AmSouth Bank v. Dale, 386 F.3d 763, 779 (6th Cir. 2004)* (courts may reach beyond specific statutory sections stated in complaint to reach different basis for jurisdiction, based on facts stated on face of that complaint).

(n39)Footnote 38. *See 28 U.S.C. § 1337*.

(n40)Footnote 39. *See 28 U.S.C. § 1340*.

(n41)Footnote 40. *See 28 U.S.C. § 1343*.

(n42)Footnote 41. *See 28 U.S.C. § 1346*.

(n43)Footnote 42. *See 28 U.S.C. § 1338*.

(n44)Footnote 43. *Fed. R. Civ. P. 9(h)(1)*; *see* Fed. R. Civ. P., Appendix of Forms, Official Form 7(c).

(n45)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, §§ 8.04, 8.09, 9.10 (Matthew Bender 3d ed.).

(n46)Footnote 1. *Fed. R. Civ. P. 8(a)(2)*.

(n47)Footnote 2. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* .

(n48)Footnote 3. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n49)Footnote 4. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n50)Footnote 5. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n51)Footnote 6. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883 (2009)* .

(n52)Footnote 7. *Hayden v. Paterson, 594 F.3d 150, 161-162 (2d Cir. 2010)* .

(n53)Footnote 8. *Fed. R. Civ. P. 9(b)*; *see Carroll v. Fort James Corp, 470 F.3d 1171, 1174 (5th Cir. 2006)* (citing *Moore's Federal Practice*).

(n54)Footnote 8.1. *Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. N.Y. 2010)* .

(n55)Footnote 9. *Desai v. Tire Kingdom, Inc., 944 F. Supp. 876, 879 (M.D. Fla. 1996)* .

(n56)Footnote 10. *Fed. R. Civ. P. 8(a)(2)*.

(n57)Footnote 11. *Fed. R. Civ. P. 8(d)(1)*.

(n58)Footnote 12. *Fed. R. Civ. P. 8(d)(2)*.

(n59)Footnote 13. *Fed. R. Civ. P. 8(d)(3)*.

(n60)Footnote 14. *Fed. R. Civ. P. 11(b)(3)*.

(n61)Footnote 15. *Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)* .

(n62)Footnote 16. *Fed. R. Civ. P. 9(a)(2)*.

(n63)Footnote 17. *Fed. R. Civ. P. 9(b)*.

(n64)Footnote 18. *Fed. R. Civ. P. 9(c)*.

(n65)Footnote 19. *Fed. R. Civ. P. 9(g)*.

(n66)Footnote 20. *Fed. R. Civ. P. 23.1(b)*.

(n67)Footnote 21. *See 28 U.S.C. § 2071(a)* (federal courts' rules must be consistent with Acts of Congress).

(n68)Footnote 22. *15 U.S.C. § 78u-4(b)(1).*

(n69)Footnote 23. *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n70)Footnote 24. *Bushnell Corp. v. ITT Corp., 973 F. Supp. 1276, 1287 (D. Kan. 1997)* .

(n71)Footnote 25. *Doe v. Chicago, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994)* (statute deemed substantive and thus controlling in federal court).

(n72)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, § 8.05 (Matthew Bender 3d ed.).

(n73)Footnote 1. *Fed. R. Civ. P. 8(a)(3).*

(n74)Footnote 2. *See, e.g.*, Fed. R. Civ. P., Appendix of Forms, Official Form 11

(n75)Footnote 3. *Pulliam v. GM, 2004 U.S. Dist. LEXIS 3925, at *2 (W.D. Wis. 2004)* .

(n76)Footnote 4. *Chimney Safety Inst. of Am. v. Chimney King, 2004 U.S. Dist. LEXIS 11985, at *11 (N.D. Cal. 2004)* .

(n77)Footnote 5. *Barrow v. Greenville Indep. Sch. Dist., 2005 U.S. Dist. LEXIS 216, at *28 (N.D. Tex. 2005)* .

(n78)Footnote 6. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 17.

(n79)Footnote 7. *Moriarty v. Lewis Funeral Dirs. Ltd., 150 F.3d 773, 777-778 (7th Cir. 1998)* .

(n80)Footnote 8. *Fed. R. Civ. P. 54(c)*; *see Mark Andy, Inc. v. Hartford Fire Ins. Co., 229 F.3d 710, 719-720* (every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings); *see also* Ch. 25, *Judgment*.

(n81)Footnote 9. *See Fed. R. Civ. P. 54(c).*

(n82)Footnote 10. *Fed. R. Civ. P. 38*; *see* Ch. 22, *Trial by Jury*.

(n83)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, §§ 8.06-8.08 (Matthew Bender 3d ed.).

(n84)Footnote 1. *Fed. R. Civ. P. 8(b)(1)(A).*

(n85)Footnote 2. *Fed. R. Civ. P. 8(b)(1)(B).*

(n86)Footnote 3. *Fed. R. Civ. P. 8(b)(2).*

(n87)Footnote 4. *Fed. R. Civ. P. 8(d)(2).*

(n88)Footnote 5. *Fed. R. Civ. P. 8(b)(3).*

(n89)Footnote 6. *Indigo Am., Inc. v. Big Impressions, LLC, 597 F.3d 1, 5 (1st Cir. 2010)* (denial of allegations of breach of contract).

(n90)Footnote 7. *Fed. R. Civ. P. 8(b)(4).*

(n91)Footnote 8. *Fed. R. Civ. P. 8(b)(5).*

(n92)Footnote 9. *Fed. R. Civ. P. 11(b)(1).*

(n93)Footnote 10. *Fed. R. Civ. P. 11(b)(2).*

(n94)Footnote 11. *Fed. R. Civ. P. 11(b)(3).*

(n95)Footnote 12. *Fed. R. Civ. P. 11(b)(4).*

(n96)Footnote 13. *Fed. R. Civ. P. 8(b)(6).*

(n97)Footnote 14. *Fed. R. Civ. P. 7(a)(2).*

(n98)Footnote 15. *Fed. R. Civ. P. 7(a)(3).*

(n99)Footnote 16. *Fed. R. Civ. P. 7(a)(4).*

(n100)Footnote 17. *Fed. R. Civ. P. 7(a)(6).*

(n101)Footnote 18. *Fed. R. Civ. P. 7(a)(7).*

(n102)Footnote 19. *Fed. R. Civ. P. 8(b)(6).*

(n103)Footnote 20. *See Arizona v. California, 530 U.S. 392, 408-410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n104)Footnote 21. *See Fed. R. Civ. P. 7(a).*

(n105)Footnote 22. *Fed. R. Civ. P. 7(a).*

(n106)Footnote 23. *Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 271 (4th Cir. 2003)* .

(n107)Footnote 24. *Quiller v. Barclays American/Credit, 727 F.2d 1067, 1069 (11th Cir. 1984)* .

(n108)Footnote 25. *Fed. R. Civ. P. 8(c)(1).*

(n109)Footnote 26. *Santos v. Alaska Bar Ass'n, 618 F.2d 575, 576-577 (9th Cir. 1980)* .

(n110)Footnote 27. 999 v. *C.I.T. Corp., 776 F.2d 866, 870 n.2 (9th Cir. 1985)* .

(n111)Footnote 28. *Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d 1373 1377 (7th Cir. 1990)* .

(n112)Footnote 29. *Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)* .

(n113)Footnote 30. *Troxler v. Owens-Ill., Inc., 717 F.2d 530, 532-533 (11th Cir. 1983)* .

(n114)Footnote 31. *Simon v. United States, 891 F.2d 1154, 1156-1157 (5th Cir. 1990)* .

(n115)Footnote 31.1. *Std. Waste Sys. v. Mid-Continent Cas. Co., 612 F.3d 394, 398 (5th Cir. 2010)* .

(n116)Footnote 32. *See Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 350, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)* .

(n117)Footnote 33. *Smith-Haynie v. District of Columbia, 155 F.3d 575, 577-578 (D.C. Cir. 1998)* .

(n118)Footnote 34. *See Fed. R. Civ. P. 56(b).*

(n119)Footnote 35. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**); *see* [ii], *below*.

(n120)Footnote 36. *Fed. R. Civ. P. 8(c)(1)*; *First Union Nat'l Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 622 (8th Cir. 2007)* .

(n121)Footnote 37. *Arizona v. California, 530 U.S. 392, 408-410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n122)Footnote 38. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**).

(n123)Footnote 39. *See First Union Nat'l Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 622 (8th Cir. 2007)* (rule must not be applied mechanically in manner which places form over substance).

(n124)Footnote 40. *Concordia v. Bendekovic, 693 F.2d 1073, 1075 (11th Cir. 1982)* (res judicata is affirmative defense usually pleaded under Rule 8(c), but may be raised in Rule 12(b)(6) motion); *see* [i], *above*.

(n125)Footnote 41. *Brinkley v. Harbour Recreation Club, 180 F.3d 598, 612-613 (4th Cir. 1999)* .

(n126)Footnote 42. *See El-Hakem v. BJY, Inc., 415 F.3d 1068, 1076 (9th Cir. 2005)* .

(n127)Footnote 43. *Material Supply Int'l, Inc. v. Sunmatch Indus. Co., 146 F.3d 983, 991 (D.C. Cir. 1998)* .

(n128)Footnote 44. *United States v. Shanbaum, 10 F.3d 305, 312 (5th Cir. 1994)* .

(n129)Footnote 45. *Ahmad v. Furlong, 435 F.3d 1196, 1201-1202 (10th Cir. 2005)* (citing **Moore's Federal Practice**).

(n130)Footnote 46. *Bechtold v. City of Rosemount, 104 F.3d 1062, 1068 (8th Cir. 1997)* .

(n131)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, §§ 7.1.02, 7.1.03 (Matthew Bender 3d ed.).

(n132)Footnote 1. *Fed. R. Civ. P. 7.1(a)(1).*

(n133)Footnote 2. *Fed. R. Civ. P. 7.1(a)(2).*

(n134)Footnote 3. *Fed. R. Civ. P. 7.1(a)*, Committee Note.

(n135)Footnote 4. *See Nipponkoa Ins. Co. v. GlobeGround Servs., 2006 U.S. Dist. LEXIS 76227, at *9-*10 (N.D. Ill. 2006)* .

(n136)Footnote 5. *Fed. R. Civ. P. 7.1(b)(1).*

(n137)Footnote 6. *Fed. R. Civ. P. 7.1(b)(2).*

(n138)Footnote 7. *Fed. R. Civ. P. 7.1(b)*, Committee Note.

(n139)Footnote 8. *Hall v. Tyco Int'l, Ltd., 223 F.R.D. 219, 257 (M.D.N.C. 2004)* .

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART II. CONTENT AND FORM OF PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.11

§ 9.11 Pleading Special Matters

[1] Pleading Capacity, Authority, or Legal Existence n*

[a] Capacity, Authority, or Legal Existence Must Be Pleaded Only to Show Jurisdiction

A person need not allege capacity, authority, or legal existence except when necessary to show the existence of jurisdiction, n1 either federal question jurisdiction or diversity jurisdiction. n2 Capacity, authority to sue or be sued in federal civil actions, as well as questions of a party's legal existence, are generally determined by state law. n3 However, Rule 9(a) governs the procedural aspects of the issue, such as the manner and time in which to plead or to challenge a party's capacity, authority, or legal existence. n4

With respect to diversity cases, allegations of capacity, authority, or legal existence may be necessary to establish the citizenship of the claimant. Thus, in determining whether diversity jurisdiction exists, the citizenship of nominal or formal parties, such as the legal representative of a decedent's estate, an infant, or an incompetent, will be deemed by the court to be the same as that of the decedent, infant, or incompetent. n5 However, if a party is a trustee of an active trust, the trustee will be considered the real party in interest for diversity purposes. n6 In a class action, the capacity of the representative or representatives of the class should be alleged, because it is the citizenship of the representatives that controls for diversity jurisdiction purposes. n7

Federal question jurisdiction means that federal district courts have jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States; n8 consequently, to show federal question jurisdiction, claimants typically need to plead capacity, authority, or legal existence to show that the claimant is within the purview of the federal statute under which the claim arose. For example, under the Employee Retirement Income Security Act the claimant must specifically allege that the claimant has the status of a participant, beneficiary, or fiduciary under the Act before it comes within the jurisdiction of the federal district court. n9 In another example, in a shareholder derivative suit Rule 23.1 requires that the complaint contain a specific allegation that the plaintiff was a shareholder or member at the time of the transaction on which the complaint is based or that the plaintiff's shares devolved by operation of law after the transaction. n10

[b] Capacity Must Be Raised by Specific Denial

A defending party must raise the issue of lack of capacity, authority, or legal existence by a specific denial, which must state any supporting facts that are peculiarly within the denying party's knowledge. n11 Thus, a general denial is not sufficient to challenge a party's capacity, authority, or legal existence. n12 However, when the lack of capacity, authority, or legal existence affirmatively appears on the face of a complaint or other pleading seeking relief, the issue is raised by that pleading, and raising the issue by specific denial of capacity is not necessary. n13

The requirements of Rule 9(a) apply to all parties responding to claims for relief, whether a claim in a complaint or third-party complaint, a counterclaim, or a crossclaim. For example, a plaintiff responding to a counterclaim must raise the issue of lack of capacity to be sued as an individual by a specific denial in the plaintiff's answer to the counterclaim. n14 However, the fact that the issue of the lack of capacity or authority must be raised by specific denial does not shift the burden of proof. The burden of proof remains on the party making a claim for relief; thus, once the issue of lack of capacity is raised by a defending party's specific denial, both parties will be able to present evidence on the issue, but the plaintiff has the ultimate burden to prove capacity. n15

[c] Issue Waived If Not Raised in Timely Manner

Except when an allegation of capacity, authority, or legal existence is necessary to show subject matter jurisdiction, n16 a party waives a defense of lack of capacity, authority, or legal existence if the defense is not raised in a timely manner. n17 These defenses are generally considered timely if raised: n18 in the initial responsive pleading, by motion to dismiss under Rule 12(b) for failure to state a claim on which relief may be granted, n19 by motion for summary judgment, n20 or in the case of a claimant's incapacity, by motion under Rule 17(a) that the action be prosecuted in the name of the real party in interest. n21

In any event, a defense of lack of capacity, authority to act in a representative capacity, nor legal existence may not be raised for the first time after the trial has started. n22 However, the court may permit a specific denial of lack of capacity later than the initial responsive pleading or in a pre-answer motion under the liberal pleading amendment policies of Rule 15, n23 or if the harm or prejudice to the opposition was not great. n24

[2] Pleading Fraud, Mistake, and Conditions of Mind n*

[a] Pleading Requirements Stated in Federal Rule

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. On the other hand, any condition of mind of a person may usually be alleged generally. n1 However, there are exceptions to these general rules. For a discussion of the specific requirements for pleading fraud, see [b], *below*; for a discussion of the specific requirements for pleading mistake, see [c], *below*; for a discussion of the specific requirements for pleading any condition of mind, see [d], *below*.

If a party fails to plead fraud, mistake, or condition of mind (when required) with sufficient particularly, the court may dismiss the claim for failure to state a claim for relief. n2 However, especially if the pleading party has not had an opportunity to amend its claim, the court has considerable discretion under Rule 15(a) to allow the pleading party the right to amend to conform the pleading with the particularity requirements of Rule 9(b). n3 Rule 15(a) provides that the court should freely give leave to amend when justice requires and should grant a party a right to amend as a matter of course at any time before a responsive pleading is served. n4 However, the court will not grant the party leave to amend if, after a responsive pleading is filed, the pleading in any event would still fail to state a claim or defense even if drafted in compliance with Rule 9(b). n5

[b] Pleading Fraud

[i] Particularity Requirements of Federal Rules

A party must state circumstances constituting fraud with particularity, n6 whether the allegation of fraud appears in a pleading containing claims for relief n7 or in a pleading containing defenses to claims for relief. n8 The purposes of the particularity requirement are (1) to provide detailed notice of a fraud claim to a defending party, (2) to protect a defending party's reputation from improvident charges of wrongdoing, n9 (3) to prevent "strike suits," which are intended to consume a defending party's resources rather than redress wrongdoing, and (4) to prevent persons from first filing a civil claim for relief and then searching to find a valid claim after the action has been commenced. n10

Because of these four purposes of the particularity requirement of Rule 9(b), the court has discretion to relax the requirement in cases when the evidence of fraud is within a defendant's exclusive possession. In such cases, a claimant may plead fraud on information and belief provided that the pleading states facts and information on which the belief of fraud is founded, as well as the efforts made to obtain additional information. However, in the ordinary case when the claimant has adequate access to the necessary facts, the claimant may not plead fraud on information and belief nor in a vague manner. n11

The pleading of the "circumstances constituting fraud" generally requires that the claimant allege the identity of the person who made the fraudulent statement, including: (1) precisely what false or misleading statements were made in what documents or oral representations or what omissions were made; (2) the time and place of each such statement and the person responsible for making or not making (in cases of omission) the statement; (3) the content of any such statements and the manner in which they misled the claimant; and (4) what the person obtained as a consequence of the fraudulent statement or omission. n12 When the party claims a fraudulent misrepresentation based on an omission of facts, Rule 9(b) requires the claimant to plead the type of facts omitted, the place in which omissions should have appeared, and the manner in which omitted facts made the representations misleading. n13 If a claim involves multiple defending parties, a claimant usually may not group all wrongdoers together in a single set of allegations. Rather, the claimant is required to make specific and separate allegations against each defendant. n14

However, each and every alleged misrepresentation need not appear in the pleadings. Furthermore, a claimant is not required to explain the legal theory of the fraud claim. A claimant is merely required to set forth the major misrepresentations or omissions on which the fraud claims are based. n15 Also, while the particularity requirement applies to all pleadings pertaining to fraud, the requirement does not apply to allegations in the pleadings that do not relate to fraud. n16

[ii] Other Statutory Pleading Requirements for Allegations of Fraud

For actions alleging fraud under § 10(b) of the Securities Exchange Act, the pleading requirements are no longer governed exclusively by Rule 9, because Congress has expressly set forth specific pleading requirements for alleging fraud under the Act, n17 and the pleading requirements in securities fraud cases are now more rigorous than those set forth in Rule 9(b). n18 These statutory requirements do not replace the procedural rule requiring specificity in pleading fraud; rather, they augment the specific requirements for pleading fraud in general and a plaintiff must fulfill all the requirements of both the statute and the rule. Therefore, in a securities fraud case, the plaintiff must allege: the statements plaintiff asserts were fraudulent and why they were fraudulent, who made the statements, and where and when the statements were made. n19 The plaintiff must also allege that in connection with the purchase or sale of securities, the defendant acted with scienter, n20 and either made a false material representation or omitted to disclose material information so that the plaintiff acted in reliance either on defendant's false representation or its failure to disclose material information, and as a result the plaintiff suffered injury and damages. n21 If an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all the facts on which that belief is formed. n22

Civil causes of action under the Racketeer Influenced and Corrupt Organization Act (RICO) n23 often involve allegations of fraud, and if so, the pleading is governed by Rule 9(b). n24 Accordingly, a RICO plaintiff must, at a

minimum, describe the predicate acts of fraud with some specificity and state the time, place, and content of the alleged communications perpetrating the fraud. Furthermore, in a multiple defendant case, Rule 9(b) requires a RICO plaintiff to plead sufficient facts to notify each defendant of his or her alleged participation in the scheme. n25

[c] Pleading Mistake

Rule 9(b) requires that the circumstances constituting mistake be stated with particularity. n26 Thus, the court will not accept conclusory allegations of mistake. n27 Furthermore, a claimant may plead mistake on information and belief only if the facts required to allege mistake with particularity are not within the control of the party, but are in the control of a defending party. n28 Pleadings containing allegations of mistake are far less frequent in the federal courts than pleadings containing allegations of fraud. n29 However, when mistake does constitute an element of a claim or defense in a federal civil action, its circumstances should be pleaded by making allegations on the "who, what, where, when and how" of the mistake. n30

[d] Pleading Condition of Mind

In contrast to fraud and mistake, a party may allege conditions of a person's mind, such as malice, intent, or knowledge in a general manner. n31 The rationale for allowing conditions of the mind to be generally alleged is that a party cannot be expected to know the adverse party's state of mind. n32 While conditions of mind may be alleged generally, some courts require that intent to harm and other conditions of mind must be alleged with at least some particularity when they are relevant to fraud and mistake. These courts require a party to allege the circumstances that provide a strong, or at least some, foundation for the party's belief that someone else had the requisite intent or other condition of mind. n33

[3] Pleading Conditions Precedent n*

[a] Pleading Performance or Occurrence of Condition Precedent

A party may plead the performance or occurrence of a condition precedent in a general manner. n1 The purpose of Rule 9 in allowing a general allegation of conditions precedent is to promote simple, concise, and direct pleadings as specified in Rule 8(d)(1), and therefore to eliminate lengthy, detailed allegations. n2 For example, a party may allege that "all conditions precedent to the institution of this lawsuit have been fulfilled." n3 For a contract claim, it is sufficient for the party to allege "all conditions precedent have been performed or have occurred," n4 or to allege simply that the "claimant has performed all of its obligations" as an insured under the policy." n5 In the event a claimant has failed to plead performance of a condition precedent, the dismissal of the claim is not the appropriate initial course of action. Rather, the court should first provide the claimant with an opportunity to amend. n6

[b] Pleading Denial of Performance or Occurrence of Condition Precedent

To deny occurrence or performance of condition precedents the party must make allegations with particularity. n7 Therefore, when a claimant has generally pleaded that it has performed conditions precedent, the defending party must plead nonperformance particularly by stating which particular condition precedent in the agreement or statute in dispute has not been performed. n8 For example, a defendant insurer, wanting to assert that the time limits in the insurance policy were conditions precedent to a plaintiff's claim and were not met by the plaintiff, may not simply plead that the plaintiff failed to sue "within the limits of time prescribed by relevant statutes." n9

Rule 9(c) applies to all pleadings containing issues of performance or occurrence of conditions precedent. Therefore, if a defending party makes a general allegation of performance of a condition precedent in a counterclaim or crossclaim, the plaintiff or opposing party must specifically deny performance or occurrence of the condition precedent. Similarly, in an action for breach of contract based on defendant's failure to comply with a condition precedent within a contract that would bar the contract from taking effect, the plaintiff must allege specifically in the complaint the nonperformance of the condition precedent. n10

If a defending party fails to deny performance or occurrence of a condition precedent in a timely manner, the failure may result in a waiver of the defense, n11 which makes evidence regarding nonperformance inadmissible at trial. n12 Failure to deny the performance or occurrence of a condition is generally construed as an admission of performance or occurrence. n13 However, a court may permit late allegations denying conditions precedent by granting leave to amend when required by justice. n14 In making its determination of whether to grant leave to amend, the court will consider the degree of culpability of the party who failed to timely deny, the harm to the opposing party and others, and any earlier warnings and chances to rectify given the party. n15 In any event, the court may restrict the availability of the defense by ordering that it not be raised after issuance of a pretrial order, n16 or after the time a trial has commenced. n17

[4] Pleading Official Document or Act n*

A party may plead an official document or official act by making an allegation that the document was legally issued or that the act was legally done. n1 Rule 9(d) is thus consistent with Rule 8(a), which requires that a pleading setting forth a claim for relief need contain only a short and plain statement showing the party is entitled to relief. n2 It also is consistent with Rule 10(c), which permits, but does not require, written instruments to serve as exhibits to pleadings. n3 The application of Rule 9(d) is illustrated in Paragraph 2 of Form 18 in the Appendix of Forms, which provides for a claimant in a patent infringement action to allege the official Letters Patent that were issued to the claimant. n4 It is also illustrated and Paragraph 4 of Form 19, which provides for a claimant in a complaint for copyright infringement to allege that the claimant received the official certificate of registration in compliance with all laws governing copyright, as well as Paragraph 5 of Form 19, which provides for a copyright infringement claimant to allege that the claimant has published or licensed for publication all copies of the book in compliance with the copyright laws. n5

[5] Pleading Judgment or Decision n*

A party may plead the judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, board, or officer by making an allegation of the judgment or decision. A party need not specify facts showing the rendering entity's or officer's jurisdiction to render the judgment or decision. n1 Thus, Rule 9(e) creates a presumption that the judgment or decision earlier rendered was within the jurisdictional authority of the judicial entity or officer and requires the party who opposes use of the earlier judgment or decision to raise the issue of lack of jurisdiction. This does not require that an opposing party plead the lack of jurisdiction with particularity. n2 However, the party opposing the use of the earlier judgment may not allege lack of jurisdiction to render a judgment by a general denial or by motion to dismiss but must raise the issue specifically in the answer. Although the party has the burden of raising the issue of lack of jurisdiction of the court rendering the earlier judgment, the burden of proof on the issue remains with the proponent of the judgment. n3

[6] Pleading Time and Place n*

Allegations of time and place are material for the purpose of testing the sufficiency of a pleading, and time and place must be considered like any other allegation of material matter. n1 Rule 9(f) itself does not necessarily require specificity in pleading time and place. n2 By "material," Rule 9(f) means that allegations that refer to time and place are significant, and if there is any defect or misstatement in an allegation regarding a reference to time or place, it could cause loss of a claim or defense, unless the pleading otherwise specifically cures the defect. The most frequent example is that allegations of a pleading with respect to time have significance in the determination of whether a party has complied with a statute of limitations or some other filing deadline. Under the normal rules of pleading, a statute of limitation is an affirmative defense and must be raised in the answer. However, because Rule 9(f) makes allegations of time material, the defense of the statute may be raised by a motion to dismiss under Rule 12(b)(6) when it is apparent from the face of the complaint that the time limit for bringing the claim has passed. Therefore, if a complaint on its face establishes the defense of the lapse of a limitations period, the complaint may be required to establish with particularity

that the statute should be tolled, for example, due to equitable tolling. n3

Allegations of time and place may be important to either the claiming or the defending party. n4 For a defendant, a defense to a plaintiff's claim based on a statute of limitation must be set forth "affirmatively" under Rule 8(c) and typically means that time and place have significance. n5 If a court finds insufficient allegations of time or place, the court will generally provide a claimant with an opportunity to amend if there is some chance a claim may be sufficiently alleged. n6

[7] Pleading Special Damages n*

[a] Requirement of Specificity

When making any claim for relief, the claimant must specifically state any special damages in the claim. n1 Special damages are damages that have resulted from the occurrence of a wrongful act or omission but that are unusual for, or not normally associated with, the type of claim. n2 In contrast, general damages are defined as the actual damages that are the natural consequence of the wrongful act or omission. n3 For example, damages for personal injury (noneconomic losses) are unusual in contract cases but normal in automobile accident cases, while lost profits are normal in contract cases and unusual in personal injury cases. n4 For claims based on diversity of citizenship or supplemental jurisdiction, state law governs the nature of the damages, while the procedure for pleading damages is governed by the Federal Rules of Civil Procedure. n5

The purpose of the requirement that special damages essential to claims must be specifically stated is to provide notice to the opposition that the party is claiming these unusual damages n6 and to permit groundless claims to be discovered and dismissed earlier in litigation. n7 There is no black and white test for determining whether an allegation of special damages has been stated with sufficient particularity under Rule 9(g), although conclusory allegations are obviously insufficient. n8 Allegations of special damage must be sufficient to permit a defending party to begin preparing a defense and to give the defending party adequate notice of the alleged damages. Therefore, the more natural or likely or probable the damages are in connection to the claimed injury or breach, the less particularity is needed. n9

The allegation in a demand for relief containing special damages must at least contain a statement of the causes giving rise to the special damages. n10 Special damages with several elements should be set forth in an itemized form rather than in a lump sum. n11 However, if the damages are of such a nature that precise allegations as to the amount of special damages at the time of the initial pleading are impossible, the court will not deny relief merely because the damage or loss computation or manner of proof was not alleged with certainty. In such circumstances it is sufficient for a claimant to state the general nature of the special damages in anticipation that the damage allegation can be made more precise as discovery progresses. n12

[b] Failure to Specifically Allege Special Damages May be Raised By Motion

A defending party may raise a claimant's failure to plead special damages pursuant to Rule 9(g) either by answer or other responsive pleading, or by any of the following motions, which may be filed before answering:

1. Motion to dismiss. If a party commits a violation of Rule 9(g) by failing to adequately plead special damages, the opposition may raise the issue by a motion to dismiss for failure to state a claim on which relief may be granted. n13 However, this motion will not be appropriate in many cases, because the failure to adequately plead special damages does not necessarily mean that the party has failed to state a valid claim. n14 There is only one common type of claim in which courts frequently note that special damages are an essential element of a valid claim for relief. In defamation per quod actions, a motion to dismiss is appropriate if the party failed to adequately allege special damages, because such damages are required in such an action. n15 However, the court will usually grant the claimant an opportunity to

amend the pleading before granting a motion to dismiss. n16

2. Motion in limine or motion to exclude evidence. A party that wants to raise or preserve a challenge of a failure to particularly plead special damages must at a minimum object before or at trial to the introduction of evidence concerning those special damages. Failure to object amounts to a waiver of any complaint concerning the inadequate pleading, because the matter will be deemed to have been tried by express or implied consent and treated as if it had been properly raised in the pleadings, n17 and the court will allow an amendment to conform the pleadings to the proof. n18 The motion may be made before trial in a motion in limine or motion to exclude evidence. n19 Before granting a motion to exclude, the court will provide the claimant with an opportunity to amend the offending pleading to properly state the special damages with particularity. n20

3. Motion for summary judgment. A party may make a motion for summary judgment for the opposition's failure to adequately allege special damages, but only in the same limited circumstances as would support a Rule 12(b)(6) motion to dismiss, as discussed in item 1, above. As with a motion to dismiss, an opportunity to amend would be granted before the rendering of any actual summary judgment. A court will grant summary judgment only if the party refuses to amend or is incapable of alleging the required special damages. n21

4. Motion for more definite statement. Inadequate pleading of special damages may be raised by a Rule 12(e) motion for a more definite statement. n22 However, a motion for a more definite statement should be granted only when a pleading to which a responsive pleading is permitted is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading. n23 Furthermore, motions pursuant to Rule 12(e) are disfavored, and the court will not grant the motion unless the complaint is so excessively vague and ambiguous as to be unintelligible and to prejudice the defending party seriously in attempting to answer it. n24

[c] Effect of Failure to Plead Special Damages With Requisite Specificity

If a party violates the pleading requirements of Rule 9(g), the court may deny an award of special damages. n25 However, it is important to note that in most of the cases stating that special damages may be denied for the failure to adequately plead them, the claim for the special damages was raised for the first time at or after trial. n26 Usually when the inadequate pleading of special damages is raised in a pretrial motion or at a pretrial conference, the court will simply order the party to amend his or her pleading. n27 It is only when the inadequately pleaded special damages surprise a party at trial and the surprised party objects, or when the unpleaded special damages are raised for the first time in a post-trial motion, that inadequately pleaded special damages are likely to be denied. In other cases, the courts will give the defaulting party an opportunity to amend. n28

[8] Pleading in Admiralty and Maritime Cases n*

[a] Election to Proceed Under Admiralty and Maritime Rules

Admiralty and nonadmiralty claims may both arise from the same facts, for example, when a seaman is hurt aboard ship. n1 If a claim for relief is within admiralty or maritime jurisdiction, and also within some other subject-matter jurisdiction of the court, the pleading may designate that the claim is to come within the admiralty or maritime jurisdiction for procedural purposes. n2 If such a claim does not receive a designation in the pleadings, it will be treated as within nonadmiralty jurisdiction. When there is no basis for federal jurisdiction on a claim other than admiralty and maritime jurisdiction, the claim must be treated as an admiralty or maritime claim even if no Rule 9(h) allegation is made in the pleading. n3 As discussed in [b], *below*, the purpose of Rule 9(h)(1) is to allow the claimant to elect that certain special admiralty and maritime procedures and rules apply. Rule 9(h)(1) also clarifies the applicability of these

admiralty and maritime rules and procedures in a case when more than one basis for subject matter jurisdiction has been asserted. n4 To invoke the admiralty or maritime jurisdiction, a claimant must insert a statement in the pleading identifying the claim "as an admiralty or maritime claim for purposes of Rule 14(c), 38(e), 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Claims." n5

While the claimant has the power to determine in the initial pleading whether the procedural rules for a case will be either within or outside admiralty and maritime jurisdiction under Rule 9(h), the initial choice is not irrevocable. n6 The designation may be amended in accordance with Rule 15, which provides that leave to amend shall be given freely unless prejudice will result to the opposition. n7 The court has discretion in determining whether to grant leave to amend. n8

[b] Procedural Effects of Admiralty or Maritime Jurisdiction

Several important procedural consequences arise when: either (1) a claimant invokes the benefits of Rule 9(h) by identifying a claim as an admiralty or maritime claim or (2) when a claim is cognizable solely in admiralty or maritime: n9

1. Special rules of procedure for admiralty and maritime claims apply. n10

2. When a claimant invokes admiralty or maritime jurisdiction pursuant to Rule 9(h)(1), there is a waiver of the right to a jury trial, which is otherwise applicable to claims that are based on common law. n11 There is no right to a jury trial because the *Seventh Amendment of the federal Constitution* does not afford a right to a jury trial when a claim is being heard within a federal court's admiralty jurisdiction. n12

3. The general venue statutes do not apply to admiralty or maritime claims identified under Rule 9(h)(1). n13 Rather, general admiralty practice controls, which provides that venue of admiralty actions in personam is in any district where service of process could have been made on a defending party. n14 For actions in rem, venue of admiralty actions is in the district where seizure of a vessel is made or other property is found or a substitute of the res exists. n15

4. A special rule for third party practice applies. When a claimant elects to invoke admiralty jurisdiction pursuant to Rule 9(h), there is unique third party complaint procedure. A defending party to an admiralty claim, as a third-party plaintiff may bring in a third-party defendant, seeking recovery from either the complaining or the defending party. n16 This rule is intended to preserve a defending party's traditional right in admiralty and maritime claims to demand judgment directly in favor of the plaintiff and against the third-party defendant, in contrast to Rule 14(a), which does not automatically establish a direct relationship between the plaintiff and the third-party defendant. n17

5. A special rule applies to interlocutory appeals. n18 When a court exercises subject matter jurisdiction in a federal civil action over admiralty or maritime claims, there are special rights to appeals. A statute permits appeals from interim decrees that determine the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed. n19 However, this provision is strictly construed, and interlocutory appeals will not be permitted unless the order had the effect of determining substantive rights and liabilities. n20 The statute applies even to non-admiralty claims that have been decided and are joined in an action that has been identified as an admiralty action pursuant to Rule 9(h). n21

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePartiesFictitious Names

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 2 *Moore's Federal Practice*, § 9.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 9(a)(1).*

(n3)Footnote 2. *See § 9.10[1].*

(n4)Footnote 3. *See Fed. R. Civ. P. 17(b).*

(n5)Footnote 4. *Morgan Guaranty Trust Co. v. Blum, 649 F.2d 342, 344 (5th Cir. 1981)* .

(n6)Footnote 5. *28 U.S.C. § 1332(c).*

(n7)Footnote 6. *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464-465, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* .

(n8)Footnote 7. *Snyder v. Harris, 394 U.S. 332, 340, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969)* .

(n9)Footnote 8. *28 U.S.C. § 1331.*

(n10)Footnote 9. *29 U.S.C. § 1132(e)(1)*; *see Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 71 (D.C. Cir. 1987)* .

(n11)Footnote 10. *Fed. R. Civ. P. 23.1*; *Lawson v. Baltimore Paint & Chem. Corp., 298 F. Supp. 373, 375 (D. Md. 1969)* (allegation of capacity sufficient under Rule 9(a) may be insufficient under more specific requirements for alleging capacity of Rule 23.1).

(n12)Footnote 11. *Fed. R. Civ. P. 9(a)(2).*

(n13)Footnote 12. *NAACP v. Laborers' Int'l Union, 902 F. Supp. 688, 699 (W.D. Va. 1993)* (citing **Moore's Federal Practice**).

(n14)Footnote 13. *Comstock v. Pfizer Retirement Annuity Plan, 524 F. Supp. 999, 1002 (D. Mass. 1981)* .

(n15)Footnote 14. *Ivey v. Daus, 181 F. Supp. 793, 797 (S.D.N.Y. 1960)* .

(n16)Footnote 15. *See Howerton v. Designer Homes by Georges, Inc., 950 F.2d 281, 283 (5th Cir. 1992)* .

(n17)Footnote 16. *Fed. R. Civ. P. 9(a)(1)*; *see* [a], *above*

(n18)Footnote 17. *Bondpro Corp. v. Siemens Power Generation, Inc., 463 F.3d 702, 705 (7th Cir. 2006)* (citing **Moore's Federal Practice**).

(n19)Footnote 18. *See Animazing Entertainment, Inc. v. Louis Lofredo Assocs., 88 F. Supp. 2d 265, 268 (S.D.N.Y. 2000)* .

(n20)Footnote 19. *See Fed. R. Civ. P. 12(b).*

(n21)Footnote 20. *See Fed. R. Civ. P. 56.*

(n22)Footnote 21. *Fed. R. Civ. P. 17(a)*; *see Marston v. American Employers Ins. Co., 439 F.2d 1035, 1041 (1st*

Cir 1971) .

(n23)Footnote 22. *First Union Natl Bank v. Pictet Overseas Trust Corp., 351 F.3d 810, 815 (8th Cir. 2003)* (party waives capacity defense if party defends on merits after it failed to proffer that defense).

(n24)Footnote 23. *Fed. R. Civ. P. 15(a)* (leave to amend pleading freely given when justice requires).

(n25)Footnote 24. *Gardner v. Parson, 874 F.2d 131, 139 n.12 (3d Cir. 1989)* (plaintiff not prejudiced when defendant failed to specifically deny capacity in initial answer).

(n26)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.03 (Matthew Bender 3d ed.).

(n27)Footnote 1. *Fed. R. Civ. P. 9(b).*

(n28)Footnote 2. *Carroll v. Fort James Corp, 470 F.3d 1171, 1174-1177 (5th Cir. 2006)* ; *see Fed. R. Civ. P. 12(b)(6).*

(n29)Footnote 3. *Drobnak v. Andersen Corp., 561 F.3d 778, 788 (8th Cir. 2009)* (Rule 15(a)(2) allows amendment when justice so requires).

(n30)Footnote 4. *Fed. R. Civ. P. 15(a)*; *see Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 368-369 (5th Cir. 2001)* .

(n31)Footnote 5. *Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)* (dismissal with prejudice proper when even more carefully drafted pleading could not state claim for relief).

(n32)Footnote 6. *Fed. R. Civ. P. 9(b).*

(n33)Footnote 7. *Fed. R. Civ. P. 8(a)(2).*

(n34)Footnote 8. *See Fed. R. Civ. P. 8(b)(1)(a), 8(c)(1).*

(n35)Footnote 9. *ATSI Communs., Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007)* .

(n36)Footnote 10. *United States ex rel. Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 504 (6th Cir. 2008)* (sometimes referred to as "fishing expedition").

(n37)Footnote 11. *Drobnak v. Andersen Corp., 561 F.3d 778, 783-784 (8th Cir. 2009)* (citing **Moore's Federal Practice**).

(n38)Footnote 12. *Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008)* ; *Hefferman v. Bass, 467 F.3d 596, 601-602 (7th Cir. 2006)* .

(n39)Footnote 13. *Carroll v. Fort James Corp, 470 F.3d 1171, 1174 (5th Cir. 2006)* (citing **Moore's Federal Practice**).

(n40)Footnote 14. *Vicom, Inc. v. Harbridge Merchant Servs., 20 F.3d 771, 778 (7th Cir. 1994)* .

(n41)Footnote 15. *Midwest Commerce Banking Co. v. Elkhart City Centre, 4 F.3d 521, 523 (7th Cir. 1993)* .

(n42)Footnote 16. *Lone Star Ladies Inv. Club v. Schlotzsky's, Inc., 238 F.3d 363, 368-369 (5th Cir. 2001)* .

(n43)Footnote 17. *See 15 U.S.C. § 78u-4*; *see also Maldonado v. Dominguez, 137 F.3d 1, 9 n.5 (1st Cir. 1998)*

(Congress enacted "heightened" pleading standard under federal securities law which requires that factual allegations be of sufficient particularity to give rise to strong inference that defendant acted with requisite state of mind).

(n44)Footnote 18. *SEC v. Tambone, 550 F.3d 106, 119 (1st Cir. 2008)* (heightened requirements for pleading scienter apply in private actions for securities fraud under PSLRA, but do not apply to actions brought by SEC).

(n45)Footnote 19. *Hollin v. Scholastic Corp. (In re Scholastic Corp. Sec. Litig.), 252 F.3d 63, 69-70 (2d Cir. 2001)* .

(n46)Footnote 20. *See Ley v. Visteon Corp., 543 F.3d 801, 809 (6th Cir. 2008)* (knowing and deliberate intent to manipulate, deceive, or defraud, and recklessness may constitute scienter; providing nonexhaustive list of factors that are probative of scienter in securities fraud cases).

(n47)Footnote 21. *15 U.S.C. § 78u-4(b).*

(n48)Footnote 22. *15 U.S.C. § 78u-4(b)(1).*

(n49)Footnote 23. *See 28 U.S.C. § 1964(c).*

(n50)Footnote 24. *Vild v. Visconsi, 956 F.2d 560, 567 (6th Cir. 1992)* .

(n51)Footnote 25. *See Goren v. New Vision Int'l, Inc., 156 F.3d 721, 729-730 (7th Cir. 1998)* .

(n52)Footnote 26. *Fed. R. Civ. P. 9(b).*

(n53)Footnote 27. *McAninch v. Wintermute, 478 F.3d 882, 890 (8th Cir. 2007)* .

(n54)Footnote 28. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702, 728 (10th Cir. 2006)* ; *see also Fed. R. Civ. P. 11(b)(3)* (allowing pleading of factual allegations that will likely have evidentiary support after reasonable opportunity for further investigation or discovery).

(n55)Footnote 29. *Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992)* .

(n56)Footnote 30. *DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)* .

(n57)Footnote 31. *Fed. R. Civ. P. 9(b).*

(n58)Footnote 32. *EP Medsystems, Inc. v. Echocath, Inc., 235 F.3d 865, 880-882 (3d Cir. 2000)* .

(n59)Footnote 33. *Campaniello Imports Ltd. v. Saportini Italia S.P.A., 117 F.3d 655, 663-664 (2d Cir. 1997)* (intent not adequately pleaded when coupled with fact plaintiff failed to allege any specific instance of defendant's soliciting direct sales in violation of distributorship agreement).

(n60)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.04 (Matthew Bender 3d ed.).

(n61)Footnote 1. *Fed. R. Civ. P. 9(c).*

(n62)Footnote 2. *See Walton v. Nalco Chem. Co., 272 F.3d 13, 22-23 (1st Cir. 2001)* .

(n63)Footnote 3. *EEOC v. Standard Forge & Axle Co., 496 F.2d 1392, 1395 (5th Cir. 1974)* .

(n64)Footnote 4. *Fitz-Patrick v. Commonwealth Oil Co., 285 F.2d 726, 729 (5th Cir. 1960)* .

(n65)Footnote 5. *W.E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F. Supp. 984, 996 (N.D. Ill. 1989)* .

(n66)Footnote 6. *Reindl v. City of Leavenworth, 361 F. Supp. 2d 1294, 1301-1302 (D. Kan. 2005)* .

(n67)Footnote 7. *Fed. R. Civ. P. 9(c).*

(n68)Footnote 8. *Walton v. Nalco Chem. Co., 272 F.3d 13, 22 (1st Cir. 2001)* ; *Runnemede Owners, Inc. v. Crest Mortg. Corp., 861 F.2d 1053, 1057-1058 (7th Cir. 1988)* .

(n69)Footnote 9. *Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1011 n.26 (11th Cir. 1982)* .

(n70)Footnote 10. *Majchrowski v. Norwest Mortgage, Inc., 6 F. Supp. 2d 946, 967 (N.D. Ill. 1998)* .

(n71)Footnote 11. *Davis v. Kansas City Hous. Auth., 822 F. Supp. 609, 618-619 (W.D. Mo. 1993)* .

(n72)Footnote 12. *McKee-Berger-Mansueto, Inc. v. Board of Educ., 626 F.2d 559, 562-563 (7th Cir. 1980)* .

(n73)Footnote 13. *Fed. R. Civ. P. 8(d).*

(n74)Footnote 14. *Fed. R. Civ. P. 15(a)*; *see Fed. R. Civ. P. 8(f)* (all pleadings should be construed to accomplish substantial justice); *see also Farlow v. Union Central Life Ins. Co., 874 F.2d 791 (11th Cir. 1989)* .

(n75)Footnote 15. *International Paving Sys. v. Van-Tulco, Inc., 866 F. Supp. 682, 691 (S.D.N.Y. 1994)* .

(n76)Footnote 16. *EEOC v. May & Co., 572 F. Supp 536, 540-541 (N.D. Ga. 1983)* .

(n77)Footnote 17. *Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 192 (5th Cir. 1985)* .

(n78)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.05 (Matthew Bender 3d ed.).

(n79)Footnote 1. *Fed. R. Civ. P. 9(d).*

(n80)Footnote 2. *See Fed. R. Civ. P. 8(a)(1).*

(n81)Footnote 3. *Fed. R. Civ. P. 10(c).*

(n82)Footnote 4. Fed. R. Civ. P., Appendix of Forms, Official Form 18.

(n83)Footnote 5. Fed. R. Civ. P., Appendix of Forms, Official Form 19.

(n84)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.06 (Matthew Bender 3d ed.).

(n85)Footnote 1. *Fed. R. Civ. P. 9(e)*; *see Hillman v. Arkansas Highway & Transp. Dep't, 39 F.3d 197, 200 (8th Cir. 1994)* (noting relationship between Rule 9(e) and Rule 8(c), affirmative defense of res judicata).

(n86)Footnote 2. *See Fed. R. Civ. P. 9(e).*

(n87)Footnote 3. *See Gull v. Constam, 105 F. Supp. 107, 108 (D. Colo. 1952)* .

(n88)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.07 (Matthew Bender 3d ed.).

(n89)Footnote 1. *Fed. R. Civ. P. 9(f).*

(n90)Footnote 2. *Huckabay v. Moore, 142 F.3d 233, 241 (5th Cir. 1998)* .

(n91)Footnote 3. *See Staehr v. Hartford Fin. Servs. Group, 547 F.3d 406, 426 (2d Cir. 2008)* .

Hoover v. Langston Equipment Assoc., Inc., 958 F.2d 742, 744-745 (6th Cir. 1992) ; *see KBT Corp. v. Ceridian Corp., 966 F. Supp. 369, 375 (E.D. Pa. 1997)* (in defamation action, plaintiff must plead dates of allegedly disparaging statements with sufficient specificity to allow defendants to raise applicable defenses, such as statute of limitation).

(n92)Footnote 4. *See Mullins v. I. C. Sys., 2007 U.S. Dist. LEXIS 45111, at * 3-*4 (D. Colo. 2007)* .

(n93)Footnote 5. *Fed. R. Civ. P. 8(c)*; *see also* Fed. R. Civ. P., Appendix of Forms, Official Form 30 (defending party may allege in answer that complainant's claim did not arise within specific number of years immediately before commencement of action).

(n94)Footnote 6. *See Fed. R. Civ. P. 15(a)*; *see also Linnabery v. DePauw, 695 F. Supp. 411, 412 (C.D. Ill. 1988)* .

(n95)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.08 (Matthew Bender 3d ed.).

(n96)Footnote 1. *Fed. R. Civ. P. 9(g).*

(n97)Footnote 2. *Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc., 661 F.2d 761, 765 (9th Cir. 1981)* .

(n98)Footnote 3. *LINC Finance Corporation v. Onwuteaka, 129 F.3d 917, 922 (7th Cir. 1997)* .

(n99)Footnote 4. *Avitia v. Metropolitan Club, Inc., 49 F.3d 1219, 1226 (7th Cir. 1995)* .

(n100)Footnote 5. *See Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 924 (7th Cir. 2003)* .

(n101)Footnote 6. *Figgins v. Advance Am. Cash Advance Ctrs. of Mich., Inc., 482 F. Supp. 2d 861, 868 (E.D. Mich. 2007)* .

(n102)Footnote 7. *Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 270 (7th Cir. 1983)* .

(n103)Footnote 8. *Lebeda v. A.H. Robins Co., 101 F.R.D. 689, 690 (D. Me. 1984)* (citing **Moore's Federal Practice**, and using Federal Rules Appendix of Forms, Official Form 11, as example of sufficient pleading to hold that bare allegation of injury does not meet minimal degree of specificity required by Rule 9(g)).

(n104)Footnote 9. *Suarez Matos v. Ashford Presbyterian Community Hosp., Inc., 4 F.3d 47, 51 (1st Cir. 1993)* .

(n105)Footnote 10. *Browning v. Clinton, 292 F.3d 235, (D.C. Cir. 2002)* .

(n106)Footnote 11. *Woodmont Corp. v. Rockland Center Partnership, 811 F. Supp. 1478, 1484 (D. Kan. 1993)* .

(n107)Footnote 12. *Everco Indus., Inc. v. O.E.M. Prods. Co., 63 F.R.D. 662, 666 (N.D. Ill. 1974)* .

(n108)Footnote 13. *See Fed. R. Civ. P. 12(b)(6).*

(n109)Footnote 14. *Diaz Irizarry v. Ennia, N.V., 678 F. Supp. 957, 959 (D.P.R. 1988)* .

(n110)Footnote 15. *Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d 1292, 1298 (10th Cir. 2002)* .

(n111)Footnote 16. *Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035 (C.D. Cal. 1998)* .

(n112)Footnote 17. *See Fed. R. Civ. P. 15(b).*

(n113)Footnote 18. *Niedland v. United States, 338 F.2d 254, 258-259 (3d Cir. 1964)* .

(n114)Footnote 19. *See Fed. R. Civ. P. 16(c)(3)* (proper subjects for pretrial conferences include advance rulings from court on admissibility of evidence).

(n115)Footnote 20. *Crosby v. Old Republic Ins. Co., 978 F.2d 210, 211 n.1 (5th Cir. 1992)* .

(n116)Footnote 21. *See Parker v. Aetna Life & Cas., 791 F. Supp. 175, 178 (W.D. Mich. 1991)* .

(n117)Footnote 22. *See KBT Corp., Inc. v. Ceridian Corp., 966 F. Supp. 369, 374, 378 (E.D. Pa., 1997)* .

(n118)Footnote 23. *Fed. R. Civ. P. 12(e).*

(n119)Footnote 24. *Greater N.Y. Auto. Dealers Ass'n v. Envtl. Sys. Testing, 211 F.R.D. 71, 76 (E.D.N.Y. 2002)* .

(n120)Footnote 25. *Smith v. De Bartoli, 769 F.2d 451, 453 n.2 (7th Cir. 1985)* (in action alleging denial of due process, plaintiff denied recovery for damages for emotional distress because plaintiff failed to plead such damages and emotional distress injury does not necessarily flow from denial of due process).

(n121)Footnote 26. *See National Liberty Corp. v. Wal-Mart Stores, Inc. 120 F.3d 913, 917 (8th Cir. 1997)* (motion to amend counterclaim made during trial to add claim for special damages properly denied as untimely).

(n122)Footnote 27. *See* [b], *above*.

(n123)Footnote 28. *See, e.g., Action Repair, Inc. v. American Broadcasting Co., 776 F.2d 143, 149-150 (7th Cir. 1985)* .

(n124)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 9.09 (Matthew Bender 3d ed.).

(n125)Footnote 1. *See, e.g., Zrncevich v. Blue Haw. Enters., Inc., 738 F. Supp. 350, 352 (D. Haw. 1990)* .

(n126)Footnote 2. *Fed. R. Civ. P. 9(h)(1)*; *see Doyle v. Huntress, Inc., 419 F.3d 3, 6-7 (1st Cir. 2005)* ; *see also Fed. R. Civ. P. 14(c)*, *38(e)*, and *82*; Fed. R. Civ. P., Supplemental Rules for Admiralty and Maritime Claims.

(n127)Footnote 3. *Fed. R. Civ. P. 9(h)(1)*; *Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1547 (5th Cir. 1991)* (election under Rule 9(h) applies only to a claim that is also within the jurisdiction of the district court on some other ground than admiralty).

(n128)Footnote 4. *Doyle v. Huntress, Inc., 419 F.3d 3, 6 (1st Cir. 2005)* .

(n129)Footnote 5. *Fed. R. Civ. P. 9(h)(1).*

(n130)Footnote 6. *Duhon v. Koch Exploration Co., 628 F. Supp. 925, 928 (W.D. La. 1986)* .

(n131)Footnote 7. *See Fed. R. Civ. P. 15.*

(n132)Footnote 8. *Conti v. Sanko S.S. Co., 912 F.2d 816, 818 (5th Cir. 1990)* .

(n133)Footnote 9. *Fed. R. Civ. P. 9(h)*; *see Doyle v. Huntress, Inc., 419 F.3d 3, 6-7 (1st Cir. 2005)* ; *see also* [a], *above*.

(n134)Footnote 10. *Marmac, LLC v. Reed, 232 F.R.D. 409, 413 (M.D. Fla. 2005)* ; *see* Fed. R. Civ. P., Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions; *see also Fed. R. Civ. P. 14(c)*, *38(e)*, and *82*.

(n135)Footnote 11. *See Murphy v. Fla. Keys Elec. Coop. Ass'n, 329 F.3d 1311, 1319 (11th Cir. 2003)* ; *Nat'l Cas. Co. v. Lockheed Martin Corp., 415 F. Supp. 2d 596, 604 (D. Md. 2006)* ; *see also Lewis v. United States, 812 F. Supp. 620, 627 (E.D. Va. 1993)* (citing **Moore's Federal Practice** for proposition that most important consequence of proceeding in admiralty is forfeit of right to jury trial).

(n136)Footnote 12. *See Fitzgerald v. United States Lines Co., 374 U.S. 16, 20, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* .

(n137)Footnote 13. *Fed. R. Civ. P. 82*.

(n138)Footnote 14. *Gipromer v. SS Tempo, 487 F. Supp. 631, 633 (S.D.N.Y. 1980)* .

(n139)Footnote 15. Fed. R. Civ. P., Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule F(9).

(n140)Footnote 16. *Fed. R. Civ. P. 14(c)*.

(n141)Footnote 17. *Harrison v. Glendel Drilling Co., 679 F. Supp. 1413, 1417-1418 (W.D. La. 1988)* (citing **Moore's Federal Practice**).

(n142)Footnote 18. *Fed. R. Civ. P. 9(h)(2)*; *see Doyle v. Huntress, Inc., 419 F.3d 3, 7 (1st Cir. 2005)* .

(n143)Footnote 19. *See 28 U.S.C. § 1292(a)(3)*.

(n144)Footnote 20. *Francis v. Forest Oil Corp., 798 F.2d 147, 149 (5th Cir. 1986)* .

(n145)Footnote 21. *Fed. R. Civ. P. 9*, Committee Note to 1997 Amendments.

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART II. CONTENT AND FORM OF PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.12

§ 9.12 Form of Pleadings

[1] Caption Requirements n*

[a] Name of Court

The caption is the case identification information that must be included at the beginning of every document filed with a federal court. n1 The caption of every pleading must specify the name of the district court where the pleading is initially filed or is pending. n2 If the district court has divisions, the division must be indicated in the caption. n3 If a motion to change venue is granted or the case is otherwise transferred, the name of the court in the caption must specify the district court to which the action is transferred. n4

[b] Title of Action

[i] Names of Parties

The caption of every pleading must contain the title of the action, generally including the names of all of the parties. n5 The names of parties must be included in the original complaint, but in subsequent pleadings in which no new parties are joined it is sufficient to state the name of the first party on each side and an appropriate designation of other parties. n6 The other parties may be indicated by a phrase such as "et al." n7 However, in subsequent pleadings in which new parties are joined, such as a third-party complaint, n8 the caption should also identify each party as in the complaint. n9

All parties to a civil action must be properly identified in the caption of the initial pleading in which they are named. n10 The court has the authority to dismiss a civil action or one or more claims for relief in an action if a named party has no legal identity or is not sufficiently identified to permit the necessary service of process. n11 However, the requirement that each pleading must accurately specify the full name of each individual or entity named as a party in the action is enforced liberally. In the absence of prejudice, the court will permit a party to amend any errors and omissions in the naming of parties. n12 Before a responsive pleading has been filed, a party may even make an amendment without either court order or leave of court, n13 including an amendment to a caption to correct an improper designation. n14

[ii] Exceptions for Pseudonym Use By Plaintiff

The provision of Rule 10(a) that the complaint must provide the names of all claimants to the suit is based on a strong policy that judicial proceedings must be conducted in public. n15 However, the Federal Rules of Civil Procedure do not expressly authorize or prohibit the use of fictitious names by plaintiffs in a claim for relief. Consequently, the federal courts have in special circumstances made exceptions to the policy favoring disclosure. For example, a court may allow plaintiffs to proceed under a pseudonym to protect privacy interests or to avoid physical harm. n16

The courts have developed several similar tests of factors to be weighed by the court in deciding whether to permit plaintiffs to proceed anonymously. These factors include: the degree of need to preserve privacy, the risk of harm to the claimant; the ages of anonymous parties; whether the action is against government or private parties because greater public disclosure is required when the government is involved; and the degree of unfairness to opposing parties. n17 Therefore, the court should permit a plaintiff to proceed anonymously only in exceptional cases involving matters of a highly sensitive and personal nature, actual danger of physical harm, or if the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. n18 Leave to proceed under a fictitious name is generally applicable only to individuals, because business entities have little need to avoid publicity harm and have insufficient privacy interests. n19 The use of a fictitious name should not be granted automatically even if the opposing party does not object. The use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts. n20

A party seeking to proceed anonymously must request permission from the court. Absent such permission, the court lacks jurisdiction over the fictitiously named parties. n21 Therefore, if a party proceeds in litigation under a false name without permission from the court, or in deception of the court, dismissal of the entire action is warranted, even if the litigation has proceeded for years. n22

[iii] Exceptions for Designation of Defendant by Pseudonym

The strong public policy that a party to a civil action may use a pseudonym when the circumstances of the case justify such use generally applies in the same manner to a defendant. n23 Thus, in a complaint or other affirmative pleading a party may name an unknown defendant by using a "John Doe"or "Doe" pseudonym or other description if the plaintiff has been unable to ascertain the real identify of the defendant after a reasonable inquiry. A party who wants to use a pseudonym for a defendant must not only allege that the defendant is unknown but must also attempt to provide an adequate description or other known information so that service of process can at least be attempted. n24 A court will not permit use of the Doe designation for a defendant if the plaintiff's ignorance of the defendant's true identity is the result of willful neglect or lack of reasonable inquiry. If reasonable inquiry would have revealed the true identity, the court will dismiss a pleading naming Doe defendants. n25

Naming Doe defendants without identifying their citizenship is insufficient to establish diversity of citizenship jurisdiction. n26 However, the removal statute has been amended to provide that if cases are removed from a state trial court to a federal district court based on general diversity of citizenship jurisdiction, the citizenship of defendants sued under fictitious names shall be disregarded. n27

It may be necessary for a plaintiff to designate an unknown defendant with a pseudonym if the statute of limitation on the claim is about to expire. Once the plaintiff determines the proper identity of the defendant, the plaintiff may then make a motion to amend the pleading containing the claim for relief, and the amendment to the pleading will "relate back" to the time of the original pleading for purposes of the statute of limitation. n28 However, this relation back depends on what the defendant to be added knew or should have known; the defendant to be brought in by amendment should have known that the action would have been brought against it but for a misdesignation of the proper party's identity. n29

[c] File Number

In the caption of each pleading, the party must set forth the file number. n30 At the time each civil action is commenced, the clerk of the district court will assign the action a number on a consecutive basis. n31 Some district courts indicate different categories of civil cases in their file number, such as whether the case involves adversary, bankruptcy, or civil proceedings; because local federal district court rules regulate the assignment of file numbers, information contained in the file number may vary among the district courts, and should be obtained from the clerk. n32

[d] Designation of Pleading Type

The pleading party must specify in the caption of every pleading a designation of pleading type. n33 The designations in Rule 7(a), specifying the types of pleadings permitted in civil actions in federal district courts, are: complaint; answer to a complaint; answer to a counterclaim designated as a counterclaim; answer to a crossclaim; third-party complaint; an answer to a third-party complaint; and reply to an answer. n34 These pleading designations are not used for the captions of motions or other papers. It would be improper to designate a pleading as a "counterclaim" or a "crossclaim" in the caption, because these terms are claims for relief, which are alleged in a responsive pleading, the answer. n35

[2] Requirements for Text of Pleading n*

[a] Numbering of Paragraphs

A pleading party must make all allegations of a claim or defense in separate numbered paragraphs. n1 Rule 10(b) is designed to direct attorneys in drafting pleadings that frame issues with sufficient clarity to allow an orderly and meaningful presentation of a claims for relief and any corresponding defenses, either in a motion or at trial. n2 However, the court will excuse a failure to number paragraphs provided that the pleading is intelligible and there is no prejudice to the opposing party. n3 Properly numbering the paragraphs in consecutive order is generally necessary to make useful cross references to particular paragraphs in the same pleading, in a different pleading, or in a motion. n4 For example, parties regularly use incorporation by reference of numbered paragraphs appearing elsewhere in a pleading to satisfy a pleading requirement that a particular allegation such as fraud be pleaded with particularity. n5

[b] Each Paragraph States Distinct Facts

The contents of each numbered paragraph in a pleading must be limited as far as practicable to a statement of a single set of circumstances. n6 This means that there should be a separate paragraph for each distinct set of facts or occurrences. Thus, pleading multiple acts of wrongful conduct in one claim violates Rule 10(b)'s clear requirement that each claim founded on a separate transaction or occurrence must be stated in a separate claim or defense. n7 However, the courts have enforced this requirement liberally. The court will a excuse a failure to limit a paragraph to a statement of a single set of circumstances, and not dismiss the complaint, provided that a pleading is otherwise clear and other parties are not prejudiced. Further, the court will generally provide a party several opportunities to amend a paragraph that covers multiple sets of circumstances. n8 The court may also grant leeway when it ascertains that separate paragraphs would not facilitate clearer understanding of allegations, for example, when the claimant bases their entire claim for relief on a single transaction with a single party. However, parties must remember that distinct paragraphs may be useful even when there is only a single claim or defense if the claim involves many facts or more than a single ground to support a claim or defense. n9

[c] Pleading Multiple Transactions or Parties

If doing so would promote clarity, each claim founded on a separate transaction or occurrence must be stated in a separate count. Similarly, if doing so would make a responsive pleading clearer, each defense, other than a denial, which is founded on a separate transaction or occurrence must be stated in a separate defense. n10 The effect of this rule is that each individual paragraph should not state allegations regarding more than one transaction or occurrence or more

than one party. Especially to be avoided are extremely long paragraphs that cover multiple parties and grievances or defenses. n11

The court will require separate counts if necessary to enable the defendant to frame a responsive pleading or to enable the court and the other parties to understand the claims. n12 Thus, if a complaint or other pleading seeking relief is presented against more than one defendant, the claimant may be required to state separate counts to clearly indicate to which defendant each claim applies. n13 Separate counts may also be required if multiple plaintiffs join several claims against the same defendant or defendants. n14

However, if several plaintiffs plead an identical occurrence simultaneously against a single defendant, or the liability asserted by a single plaintiff against two or more defendants is joint, separate counts may not be required because there may be only one transaction or occurrence or one claim involved. n15 Furthermore, because the objective of this requirement is clarity in pleading, the requirement is not strictly enforced when violation causes no uncertainty. n16

[3] Adoption of Pleading Allegations by Reference n*

A party may adopt by reference a statement from any pleading into another place in the same pleading, in another pleading, or in any motion. n1 The purpose for allowing adoption by reference of pleading statements is to eliminate redundancy and repetition. n2 A reference is effective only if the reference is clear and explicit and specifically identifies the statements incorporated. Adoption by reference will not be allowed if vague or imprecise. n3

Most frequently, statements in a pleading are adopted by reference later in the same pleading. Separate counts within the same affirmative pleading may be based on different legal theories and even involve different transactions but nevertheless may share common facts or request the same relief. n4 Similarly, an answer to a complaint may contain both a response to the plaintiff's allegations and a counterclaim against the plaintiff, that could each share many common facts. In these situations, the court will allow adoption by reference of statements later in the same pleading. n5

Statements in one pleading may also be adopted by reference in a subsequent pleading in the same civil action, n6 including adoption of statements from another party's pleading. n7 However, a party must make any such adoption from the same pleading, another pleading, or a motion with a degree of specificity and clarity that will enable the responding party to easily determine the nature and extent of the adoption. n8 Furthermore, the courts have consistently ruled that adoption of a statement in a pleading in one civil action of a statement from another civil action is not permitted, even if the parties to the two civil actions are the same. n9

A party may also adopt by reference a statement in a pleading into a motion in the same case. n10 For example, a motion for judgment on the pleadings may adopt by reference statements in pleadings to support the movant's allegation that there are no material factual issues in dispute and that judgment on the pleadings is proper. n11 A motion for summary judgment may be supported or opposed by reference to statements in the pleadings. The rule on summary judgment clearly contemplates that a motion for summary judgment should be supported or opposed by reference to pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits. n12

[4] Exhibits to Pleadings and Incorporation by Reference n*

[a] Documents Attached as Exhibits

A party may make a copy of a written document an exhibit to a pleading, and it becomes a part of the pleading for all purposes. n1 Thus, the contents of a written document that is an exhibit to a pleading will be considered in determining the party's claim for relief or defense to a claim for relief. n2 All types of documents may be included as exhibits in a pleading under Rule 10(c), n3 such as written contracts, n4 correspondence, n5 motion documents, n6 and litigation papers from earlier state court proceedings. n7 Rule 10(c) does not specify how a party should size, attach, and identify

exhibits. Local district court rules typically specify such guidelines. For example, one district court requires that exhibits must be securely fastened, numbered at the bottom of the page and be of particular size. n8

Ordinarily, in the case of a conflict between the exhibit and the pleading, the court will determine that the exhibit controls. n9 However, even though an exhibit becomes a part of a pleading "for all purposes" under Rule 10(c), the party does not necessarily adopt as true the entire contents of the exhibit. For example, a libel plaintiff may attach the writing alleged in the complaint to be libelous without asserting the truth of the matters in the writing, and the court need not accept them as true. n10

[b] Incorporation by Reference

Encompassed in Rule 10(c) is the process of incorporation of a written document by reference. n11 Thus, a written instrument incorporated by reference into a pleading will be considered by the court deciding the motion, provided that there is a "clear and definite reference" to the instrument in the pleading. n12

Rule 10(c) is permissive and not mandatory, and a claim or defense will not be dismissed for failure to attach a document to the pleading merely because the document may have a bearing on the claim or defense. n13 Some courts have held that it is proper for the trial court to consider documents even if they are not directly incorporated by reference, if the document is "integral" to an evaluation of the claim or defense. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsBaseless FilingsSigning Requirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 10.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 1.

(n3)Footnote 2. *Fed. R. Civ. P. 10(a)*; *see Fed. R. Civ. P. 1* (Federal Rules of Civil Procedure apply to all civil actions in United States district courts).

(n4)Footnote 3. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 1.

(n5)Footnote 4. *See 28 U.S.C. § 1404(a)*; *see also Reytblatt v. Illinois Inst. of Tech., 1999 U.S. App. LEXIS 31943, at *3 (7th Cir. 1999)* .

(n6)Footnote 5. *Fed. R. Civ. P. 10(a)*; *see* Fed. R. Civ. P., Appendix of Forms, Official Form 1.

(n7)Footnote 6. *Fed. R. Civ. P. 10(a)*.

(n8)Footnote 7. *See, e.g., Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 814 n.1 (5th Cir. 2004)* .

(n9)Footnote 8. *Fed. R. Civ. P. 14(a), (b)*; *see* Fed. R. Civ. P., Appendix of Forms, Official Form 1; *see also* Fed. R. Civ. P., Appendix of Forms, Official Form 4.

(n10)Footnote 9. *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp., 381 F. Supp. 2d 427, 431-432 (E.D. Pa. 2006)* ; *see Van Well Nursery, Inc. v. Mony Life Ins. Co., 421 F. Supp. 2d 1321, 1325 (E.D. Wash. 2006)* (case caption of all future pleadings must reflect substitution of new plaintiffs for former plaintiffs).

(n11)Footnote 10. *Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir. 1996)* .

(n12)Footnote 11. *Stratton v. Boston, 731 F. Supp. 42, 45 (D. Mass. 1989)* (citing **Moore's Federal Practice**).

(n13)Footnote 12. *Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 730 (5th Cir. 1987)* .

(n14)Footnote 13. *See Fed. R. Civ. P. 15(a).*

(n15)Footnote 14. *See United States v. Edwards, 241 F.R.D. 146, 149 (E.D.N.Y. 2007)* (after responsive pleading has been filed, leave of court required to amend name in caption).

(n16)Footnote 15. Doe v. Smith, 429 F.3d 706 (7th Cir. 2005) .

(n17)Footnote 16. *Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 684-686 (11th Cir. 2001)* .

(n18)Footnote 17. *James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993)* , *see Doe v. City of New York, 201 F.R.D. 100, 101-102 (S.D.N.Y. 2001)* .

(n19)Footnote 18. *Roe v. Aware Woman Ctr. for Choice, 253 F.3d 678, 684-686 (11th Cir. 2001)* (abortion cases have always been considered exceptional).

(n20)Footnote 19. *In re S. Cent. States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 411 n.4 (M.D. La. 1980)* .

(n21)Footnote 20. *Doe v. Blue Cross & Blue Shield, 112 F.3d 869, 872 (7th Cir. 1997)* .

(n22)Footnote 21. *National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989)* .

(n23)Footnote 22. *Zocaras v. Castro, 465 F.3d 479, 483-485 (11th Cir. 2006)* (because courts must be able to preserve integrity of judicial process, party who files suit under false name and proceeds with that deception right up to trial loses right to seek judicial relief).

(n24)Footnote 23. *Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464, 466-467 (E.D. Pa. 1997)* .

(n25)Footnote 24. *Beckerman v. Weber, 2007 U.S. Dist. LEXIS 58092, at *20 (M.D. Pa. 2007)* (citing **Moore's Federal Practice**).

(n26)Footnote 25. *Roper v. Grayson, 81 F.3d 124, 126 (10th Cir. 1996)* .

(n27)Footnote 26. *Eckert v. Lane, 678 F. Supp. 773, 775 (W.D. Ark. 1988)* .

(n28)Footnote 27. *28 U.S.C. § 1441(a).*

(n29)Footnote 28. *See Fed. R. Civ. P. 15(c)(1)(C)*; *see Nelson v. Adams USA, Inc., 529 U.S. 460, 465-467, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000)* .

(n30)Footnote 29. *Krupski v. Costa Crociere S. p. A., ___ U.S. ___, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 57-58 (2010)* .

(n31)Footnote 30. *Fed. R. Civ. P. 10(a)*; *see* Fed. R. Civ. P., Appendix of Forms, Official Form 1.

(n32)Footnote 31. *Fed. R. Civ. P. 79(a)(1).*

(n33)Footnote 32. *See Fed. R. Civ. P. 83(a)(1).*

(n34)Footnote 33. *Fed. R. Civ. P. 10(a)*; *see Fed. R. Civ. P. 7(a)*.

(n35)Footnote 34. *Fed. R. Civ. P. 7(a)(1)-(7)*.

(n36)Footnote 35. *See Fed. R. Civ. P. 7(a)*.

(n37)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 10.03 (Matthew Bender 3d ed.).

(n38)Footnote 1. *Fed. R. Civ. P. 10(b)*.

(n39)Footnote 2. *See Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000)* .

(n40)Footnote 3. *Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776, 781 (W.D. Pa. 1982)* .

(n41)Footnote 4. *Fed. R. Civ. P. 10(b), (c)*.

(n42)Footnote 5. *Schwartz v. Celestial Seasonings, Inc., 124 F.3d 1246, 1252-1253 (10th Cir. 1997)* .

(n43)Footnote 6. *Fed. R. Civ. P. 10(b)*.

(n44)Footnote 7. *Corbitt v. Home Depot U.S.A., Inc., 589 F.3d 1136, 1166 (11th Cir. 2009)* .

(n45)Footnote 8. *Frederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004)* .

(n46)Footnote 9. *See Lamar Advertising, Inc. v. City of Lakeland, Florida, 980 F. Supp. 1455, 1458 (M.D. Fla. 1997)* .

(n47)Footnote 10. *Fed. R. Civ. P. 10(b)*.

(n48)Footnote 11. *See Frederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004)* .

(n49)Footnote 12. *Anderson v. District Bd. of Trustees, 77 F.3d 364, 366-367 (11th Cir. 1996)* .

(n50)Footnote 13. *Ames v. Associated Musicians, 47 F.R.D. 540, 542 (S.D.N.Y. 1968)* .

(n51)Footnote 14. *Erone Corp. v. Skouras Theatres Corp., 19 F.R.D. 299, 300-301 (S.D.N.Y. 1956)* .

(n52)Footnote 15. *Peterson v. Stanczak, 48 F.R.D. 426, 432 (N.D. Ill. 1969)* ; *see Lamar Advertising, Inc. v. City of Lakeland, Florida, 980 F. Supp. 1455, 1458 (M.D. Fla. 1997)* .

(n53)Footnote 16. *Kjorlie v. Lundin, 765 F. Supp. 671, 672-673 (D. Kan. 1991)* .

(n54)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 10.04 (Matthew Bender 3d ed.).

(n55)Footnote 1. *Fed. R. Civ. P. 10(c)*.

(n56)Footnote 2. *East Troy v. Soo L. R. Co., 409 F. Supp. 326, 330 (E.D. Wis. 1976)* .

(n57)Footnote 3. *Federal Nat'l Mortgage Ass'n v. Cobb, 738 F. Supp. 1220, 1227 (N.D. Ind. 1990)* .

(n58)Footnote 4. *See Fontana v. Haskin, 262 F.3d 871, 877 (9th Cir. 2001)* .

(n59)Footnote 5. *Van Dyke Ford, Inc. v. Ford Motor Co., 399 F. Supp. 277, 285 (E.D. Wis. 1975)* .

(n60)Footnote 6. *Fed. R. Civ. P. 10(c).*

(n61)Footnote 7. *Federal Nat'l Mortgage Ass'n v. Cobb, 738 F. Supp. 1220, 1227 (N.D. Ind. 1990)* .

(n62)Footnote 8. *Carroll v. Fort James Corp, 470 F.3d 1171, 1176 (5th Cir. 2006)* .

(n63)Footnote 9. *Muth v. Dechert, Price & Rhoads, 391 F. Supp. 935, 938 (E.D. Pa. 1975)* .

(n64)Footnote 10. *Fed. R. Civ. P. 10(c).*

(n65)Footnote 11. *See Fed. R. Civ. P. 12(c).*

(n66)Footnote 12. *See Fed. R. Civ. P. 56(c).*

(n67)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 10.05 (Matthew Bender 3d ed.).

(n68)Footnote 1. *Fed. R. Civ. P. 10(c).*

(n69)Footnote 2. *Kolbeck v. LIT Am., Inc., 923 F. Supp. 557, 560 (S.D.N.Y. 1996)* .

(n70)Footnote 3. *Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1352 (11th Cir. 2006)* (facts drawn from allegations of plaintiffs' complaint and attached exhibit, investigative report which complaint incorporated by reference).

(n71)Footnote 4. *Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 466 (7th Cir. 2007)* .

(n72)Footnote 5. *Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1005-1006 (7th Cir. 1990)* .

(n73)Footnote 6. *Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 904 F. Supp. 753, 757 (N.D. Ill. 1995)* .

(n74)Footnote 7. *Roucchio v. Coughlin, 923 F. Supp. 360, 366 (E.D.N.Y. 1996)* .

(n75)Footnote 8. Local Rules, U.S. District Court for the Central District of California, Rule 11-5.

(n76)Footnote 9. *Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 466 (7th Cir. 2007)* .

(n77)Footnote 10. *Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 674 (2d Cir. 1995)* (even though plaintiff's complaint attached school superintendent's report as exhibit, plaintiff did not adopt superintendent's exculpatory conclusions in report).

(n78)Footnote 11. *See Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997)* .

(n79)Footnote 12. *Hinton v. Trans Union, LLC, 654 F. Supp. 2d 440, 446 (E.D. Va. 2009)* (incorporation by reference under Rule 10(c) must be sufficiently direct and explicit to enable responding party to ascertain exact nature and extent of incorporation).

(n80)Footnote 13. *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)* .

(n81)Footnote 14. *Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART II. CONTENT AND FORM OF PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure §§ 9.13through 9.19

[Reserved]

§§ 9.13[Reserved]

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART III. SIGNIFICANCE OF SIGNING PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.20

§ 9.20 Purpose and Applicability of Pleading Signature Rule

[1] Purpose of Signature Rule n*

Rule 11 of the Federal Rules of Civil Procedure requires the signing of pleadings and other documents to be filed in federal court, provides that such a signing constitutes certain representations to the court about the propriety and veracity of the pleading, and provides for sanctions in the event of violation of the rule. n1 The primary purpose of the requirements of Rule 11 is to deter frivolous and baseless filings in district court and thus streamline the administration and procedure of federal courts. n2 Rule 11 is also designed to prevent the filing of pleadings and other papers based on an improper motive, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. n3 It is not the purpose of Rule 11 to deter novel legal arguments or plausible arguments of first impression. n4 A court applies a standard of objective reasonableness to determine whether the pleading or paper was frivolous, groundless, or advanced for an improper purpose. n5

[2] Applicability of Signature Rule n

[a] Actions In Which Rule Applicable

The signature provisions of Rule 11 apply to all papers filed in civil cases in federal district courts n1 but not to criminal cases. n2 There are two other situations in which Rule 11 is applicable, but in a limited manner: to actions removed from state court to federal court and to habeas corpus proceedings. A notice of removal of a case from a state court to a federal district court is subject to Rule 11, and the notice of removal contains all of the Rule 11 representations regarding the propriety of federal court jurisdiction. n3 Courts are divided, however, on the question of whether Rule 11 may be invoked in a removed action to impose sanctions against a plaintiff on the grounds that the original state court complaint violated the rule. Most of the circuit courts that have addressed the issue have held that papers filed in state court prior to removal are not subject to Rule 11 provisions. n4

On the other hand, at least one circuit has held that a party may be sanctioned on the basis of a complaint filed in state court, finding that when the complaint is removed to federal court, Rule 11 applies at the moment the federal jurisdiction is invoked over the proceedings. n5 Furthermore, if a party continues to advocate a frivolous position taken in a removed complaint, the court may impose Rule 11 sanctions based on that advocacy. n6 Once an action has been

removed to a federal district court, any further papers submitted in the removed action must conform to Rule 11, n7 and a party that makes a motion to remand a case to state court after removal may be sanctioned if the motion to remand violates Rule 11. n8

Rule 11 generally applies to habeas corpus proceedings. n9 However, courts have limited this applicability by stating that Rule 11 sanctions should be imposed on habeas corpus petitioner only in the most egregious circumstances. n10 Some courts have also stated that the trial judge must specifically find that Rule 11 sanctions are indispensable, that other remedies are inadequate, and that the sanction award is tailored to the wrong found by the court. n11

[b] Situations When Rule is Inapplicable

The requirements of Rule 11 are limited to conduct related to the signing of pleadings, motions, and other filings in all civil actions in federal district courts. n12 However, Rule 11 provisions do not apply in any of the circumstances listed below.

1. Prelitigation papers or misconduct not involving representations of documents. n13 Because Rule 11 sanctions are available only with regard to papers filed with the court, they do not apply to attorney misconduct in general. n14 Thus, an attorney or party may not be sanctioned for improperly refusing to settle a case. n15

2. Rule 11 does not apply to discovery motions or other documents. n16 Signature requirements, certification standards, and sanctions applicable to discovery requests are governed by Rule 26. n17 For a discussion of discovery certification standards and sanctions, see Ch. 15, *Discovery*.

3. Bankruptcy proceedings in a district court. These proceedings are controlled by the bankruptcy counterpart to Rule 11, Federal Rule of Bankruptcy Procedure 9011. n18

4. Appeals. Rule 11 does not apply to appellate proceedings. n19 The question of sanctions for filing a frivolous appeal is governed by Appellate Rule 38. n20 For further discussion of sanctions for frivolous appeals, see Ch. 28, *Appeal To Court of Appeals*.

5. Other controlling law. If specific provisions of other rules or statutes are directly applicable to particular misconduct that is more generally covered by Rule 11, the more specifically tailored provisions generally control in determining whether to impose sanctions. n21 However, if another rule or statute subjects parties or attorneys to a less stringent standard of conduct than that of Rule 11, the more stringent standard may be applied. n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsBaseless FilingsSigning Requirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 11(a)-(c)*; *see Peer v. Lewis, 606 F.3d 1306, 1311 (11th Cir. 2010)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)*
.

(n4)Footnote 3. *Reinhardt v. Gulf Ins. Co., 489 F.3d 405, 416 (1st Cir. 2007)* .

(n5)Footnote 4. *Baker v. Alderman, 158 F.3d 516, 521 (11th Cir. 1998)* .

(n6)Footnote 5. *See Peer v. Lewis, 606 F.3d 1306, 1311 (11th Cir. 2010)* (in determination whether to order sanctions court asks whether party's claims are objectively frivolous, and whether person who signed pleadings should have been aware that they were frivolous).

(n7)Footnote . For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.02 (Matthew Bender 3d ed.).

(n8)Footnote 1. *Fed. R. Civ. P. 1.*

(n9)Footnote 2. *Fed. R. Crim. P. 1*; *see United States v. White, 980 F.2d 836, 843 (2d Cir. 1992)* .

(n10)Footnote 3. *Lowery v. Ala. Power Co., 483 F.3d 1184, 1217 (11th Cir. 2007)* ; *see 28 U.S.C. § 1446(a).*

(n11)Footnote 4. *See Edwards v. Gen. Motors Corp., 153 F.3d 242, 245 (5th Cir. 1998)* (Rule 11 does not apply to filings in any court other than a federal district court; declining to uphold a sanctions award to the extent that it punished the filing of a state court petition).

(n12)Footnote 5. *Herron v. Jupiter Transp. Co., 858 F.2d 332, 335 (6th Cir. 1988)* .

(n13)Footnote 6. *Khorozian v. Hudson United Bancorp, 2007 U.S. Dist. LEXIS 209, at *9 (D.N.J. 2007)* ; *see Bisciglia v. Kenosha Unified Sch. Dist. No.1, 45 F.3d 223, 227 (7th Cir. 1995)* (court can impose Rule 11 sanctions on removed action if party opposes dismissal of frivolous action first filed in state court which is later challenged in federal court).

(n14)Footnote 7. *Willy v. Coastal Corp., 503 U.S. 131, 133, 112 S. Ct. 1076, 1078, 117 L. Ed. 2d 280 (1992)* .

(n15)Footnote 8. *Burnette v. Lockheed Missiles & Space Co., 72 F.3d 766, 767 (9th Cir. 1995)* .

(n16)Footnote 9. *Weichert v. United States, 458 F. Supp. 2d 57, 67 (N.D.N.Y. 2006)* ; *see Fed. R. Civ. P. 81(a)(2).*

(n17)Footnote 10. *United States v. Quin, 836 F.2d 654, 654 (1st Cir. 1988)* .

(n18)Footnote 11. *Anderson v. Butler, 886 F.2d 111, 114 (5th Cir. 1989)* .

(n19)Footnote 12. *Christian v. Mattel, Inc., 286 F.3d 1118, 1121 (9th Cir. 2002)* (Rule 11 sanctions do not apply to conduct of attorney outside pleadings, such as conduct in oral argument, at meetings of counsel, or at depositions).

(n20)Footnote 13. *Sussman v. Bank of Israel, 56 F.3d 450, 459 (2d Cir. 1995)* .

(n21)Footnote 14. *Trulis v. Barton, 67 F.3d 779, 789 (9th Cir. 1995)* .

(n22)Footnote 15. *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988)* .

(n23)Footnote 16. *Fed. R. Civ. P. 11(d).*

(n24)Footnote 17. *See Fed. R. Civ. P. 26(g)(1)-(3).*

(n25)Footnote 18. *See 28 U.S.C. § 1446(a).*

(n26)Footnote 19. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 406, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d*

359 (1990) .

(n27)Footnote 20. *Fed. R. App. P. 38.*

(n28)Footnote 21. *See Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1003-1004 (10th Cir. 1995)* .

(n29)Footnote 22. *Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 549, 111 S. Ct. 922, 932, 112 L. Ed. 2d 1140 (1991)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART III. SIGNIFICANCE OF SIGNING PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.21

§ 9.21 Signature and Filing Requirements

[1] Required Contents n*

Every pleading, motion, or other paper presented to a federal district court in a civil action must be signed. n1 If a party is represented by counsel, n2 the document must be signed by at least one attorney of record in that attorney's name. n3 If a party is not represented by an attorney and appears pro se, the document must be signed by the party personally. n4 A typed name is not sufficient to meet the requirements of the rule. n5 However, the local rules of a particular district may specify the method for signing a document when that document is filed electronically. n6

In addition to the signature, each document covered by Rule 11 must also include the signer's address, e-mail address, and telephone number. A court may also provide by local rule that a document must include the signer's telephone number for facsimile transmission, if any. n7 Unless there is a specific provision to that effect in another rule or statute, a pleading does not have to be verified or accompanied by an affidavit. n8

The court must strike an unsigned document if it is not corrected promptly after the attorney or party has been informed of the signature omission. n9 Therefore, the court will not automatically strike an unsigned document but will give the attorney or party the opportunity to sign the document before striking it. n10 For example, when a corporate defendant's answer was erroneously signed by a corporate officer rather than by the attorney representing the corporation, the proper action by the court was not to grant a default, but rather to treat the answer as unsigned and give the attorney the opportunity to sign it. n11

[2] Signature Constitutes Certifications Made to Court n*

[a] Certifications Made By Signing or Advocating Pleading

When an attorney or unrepresented party presents a pleading, motion, or other paper to a federal district court by signing, filing, submitting, or later advocating it, the attorney or unrepresented party certifies to the best of his or her knowledge, information, and belief formed after an inquiry reasonable under the circumstances, n1 the following four matters: n1.1

1. That it is not being presented for an improper purpose. n2

2. That its legal contentions are warranted by existing law or by a nonfrivolous argument to change existing law or establish new law. n3

3. That its factual contentions have, or, if specifically so identified, likely will have, evidentiary support. n4

4. That its denials of factual contentions are warranted by the evidence or are reasonably based on a lack of information or belief. n5

[b] Reasonable Inquiry Regarding Certifications

[i] Obligation to Make Inquiry

An attorney or a self-represented party has an affirmative duty to make a reasonable investigation under the circumstances of the facts and the law before he or she signs and submits any pleading, motion, or other paper. n6 Thus, an attorneys or self-represented party may not file suit solely relying on discovery to later show that a claim was proper, n7 or file papers and insist that the court or opposing counsel undertake burdensome factual and legal investigation regarding the subject matter of the papers. n8 Rule 11 also prohibits continuing to advocate a position that subsequent discovery or research reveals to be factually or legally groundless. n9

The reasonable inquiry test is an objective standard. As applied to attorneys, the reasonable investigation standard is generally determined with reference to the conduct that would be expected of a competent attorney. n10 When evaluating the reasonableness of an investigation by a pro se litigant, the court may consider the various difficulties that may be encountered by the typical party who appears without an attorney. n11 The objective criteria for measuring the reasonableness of an investigation are discussed in [ii], below.

[ii] Required Extent of Inquiry

Prior to the time an attorney or self-represented party files a pleading, motion, or other paper, the attorney or party has an affirmative duty to conduct both a reasonably thorough factual investigation, n12 and adequate legal research to confirm whether the statements in the paper are warranted by existing law or a good faith argument for an extension, modification, or reversal of existing law. n13 Whether an attorney's or a party's investigation of the facts and the law is reasonable depends on whether he or she performed as the ordinary attorney or party would perform in the circumstances of the case. n14 For example, the amount of time available to investigate a case will be considered by a court in deciding whether sanctions should be imposed. n15 In the absence of time pressure, a reasonable attorney would interview witnesses and any attorneys who represented the client in prior related proceedings, n16 would examine all available documents that are relevant to the case, n17 and would rely on reasonable representations of a competent client. n18

Because a determination of reasonableness of an inquiry is an objective standard, a violation of Rule 11 does not require subjective bad faith. However, some courts have stated that a finding of bad faith must be made for the imposition of sanctions against parties who file frivolous pleadings when the parties are represented by counsel. n19

[iii] Reasonableness Determined at Time of Presentation

Whether a position taken or assertion made in a document presented to a district court is reasonable must be determined considering the situation existing, and the facts known, at the time the pleading, motion, or other paper was signed, filed, or presented. n20 However, the court may examine an attorney's or party's postfiling actions to determine whether he or she recognized that the claims asserted were unreasonable as of the time the document was signed or filed. n21

Additionally, reasonableness after the time of the signing or presentation are relevant to determine whether the litigant is continuing to advocate a position or assertion contained in papers after learning that the papers have ceased to have any merit. n22

[c] Certification Related to Propriety of Purpose

Rule 11 prohibits presentation of a document for an improper purpose, for example for harassment, delay, or needless increase in litigation costs. n23 The list is not exhaustive, and an attorney or party may be sanctioned for any improper purpose. The "improper purpose" test is an objective standard. n24 In applying the objective test, courts may infer the purpose of a filing from the consequences of the pleading or motion. For example, an improper purpose may be inferred when the effect of a pleading or motion is to delay the proceedings. n25 Furthermore, a court may find an improper purpose when a pleading, motion, or other paper has been filed as part of a persistent pattern of abusive litigation. n26 On the other hand, the fact that particular litigation is distasteful or inconvenient for parties involved does not necessarily make the complaint filed for an improper purpose, and the mere fact that a plaintiff is forum shopping does not constitute an improper purpose provided that a viable ground for federal jurisdiction arguably exists. n27

[d] Certifications Related to Legal Argument

A court may impose sanctions against an attorney or unrepresented party for signing, filing, or later advocating a claim, defense, or other legal contention that is not warranted by existing law. n28 However, a party who is represented by an attorney may not be ordered to pay monetary sanctions for violating Rule 11(b)(2). n29 A legal contention is not warranted by existing law if it is based on legal theories that are plainly foreclosed by well-established legal principles and authoritative precedent, n30 unless the advocate plainly states that he or she is arguing for a reversal or change of law n31 and presents a nonfrivolous argument in support of that position. n32

A legal argument violates Rule 11(b)(2) when, in applying a standard of objective reasonableness, the court concludes that a reasonable attorney in like circumstances could not have believed his or her argument to be legally justified. The legal argument must have absolutely no chance of success under the existing precedent to violate the rule. n33 Thus, a legal contention that is made in spite of the obvious preclusive effect of a judgment in prior litigation is not warranted by existing law. n34 Sanctions may also be imposed for asserting claims that have been barred by the law of the case. n35

The court may not impose sanctions if the assertion in the paper is supported by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. n36 Thus, although Rule 11 is intended to eliminate baseless or frivolous arguments, it is not intended to preclude an attorney's resourcefulness pursuing plausible legal theories. n37 The extent to which a litigant has researched the issues and found some support for its theories in minority opinions, law review articles, or in consultation with other attorneys should be taken into account in determining whether Rule 11(b)(2) has been violated. n38

On the other hand, even an arguable legal assertion is a violation of the rule if it is "frivolous," n39 that is, a claim, defense, or assertion that is baseless and made without a reasonable and competent inquiry, n40 or that has an obvious lack of merit. n41 In determining whether a filing is frivolous, courts are to resolve ambiguities in favor of the filing party. n42 If an argument has been accepted by courts in other jurisdictions, it is likely to be nonfrivolous. n43

[e] Certifications Related to Factual Contentions

When an attorney or unrepresented party presents a pleading, motion, or other paper to a federal district court by signing, filing, submitting, or later advocating it, the attorney or unrepresented party certifies to the court that its factual contentions have evidentiary support, or that specifically identified factual assertions likely will have evidentiary support. n44 Although it is not necessary for all discovery or investigation to be complete prior to the filing of a

complaint, the complainant is required to specifically identify any factual contentions that lack an evidentiary basis. n45 If, after a reasonable inquiry under the circumstances, the claimant knows there is no factual basis to support a claim, the court should impose sanctions. n46 The court is especially likely to impose sanctions if the erroneous factual contention is an extremely important one for the situation at issue and likely to alter the outcome of the case. n47

On the other hand, the court should not impose sanctions if there is some evidence tending to support the factual contention, even if the allegations are ultimately disproved. n48 Furthermore, an inadvertent factual error not central to a complainant's case should not form a basis for sanctions under Rule 11 if the error was a good faith mistake made after an adequate prefiling investigation. n49

[f] Certifications Related to Denial of Factual Contentions

When an attorney or unrepresented party presents a pleading, motion, or other paper to a federal district court by signing, filing, submitting, or later advocating it, the attorney or unrepresented party certifies to the court that the denials of factual contentions are warranted on the evidence, or that specifically identified denials of factual contentions are reasonably based on belief or a lack of information. n50 If a denial does not clearly and unequivocally state that it is based on belief or a lack of information, the court may impose sanctions on the party making the denial if the factual contention ultimately is shown not to be warranted by any evidence. n51

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 11(a).*

(n3)Footnote 2. *See Duran v. Carris, 238 F.3d 1268, 1271-1273 (10th Cir. 2001)* (attorney who provided substantial legal assistance, including ghost-writing brief, should have signed brief in addition to entering appearance).

(n4)Footnote 3. *Fed. R. Civ. P. 11(a)*; *see Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992)* .

(n5)Footnote 4. *Fed. R. Civ. P. 11(a).*

(n6)Footnote 5. *Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* .

(n7)Footnote 6. *See, e.g.*, United States District Court, Northern District of Ohio, Electronic Filing Policies and Procedural Manual, at p. 8 (party identification name and password constitutes party's signature).

(n8)Footnote 7. *Fed. R. Civ. P. 11(a)*, Committee Notes to 1993 Amendments.

(n9)Footnote 8. *Fed. R. Civ. P. 11(a)*; *see Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 544, 111 S. Ct. 922, 932, 112 L. Ed. 2d 1140 (1991)* (if an affidavit is submitted to the court, it is subject to the requirements of Rule 11).

(n10)Footnote 9. *Fed. R. Civ. P. 11(a).*

(n11)Footnote 10. *Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* .

(n12)Footnote 11. *Operating Eng'rs Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F. Supp. 2d*

1022, 1023-1024 (E.D. Wis. 2001) .

(n13)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.11 (Matthew Bender 3d ed.).

(n14)Footnote 1. *See* [b]. *below*.

(n15)Footnote 1.1. *Fed. R. Civ. P. 11(a)-(c)*; *see Peer v. Lewis, 606 F.3d 1306, 1311 (11th Cir. 2010)* (citing Moore's Federal Practice).

(n16)Footnote 2. *Fed. R. Civ. P. 11(b)(1)*; *see* [c], *below*.

(n17)Footnote 3. *Fed. R. Civ. P. 11(b)(2)*; *see* [d], *below*.

(n18)Footnote 4. *Fed. R. Civ. P. 11(b)(3)*; *see* [e], *below*.

(n19)Footnote 5. *Fed. R. Civ. P. 11(b)(4)*; *see* [f], *below*.

(n20)Footnote 6. *Fed. R. Civ. P. 11(b)*; *see, e.g., Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002)* (attorney has affirmative duty not only to conduct reasonably thorough factual investigation but also to perform adequate legal research).

(n21)Footnote 7. *Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 786 (5th Cir. 1986)* .

(n22)Footnote 8. *Land v. Chicago Truck Drivers Union, 25 F.3d 509, 517-518 (7th Cir. 1994)* .

(n23)Footnote 9. *Fed. R. Civ. P. 11(b)*.

(n24)Footnote 10. *Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 802 (5th Cir. 2003)* .

(n25)Footnote 11. *Fed. R. Civ. P. 11(b)*, Committee Note to 1993 Amendments.

(n26)Footnote 12. *Fed. R. Civ. P. 11(b)(3)*.

(n27)Footnote 13. *Fed. R. Civ. P. 11(b)(2)*.

(n28)Footnote 14. *Fed. R. Civ. P. 11(b)*; *see Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 802 (5th Cir. 2003)* .

(n29)Footnote 15. *Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 447 (5th Cir. 1992)* .

(n30)Footnote 16. *Wigod v. Chicago Mercantile Exch., 981 F.2d 1510, 1523 (7th Cir. 1992)* .

(n31)Footnote 17. *Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1357 (7th Cir. 1989)* .

(n32)Footnote 18. *Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1323, 1329-1330 (2d Cir. 1995)* .

(n33)Footnote 19. *Corporate Printing Co. v. New York Typographical Union, 886 F. Supp. 340, 344 (S.D.N.Y. 1995)* .

(n34)Footnote 20. *FDIC v. Calhoun, 34 F.3d 1291, 1296 (5th Cir. 1994)* .

(n35)Footnote 21. *Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 695 (11th Cir. 1995)* .

(n36)Footnote 22. *Fed. R. Civ. P. 11(b)*, Committee Note to 1993 Amendments; *see Christian v. Mattel, Inc., 286*

F.3d 1118, 1124 (9th Cir. 2002) .

(n37)Footnote 23. *Fed. R. Civ. P. 11(1)(b).*

(n38)Footnote 24. *G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1099 (9th Cir. 2003)* .

(n39)Footnote 25. *Bay State Towing Co. v. Barge Am. 21, 899 F.2d 129, 132-133 (1st Cir. 1990)* .

(n40)Footnote 26. *Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988)* .

(n41)Footnote 27. *Sussman v. Bank of Israel, 56 F.3d 450, 459 (2d Cir. 1995)* .

(n42)Footnote 28. *Fed. R. Civ. P. 11(b)(2).*

(n43)Footnote 29. *Fed. R. Civ. P. 11(c)(5)(A).*

(n44)Footnote 30. *Christian v. Mattel, Inc., 286 F.3d 1118, 1128 (9th Cir. 2002)* .

(n45)Footnote 31. *Smith v. Blue Cross & Blue Shield, 959 F.2d 655, 659 (7th Cir. 1992)* .

(n46)Footnote 32. *Lerch v. Boyer 929 F. Supp. 319, 324 (N.D. Ind. 1996)* .

(n47)Footnote 33. *Morris v. Wachovia Secs., 448 F.3d 268, 277 (4th Cir. 2007)* .

(n48)Footnote 34. *Foster v. Skinner, 70 F.3d 1084, 1089 (9th Cir. 1995)* .

(n49)Footnote 35. *Morley v. Ciba-Geigy Corp., 66 F.3d 21, 25 (2d Cir. 1995)* .

(n50)Footnote 36. *Fed. R. Civ. P. 11(b)(2).*

(n51)Footnote 37. *See Hurd v. Ralphs Grocery Co., 824 F.2d 806, 811 (9th Cir. 1987)* .

(n52)Footnote 38. *Fed. R. Civ. P. 11(b)(2)*, Committee Notes to 1983 Amendments.

(n53)Footnote 39. *See Fed. R. Civ. P. 11(b)(2).*

(n54)Footnote 40. *Fries v. Helsper, 146 F.3d 452, 458 (7th Cir. 1998)* .

(n55)Footnote 41. *Christian v. Mattel, Inc., 286 F.3d 1118, 1128-1129 (9th Cir. 2002)* .

(n56)Footnote 42. *Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986)* .

(n57)Footnote 43. *Smith v. National Health Care Servs., 934 F.2d 95, 96-97 (7th Cir. 1991)* .

(n58)Footnote 44. *Fed. R. Civ. P. 11(b)(3).*

(n59)Footnote 45. *Fed. R. Civ. P. 11(b)(3)*; *see Loggerhead Turtle v. County Council, 148 F.3d 1231, 1256 (11th Cir. 1998)* .

(n60)Footnote 46. *West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1528 (9th Cir. 1990)* .

(n61)Footnote 47. *Jenkins v. Methodist Hosps. of Dallas, 478 F.3d 255, 264-265 (5th Cir. 2007)* .

(n62)Footnote 48. *Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1323, 1329-1330 (2d Cir. 1995)* .

(n63)Footnote 49. *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., 8 F.3d 441, 449, 450 (7th Cir. 1993)* .

(n64)Footnote 50. *Fed. R. Civ. P. 11(b)(4)*.

(n65)Footnote 51. *Chancellor v. Pottsgrove Sch. Dist., 2007 U.S. Dist. LEXIS 58045, at *15 (E.D. Pa. 2007)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART III. SIGNIFICANCE OF SIGNING PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.22

§ 9.22 Sanctions for Violations Of Signature Requirements

[1] Purpose of Sanctions n*

The purpose of sanctions under Rule 11 is to deter frivolous litigation and filings. n1 Therefore, when a district court determines that a sanction is warranted for a violation of Rule 11, the sanction imposed should be the minimum necessary to deter future violations. n2 Because the purpose of Rule 11 is to deter conduct rather than to compensate a victim, a monetary sanction such as an award of attorney's fees should not automatically be the court's primary option. n3 For the same reason, a party is not automatically entitled to receive full reimbursement of their expenses merely because Rule 11 was violated. To deter future violations, a court should take ability to pay into account when imposing sanctions. For example, to a sole practitioner with a practice that is not lucrative, a fine of $500 may be painful enough to make the desired impact. To a big law firm, a much larger sum may not be a deterrent. The burden is on the sanctioned party to show he or she cannot pay a reasonable sanction. n4

[2] Acts That Precipitate Sanctions n*

Any of the following acts will trigger liability under Rule 11 if the act violates the rule's certification standards:

1. Signing a document. n1

2. Filing or presenting a pleading or motion. n2

3. Filing or presenting a document. n3

4. Advocating a factual or legal contention in a pleading or paper that has already been filed. n4 For example, oral statements made in advocating a pleading or motion are sanctionable when the oral representation advocates a baseless allegation and relates directly to a matter addressed in the underlying, signed paper. The use of the word "advocating" in the text of the rule means that continuing to advocate a position orally after a paper has been signed, filed, or submitted may result in the imposition of sanctions. Sanctions may not be imposed under Rule 11 for statements made for the first time during oral argument. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessAmended & Supplemental Service

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 11.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *DiPaolo v. Moran, 407 F.3d 140, 146 (3d Cir. 2005)* .

(n3)Footnote 2. *Jenkins v. Methodist Hosps. of Dallas, 478 F.3d 255, 265 (5th Cir. 2007)* .

(n4)Footnote 3. *Waltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir. 1992)* .

(n5)Footnote 4. *Anderson v. County of Montgomery, 111 F.3d 494, 502 (7th Cir. 1997)* .

(n6)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.21 (Matthew Bender 3d ed.).

(n7)Footnote 1. *See, e.g., Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 544, 111 S. Ct. 922, 929, 112 L. Ed. 2d 1140 (1991)* .

(n8)Footnote 2. *Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697, 699 (8th Cir. 1991)* .

(n9)Footnote 3. *Eisenberg v. University of New Mexico, 936 F.2d 1131, 1133-1134 (10th Cir. 1991)* .

(n10)Footnote 4. *Christian v. Mattel, Inc., 286 F.3d 1118, 1124 (9th Cir. 2002)* .

(n11)Footnote 5. *O'Brien v. Alexander, 101 F.3d 1479, 1489-1491 (2d Cir. 1996)* .

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1-9 Moore's Manual--Federal Practice and Procedure §§ 9.23through 9.29

[Reserved]

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART IV. SERVICE AND FILING REQUIREMENTS

1-9 Moore's Manual--Federal Practice and Procedure § 9.30

§ 9.30 Service of Pleadings and Papers Other than Complaint

[1] Types of Papers Requiring Service on Each Party n*

[a] Pleadings Subsequent to Original Complaint

As discussed in Ch. 6, *Service of Process and Jurisdiction Over the Person*, personal jurisdiction and notice must be established at the initiation of a suit under the exacting service provisions of Rule 4 for the summons and complaint. n1 Once jurisdiction is established, a presumption arises that the party will keep itself informed of the subsequent progress of the proceedings through its attorney. n2 This presumption also means that the provisions of Rule 5 take effect, and Rule 5's less stringent standards regarding notice of future pleadings and papers. Thus, the following pleadings fall within the phrase "pleadings subsequent to the original complaint" in Rule 5(1)(B), and such pleadings must be served on each other party in accordance with the provisions of Rule 5: n3

1. Answer to a complaint. n4

2. Answer to a counterclaim. n5

3. Answer to a crossclaim. n6

4. Third-party complaint. n7 Note, however, that the new party, referred to as the third-party defendant, must be served the third-party complaint pursuant to Rule 4. n8

5. Answer to a third-party complaint. n9

6. Reply to any answer. n10

7. Amended complaints that contain no new or additional claims for relief against a party who has previously appeared. n11

[b] Other Documents Served Under Rule 5

In addition to all pleadings filed subsequent to the original complaint, n12 all of the following types of documents must be served under the provisions of Rule 5:

1. Order which states by its terms that service of the order is required. n13 On entry of such an order or judgment by the court, the clerk must serve notice of that order or judgment pursuant to the method outlined in Rule 5(b). n14

2. Discovery paper required to be served on a party, unless the court orders otherwise. n15 Thus, the court may direct an exception to this requirement in limited instances, such as when service on each and every party of all discovery material would be overly burdensome and expensive in complex litigation involving numerous parties. n16

3. Written motion, except a motion that may be heard ex parte. n17 Motions must be in writing unless presented during a hearing or a trial; consequently, most motions must be served on all parties. n18 Affidavits supporting or opposing motions must also be served on each party in accordance with Rule 5. n19

4. Written notice, appearance, demand, or offer of judgment, or any similar paper. This catch-all provision covers all other similar papers that must be served on each party to the action by the federal rules. n20

[2] Appearance Determines Which Parties Are Entitled to Receive Service n*

A person is entitled to service pursuant to Rule 5 only after the person has made an appearance in the proceeding. n1 An "appearance" is an open, public act by which a party comes into court and submits itself to the jurisdiction of the court. n2 It is an affirmative act requiring knowledge of the action and an intention to appear. n3 An appearance at any stage in the action entitles that party to receive service of all subsequent pleadings and papers. n4

On the other hand, if a party has never made an appearance in the proceeding, and thus is in default for failure to appear, the party is not entitled to notice or service under Rule 5. n5 No affirmative duty is placed on the plaintiff or any other party in the proceeding to serve any pleading or paper on the party in default for failure to appear. Thus, a party in default for failure to appear is not entitled to be notified of any progress regarding the proceedings concerning that party because they have never submitted themselves to the jurisdiction of the court. n6 However, if a party who has made an appearance subsequently defaults, that party continues to be entitled to the service of all pleadings and papers under Rule 5, because an appearance at any time during the action requires service on that party of all subsequent pleadings and papers. n7 But if a new claim is added against a party in default for failure to appear, service of that claim must be made under Rule 4. n8

[3] Persons That Must be Served n*

[a] Service on Attorney of Represented Party

When a party to proceedings in federal court makes an appearance and is represented by an attorney, all service under Rule 5 must be directed to that party's attorney, rather than the party itself, unless the court orders service on the party. n1 Thus, for purposes of service of notice under Rule 5, a represented party and the party's attorney are treated as one. n2 A motion to compel a represented client, for example, may be made by service of the notice on the client's attorney. n3 With respect to class actions, the attorney rather than the class must be served with papers under Rule 5, and notice to the attorney of record constitutes notice to the entire class. n4 If an individual is represented by several attorneys, service on any one of them constitutes valid service on the party under the rule. n5

This rule requiring service on an attorney, rather than directly on the represented party, applies only to service of papers and orders after the service of the summons and complaint n6 and does not apply to service of other process or subpoenas. n7 If a party is represented by counsel, any service made directly on that party, unless expressly ordered by the court, is invalid as not complying with the provisions of Rule 5 n8 and may also constitute a violation of professional ethics. n9

[b] Direct Service on Unrepresented Party

If a party is not represented by an attorney of record in proceedings, that party must be served directly under Rule 5. n10 Additionally, if a party formerly represented is no longer represented by an attorney in a particular action, service must be made directly on the party. Once an attorney has ceased to represent a party, service on the attorney is ineffective service on that party. n11 However, the requirement that service must be made on an unrepresented party directly is applicable only to service made under Rules 5(a) and 77(d). n12 When service of summons or process is made pursuant to Rules 4, 4.1, 45(b), and 71.1, service must be made as provided in those rules. n13

[c] Service on Custodian of Property

If an action is commenced by the seizure of property, any service required to be made before an absentee owner appears must be made on the person with custody or possession of the property at the time of its seizure. n14 This provision applies only when an attachment, arrest, or garnishment is made on a particular piece of property and no person is or need be named as a defendant in order to commence the proceedings. n15 For example, when a prompt deposition n16 is needed for an in rem maritime action, service on the custodian of the ship would comply with Rule 5(a)'s service provisions. In such circumstances, the serving party is not required to locate an actual absentee owner of the ship to accomplish proper service. n17

[d] Discretion of Court to Specify Service in Cases of Numerous Defendants

In any action in which there are unusually large numbers of defendants, the court has discretion, by motion or on its own initiative, to order special service rules for pleadings, claims, and defenses. n18 Under this provision the court may order that:

1. defendants' pleadings and replies to them need not be served on other defendants; n19

2. any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; n20 and

3. filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties. n21

When the court makes such a special service order in cases of multiple defendants, the court has discretion to direct which parties are entitled to service of the order. n22

These provisions allow the court flexibility to dispense with strict compliance with Rule 5 in circumstances when it is unnecessarily burdensome or expensive because of the number of parties. n23

[4] Acceptable Means of Performing Service n*

[a] Summary of Methods of Service After Complaint is Filed

There are several alternative methods for service of pleadings and papers after the complaint has been filed and served.

A party may effect service by any of the following:

1. handing it to the person. n1

2. leaving it at the person's office or dwelling. n2

3. mailing it to the person's last known address. n3

4. leaving it with the court clerk if the person has no known address. n4

5. sending it by electronic means, if the person consented in writing. However, such service is not effective if the serving party learns that it did not reach the person to be served. n5

6. delivering it by any other means that the person consented to in writing. n6

If service is accomplished through any of methods 2 through 6 in the above list, and the receiving party has the right to take some action in response to the served paper, or must take such action, the responding party has three additional days for any prescribed period to make the required response. n7 This extension is granted because there is an interval of time that may pass between the sending of a pleading or document served by one of these methods and the actual receipt of the pleading or document. n8 Therefore, a party wishing to expedite matters should serve the other party by hand delivery to avoid the imposition of this three-day time extension. n9

[b] Hand Delivery to Person

The most direct and safest type of service is for the server to personally hand the paper in person to the attorney for the person, or when a party is unrepresented, directly to the party. n10 If service is made in this manner, the party receiving the service does not receive the three additional days for any prescribed period to make a response to the matter that is the subject of the service. n11

[c] Leaving Paper at Office or Residence

A party may serve a paper by leaving it at the person's office if open for business with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office. n12 A paper may not be left at a closed office. n13 If the person has no office or the office is closed, the paper may be left at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there. n14

[d] Service by Mail

A party may accomplish service by mailing the paper to the person's last known address; this service is complete on mailing. n15 Service by mail is valid when the serving party places the documents to be served in an envelope properly addressed to the last known address of the party's attorney or, when a party is unrepresented, of the party, and depositing it with the United States Postal Service. n16 On the other hand, service by mail is not valid if a party attempts to serve another party at an address the party knows or should have known was not the other party's last address. n17

Service by mail is deemed complete at the moment the documents are placed into a receptacle of the United States Postal Service. n18 Therefore, the crucial occurrence in the service procedure under Rule 5 is the mailing, and not the receipt, of the documents being served. Nonreceipt or nonacceptance of an envelope containing the documents is insignificant and has no effect on the validity of service. n19 If a party can prove nonreceipt, however, it is within the court's discretion to extend any applicable response period pertaining to the served document. n20

[e] Delivery to Court Clerk When Address is Unknown

If service on the attorney or the unrepresented party cannot be accomplished because the attorney or unrepresented party's address is unknown, the papers may be left with the clerk of the court to satisfy the service requirements of Rule 5. n21 This service method is of limited necessity and utility in modern practice because Rule 11 states that all pleadings, written motions, and other papers must be signed by either the attorney of record or, if the party is unrepresented, by the party, and the signer must also provide his or her mailing address, e-mail address, and telephone number, and update that information when it changes. n22

[f] Service by Electronic Transmission

A party may accomplish service by sending a document by electronic means if the person consented in writing, in which event service is complete on transmission. However, such service is not effective if the serving party learns that it did not reach the person to be served. n23 Even though consent to electronic service must be in writing, the consent itself may be by electronic writing. Electronic transmission is effected when the sender does the last act that must be performed by the sender. n24 If a local rule so authorizes, a party may use the court's transmission facilities to make this electronic service. n25

For consent to electronic transmission of service, parties should specify the scope and duration of the consent, and the specification should include at least the persons to whom service should be made, the appropriate address or location for such service, such as the e-mail address, n26 and the format to be used for attachments. The court has discretion to adopt local rules that provide for service through the court. Thus, it is anticipated that electronic case filing systems will ultimately have the capacity to make service by using the court's facilities to transmit all documents filed in the case. n27

[g] Consent to Service by Other Means

A party may complete service to a person by any other non electronic means that the served person consented to in writing; this type of service is complete when the person making service delivers it to the agency designated to make delivery under the consent. n28 If the parties agree to service by a means other than electronic transmission, the use of court facilities is not available. n29

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofCertificates

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 11.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 4(c)(1).*

(n3)Footnote 2. *See Jones Stevedoring Co. v. Director, 133 F.3d 683, 688-689 (9th Cir. 1997)* .

(n4)Footnote 3. *Employee Painters' Trust v. Ethan Enters., 480 F.3d 993, 999 (9th Cir. 2007)* ; *see Fed. R. Civ. P. 5(a)(1)(B).*

(n5)Footnote 4. *Fed. R. Civ. P. 7(a)(2).*

(n6)Footnote 5. *Fed. R. Civ. P. 7(a)(3).*

(n7)Footnote 6. *Fed. R. Civ. P. 7(a)(4).*

(n8)Footnote 7. *Fed. R. Civ. P. 7(a)(5).*

(n9)Footnote 8. *Oklahoma Radio Assocs. v. FDIC, 969 F.2d 940, 943 (10th Cir. 1992)* (Rule 4 must be used to provide court with personal jurisdiction over person of party served).

(n10)Footnote 9. *Fed. R. Civ. P. 7(a)(6).*

(n11)Footnote 10. *Fed. R. Civ. P. 7(a)(7).*

(n12)Footnote 11. *Ahmad v. Independent Order of Foresters, 81 F.R.D. 722, 726 (E.D. Pa. 1979)* .

(n13)Footnote 12. *See* [a], *above.*

(n14)Footnote 13. *Fed. R. Civ. P. 5(a)(1)(A).*

(n15)Footnote 14. *Fed. R. Civ. P. 77(d)(1).*

(n16)Footnote 15. *Fed. R. Civ. P. 5(a)(1)(C).*

(n17)Footnote 16. *Fed. R. Civ. P. 5,* Committee Note to 1970 Amendments.

(n18)Footnote 17. *Fed. R. Civ. P. 5(a)(1)(D).*

(n19)Footnote 18. *Fed. R. Civ. P. 7(b)(1).*

(n20)Footnote 19. *See Fed. R. Civ. P. 6(c)(2).*

(n21)Footnote 20. *Fed. R. Civ. P. 5(a)(1)(E).*

(n22)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.03 (Matthew Bender 3d ed.).

(n23)Footnote 1. *Fed. R. Civ. P. 5(a)(2).*

(n24)Footnote 2. *New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996)* .

(n25)Footnote 3. *Anderson v. Taylorcraft Inc., 197 F. Supp. 872, 874 (W.D. Pa. 1961)* .

(n26)Footnote 4. *Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 541-542 (2d Cir. 1963)* .

(n27)Footnote 5. *Fed. R. Civ. P. 5(a)(2).*

(n28)Footnote 6. *Cutting v. Allenstown, 936 F.2d 18, 21 (1st Cir. 1991)* .

(n29)Footnote 7. *New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996)* ; *see Fed. R. Civ. P. 5(a)(2).*

(n30)Footnote 8. *Fed. R. Civ. P. 5(a)(2)*; *Varnes v. Glass Bottle Blowers Asso. 674 F.2d 1365, 1368 (11th Cir. 1982)* (citing **Moore's Federal Practice**).

(n31)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.04[1] (Matthew Bender 3d ed.).

(n32)Footnote 1. *Fed. R. Civ. P. 5(b)(1).*

(n33)Footnote 2. *Jones Stevedoring Co. v. Director, 133 F.3d 683, 688-689 (9th Cir. 1997)* .

(n34)Footnote 3. *Berry v. Hawaiian Express Serv., 2007 U.S. Dist. LEXIS 58184, at *9-*10 (D. Haw. 2007)* .

(n35)Footnote 4. *United States v. Pend Oreille Pub. Util. Dist. No.1, 28 F.3d 1544, 1553 (9th Cir. 1994)* .

(n36)Footnote 5. *Bueford v. Resolution Trust Corp., 991 F.2d 481, 487 (8th Cir. 1993)* .

(n37)Footnote 6. *Fed. R. Civ. P. 5(a)(1)*.

(n38)Footnote 7. *See Fed. R. Civ. P. 5(b)(1)*, Committee Note to 2001 Amendments.

(n39)Footnote 8. *Fortner v. Balkcom, 380 F.2d 816, 818 (5th Cir. 1967)* .

(n40)Footnote 9. *Upjohn v. Aetna Casualty & Sur. Co., 768 F. Supp. 1186 (W.D. Mich. 1990)* .

(n41)Footnote 10. *Fed. R. Civ. P. 5(b)(1)*; *see Love v. Hayden, 757 F. Supp. 1209, 1211 (D. Kan. 1991)* .

(n42)Footnote 11. *SEC v. Everest Management Corp., 87 F.R.D. 100, 102 n.1 (S.D.N.Y. 1980)* .

(n43)Footnote 12. *Fed. R. Civ. P. 5(b)(1)*.

(n44)Footnote 13. *Fed. R. Civ. P. 5(b)(1)*, Committee Note to 2001 Amendments; *see Bellis v. Tokio Marine and Fire Ins. Co., 2002 U.S. Dist. LEXIS 1714, *54 (S.D.N.Y. 2002)* .

(n45)Footnote 14. *Fed. R. Civ. P. 5(a)(3)*.

(n46)Footnote 15. *Fed. R. Civ. P. 5(a)(3)*, Committee Note to 1970 Amendments.

(n47)Footnote 16. See *Fed. R. Civ. P. 30(a)*, *30(b)(2)*.

(n48)Footnote 17. *Fed. R. Civ. P. 5(a)(3)*, Committee Note to 1970 Amendments.

(n49)Footnote 18. *Fed. R. Civ. P. 5(c)(1)*.

(n50)Footnote 19. *Fed. R. Civ. P. 5(c)(1)(A)*.

(n51)Footnote 20. *Fed. R. Civ. P. 5(c)(1)(B)*.

(n52)Footnote 21. *Fed. R. Civ. P. 5(c)(1)(B)*.

(n53)Footnote 22. *Fed. R. Civ. P. 5(c)(1)*.

(n54)Footnote 23. *Fed. R. Civ. P. 5(a)*, Committee Note to 1970 Amendments; *see United States v. Environmental Conservation & Chem. Corp., 100 F.R.D. 490, 490 (S.D. Ind. 1984)* (because toxic tort litigation frequently involves many defendants, court will typically relax strict service requirements).

(n55)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.04[2] (Matthew Bender 3d ed.).

(n56)Footnote 1. *Fed. R. Civ. P. 5(b)(2)(A)*; *see* [b], *below*.

(n57)Footnote 2. *Fed. R. Civ. P. 5(b)(2)(B)*; *see* [c], *below*.

(n58)Footnote 3. *Fed. R. Civ. P. 5(b)(2)(C)*; *see* [d], *below*.

(n59)Footnote 4. *Fed. R. Civ. P. 5(b)(2)(D)*; *see* [e], *below*.

(n60)Footnote 5. *Fed. R. Civ. P. 5(b)(2)(E)*; *see* [f], *below*.

(n61)Footnote 6. *Fed. R. Civ. P. 5(b)(2)(F)*; *see* [g], *below*.

(n62)Footnote 7. *Fed. R. Civ. P. 6(d)*.

(n63)Footnote 8. *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)* .

(n64)Footnote 9. *See Albright v. Virtue, 273 F.3d 564, 571-572 (3d Cir. 2001)* .

(n65)Footnote 10. *Fed. R. Civ. P. 5(b)(2)(A)*; *see Fed. R. Civ. P. 5(b)(1)*.

(n66)Footnote 11. *See Fed. R. Civ. P. 6(d)*.

(n67)Footnote 12. *Fed. R. Civ. P. 5(b)(2)(B)(i)*.

(n68)Footnote 13. *Sinett Inc. v. Blairex Labs., Inc., 909 F.2d 253, 254 (7th Cir. 1990)* .

(n69)Footnote 14. *Fed. R. Civ. P. 5(b)(2)(B)(ii)*.

(n70)Footnote 15. *Fed. R. Civ. P. 5(b)(2)(C)*.

(n71)Footnote 16. *Russell v. Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 750 (7th Cir. 1995)* .

(n72)Footnote 17. *New York Life Ins. Co. v. Brown, 84 F.3d 137, 142 (5th Cir. 1996)* .

(n73)Footnote 18. *Vincent v. Consolidated Operating Co., 17 F.3d 782, 785 n.9 (5th Cir. 1994)* .

(n74)Footnote 19. *Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* (citing **Moore's Federal Practice**).

(n75)Footnote 20. *Fed. R. Civ. P. 6(b)*.

(n76)Footnote 21. *Fed. R. Civ. P. 5(b)(2)(D)*.

(n77)Footnote 22. *Fed. R. Civ. P. 11(a)*; *see Freed v. Plastic Packaging Materials, Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975)* .

(n78)Footnote 23. *Fed. R. Civ. P. 5(b)(2)(E)*.

(n79)Footnote 24. *Fed. R. Civ. P. 5(b)(2)*, Committee Note to 2001 Amendments.

(n80)Footnote 25. *Fed. R. Civ. P. 5(b)(3)*.

(n81)Footnote 26. *See Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 n.6 (9th Cir. 2002)* (noting that rules permit service to email address).

(n82)Footnote 27. *Fed. R. Civ. P. 5(b)(2)*, Committee Note to 2001 Amendments.

(n83)Footnote 28. *Fed. R. Civ. P. 5(b)(2)(F)*.

(n84)Footnote 29. *Fed. R. Civ. P. 5(b)(2)(E)*, Committee Note to 2007 Amendments.

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART IV. SERVICE AND FILING REQUIREMENTS

1-9 Moore's Manual--Federal Practice and Procedure § 9.31

§ 9.31 Proof of Service for Pleadings and Papers Other than Complaint

[1] Required Certificate of Service n*

After service of any post-complaint pleading, motion, or other paper required to be served, the serving party must complete a certificate of service, and file both the paper itself and the certificate of service with the court. n1 Rule 5, itself, contains no information regarding the format of certificates of service. The format is generally controlled by local rule. n2 However, the certificate of service should specify both the date and the manner of service, as well as provide a certification by the serving party that service of the pleading or paper was actually completed. n3 This information is extremely useful if the effectiveness or timeliness of service is subsequently challenged. For example, the certificate of service may be offered as proof to establish that a motion was received on time by the opposition. n4 Thus, the principal importance of the certificate of service is to provide the court with clear proof that service has been accomplished. This means that a pleading under Rule 5 is not necessarily defective when it has no certificate of service, provided that the party can otherwise prove service. n5

[2] Local Rules Requirements n*

Attorneys should always familiarize themselves with local rules regarding proof of service, because there are no explicit provisions regarding the format of a certificate of service in Rule 5's provisions. Most of the federal district court local rules set forth the required content of the certificate of service. n1 Usually, these local rules require that proof of service show the time and manner of service and the name of the person served. n2 Local rules typically provide that the proof be made either by written acknowledgment of service, by affidavit, n3 or by certification of the attorney. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 5(d)(1)*; *see § 9.32* (filing requirements).

(n3)Footnote 2. *See* [2], *below*.

(n4)Footnote 3. *Fed. R. Civ. P. 5(d)*, Committee Note to 1991 Amendments.

(n5)Footnote 4. *Sterling v. Interlake Indus., 154 F.R.D. 579, 584 (E.D.N.Y. 1994)* .

(n6)Footnote 5. *Ives v. Guilford Mills, Inc., 3 F. Supp. 2d 191, 195 (N.D.N.Y. 1998)* .

(n7)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.21 (Matthew Bender 3d ed.).

(n8)Footnote 1. *See, e.g.*, Northern District of Illinois Rule 5.5(b).

(n9)Footnote 2. *Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* .

(n10)Footnote 3. *Interstate Commerce Comm. v. Carpenter, 648 F.2d 919, 921 (3d Cir. 1981)* .

(n11)Footnote 4. *See, e.g.*, Northern District of Illinois Rule 5.5(b).

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART IV. SERVICE AND FILING REQUIREMENTS

1-9 Moore's Manual--Federal Practice and Procedure § 9.32

§ 9.32 Filing of Pleadings and Papers Other than Complaint

[1] Acts Constituting Filing n*

[a] Receipt by Court Clerk

After the filing of the complaint, all papers that are required to be served on a party must be filed with the court within a reasonable time after service, together with a certificate of service. n1 The filing requirements for a particular document are considered completed when the document is delivered to the clerk of the court. n2 Provided that they are left in a place particularly designated for filing, papers may be deemed as filed even if at the time of delivery the clerk is not physically present. n3

There are two alternatives to personal delivery to the clerk. First, documents may be delivered to the clerk electronically, when permitted or required by local rule. n4 Second, papers may be mailed to the clerk; n5 however, filing is complete only on actual receipt of the documents or when they are placed in the box in the clerk's office. n6 Unlike service, filing is not deemed complete on mailing, but when the papers are actually received by the clerk. n7

The clerk of the court is expressly prohibited from refusing to accept the papers tendered on the grounds that the papers are not presented in the proper form. n8 This rule was promulgated because the drafters believed that allowing the clerk to reject papers tendered for filing was not a suitable role for the office of the clerk, and such a practice would expose litigants to the hazards of time bars. n9 However, the clerk is still free to advise a litigant or attorney that a paper intended to be filed is not in proper form. A defect may usually be corrected after the document is filed. The court has discretion, however, to strike any non-conforming document after the document is filed. n10

[b] Receipt by Judge

A party may complete filing a paper by delivering the paper to a judge who agrees to accept it for filing. The judge must then note the filing date on the paper and promptly send it to the clerk. n11 When a judge determines that filing with the bench is warranted, the judge will allow particular papers to be filed directly. The decision to accept direct filing remains within the sole discretion of the court, and a judge need not provide particular reasons for a ruling on this issue. n12 A court may grant authorization when it is deemed essential for the protection of a party, such as in situations when

a party needs to expedite the effectiveness of a temporary restraining order in order to avoid irreparable harm. n13

Once a party has obtained authorization for direct filing and the papers are delivered to the judge as authorized, filing is established regardless of whether or not the judge properly handles and transmits the papers to the clerk. n14 However, if a party attempts to file papers with the judge and has not acquired the necessary previous judicial authorization from the court, the filing is invalid. n15 If the judge fails to recognize any such defect at the time of the filing, the court may at a subsequent time strike the defective pleading or paper. n16

[c] Filing by Incarcerated Pro Se Litigant

When an incarcerated person without representation by an attorney files a document, the party is deemed to have filed the document in accordance with Rule 5 when the party tenders the document to prison authorities for mailing. n17 The necessity of actual court delivery, either personally or by mail is waived for such prisoners, because prisoners lack control over the timeliness of mailing their documents due to the extensive monitoring of mail by the correctional facilities. n18 Prisoners who have the benefit of representation by an attorney are not accorded the benefit of this early filing determination. n19

[d] Delivery by Electronic Transmission

A district court may by local rule permit or require papers to be filed, signed, or verified by electronic means, provided that the means are consistent with any technical standards that have been established by the Judicial Conference of the United States. n20 If a paper is filed by electronic means in compliance with a local rule, the paper is a "written paper" for purposes of the federal rules. n21 A local rule may *require*, as opposed to *permit*, filing by electronic means only if reasonable exceptions are allowed. n22 Many courts require electronic filings, and all courts that have done so must make exceptions when electronic filing would impose a hardship on a party, such as when a party does not have technological capability to make an electronic filing. n23

Under the federal rules, a telephone facsimile transmission, also known as a fax, is considered a transmission by electronic means. n24 Therefore, all of the requirements for electronic transmissions apply to filing by fax, including the requirement that a filing by fax is not allowed in federal court unless permitted by local rule. n25

[e] Other Filing Requirements Established by Local Rule

Local rules for each district may establish particular requirements for filing provided the requirements do not conflict with the federal rules. For example, many district courts specify whether copies must be filed in the ordinary case in addition to the original document. Rules in many of the courts require that a paper original and one paper copy be filed, or if the original filing is electronic, that a paper copy must also be provided to court. n26 Some of the courts require that two copies be filed with the original. n27 Attorneys should become familiar with the local rules that specify particular filing requirements.

[2] Discovery Documents Should Ordinarilty Not Be Filed Until Used n*

Initial discovery requests, depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission generally must not be filed until they are used in the proceeding or the court orders their filing. n1 The purpose of this provision is to alleviate storage problems resulting from the filing of these often voluminous materials, as well as to save the additional expense of copying such documents solely for the purpose of filing them. n2 Many federal district courts have standing local rules stating that discovery documents are not to be filed unless ordered by the court. n3

[3] Time Requirements for Filing

[a] Filing Must Be Accomplished Within Reasonable Time

A party must file all papers requiring service within a reasonable time following service. n1 The precise definition of "reasonable time" is not specified in Rule 5. Therefore, what constitutes a reasonable time has been intentionally left for the court to determine on a case-by-case basis. The courts have liberally construed the provision to avoid technical objections when papers required to be served are served in a timely fashion but happen not to be filed immediately after service. n2 Thus, a party must show prejudice as a result of the delay between service and filing to justify consideration of a sanction such as default judgement. n3

[b] Local Rules May Specify Timeliness

Local rules of a jurisdiction may define a "reasonable time" in terms of a specific number of days for purposes of the Rule 5 requirement that papers be filed within a reasonable time after service. n4 However, the federal rules contemplate that a time limit for filing after service will vary depending on the particular circumstances of the case, and the court should decide on an individual basis whether a particular filing was timely. Thus, the local rules may operate as guidelines rather than as arbitrary time periods. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 5(d)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 5(d)(2)(A).*

(n4)Footnote 3. *Smith v. Planned Parenthood, 327 F. Supp. 2d 1016, 1018-1019 (E.D. Mo. 2004) .*

(n5)Footnote 4. *Fed. R. Civ. P. 5(d)(3)*; *see* [d], *below.*

(n6)Footnote 5. *Strickland v. Wayne Farms-Southland Hatchery, 132 F. Supp. 2d 1331, 1332-1333 (M.D. Ala. 2001) .*

(n7)Footnote 6. *Fed. R. Civ. P. 5(d)(2)(A).*

(n8)Footnote 7. *Raymond v. Ameritech Corp., 442 F.3d 600, 604-605 (7th Cir. 2006) .*

(n9)Footnote 8. *Fed. R. Civ. P. 5(d)(4).*

(n10)Footnote 9. *Wilson v. Lowe's Home Ctr., Inc., 401 F. Supp. 2d 186, 189 (D. Conn. 2005) .*

(n11)Footnote 10. *Transamerica Corp. v. National Union Fire Ins. Co., 143 F.R.D. 189, 191 (N.D. Ill. 1992) .*

(n12)Footnote 11. *Fed. R. Civ. P. 5(d)(2)(B).*

(n13)Footnote 12. *United States v. Brown, 921 F.2d 1304, 1309 (D.C. Cir. 1990) .*

(n14)Footnote 13. *See Fed. R. Civ. P. 65(b).*

(n15)Footnote 14. *Life Ins. Co. of N. Am. v. Von Valtier, 116 F.3d 279, 282-283 (7th Cir. 1997)* .

(n16)Footnote 15. *DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1195 n.4 (3d Cir. 1978)* .

(n17)Footnote 16. *Transamerica Corp. v. National Union Fire Ins. Co., 143 F.R.D. 189, 191 (N.D. Ill. 1992)* .

(n18)Footnote 17. *Cooper v. Brookshire, 70 F.3d 377, 379 (5th Cir. 1995)* .

(n19)Footnote 18. *Lewis v. Richmond City Police Dep't, 947 F.2d 733, 735 (4th Cir. 1991)* .

(n20)Footnote 19. *Faile v. Upjohn Co., 988 F.2d 985, 988 (9th Cir. 1993)* .

(n21)Footnote 20. *Fed. R. Civ. P. 5(d)(3)*; *see AgSouth Farm Credit, ACA v. Bishop, 333 B.R. 746, 748 (D.S.C. 2005)* (in absence of local rule to contrary, filing by "electronic means" is not permitted).

(n22)Footnote 21. *Fed. R. Civ. P. 5(d)(3)*.

(n23)Footnote 22. *Fed. R. Civ. P. 5(d)(3)*.

(n24)Footnote 23. *Fed. R. Civ. P. 5*, Committee Note to 2006 Amendments.

(n25)Footnote 24. *Fed. R. Civ. P. 5*, Committee Note to 1996 Amendments.

(n26)Footnote 25. *AgSouth Farm Credit, ACA v. Bishop, 333 B.R. 746, 748-749 (D. S.C. 2005)* .

(n27)Footnote 26. N.D. Ill. Local Rule 5.2(e) (copy must be included for use by court).

(n28)Footnote 27. E.D. Ark. Local Rule 5.5(a).

(n29)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice*, § 5.32 (Matthew Bender 3d ed.).

(n30)Footnote 1. *Fed. R. Civ. P. 5(d)(1)*.

(n31)Footnote 2. *Fed. R. Civ. P. 5*, Committee Note to 1980 Amendments.

(n32)Footnote 3. *See, e.g.*, Wyoming U.S.D.C.L.R. 26.1(f).

(n33)Footnote 1. *Fed. R. Civ. P. 5(d)(1)*.

(n34)Footnote 2. *Keohane v. Swarco, Inc., 320 F.2d 429, 430-432 (6th Cir. 1963)* (citing **Moore's Federal Practice**).

(n35)Footnote 3. *Hartford Accident & Indem. Co. v. Segal, 163 B.R. 677, 679 n.2 (Bankr. E.D.N.Y. 1994)* .

(n36)Footnote 4. *See, e.g.*, S.D. Fla. Local Rule 5.1.B.

(n37)Footnote 5. *Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1338 (11th Cir. 2005)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART IV. SERVICE AND FILING REQUIREMENTS

1-9 Moore's Manual--Federal Practice and Procedure § 9.33

§ 9.33 Protection for Private Information in Court Filings

[1] Purpose and Scope of Civil Rule Requiring Privacy Protection in Court Filings

Congress has enacted Civil Rule 5.2, n1 which mandates that all documents filed with the court comply with certain personal privacy protection requirements. The rule was adopted in compliance with the E-Government Act of 2002, requiring the Supreme Court to prescribe rules to protect privacy and security concerns relating to electronic filing of documents and the public availability of documents filed electronically. Thus, the Rule was enacted partially in response to the federal policy of access that all documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with the one exception of Social Security cases. Actually, Rule 5.2 goes beyond the requirements of the E-Government Act because it regulates privacy content in paper filings even when they are not converted to electronic form. n2

To accomplish its purpose, Rule 5.2 includes the following provisions: (1) required redaction of filings to protect social-security numbers, taxpayer-identification numbers, an individual's birth date, the minor's initials, and financial-account numbers; n3 (2) limitations on remote access to electronic files; n4 (3) an authorization for the court of appeals to order that filings be made under seal; n5 and (4) the discretion for the court of appeals to make any other appropriate order regarding redaction and limitations on electronic access. n6

[2] Redaction of Filing Required to Conceal Sensitive Private Information

[a] Required Redaction

Unless the court orders otherwise, in an electronic or paper filing with the court, any of the following applicable information must be redacted to include only:

- The last four digits of any social-security number and any taxpayer-identification number. n1
- The year of any individual's birth. n2
- Only initials in the identification of any minor. n3

- The last four digits of any financial-account number. n4

If the person filing an electronic or paper document does not include a required redaction, the court may refuse to accept the document for filing until it complies with the rule. n5 It should also be noted that when a redaction is filed, future references in the case to the information, such as in pleadings, motions, orders, and opinions, should also be in the redacted format. n6

[b] Exemptions from Redaction Requirements

The redaction requirement specified in [a], above, does not apply to any of the following:

- A financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding. n7

- The record of an administrative or agency proceeding. n8

- The official record of a state-court proceeding. n9

- The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed. n10

- A filing in a social security or immigration case covered by Rule 5.2(c) or (d). n11

- A pro se filing in an action brought under *28 U.S.C. §§ 2241*, *2254*, or *2255*. n12

[c] Discretion of Court

The provision allowing the court to order "otherwise" in the Rule gives the court discretion to require a greater redaction, such as preventing use of even the last four digits of a number, or precluding use of a number entirely, or requiring use of a complete number. In other words, based on the circumstances of the case, the court may order greater or lesser redaction or protection than specified in the rule. n13

[d] Waiver of Redaction Requirements

If a person files the person's own information by filing it unredacted and not under seal, the person waives the protection provided by Rule 5.2(a). n14 A person may want to make such a waiver, for example, if the person determines that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier inadvertently or by mistake, that person may seek relief from the court to make a redaction. n15

[3] Limitation on Remote Access to Electronic Files in Social Security and Immigration Cases

Unless the court orders otherwise, in an action for benefits under the Social Security Act or in an immigration proceeding, Rule 5.2 restricts access to an electronic file in the case, based on the status of the person seeking access. n1

First, the parties to the proceeding and their attorneys have remote electronic access to any part of the case file, including the administrative record. n2

Second, any other person from the public may have electronic access to the full record while at the courthouse. However, the public may have remote electronic access only to the docket maintained by the court, n3 and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record. n4

With respect to Social Security disability claims, these restrictions on public access recognize that claims contain extremely detailed medical records and other personal information which an applicant must submit in order to establish disability. That medical and personal information is critical to the court, but is of little or no legitimate use to anyone not a party to the case. n5

[4] Alternatives for Filings Under Seal

The court may order that a filing be made under seal without redaction, and also has the option to later unseal the filing or order the person who made the filing to file a redacted version for the public record. n1 This provision reflects the option for the court to use redaction as an alternative to sealing. n2 However, the provision does not limit or expand the judicially developed rules that generally govern sealing. n3 Thus, depending on the circumstances of the filing, the court may order a combination of complete or partial redaction and complete or partial sealing of the filing. n4

Additionally, when a person is making a redacted filing required by Rule 5.2(a), n5 the person may also file an unredacted copy of the filing under seal, and the court must retain the unredacted, sealed copy as part of the record. n6

[5] Protective Orders Related to Privacy in Filing

If the court determines that good cause exists, the court has the discretion to require redaction of information that is in addition to that automatically required by Rule 5.2(a). n1 Additionally, the court for good cause may limit or prohibit a nonparty's remote electronic access to a document filed with the court. n2 In the exercise of its discretion regarding protective orders, the court may request that a proposed protect order be submitted by the parties, but the court retains absolute discretion to reject proposed orders entirely, or to redraft proposed orders to conform to the court's own findings. n3

[6] Optional Filing of Reference List

If a person makes a filing with the court that contains redacted information, the person may also make a filing of a "reference list" (also referred to as a register) that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. n1 Then when any reference is made in the case to a listed identifier, it must be construed to refer to the corresponding item of information. n2

The person who files a reference list has the option to file the reference list under seal, and after filing a list, the filer has the option to amend the list as of right. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawPrivacy & SecurityGeneral OverviewComputer & Internet LawPrivacy & SecurityElectronic Communications Privacy ActComputer & Internet LawPrivacy & SecurityInvasion of PrivacyLegal EthicsClient RelationsConfidentiality of Information

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 5.2.*

(n2)Footnote 2. *Fed. R. Civ. P. 5.2*, Original Committee Notes of 2007.

(n3)Footnote 3. *Fed. R. Civ. P. 5.2(a), (b)*; *see* [2], *below.*

(n4)Footnote 4. *Fed. R. Civ. P. 5.2(c)*; *see* [3], *below.*

(n5)Footnote 5. *Fed. R. Civ. P. 5.2(d)*; *see* [4], *below*.

(n6)Footnote 6. *Fed. R. Civ. P. 5.2(e)*; *see* [5], *below*.

(n7)Footnote 1. *Fed. R. Civ. P. 5.2(a)(1)*.

(n8)Footnote 2. *Fed. R. Civ. P. 5.2(a)(2)*.

(n9)Footnote 3. *Fed. R. Civ. P. 5.2(a)(3)*.

(n10)Footnote 4. *Fed. R. Civ. P. 5.2(a)(4)*.

(n11)Footnote 5. *See Fed. R. Civ. P. 5.2(a)*, Original Committee Notes of 2007 (responsibility to redact filings rests with attorneys and party or nonparty making filing); *Jamison v. Campbell Chain Cooper Tools, 2008 U.S. Dist. LEXIS 61304, at *1 n.1 (M.D. Pa. July 24, 2008)* ; *see also Johnson v. Astrue, 2008 U.S. Dist. LEXIS 102336, at *1 n.1 (W.D. Ark. Dec. 17, 2008)* (clerk changed docket sheet because plaintiff should have only included initials of minor child).

(n12)Footnote 6. *See Lachhman v. Lachhman, 2008 U.S. Dist. LEXIS 95185, at *1 n.1 (E.D.N.Y. Nov. 20, 2008)* .

(n13)Footnote 7. *Fed. R. Civ. P. 5.2(b)(1)*.

(n14)Footnote 8. *Fed. R. Civ. P. 5.2(b)(2)*.

(n15)Footnote 9. *Fed. R. Civ. P. 5.2(b)(3)*; *see McCormick v. Brzezinski, 2008 U.S. Dist. LEXIS 95260, at *5 (E.D. Mich. Nov. 18, 2008)* (in filing exhibit with motion in opposition to compel, defendant was not required to redact plaintiff's date of birth, when that information was already contained in official records of state-court proceeding).

(n16)Footnote 10. *Fed. R. Civ. P. 5.2(b)(4)*.

(n17)Footnote 11. *Fed. R. Civ. P. 5.2(b)(5)*.

(n18)Footnote 12. *Fed. R. Civ. P. 5.2(b)(6)*.

(n19)Footnote 13. *Fed. R. Civ. P. 5.2(a)*, Original Committee Notes of 2007; *see Fed. R. Civ. P. 5.2(d),(e)*; *see also* [4],[5], *below*.

(n20)Footnote 14. *Fed. R. Civ. P. 5.2(h)*.

(n21)Footnote 15. *Fed. R. Civ. P. 5.2(h)*, Original Committee Notes of 2007.

(n22)Footnote 1. *Fed. R. Civ. P. 5.2(c)*.

(n23)Footnote 2. *Fed. R. Civ. P. 5.2(c)(1)*.

(n24)Footnote 3. *Fed. R. Civ. P. 5.2(c)(2)(A)*.

(n25)Footnote 4. *Fed. R. Civ. P. 5.2(c)(2)(B)*; *see Massey v. Ballard, 2008 U.S. Dist. LEXIS 87806, at *1-*2 (D. W. Va. Oct. 29, 2008)* (court order limiting remote access).

(n26)Footnote 5. *Traversa v. Educ. Credit Mgmt. Corp. (In re Traversa), 2008 Bankr. LEXIS 1280, at *8-*9 (Bankr. D. Conn. Apr. 16, 2008)* .

(n27)Footnote 1. *Fed. R. Civ. P. 5.2(d)*.

(n28)Footnote 2. *See Gedo v. Sevison, 2008 U.S. Dist. LEXIS 45142, at *1 (D. Utah June 9, 2008)* (when complaint contained material required to be redacted or sealed, district court sealed complaint to allow plaintiff to file amended complaint with redaction or their names entirely blacked out).

(n29)Footnote 3. *See Fed. R. Civ. P. 5.2(d)*, Original Committee Notes of 2007; *see, e.g., Fed. R. Civ. P. 26(c)(1)(C)* (order for decoction to be sealed).

(n30)Footnote 4. *See Perea v. Hunter Douglas Window Fashions, Inc., 2008 U.S. Dist. LEXIS 13461, at *13-*14 (D. Colo. Feb. 22, 2008)* ; *Edward G. Rahll & Sons, Inc. v. Zach, 2008 U.S. Dist. LEXIS 99269, at *2 (M.D. Pa. Dec. 9, 2008)* .

(n31)Footnote 5. *See* [2], *above*.

(n32)Footnote 6. *Fed. R. Civ. P. 5.2(f)*.

(n33)Footnote 1. *Fed. R. Civ. P. 5.2(e)(1)*.

(n34)Footnote 2. *Fed. R. Civ. P. 5.2(e)(2)*; *see Miller v. Nichols, 2008 U.S. Dist. LEXIS 92468, at *1-*2 (D. Me. Nov. 12, 2008)* (court order Attachments to Motion be sealed in order to prohibit remote electronic access to document by any nonparty).

(n35)Footnote 3. *Ipox v. EHC Fin. Servs., LLC, 2008 U.S. Dist. LEXIS 83577, at *11-*13 (W.D. Wash. Oct. 7, 2008)* .

(n36)Footnote 1. *Fed. R. Civ. P. 5.2(g)*; *see Fed. R. Civ. P. 5.2(g)*, Original Committee Notes of 2007 (one filing contains original redactions and another filing contains register of indentifiers).

(n37)Footnote 2. *Fed. R. Civ. P. 5.2(g)*.

(n38)Footnote 3. *Fed. R. Civ. P. 5.2(g)*.

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
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1-9 Moore's Manual--Federal Practice and Procedure §§ 9.34 through 9.39

[Reserved]

§§ 9.34 through 9.39[Reserved]

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
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1-9 Moore's Manual--Federal Practice and Procedure § 9.40

§ 9.40 Source of Litigation Deadlinesn*

Deadlines which require parties to act during federal litigation may be established either by court order or by statute or federal rule. For example, the court may specify that a party must file or mail a particular document on a specified fixed calendar date, such as "February 14." Alternatively, the court may specify that a party must act within a particular time period; this is a deadline based on a specified number of days or hours following the occurrence of a given event. n1 Similarly, a statute or federal procedural rule may also create a deadline based on a particular time period. n2 For example, Rule 54(d) specifies that a party may file a motion for attorney fees no later than 14 days after the entry of a judgment. n3

Rule 6(a) is a procedural device that specifies the methods to use to calculate those deadlines which are based on time periods. These time computation provisions of Rule 6(a) apply only when an expiration of a time period must be calculated under the applicable statute, rule, or court order. n4 They do not apply when a different time to act is explicitly set out by statute, rule, or court order. In other words, Rule 6(a) does not apply to situations where the court has established a specific calendar date or a particular time of hour as a deadline. n5 Furthermore, Rule 6(a) computation provisions do not apply if a particular statute or rule explicitly states its own method of computing time, rather than Rule 6. n6 In this regard, the mechanism of Rule 6(a) is applicable to calculate federal statute of limitations deadlines for the filing of an action, provided the statute does not do so. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Violette v. P.A. Days, Inc., 427 F.3d 1015, 1016 (6th Cir. 2005)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 6(a)*, Committee Note to 2009 Amendments.

(n4)Footnote 3. *See Fed. R. Civ. P. 54(d)(2)(B)(i).*

(n5)Footnote 4. *Fed. R. Civ. P. 6(a).*

(n6)Footnote 5. *Violette v. P.A. Days, Inc., 427 F.3d 1015, 1017 (6th Cir. 2005)* ; *see Fed. R. Civ. P. 6*, Committee Note to 2009 Amendments.

(n7)Footnote 6. *Fed. R. Civ. P. 6(a)*; *Fed. R. Civ. P. 6(a)*, Committee Note to 2009 Amendments.

(n8)Footnote 7. *See, e.g., Mondragon v. Thompson, 519 F.3d 1078, 1081 (10th Cir. 2008)* ; *see also* 1 *Moore's Federal Practice, § 6.03[2], [3]* (Matthew Bender 3d ed.).

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1-9 Moore's Manual--Federal Practice and Procedure § 9.41

§ 9.41 Deadline Calculation is Based on Increment of Time Periodn*

Rule 6 provides for two categories of time increment for the computation of a time period: n1 (1) time periods specified in days, weeks, months, or years n2 and (2) time periods specified in hours. n3 These categories are important because the computation of the beginning of a time period and the ending of the time period are both controlled by whether the time increment is stated in days or longer units n4 or in hours. n5

In the federal rules, time periods most frequently are designated in terms of days, rather than weeks, months, or years. The use of days to compute a time period provides a greater degree of uniformity in calculations and fairness to all litigants, than that which occurs when a less precise term such as month or year is used. Furthermore, most of the time periods in the Federal Rules now are specified in multiples of 7 days, so that deadlines will not fall on a weekend. To accomplish this result, intermediate Saturdays, Sundays, and holidays are now counted as any other day. n6

Time periods are still occasionally designated in terms of weeks, months, or years. In such situations month or year means calendar month or calendar year. Thus, whether a particular month in question is 28, 29, 30, or 31 days long, a one month time period will expire on the anniversary date in the next calendar month. For example, a one month period that begins on February 15 will end on March 15, in a leap year or in a regular year. n7 Just as month means calendar month, year means calendar year. Therefore, whether the year in question is a regular year or a leap year does not matter for computational purposes. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 6(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 6(a)(1)*; *Fed. R. Civ. P. 6(a)(1)*, Committee Note to 2009 Amendments.

(n4)Footnote 3. *Fed. R. Civ. P. 6(a)(2).*

(n5)Footnote 4. *See § 9.42.*

(n6)Footnote 5. *See § 9.43.*

(n7)Footnote 6. *Fed. R. Civ. P. 6(a)(1)*, Committee Note to 2009 Amendments.

(n8)Footnote 7. *See Merriweather v. City of Memphis, 107 F.3d 396, 400 (6th Cir. 1997)* .

(n9)Footnote 8. *See United States v. Hurst, 322 F.3d 1256, 1261 (10th Cir. 2003)* .

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1-9 Moore's Manual--Federal Practice and Procedure § 9.42

§ 9.42 Deadline Calculation When Time Period is Stated in Days or Longer Unitn*

[1] Beginning of Time Period

When the time period under consideration is stated in terms of days, weeks, months, or years, n1 the day of the occurrence of the event that triggers the time period is excluded in the computation. n2 In other words, the day that the event occurs is not counted as one of the days of the time period. Thus, the first day counted to establish the time period is the day after the event. n3 Consequently, if a paper were required to be filed within one month from an event that occurred on February 14, then the first day counted would be February 15, and the filing period would end on March 14, exactly one month after the event. In other words, the time period ends on the anniversary date of the event, not the day before. n4

[2] End of Time Period

[a] Computation of End of Time Period

When the time period under consideration is stated in terms of days, weeks, months, or years, n1 there are two primary rules regarding the computation of the end of the period, which is the deadline. n2

First, after the day of the triggering event is excluded, every day is counted, including intermediate Saturdays, Sundays, and legal holidays. n3

Second, the last day of a period is counted, except that if the last day is a Saturday, Sunday, legal holiday, n4 or the clerk's office is inaccessible n5 that day is excluded and the period continues to run until the end of the next day that is not so excluded. n6 This non-excluded "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. n7

[b] Ending of Last Day

Unless a different time is set by a statute, local rule, or court order, the "last day" of a period ends at either of the following times: for electronic filing, at midnight in the court's time zone, n8 or, for a filing by any other means, when

the clerk's office is scheduled to close. n9 Thus, to meet a deadline for an electronic filing, a party must make the electronic transmission by midnight of the court's time on the "last day" calculated under the mechanism of Rule 6(a)(1). With respect to a hardcopy filing, the end of the "last day" is at the time of the scheduled closure of the clerks office. However, because Rule 6(a)(4) allows variance by local rule, such a rule could provide that papers filed in a drop box after the scheduled hours of the clerk's office are deemed filed as of the day that is date stamped on the papers by a device in the drop box. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.04[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 6(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 6(a)(1)(A).*

(n4)Footnote 3. Mascone v. Am. Physical Soc'y, 2009 U.S. Dist. LEXIS 88487, at *5 n.1 (D. Md. 2009) .

(n5)Footnote 4. *See United States v. Hurst, 322 F.3d 1256, 1261 (10th Cir. 2003)* ; *Conde v. Pena, 793 F. Supp. 33, 34 36 (D.P.R. 1992)* .

(n6)Footnote 1. *See Fed. R. Civ. P. 6(a)(1).*

(n7)Footnote 2. *See Fed. R. Civ. P. 6(a)(1)(B), (C).*

(n8)Footnote 3. *Fed. R. Civ. P. 6(a)(1)(B).*

(n9)Footnote 4. *Fed. R. Civ. P. 6(a)(6)* (legal holidays are specified by statute, president, Congress or state where federal district court is located).

(n10)Footnote 5. *See Fed. R. Civ. P. 6(a)(3)*; § 9.44.

(n11)Footnote 6. *See Fed. R. Civ. P. 6(a)(1)(C)*; *see* [b], below.

(n12)Footnote 7. *See Fed. R. Civ. P. 6(a)(5).*

(n13)Footnote 8. *See Fed. R. Civ. P. 6(a)(4)(A).*

(n14)Footnote 9. *See Fed. R. Civ. P. 6(a)(4)(B).*

(n15)Footnote 10. *Fed. R. Civ. P. 6(a)(4)*, Committee Note to 2009 Amendments.

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1-9 Moore's Manual--Federal Practice and Procedure § 9.43

§ 9.43 Deadline Calculation When Time Period is Stated in Hoursn*

[1] Beginning of Time Period

When the time period under consideration is specified in terms of hours, the computation of the time period begins immediately on the occurrence of the event that triggers the period. n1 Therefore, periods stated in hours are not rounded up to the next whole hour. In other words, if the triggering event for a time period of 72 hours occurs at 11:01 AM on February 2, the period also begins at 11:01 AM, n2 and the period ends precisely 72 hours later at 11:01 AM on February 5 n3 (unless there is an intervening shift from daylight saving time to standard time, or vice versa). n4

The Federal Rules of Civil Procedure currently do not contain any deadlines stated in terms of hours. However, some statutes contain deadlines stated in hours; furthermore, the court may order deadlines in terms of hours, and typically does so in expedited proceedings. n5

[2] End of Time Period

When the period is stated in hours, every hour is counted to determine the deadline, including hours during intermediate Saturdays, Sundays, and legal holidays, n1 However, if the last day is a Saturday, Sunday, legal holiday, n2 or the clerk's office is inaccessible n3 that day is excluded and the period continues to run until the end of the next day that is not so excluded. n4

Because subdivision Rule 6(a)(2)(B) directs that every hour be counted, a 72 hour period that commences at 10:23 AM on Friday runs until 10:23 AM on Monday unless on there is an intervening shift from daylight saving time to standard time, in which case the period ends at 9:23 AM. This result occurs because all of the number of hours are counted, irregardless of the change in clock time. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading &

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FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.04[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 6(a)(2)(A).*

(n3)Footnote 2. *See Fed. R. Civ. P. 6(a)(2)(A).*

(n4)Footnote 3. *Fed. R. Civ. P. 6(a)(2)*, Committee Note to 2009 Amendments.

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 6(a)(2)*, Committee Note to 2009 Amendments.

(n7)Footnote 1. *Fed. R. Civ. P. 6(a)(2)(B).*

(n8)Footnote 2. *Fed. R. Civ. P. 6(a)(6)* (legal holidays are specified by statute, president, Congress or state where federal district court is located).

(n9)Footnote 3. *See Fed. R. Civ. P. 6(a)(3)*; § 9.44.

(n10)Footnote 4. *See Fed. R. Civ. P. 6(a)(2)(C)*; *see also Fed. R. Civ. P. 6(a)(5)* ("next day" is determined by continuing to count forward when period is measured after event, and backward when measured before event).

(n11)Footnote 5. *Fed. R. Civ. P. 6(a)(2)*, Committee Note to 2009 Amendments.

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1-9 Moore's Manual--Federal Practice and Procedure § 9.44

§ 9.44 Effect of Inaccessibility of the Clerk's Officen*

[1] Inaccessibility May Postpone End of Time Period

Unless otherwise ordered by the court, inaccessibility of the clerk's office on the last day of a time period postpones the end of the period, whether the period is stated in terms of days or longer units or stated in terms of hours. n1 When the time period is specified in days or longer unit, inaccessibility of the clerk's office on the last day extends the time period to the first accessible day that is not a Saturday, Sunday, or legal holiday. n2 When the time period is specified in hours, inaccessibility of the clerk's office in the last hour of the period extends the time to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday. n3

It is important to recognize that the inaccessibility exclusion is applicable only when the day in question is the day on which the filing is due, the inaccessibility exclusion is limited by its terms to the final day of a time period. n4 It is immaterial whether the clerk's office is inaccessible on intermediate days because it is only on the day when the papers are due that access to the clerks office is necessary. n5

[2] Inaccessibility Established by Case Law

"Inaccessibility" is not defined, but has been established by case precedent. n1 For purposes of computation of time, inaccessible means that the clerk's office is either closed for business or a person cannot reasonably obtain access to the court as a practical matter. n2 Inclement weather is a typical, but not exclusive, condition of inaccessibility. For example, if weather conditions in the area surrounding the courthouse prevent access to an attorney's office or computer files, the clerk's office is inaccessible under Rule 6(a). n3 Inaccessibility for non-weather related reasons includes an outage of the clerk's electronic filing system. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime

LimitationsExtensions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 6(a)(3).*

(n3)Footnote 2. *See Fed. R. Civ. P. 6(a)(3)(A).*

(n4)Footnote 3. *See Fed. R. Civ. P. 6(a)(3)(B).*

(n5)Footnote 4. *See Fed. R. Civ. P. 6(a)(3)(A), (B).*

(n6)Footnote 5. *Hart v. Sheahan, 396 F.3d 887, 890 (7th Cir. 2005)* .

(n7)Footnote 1. *Fed. R. Civ. P. 6(a)(3)*, Committee Note to 2009 Amendments.

(n8)Footnote 2. *Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 747 (9th Cir. 2001)* (inaccessible does not necessarily mean that the clerk's office must be physically closed).

(n9)Footnote 3. *United States Leather, Inc. v. H & W Partnership, 60 F.3d 222, 226 (5th Cir. 1995)* .

(n10)Footnote 4. *Fed. R. Civ. P. 6(a)(3)*, Committee Note to 2009 Amendments.

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART V. COMPLIANCE WITH FEDERAL LITIGATION TIME DEADLINES

1-9 Moore's Manual--Federal Practice and Procedure § 9.45

§ 9.45 Additional Three Days to Respond When Service Is Not by Hand Deliveryn*

[1] Right of Additional Three Days to Respond

If a party makes service of a paper or document other than the complaint in a manner other than by hand delivery or leaving it at the person's office or residence, n1 the party served has an additional three days added to the prescribed time period to make a response to the served document. n2 Therefore, this three day extension to respond to a served document is applicable when service has been made in any of the following ways:

1. Mailed to the person's last known address; n3

2. Left with the court clerk because the person served had no known address; n4

3. Sent by electronic means, if the when person consented in writing; n5 or

4. Delivered by any other means that the person consented to in writing. n6

This three day extension constitutes an adjustment for the extra time required for delivery in a manner other than hand delivery; n7 in practical effect, it is a presumption that the document served will be received by the party served three days after it is mailed, delivered to the clerk, or electronically or otherwise transmitted. n8 However, the rule does not establish that a document served in one of these ways necessarily reaches its destination in three days. Rather, by allowing a reasonable amount of time for the transmission of documents other than by hand delivery, the three day extension provides a balance between the rigidity of measuring from the date of mailing or other transmission, and the ambiguity of measuring from the date of receipt. n9

The three day additional time provision of Rule 6(d) applies only when a time period is triggered by the "service" of a notice or other paper. n10 Rule 6(d) does not apply to time periods that begin with the filing in court of a judgment or an order. n11 Thus, for example, Rule 6(d) does not apply to the 28 day period that runs from entry of judgment for a motion to alter or amend judgment pursuant to Rule 59(e). n12

[2] Computation of Response Period With Three Additional Days

In calculating a deadline when the three days are added under Rule 6(d), the original time period is calculated as it ordinarily would under Rule 6(a). n1 In other words, Rule 6(d) makes clear that the three days are added after the original prescribed period would otherwise expire. n2 Thus, when the time period is specified in days, the day of the triggering event is excluded, and intermediate Saturdays, Sundays, and legal holidays are included in counting the three added days. Furthermore, if the last day of added days falls on a weekend, a legal holiday, or a day when the clerk's office is inaccessible, the period for response runs until the following business day. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 5(b)(2)(A), (B).*

(n3)Footnote 2. *Fed. R. Civ. P. 6(d).*

(n4)Footnote 3. *See Fed. R. Civ. P. 5(b)(2)(C).*

(n5)Footnote 4. *See Fed. R. Civ. P. 5(b)(2)(D).*

(n6)Footnote 5. *See Fed. R. Civ. P. 5(b)(2)(E).*

(n7)Footnote 6. *See Fed. R. Civ. P. 5(b)(2)(F).*

(n8)Footnote 7. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 381 F. Supp. 2d 398, 402 (D.N.J. 2005)* .

(n9)Footnote 8. *Smith Haynie v. District of Columbia, 155 F.3d 575, 578 (D.C. Cir. 1998)* .

(n10)Footnote 9. *Rivkin v. County of Montgomery, 153 F.R.D. 572, 574 575* & n.9 (E.D. Pa. 1994).

(n11)Footnote 10. *See Sea Land Serv., Inc. v. Barry, 41 F.3d 903, 908 (3d Cir. 1994)* (deadline for delivery of judgment did not make Rule 6(d) applicable, because that deadline was not triggered by service.).

(n12)Footnote 11. *Albright v. Virtue, 273 F.3d 564, 571-572 (3d Cir. 2001)* (Rule 6(d) only extends time limits that commence with service of notice or other paper, rather than time limit that is measured from entry of judgment).

(n13)Footnote 12. *See Jackson v. Crosby, 375 F.3d 1291, 1295-1296 (11th Cir. 2004)* .

(n14)Footnote 1. *Fed. R. Civ. P. 6(d)*, Committee Note to 2005 Amendments.

(n15)Footnote 2. *Fed. R. Civ. P. 6(d).*

(n16)Footnote 3. *Smith v. Krieger, 643 F. Supp. 2d 1274, 1279 (D. Colo. 2009)* .

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1-9 Moore's Manual--Federal Practice and Procedure § 9.46

§ 9.46 Extension of Time by Discretion of Courtn*

[1] Court Has Discretionary Power to Extend Most Time Periods

[a] Discretion of Court to Order Extensions

When a party may or must perform an act within a time specified by the court or in the Federal Rules, the court has discretion for good cause to allow an extension of most specified time periods. n1 The degree of the court's discretion to extend depends on whether the applying party has made its request for extension before the expiration of the original time period n2 or after the original period expired. n3

The parties to an action may stipulate to an extension of time; however, such a stipulation is subject to approval by the court. Parties may stipulate to an extension of time only with the approval of the court because of the good cause requirement and because the court has the inherent and ultimate responsibility for handling its docket and management of its cases, including the exercise of full control over extensions of time periods. n4

[b] Extension Prohibited for Specified Time Periods

Although the Federal Rules provide for flexibility in their application by allowing the court discretion to extend of some time periods based on the circumstances of the case, it is also necessary to preserve the finality of judgments. Therefore, to ensure certainty in the judgments of the courts, Rule 6(b) specifically lists certain rules that are not subject to Rule 6(b) extension. n5 A party's deadline to act under the following Rules are not subject to an extension by the court: n6 Rule 50(b) (renewal of motion for judgment after trial and alternative motion for new trial); Rule 50(d) (losing party's motion for new trial); Rule 52(b) (motion for amended or additional findings), Rule 59(b) (motion for new trial), Rule 59(d) (grant of new trial on court's own initiative), Rule 59(e) (motion to alter or amend a judgment), and Rule 60(b) (order for relief from a final judgment, order, or proceeding). It should also by noted that these rules are not subject to the three day addition allowance of time of Rule 6(d) because the time periods involved all run from the filing of a judgment or order, and not from the service of notice. n7

Even though Rule 6(b) forbids courts from extending the filing periods set out in the judgment-related rules listed above, sometimes a district court will inadvertently extend such a time period. An equitable doctrine has developed

when reasonable reliance on the district court's inadvertent action of extending the time for filing such a motion prevents the party from filing notice within the required period after entry of judgment. Thus, when a district court inadvertently has allowed for the extension of a time period, the courts have allowed a party to file notice of appeal after the 30 day period has expired. n8 This result is based on the principle held by most courts that the judgment related deadlines of these rules are not absolutely jurisdictional, and may be waived or forfeited. n9 On the other hand, if a party has not reasonably rely on the district court's wrongful extension when filing the late notice of appeal, the court will dismiss the appeal. n10

[2] Extension for Requests Made Before Expiration of Period

When any act may or must be done within a specified time, the court has discretion to allow an extension of the specified time period on a mere showing of good cause, provided that the party requests an extension before the original time or its extension expires. For such a request, the court may grant the extension with or without motion or notice. n1 On the other hand, when a request is made after the expiration of the time period, the courts will grant an extension only on motion, and only if the stricter excusable neglect standard is established. n2

Even before expiration of the time period, an extension of time must be supported by "good cause." However, courts have consistently held that the good cause standard is a liberal one. The good cause standard is ordinarily satisfied and an extension will be granted provided there is no bad faith on the part of the party seeking relief nor prejudice to the adverse party. n3 It should be noted that even if good cause is shown the court is not required to grant the extension, but has discretion not to do so in the management of the litigation. n4

[3] Extension of Time Period After Period Has Already Expired

[a] Requires Court's Determination of Excusable Neglect

If a particular time period has already expired, a party must make a motion for an extension of the time period and must show that excusable neglect caused the failure to act in a timely manner. n1 The motion for extension must state the specific reasons for the request and must include factual assertions which establish the standard of excusable neglect. It is not enough merely to assert that excusable neglect has caused the delay. n2

"Excusable neglect" sufficient to justify an extension has been defined as a reason to overlook a lack of justification to meet the deadline; the reason needn't be a compelling reason. A common reason is that the neglect did no harm to harm anyone. It is not sufficient if the excuse is so threadbare as to make the neglect inexplicable. n3 In making its determination of whether an action or omission constitutes excusable neglect, the court is required to consider all evidence proffered by the party in support of the party's claim of excusable neglect and make an equitable determination as to whether an extension is proper. n4 In addition to any other pertinent factors, the court should consider whether any prejudice to the opposing party or undue delay would result from the extension, the importance of the matter at issue, and the degree of the movant's fault in the delay. n5

[b] Inadvertence

Generally, neither mere inadvertence, ignorance, nor other types of carelessness does not qualify as excusable neglect. n6 Similarly, mere mistaken reliance on provisions of the rules or unfamiliarity with the rules does not rise to the level of excusable neglect. n7 In limited circumstances, however, inadvertence, carelessness, or unfamiliarity with the rules may be treated as excusable neglect. A careless neglect may be deemed excusable provided that the risk of prejudice to the opposition is minor, the length of the delay and its potential impact on judicial proceedings were minimal, the reason for the delay was articulable, the delay was not within the reasonable control of the movant, and the movant acted in good faith. n8

[c] Requirement of Motion for Extension

Unlike a request for an extension before a deadline expires, a request for extension made after the expiration must be made by formal motion. n9 This means that the court may not extend the deadline on its own initiative, and that a request for extension may not be made ex parte or informally. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 6.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 6(b)(1)*; *see* [b], *below* (exclusion for certain time periods).

(n3)Footnote 2. *See* [2], *below*.

(n4)Footnote 3. *See* [3], *below*.

(n5)Footnote 4. *See Welch & Forbes, Inc. v. Cendant Corp., 233 F.3d 188, 189 (3d Cir. 2000)* ; *cf. Fed. R. Civ. P. 29* (stating that parties may modify discovery deadlines by stipulation but that court approval may be required if modification would interfere with case management).

(n6)Footnote 5. *See Fed. R. Civ. P. 6(b)(2)*.

(n7)Footnote 6. *Fed. R. Civ. P. 6(b)(2)*.

(n8)Footnote 7. *See Albright v. Virtue, 273 F.3d 564, 571 572 (3d Cir. 2001)* .

(n9)Footnote 8. *Fairley v. Jones, 824 F.2d 440, 443 (5th Cir. 1987)* .

(n10)Footnote 9. *Art Attacks Ink, LLC v. MGA Enter. Inc., 581 F.3d 1138, 1143 (9th Cir. 2009)* .

(n11)Footnote 10. *Fairley v. Jones, 824 F.2d 440, 443 (5th Cir. 1987)* .

(n12)Footnote 1. *Fed. R. Civ. P. 6(b)(1)(A)*.

(n13)Footnote 2. *Fed. R. Civ. P. 6(b)(1)(B)*; *see* [3], *below*.

(n14)Footnote 3. *California Trout v. FERC, 572 F.3d 1003, 1027 n.1 (9th Cir. 2009)* (noting that Black's Law Dictionary defines "good cause" as any legally sufficient reason why request should be granted or action excused).

(n15)Footnote 4. *See United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006)* .

(n16)Footnote 1. *Fed. R. Civ. P. 6(b)(1)(B)*; *see* [c], *below* (motion required).

(n17)Footnote 2. United States v. Premises Known as Lots 14, 15, 16, 19, 47, & 48, *682 F. Supp. 288, 290 (E.D.N.C. 1987)* .

(n18)Footnote 3. *See United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006)* .

(n19)Footnote 4. *Halicki v. Louisiana Casino Cruises, Inc, 151 F.3d 465, 469 (5th Cir. 1998)* .

(n20)Footnote 5. *Pigford v. Johanns, 416 F.3d 12, 28 (D.C. Cir. 2005)* ; *see Sampath v. Concurrent Techs. Corp., 227 F.R.D. 399, 403 (W.D. Pa. 2005)* (listing other factors).

(n21)Footnote 6. *See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 895-898, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* .

(n22)Footnote 7. *Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1114-1115 (11th Cir. 1993)* .

(n23)Footnote 8. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* .

(n24)Footnote 9. *Fed. R. Civ. P. 6(b)(1)(B)*; *see Key v. Robertson, 626 F. Supp. 2d 566, 575 (E.D. Va. 2009)* .

(n25)Footnote 10. *See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 896, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* ; *Boston Post Rd. Med. Imaging, P.C. v. Allstate Ins. Co., 221 F.R.D. 410, 414 (D. Mass. 2004)* .

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1-9 Moore's Manual--Federal Practice and Procedure § 9.47

§ 9.47 Motions and Notices of Hearingn*

[1] Deadlines for Service of Motion and Notice

A party must generally serve any written motion and the notice of hearing on the motion at least 14 days before the hearing date. n1 However, a party need not comply with the 14-day deadline for service of a motion and notice of hearing if at least one of the following three exceptions is applicable:

1. The party is entitled to a hearing on the motion ex parte. n2

2. The Federal Rules specify a different time period for a particular motion. n3 Thus, Rule 55 requires service of a motion to obtain a default judgment against a party that has appeared in the action at least 7 days prior to the hearing on the motion. n4 Rule 65 requires only two days' prior service on a motion to dissolve a temporary restraining order that was granted without notice to the restrained party. n5

3. When a court order specifies a different time. A party may apply ex parte for such an order on a showing of good cause. n6

[2] Affidavits in Support of Motion

[a] Deadline for Service of Affidavits

A party must serve any affidavit in support of a motion with the motion. Any affidavit opposing a motion must be served at least 7 days before the hearing on the motion, unless the court establishes a different time for service, or unless the motion is for a new trial. n1 The court may use its discretion to extend time pursuant to Rule 6(b) for serving affidavits on a showing of good cause to account for the delay. Furthermore, if the time period has already expired, a party must make a motion for an extension of the time period and must show that excusable neglect caused the failure to act in a timely manner. n2

[b] Deadline for Service of Affidavit In Opposition of Motion for New Trial

A motion for new trial that is based on affidavits is governed by the provisions of Rule 59(c), not by Rule 6(d). n3 Therefore, an affidavit supporting a motion for new trial must be filed with the motion, and any opposing affidavits must be filed within 14 days of service of the motion. n4 This 14 day limit under Rule 59(c) may be extended by Rule 6(b). n5

After a party files an affidavit in opposition to a motion for new trial based on affidavits, a reply may be filed by the party who made the original motion. Rule 6(c)(2) is silent on the subject of when affidavits filed in support of the reply must be filed. Rule 59(c) states that reply affidavits are permitted but also fails to specify a time frame in which to file them. n6 The courts generally have allowed reply affidavits to be filed with the reply when the affidavits are found to support the reply rather than the original motion. n7

[3] Calculation of Deadline for Service and Affidavits

Calculations of all deadlines related to service of motions, notice of motions, and affidavits are calculated according to the methodology of Rule 6(a). n1 Thus, after the day of the triggering event is excluded, all days, including intermediate Saturdays, Sundays, and legal holidays, are included in the counting of the time period. However, if the last day falls on a weekend, a legal holiday, or a day when the clerk's office is inaccessible, the period for response runs until the next business day. n2 Furthermore, because the response deadline for a motion is triggered by service of the motion, three days are added to the end of the 14 day period by Rule 6(d) when service is made by any method under than hand delivery. n3

As a practical matter, the time periods for service of notice of motions and affidavits is also typically modified by provisions of local rules. Such local rules do not conflict with Rule 6, which explicitly allows a court order to set a different time. n4 Therefore, an attorney in motion practice should not rely exclusively on the provisions of Rule 6(c)(1) for determining the time period for serving a motion and notice, but should also consider the particular Federal Rule that governs that particular type of motion, all local rules and standing orders and any particular court orders that has been made in connection with the current motion under consideration. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, §§ 6.07, 6.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 6(c)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 6(c)(1)(A).*

(n4)Footnote 3. *Fed. R. Civ. P. 6(c)(1)(B).*

(n5)Footnote 4. *Fed. R. Civ. P. 55(b)(2).*

(n6)Footnote 5. *Fed. R. Civ. P. 65(b)(4).*

(n7)Footnote 6. *Fed. R. Civ. P. 6(c)(1)(C)*; *see, e.g., Anderson v. Davila, 125 F.3d 148, 156-157 (3d Cir. 1997)* (good cause shown to shorten notice period for hearing on injunction due to seriousness of allegations; construing

former time periods).

(n8)Footnote 1. *Fed. R. Civ. P. 6(c)(2)*; *see also* [b], *below* (time period to serve affidavit opposing motion for new trial).

(n9)Footnote 2. *See Fed. R. Civ. P. 6(b)(1)*, discussed in *§ 9.46*; *see also Fed. R. Civ. P. 59*, Committee Note to 2009 Amendments; *Shapiro v. Cantor, 123 F.3d 717, 722 (2d Cir. 1997)* .

(n10)Footnote 3. *See Fed. R. Civ. P. 6(c)(2)*.

(n11)Footnote 4. *Fed. R. Civ. P. 59(c)*.

(n12)Footnote 5. *See Fed. R. Civ. P. 6(b)(1)*, discussed in *§ 9.46*.

(n13)Footnote 6. *Fed. R. Civ. P. 59(c)*.

(n14)Footnote 7. *McGinnis v. Southeast Anesthesia Assocs., 161 F.R.D. 41, 42 & n.1 (W.D.N.C. 1995)* .

(n15)Footnote 1. *See Lerro v. Quaker Oats Co., 84 F.3d 239, 242 (7th Cir. 1996)* ; *see also Fed. R. Civ. P. 6(a)*.

(n16)Footnote 2. *See Fed. R. Civ. P. 6(a)(1)-(3)*.

(n17)Footnote 3. *See Fed. R. Civ. P. 6(d)*; *see also Lerro v. Quaker Oats Co., 84 F.3d 239, 242 (7th Cir. 1996)* .

(n18)Footnote 4. *Fed. R. Civ. P. 6(c)(1)(C)*.

(n19)Footnote 5. *Cf. S.D. v. St. Johns County Sch. Dist., 632 F. Supp. 2d 1085, 1100 (M.D. Fla. 2009)* .

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1-9 Moore's Manual--Federal Practice and Procedure §§ 9.48through 9.49

[Reserved]

§§ 9.48[Reserved]

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART VI. AMENDED AND SUPPLEMENTAL PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.50

§ 9.50 Nature of Amended and Supplemental Pleadingsn*

[1] Characteristics of Amendments and Supplements to Pleadings

If circumstances relating to claims or defenses change during the course of litigation, the Federal Rules of Civil Procedure allow for the modification of pleadings, referred to as amended pleadings, and the presentation of new materials in pleadings, referred to as supplemental pleadings. An amended pleading generally is a modification to incorporate events that were unknown but occurred prior to the filing of the original pleading. n1 By contrast, a supplemental pleading refers to additions to include transactions or occurrences that take place after the filing of the original pleading. n2 Note, however, that the technical label attached to a modified pleading is not significant if it meets the requirements to operate as either an amendment or a supplement. n3 Rule 15 allows for liberal amendment and supplementation in the interests of resolving cases on the merits. n4

A party must expressly request all amendments and supplemental pleadings from the district court. A formal motion is advised but not required, provided that the requesting party has set forth with particularity the grounds for the amendment or supplement, and the relief sought. Therefore, a bare request in an opposition to a motion to dismiss, without any indication of the particular grounds on which the amendment is requested, does not constitute a sufficient motion for amendment or supplement. n5 Amendments may relate to either parties or claims and may serve such purposes as adding claims or defenses, properly naming or identifying parties, adding, substituting, or dropping parties, or clarifying jurisdiction. n6

[2] Purposes of Amendments and Supplements to Pleadings

The purpose of modifications to pleadings, including amendments and supplements to pleadings, is to obtain a just, speedy, and inexpensive determination of the legal merits of the action. n1 Because all pleadings must be construed in a manner to do substantial justice, n2 a court should disregard errors or defects in pleading modifications that do not affect the substantive rights of the parties. n3 Furthermore, that amendments should be freely given when justice so requires n4 and supplemental pleadings should be allowed on reasonable notice and on terms that are just. n5

Another significant purpose of Rule 15 is to specify when an amendment to a pleading that is filed after the statute of limitation has run is deemed to relate back to the date of the original pleading so that the claim is not time barred. In

order for amendments to relate back, they generally must arise from the same conduct, transaction, or occurrence set forth in the original pleading. n6 For an amendment that adds or changes parties to relate back: (1) the new party must have such notice of the action that it will not be prejudiced in defending on the merits; and (2) the new party either must have known or should have known that but for the mistaken identity it would have been named. n7 Issues pertaining to relation back are discussed in *§ 9.51[7][a]*, below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, § 15.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 15(d).*

(n4)Footnote 3. *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008)* (although parties and courts sometimes mislabel amended pleadings and supplemental pleadings, mislabels are not of significance, and court may consider either motion to amend or supplement under correct portion of Rule 15).

(n5)Footnote 4. *Foman v. Davis, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* .

(n6)Footnote 5. *United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 386-387 (5th Cir. 2003)* .

(n7)Footnote 6. *Burns v. Exxon Corp., 158 F.3d 336, 343 (5th Cir. 1998)* .

(n8)Footnote 1. *Nkihtaqmikon v. BIA, 453 F. Supp. 2d 193, 201-202 (D. Maine 2006)* ; *see Fed. R. Civ. P. 1.*

(n9)Footnote 2. *Fed. R. Civ. P. 8(e).*

(n10)Footnote 3. *See Fed. R. Civ. P. 61.*

(n11)Footnote 4. *Fed. R. Civ. P. 15(a).*

(n12)Footnote 5. *Fed. R. Civ. P. 15(d).*

(n13)Footnote 6. *Fed. R. Civ. P. 15(c)*; *see Wilson v. Fairchild Republic Co., Inc., 143 F.3d 733, 738 (2nd Cir. 1998)* .

(n14)Footnote 7. *Fed. R. Civ. P. 15(c)(1)(C).*

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART VI. AMENDED AND SUPPLEMENTAL PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.51

§ 9.51 Amendments to Pleadings

[1] Amendment Allowed Once Without Leave of Court n*

A party may amend a pleading once as a matter of course or without leave of court, n1 provided that the amendment is made within the applicable of the following time periods: n2

- Within 21 days after giving service of the pleading; n3 or
- If the pleading is one to which a responsive pleading is required, within the earlier of: n4
  - 21 days after receiving service of a responsive pleading; or
  - 21 days after receiving service of a motion under Rule 12(b), (e), or (f).

Even if the court will ultimately dismiss a plaintiff's claim, the plaintiff has the right to attempt to amend once, at least after paying a filing fee. n5 However, amendment as a matter of course is allowed only once. n6 Even purely technical amendments are not allowed without leave of court, once one amendment has been made. n7 Furthermore, a claimant must obtain leave to amend the complaint more than once even if the *first amendment* was not requested, but was made at the court's direction. n8

[2] Pleader Has at Least 21 Days After Serving Pleading to Amend Without Leave

A party may amend its pleading once as a matter of course within 21 days after serving it. n1 Furthermore, if a pleading is one that requires the opposition to file a responsive pleading or certain responsive motions, a longer time is allowed to file one amendment as a matter of course, because the time period of 21 days in such cases are triggered when the pleader receives service of the responsive pleading or motion. n2

After 21 days has elapsed since service of a pleading to which no response is required, the party's right to amend without leave of court is terminated. n3 However, the pleading may then be amended with leave of court or by consent of the opposition. n4 For example, a defending party must obtain leave to amend an answer if more than 21 days have

passed since service of that answer. n5

[3] Pleader Has Longer Time to Amend Without Leave if Pleading Requires Response

If a pleading is one to which a responsive pleading is required, the pleading party may amend its pleading once as a matter of course at the expiration of the earlier of two time periods: n1

- 21 days after receiving service of the responsive pleading, or
- 21 days after receiving service of a motion under Rule 12(b) (motion presenting defenses), 12(e) (motion for more definite statement), or 12(f) (motion to strike).

Based on the "earlier" terminology used in Rule 15(a)(1)(B) it is clear the 21 day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. For example, if a responsive pleading is served after one of the designated motions is served, a new 21 day period does not start after service of the responsive pleading. n2

Typically, complaints and a third party complaints are pleadings which require a response. n3 The purpose of giving the party serving a complaint time to amend until 21 days after a responsive pleading or motion has been served is that the pleader moving for amendment will have time to read the response to the pleading, and adjust the amendment accordingly. Thus, the responsive pleading may point out issues that the original pleader had not considered and indicate to the pleader how to draft an appropriate amendment. n4

After 21 days has elapsed since service of a responsive pleading when required, the pleader's right to amend its pleading without leave of court is terminated. However, the pleading may then be amended with leave of court or by consent of the opposition. n5

[4] Amendment With Leave of Court or By Consent of Opposition

[a] Court Has Considerable Discretion to Grant Leave

After the expiration of the appropriate 21 day time period, depending on whether a response is required to a pleading, n1 a party may amend its pleading only by leave of court, or with the opposing party's written consent. n2

The court should freely give leave to amend when justice requires an amendment. n3 The requirement of justice means that there is a strong policy to permit amendment, and that the court should grant leave to amend with considerable liberality. The court's broad discretion in this regard must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities. n4

During the pretrial phase, a court should allow amendments to ensure that all the issues will come before the court. Thus, the pretrial conference must include discussions of any need or desirability to amend. n5 Parties are required to file amendments no later than the pretrial order unless there is a compelling reason why this could not be done. n6 However, there is a presumption that a court will permit amendment after a pretrial order if amendment would promote the interest of justice and sound judicial administration, provided there will be no substantial injury to an opposing party, and refusal of leave to amend will result in injustice to the movant. n7 On the other hand, despite the lenient standard of amendment under Rule 15, once a deadline for amendment is set in a Rule 16 scheduling order, the moving party must establish good cause for modifying the scheduling order to allow an amendment of a pleading, and the district court does not abuse its discretion in denying leave to amend if the moving party does not show good cause. n8

The policy that a court should freely grant amendments limits a court's ability to deny leave to amend, and if a court

abuses its discretion in denying leave, the denial will be reversed. n9 An appellate court will consider whether any reasonable person could disagree with the decision and will find abuse based on a showing that the district court made an error in judgment or clearly erroneous findings. n10 It is an abuse of discretion if the district court refuses to grant leave to amend without giving any reason. n11 However, a court is not required to expressly set forth the basis for denial. Rather, the court's rationale must be readily apparent from either the written opinion or the record before the appellate court. n12

Federal practice expressly permits amendments to cure inadequate jurisdictional allegations. By statute, defective allegations of jurisdiction may be amended in the trial court or appellate court, n13 and courts should liberally construe the statute to allow amendments for those purposes. n14 However, a plaintiff may not use the statute to cure defects in jurisdiction, only to correct defective allegations in a pleading that pertain to jurisdiction. Therefore, a plaintiff may not amend the complaint to substitute a new plaintiff in order to cure a lack of jurisdiction, n15 but may drop dispensable parties (those parties not needed establish subject matter jurisdiction), in order to perfect diversity jurisdiction. n16

[b] Factors for Court to Consider

The Supreme Court has stated that, because the purpose of pleading is to facilitate a proper decision on the merits, n17 the district court should freely grant amendments unless the district court indicates a reason for not doing so. The Court also listed the specific grounds on which a district court may base its decision to deny leave to amend, including: n18

1. Bad faith. The degree to which a party moving to amend has exhibited bad faith or a dilatory motive is a consideration, such as a repeated failure to cure deficiencies by amendments previously allowed by the court. n19

2. Prejudice to the opposing party. n20 This factor is based on the opposition party's inability to prepare for the amendment and may be related to the delay factor, discussed in item 3, *below*. A court will deny leave to amend only if the non-moving party is in fact prejudiced by the actions of the moving party. n21

3. Undue delay. The passage of time alone does not necessarily mean the court will deny leave to amend. n22 However, if delay is unduly excessive the court may deny leave based on the factor of the length of delay alone. n23 For example, it was proper for the district court to deny a motion to amend on the grounds of undue delay when the motion was filed after discovery was completed and after an nearly dispositive order had been rendered by the district court. n24

4. Futility of the proposed amendment. A court must deny the motion to amend if it makes a legal determination that the proposed pleading as amended would be insufficient to cure the pleading's deficiencies. n25 Thus, the court will deny an amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to summary judgment. n26 An amendment is "futile" if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss. n27

5. The number of times, if any, that the party has already amended its pleadings. For example, a party may be denied leave to amend if the party has repeatedly failed to cure deficiencies in previously allowed amendments. n28

Not all of the factors listed carry equal weight. Some circuits have indicated that the consideration of prejudice to the opposing party carries the greatest weight. n29

[c] Conditional Grant of Leave to Amend

A court has discretion to conditionally grant an amendment when prejudice might otherwise result from granting leave. In this regard, a court has discretion to impose reasonable conditions when granting leave to amend. n30 In determining whether to impose any conditions, a court should consider the factors that affect a court's decision to grant leave. One typical condition imposed by courts is that the party moving for amendment must drop or adjust claims or defenses that have been filed, other than those in the motion. For example, the court may grant the amendment on the condition that the moving party dismiss a claim in parallel litigation in state court. n31

[d] Opposing Party's Written Consent

Even after the expiration of the appropriate 21 day time period, depending on whether a response is required to a pleading, n32 a party may nevertheless amend its pleading if the party obtains the opposing party's written consent. n33 In addition to such a formal written consent, the parties may also agree to permit an amendment to a pleading by "express or implied consent" to a trial of issues not in the original proceeding. n34 However, trial of issues by express consent requires evidence of such consent, and trial by implied consent requires proof by a demanding standard. n35

[5] Contents and Form of Motion to Amend n*

All motions for leave to amend that require court approval must satisfy Rule 7, n1 which requires a party to set forth with particularity the relief requested and the grounds supporting the request. n2 If the party moving for amendment fails to state supporting information, the failure in and of itself may be a sufficient reason for denial of leave to amend. Additionally, the party filing a Rule 15 motion to amend should attach the proposed amendment or new pleading to the motion. n3 However, while failure to attach a proposed amendment is a factor considered by the court, it is not usually an automatically fatal defect. n4

Courts have noted that the principle of freely granted amendment applies only when the party actually has moved for leave to amend, and therefore, the request for leave must be submitted in the form of a formal written motion. n5 Some circuits have held that a request for an amendment in a response to a motion to dismiss does not constitute a proper motion for leave to amend. However, some district courts are at times willing to consider the arguments raised in a response to a motion to dismiss, either as a motion to amend or in conjunction with a formal motion for leave to amend. n6

[6] Amendment to Conform to Evidence n*

[a] Right to Amendment After Objection to Evidence at Trial

The first of two mechanisms of Rule 15(b) to amend a pleading by conforming the pleading to the evidence provides that the pleadings may be amended if a party expressly moves to amend the complaint, and the objecting party fails to establish to the satisfaction of the court that it will be prejudiced by the amendment. n1 If it is in the interest of justice, a court may freely grant leave to amend after an objection. n2 A party may obtain leave to amend over objection unless the opposing party is able to show resulting prejudice. The burden is on the opposing party to show that allowing amendment would result in prejudice to the party. n3 Even if actual prejudice is shown and leave to amend is denied, the court may grant the moving party's request for a continuance in order to address new issues raised at trial. n4

[b] Right to Amendment by Express or Implied Consent

The second of two mechanisms of Rule 15(b) to amend a pleading by conforming the pleading to the evidence allows amendment when a party has expressly or impliedly consented to the amendment. n5 When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue. n6 The purpose of this

type of amendment is to have the pleadings mirror the actual issues tried in the case. n7 This procedure is useful in clarifying the record on appeal or in determining the preclusive effects to be given to the judgment. To accomplish an amendment, a court should liberally allow changes to the pleadings to conform them to the evidence. n8

In determining whether to allow amendments to conform to the evidence, a court should consider whether the opposing party expressly or impliedly consented to the introduction of the evidence. n9 Express consent may be found when a party has stipulated to an issue or the issue is set forth in a pretrial order. n10

Implied consent typically arises in two situations. First, a claim or defense outside of a pleading may be raised at trial, and then be treated by the opposing party as if the claim or defense had been pleaded. n11 Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to an issue that has not been pleaded. Implied consent must be established by three factors: [1] the parties recognized that the issue outside the pleadings entered the case at trial, [2] the evidence supporting the issue was introduced at trial without objection, and [3] a finding of trial by consent would not prejudice the opposing party. n12 On the other hand, the court may not find implied consent if the opposing party did not recognize that new matters were at issue during the trial. Furthermore, a court may not find consent when the opposing party failed to object to evidence supporting an issue allegedly tried by implied consent, but that evidence is also relevant to other issues actually pleaded and tried. n13

[7] Effects of Amendment of Pleading

[a] Relation Back to Time of Original Pleading n*

[i] Principle of Relation Back

The principle of relation back means that, in specified circumstances, amendments to pleadings relate back to the date of the original pleading for purposes of determination of compliance with the applicable statute of limitation. n1 In other words, Rule 15(c) specifies the circumstances in which an amendment is deemed to have been filed as of the date of the original claim, rather than the later date of amendment. The purpose of allowing an amendment to relate back to the time of the original pleading is that the original pleading notified the opposition party of litigation involving a specific factual circumstances that form the basis of a claim for relief. n2 Therefore, the party has received the protection of the statute of limitation, which is designed to prevent stale claims. n3 The following are the three situations when relation back is allowed in federal court:

1. The applicable statute of limitation allows relation back. n4

2. The amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence stated in the original pleading. n5

3. The amendment adds new parties who received notice of the action and should have known that the action would have been brought against them but for a mistake concerning the proper party's identity. n6

[ii] Relation Back Provided by Statute

An amendment to a pleading relates back to the date of the original pleading when the law that provides the applicable statute of limitation allows relation back. n7 The rule permits any relation back that may be permitted under the applicable body of limitations law, which may be federal law or may be state law in diversity cases. If controlling state law affords a more forgiving principle of relation back than the one provided in the federal rules, state law may save a claim that would otherwise be cut off. n8

[iii] Relation Back Because Amendment Arose From Same Facts

A party's amendment of a defective complaint generally relates back to the date of the original pleading, even if the amendment states a new claim, provided that the new claim is within the federal court's jurisdiction and arises out of the conduct, transaction, or occurrence set forth in the original complaint. n8 Factors that a court should consider in determining whether a claim arose out of the same conduct, transaction, or occurrence include: whether the defendant had notice of the claim that plaintiff is now asserting; n9 whether the plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim; n10 and whether unfair surprise to the defendant would result if the court allowed the amendment to relate back. n11 For example, courts generally allow relation back when the new claim is based on the same facts as the original pleading and only amends the legal theory. n12

[iv] Relation Back to Add New Parties

After the statute of limitation has run, Rule 15(c)(1)(C) is the only method for a plaintiff to amend the complaint to change or add a defendant when the plaintiff has made a mistake concerning the identity of the defendant. n13 Thus, Rule 15 expressly allows amendments that change or add parties to relate back to the time of the original pleading if all of the following requirements are satisfied: n14

1. The claim or defense asserted in the amended pleading must arise from the conduct, transaction, or occurrence advanced in the original pleading. n15

2. The new party named in the amended pleading must have received adequate notice so as not to be prejudiced in defending on the merits. n16

3. The new party must have known or should have known that the action would have been brought against the new party but for the mistake. n17

4. The second and third factors above must have been satisfied within the period prescribed for service of process and complaint. n18

If the United States or a United States officer or agency is added as a new defendant by amendment, the notice requirements in items 2 and 3 above are satisfied if, during the period stated in item 4, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency. n19

Because Rule 15(c)(3) is premised on the situation in which the plaintiff has made a mistake concerning the identity of a defending party, it does not apply when the defendant is merely unaware that the person was a potential party or when a plaintiff simply omits from the original complaint a separate, unrelated party, regardless of whether the omission was unintentional. n20 Also, an amended complaint does not relate back if the plaintiff had been aware of the identity of the newly named parties when the plaintiff filed the original complaint, and simply decided not to sue them at that time. In other words, a conscious decision to sue one party and not another does not constitute a mistake, and therefore may not form the basis for relation back. n21

[b] Other Effects of Amendment

In addition to the relation back of an amendment to the date of the filing of the original pleading, n22 properly completed amendments also have the following effects:

1. The amended pleading supersedes the prior pleading, provided that the amended pleading is complete in itself and does not reference or adopt any portion of the prior pleading. n23

2. If the district court sustains an objection to a pleading and the pleading party amends that pleading, the

objecting party does not waive all possible objections to that ruling. However, the amending party does waive objections to a court's ruling based on indefiniteness, incompleteness, insufficiency or other technical pleading defects. n24

3. If the opposition party served with an amended pleading is required to plead in response, the opposition party must respond to the amended pleading within 14 days after being served with the amendment, or within the time to respond to the original pleading, whichever is later. n25 As a practical matter, some courts do not strictly require a response to an amendment unless the amendment adds new parties, new claims, or significant new factual allegations; if not, the previously filed response to the original pleading should be a sufficient response. n26

4. Generally, a party responding to an amended pleading must plead in response to the amendments in the pleading and any claims or defenses not responded to in the original pleading. n27 The responding party must also request leave of court if it wishes to add any new counterclaims in its response to the amended pleading. n28 However, if a plaintiff files an amended complaint changing the theory or scope of the case, some courts hold that the defendant is entitled to plead as though it were responding to the original complaint, and therefore the defendant may add new counterclaims without requesting leave of court. n29

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation Back

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, § 15.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Dimaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1303 (11th Cir. 2008)* .

(n3)Footnote 2. *Fed. R. Civ. P. 15(a)(1)*.

(n4)Footnote 3. *Fed. R. Civ. P. 15(a)(1)(A)*; *see* [2], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 15(a)(1)(B)*.

(n6)Footnote 5. *Butler v. Leen, 4 F.3d 772, 773 (9th Cir. 1993)* .

(n7)Footnote 6. *Fed. R. Civ. P. 15(a)(1)*; *Mayle v. Felix, 545 U.S. 644, 665-666, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)* .

(n8)Footnote 7. *Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 203 (7th Cir. 1985)* (federal rules do not distinguish between technical and substantive amendments).

(n9)Footnote 8. *Elliott v. Foufas, 867 F.2d 877, 882 (5th Cir. 1989)* .

(n10)Footnote 1. *See Fed. R. Civ. P. 15(a)(1)(A)*.

(n11)Footnote 2. *See Fed. R. Civ. P. 15(a)(1)(B)*; *see also* [3], *below*.

(n12)Footnote 3. *See Fed. R. Civ. P. 15(a)(1)(B).*

(n13)Footnote 4. *Fed. R. Civ. P. 15(a)(2)*; *see* [4], *below*.

(n14)Footnote 5. *See Russo v. Abington Mem'l Hosp., 881 F. Supp. 177, 182 (E.D. Pa. 1995)* .

(n15)Footnote 1. *See Fed. R. Civ. P. 15(a)(1)(B).*

(n16)Footnote 2. *Fed. R. Civ. P. 15(a)(1)(B)*, Committee Note to 2009 Amendments.

(n17)Footnote 3. *See* 3 *Moore's Federal Practice, § 15.12[1]* (Matthew Bender 3d ed.).

(n18)Footnote 4. *Fed. R. Civ. P. 15(a)(1)*, Committee Note to 2009 Amendments.

(n19)Footnote 5. *Fed. R. Civ. P. 15(a)(2)*; *see* [4], *below*.

(n20)Footnote 1. *See* [2], [3] *above*.

(n21)Footnote 2. *See Fed. R. Civ. P. 15(a)(2)*; *see* [d], *below* (amendment by express consent of party).

(n22)Footnote 3. *See Fed. R. Civ. P. 15(a)(2).*

(n23)Footnote 4. *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)* .

(n24)Footnote 5. *Fed. R. Civ. P. 16(c)(2)(B).*

(n25)Footnote 6. *Fed. R. Civ. P. 16(b)(3)(A).*

(n26)Footnote 7. *United States v. Varner, 13 F.3d 1503, 1508 (11th Cir. 1994)* .

(n27)Footnote 8. *Parker v. Columbia Pictures Indus., 204 F.3d 326, 339-341 (2d Cir. 2000)* (finding of good cause depends on diligence of moving party).

(n28)Footnote 9. *Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)* .

(n29)Footnote 10. *United Union of Roofers v. Insurance Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990)* .

(n30)Footnote 11. *Foman v. Davis, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* ; *see California Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 163-166 (3d Cir. 2004)* .

(n31)Footnote 12. *Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993)* .

(n32)Footnote 13. *28 U.S.C. § 1653.*

(n33)Footnote 14. *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006)* .

(n34)Footnote 15. *Federal Recovery Servs., Inc. v. United States, 72 F.3d 447, 453 (5th Cir. 1995)* .

(n35)Footnote 16. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831-838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* ; *see Koehler v. Dodwell, 152 F.3d 304, 308-309 (4th Cir. 1998)* .

(n36)Footnote 17. *AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 957 (9th Cir. 2006)* .

(n37)Footnote 18. *Foman v. Davis, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* ; *Palmer v.*

Champion Mortgage, 465 F.3d 24, 30-31 (1st Cir. 2006) .

(n38)Footnote 19. *Long v. Wilson, 393 F.3d 390, 400 (3d Cir. 2004)* .

(n39)Footnote 20. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-331, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (citing **Moore's Federal Practice**); *Minter v. Prime Equip. Co., 451 F.3d 1196, 1205 (10th Cir. 2006)* .

(n40)Footnote 21. United States v. Pend Oreille Pub. Util. Dist. No. 1, *926 F.2d 1502, 1511 (9th Cir. 1991)* .

(n41)Footnote 22. *United States v. Pend Orielle Pub. Util. Dist. No. 1, 926 F.2d 1502, 1511 (9th Cir. 1991)* .

(n42)Footnote 23. *Benzon v. Morgan Stanley Distribs., 420 F.3d 598, 613 (6th Cir. 2005)* .

(n43)Footnote 24. *LaRocca v. Borden, Inc., 276 F.3d 22, 32 (1st Cir. 2002)* .

(n44)Footnote 25. *United States ex rel. v. St. Luke's Hosp., Inc., 441 F.3d 552, 555, 558 (8th Cir. 2006)* .

(n45)Footnote 26. *Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001)* .

(n46)Footnote 27. *Bower v. Jones, 978 F.2d 1004, 1008 (7th Cir. 1992)* ; *see In re NAHC, Inc. Securities Litigation, 306 F.3d 1314, 1332 (3d Cir. 2002)* (amendment was futile when one claim would be time-barred under the statute of limitation and other claims would not survive Rule 12(b)(6) motions even if made with more particularity).

(n47)Footnote 28. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* .

(n48)Footnote 29. *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)* (prejudice is the primary inquiry under Rule 15(a)(2)).

(n49)Footnote 30. *Polycast Technology Corp. v. Uniroyal, Inc., 728 F. Supp. 926, 939 (S.D.N.Y. 1989)* ; *see Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981)* (court avoided any prejudice to defendant by conditioning grant of leave on payment of additional expense of discovery by plaintiff).

(n50)Footnote 31. *Collaboration Props. v. Tangberg ASA, 2006 U.S. Dist. LEXIS 13968, at *14-*15 (N.D. Cal. 2006)* .

(n51)Footnote 32. *See* [2], [3], *above*.

(n52)Footnote 33. *Fed. R. Civ. P. 15(a)(2)*.

(n53)Footnote 34. *Fed. R. Civ. P. 15(b)(2)*.

(n54)Footnote 35. *S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 590 (8th Cir. 2009)* ; *see* [6][b], *below*.

(n55)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, § 15.17 (Matthew Bender 3d ed.).

(n56)Footnote 1. *Moore v. Indiana, 999 F.2d 1125, 1131 (7th Cir. 1993)* .

(n57)Footnote 2. *See Fed. R. Civ. P. 7(b)*.

(n58)Footnote 3. *Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 58 (1st Cir. 2006)* (citing **Moore's Federal Practice**; normal procedure for requesting leave to amend is for party to submit proposed amendment or new pleading to be submitted with motion).

(n59)Footnote 4. *Harris v. City of Auburn, 27 F.3d 1284, 1287 (7th Cir. 1994)* .

(n60)Footnote 5. *Belizan v. Hershon, 434 F.3d 579, 582 (D.C. Cir. 2006)* (verbal request for leave to amend made at oral argument was not proper motion for leave to amend).

(n61)Footnote 6. *See Meehan v. United Consumers Club Franchising Corp., 312 F.3d 909, 913-914 (8th Cir. 2002)* (court has discretion, but is not required, to accept response to motion to dismiss as motion for leave to amend); *Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993)* (court should have considered arguments raised in opposition to motion to dismiss as amendment to complaint).

(n62)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, § 15.18 (Matthew Bender 3d ed.).

(n63)Footnote 1. *Fed. R. Civ. P. 15(b)(1)*; *Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1280-1281 (10th Cir. 2004)* .

(n64)Footnote 2. *American Eagle Credit Corp. v. Select Holding, Inc., 865 F. Supp. 800, 809 (S.D. Fla. 1994)* .

(n65)Footnote 3. *Crossland v. Canteen Corp., 711 F.2d 714, 729 (5th Cir. 1983)* .

(n66)Footnote 4. *Matter of Prescott, 805 F.2d 719, 725 (7th Cir. 1986)* .

(n67)Footnote 5. *Cook v. City of Bella Villa, 582 F.3d 840, 852 (8th Cir. 2009)* (noting that some courts recognize implied consent to amendment even before trial).

(n68)Footnote 6. *Fed. R. Civ. P. 15(b)(2)*; *Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1280-1281 (10th Cir. 2004)* .

(n69)Footnote 7. *Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 646 (2d Cir. 1989)* .

(n70)Footnote 8. *First Nat'l Bank of Louisville v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 933 F.2d 466, 469 (7th Cir. 1991)* .

(n71)Footnote 9. *MacDraw, Inc. v. CIT Group Equipment Financing, Inc., 157 F.3d 956, 962 (2nd Cir. 1998)* .

(n72)Footnote 10. *Studiengesellschaft Kohle, M.B.H. v. Shell Oil Co., 112 F.3d 1561, 1566 (Fed. Cir. 1997)* .

(n73)Footnote 11. *Brandon v. Holt, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985)* .

(n74)Footnote 12. *Banks v. Thaler, 583 F.3d 295, 307 (5th Cir. 2009)* .

(n75)Footnote 13. *Portis v. First Nat'l Bank of New Albany, 34 F.3d 325, 332 (5th Cir. 1994)* .

(n76)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, §§ 15.19, 15.20 (Matthew Bender 3d ed.).

(n77)Footnote 1. *Fed. R. Civ. P. 15(c)*.

(n78)Footnote 2. *See In re Safeco Ins. Co. of Am., 585 F.3d 326, 334 (7th Cir. 2009)* (key of relation back of amendment principle is adequate notice at time of original pleading to defendant of its potential liability).

(n79)Footnote 3. *Johnson v. Crown Enters., 398 F.3d 339, 342 (5th Cir. 2005)* .

(n80)Footnote 4. *Fed. R. Civ. P. 15(c)(1)(A)*; *see* [ii], *below*.

(n81)Footnote 5. *Fed. R. Civ. P. 15(c)(1)(B)*; *see* [iii], *below*.

(n82)Footnote 6. *Fed. R. Civ. P. 15(c)(1)(C)*; *see* [iv], *below*.

(n83)Footnote 7. *Fed. R. Civ. P. 15(c)(1)(A)*.

(n84)Footnote 8. *DeRienzo v. Harvard Indus., 357 F.3d 348, 353 (3d Cir. 2004)* .

(n85)Footnote 8. *Fed. R. Civ. P. 15(c)(1)(B)*; *Johnson v. Crown Enters., 398 F.3d 339, 342 (5th Cir. 2005)* .

(n86)Footnote 9. *Baldwin County Welcome Ctr. v. Broan, 466 U.S. 147, 149-150, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* .

(n87)Footnote 10. *Johnson v. Crown Enters., 398 F.3d 339, 342 (5th Cir. 2005)* (citing **Moore's Federal Practice**).

(n88)Footnote 11. *Benfield v. Mocatta Metals Corp., 26 F.3d 19, 23 (2d Cir. 1994)* .

(n89)Footnote 12. *Mayle v. Felix, 545 U.S. 644, 665-666, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)* .

(n90)Footnote 13. *See Garrett v. Fleming, 362 F.3d 692, 696 (10th Cir. 2004)* .

(n91)Footnote 14. *Fed. R. Civ. P. 15(c)(1)(C)*; *see Sanders Burns v. City of Plano, 578 F.3d 279, 288 (5th Cir. 2009)* (citing **Moore's Federal Practice**).

(n92)Footnote 15. *Fed. R. Civ. P. 15(c)(1)(C)*; *see Fed. R. Civ. P. 15(c)(1)(B)*.

(n93)Footnote 16. *Fed. R. Civ. P. 15(c)(1)(C)(i)*.

(n94)Footnote 17. *Fed. R. Civ. P. 15(c)(1)(C)(ii)*.

(n95)Footnote 18. *Fed. R. Civ. P. 15(c)(1)(C)*; *see Fed. R. Civ. P. 4(m)*.

(n96)Footnote 19. *Fed. R. Civ. P. 15(c)(2)*; *see Montgomery v. United States Postal Serv., 867 F.2d 900, 903 (5th Cir. 1989)* .

(n97)Footnote 20. *Mailey v. SEPTA, 204 F.R.D. 273, 275-276 (E.D. Penn. 2001)* .

(n98)Footnote 21. *Arthur v. Maersk, Inc., 434 F.3d 196, 204 n.9 (3d Cir. 2005)* .

(n99)Footnote 22. *See* [a], *above*.

(n100)Footnote 23. *Fritz v. Standard Sec. Life Ins. Co. of N.Y., 676 F.2d 1356, 1358 (11th Cir. 1982)* .

(n101)Footnote 24. *Davis v. TXO Prod. Corp., 929 F.2d 1515, 1517-1518 (10th Cir. 1991)* .

(n102)Footnote 25. *Fed. R. Civ. P. 15(a)(3)*.

(n103)Footnote 26. *See, e.g., Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 664-665 (E.D. Cal. 1990)* .

(n104)Footnote 27. *Carter v. Church, 791 F. Supp. 297, 298 (M.D. Ga. 1992)* .

(n105)Footnote 28. *See Fed. R. Civ. P. 13(a)*.

(n106)Footnote 29. *Tralon Corp. v. Cedarapids, Inc., 966 F. Supp. 812, 832 (N.D. Iowa 1997)* .

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PART III Pleading Stage
CHAPTER 9 PLEADINGS AND MOTIONS IN GENERAL
PART VI. AMENDED AND SUPPLEMENTAL PLEADINGS

1-9 Moore's Manual--Federal Practice and Procedure § 9.52

§ 9.52 Supplemental Pleadingsn*

[1] Characteristics and Purpose of Supplemental Pleading

A "supplemental pleading" is one that adds claims, defenses, allegations, and statements for any occurrences relevant to the original pleading that take place after the original pleading. n1 Its purpose is to bring the pleading up to date to the current status among the parties, n2 and to promote as complete an adjudication of the dispute between the parties as possible. n3

Thus, on the motion of a party and on such terms as are just, a court may allow a supplemental pleading that sets forth transactions and occurrences or events which have happened since the date of the pleading to be supplemented. n4 A supplemental pleading may be used to add additional facts or events relating to liability or to change the relief requested. n5 A party also may supplement a pleading under Rule 15(d) to add new parties when subsequent events make it necessary to do so. n6 Supplemental pleadings are not limited to use by the plaintiff. A defendant may supplement an answer with new or additional defenses, including affirmative defenses, based on after-occurring events. n7

[2] Court's Discretion to Permit Supplemental Pleading

A court has discretion to allow a party to supplement a complaint in the interest of justice. However, the discretion is not unlimited. The court does not have discretion unless in fact there has transpired a transaction, occurrence, or event in the period of time after the original pleading was filed. While the text of Rule 15(a)(2) provides that leave should be freely granted for an amendment, the text of Rule 15(d) does not similarly provide for supplement. n1 However, supplemental pleadings are ordinarily useful to the efficient administration of justice; consequently, they should be allowed by the district court as a matter of course, unless some particular reason for disallowing them appears. n2 It is within the discretion of the court to allow a supplemental pleading to be filed at any stage of the case. n3

[3] Requirements for Supplemental Pleadings

Rule 15(d) applies only to events that have occurred since the date of the filing of the pleading. Supplemental pleadings also are limited to subsequent events related to the claim or defense presented in the original pleading. n1 The

allegations in the supplemental pleading, however, do not need to arise out of the same transaction or occurrence as the original; they need only have some significant relationship to the subject of the original pleading. n2 Supplemental pleadings are optional on the part of the party that filed the original pleading. n3 Therefore, neither an opposition party nor the district court has the authority to compel a party making a claim for relief to supplement its pleading, and it is inappropriate for the district court to enter an adverse judgment with respect to claims not included in the original pleading. n4

Other than the required change in circumstances, the same general principles that support the amendment of pleadings also apply to supplemental pleadings. Leave of court is required to supplement a pleading. n5 A court may deny leave to supplement when it would cause undue delay or prejudice to the opposing party, or if the supplementing party has shown bad faith or a motive to delay the action. n6

The court may allow a plaintiff or defendant to supplement a claim or defense even if the original pleading did not state a proper claim for relief. n7 Thus, a plaintiff need not commence a new action when after-occurring events demonstrate that it has a right to relief, even if the original complaint was defective or insufficient. A court may also allow a plaintiff to supplement the complaint even if jurisdiction or venue would not have been proper if the claim had been asserted in an independent action. n8 The court may order how the adverse party must respond to the supplemental complaint and the time allowed for such response. n9

[4] Relation Back of Supplemental Pleading

A supplemental pleading ordinarily does not relate back to the time of the original pleading for statute of limitation purposes to the extent it relies on facts that did not occur until after the expiration of the statute of limitation. n1 However, a court may allow relation back when the allegations in the supplemental complaint show changed or additional circumstances. For example, a court will allow relation back when the injury alleged in the original complaint has become aggravated, when the violations alleged in the supplemental complaint are a continuation of the initial violations alleged in the original complaint, n2 or when the supplemental complaint alleges an occurrence that corrects a defective jurisdictional allegation. n3 A supplemental pleading differs from an amended pleading because it relates to matters occurring subsequent to the filing of the initial complaint, while an amendment relates to events occurring prior to the original pleading. Consequently, relation back principles may be unnecessary, because a new occurrence that takes place after the filing of the original complaint in itself would set a date of accrual of the claim for relief and obviate statute of limitation problems. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice*, § 15.30 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 15(d)*; *see Wagner v. Professional Eng'rs in Cal. Gov't, 354 F.3d 1036, 1052 (2004)* .

(n3)Footnote 2. *Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 226-227, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964)* .

(n4)Footnote 3. *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc., 668 F.2d 1014, 1057 (9th Cir. 1982)* .

(n5)Footnote 4. *Fed. R. Civ. P. 15(d).*

(n6)Footnote 5. *Glatt v. Chicago Park Dist., 87 F.3d 190, 193-194 (7th Cir. 1996)* (supplemental pleading to add specified injuries arising from the event on which the claim is based which occurred after plaintiff filed complaint).

(n7)Footnote 6. *Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 227, 84 S. Ct. 1226, 1231, 12 L. Ed. 2d 256 (1964)* .

(n8)Footnote 7. *Sanchez v. City of Santa Ana, 915 F.2d 424, 431-432 (9th Cir. 1990)* .

(n9)Footnote 1. *Burns v. Exxon Corp., 158 F.3d 336, 343 (5th Cir. 1998)* .

(n10)Footnote 2. *Ashton v. City of Concord, 337 F. Supp. 2d 735, 740 (M.D.N.C. 2004)* .

(n11)Footnote 3. *Novak v. National Broadcasting Co., 724 F. Supp. 141, 145 (S.D.N.Y. 1989)* .

(n12)Footnote 1. *Novak v. National Broadcasting Co., 724 F. Supp. 141, 145-146 (S.D.N.Y. 1989)* .

(n13)Footnote 2. *Al-Ra'id v. Ingle, 69 F.3d 28, 33 (5th Cir. 1995)* .

(n14)Footnote 3. *Fed. R. Civ. P. 15(d).*

(n15)Footnote 4. *International Rectifier Corp. v. IXYS Corp., 383 F.3d 1312, 1317-1318 (Fed. Cir. 2004)* .

(n16)Footnote 5. *Fed. R. Civ. P. 15(d).*

(n17)Footnote 6. *Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410, 1412-1413 (W.D.N.Y. 1993)* .

(n18)Footnote 7. *Fed. R. Civ. P. 15(d).*

(n19)Footnote 8. *U.S. Envtl. Prods., Inc. v. Infilco Degremont, Inc., 611 F. Supp. 371, 374 (N.D. Ill. 1985)* .

(n20)Footnote 9. *Pratt v. Rowland, 769 F. Supp. 1128, 1132 (N.D. Cal. 1991)* .

(n21)Footnote 1. *United States ex rel. Wulff v. CMA, Inc., 890 F.2d 1070, 1073-1074 (9th Cir. 1989)* .

(n22)Footnote 2. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1016-1018 (9th Cir. 1981)* .

(n23)Footnote 3. *Bates v. Western Electric, 420 F. Supp. 521, 524 (E.D. Pa. 1976)* .

(n24)Footnote 4. *See Reiter v. United States, 371 F. Supp. 2d 417, 423-424 (S.D.N.Y. 2005)* .

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PART III Pleading Stage
1 SPECIAL ALERT TO CHAPTER 10

1-1 Moore's Manual--Federal Practice and Procedure Scope

Scope

***Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009 U.S. LEXIS 3472 (May 18, 2009)**

Background of Case

In *Ashcroft v. Iqbal*, the respondent was a citizen of Pakistan and a Muslim. After the September 11, 2001, terrorist attacks he was arrested in the United States on immigration charges and detained by federal officials. He was deemed to be "of high interest" to the investigation into the terrorist attacks, and was therefore held under restrictive conditions, spending 23 hours a day in lockdown and the remaining hour outside his cell in handcuffs and leg irons. He eventually pleaded guilty to the immigration fraud charges and was removed to Pakistan.

He then filed a *Bivens* action in federal court against various federal officials and corrections officers, including the U.S. Attorney General and the Director of the FBI, who were the petitioners here. The complaint alleged that they violated the U.S. Constitution by designating him as a person of "high interest," and thereby subjected him to harsh conditions of confinement, on account of his race, religion, or national origin. It further alleged that the petitioners approved a policy of arresting and detaining Arab Muslim men as part of the investigation of the September 11 terrorist attacks, and that both petitioners "knew of, condoned, and willfully and maliciously agreed to subject" the respondent to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, or national origin and for no legitimate penological reason.

The petitioners asserted qualified immunity and moved to dismiss the suit on the grounds the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, and the petitioners appealed to the Second Circuit Court of Appeals. While the appeal was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* , which set out standards for evaluating the sufficiency of a complaint. The Second Circuit discussed *Twombly* at length, concluding that it called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." The Second Circuit decided that it was not presented with one of those contexts requiring amplification, and that the respondent's complaint was sufficient to allege the petitioners' personal involvement in discriminatory decisions that, if true, violated clearly established constitutional law.

Determination of Subject Matter Jurisdiction

The Supreme Court first noted (Justice Kennedy delivered the opinion of the Court) that the respondent had disputed the Second Circuit's subject matter jurisdiction to hear the appeal, but that the Second Circuit had hardly discussed the issue. However, subject matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.

The Court concluded that the Second Circuit had jurisdiction to hear the appeal under the collateral order doctrine. This doctrine makes a limited set of district court orders reviewable even though not final judgments, when they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

A decision denying a claim of qualified immunity falls within the narrow class of orders that are appealable under the doctrine. This is so because qualified immunity, which shields government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation.

The respondent argued that a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction. The Court ruled, however, that appellate jurisdiction is not so strictly confined.

Elements of *Bivens* Action

The Court began by taking note of the elements of a *Bivens* action--that is, the elements the plaintiff was required to plead to state a claim of unconstitutional discrimination against officials entitled to assert qualified immunity [*see Bivens v. Six Unknown FBI Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)] . Bivens* recognized an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights. The Court noted, however, that it has never extended this right of action to *First Amendment* claims. However, the petitioners did not press this argument, so the Court assumed without deciding that the respondent's *First Amendment* claim was actionable under *Bivens*.

Government officials, the Court said, may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Accordingly, a plaintiff must plead that each government official defendant, through the official's own individual actions, violated the Constitution. The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. When the claim is invidious discrimination in contravention of the *First* and *Fifth Amendments*, the plaintiff must plead and prove that the defendant acted with discriminatory purpose.

The respondent argued that the petitioners could be liable, under a theory of "supervisory liability" for knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees. That is, that a supervisor's mere knowledge of a subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. The Court rejected this argument--each government official is liable only for his or her own misconduct. Thus, a plaintiff must plead and prove discriminatory intent, not mere knowledge of discrimination by subordinates.

***Twombly* Is Not Limited to Antitrust Disputes**

The pleading standards here were governed by the Court's earlier decision in *Bell Atlantic Corp. v. Twombly*. *Twombly* was a complex antitrust case, and the respondent raised the argument that it should be limited to pleadings made in the context of an antitrust dispute. The Court made clear, however, that its ruling in *Twombly* was based on interpretation and application of Rule 8, which sets out the pleading standard for all civil actions.

Application of *Twombly's* Pleading Standard

Civil Rule 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under *Twombly*, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Two working principles underlie the *Twombly* decision, the Court said. First, the tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Thus, the Court read *Twombly* as applying a two-pronged approach. "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Following this methodology, the Court concluded that the complaint did not sufficiently plead claims of invidious discrimination. The complaint contained allegations that the petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint further alleged that the Attorney General was the "principal architect" of this invidious policy, and that the Director of the FBI was "instrumental" in adopting and executing it. The Court characterized these assertions as nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, and therefore conclusory and not entitled to be assumed true. The Court made clear that it was "the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."

The Court then considered whether the remaining allegations plausibly suggested an entitlement to relief. The complaint alleged that the FBI, under the direction of one of the petitioners, "arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11" and that the policy of holding post-September-11 detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by both petitioners in the weeks after September 11, 2001.

These allegations, taken as true, did not plausibly establish discriminatory purpose on the part of the petitioners with respect to the respondent's arrest, as there were more likely explanations for their conduct. A legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. The arrests "were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." Because of this obvious alternative explanation, discrimination was not a "plausible" conclusion.

Moreover, these allegations were with reference to the respondent's arrest--but his claims against the petitioners rested on their ostensible policy of holding detainees under severe conditions of confinement once they were categorized as "of high interest" The complaint failed to plausibly show that the petitioners purposefully adopted a policy of classifying detainees as "of high interest" because of their race, religion, or national origin. The complaint alleged that the petitioners approved restrictive conditions of confinement for detainees until they were cleared by the FBI. Even

accepting the truth of these allegations, the complaint did not show that this action was due to the detainees' race, religion, or national origin.

The Court also rejected the idea that application of Rule 8 and the *Twombly* standard might be tempered when the district court cabins discovery in such a way as to preserve the defense of qualified immunity as much as possible. The Court ruled that "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process... Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."

The Court concluded that the respondent's complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination against the petitioners, and reversed and remanded for further proceedings.

Dissent

Justice Souter (the author of the *Twombly* opinion) filed a dissent, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer. The dissent concluded that the majority both misapplied the pleading standard under *Twombly* and incorrectly rejected supervisory liability.

The dissent first observed that the petitioners had explicitly conceded, for purposes of their appeal, that an officer may be subject to *Bivens* liability as a supervisor on grounds other than respondeat superior. The Court had therefore received no briefing or argument on the proper scope of supervisory liability. Rejecting the principle of supervisory liability in these circumstances was uncalled for, especially as this conclusion had no bearing on the majority's resolution of the present case.

Given the petitioners' concession, the complaint satisfied Rule 8, in the dissent's view. The petitioners admitted they were liable for their subordinates' conduct if they had actual knowledge of the discriminatory nature of the classification of suspects as being "of high interest," and were deliberately indifferent to that discrimination. The complaint alleged, at a bare minimum, that the petitioners knew of and condoned the discriminatory policy their subordinates carried out, and in fact went further and alleged that they acted affirmatively to create the discriminatory detention policy.

The petitioners argued that the complaint failed to satisfy *Twombly's* plausibility standard because it was implausible that such high-ranking officials would be personally involved in the specific actions of lower-level officers. This response, the dissent said, "bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be... The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here."

The dissent did not necessarily disagree with the majority over the definition of "plausibility" under *Twombly*. Rather, the dissent took issue with the first prong of the majority's analysis, under which the majority discarded a number of allegations as "conclusory," leaving only two statements to consider. The dissent agreed that the two allegations selected by the majority did not, by themselves, state a plausible entitlement to relief.

However, the complaint contained allegations linking the petitioners to the discriminatory practices of their subordinates. These allegations, in the dissent's view, were not merely "bare assertions" or a "formulaic recitation of the elements," as the majority would have it. The complaint contained specific allegations as to a policy that discriminated against Arab Muslim men, and further alleged that the two petitioners knew of, condoned, and agreed to subject the respondent to this particular, discrete, discriminatory policy. Taking the complaint as a whole, the dissent concluded that the complaint gave the petitioners fair notice of the claim and the grounds on which it rested.

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure 10.syn

§ 10.syn Synopsis to Chapter 10: PLAINTIFF'S PLEADINGS

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.01

§ 10.01 Table of Times for Plaintiffn1

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Service of Summons and Complaint.....	Within 120 days after filing of complaint, except in case of service in foreign country pursuant to Rule 4(f), 4(j)(1). Rule 4(m).
Proof of service of process.....	After service is completed or at direction of court. Rule 4(*l*).
Motion to amend summons or proof of service of amended process.....	At any time in discretion of court. Rule 4(a)(2), 4(*l*)(3).
Amendment of complaint as matter of course.....	Once within 21 days of service of answer or within 21 days after service of motion under Rule 12(b), (e), or (f), whichever is earlier. Rule 15(a)(1).
Amendment of complaint with leave of court.....	At any time. Rule 15(a)(2). Subject to scheduling order. Rule 16(b)(3)(A).
Demand for Jury Trial.....	Within 14 days of service of last pleading directed to issue triable by jury. Rule 38(b)(1).
Demand for Jury Trial in Removed Action.....	Within 14 days of date that demanding party either (1) filed notice of removal, or (2) was served with notice of removal. Rule 81(c)(3).
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Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. The times specified in this table are subject to the provisions for the extension of time under Rule 6(b), and to the provision of Rule 6(d) for the addition of 3 days to the period prescribed or allowed in the rules when service is accomplished by any means other than by hand delivery. *See* Fed. R. Civ. P. 6(d); *see also* Fed. R. Civ. P. 5(b)(2)(C)-(F). For further discussion of the time periods for pleadings and motions, see Ch. 9, *Pleadings and Motions in General*.

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.02

§ 10.02 Commencement of Civil Action; Filing of Complaintn*

[1] Acts Constituting Commencement of Action

To commence a civil action governed by the federal rules, a party must file a formal complaint with the court. n1 The act of filing constitutes the "commencement" of the action. n2 An action is not commenced, for example, by completion of service of process under Rule 4, n3 by filing a motion with the court, n4 or by filing a right-to-sue letter issued by a federal agency for a Title VII discrimination claim. n5 Rule 3's requirement of a complaint applies in actions brought by or against the United States n6 or an officer or agency of the United States. n7 Rule 3 generally controls the commencement of all civil actions; n8 however, a federal statute adopted subsequent to the rules may provide for a different method of commencing an action to the extent provided by Congress. n9

An action is commenced under Rule 3 by the filing of a complaint, even if the complaint fails to comply with local court rules. n10 In diversity actions, the commencement date of the federal action is determined by state law. n11 In cases when an action filed in state court is subsequently removed to federal court, the commencement of the action is also governed by the rules of the state where the action originated. n12

Some circuit courts consider the failure to pay a filing fee a violation of Rule 3. In those jurisdictions, a complaint filed without the applicable filing fee does not commence the action. n13 Other circuits consider an action commenced by the filing of a complaint, even if the filing fees are not paid to the clerk at the time of the filing. n14

[2] Significance of Commencement of Action

The time of commencement of an action, which is to an extent determined by the manner of filing, is important because it may affect the following matters: compliance with an applicable statute of limitations; n1 the availability of provisional remedies; n2 and the assumption of jurisdiction by the federal court, n3 which ultimately gives the court power to enter a valid judgment disposing of the litigation. n4 Thus, a complaint must generally be filed pursuant to Rule 3 before a court may grant a judgment. However, if a complaint has technical deficiencies, but the defendant fails to object on the ground that the action was not properly commenced, the action may proceed as if a complaint had been filed, and a judgment may be entered. n5 Conversely, if the defendant objects to the plaintiff's failure to file a complaint within the prescribed period, the action must be dismissed, and the plaintiff is precluded from filing a new action. n6

[3] Consideration of Other Rules to Determine Commencement of Action

Rule 3 provisions governing the commencement of an action must be construed in consideration of all other federal rules. n1 The following rules are particularly important with respect to the commencement of an action: n2

1. Rule 4, which governs the service of summons. Rule 3 applies in all civil actions requiring service under Rule 4. n3 There is, however, no general requirement that the plaintiff effect service pursuant to Rule 4 to toll the statute of limitation, unless there is explicit statutory law to the contrary. n4

2. Rule 5, which specifies the permissible methods of filing papers, including the complaint, defines the term "filing with the court." n5 Rule 3 must therefore be considered in conjunction with Rule 5(e) to ascertain the time at which the complaint has been properly filed, and thus, the action commenced. n6 The most common method for completion of filing pursuant to Rule 5(e) is to deliver the complaint to the clerk of the court. n7 However, Rule 5(e) also provides for filing of a complaint in other ways: if ordered by the court, the complaint may be delivered by the claiming party directly to the judge, or a court may by local rule permit or require papers to be filed by electronic means. n8

3. Rule 6(b), which provides that time requirements may be extended in certain circumstances. For example, although the service of a summons usually must occur within 120 days after the filing of the complaint, the time period to effect service of process under Rule 4(m) may be enlarged under Rule 6(b). This enlargement can affect the proper commencement of an action under Rule 3 if the action is dismissed for failure to effectuate service of process within the prescribed period. n9

4. Rule 8(a), which provides the requirements for drafting the complaint. Thus, for an effective filing under Rule 3, the provisions of Rule 8(a) must be satisfied, including: a short and plain statement of the grounds for jurisdiction; a claim showing that the pleader is entitled to relief; and a demand for judgment for the relief the pleader seeks. For example, in one case the plaintiff timely filed a document entitled "right to sue letter" with the court, but failed to file a complaint denominated as such. The Supreme Court held that the action was not properly commenced because the right-to-sue letter failed to set forth a short statement regarding the nature of the claim as required by Rule 8(a). n10 For a complete discussion of pleading rules under Rule 8(a), see Ch. 9, *Pleadings and Motions in General*.

5. Rule 10(a), which requires that in the complaint the title of the action must include the names of all the parties. Thus, a careful attorney will be sure the complaint meets all the requirements of Rule 10, including captions and paragraphs. n11

6. Rule 15, which describes the requirements for amendment of a complaint or other pleading, n12 and the principle that the date of an amendment is effective as date of the commence of the action. n13 Just as an action is commenced with the filing of a complaint, an amendment to a complaint is effective when filed. n14

[4] Corporate Disclosure Statement

[a] Required Disclosure Statement

At the commencement of an action, n1 a nongovernmental corporate party must file two copies of a statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock n1.1 or (2) states that the corporation has no parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock. n2

The purpose of this statement is to enable the district court judge to determine whether he or she has the "financial

interest" required to subject the judge to automatic disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges. n3

[b] Time for Filing

A nongovernmental corporate party plaintiff that comes within the rule must file an initial disclosure statement at the time of filing its complaint, or at the time of its first appearance or any other request by the corporation addressed to the court. n4 Additionally, a party must supplement its statement whenever the information that must be disclosed under Rule 7.1 changes. n5 Thus, if a nongovernmental corporate plaintiff in a district court had no parent corporation at the time of filing the complaint, but was later acquired by a parent corporation, the party must disclose that information in a supplemental disclosure at the time of acquisition by the parent corporation. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedurePleading & PracticePleadingsComplaintsPrelitigation NoticesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* § 3.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Bush v. Cheaptickets, Inc., 425 F.3d 683, 686 (9th Cir. 2005)* .

(n3)Footnote 2. *Fed. R. Civ. P. 3.*

(n4)Footnote 3. *Pacesetter Sys. v. Medtronic, Inc. 678 F.2d 93, 96 (9th Cir. 1982)* .

(n5)Footnote 4. *In re Allied-Signal, Inc., 915 F.2d 190, 191-192 (6th Cir. 1990)* (class action commenced by filing complaint and not by filing motion for class certification).

(n6)Footnote 5. *Birge v. Delta Air Lines, 597 F. Supp. 448, 454 (N.D. Ga. 1984)* (filing of federal agency right-to-sue letter not sufficient to commence action in federal court without filing of formal complaint in court).

(n7)Footnote 6. *United States v. Certain Parcels of Land, 149 F. Supp. 696 (N.D. Ohio 1957)* .

(n8)Footnote 7. *Farrell v. Ignatius, 283 F. Supp. 58 (S.D.N.Y. 1968)* .

(n9)Footnote 8. *Woodford v. Garceau, 538 U.S. 202, 208, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)* .

(n10)Footnote 9. *Matles v. United States, 356 U.S. 256, 256, 78 S. Ct. 712, 2 L. Ed. 2d 741 (1958)* (in addition to complaint, affidavit of good cause must be filed with complaint to commence denaturalization proceeding).

(n11)Footnote 10. *Loya v. Desert Sands Unified Sch. Dist., 721 F.2d 279, 281 (9th Cir. 1983)* .

(n12)Footnote 11. *South v. Saab Cars USA, Inc., 28 F.3d 9, 12 n.2 (2d Cir. 1994)* .

(n13)Footnote 12. *Juliano v. Stroehmann Bakeries, Inc., 734 F. Supp. 595, 596-599 (W.D.N.Y. 1990)* .

(n14)Footnote 13. *Wanamaker v. Columbian Rope Co., 713 F. Supp. 533, 538-539 (N.D.N.Y. 1989)* .

(n15)Footnote 14. *Johnson v. Brown, 803 F. Supp. 1414, 1418-1419 (N.D. Ind. 1992)* .

(n16)Footnote 1. *See Pace v. DiGuglielmo, 544 U.S. 408, 415 n.5, 125 S. Ct. 1807, 161 L. Ed. 2d 669* ; *United States ex rel. Mathews v HealthSouth Corp., 332 F.3d 293, 295-296 (5th Cir. 2003)* ; *see also § 10.03*.

(n17)Footnote 2. *P.K. Family Restaurant v. Internal Revenue Service, 535 F. Supp. 1223, 1224 (N.D. Ohio 1982)* ; *see § 10.04*.

(n18)Footnote 3. *See Allen v. Highlands Hosp. Corp., 545 F.3d 387, 401 (6th Cir. 2008)* (court cannot assume jurisdiction of claim by individual under Age Discrimination in Employment Act until 60 days after complaint has been filed with Equal Employment Opportunity Commission).

(n19)Footnote 4. *Kirkland v Legion Ins. Co., 343 F.3d 1135, 1142 (9th Cir. 2005)* ; *see § 10.05*.

(n20)Footnote 5. *Schlesinger v. Councilman, 420 U.S. 738, 742 n.5, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)* (technical defect in manner action commenced not jurisdictional and does not prevent entry of valid judgment).

(n21)Footnote 6. *Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149-152, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* (filing of right-to-sue letter did not satisfy Rule 3 requirements).

(n22)Footnote 1. *McIntosh v. Antonino, 71 F.3d 29, 35-36 (1st Cir. 1995)* .

(n23)Footnote 2. For a complete discussion of the following rules as applicable to pleadings, see Ch. 9, *Pleadings and Motions in General*.

(n24)Footnote 3. *Harrison v. Kovats, 224 F. Supp. 581, 583 (D.S.C. 1963)* .

(n25)Footnote 4. *Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1188 (5th Cir. 1980)* .

(n26)Footnote 5. *See Fed. R. Civ. P. 5(e)*.

(n27)Footnote 6. *See Smith v. Planned Parenthood, 327 F. Supp. 2d 1016, 1018-1019 (E.D. Mo. 2004)* .

(n28)Footnote 7. *Greenwood v. N.Y. Office of Mental Health, 842 F.2d 636, 639 (2d Cir. 1988)* (plaintiff placed complaint in night depository box of court clerk after court closed for day; court ruled that action was filed on that day.).

(n29)Footnote 8. *Fed. R. Civ. P. 5(e)*; *see § 9.32[1]*.

(n30)Footnote 9. *Fed. R. Civ. P. 6(b)*.

(n31)Footnote 10. *Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149-150, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* .

(n32)Footnote 11. *Roe v. New York, 49 F.R.D. 279, 281 (S.D.N.Y. 1970)* (complaint that failed to properly identify plaintiffs did not commence action under Rule 3).

(n33)Footnote 12. *United States ex rel. Mathews v HealthSouth Corp., 332 F.3d 293, 295-296 (5th Cir. 2003)* .

(n34)Footnote 13. *See Fed. R. Civ. P. 15(c)*.

(n35)Footnote 14. *Greenfield v. Shuck, 856 F. Supp. 705, 711 (D. Mass. 1994)* .

(n36)Footnote 1. *See* [b], *below*.

(n37)Footnote 1.1. *Fed. R. Civ. P. 7.1(a)(1)*.

(n38)Footnote 2. *Fed. R. Civ. P. 7.1(a)(2).*

(n39)Footnote 3. *See Fed. R. Civ. P. 7.1(a)*, Committee Note to original rule; *see also Banks v. Corr. Servs. Corp., 475 F. Supp. 2d 189, 194 (E.D.N.Y. 2007)* (Rule 7.1 disclosure provides current status of corporation regarding required information).

(n40)Footnote 4. *Fed. R. Civ. P. 7.1(b)(1).*

(n41)Footnote 5. *Fed. R. Civ. P. 7.1(b)(2).*

(n42)Footnote 6. *See Fed. R. Civ. P. 7.1(b)*, Committee Note to original rule.

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.03

§ 10.03 Statutes of Limitationn*

[1] Suit Must Be Commenced Within Applicable Time Limit

A statute of limitation is a statute that places a deadline on a person's commencement of a lawsuit for a particular type of legal claim for relief. The deadline is measured from the date a person acquires a right to bring the lawsuit, and this date is known as the date of "accrual" of the claim. n1 Statutes of limitation generally provide that a particular type of claim will be heard by the court only if the person who has the right to sue on that claim commences suit within the applicable period of time. Therefore, three determinations are necessary to answer the question of whether an action is barred by a statute of limitation: (1) a determination of what limitation period of time is applicable; (2) a determination of the time of "accrual" of the claim; and (3) whether any event triggers the stopping or "tolling" of the applicable time period. n2

[2] Determination of Applicable Limitation Period

[a] Claims Based on State Law

Under the Rules of Decision Act, n1 federal courts must follow the laws of the state in which they sit when they are hearing actions involving state law claims. n2 Thus, federal courts must apply state statutes of limitation, n3 as well as any related decisional law, in actions that are instituted in or removed to the federal court on the basis of diversity or alienage jurisdiction. n4 Furthermore, the federal court in a conflict of laws case should apply whatever statute of limitation the court of the forum state would apply. n5

[b] Claims Based on Federal Law

[i] Claim Based on Federal Statute With Specified Limitations Period

When legal rights are created by a federal statute and the statute includes its own limitations period, that limitations provision applies regardless of whether the suit is brought in a state or federal court. n6

[ii] Claim Based on Post-1990 Congressional Enactment With No Specified Limitations Period

In 1990, Congress enacted a statute of limitations that applies to all civil actions arising under any Act of Congress enacted after the effective date of the new statute of limitations, December 1, 1990. The statute specifies that any such cause of action may not be commenced later than four years after the date that the cause of action accrues. n7 This four year "catch all" statute of limitations applies whenever a post 1990 congressional enactment creates a new federal right to maintain an action. Thus, it applies both to any federal right claims congressionally created after December 1, 1990, either from newly enacted stand alone statutes or from amendments to existing statutes. n8 It is important to recognize that because Congress explicitly declined to make Section 1658 retroactive Section 1658 is applicable only to subsequently enacted federal statutes. Therefore, the statute does not displace the "borrowing" doctrines for all claims created by federal statutes enacted before 1990. n9

[iii] Claim Based on Pre-1991 Congressional Enactment With No Specified Limitations Period or Federal Common Law

If a claim is made possible by a pre-1991 congressional enactment of a federal right, or if a claim is based on federal common law and no federal statute provides for a limitations period, the federal court will generally borrow a limitations period from an appropriate source. n10 The determination of which state statute is most analogous is a question of federal law. n11 Thus, when an appropriate limitations period state is borrowed by the federal courts, the statute, in effect, becomes federal law. n12

When a federal court borrows a state statute of limitations, certain essential elements of the state construction of the statute may also be borrowed. For example, questions of tolling are also ordinarily determined in accordance with state law. n13 However, federal courts should borrow only those aspects of state law that are necessary to fill a federal void. n14 For example, even though a limitations period is borrowed from state law, the jurisprudence of a particular substantive federal statute may require that the court examine federal law in order to determine the accrual period for the statute. n15 However, if an analogous state limitations period would frustrate or interfere with the implementation of federal policies n16 or conflict with the purpose or operation of federal substantive law, n17 the federal court may borrow analogous federal law, rather than state law, for a limitations statute more consistent with the objectives of the federal right of action. n18

Both Congress and the courts have recognized that the process of "borrowing" statutes of limitations has a tendency to create inconsistencies and other problems. n19 Consequently, the Supreme Court has summarized a hierarchical process for ascertaining the appropriate limitations period for a federal cause of action when Congress has not set the time within which that type of action must be brought. First, the court must determine whether a uniform statute of limitations should be selected. The court should do so when a federal cause of action tends in practice to include numerous and diverse topics and subtopics, to the extent that a single state limitations period may not be consistently applied within a jurisdiction. Second, when a uniform limitations period is appropriate, the court must decide whether this period should be derived from a state or a federal source. In making this judgment, the court should accord particular weight to the geographic character of the claim: when the federal cause of action at issue has a multistate nature, a uniform federal statute of limitations is desirable. With the possibility of multiple state periods of limitation, the use of state statutes in such a situation presents the danger of forum shopping and complex and expensive litigation over what should be a straightforward matter. Third, even where geographic considerations give a preference to borrowing from federal statute sources, the general presumption of state borrowing requires that a court determine whether an analogous federal source actually provides a closer fit with the cause of action at issue than does any available state-law source. These three considerations will vary depending on the federal cause of action and the available state and federal analogues, and such factors as commonality of purpose and similarity of elements will be relevant. n20

[3] Tolling of Applicable Limitation Period

[a] Action Based on State Law

In federal diversity cases, tolling principles, including the time of commencement of an action, are governed by state statutes and decisional law, n1 rather than the Federal Rules of Civil Procedure. n2 State law governs statutes of limitation tolling principles under the Rules of Decision Act n3 and such tolling provisions are considered "substantive law" under the *Erie* doctrine. n4 Thus, if state law provides that an action must be "commenced" by some means other than filing a complaint, the mere filing of a complaint is insufficient to satisfy the statute of limitation. n5

[b] Action Based on Federal Law

When a cause of action is based on a federal question, the running of the applicable statute of limitation is stopped by the filing of the complaint, unless there is an explicit applicable federal law provision to the contrary. n6 This is true whether there is a directly applicable federal statute of limitation or a limitation period is borrowed from an analogous state or federal cause of action. The Supreme Court has stated that when the underlying cause of action is based on federal law and the absence of an express federal statute of limitation makes it necessary to borrow a limitation period from another statute, the action is not barred if it has been "commenced" in compliance with Rule 3 within the borrowed period. n7

When the court "borrows" a limitation rule by analogy from another federal statute, it may borrow the limitation period, the time of accrual, or any method of the tolling of the period, and may borrow each of these determinations from a different statute, depending on the policy considerations to be advanced by the borrowing from the statute. In one case, the Supreme Court decided that a uniform 4-year statute of limitation period applies for civil RICO actions. Noting that the circuits had different rules for when accrual of the action occurred, the Court also held that the accrual of the action occurs at the time the injury actually occurs and not when it is discovered by the plaintiff. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & ProofGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTolling

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 1 *Moore's Federal Practice,* §§ 3.05, 3.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Rotella v. Wood, 528 U.S. 549, 553-559, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)* (court borrowed accrual rule for RICO claim by analogy from claim for relief under Clayton Act; consequently, action accrued when plaintiff was injured).

(n3)Footnote 2. *See Pearl v. City of Long Beach, 296 F.3d 76, 78-82 (2d Cir. 2002) , cert. denied, 538 U.S. 922 (2003)* (discussion of limitation periods, accrual of claims, and tolling); *Gonzales v. Wyatt, 157 F.3d 1016, 1020-1022 (5th Cir. 1998)* (jurisprudence under particular substantive federal statute may require that court examine federal law in order to determine accrual period for statute); *see also Young v. United States, 535 U.S. 43, 49-51, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002)* (discussion of equitable tolling).

(n4)Footnote 1. *28 U.S.C. § 1652.*

(n5)Footnote 2. *Royal Ins. Co. of Am. v. Ru-Val Elec. Corp., 918 F. Supp. 647, 652 (E.D.N.Y. 1996) .*

(n6)Footnote 3. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938) .*

(n7)Footnote 4. *Wells v. Simonds Abrasive Co., 345 U.S. 514, 73 S. Ct. 856, 97 L. Ed. 1211 (1953) ; Eades v.*

Clark Distributing Co., Inc., 70 F.3d 441, 443-444 (6th Cir. 1995) , *cert. denied, 517 U.S. 1157 (1996)* .

(n8)Footnote 5. *King v. Otasco, Inc., 861 F.2d 438, 441 (5th Cir. 1988)* .

(n9)Footnote 6. *Holmberg v. Armbrecht, 327 U.S. 392, 395, 66 S. Ct. 582, 90 L. Ed. 743 (1946)* ; *Tribue v. United States, 826 F.2d 633, 634 (7th Cir. 1987)* (action governed by limitations period of Federal Tort Claims Act).

(n10)Footnote 7. *28 U.S.C. § 1658*.

(n11)Footnote 8. *See Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 656 (2004)* (uniform nationwide limitations period for federal cause of action is always more appropriate than rule which would apply in some States but not in others).

(n12)Footnote 9. *See Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 653 (2004)* ; *see* [iii], *below*.

(n13)Footnote 10. *Faibisch v. University of Minn., 304 F.3d 797, 801-802 (8th Cir. 2002)* .

(n14)Footnote 11. *Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 147, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* .

(n15)Footnote 12. *Menowitz v. Brown, 991 F.2d 36, 40-41 (2d Cir. 1993)* .

(n16)Footnote 13. *Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992)* .

(n17)Footnote 14. *Gonzales v. Wyatt, 157 F.3d 1016, 1020 (5th Cir. 1998)* .

(n18)Footnote 15. *Carreras-Rosa v. Alves-Cruz, 127 F.3d 172, 173 (1st Cir. 1997)* , *cert. denied, 532 U.S. 920 (2001)* .

(n19)Footnote 16. *Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977)* .

(n20)Footnote 17. *DelCostello v. Teamsters, 462 U.S. 151, 161, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)* .

(n21)Footnote 18. *Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 146-156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* .

(n22)Footnote 19. *See Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 655 (2004)*.

(n23)Footnote 20. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 357, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991)* .

(n24)Footnote 1. *Walker v. Armco Steel Corp., 446 U.S. 740, 751, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)* (state law applies in diversity actions for purposes of tolling statute of limitation period); *Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-533, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949)* .

(n25)Footnote 2. *See Torre v. Brickey, 278 F.3d 917, 919-920 (9th Cir. 2002)* (district court was correct in applying state law, rather than *Fed R. Civ. Proc. 3* and *4(m)*, to determine when an action was commenced for purposes of applying state statute of limitation).

(n26)Footnote 3. *See 28 U.S.C. § 1652*.

(n27)Footnote 4. *Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-533, 69 S. Ct. 1233, 93 L.*

Ed. 1520 (1949) (although action was filed (and therefore commenced under Rule 3) within limitation period prescribed by state law, it was nevertheless barred because state law provided that service of process had to be completed before action was "commenced"); *see Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n28)Footnote 5. *Habermehl v. Potter, 153 F.3d 1137, 1139 (10th Cir. 1998)* (in diversity personal injury lawsuit, commencement of action was controlled by Wyoming rule, which provided that date of filing of complaint would be deemed date of commencement of case only if complaint was served within 60 days after filing); *Converse v. General Motors Corp., 893 F.2d 513, 516 (2d Cir. 1990)* (products liability action barred by state "service" requirements, even though complaint was filed within state limitation period).

(n29)Footnote 6. *Sain v. City of Bend, 309 F.3d 1134, 1137-1138 (9th Cir. 2002)* .

(n30)Footnote 7. *West v. Conrail, 481 U.S. 35, 38-39, 107 S. Ct. 1538, 95 L. Ed. 2d 32 (1987)* (action by railroad employee against employer and union under Federal Railway Act not barred when commenced by filing pursuant to Rule 3).

(n31)Footnote 8. *Rotella v. Wood, 528 U.S. 549, 551-555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)* (when patient brought civil RICO action suit against physicians and their related business entities, alleging that they improperly conspired to treat and retain him at psychiatric facility for financial gain rather than his psychiatric condition, Supreme Court held that accrual of patient's action occurred when injury occurred and was not delayed until time he discovered alleged pattern of racketeering activity).

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.04

§ 10.04 Provisional Remedies

[1] Seizure of Persons or Property n*

[a] Nature of Remedy

At the commencement of and throughout an action in federal court, a party has available every remedy under the law of the state where the federal court is located that provides for seizing a person or property to secure satisfaction of the potential judgment. However, if a federal statute is applicable, it governs to the extent it applies. Rule 64 authorizes the use of provisional remedies at the commencement and during the course of an action in order to secure the satisfaction of the judgment ultimately to be entered. Provisional remedies are available regardless of how the remedies are designated by state law or whether under state procedure the remedy is ancillary to an action or must be obtained by an independent action. n1 The law of the state in which the district court is held determines the types of remedies available in the particular circumstances. n2 However, the use of any of these remedies is subject both to applicable statutes of the United States and to constitutional limitations such as due process. n3 Although Rule 64 governs the procedure in the federal courts in both federal question and diversity cases, it incorporates the law of seizure "provided by the state in which the district court sits," unless an applicable federal statute or another of the Federal Rules of Civil Procedure provides to the contrary. n4

[b] Provisional Remedies Available on Commencement of Action

The use of provisional remedies is available in federal court only after the "commencement" of an action, n5 which occurs only on the filing of a complaint. n6 Thus, a state practice allowing seizure of persons or property is not available in a federal court before the filing of a complaint. n7 Once an action has been commenced by the filing of a complaint, the defendant's property may be seized pursuant to the relevant law, even before service of summons on the defendant, provided there is a likelihood that service can be made in due course and the requirements of due process are met. n8

Rule 64 applies to actions removed from state court to federal court. However, for provisional remedies to be authorized, the rule requires an action removed from state court to be prosecuted after removal pursuant to the Federal Rules of Civil Procedure. n9 The federal removal statute provides that all injunctions, orders, and other proceedings occurring in the state court prior to removal shall remain in effect on removal to the district court. Any attachment or

garnishment made by the state court will continue in force in order to secure the final judgment. n10 After removal of a case in which property has been attached in the state court, additional property may be attached or garnished if state law permits. n11

[c] Procedure Controlled by Federal Rules

Under Rule 64, state law controls the substantive law regarding the provisional remedy, but does not affect the procedure for the underlying action, which is governed by the Federal Rules of Civil Procedure. n12 In a cause of action for garnishment, for example, Federal Rule 4(c), and not a Florida rule, controlled the service of the writ of garnishment. n13 In another case, Federal Rule 13 applied to an action for replevin. n14

[d] Available Remedies

Provisional remedies are available during the pendency of a federal action under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, except as otherwise provided by the Constitution of the United States n15 or an applicable federal statute. n16 Under Rule 64, this conformity is to the state law as it exists at the time of the commencement of the action, rather than static conformity to state law as it existed on a specified past date. n17 The following remedies are available: n17.1

1. Civil Arrest. If provided by state law, civil arrest is available as a provisional remedy. Civil arrest, which is the apprehension of a person to answer the demands in a civil action, is nearly obsolete, n18 but is still listed in Rule 64 as a provisional remedy. n19

2. Attachment. Designed to ensure that a judgment will be collectible, attachment is the seizure of the defendant's property as security before judgment. n20

3. Garnishment. Garnishment is a process by which a debt owed by a third person to the defendant, or property belonging to the defendant in the hands of a third person, is made subject to plaintiff's claim. n21

4. Replevin. Under the process of replevin, a court can compel one having wrongful possession of the personal property of another to surrender and deliver the property to the rightful owner. n22

5. Sequestration. Sequestration is the act of seizing the property of a party pending the outcome of litigation or that party's compliance. n23

6. Equivalent Remedies. Under the circumstances of a case, the particular remedy sought by the party may be an equivalent to one listed above. When faced with a motion that appears to call for a remedy listed above but is labeled something else, federal courts must look past the terminology to the actual nature of the relief requested. n24

Rule 64 was not intended to embrace all provisional remedies. Rule 65, for example, deals with the practice applicable to the equitable injunctive remedy. Under Rule 65, the court, on a sufficient showing of urgency, will issue a temporary restraining order without a hearing and, in matters of exigency, even without notice to the adverse party. n25 Such an order must be followed promptly by an application for a preliminary injunction, and strict adherence to the requirements for an injunction, such as notice and a hearing. n25.1 Rule 64 governs only the use of provisional remedies prior to judgment. n26 Other rules determine the availability of remedies after judgment. Rule 69 regulates execution to enforce a judgment. n27 Rule 70 regulates judgment for specific acts and vesting title. n28

[e] Due Process Considerations

The remedies available under Rule 64 are limited by applicable provisions of the United States Constitution. In the

context of these provisional remedies, governmental deprivations of liberty or property without due process of law are prohibited by both the Fifth n29 and *Fourteenth Amendments*. n30 The due process considerations related to provisional remedies usually arise from the fact that such remedies are sought prior to adjudication on the merits. In this regard, a defendant risks being deprived of property even though the defendant may ultimately be vindicated after full judicial procedures. In light of this situation, the Supreme Court has applied the Constitution's due process provisions to control the scope and availability of provisional remedies. Stressing the tremendous hardship that a seizure of property may cause, the Supreme Court has required that state garnishment laws must provide notice and an opportunity to be heard prior to issuance of a writ of garnishment. n31 Once the Supreme Court found that notice and hearing were constitutionally required, it proceeded to hold that such procedural protections must be granted at a time when the deprivation of property can still be prevented. n32

The Supreme Court has also held unconstitutional a state statute authorizing prejudgment attachment of real estate without prior notice or hearing, absent a showing of extraordinary circumstances and without the required posting of a bond. The Court invoked a three-part balancing analysis to determine the process due when the government sought to effect a deprivation on its own initiative. Factors to be considered include (1) the private interest to be affected by the official action; (2) the risk of an erroneous deprivation of that interest and the probable value, if any, of additional safeguards; and (3) the government's interest in avoiding the fiscal and administrative burdens that use of additional procedures would entail. n33

[2] Proceedings Against Sureties n*

[a] Summary Procedure for Enforcement of Surety's Liaibility

Rule 65.1 of the Federal Rules of Civil Procedure provides a summary procedure for the enforcement of a surety's liability on a bond or stipulation or other undertaking presented under the federal rules. n1 The importance of this provision is that it obviates the need to bring an independent action to enforce the liability of a surety and alternatively allows for a summary procedure on motion. n2 Some of the situations involving plaintiffs in which a surety may be required or permitted by the Federal Rules of Civil Procedure to enter into a bond or stipulation or other undertaking are as follows:

1. Incidental to an attachment, garnishment, and other provisional remedy where state law requiring security is applicable. n3

2. As a condition to granting a restraining order n4 or preliminary injunction. n5

3. When security for costs is required by the district court pursuant to a local rule promulgated under Rule 83. n6

4. In a derivative action, when state law applies to require a plaintiff shareholder to give security as a condition to the maintenance of an action. n7

[b] Enforcement by Motion

Under federal procedure, a surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion that the court prescribes may be served on the clerk of the court, who must mail copies to the sureties if their addresses are known. n8 Thus, a judgment against a surety will not stand when notice has not been given. n9

As discussed above, Rule 65.1 provides that a motion to enforce a surety's liability may be filed after the final determination on the merits of an underlying action. n10 However, a judgment creditor has the alternative right to bring a wholly separate and independent action to enforce a surety's liability. n11 Furthermore, despite its narrow and literal

wording, the summary procedure of Rule 65.1 is applicable to a principal as well as a surety on a bond. n12

[c] Surety Submits to Jurisdiction of Court

When a surety enters into a bond or stipulation or other undertaking required or permitted by the Federal Rules of Civil Procedure, the surety irrevocably appoints the clerk of the court as the surety's agent; therefore, any papers affecting the surety's liability on the bond or undertaking may be served on the clerk. Every surety is in effect submitting to the jurisdiction of the court by becoming a surety, and the federal courts automatically obtain personal jurisdiction over a surety on any bond or stipulation or other undertaking posted under the Federal Rules of Civil Procedure. n13 Furthermore, *28 U.S.C. § 1352* provides that the district courts have original jurisdiction, concurrent with state courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under *28 U.S.C. § 1582*. n14 Thus, district courts have subject matter jurisdiction both over proceedings on a motion under Rule 65.1, as well as over independent actions brought to enforce the liability of a surety. n15 No jurisdictional amount is required. n16 A district court will not have jurisdiction under *28 U.S.C. § 1352*, however, on a suit on a bond once it has been exonerated. n17

[3] Appointment of Receiver n*

[a] Availability of Receivership

A plaintiff may request that the court appoint a receiver under the general equitable powers of the court. n1 A receiver is a person appointed to be an officer of the court to receive, collect, care for, administer, and dispose of the property or the fruits of the property of another or others brought under the orders of the court by the institution of a proper action or actions. n2 When a district court properly appoints a receiver on equitable grounds under Rule 66, n2.1 the receiver may obtain control over the property that is subject to the receivership, even if the property is not located in the district of the appointment. The receiver is entitled to control the property by filing copies of the complaint and order of appointment in the district court for each district in which receivership property is located within 10 days after the entry of his or her order of appointment. n2.2

Rule 66 of the Federal Rules of Civil Procedure was specifically designed to cover actions involving an equity receiver. It does not apply to receivers appointed in bankruptcy cases. The regulation of receivers appointed in bankruptcy actions is governed by the Bankruptcy Act. n3 Furthermore, the appointment of a receiver in lieu of a trustee in a bankruptcy proceeding is expressly prohibited by statute. n4

The court may appoint a receiver to preserve property pending final determination of its distribution in supplementary proceedings in the aid of execution. n5 Receivership is also an appropriate remedy for a judgment creditor who (1) seeks to set aside allegedly fraudulent conveyances by the judgment debtor; (2) has had execution issued and returned unsatisfied; (3) seeks to subject equitable assets to the payment of the judgment, or (4) is otherwise attempting to have the debtor's property preserved from dissipation until the creditor's claim can be satisfied. n6 In any event, a receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. n7

Inherent in the power of the court to appoint a receiver is the power to vacate the order. n8 Thus, the court may dismiss an equity receivership and restore the property to the debtor when the debtor becomes able and offers to discharge the debts, n9 or the court may condition the continuation of a receivership on the plaintiff's prompt prosecution of the main action. n10 When the reason for continuing the receivership has ceased, the property should be released and restored to the owner. The court should not use a receivership to continue indefinitely an enterprise that does not show signs of working to the benefit of creditors. n11 Once a receivership has terminated, the receiver may still be sued in an individual capacity for improper conduct outside the scope of the appointing authority if there is in personam jurisdiction. Thus, the appointing court retains personal jurisdiction over the individual receiver and may hear suits

alleging a breach of authority by the receiver toward the receivership assets. n12

[b] Grounds for Appointment of Receiver

Courts consider the appointment of a receiver to be an extraordinary equitable remedy. n13 Therefore, a court will appoint a receiver only in those situations when the circumstances are extreme and the property interests of the parties are clearly in jeopardy. n14 In this regard, the requisite showing might be analogized to the burden to demonstrate some irreparable harm and a likelihood of success on the merits in order to obtain injunctive relief, which sometimes is requested along with the request for the order appointing a receiver. n15 There is no precise formula for a federal court to determine when a receiver may be appointed. The court should consider a variety of equitable factors in making this determination, including, for example: n16

1. Whether the party seeking the appointment has a valid claim.

2. Whether the defendant has engaged in fraudulent conduct or there is a probability of fraudulent conduct by the defendant.

3. Whether the subject property is in imminent danger of being lost, concealed, damaged, diminished in value, or squandered.

4. Whether legal remedies are inadequate.

5. Whether the harm to plaintiff by denial of the appointment would outweigh injury to the party opposing appointment.

6. The plaintiff's probable success in the action and the possibility of irreparable injury to plaintiff's interest in the property.

7. The degree to which the receivership will serve the plaintiff's interests sought to be protected.

In addition to these general factors, the court will consider the other circumstances on a case-by-case basis. For example, the court may take into account the defendant's refusal to cooperate and supply material needed during discovery. n17 On the other hand, a court may refuse to appoint a receiver if the court concludes that (1) the receivership would serve more harm than good, (2) there is no imminent harm, (3) an adequate remedy exists at law, and (4) the receivership would not serve either the public interest or the interests of the parties. n18

[c] Notice and Hearing for Appointment of Receiver

When a party submits an application for the appointment of a receiver, the court must give notice to all parties concerned. n19 The Supreme Court has held that individuals generally may not be deprived of their property without notice, unless providing notice is somehow impractical. n20 However, Rule 66 does not require that a court have a formal hearing before a receiver is appointed, provided that the record discloses the necessary facts showing the equitable grounds for the appointment. n21 Any person seeking a receivership must supply the appropriate documentation to support their claims that appointment should be granted without a hearing. n22

The notice given to appoint a receiver must be adequate and fair. Factors that are considered when determining if the notice is adequate and fair include the method and scope of the notice, its duration, and the amount of time the notice affords to the opposition to prepare a reply. n23 Thus, when a receiver sent notices to all known investors who may have had a claim against the receivership property, and a separate notice was published in four newspapers, the court held that this form of notice was acceptable. n24

There are circumstances when it is not possible to give the interested parties notice. Such circumstances have to be exceptional to justify the appointment of a receiver without notice. When such relief is requested, it is known as ex parte relief, and the court must carefully review the terms of the order authorizing the receivership. It is important to ascertain whether due process was served in order to protect the property rights of all parties. For example, it is not proper for the court to grant a request for identical relief against all defendants, rather than relief pertaining specifically to each individual defendant, or to appoint a receiver after no more than cursory efforts to serve the defendant personally. n25

Rule 66 provides that practice by receivers must be in accordance with prior federal practice, subject to rules promulgated by the district courts under Rule 83. In all matters other than administration and dismissal, the action is governed by applicable statutes and other Federal Rules of Civil Procedure. n26 The general intent is that an action in which a plaintiff seeks a receiver must be commenced like any other civil action and must be prosecuted in accordance with the federal rules. Thus, appointment of a receiver by a federal court is governed by federal law even in cases of diversity jurisdiction. n27

[d] Subject-Matter Jurisdiction

In order to appoint a receiver, a federal court must have subject-matter jurisdiction. n28 Thus, when a plaintiff requests appointment of a receiver, the court must first consider whether the plaintiff has alleged at least one of the following: n29

1. A federal question in a well-pleaded complaint; n30

2. Diversity of citizenship and a claim in excess of $75,000; n31 or

3. A statute setting forth a specific jurisdictional basis. n32 In most cases, the district court will obtain subject-matter jurisdiction through diversity of citizenship. n33 However, the district court will have ancillary subject-matter jurisdiction for all additional suits regardless of diversity of citizenship, amount in controversy, or any other form of relief setting forth a jurisdictional basis if the primary suit involving the appointment of the receiver was proper. Thus, if subject-matter jurisdiction was proper in the appointment of the receiver, any suit which the receiver brings in the future will be ancillary n34 or supplemental to the primary suit. n35

[e] Bond

When it appoints a receiver, the court often requires the receiver to post a bond sufficient to indemnify the parties in the litigation. However, when the primary effect of requiring a bond would cause further depletion of the property, a court will not require the posting of a bond unless it is essential to protect the interest in the property. n36 In the absence of a statute mandating the requirement of a bond, n37 the district court has wide discretion on whether to order the posting of the bond, and in determining the terms and conditions if so ordered. n38

[4] Deposit in Court n*

[a] Purpose of Deposit

If any part of a claim for relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party on notice to other parties and by leave of court may deposit with the court all or part of the money or thing, whether or not that party claims any of the deposited item. n1 The purpose of a deposit in court is to relieve the depositor of responsibility for a fund in dispute, while the parties litigate their differences with respect to the fund. n2 Therefore, the deposit procedure is strictly voluntary; the court has no authority to compel a party to make a deposit under Rule 67. n3 Once a party has deposited a sum of money with the court, the court has the ultimate

responsibility to determine ownership and make disbursements of the sum. This is the rule even if the court determines it has no jurisdiction over the proceedings where the deposit was made. The court must then disburse the sum to the depositor or on the terms and conditions of the deposit. n3.0.1

Under Rule 67, a party is relieved of responsibility for the sum or thing deposited but may still claim an interest in all or part of it. n3.1 However, the party making the deposit may relinquish all interest in the fund or thing by clearly disavowing any interest. n4

Whether a deposit should be allowed in any particular case is a matter committed to the sound discretion of the district court and subject to review only under an abuse of discretion standard. n5 Deposits into court are commonly made in several situations: interpleader actions brought under the Federal Interpleader Act, n6 interpleader actions brought under Rule 22, n7 when the deposit is in effect an offer of settlement, n8 or when a party tenders a payment designed to stop the running of interest. n9

[b] Procedure for Deposit

A party may make a deposit in court only in actions where at least part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or some thing capable of delivery. n10 The party may deposit with the court all or any part of the sum or thing in dispute. n11 While the court should allow a later assertion of a claim to the fund by the depositor, unless there is a clear and unambiguous waiver or abandonment, the safest course is for the party depositing the fund to assert any claim to the money in the motion to deposit. n12

Before any deposit is made into court, the depositor must obtain leave of the court and must give notice to all other parties. Then the party making the deposit must serve the court order permitting the deposit on the clerk of the court. n12.1 This is basically to ensure that the clerk is on notice of what is being deposited and when, so that the clerk may carry out the court's responsibilities with respect to the deposit. Notifying the clerk is necessary because funds deposited in the court must be deposited in an interest bearing account or invested in an interest bearing instrument approved by the court. n13 Once deposited with the court, the depositor is no longer responsible for the interest on the fund, which eventually will be awarded along with the funds. n14

By statute, any money paid into any court of the United States, or received by its officers must be deposited with the Treasurer of the United States or a designated depositary in the name and to the credit of the court. n15 Local rules of the district court may provide the details of how the clerk will accept and invest these funds, which can be quite large sums with correspondingly large interest earnings. n16 Once deposited, the funds may be withdrawn only by order of the court. n17 Finally, there is a statutory time limit: funds that have been on deposit with a court and not claimed for five years after the dispute has been fully and finally resolved are required to be deposited in the Treasury in the name and to the credit of the United States. n18 This time limit begins to run on the final resolution of the dispute over the fund, not from the time of the deposit in court. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesCivil ArrestsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevins

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 64.10 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 64(a), (b)*; *see* [d] *below,* for discussion of available provisional remedies of arrest,

attachment, garnishment, replevin, sequestration, and other equivalent remedies.

(n3)Footnote 2. *United States v. Cohen, 152 F.3d 321, 325-326 (4th Cir. 1998)* (under Rule 64, court applied law of attachment in Virginia, which is in equity).

(n4)Footnote 3. *Fed. R. Civ. P. 64(a)*; *see Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d 1449, 1459 (9th Cir. 1996)* .

(n5)Footnote 4. *Fed. R. Civ. P. 64(a)*; *see, e.g., 28 U.S.C. § 2463* (property taken under any revenue law of the United States is not obtainable by replevin); *28 U.S.C. § 2713* (limits third party claim of ownership of property attached by the United States); *40 U.S.C. § 308* (United States property is not subject to attachment or seizure by other judicial process).

(n6)Footnote 5. *Fed. R. Civ. P. 64(a)*.

(n7)Footnote 6. *See Fed. R. Civ. P. 3*.

(n8)Footnote 7. *Miller v. Gillette, 267 F.2d 783, 783 (2d Cir. 1959)* ; *cf. United States v. Cohen, 152 F.3d 321, 325-326 (4th Cir. 1998)* .

(n9)Footnote 8. *Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1047 (N.D. Cal. 1977)* .

(n10)Footnote 9. *See Fed. R. Civ. P. 64(a), 81(c)(1)*.

(n11)Footnote 10. *28 U.S.C. § 1450*.

(n12)Footnote 11. *See Fed. R. Civ. P. 64(a)*.

(n13)Footnote 12. *See Fed. R. Civ. P. 1*; *Consumers Time Credit, Inc. v. Remark Corp., 227 F. Supp. 263, 266 (E.D. Pa. 1964)* .

(n14)Footnote 13. *United States v. St. Paul Mercury Ins. Co., 361 F.2d 838, 839 (5th Cir. 1966)* .

(n15)Footnote 14. *Wright v. Redding, 408 F. Supp. 1180, 1183 (E.D. Pa. 1975)* (quoting **Moore's Federal Practice**).

(n16)Footnote 15. *See* [e], *below*.

(n17)Footnote 16. *See* [f], *below*.

(n18)Footnote 17. *McDowell v. Davies, 96 F. Supp. 301, 304 (D. Wash. 1951)* .

(n19)Footnote 17.1. *Fed. R. Civ. P. 64(b)*.

(n20)Footnote 18. *Aetna Casualty & Surety Co. v. Markarian, 114 F.3d 346, 349 (1st Cir. 1997)* .

(n21)Footnote 19. *United Refrigerator Co. v. Gershel, 276 F.2d 573, 574 (2d Cir. 1960)* .

(n22)Footnote 20. *Ross v. Peck Iron & Metal Co., 264 F.2d 262, 268 (4th Cir. 1959)* .

(n23)Footnote 21. *United States v. Schuermann, 106 F. Supp. 86, 88 (E.D. Mo. 1952)* .

(n24)Footnote 22. *Commonwealth Trust Co. v. Reconstruction Finance Corp., 28 F. Supp. 586, 587-588 (W.D. Pa. 1939)* (trustee in bankruptcy seeking to recover asset subject to fraudulent transfer by bankrupt).

(n25)Footnote 23. *Altherr v. Swiss Am. of Miss., Inc., 446 F. Supp. 17, 18 (D. Miss. 1977)* .

(n26)Footnote 24. *See Fed. R. Civ. P. 64(a)*; *Rosen v. Cascade International, Inc., 21 F.3d 1520, 1530 (11th Cir. 1994)* (application for preliminary injunction freezing defendant's assets equivalent to request for prejudgment attachment).

(n27)Footnote 25. *See Fed. R. Civ. P. 65(b).*

(n28)Footnote 25.1. *See Fed. R. Civ. P. 65(a).*

(n29)Footnote 26. *United States v. Cohen, 152 F.3d 321, 325-326 (4th Cir. 1998)* .

(n30)Footnote 27. *Fed. R. Civ. P. 69.*

(n31)Footnote 28. *Fed. R. Civ. P. 70.*

(n32)Footnote 29. *U.S. Const. Amend. V*, Cl. X.

(n33)Footnote 30. *U.S. Const. Amend. XIV, § 1.*

(n34)Footnote 31. *Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-342, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969)* .

(n35)Footnote 32. *Fuentes v. Shevin, 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)* .

(n36)Footnote 33. *Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)* .

(n37)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice*, § 65.1.02 et seq. (Matthew Bender 3d ed.)

(n38)Footnote 1. *Fed. R. Civ. P. 65.1.*

(n39)Footnote 2. *See* [b], *below.*

(n40)Footnote 3. *Fed. R. Civ. P. 64*; *see* [1], *above.*

(n41)Footnote 4. *Fed. R. Civ. P. 65(b).*

(n42)Footnote 5. *See Fed. R. Civ. P. 65(a), (c).*

(n43)Footnote 6. *Fed. R. Civ. P. 83.*

(n44)Footnote 7. *See Fed. R. Civ. P. 23.1(a)*; *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-557, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n45)Footnote 8. *Fed. R. Civ. P. 65.1*; *United States v. Lacey, 982 F.2d 410, 412-413 & n.2 (10th Cir. 1992)* .

(n46)Footnote 9. *Beatrice Foods Co. v. New England Printing & Lithographing Co., 930 F.2d 1572, 1576-1577 (Fed. Cir. 1991)* (sufficient notice of motion to execute surety's bond was provided by notice sent in response to motion to enforce bond).

(n47)Footnote 10. *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1033 (9th Cir. 1994)* , *cert. denied, 115 S. Ct. 85 (1994)* .

(n48)Footnote 11. *American Bible Soc'y v. Blount, 446 F.2d 588, 590 (3d Cir. 1971)* .

(n49)Footnote 12. *Connecticut Hosp. Ass'n v. O'Neill, 891 F. Supp. 693, 694 n.1 (D. Conn. 1995)* .

(n50)Footnote 13. *Fed. R. Civ. P. 65.1.*

(n51)Footnote 14. *28 U.S.C. § 1352.*

(n52)Footnote 15. *Buddy Sys., Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1169 (9th Cir. 1976)* , *cert. denied, 431 U.S. 903 (1977)* .

(n53)Footnote 16. *28 U.S.C. § 1352.*

(n54)Footnote 17. *Buddy Sys., Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1165 (9th Cir. 1976)* , *cert. denied, 431 U.S. 903 (1977)* .

(n55)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 66.02 et seq. (Matthew Bender 3d ed.)

(n56)Footnote 1. *Fed. R. Civ. P. 66.*

(n57)Footnote 2. *Booth v. Clark, 58 U.S. 322, 331, 15 L. Ed. 164 (1854)* ; *Commissioner v. Owens, 78 F.2d 768 (10th Cir. 1935)* .

(n58)Footnote 2.1. *See* [b], *below.*

(n59)Footnote 2.2. *SEC v. Bilzerian, 378 F.3d 1100, 1103-1104 (D.C. Cir. 2004)* (citing **Moore's Federal Practice;** requirement of minimum contacts with state of receivership is inapplicable when court exercises personal jurisdiction pursuant to nationwide service of process); *see 28 U.S.C. §§ 754, 1692.*

(n60)Footnote 3. *Fed. R. Civ. P. 66*, Advisory Committee Note of 1946.

(n61)Footnote 4. *11 U.S.C. § 105(b).*

(n62)Footnote 5. *Santibanez v. Wier McMahon & Co., 105 F.3d 234, 241-242 (5th Cir. 1997)* (any person may seek appointment of receiver under Rule 66 when person establishes interest in particular property or relation to party in control or ownership of property such as to justify conservation of property by court officer).

(n63)Footnote 6. *Santibanez v. Wier McMahon & Co., 105 F.3d 234, 241-242 (5th Cir. 1997)* .

(n64)Footnote 7. *Kelleam v. Maryland Casualty Co., 312 U.S. 377, 381, 61 S. Ct. 595, 85 L. Ed. 899 (1941)* ; *National Pshp. Inv. Corp. v. National Hous. Dev. Corp., 153 F.3d 1289, 1292 (11th Cir. 1998)* (receivership is equitable remedy not substantive right).

(n65)Footnote 8. *United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995)* .

(n66)Footnote 9. *Federal Sav. & Loan Ins. Corp. v. PSL Realty Co., 630 F.2d 515, 521 (7th Cir. 1980)* , *cert. denied, 452 U.S. 961 (1981)* .

(n67)Footnote 10. *See Strategis Asset Valuation & Management, Inc. v. Pacific Mut. Life Ins. Co., 805 F. Supp. 1544, 1553 (D. Colo. 1992)* .

(n68)Footnote 11. *Jones v. Village of Proctorville, 332 F.2d 419, 421 (6th Cir. 1964)* .

(n69)Footnote 12. *Federal Sav. & Loan Ins. Corp. v. PSL Realty Co., 630 F.2d 515, 521 (7th Cir. 1980) , cert. denied, 452 U.S. 961 (1981) .*

(n70)Footnote 13. *National Pshp. Inv. Corp. v. National Hous. Dev. Corp., 153 F.3d 1289, 1291 (11th Cir. 1998)* (appointment of receiver in equity is not substantive right, but is an ancillary remedy which does not affect ultimate outcome of action).

(n71)Footnote 14. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316-317 (8th Cir. 1993) .*

(n72)Footnote 15. *New York Life Ins. Co. v. Watt West Inv. Corp., 755 F. Supp. 287, 292-293 (E.D. Cal. 1991) .*

(n73)Footnote 16. *Can. Life Assur. Co. v. LaPeter, 557 F.3d 1103, 1104 (9th Cir. 2009)* (citing **Moore's Federal Practice**).

(n74)Footnote 17. *United States v. Ianniello, 824 F.2d 203, 208 (2d Cir. 1987)* (not violation of *Fifth Amendment* for district court to draw negative inference from defendants' refusal to answer questions relating to restaurant operations in considering whether to appoint receiver to prevent conversion of restaurant profits).

(n75)Footnote 18. *Meyer Jewelry Co. v. Meyer Holdings, Inc., 906 F. Supp. 428, 432-434 (E.D. Mich. 1995)* (court declined to appoint receiver when corporate wrongs alleged by movants were clearly compensable by money damages).

(n76)Footnote 19. *Solis v. Matheson, 563 F.3d 425, 438 (9th Cir. 2009) .*

(n77)Footnote 20. *Connecticut v. Doehr, 501 U.S. 1, 12, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991) .*

(n78)Footnote 21. *Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F.2d 1180, 1188-1189 (11th Cir. 1991)* ; *Resolution Trust Corp. v. Fountain Circle Assoc. Ltd. P'ship, 799 F. Supp. 48 (N.D. Ohio 1992) .*

(n79)Footnote 22. *United States v. Ianniello, 824 F.2d 203, 207 (2d Cir. 1987)* (district court properly refused to hold plenary hearing on government's motion to appoint receiver when such hearing would not provide court with additional information because defendants asserted *Fifth Amendment* protection).

(n80)Footnote 23. *See Solis v. Matheson, 563 F.3d 425, 439 (9th Cir. 2009)* ; *Sterling Sav. Bank v. Citadel Dev. Co., 656 F. Supp. 2d 1248, 1260 (D. Or. 2009).*

(n81)Footnote 24. *SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986)* (over two months notice of receivership action was fair and reasonable where receiver sent notice to all known investors and published separate notice in four local newspapers that clearly stated deadline for filing claim).

(n82)Footnote 25. *Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc., 813 F. Supp. 234, 236-237 (S.D.N.Y. 1993) .*

(n83)Footnote 26. *See Fed. R. Civ. P. 66*, Advisory Committee Note of 1946.

(n84)Footnote 27. *National Pshp. Inv. Corp. v. National Hous. Dev. Corp., 153 F.3d 1289, 1292 (11th Cir. 1998) .*

(n85)Footnote 28. *See Crawford v. Silette, 608 F.3d 275 (5th Cir. 2010) .*

(n86)Footnote 29. *See, e.g., National Pshp. Inv. Corp. v. National Hous. Dev. Corp., 153 F.3d 1289, 1291 (11th Cir. 1998) .*

(n87)Footnote 30. *28 U.S.C. § 1331.*

(n88)Footnote 31. *28 U.S.C. § 1332*.

(n89)Footnote 32. *28 U.S.C. § 1345*.

(n90)Footnote 33. *See, e.g., National Pshp. Inv. Corp. v. National Hous. Dev. Corp., 153 F.3d 1289, 1291 (11th Cir. 1998)* .

(n91)Footnote 34. *United States v. Franklin Nat'l Bank, 512 F.2d 245, 249-250 (2d Cir. 1975)* .

(n92)Footnote 35. *O'Neal v. General Motors Corp., 841 F. Supp. 391, 395 (M.D. Fla. 1993)* .

(n93)Footnote 36. *SEC v. Universal Fin., 760 F.2d 1034, 1039 (9th Cir. 1985)* (district court did not abuse discretion in failing to require receiver to post bond to indemnify investors when posting bond would further diminish value of receivership estate).

(n94)Footnote 37. *See, e.g., 28 U.S.C. § 754*; *SEC v. Bilzerian, 378 F.3d 1100, 1103-1104 (D.C. Cir. 2004)* (bond required by Section 754 is necessary for appointing court to exercise in personam jurisdiction over person or entity that holds receivership assets in remote district).

(n95)Footnote 38. *FTC v. World Wide Factors, Ltd., 882 F.2d 344, 348 (9th Cir. 1989)* .

(n96)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice*, § 67.02, 67.03 (Matthew Bender 3d ed.)

(n97)Footnote 1. *Fed. R. Civ. P. 67(a)*.

(n98)Footnote 2. *Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp., 901 F.2d 441, 444-445 (5th Cir. 1990)* .

(n99)Footnote 3. *Rogath v. Siebenmann, 941 F. Supp. 416, 425 (S.D.N.Y. 1996)* .

(n100)Footnote 3.0.1. *Craig's Stores of Tex., Inc. v. Bank of La., 402 F.3d 522, 523-524 (5th Cir. Tex. 2005)* .

(n101)Footnote 3.1. *Fed. R. Civ. P. 67(a)*.

(n102)Footnote 4. *See Veillon v. Exploration Servs., Inc., 876 F.2d 1197, 1201 (5th Cir. 1989)* (depositing party relinquished interest in insurance proceeds by disavowing any interest in fund at pre-trial hearing).

(n103)Footnote 5. *Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp., 901 F.2d 441, 445 (5th Cir. 1990)* .

(n104)Footnote 6. *28 U.S.C. § 1335(a)(2)*.

(n105)Footnote 7. *John v. Sotheby's, Inc., 141 F.R.D. 29, 33 (S.D.N.Y. 1992)* .

(n106)Footnote 8. *Smith v. Martin, 336 F.2d 142, 144 (10th Cir. 1964)* .

(n107)Footnote 9. *United States ex rel Garrett v. Midwest Constr. Co., 619 F.2d 349, 353-354 (5th Cir. 1980)* .

(n108)Footnote 10. *Fed. R. Civ. P. 67(a)*; *Gulf States Utils. Co. v. Alabama Power Co., 824 F.2d 1465, 1474-1475 (5th Cir. 1987)* .

(n109)Footnote 11. *Fed. R. Civ. P. 67(a)*.

(n110)Footnote 12. *Veillon v. Exploration Servs. Inc., 876 F.2d 1197, 1201 (5th Cir. 1989)* .

(n111)Footnote 12.1. *Fed. R. Civ. P. 67(a).*

(n112)Footnote 13. *Fed. R. Civ. P. 67(b).*

(n113)Footnote 14. *Cordero v. De Jesus-Mendez, 922 F.2d 11, 18-19 (1st Cir. 1990)* (defendants not liable for post-judgment interest when court failed to deposit funds in interest bearing account).

(n114)Footnote 15. *28 U.S.C. § 2041*; *see Fed. R. Civ. P. 67(b).*

(n115)Footnote 16. *National Indem. Co. v. Grimm, 760 F. Supp. 489, 490 n.2, 494 (W.D. Pa. 1991)* .

(n116)Footnote 17. *28 U.S.C. § 2042.*

(n117)Footnote 18. *See 28 U.S.C. § 2042*; *Fed. R. Civ. P. 67(b)*; *see also Craig's Stores of Tex., Inc. v. Bank of La., 402 F.3d 522, 525 (5th Cir. 2005)* .

(n118)Footnote 19. *See Folding Carton Antitrust Litig., 744 F.2d 1252, 1254-1256 (7th Cir. 1984)* .

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.05

§ 10.05 Plaintiff's Pleading of Jurisdictionn*

[1] Existence of Jurisdiction Determined at Commencement of Action

Whether a court has subject matter jurisdiction depends on the circumstances that exist at the time the action is commenced. For example, whether there is diversity jurisdiction is determined at the time the lawsuit is commenced pursuant to Rule 3. n1 Furthermore, if a court has subject matter jurisdiction at the time an action commenced subsequent statutory amendments that would otherwise defeat jurisdiction do not apply. n2 However, the act of filing a complaint pursuant to Rule 3 does not by itself confer subject matter jurisdiction on the court, n3 because subject matter jurisdiction is governed by statutory authorization. n4 Conversely, failure to properly commence an action under Rule 3 does not remove subject matter jurisdiction over a matter that the court already possesses. n5

Commencement of an action by filing a complaint does not provide a federal court with personal jurisdiction over a particular defendant. Personal jurisdiction over a defendant depends on proper service and the amount of contact the particular defendant has with the forum jurisdiction. n6 However, personal jurisdiction over a defendant is not necessary to commence an action under Rule 3; proper service establishing jurisdiction may occur later. n7

[2] Manner of Pleading Jurisdiction

[a] Statement of Jurisdiction

Any pleading which states a claim for relief must contain a short and plain statement of the grounds that give the court jurisdiction, unless the court already has jurisdiction and the claim needs no new ground of jurisdiction to support it. Therefore, an original plaintiff commencing a civil action in a federal district court must always plead the basis for jurisdiction. n1 Jurisdiction under Rule 8 refers to subject matter jurisdiction. Subject matter jurisdiction is required because federal district courts are courts of limited jurisdiction. Pursuant to Article III of the Constitution, Congress created the federal district courts and granted them exclusive jurisdiction in matters involving admiralty, bankruptcy, patents, copyrights and trademarks, and concurrent jurisdiction with the state courts in federal question and diversity of citizenship cases. n2

The requirements of a complaint for each of these grounds for subject matter jurisdiction will be discussed below. n3 A statement of jurisdiction may either refer to the appropriate jurisdictional statute or contain factual assertions that

establish jurisdiction. Thus, if a complaint alleges sufficient facts to establish jurisdiction, the party need not make a statement of the precise statutory basis for subject matter jurisdiction, n4 although it is generally considered good practice to do so. n4.1 Lack of subject matter jurisdiction is not waivable in the trial court and may even be raised sua sponte by the court. n5 By contrast, lack of personal jurisdiction is a defense that is waivable by a defending party. n6

[b] Pleading Federal Question Jurisdiction

A federal district court has subject matter jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. n7 Federal question jurisdiction exists only when a claimant's basis for recovery, rather than a defense to a claim for relief, is based on federal law. n8 No minimum amount in controversy is necessary to establish general federal question jurisdiction. n9

Federal question jurisdiction arises only those cases in which a well pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. Consequently, the complaint should set forth the facts that show a claim is based on a violation of the Constitution, a particular federal statute, or the federal common law. n9.1

A formal allegation of jurisdiction is simple to set forth, but it is important to note that a general allegation of jurisdiction must be supported by a short and plain statement of a factual situation showing that a claim exists based on the stated jurisdiction. n10 The claimant may decide what law will be relied on, and the court must look to the manner in which the claim is pleaded to see if a substantial federal question is presented. n11

An allegation of general federal question jurisdiction under Rule 8(a)(1) should be stated simply, usually in the first paragraph of the body of the complaint stating a claim for relief. The safer practice is to include a specific reference to the particular section of the Constitution, statute, or treaty that supplies the basis for recovery, n12 although such a reference is not strictly required provided that the complaint, read as a whole, establishes the presence of a federal question. n13

In cases when federal common law is the basis for federal question jurisdiction, a reference to the relevant case establishing the law and a description of the case's holding apparently is sufficient to provide the general notice required by Rule 8. n14

Whether a complaint adequately states a federal question is normally measured by the face of the complaint. However, a plaintiff who chooses to proceed in state court on a potential federal question may not defeat a defendant's right to remove a case to federal court by artful pleading, that is, by omitting discussion of the federal questions that are in fact central to the suit. n15

[c] Pleading Diversity Jurisdiction

[i] General Requirements: Amount in Controversy and Citizenship of Parties

A claim alleging diversity of citizenship jurisdiction must contain averments of the parties' citizenship and the amount in controversy. n16 In general, a federal district court may exercise general diversity jurisdiction over all civil actions in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which the matter in controversy is between (a) citizens of different states; (b) citizens of a state and citizens or subjects of a foreign state; (c) citizens of different states and in which citizens or subjects of a foreign state are additional parties; or (d) A foreign state as plaintiff and citizens of a state or of different states. n17 A plaintiff filing a complaint must specifically allege both the amount in controversy and citizenship of the parties, usually in the opening paragraph of the complaint, even if an express citation or reference is made to the diversity statute. A court will deem insufficient a complaint that does not address the amount in controversy and each party's citizenship. n18 However, a failure to expressly refer to the diversity

statute is not fatal if the facts necessary to establish diversity are pleaded. n19

[ii] Citizenship of Individual

A complaint that relies on general diversity jurisdiction must explicitly allege facts that show that each complaining party is of diverse citizenship from each defending party. This is commonly characterized as the complete diversity requirement, n20 in contrast to the "minimal" diversity that is permitted under the interpleader act. n21 Citizenship of the parties sufficient to establish diversity should be distinctly and affirmatively averred. An allegation that a person is a resident of a certain state or foreign country is not a sufficient allegation of his or her citizenship, because residence is not the equivalent of citizenship. n22

A party making an allegation of the citizenship of an individual should state that the individual is a citizen of a particular state or foreign country. n23 In general, an individual who is a United States citizen may be a citizen of only one state at any time. Citizenship is based on the same criteria used to define domicile for personal jurisdiction purposes. n24 Individual United States citizens living in United States territories, the District of Columbia, and the Commonwealth of Puerto Rico are deemed citizens of "states" for diversity purposes. n25 Individuals who are citizens or subjects of a foreign country are deemed citizens of the state of the United States in which they are domiciled if they are aliens admitted to the United States for permanent residence. Otherwise, they are deemed citizens of the foreign country and must be pleaded as such. n26

[iii] Citizenship of Legal Entities

When a party makes an allegation of citizenship of a corporation, the party must indicate the states of citizenship of the corporation. Unlike an individual, n27 a corporation may have two or more states of citizenship for general diversity purposes. n28 Thus, a corporation is deemed a citizen of any state in which it is incorporated and also of the state where it has its principal place of business. n29

When a party makes an allegation of citizenship of a partnership or unincorporated association, the party must specify the particular states of citizenship of each partner or member. Partnerships and unincorporated associations lack their own citizenship for purposes of the general diversity statute. Rather, the citizenship of any unincorporated entity, including partnerships and unincorporated associations, is determined by the citizenship of each of its owners or members. n29.1 In a partnership, every partner (including limited partners in a limited partnership) must be of diverse citizenship from the party or parties opposing the partnership in the litigation. This is so even if state law permits a partnership to sue or be sued in its firm name. n30 Similarly, each member of an unincorporated association must be of diverse citizenship from that of any party or parties opposing the association. n31 Thus, the citizenship of any entity other than a corporation is the citizenship of each of its members, and this rule applies to any type of association that has not been incorporated, including a joint venture, n32 and the most recently created unincorporated association, a limited liability company. n33

A state of the United States is not a citizen for purposes of general diversity jurisdiction. n34 However, a municipal corporation, a county, or some other political subdivision of a state is a citizen of the state in which it is located, n35 unless it is merely an arm or the alter ego of the state. n36 For a more detailed discussion of the citizenship of corporations and other entities for diversity jurisdiction purposes, see § 5.06.

[iv] Amount in Controversy

A complaint that relies on general diversity jurisdiction must allege that the amount in controversy exceeds $75,000, exclusive of interest and costs. n37 It is not necessary for a party to set forth a detailed description of the composition of the amount. n38 In general, all that a plaintiff must set forth in the complaint is a good faith allegation that the amount in controversy exceeds the jurisdictional amount, and a court will not dismiss unless it appears to a legal certainty that

the claim is for less than the jurisdictional amount. n39

An adverse party, or the court on its own motion, may challenge an allegation of the jurisdictional amount. n40 Whether the amount in controversy exceeds $75,000 is usually determined from the perspective and pleading of the party invoking jurisdiction, and the amount is determined as of the time subject matter jurisdiction is first invoked, which is the time of the filing of the complaint. The legal certainty test may not be applicable when the plaintiff alleges only an indeterminate amount of damages, so such an allegation should be avoided. n41

[d] Pleading Jurisdiction Under Special Jurisdictional Statutes

If jurisdiction is based on a special jurisdictional statute, the plaintiff should make reference to the statute in the first paragraph of the pleading, n41.1 and should make specific factual averments in the body of the pleading demonstrating that the statute applies. n42 Examples of special federal question statutes include statutory provisions on patents, copyrights, and trademarks, n43 antitrust, n44 enforcement of orders related to interstate commerce, n45 federal tax matters, n46 postal matters, n47 civil rights matters, n48 actions against the United States under the Torts Claims Act, n49 claims under the Employee Retirement Income Security Act, n50 and under the Federal Employers' Liability Act. n51

If a complaint is based on a claim under admiralty and maritime jurisdiction, n52 or under the Merchant Marine Act, n53 the plaintiff should include allegations of fact demonstrating the applicability of admiralty or maritime authority are required. To invoke admiralty status under Rule 9(h), the complaint should state that the claim is an admiralty or maritime claim within the meaning of Rule 9(h). n54

In the federal courts, suits are commonly filed by prisoners and inmates of federal institutions to redress violations of their civil rights. n55 Congress has recently limited access to courts for prisoners who have not suffered from physical harm. Under the federal Tort Claims Act, the federal district courts have exclusive jurisdiction of civil actions on claims against the United States or its agents for money damages for personal injury or death caused by the negligent or wrongful act or omission. However, under the recent restriction imposed by Congress, no person convicted of a felony who is incarcerated may bring a civil action against the United States or employee of the government for mental or emotional injury suffered while in custody without a prior showing of physical injury. Therefore, physical injury should be alleged in the complaint. n56

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 8.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Northern Trust Co. v. Bunge Corp., 899 F.2d 591, 596 (7th Cir. 1990)* .

(n3)Footnote 2. *Gaunce v. De Vincentis, 708 F.2d 1290, 1293-1294 (7th Cir. 1983*).

(n4)Footnote 3. *United States ex rel. FTC v. Larkin, 841 F. Supp. 899, 903 (D. Minn. 1993)* .

(n5)Footnote 4. *28 U.S.C. § 1331 et seq*; *see* [2], *below,* for requirements for pleading jurisdiction.

(n6)Footnote 5. *Schlesinger v. Councilman, 420 U.S. 738, 742 n.5, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)* .

(n7)Footnote 6. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154 (1945)* ; *see* [2], *below*,

for requirements for pleading jurisdiction.

(n8)Footnote 7. *Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1188 (11th Cir. 1980)* (statute of limitation tolled on commencement of action, which occurs when complaint is filed and not when service is complete).

(n9)Footnote 1. *Fed. R. Civ. P. 8(a)(1).*

(n10)Footnote 2. U.S. Const. Art. III; *28 U.S.C. §§ 1331-1365.*

(n11)Footnote 3. *See* [b], *below* (federal question jurisdiction); [c], *below* (diversity jurisdiction); [d], *below* (special jurisdictional statutes).

(n12)Footnote 4. *Elliott v. Tilton, 62 F.3d 725, 728 (5th Cir. 1995)* (Rule 8(a)(1) does not require citation of statute by name or number).

(n13)Footnote 4.1. Fed. R. Civ. P., Appendix of Forms, Official Form 7(b).

(n14)Footnote 5. *Fed. R. Civ. P. 12(h)(3).*

(n15)Footnote 6. *Fed. R. Civ. P. 12(b)(2), 12(h)(1).*

(n16)Footnote 7. *28 U.S.C. § 1331.*

(n17)Footnote 8. *See Rivet v. Regions Bank, 522 U.S. 470, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998)* (presence or absence of federal-question jurisdiction is determined by whether federal issue is presented on face of properly pleaded complaint).

(n18)Footnote 9. *28 U.S.C. § 1331.*

(n19)Footnote 9.1. *Interstate Petroleum Corp. v. Morgan, 249 F.3d 215, 220 (4th Cir. 2001)* (trial court lacked federal question jurisdiction when complaint stated only that court had subject matter jurisdiction "based on federal question jurisdiction pursuant to Petroleum Marketing Practices Act," complaint made no claim that defendant violated any provision of Act, did not allege facts showing violation of Act, and alleged only facts that established breach of contract).

(n20)Footnote 10. *Household Bank v. JFS Group, 320 F.3d 1249, 1251 (11th Cir. 2003) .*

(n21)Footnote 11. *Gober v. Terra + Corporation, 100 F.3d 1195, 1207 (5th Cir. 1996)* (plaintiff's allegations did not satisfy requirements for federal question jurisdiction under *28 U.S.C. § 1331* or diversity jurisdiction under *28 U.S.C. § 1332*).

(n22)Footnote 12. See Fed. R. Civ. P., Appendix of Forms, Official Form 7(b).

(n23)Footnote 13. *Reich v. Tiller Helicopter Servs., Inc., 8 F.3d 1018, 1032 (5th Cir. 1993) .*

(n24)Footnote 14. *Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* ; *Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968) .*

(n25)Footnote 15. *Rivet v. Regions Bank, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998) .*

(n26)Footnote 16. *See 28 U.S.C. § 1332.*

(n27)Footnote 17. *28 U.S.C. § 1332(a).*

(n28)Footnote 18. *Hammes v. Aamco Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994)* .

(n29)Footnote 19. *Scheuer v. Rhodes, 416 U.S. 232, 234 n.2, 94 S. Ct. 1683, 40 L. Ed. 2d 90, 71 Ohio Op. 2d 474 (1974)* .

(n30)Footnote 20. *Howell v. Tribune Entertainment Company, 106 F.3d 215, 218 (7th Cir. 1998)* .

(n31)Footnote 21. *See 28 U.S.C. § 1335.*

(n32)Footnote 22. Guaranty Nat'l Title Co. v. J.E.G. *Assocs., 101 F.3d 57, 59 (7th Cir. 1996)* (when parties allege residence but not citizenship, court must dismiss suit); *Strain v. Harrelson Rubber Co., 742 F.2d 888, 889 (5th Cir. 1984)* .

(n33)Footnote 23. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(a).

(n34)Footnote 24. *Whitelock v. Leatherman, 460 F.2d 507, 514-515 (10th Cir. 1972)* .

(n35)Footnote 25. *28 U.S.C. § 1332(d).*

(n36)Footnote 26. *28 U.S.C. § 1332(a).*

(n37)Footnote 27. *See* [ii], *above.*

(n38)Footnote 28. *In re Balfour MacLaine International, Limited, 85 F.3d 68, 76 (2d Cir. 1996)* (for purposes of federal court's diversity jurisdiction, corporation may have dual citizenship).

(n39)Footnote 29. *28 U.S.C. § 1332*; *Illinois Cent. Gulf R.R. v. Pargas, Inc., 706 F.2d 633, 638 (5th Cir. 1983)* .

(n40)Footnote 29.1. *Iraola & Cia v. Kimberly-Clark Corp., 232 F.3d 854, 860 (11th Cir. 2000)* (federal courts do not have diversity jurisdiction over cases where there are foreign entities on both sides of action, without presence of citizens of state on both sides of action).

(n41)Footnote 30. *Carden v. Arkoma Assoc., 494 U.S. 185, 195-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* ; Guaranty Nat'l Title Co. v. J.E.G. *Assocs., 101 F.3d 57, 59 (7th Cir. 1996)* .

(N42)Footnote 31. *Carden v. Arkoma Assoc., 494 U.S. 185, 195-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* (diversity jurisdiction in suit by or against entity depends on citizenship of all the members of entity).

(n43)Footnote 32. *Schiavone Constr. Co. v. City of New York, 99 F.3d 546, 548 (2d Cir. 1996)* .

(n44)Footnote 33. *International Flavors & Textures, LLC v. Gardner, 966 F. Supp. 552, 554-555 (W.D. Mich. 1997)* .

(n45)Footnote 34. *Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 217, 58 S. Ct. 834, 82 L. Ed. 1294 (1938)* .

(n46)Footnote 35. *Moor v. County of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)* .

(n47)Footnote 36. *State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199, 49 S. Ct. 104, 73 L. Ed. 262 (1929)* (no diversity because state highway commission was merely arm of state).

(n48)Footnote 37. *28 U.S.C. § 1332(a).*

(n49)Footnote 38. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(a).

(n50)Footnote 39. *St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1254-1255 (5th Cir. 1998)* (in ascertaining amount in controversy for diversity jurisdiction in insurance cases, court can consider policy limits, potential attorney fees, penalties, statutory damages, and punitive damages, when insurer could be liable for those sums under state law).

(n51)Footnote 40. *Fed. R. Civ. P. 12(b)(1).*

(n52)Footnote 41. *De Aguilar v. Boeing Co., 47 F.3d 1404, 1408-1411 (5th Cir. 1995) , cert. denied, 516 U.S. 865 (1995)* (allegation of indeterminate amount of damages insufficient).

(n53)Footnote 41.1. *Cf. Doe v. Norwich Roman Catholic Corp., 606 F. Supp. 2d 244, 245 (D. Conn. 2009) .*

(n54)Footnote 42. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(b).

(n55)Footnote 43. *28 U.S.C. § 1338.*

(n56)Footnote 44. *28 U.S.C. § 1337.*

(n57)Footnote 45. *28 U.S.C. § 1337.*

(n58)Footnote 46. *28 U.S.C. § 1340.*

(n59)Footnote 47. *28 U.S.C. § 1339.*

(n60)Footnote 48. *28 U.S.C. § 1343.*

(n61)Footnote 49. *28 U.S.C. § 1346.*

(n62)Footnote 50. 28 U.S.C. § 1132(e).

(n63)Footnote 51. *45 U.S.C. § 56.*

(n64)Footnote 52. *28 U.S.C. § 1333.*

(n65)Footnote 53. *46 U.S.C. App. § 688.*

(n66)Footnote 54. *See* Fed. R. Civ. P., Appendix of Forms, Official Form 7(c); *see also Fed. R. Civ. P. 9(h).*

(n67)Footnote 55. *See, e.g., Women Prisoners of the Dist. of Columbia Dep't of Corrections v. Dist. of Columbia, 93 F.3d 910, 923 (D.C. Cir. 1996) .*

(n68)Footnote 56. *28 U.S.C. § 1346(b)(1).*

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.06

§ 10.06 Pleading Claim for Reliefn*

[1] Short and Plain Statement of Claim

[a] Notice Pleading Standard

Every complaint must set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief. n1 Thus, Rule 8(a)(2) specifies a notice pleading standard, which means that the purpose of the complaint is to provide adequate notice to the defendant of the plaintiff's claims prior to the time of discovery. Consequently, there is no requirement that the plaintiff plead all of the detailed facts to establish each element of a prima facie case for the particular claim. However, to even reach the discovery stage, notice pleading requires a minimum threshold of factual notice. n2 Thus, notice pleading requires at the minimum that the allegations give the opposition fair notice of the claim, n3 by stating a minimum factual basis of the claim. n4 However, in more complex cases, the plaintiff may be required to factually address most of the essential elements of the claim. n5

The Rule 8 notice pleading standard applies to all civil cases in federal court. n6 Even in diversity cases, state pleading law does not govern the question of the procedural adequacy of federal court pleadings. n7 Rule 8 is to be construed in the light of reason and common sense, to accomplish the goal that all complaints must be so construed as to do substantial justice. n8 The rule is fashioned in the interest of fair and reasonable notice, not technicality. The test is whether the complaint factually specifies a wrong the plaintiff has suffered and connects the violation to the named defendants. n9

[b] Detail Required in Statement Depends on Circumstances of Case

Whether a statement of a claim is sufficient to give fair notice depends on the circumstances of the case; it is a context specific issue that requires the reviewing court to draw on its judicial experience and common sense. n10 The pleading requirements are not tied to rigid standards of the elements of a cause of action. However, a court may impose heightened pleading requirements for a particular case, but only when such requirements are found in the federal rules, such as the Rule 9(b) requirement that when pleading fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. n11 Additionally, in complex cases, the plaintiff may have to plead facts regarding many or most of the essential elements of a claim to inform the defendant of the nature of the claim. n12

The court should determine the adequacy of a pro se pleading under a more liberal standard than pleading drafted by attorneys. n13 Although the pleadings of pro se plaintiffs are held to less stringent standards, even a pro se complaint will eventually be dismissed for a Rule 8(a)(2) violation if the claimant fails to state a claim for relief after being afforded more than one opportunity to amend. n14

The court should determine the adequacy of a pro se pleading under an even more liberal standard than pleading drafted by attorneys. n15 Although the pleadings of pro se plaintiffs are held to less stringent standards, even a pro se complaint will eventually be dismissed for Rule 8 violations if the claimant fails to state a claim for relief after being afforded at least a few opportunities to amend. n16

[2] Notice to Defendant is Sufficient

[a] Allegations of Facts

To survive a motion to dismiss based on the notice pleading standard, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The "plausibility" standard is not equivalent to a "probability" requirement; rather, it requires only more than a sheer possibility that a defendant has acted wrongfully. Therefore if a complaint pleads facts that are merely consistent with a defendant's liability, it does not satisfy the plausibility requirement. n1

Based on these principles, a court evaluating the sufficiency of a complaint should use a two step approach: n2

> (1) The first step is for the court to identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations; bald accusations or recitals of legal elements are insufficient without facts. n3 When there are well pleaded factual allegations, a court may assume the veracity of those facts and go to the second step.
>
> (2) In the second step, the court must consider whether the factual allegations that have been asserted in the complaint plausibly suggest an entitlement to relief. Under this step, the court must determine if the there are enough facts to raise a reasonable expectation that discovery will reveal evidence of the alleged wrongdoing. In other words, a claim has facial plausibility if the plaintiff pleads enough factual content to allow the court to draw the reasonable inference that the defendant is liable for the wrongdoing.

Once the plaintiff alleges facts sufficient to state a claim, even if the claim does set forth a legal theory, any relief finally granted is not limited strictly to that theory. n4 Thus, the federal rules permit a plaintiff to set forth simultaneously several legal claims, regardless of consistency, n5 and also alternative or hypothetical claims. n6

[b] Surplusage Does Not Necessarily Invalidate Claim

Mere surplusage in allegations is generally not fatal to a claim for relief. Surplusage in a complaint must be extreme before it is grounds to dismiss. Nonetheless, the plaintiff should ordinarily avoid pleading evidence because it may violate the short and plain statement requirement of Rule 8(e)(1). However, when pleading evidence is harmless, or if it assists in providing fair notice, it is tolerated. n7 Another principle that has developed under notice pleading is that excess length in a pleading is not necessarily a fatal defect, because all complaints must be construed as to do substantial justice. n8 For example, the fact that a 12-page complaint in an employment discrimination case was longer than necessary and longer than a model complaint and that most averments in the complaint after page five were unnecessary was not sufficient to justify a dismissal on the grounds that the complaint was not a short and plain statement of the claim. The court reasoned that although the complaint could be improved, it was intelligible and gave the defendants notice of the claim for relief. n9

[c] Merely Conclusory Allegations Insufficient

Although the notice pleading standard does not require all of the detailed factual allegations that could be asserted for a claim, it requires more than a bald accusation that the defendant unlawfully harmed the plaintiff. n10 A pleading that offers mere labels and conclusions or a formulaic recitation of the elements of a cause of action is not sufficient without any factual statements. n11

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true by the court, to state a claim to relief that is plausible on its face. n12 A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct asserted. On the other hand, a conclusory allegation is one that simply declares that the defendant violated some ultimate legal standard that is at issue. A statement of a claim meets the notice pleading standard if it asserts facts that describe the defendant's conduct which imply a violation of a legal standard, such as the conduct that constituted the wrong. n13

As an example, if a claim requires an allegation of "competition" to be plausible, it is insufficient for the plaintiff to merely allege that it is a competitor of the defendant; rather, the plaintiff must allege the facts establishing that status, such as it makes direct sales in the same location as the defendant. n14

[3] Party May Make Statement of Claim on Information and Belief

Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief. n1 However, Rule 11 permits a claimant, after reasonable inquiry, to set forth allegations that are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. n2 The policy underlying Rule 8 taken together with Rule 11 permits claimants to aver facts that they believe to be true but that lack evidentiary support at the time of pleading. n3

[4] Official Forms Are Sufficient as Pleadings

Official forms are provided in the Appendix accompanying the Federal Rules of Civil Procedure. Parties in federal civil actions have the option to use these forms when pleading because the forms are deemed "sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." n1 Given the Rule 8(a)(2) requirement that each pleading that states a claim for relief must contain a short and plain statement of the claim showing the facts that the pleader is entitled to relief, the best practice would be to always include such a factual statement in any Official Form used; counsel must also consider the landmark *Iqbal* and *Twombly* cases on pleading standards, which in some cases may call for more specificity than is required in the Official Forms. n2 The complexity of many actions and claims in modern litigation, and the availability of many detailed, factual, and specialized legal forms from bar associations and legal publishing vendors also warrants use of factual statements. Courts do not require verbatim use of the official forms, except when specified in another rule or statute. n3

[5] Special Pleading Requirements

Congress has retained authority to enact laws pertaining to federal civil procedure and to change pleading requirements by statute. n1 For example, the Immigration and Nationality Act requires that a complaint contain an affidavit of good cause. The Supreme Court has held that the affidavit "must be filed with the complaint when the proceedings are instituted" and that failure to file the affidavit cannot be cured by amendment. n2 Another example of such a statute is the 1995 Private Securities Litigation Reform Act, which amends the Securities Exchange Act to make the pleading standards in securities fraud cases more rigorous than the standards under Rule 8. Thus, a claimant alleging securities fraud must specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, all the facts, with particularity, on which that belief is formed. n3

In addition to statutes, Rule 8's general rules of pleading, are supplemented in certain respects by other federal rules. For example, *Rule 9 of the Federal Rules of Civil Procedure* contains special rules for fraud, special damages, and lack of capacity, and for denying the occurrence of a condition precedent. n4 For a discussion of special pleading requirements, see Ch. 9, *Pleadings and Motions in General*.

State law may also override the pleading requirements of Rule 8 in federal court when the federal court determines that a special state pleading requirement is substantive. n5 For example, the *Erie* doctrine has been used to require those pleading state law claims in federal court to follow certain state statutory directives in product liability and medical malpractice cases. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice*, § 8.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 8(a)(2)*; see *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* ; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n3)Footnote 2. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n4)Footnote 3. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n5)Footnote 4. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* ; *see* [b], *below*, [2][a], *below*.

(n6)Footnote 5. *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* .

(n7)Footnote 6. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883 (2009)* .

(n8)Footnote 7. *Bushnell Corp. v. ITT Corp., 973 F. Supp. 1276, 1287 (D. Kan. 1997)* .

(n9)Footnote 8. *Fed. R. Civ. P. 8(e)*; *see Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n10)Footnote 9. *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-348, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* .

(n11)Footnote 10. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n12)Footnote 11. *See Fed. R. Civ. P. 9(c).*

(n13)Footnote 12. *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-348, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* .

(n14)Footnote 13. *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (1980)* .

(n15)Footnote 14. *See Harris v. Ostrout, 65 F.3d 912, 915 n.3 (11th Cir. 1995)* .

(n16)Footnote 15. *Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* .

(N17)Footnote 16. *Harris v. Ostrout, 65 F.3d 912, 915 n.3 (11th Cir. 1995)* .

(n18)Footnote 1. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n19)Footnote 2. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* .

(n20)Footnote 3. *See* [c], *below*.

(n21)Footnote 4. *Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992)* .

(n22)Footnote 5. *Fed. R. Civ. P. 18(a)*; *see Fed. R. Civ. P. 8(d)(3)*.

(n23)Footnote 6. *Fed. R. Civ. P. 8(d)(2)*.

(n24)Footnote 7. *Johnson v. Methodist Med. Ctr., 10 F.3d 1300, 1305 (7th Cir. 1993)* , *cert. denied, 511 U.S. 1107 (1994)* .

(n25)Footnote 8. *Fed. R. Civ. P. 8(e)*.

(n26)Footnote 9. *Bennett v. Schmidt, 153 F.3d 516, 517-518 (7th Cir. 1998)* (it takes much more egregious offense than using 12 pages to set out claim that could have been stated in 6 pages to justify dismissal under Rule 8(a)).

(n27)Footnote 10. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* .

(n28)Footnote 11. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n29)Footnote 12. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n30)Footnote 13. *See Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* ; *see* [a], *above*.

(n31)Footnote 14. *See Jebaco Inc. v. Harrah's Operating Co Inc., 587 F.3d 314, 321 (5th Cir. 2009)* .

(n32)Footnote 1. *Fed. R. Civ. P. 8(a)*.

(n33)Footnote 2. *Fed. R. Civ. P. 11(b)(3)*; *Volkswagen, Inc. v. Centrix Fin., 357 F. Supp. 2d 837, 845-846 (D. Md. 2005)* .

(n34)Footnote 3. *Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)* ; *Syscon, Inc. v. Vehicle Valuation Servs., 274 F. Supp. 2d 975, 977 (N.D. Ill. 2003)* .

(n35)Footnote 1. *Fed. R. Civ. P. 84*; *see Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* ; *Spanierman Gallery, PSP v. Love, 320 F. Supp. 2d 108, 114 (S.D.N.Y. 2004)* ; *see also* Appendix of Forms, Appendix to Ch. 26, *Post Judgment Procedures*.

(n36)Footnote 2. *Fed. R. Civ. P. 8(a)(2)*; *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* ; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ; *see* [2], *above*.

(n37)Footnote 3. *Trevino v. D.H. Kim Enterprises, Inc., 168 F.R.D. 181, 182-183 (D. Md. 1996)* ; *see, e.g., Fed. R. Civ. P. 4(d)(1)(D)*.

(n38)Footnote 1. *28 U.S.C. § 2071(a)*.

(n39)Footnote 2. *8 U.S.C. § 1451(a)*; *Matles v. United States, 356 U.S. 256, 78 S. Ct. 712, 2 L. Ed. 2d 741 (1958)* .

(n40)Footnote 3. *15 U.S.C. § 78u-4(b)(1)*; *see Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 1630-1624, 161 L. Ed. 2d 577 (2005)* .

(n41)Footnote 4. *Fed. R. Civ. P. 9.*

(n42)Footnote 5. *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* (in diversity case, substantive law of state applied unless case controlled by Constitution or Act of Congress).

(n43)Footnote 6. *Irizarry v. Digital Equip. Corp., 919 F. Supp. 301, 304 (N.D. Ill. 1996)* .

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.07

§ 10.07 Demand for Judgmentn*

[1] Requirement of Demand

A complaint must contain a demand for judgment for the relief that the plaintiff seeks, n1 whether the pleading is a complaint or a third-party complaint. The plaintiff may demand relief in the alternative or of several different types. n2

A demand for judgment can be stated in general terms. For example, a plaintiff may request a single sum of money for an act of negligence resulting in physical injury, lost wages or income, physical and mental pain, and medical expenses. n3 Demand for relief in the alternative or for several different types of relief is also permitted. n4 For example, the demand for judgment may request specific performance, or if specific performance is not granted, that the pleader be awarded a money judgment. n5

Although special damages must be specifically stated in any affirmative pleading, n6 a demand for judgment does not have to distinguish between general damages and special damages. Furthermore, Rule 8 does not require a plaintiff to plead damages with particularity. The federal rules do not require claimants to set out in detail the facts on which they base their damages claims. Nevertheless, a plaintiff must include either direct or inferential allegations concerning all material elements necessary for recovery under some legal theory. Thus, the complaint must contain allegations establishing that the plaintiff has suffered some damages as a result of the defendant's conduct. n7

[2] Effect of Demand on Judgment

A demand for judgment will not limit the relief that may be ordered by the court, except for awards arising from default judgments. In this regard, Rule 54(c) limits the significance of Rule 8(a)(3)'s requirement of a demand for judgment once the litigation has begun by allowing the district court to grant the relief to which the prevailing party is entitled. However, it does not permit a court to impose liability where none has been proven. If the plaintiff does not present at trial a case that is valid on some theory, for example, a breach of contract, the district court does not abuse its discretion by refusing to award damages. n1 Additionally, a demand for judgment is significant in the case of a default judgment, because a default judgment may not be different in kind or exceed the amount requested in the demand for judgment. n2

A demand for judgment will also have a bearing on whether a jury trial will be allowed. If only equitable relief is sought, neither party may request a jury trial. n3

Rule 8(a)(3) permits claimants to pray for all relief, legal and/or equitable, to which they are entitled as a matter of substantive right and to pray for relief in the alternative n4 or cumulatively. For example, in an action for specific performance the plaintiff may demand either that (1) the defendant be required to specifically perform the agreement and pay damages of $___, plus interest and costs, or (2) if specific performance is not ordered, the defendant be required to pay damages of $___, plus interest and costs. n5 This prayer is proper under the procedure contemplated by the federal rules, in which the court has the power to grant all relief to which the plaintiff establishes that he or she is entitled, whether formerly legal or equitable. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 8.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Nagel v. ADM Investor Services, Inc., 995 F. Supp. 837, 840 (N.D. Ill. 1998)* .

(n3)Footnote 2. *Fed. R. Civ. P. 8(a)(3).*

(n4)Footnote 3. Fed. R. Civ. P., Appendix of Forms, Official Form 11.

(n5)Footnote 4. *Fed. R. Civ. P. 8(a)(3).*

(n6)Footnote 5. Fed. R. Civ. P., Appendix of Forms, Official Form 17.

(n7)Footnote 6. *Fed. R. Civ. P. 9(g)* (if party claims items of special damage, they must be stated expressly).

(n8)Footnote 7. *Nagel v. ADM Investor Services, Inc., 995 F. Supp. 837, 841 (N.D. Ill. 1998)* .

(n9)Footnote 1. *Old Republic Ins. Co. v. Employers Reinsurance Corp., 144 F.3d 1077, 1081 (7th Cir. 1998)* .

(n10)Footnote 2. *Fed. R. Civ. P. 54(c).*

(n11)Footnote 3. *Shum v. Intel Corp., 499 F.3d 1272, 1276-1277 (Fed. Cir. 2007)* ; *see Fed. R. Civ. P. 38(a).*

(n12)Footnote 4. *United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 467, 77 S. Ct. 490, 1 L. Ed. 2d 465 (1957)* .

(n13)Footnote 5. Fed. R. Civ. P., Appendix of Forms, Official Form 17.

(n14)Footnote 6. *Bowles v. Cohen, 65 F. Supp. 499 (E.D. Pa. 1944)* .

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.08

§ 10.08 Joinder of Claims for Reliefn*

[1] Liberal Joinder of Claims

Any party asserting a claim, counterclaim, crossclaim, or third-party claim may join as many claims as it has against an opposing party, either as independent or alternative claims. n1 This rule means that there are no procedural restrictions on the number or types of claims a plaintiff (or other claimant) may assert in a single case. n2 A claim for relief subject to joinder is essentially a statement of factual circumstances that the law states entitles the claimant to the relief requested. Some statutes also specify particular types of claims that may be joined, such as, the supplemental jurisdiction statute, which allows joinder of claims that are so related to the original claims in the action that they form part of the same case or controversy. n3

Joined claims need not be consistent because the rule expressly states that alternative claims may be joined. n4 Thus, Rule 18 complements the rule permitting the pleading of inconsistent allegations, remedies, and theories. n5 The goal of open-ended claim joinder is to permit a claimant to assert an entire dispute in a single case, thus enabling the parties to present the whole array of their disagreement before one court. n6 In other words, joinder in federal practice does not depend on the nature of the claims: joined claims may be independent of one another. n7 The plaintiff may plead in the alternative or may plead wholly inconsistent claims n8 and may assert legally diverse claims. n9

The liberal claim-joinder rule controls only the procedural propriety of bringing more than one claim in a single action. Thus, neither Rule 18 nor any of the other federal civil rules affects the subject matter jurisdiction of the federal courts. n10 In other words, even though unrestricted joinder is permitted as a matter of pleading, the court must have an independent basis of subject matter jurisdiction before the court will allow a claim to be litigated. n11 In this regard, claims against the United States are permitted only if the government has expressly waived its sovereign immunity by statute. Ordinarily, sovereign immunity protects the United States from having to defend any type of claim. However, some statutes waive immunity for joinder purposes when necessary to adjudicate the rights of all parties to the action. n12

One very significant aspect of this rule providing for liberal joinder of claims is that, in a diversity case, the claimant may join all of its claims to satisfy the minimum amount in controversy requirement. n13

[2] Permissive Joinder of Claims; Claim Preclusion

Under the permissive claim joinder Rule 18(a), claimants have the option to join any and all other claims they have against the defending party. However, joinder of claims is permissive and not compulsory. This means that the claim-joinder rule does not require a claimant to join all claims that it could assert against another party. n1 However, a claimant must realize that the doctrine of claim preclusion, also known as res judicata, essentially requires a claimant to assert all transactionally related claims in a single case, or the claims will be barred from future litigation. n2 Consequently, a claimant must be careful to join all clams related to a transaction in the current action. n3

[3] Court May Order Separate Trials of Claims or Issues

Despite the fact that the claim-joinder rule permits joinder of multiple and unrelated claims does not mean that the court must allow all such claims to be tried together; the rule addresses pleadings, not trials. n1 The district court has discretion to order separate trials of claims or issues. n2 In other words, after claims among the parties have been joined, the court has discretion to order separate trials based on the type of claim. The district court has broad authority to order separate trials for a wide variety of reasons, such as the prevention of delay, prejudice, or undue expense. n3

[4] Multiple Party Considerations

Joinder of parties is not affected by Rule 18; it is covered by other federal rules. n1 Thus, the claim-joinder rule of Rule 18 operates on the assumption that when multiple parties are asserting claims, or are the subject of claims, all such parties are properly joined under the various party joinder provisions. For example, claim joinder is not limited by the requirements of Rule 20 governing permissive joinder of parties. The latter rule permits joinder of parties if the claims by or against them arise from the same transaction and give rise to at least one common question of law or fact. n2 Those requirements apply to the question of whether certain parties may be joined in a single case; Rule 18 operates to allow such properly joined parties to assert all claims. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureJoinder of Claims & RemediesLiberal JoinderCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 18.02-18.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 18(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 18*, Committee Note of 1966.

(n4)Footnote 3. *See 28 U.S.C. § 1367(a).*

(n5)Footnote 4. *Fed. R. Civ. P. 18(a)*; *see also Fed. R. Civ. P. 8(d)(3).*

(n6)Footnote 5. *Compare Fed. R. Civ. P. 8(d)(2) with Fed. R. Civ. P. 18(a).*

(n7)Footnote 6. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) .*

(n8)Footnote 7. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 506 (4th Cir. 1992) .*

(n9)Footnote 8. *Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693, 696-697 (Fed. Cir. 1990)* .

(n10)Footnote 9. *Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2d Cir. 1980)* .

(n11)Footnote 10. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 n.13, 86 S. Ct. 1130, 16 L. Ed. 2d 218(1966)* ; *see Fed. R. Civ. P. 82* (jurisdiction unaffected by rules).

(n12)Footnote 11. *Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir. 1987)* .

(n13)Footnote 12. *See Orff v. United States, 545 U.S. 596, 603, 125 S. Ct. 2606, 162 L. Ed. 2d 544 (2005)* (such statutory provision does *not* provide consent by United States to itself become defending party on claim).

(n14)Footnote 13. *Carter v. Tennant Co., 383 F.3d 673, 680 (7th Cir. 2004)* ; *Pollock v. Trustmark Ins. Co., 367 F. Supp. 2d 293, 299 (E.D.N.Y. 2005)* (citing **Moore's Federal Practice** and noting, however, that claims based on different legal theories may generally not be aggregated).

(n15)Footnote 1. *Petrenko v. United States, 859 F. Supp. 647, 652 (E.D.N.Y. 1994)* .

(n16)Footnote 2. *Apotex, Inc. v. FDA, 393 F.3d 210, 217-218 (D.C. Cir. 2004)* (citing **Moore's Federal Practice**).

(n17)Footnote 3. *See Lytle v. Household Mfg., Inc., 494 U.S. 545, 552, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)* (merger of law and equity into one action requires plaintiffs to join all legal and equitable claims arising from single transaction to avoid bar of res judicata); *see also* Ch. 30, *Res Judicata and Related Doctrines*.

(n18)Footnote 1. *See Fed. R. Civ. P. 18(a)*.

(n19)Footnote 2. *Fed. R. Civ. P. 42(b)*.

(n20)Footnote 3. *Am. Trim, L.L.C. v. Oracle Corp., 383 F.3d 462, 474 (6th Cir. 2004)* ; *see Fed. R. Civ. P. 42(b)*.

(n21)Footnote 1. *Fed. R. Civ. P. 13(h)*, *14*, *19*, *20*, *22*, and *24*.

(n22)Footnote 2. *See Fed. R. Civ. P. 20*.

(n23)Footnote 3. *Intercon Research Assocs. v. Dresser Indus., Inc., 696 F.2d 53, 56 (7th Cir. 1982)* (Rule 20 operates independently of Rule 18; thus improper joinder of parties when requirements of Rule 20 were not met did not affect proper joinder of claims under Rule 18(a)).

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PART III Pleading Stage
CHAPTER 10 PLAINTIFF'S PLEADINGS

1-10 Moore's Manual--Federal Practice and Procedure § 10.09

§ 10.09 Joinder of Contingent Remediesn*

[1] Claimant May Request Joinder of Contingent Remedies

A party may join two claims even though one of them is contingent on the disposition of the other. However, the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money. n1 The purpose of the remedy joinder rule is to allow a claimant to join principal and contingent claims in a single case, even though technically the contingent claim does not accrue until resolution of the principal claim. n2

Essentially, Rule 18(b) provides an expedited procedure of the contingent claim by permitting the party to plead the contingent claim before it accrues by judgment on the principal claim. n3 The primary example, referred to in the rule, occurs when a plaintiff sues a debtor to recover a money judgment and joins a claim against a third-party to whom the debtor has conveyed property, asserting that the conveyance is in fraud of creditors. n4 The fraudulent conveyance fact pattern provides the most obvious use of the remedy joinder rule, but the rule is not limited to that situation. It permits joinder of any principal and contingent claims. For example, a claim to assert rights as a union member may be joined with a claim for reinstatement as a union member. n5

[2] Joinder of Contingent Remedies Procedural Only

The remedy joinder rule is procedural only and does not change substantive law. n1 The rule may not be applied if it would affect a party's *Seventh Amendment* right to jury trial on any legal issue. n2 The rule makes clear that the contingent claim and the principal claim on which it depends must both be proved before the joined remedies may be granted. n3 The remedy joinder rule merely allows the claimant to plead both remedies together in order to promote efficiency and consistency by placing the entire dispute in a single court for uniform resolution. n3.1 If the plaintiff elects not to use this procedure to join remedies, but elects instead to initiate a separate action solely against the alleged fraudulent transferee, the separate action generally may not proceed until the plaintiff has obtained a judgment on the principal, underlying claim. n4

[3] Discretion of Court

Whether to allow the joinder of remedies procedure is within the discretion of the trial court and may be disallowed if the procedure would cause confusion or delay. n1 Furthermore, as with claim joinder, the district judge has discretion to order separate trials of claims or issues for a variety of reasons, including the avoidance of jury confusion. n2

The remedy-joinder rule does not compel the district judge to allow amendment to add a fraudulent conveyance claim to a pending case against the debtor. n3 For example, when the third-party can be pursued in proceedings to enforce the judgment against the debtor and adding the contingent claim to the pending case would prolong the litigation, a court may properly conclude that the amendment should not be permitted. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesRemedies

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 18.02-18.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 18(b).*

(n3)Footnote 2. *See Wechsler v. Hunt Health Sys., 285 F. Supp. 2d 343, 347-349 (S.D.N.Y. 2003)* .

(n4)Footnote 3. *Jones v. N.W. Telemarketing, Inc., 136 F. Supp. 2d 1166, 1168-1169 (D. Ore. 2001)* .

(n5)Footnote 4. *Fed. R. Civ. P. 18(b).*

(n6)Footnote 5. *Vars v. International Bhd. of Boilermakers, 204 F. Supp. 245, 247-248 (D. Conn. 1962)* .

(n7)Footnote 1. *See Fed. R. Civ. P. 18(b)*; *Crook Motor Co. v. Goolsby, 703 F. Supp. 511, 525 (N.D. Miss. 1988)* .

(n8)Footnote 2. *Whitlock v. Hause, 694 F.2d 861, 864 (1st Cir. 1982)* .

(n9)Footnote 3. *Fed. R. Civ. P. 18(b).*

(n10)Footnote 3.1. *Fitzgerald v. United States Lines Co., 374 U.S. 16, 18, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* .

(n11)Footnote 4. *Crook Motor Co. v. Goolsby, 703 F. Supp. 511, 525 (N.D. Miss. 1988)* .

(n12)Footnote 1. *All West Pet Supply Company v. Hill's Pet Products Division, 152 F.R.D. 202, 204-205 (D. Kan. 1993)* .

(n13)Footnote 2. *Fed. R. Civ. P. 42(b).*

(n14)Footnote 3. *All West Pet Supply Co. v. Hill's Pet Prods. Div., 152 F.R.D. 202, 203-204 (D. Kan. 1993)* .

(n15)Footnote 4. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 743 (7th Cir. 1985)* .

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS

1-10A Moore's Manual--Federal Practice and Procedure 10A.syn

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.01

§ 10A.01 Definition of Injunctionn*

"Injunction" is a general term that refers to a decree or equitable order of a court of competent jurisdiction that commands or prohibits conduct by a natural person or entity. n1 Another broad definition of injunction is any equitable decree that compels obedience under threat of the court's coercive power of contempt. n2 Thus, an injunction is a device used by a court to either require or prevent *future* conduct on the part of the person who is subject to the injunction. However, the court may enter an injunction regarding someone's past conduct, n3 provided that the proponent shows that the past unlawful conduct establishes that there is a reasonable likelihood of continuing that unlawful conduct in the future. n4

The term injunction also encompasses a judicial order that prevents a statute, regulation, or administrative decision from taking effect. n5 Courts have noted that the term "injunction" should not be read narrowly but should be considered as including all equitable decrees that compel obedience under threat of contempt; thus, an order is considered injunctive based on its effect, and not necessarily by its denomination by the court. Thus, even if an order does not as a technical matter grant or refuse an injunction, but is injunctive in practical effect or in practical effect denies an injunction, it must comply with all procedural and substantive requirements regarding injunctive relief. n6

The Supreme Court has explained an important distinction between an injunction that grants relief to a party and an injunction that is procedural. Every order of a court that commands or forbids is an technically an "injunction;" however, in its accepted legal sense, an remedial injunction is an in personam order based on the merits that is directed at a particular person to govern that person's conduct relative to a particular claim for relief in the case. On the other hand, a procedural injunction, such as a stay or writ of mandate, operates only on a judicial proceeding itself, either by halting or postponing some portion of the proceeding, by temporarily divesting a judicial order of enforceability, or by commanding that a lower court take or refrain from some action. n7 In particular, pretrial orders such as orders to compel discovery and denials of summary judgment are not "injunctions" because such pretrial orders do not grant part of the relief requested by the claimant. n8 Thus, it is not an "injunction" when the court makes an order for a party to turn over papers in discovery or to submit to a physical examination. Similarly an order that parties "proceed with all deliberate speed" in calculating sums owed is a preliminary step toward judgment and not an injunction. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 173 L. Ed. 2d 550, 562 (2009)* ; *see Fed. R. Civ. P. 65(d)(1).*

(n3)Footnote 2. *Westar Energy, Inc. v. Lake, 552 F.3d 1215, 1222 (10th Cir. 2009)* .

(n4)Footnote 3. *United States Pub. Interest Research Group v. Atl. Salmon of Me., 339 F.3d 23, 33 (1st Cir. 2003)* (even though injunction looks to future, it may be rooted in past violations, and its effects may be remedial).

(n5)Footnote 4. *Wooden v. Bd. of Regents, 247 F.3d 1262, 1284 (11th Cir. 2001)* ; *SEC v. Johnson, 595 F. Supp. 2d 40, 43 (D.D.C. 2009)* ; *see § 10A.03.*

(n6)Footnote 5. *Illinois Bell Tel. Co. v. Worldcom Techs., 157 F.3d 500, 503 (7th Cir. 1998)* (to justify injunction that prevents statute, regulation, or administrative decision from taking effect, applicant must show that probability of success on merits is sufficiently high, or injury from enforcement of order is sufficiently great).

(n7)Footnote 6. *Southern Ute Indian Tribe v. Leavitt, 564 F.3d 1198, 1207 (10th Cir. 2009)* (quoting **Moore's Federal Practice**).

(n8)Footnote 7. *Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 173 L. Ed. 2d 550, 562-563 (2009)* ; *see Teshome-Gebreegziabher v. Mukasey, 545 F.3d 285, 291 (4th Cir. 2008)* (injunctions are specifically directed at parties, while stays are directed at proceedings or courts).

(n9)Footnote 8. *See Casey v. Planned Parenthood, 14 F.3d 848, 854 (3d Cir. 1994)* .

(n10)Footnote 9. *Mercer v. Magnant, 40 F.3d 893, 896 (7th Cir. 1994)* (orders to prepare plans that when adopted will be injunctions are not themselves injunctions, even if the process of preparation is extended and expensive).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.02

§ 10A.02 Nature of Remedyn*

[1] Movant Must Have Equitable Claim

A court order imposing an injunction is an equitable remedy, n1 which means that a federal court may provide such relief only if the claiming party qualifies under (1) the traditional tests for an order in equity that existed at the time of the adoption of the U.S. Constitution. n2 and (2) any particular requirements for the type of injunction requested. n3 Thus, the district court is required to weigh and balance the traditional equities of a particular case in deciding to grant an injunction. n4 Because of its equitable nature, the district court's decision on the issuance of an injunction will be overruled only in the rarest of cases. n5

[2] Extraordinary Remedy

An injunction is an extraordinary remedy, enforceable by the full coercive powers of the court. n1 Because it is an extraordinary remedy backed by all of the court's coercive power, including contempt, an injunction may be imposed only in the limited circumstances that clearly require injunctive relief. n2 The court may order injunctive relief to provide a party with preventive, protective, or restorative relief, but not to rectify alleged wrongs that have already been committed but will not occur in the future. n3 Thus, injunctive relief was traditionally designed to deter rather than punish an offending party. n4

[3] Controlling Rule is Procedural Only

Rule 65 is a procedural device which specifies the methods that a party must use to obtain any type of injunction n1 and was designed to protect against abuse of the injunction remedy. n2 Thus, Rule 65 does not affect or alter the substantive prerequisites for obtaining injunctive relief or the requirements for obtaining an equitable remedy, which must be satisfied by the movant to obtain injunctive relief. n3 Furthermore, because Rule 65 merely specifies the procedure for obtaining injunctive relief, it does not confer standing on the person seeking relief, n4 or personal or subject matter jurisdiction, which the person requesting relief must establish in addition to conforming to the proper procedure. n5 However, once a movant has established federal jurisdiction for some claim, it is not necessary that the statute providing for federal jurisdiction provide for relief in the form of an injunction. The right to injunctive relief may be provided by a supplemental state-law claim. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 171 (3d Cir. 2009)* (injunction is equitable remedy which can be granted or withheld at district court's discretion).

(n3)Footnote 2. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* ; *Wheeling Pittsburgh Steel Corp. v. Mitsui & Co., 221 F.3d 924, 927 (6th Cir. 2000)* . For a compete discussion of federal court equity jurisdiction, see Ch. 5, *Original Jurisdiction of the Subject Matter.*

(n4)Footnote 3. *See Westar Energy, Inc. v. Lake, 552 F.3d 1215, 1224 (10th Cir. 2009)* .

(n5)Footnote 4. *Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n6)Footnote 5. *See McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997)* .

(n7)Footnote 1. *Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 173 L. Ed. 2d 550, 562 (2009)* ; *Gunn v. University Comm'n to End the War in Vietnam, 399 U.S. 383, 389, 90 S. Ct. 2013, 26 L. Ed. 2d 684 (1970)* ; *see also § 10A.42.*

(n8)Footnote 2. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004)* (prerequisites for extraordinary relief of preliminary injunction).

(n9)Footnote 3. *Illinois Bell Tel. Co. v. Worldcom Techs., Inc., 157 F.3d 500, 503 (7th Cir. 1998)* ; *see Lacassagne v. Chapuis, 144 U.S. 119, 124, 12 S. Ct. 659, 36 L. Ed. 368 (1892)* .

(n10)Footnote 4. *Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61, 95 S. Ct. 2069, 45 L. Ed. 2d 12 (1975)* .

(n11)Footnote 1. *United States v. Holy Land Found., 493 F.3d 469, 473 (5th Cir. 2007)* (Rule 65 provides specified procedural safeguards to adverse party before district court issues injunction or restraining order).

(n12)Footnote 2. *Matter of California Lumber Corp., 24 F.R.D. 190, 192 (S.D. Cal. 1959)* .

(n13)Footnote 3. *Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-319, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (substantive prerequisites for obtaining equitable remedy, as well as general availability of injunctive relief, are not altered by Rule 65 but depend on traditional principles of equity jurisdiction; therefore, court must determine whether relief requested by movant was traditionally accorded by courts of equity).

(n14)Footnote 4. *Arkansas Peace Ctr. v. Department of Pollution Control, 999 F.2d 1212, 1216-1219 (8th Cir. 1993)* ; *Citizens Concerned for Separation of Church & State v. Denver, 628 F.2d 1289, 1298-1299 (10th Cir. 1980)* , *cert. denied, 452 U.S. 963 (1981)* .

(n15)Footnote 5. *Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 961 (M.D. Fla. 1993)* .

(n16)Footnote 6. *See Tory v. Cochran, 544 U.S. 734, 737, 125 S. Ct. 2108, 161 L. Ed. 2d 1042 (2005)* (substantive California law controls effect of injunction); *People v. Terry, 45 F.3d 17, 23 (2d Cir. 1995)* (court could order injunctive remedy on independent state law grounds after claimant established jurisdiction under federal civil

rights statute).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.03

§ 10A.03 Purpose of Injunctionn*

[1] General Purpose of Injunctive Relief

The primary purpose of injunctive relief is to prevent future acts or omissions by the adverse party that constitute violations of the law or harmful conduct. n1 Therefore, if the wrongful act or omission has been permanently discontinued, the court must deny a motion for injunctive relief. n2 However, a defendant's discontinuance of the wrongful act or omission is not dispositive, and the court may order injunctive relief if there is a reasonable likelihood that the harmful conduct or omission will recur. n3 This means that the court will grant an injunction only when there is a cognizable probability of harm if the defendant is not enjoined from specified acts or omissions. n4 On the other hand, a court should deny injunctive relief if the movant demonstrates only a mere possibility of future injury. n5

In all cases, the purpose of an injunction is to prevent wrongs prospectively. n6 Although injunctive relief is commonly based on past wrongs, n7 an injunction may be granted even without a showing of past wrongs if the plaintiff can show it will imminently suffer actual harm from the defendant. n8 For example, the Supreme Court has held that injunctive relief was proper to protect a prison inmate from potentially serious injury, even though the inmate had not been harmed as of the time the injunctive relief was requested, because prison officials had knowingly and unreasonably failed to respond to previous risks of harm. n9

[2] Particular Purpose of Injunction Depends on Type

The purpose of an injunction depends on the type of injunction. For example, a "prohibitory injunction" preserves the status quo, while a "mandatory injunction" is much more extensive, in that it goes beyond simply maintaining status quo, and affirmatively orders a change in the parties' circumstances. n1 For a further discussion of the prohibitory and mandatory injunction, see *§ 10A.21[2]*.

The purpose of an injunction is also reflected in its duration. The shortest duration is the "temporary restraining order." Because it is issued even before the opposition has an opportunity to be heard, its purpose is to provide a remedy of limited duration, to preserve the status quo until the adverse party and the merits of a preliminary injunction can be heard. n2 For a further discussion of the purpose of the temporary restraining order, see *§ 10A.21[1]*.

The medium-length duration order is the "preliminary injunction." Its purpose is to prevent irreparable injury by preserving the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by maintaining the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, the court must alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties by the issuance of a mandatory injunction or by allowing the parties to take proposed action that the court finds will alleviate the irreparable injury. n3 For further discussion of the purpose of the preliminary injunction, see *§ 10A.22[1]*.

In contrast to a preliminary injunction, a "permanent injunction" is an injunctive order made on the merits that grants a party all the relief it ultimately may be entitled to and that makes no provision for further hearings on the matter. n4 For example, even though it was titled a "preliminary injunction," an order was actually a "permanent injunction" when the order was issued after the court had conducted three days of fact hearings and contemplated no additional proceedings on the injunctive matter, and when the only events which could modify or lift the order were compliance with its terms. n5 For a further discussion of the purpose of the permanent injunction, see *§ 10A.05[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *United States v. Oregon Med. Soc., 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)* ; *Ernst v. Rising, 427 F.3d 351, 380-381 (6th Cir. 2005)* .

(n3)Footnote 2. *Hempstead County Hunting Club, Inc. v. Southwestern Elec. Power Co., 558 F.3d 763, 767 (8th Cir. 2009)* .

(n4)Footnote 3. *SEC v. ETS Payphones, Inc., 408 F.3d 727, 733 (11th Cir. 2005)* (party moving for injunction has burden to establish that adverse party will likely violate laws in future).

(n5)Footnote 4. *United States v. Oregon Med. Soc., 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)* (injunctive relief requires real threat of violation that is likely to continue or occur).

(n6)Footnote 5. *Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 (11th Cir. 2007)* .

(n7)Footnote 6. *See Illinois Bell Tel. Co. v. Worldcom Techs., 157 F.3d 500, 503 (7th Cir. 1998)* .

(n8)Footnote 7. *SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994)* , *cert. denied, 514 U.S. 1011 (1995)* (injunction may be ordered when defendant's past unlawful conduct indicates reasonable likelihood of further unlawful conduct).

(n9)Footnote 8. *Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* ; *see United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)* (party moving for injunctive relief need not show past wrongs).

(n10)Footnote 9. *Farmer v. Brennan, 511 U.S. 825, 845-846, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (plaintiff was not required to wait until after occurrence of physical injury in order to obtain injunctive relief).

(n11)Footnote 1. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 114 (2d Cir. 2006)* .

(n12)Footnote 2. *Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 107 (2d Cir. 2009)* .

(n13)Footnote 3. *RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208-1211 (10th Cir. 2009)* .

(n14)Footnote 4. *Rathmann Group v. Tanenbaum, 889 F.2d 787, 790 (8th Cir. 1989)* .

(n15)Footnote 5. *In re Liberty Music & Video, Inc. 50 B.R. 379, 380 (S.D.N.Y. 1985)* .

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CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.04

§ 10A.04 Discretion of Court to Issue Injunctionn*

The court has discretion whether to grant or deny requested injunctive relief. The court must exercise its discretion by applying the principles of equity and the requirements for the type of injunction to the circumstances of each case. n1 Consequently, a federal court is not required to grant injunctive relief in every circumstance in which a requesting party has shown a violation of the law by the adverse party. n2 Furthermore, the consent of any or all parties to the injunctive relief does not require the court to grant injunctive relief. n3

The district court's weighing and balancing of the equities of a particular case maybe overruled only in the rarest of cases. n4 Such a decision may be overruled when the district court abuses its discretion. n5 Such an abuse of discretion occurs only if the district court relies on clearly erroneous findings of fact, improperly applies the governing law, or uses an erroneous legal standard. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. eBay *Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)* (equitable discretion applied by district court to determine request for permanent injunction).

(n3)Footnote 2. *Weinberger v. Romero Barcelo, 456 U.S. 305, 311-312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)* .

(n4)Footnote 3. *SKF USA, Inc. v. United States, 512 F.3d 1326, 1332 (Fed. Cir. 2008)* .

(n5)Footnote 4. *Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n6)Footnote 5. *Florida Ass'n of Rehabilitation Facilities, Inc. v. State of Florida Dep't of Health & Rehabilitative*

Services, 225 F.3d 1208, 1216 (11th Cir. 2000) .

(n7)Footnote 6. *Gonzales v. National Bd. of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000)* ; *see Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 230 (6th Cir. 2003)* (high degree of deference to the district court's decision owed only if district court properly understood pertinent law and applied it in defensible manner to facts as they appear in record).

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1-10A Moore's Manual--Federal Practice and Procedure § 10A.05

§ 10A.05 Types of Injunctive Reliefn*

[1] Based on Duration of Injunction

There are three types of injunctive orders based on the duration of the injunction and the stage of litigation when the court makes the injunctive order. n1 The first type of order is a temporary restraining order (TRO), which is an injunctive order of limited duration the court may use to grant an emergency motion to preserve the status quo pending a compete hearing on an application for preliminary injunctive relief. n2 The court may grant a TRO without notice to the adverse party or attorney if the specific facts show that the applicant for the TRO will suffer irreparable injury, loss, or damage before the adverse party or attorney can be heard in opposition. The specific facts supporting an application for a TRO must be established by affidavit or by verified complaint. n3 The court may grant a temporary restraining order to preserve the status quo only for a maximum duration of 14 days. n4 For a further discussion of temporary restraining orders, see *§ 10A.21*.

The second type of order based on the duration of the injunction is a "preliminary injunction," which is an injunction that the court issues to protect a plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. n5 The primary requirement for the court to order a preliminary injunction is a showing that the movant will suffer irreparable injury in the absence of the injunction; other necessary showings include that the movant is likely to succeed on the merits; that the injunction will not cause substantial harm to others; and that the injunction would serve the public interest. n6 For a complete discussion of the preliminary injunction, see *§ 10A.22*.

The third injunctive order based on the duration of the injunction is the "permanent injunction," which is an injunctive order that implements the final decision on the merits, grants a party all the relief it ultimately may be entitled to, and makes no provision for further hearings on the matter. n7 Therefore, once a court has rendered a decision on the merits of an action, the court may grant only a permanent injunction, and not a preliminary injunction. n8 For a complete discussion of permanent injunctions, see *§ 10A.23*.

[2] Based on Function of Injunction

There are several types of injunctions that are classified according to the function that the injunction serves. n1 A

"mandatory injunction" is one that affirmatively requires a party to perform a specific, positive act to remedy alleged harmful conduct, n2 either altering the status quo, n3 or restoring the status quo pending final adjudication. n4 In contrast to the mandatory injunction is the prohibitory injunction, which preserves or alters the status quo by proscribing conduct. n5 Thus, while a "mandatory injunction" commands performance of certain acts or mandates a specific course of conduct, n5.1 a "prohibitory injunction" forbids or restrains performance of certain acts. n6

The distinction between mandatory and prohibitory injunctions is important because a heightened standard is applied to mandatory injunctive relief. n7 In this regard, the court may require that a party moving for an injunction must meet a higher than normal standard to obtain relief if the request is for any of the following: n8 (1) a mandatory injunction, n9 (2) an injunction that would alter, rather than maintain, the status quo; n10 or (3) an injunction that provides the moving party all the relief that itcould recover at the conclusion of a full trial on the merits. n11 To meet this heightened standard the moving party must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. n12

A "provisional injunction" is one that is probationary in that it is not final or permanent but rather involves the supervision of changing conduct or conditions. n13 An injunction is also considered to be provisional if it is designed to preserve the subject matter pending a hearing on the merits. n14 Thus, under the Federal Rules of Civil Procedure, there are two types of "provisional injunctions" that a court may issue: n15 a temporary restraining order n16 and a preliminary injunction. n17

An "ancillary injunction" is an injunction used by a federal court to sustain its jurisdiction. n18 Under the All Writs Act, n19 for example, a court may order an ancillary injunction to prevent conduct that has been shown to undermine the court's jurisdiction. n20 A party may prosecute an action seeking injunctive relief to maintain a court's decree without reference to the citizenship or residence of the parties, because the suit is ancillary to the original proceeding and is supplementary to the decree rendered in the original court. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Lafreniere Park Foundation v. Broussard, 221 F.3d 804 (5th Cir. 2000)* ; *Capshaw v. Butte Cmty. Bank, 2009 U.S. Dist. LEXIS 49110, at *1-*2 (E.D. Cal. 2009)* .

(n3)Footnote 2. *See Belbacha v. Bush, 520 F.3d 452, 455 (D.C. Cir. 2008)* .

(n4)Footnote 3. *Fed. R. Civ. P. 65(b)(1)(A).*

(n5)Footnote 4. *Fed. R. Civ. P. 65(b)(2).*

(n6)Footnote 5. *Golden Gate Rest. Ass'n v. City of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008)* .

(n7)Footnote 6. *Frank Russell Co. v. Wellington Management Co., 154 F.3d 97, 101 (3d Cir. 1998)* ; *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997)* .

(n8)Footnote 7. *Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* (applicant entitled to permanent injunctive relief only after prevailing on merits).

(n9)Footnote 8. *Golden Gate Hotel v. City & County of San Francisco, 836 F. Supp. 707, 709 (N.D. Cal. 1993)* , *rev'd on other grounds, 18 F.3d 1482 (9th Cir. 1994)* (preliminary injunction is inappropriate after court grants summary judgment).

(n10)Footnote 1. *Andreiu v. Reno, 223 F.3d 1111 (9th Cir. 2000)* (dissent noting that there are affirmative, ex parte, final, interlocutory, mandatory, permanent, perpetual, preliminary, preventive, prohibitory, provisional, quia-timet, reparative, special, and temporary injunctions).

(n11)Footnote 2. *D.D. ex rel. V.D. v. New York City Bd. of Educ., 465 F.3d 503, 510 (2d Cir. 2006)* .

(n12)Footnote 3. *See Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008)* .

(n13)Footnote 4. *Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005)* .

(n14)Footnote 5. *O Centro Espirita Beneficiente Unaio do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004)* , *aff'd, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)* .

(n15)Footnote 5.1. *See Sanchez v. Esso Std. Oil Co., 572 F.3d 1, 20-21 (1st Cir. 2009)* (1st Cir. 2009) (one typical example of mandatory injunction is order to clean environmental damage).

(n16)Footnote 6. *Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 114 (2d Cir. 2006)* .

(n17)Footnote 7. *See Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001)* .

(n18)Footnote 8. *O Centro Espirita Beneficiente Unaio do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004)* , *aff'd, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)* .

(n19)Footnote 9. *D.D. v. N.Y. City Bd. of Educ., 465 F.3d 503, 510 (2d Cir. 2006)* .

(n20)Footnote 10. *See LGS Architects, Inc. v. Concordia Homes of Nev., 434 F.3d 1150, 1158 (9th Cir. 2006)* .

(n21)Footnote 11. *See Mastrovincenzo v. City of New York, 435 F.3d 78, 90 (2d Cir. 2006)* .

(n22)Footnote 12. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1071 (10th Cir. 2009)* .

(n23)Footnote 13. *United States v. Swift & Co., 286 U.S. 106, 114, 52 S. Ct. 460, 76 L. Ed. 999 (1932)* (provisional injunctions contrasted with permanent injunctions, which give protection to rights fully accrued on facts so nearly permanent as to be substantially impervious to change); *Hodge v. Department of Housing & Urban Dev., Housing Div., 862 F.2d 859, 864 (11th Cir. 1989)* (injunction intended to effect institutional reform by its terms required ongoing court supervision, and therefore was provisional; modification of such an inunction may be granted more freely).

(n24)Footnote 14. *See, e.g., Brown v. Gilmore, 533 U.S. 1301, 1303, 122 S. Ct. 1, 150 L. Ed. 2d 782 (2001)* (commenting on use of injunction pursuant to All Writs Act to prohibit enforcement of a presumptively valid state statute pending writ of certiorari).

(n25)Footnote 15. *See* [1], *above*.

(n26)Footnote 16. *Fed. R. Civ. P. 65(b)*.

(n27)Footnote 17. *Fed. R. Civ. P. 65(a)*.

(n28)Footnote 18. *See Ford Motor Co. v. United States, 405 U.S. 562, 572-578, 92 S. Ct. 1142, 31 L. Ed. 2d 492*

(1972) ; *In re Nine N. Church St., Inc., 82 F.2d 186, 188 (2d Cir. 1936)* .

(n29)Footnote 19. *28 U.S.C. § 1651(a).*

(n30)Footnote 20. *ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)* .

(n31)Footnote 21. *Root v. Woolworth, 150 U.S. 401, 413, 14 S. Ct. 136, 37 L. Ed. 1123 (1893)* .

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.06

§ 10A.06 Controlling Lawn*

[1] Injunctive Relief in Federal Question and Diversity Cases

When a federal court's jurisdiction is based on a federal question, both the substantive and procedural issues regarding injunctive relief are controlled by federal law. Thus, the substantive equitable question of whether injunctive relief is available depends on the federal common law and any applicable statutes. n1 Additionally, the procedural methods regarding motions and orders for injunctive relief, as well as procedural safeguards to protect adverse parties, are controlled by Rule 65. n2

On the other hand, in diversity jurisdiction cases, the *Erie* doctrine provides that for claims based on state law, the court must apply the same law that the forum state court would apply to all "substantive" issues in the case. n3 Injunctive relief is a substantive issue under the *Erie* doctrine and therefore governed by the forum state law, and not federal law. n4 This principle applies because the equitable powers of federal courts should not enable a party suing in diversity to obtain an injunction if state law clearly rejects the availability of that remedy. n5

However, even in diversity cases, "procedural" issues are controlled by the Federal Rules. n6 In particular, Rule 65 governs all procedural matters regarding requests for injunctions in federal court, because Rule 65 merely sets forth the methods for requesting injunctive relief and the court's order related to that relief. n7 Rule 65 does not itself control whether injunctive relief is available. n8

[2] Injunction Procedures in Particular Cases

[a] Employment Relationship Cases

The procedures specified in Rule 65 do not modify any statutory provisions of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. n1 Rule 65(e)(1) recognizes that Rule 65 and the other federal civil rules are subject to, and do not change the effect of, any federal labor statutes that prohibit the issuance of injunctive relief regarding concerted labor activity or coercive conduct between parties to a labor dispute. n2 However, Rule 65(e) does not prevent the federal courts from exercising their equitable jurisdiction to order injunctive relief merely because an action has some relation to labor or employment issues, provided the

injunction does not conflict with the labor statutes. n3 For example, a court may order injunctive relief related to arbitration of a labor agreement. n4 Similarly, a court would not prohibited from ordering an injunction related to conduct when that conduct is governed by a enforceable employment agreement or collective bargaining agreement. n5

[b] Interpleader Cases

Rule 65 and the other federal civil rules do not modify any procedures specified by statute for preliminary injunctions in actions of interpleader or in the nature of interpleader. n6 The statute provides that a district court may issue enter an order restraining interpleader claimants from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. The court may make all other appropriate orders to enforce its judgment, and has the discretion to make any injunction permanent. n7

Rule 65(e)(2) means that Rule 65 and the other federal civil rules may not constrain the powers of the judge as specified by the statute. For example, a preliminary injunction may be issued under *28 U.S.C. § 2361* at same time as summons is issued by district court without notice to putative defendants in action, despite the provisions of Rule 65. n9 However, the court may nevertheless apply ordinary equitable injunctive relief principles and the procedures in Rule 65 to the extent that they do not conflict with the statute. n9

[c] Three Judge Courts

Rule 65 and the other federal civil rules do not modify any procedures for preliminary injunctions in actions heard and decided by a district court of three judges. n10 The interpleader injunction statute provides that in such cases a single judge may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted. That temporary restraining order remains in force until the hearing and determination by the district court of three judges of an application for a preliminary injunction, unless the order is previously revoked by the district judge. A single judge may not appoint hear and determine any application for a preliminary or permanent injunction or motion to vacate an injunction. Any action of a single judge may be reviewed by the full court at any time before final judgment. n11

The effect of Rule 65(e)(3) is that, in his or her determination of a temporary restraining order in a three judge case, the single judge is not governed by the other provisions of Rule 65; n12 for example, under *28 U.S.C. § 2284*, security is not required for the single judge to grant a restraining order. n13 However, the single judge of a three judge court may nevertheless apply ordinary equitable injunctive relief principles and the procedures stated in Rule 65 to the extent that they do not conflict with *28 U.S.C. § 2284*. n14

[d] Copyright Impoundment

All of the provisions of Rule 65 apply to govern equitable relief claims in copyright impoundment proceedings. n15 In a "copyright impoundment" proceeding, the court hearing a pending copyright action determines whether to order transfer of possession of documentation and physical articles that can store the subject matter of a copyright, such as copies, phonorecords, tapes, or film, when the articles constitute the subject matter of an action for copyright infringement. n16 As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all such articles that the court has found to have been made or used in violation of the copyright owner's exclusive rights. n17

Rule 65(f) was added to replace the antiquated and inconsistent Copyright Rules of Practice that formerly applied to impoundment proceedings. Courts now proceed under Rule 65 whenever utilizing discretionary impoundment under Section 503. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice*, §§ 65.07, 65.70 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 967-968 (9th Cir. 1999)* .

(n3)Footnote 2. *See United States v. Holy Land Found., 493 F.3d 469, 473-474 (5th Cir. 2007)* .

(n4)Footnote 3. *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n5)Footnote 4. *Combs v. Shelter Mut. Ins. Co., 551 F.3d 991, 1002 (10th 2008)* (court must apply law of forum state in determining whether to grant mandatory injunctive relief in diversity cases).

(n6)Footnote 5. *Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988)* .

(n7)Footnote 6. *Walker v. Armco Steel Corp., 446 U.S. 740, 750, 100 S.Ct. 1978, 1985, 64 L. Ed. 2d 659 (1980)* .

(n8)Footnote 7. *Modern Computer Sys., Inc., v. Modern Banking Sys., Inc., 871 F.2d 734, 737 n.5 (8th Cir. 1989)* ; *Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988)* .

(n9)Footnote 8. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-319, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* .

(n10)Footnote 1. *Fed. R. Civ. P. 65(e)(1).*

(n11)Footnote 2. *See 29 U.S.C. §§ 101, 104, 107, 108* (specific requirements for issuance of injunction during labor dispute); *see also Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 246-247, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970)* (9 U.S.C. § 101 et seq. did not proscribe order of injunction against strike in violation of no strike obligation when grievance at issue was subject to adjustment under collective bargaining agreement).

(n12)Footnote 3. *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, 925 F.2d 6, 9 (1st Cir. 1991)* .

(n13)Footnote 4. *Lexington Childrens Ctr. v. Dist. Council 1707, AFSCME, 2004 U.S. Dist. LEXIS 4290, at *27 (S.D.N.Y. Mar. 17, 2004)* .

(n14)Footnote 5. *See Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 246-247, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970)* .

(n15)Footnote 6. *Fed. R. Civ. P. 65(e)(2)*; *see 28 U.S.C. § 2361.*

(n16)Footnote 7. *28 U.S.C. § 2361.*

(n17)Footnote 9. *See Star Ins. Co. v. Cedar Valley Express, LLC, 273 F. Supp. 2d 38, 42 (D.D.C. 2002)* .

(n18)Footnote 9. *Prudential Ins. Co. v. Shawver, 208 F. Supp. 464, 470 (W.D. Mo. 1962)* (equitable principles permitted restraining order even though procedures of Rule 65 were not necessarily applicable).

(n19)Footnote 10. *Fed. R. Civ. P. 65(e)(3)*; *see 28 U.S.C. § 2284*.

(n20)Footnote 11. *28 U.S.C. § 2284*.

(n21)Footnote 12. *See Morrill v. Weaver, 224 F. Supp. 2d 882, 887-888 (E.D. Pa. 2002)* .

(n22)Footnote 13. *Williamsport v. United States, 273 F. Supp. 899, 901 (M.D. Pa. 1967)* .

(n23)Footnote 14. *See Ann Arbor R. Co. v. United States, 358 F. Supp. 933, 935 (E.D. Pa. 1973)* .

(n24)Footnote 15. *Fed. R. Civ. P. 65(f)*.

(n25)Footnote 16. *17 U.S.C. § 503(a)(1)*; *see Epic Games, Inc. v. Altmeyer, 2008 U.S. Dist. LEXIS 89758, at *6-*12 (S.D. Ill. Nov. 5, 2008)* (application of Rule 65 provisions in proceedings to impound alleged pirated copies of DVDs of computer games).

(n26)Footnote 17. *17 U.S.C. § 503(b)*.

(n27)Footnote 18. *Fed. R. Civ. P. 65(f)*, Committee Note to 2001 Amendments; *see Pem America, Inc. v. Sunham Home Fashions, LLC, 2003 U.S. Dist. LEXIS 24801, at *6 n.2 (S.D.N.Y. Nov. 12, 2003)* (Rule 65(f) has replaced former Copyright Rule 4).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART I. NATURE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure §§ 10A.07through 10A.19

Reserved

§§ 10A.07Reserved

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART II. FACTORS THAT DETERMINE ISSUANCE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.20

§ 10A.20 General Considerations Related to Injunctive Reliefn*

[1] Subject Matter and Personal Jurisdiction

A court may order injunctive relief only if it has both subject matter jurisdiction and personal jurisdiction over the party or parties that will be subject to the injunction. n1 With respect to subject matter jurisdiction, a claim for injunctive relief must be based either on federal question jurisdiction n2 or diversity of citizenship jurisdiction. n3 Thus, Rule 65 merely sets forth the procedure for obtaining injunctive relief; it does not provide an independent basis for personal or subject matter jurisdiction. n4

Because of the equitable nature of injunctive relief, personal jurisdiction over a party, while always required, is not necessarily sufficient for the court to order an injunction. Thus, even if the court has personal jurisdiction over the defendant, it has discretion to refuse an application for injunctive relief if the injunction would affect conduct of persons or property rights outside of the court's jurisdiction. n5 Courts are generally reluctant to grant injunctive relief when the injunctive order could affect property rights in another jurisdiction. n6 Courts are also very reluctant to issue an injunction directed toward defendants before the court when the injunction would bind unidentified and non-party individuals. n7

[2] Exhaustion of Administrative Remedies

A court may not ordinarily grant a claim for injunctive relief until the claimant has exhausted other available remedies for the claim. n1 In particular, if a claimant seeks injunctive relief regarding administrative action or inaction, the claimant cannot obtain that relief until the claimant has exhausted any administrative remedies expressly prescribed by any statute or agency rule, and the agency action is final and therefore subject to judicial review. n2

The exhaustion doctrine is an expression of executive and administrative autonomy and is particularly applicable where the function of the agency and the particular decision sought to be reviewed involve the exercise of discretionary powers granted the agency by Congress or require application of special expertise. n3 On the other hand, exhaustion is not required if the subject matter of the injunctive request does not involve the decision of an administrative agency. Thus, it was held that exhaustion of administrative remedies was not required prior to an applicant's filing suit under the Administrative Procedure Act challenging an administrative agency's regulations as facially violative of Federal

Election Campaign Act, because the suit involved a question of law regarding the agency's power and not the agency decision itself. n4

Exhaustion is required whenever another remedy for the particular claim is clearly provided by statute or regulation. n5 On the other hand, when not clearly required by statute, the district court has discretion to award injunctive relief, even when a claimant has failed to exhaust administrative remedies. n6 Furthermore, the court may grant injunctive relief in the absence of exhaustion of a clear requirement to exhaust, n7 provided the applicant makes a clear showing of irreparable injury. n8

[3] Inadequacy of Remedy at Law

Because it is an equitable remedy, the court may not grant injunctive relief when an adequate remedy at law exists for the movant. n1 Conversely, if there exists an adequate remedy at law, the court may deny a request for injunctive relief. n2 For example, a court denied injunctive relief in one case where it concluded that the plaintiff was able to protect a potential money judgment by attaching the defendant's assets. n3 While an inadequate remedy at law is required for an injunction, it is only one factor in the equitable determination necessary for injunctive relief, and a movant will not be able to support a request for injunctive relief without showing the additional equitable factors. n4

The movant may show a lack of an adequate remedy at law by showing that alternative legal remedies, while available in theory, are difficult to measure or speculative. n5 An adequate remedy at law may also be deemed unavailable if the legal remedy could be recovered only through multiple, successive litigation claims, such as when the defendant repeatedly causes damages to the claimant. n6 Furthermore, a plaintiff may demonstrate a lack of an adequate remedy at law by showing that the awarding of damages by an alternative remedy may be insufficiently compensatory because of the type of harm caused by defendant's conduct. n7

One typical example of a an inadequate remedy at law is when a wrong causes damages to the claimant's reputation, credibility, or ability to continue its business viably. Such injuries to reputation are difficult to calculate, and, thus, money damages would be an inadequate remedy to compensate those injuries. n8

[4] Irreparable Injury

A claimant is entitled to injunctive relief only if the claimant can demonstrate to the court that the claimant would suffer irreparable injury in the absence of injunctive relief. An "irreparable injury" is harm to the claimant that the court would be unable to remedy even if the claimant prevailed on the merits in the final adjudication of the claim. n1 On the other hand, a court will deny injunctive relief if the harm alleged by the movant could be prevented or remedied by some other method. n2

It should be noted that irreparability is only one factor required for injunctive relief and a movant will not be able to obtain an injunction without showing the additional equitable factors. Thus, the moving party is also required to demonstrate that it has no adequate remedy at law, n3 and likelihood of success on the merits. n4 If the moving party can pass this threshold, the court will then consider any irreparable harm a preliminary injunction would cause to the nonmoving party, as well as the consequences to nonparties of granting or denying the requested relief. Then, sitting as would a court of equity, the court will weigh all of these factors on a sliding scale; thus, the more likely that the plaintiff will succeed on the merits, the less the balance of harms need favor the plaintiff. n5

[5] Probability of Future Violations

Because it is prospective only, n1 injunctive relief will not be granted unless the claimant shows that there is a reasonable likelihood that the claimant will prevail on the merits of the claim, and that the defending party's wrongful act or omission will occur in the future. n2 To determine the likelihood of future wrongdoing, the court should consider

whether: (1) the defendant's wrong was isolated or part of a pattern, (2) whether the wrong was flagrant and deliberate or merely technical in nature, and (3) whether the defendant's business or activities will present opportunities to violate the law in the future. n3 None of these three factors is determinative; rather, the district court should determine the propensity for future wrong based on the totality of circumstances. n4 The moving party need not allege a reasonable likelihood of future violations with the specificity required by Rule 9(b), because the moving party could not be expected to allege with particularity an offense which has not yet happened. n5

[6] Balancing of Hardships and Equities

In making the determination of whether to grant a request for injunctive relief, a court must balance the hardship and equities faced by the claimant against the hardship the defendant would incur if the relief were granted. n1 In general, the court should grant an injunction if the hardship experienced by the movant exceeds the hardship experienced by the defendant. n2 Conversely, if the plaintiff fails to demonstrate that it would experience more hardship than the defendant if the injunction were denied, the court must deny the application for injunctive relief. n3 This requirement has also been expressed by some courts as a "balancing of the equities." n4 In this regard, the court must consider all of the equitable factors; however, the factors are to be balanced against one another, and each alone should not be considered a prerequisite to the grant of an injunction. n5

In its determination of the balance of hardships between the plaintiff and the defendant, the court also must consider potential harm to non-parties. Also, in assessing whether or not a court should issue a preliminary injunction, the public interest is a factor for consideration. n6 For example, in a case in which judicial candidates brought an action alleging that an enforcement policy embodied in advisory opinions of a state judicial inquiry commission violated their *First Amendment* rights and should be enjoined, the court held that the public interest would not be thwarted by granting the preliminary injunction. Without reaching the merits of the action, the court found that the public interest was well served because the duly elected officials were not hindered from performing their duties by the allegedly unconstitutional law. n7

[7] Other Equitable Considerations

Injunctive relief is a remedy in equity. Consequently the court should consider all applicable factors that are ordinary applied in equitable determinations. Thus, all of the defenses that the courts traditionally apply in equity are relevant for the court to consider in a determination of a claim for injunctive relief. In the first example, a court must consider the factor of whether the party seeking an injunction has itself acted wrongfully and therefore violated the "clean hands doctrine." n1 Even if a plaintiff has demonstrated both irreparable injury and a likelihood of success on the merits, a court may deny injunctive relief based on the defense of unclean hands if the movant is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue. n2 However, the court will consider that a movant has violated the "clean hands doctrine," only if the non-movant indicates to the court that the movant's alleged act or acts of bad faith were directly related to the issue sought to be adjudicated in the underlying action. n3

In determining a request for injunctive relief, a court must apply the "clean hands doctrine" to the both the movant and the non-movant. n4 It should be noted that even if the non-movant demonstrates that the movant acted in bad faith or in violation of the clean hands doctrine, such a violation by itself is not dispositive in determining whether to grant injunctive relief, as the court must consider all of the equities. n5

In addition to the unclean hands doctrine, the court should consider in its injunctive relief determination any other applicable equitable principles, including laches, equitable estoppel, n6 waiver, and acquiescence. n7 To prevent a denial of injunctive relief based on laches, the claimant should have commenced its claim as soon as the claimant he or she had knowledge of the wrongful conduct or omission. n7.1 Any unreasonable delay in commencing the action may bar injunctive relief on the grounds of laches or acquiescence. n8 However, while unreasonable delay may constitute laches which could preclude injunctive relief, mere delay in itself does not automatically preclude injunctive relief, n9

because delay is just one of many equitable factors to consider. n10

[8] Security for Temporary Injunctive Relief

[a] Requirement of Security

Except when the movant is the United States, or its officers or its agencies, the court may not issue a preliminary injunction or a temporary restraining order unless the movant gives security in an amount that the court determines proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. n1 This provision means that the court must always consider whether the movant must give security, but it also means that the court has wide discretion as to whether it actually requires security in a given case, n2 and it has discretion as to the amount of security. n3 It is reversible error for a court to order injunctive relief if the court has not even considered the security requirement. n4 A party may move the court to increase or decrease the amount of security so long as the restraint or injunction is in effect. n5

The purpose of the security requirement is to guarantee payment of damages andcosts incurred by a party who is wrongfully enjoined or restrained. n6 A party is "wrongfully enjoined or restrained," and therefore entitled to recover on the bond under Rule 65(c), when it is ultimately decided that the party enjoined had a right to do what it was enjoined from doing. n7 Federal and not state law determines what "costs and damages" are recoverable under bonds given to secure a restraining order or preliminary injunction. n8 In this regard, attorney's fees are not considered costs and are not recoverable from the security bond. n9 The wronged party may, however, recover interest on the amount of the bond from the time of its posting. n10

[b] Amount of Security

The district court has considerable discretion to set the amount of the security. However, it is important that the court specify a sufficient security, because the security must ensure the enjoined party that it may readily collect damages in the event that it was wrongfully enjoined, without further litigation and without regard to the possible insolvency of the applicant. n11 It has been held that, when setting an amount of security for injunctive relief, the district court should err on the high side. The rationale for this rule is that an error in setting bond too high is not serious, because the fee to post bond is usually a fraction of amount of the bond and because any recovery on the bond has to be supported by proof of actual damages. On the other hand, an error on the low side may produce irreparable injury, because the damages for erroneous preliminary injunction are limited to amount of bond. n12 For purposes of notification, and of facilitation of appellate review, circuit courts generally require that the district court explain its calculation of the security amount. n13

[c] Excuse From Security Requirements

A district court that issues a restraining or a preliminary injunction has the discretion to dispense with the security requirement of Rule 65(c) in extraordinary circumstances. n14 For example, the court may excuse the plaintiff from the requirement to post a bond or undertaking as a condition for the issuance of the preliminary injunction if the court finds that the defendants are unlikely to suffer any monetary damages as a result of the issuance of the injunction. n15 Other courts have stated they will not require security if a party lacks the financial resources to post a bond or if the bond requirement might discourage the initiation of a suit to enforce an important public interest. n16

In making its decision regarding security, the court may balance the potential hardships to the parties. n17 The court may also waive the posting of security when the party seeking injunctive relief has great wealth and therefore would be able to pay damages to a party later found to be wrongfully enjoined or restrained. n18 Another circuit has held that a district court has discretion to waive the security requirement if the injunctive order is issued to aid and preserve the court's jurisdiction over the subject matter involved. n19 Finally, the United States and its officers and agencies are exempt from the security requirement. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Smith v. Woosley, 399 F.3d 428, 433 (2d Cir. 2005)* .

(n3)Footnote 2. *Ma v. Rice, 2009 U.S. Dist. LEXIS 29404, at *9-*10 (E.D. Mich. Jan. 22, 2009)* (federal question must be presented on face of complaint for injunctive relief).

(n4)Footnote 3. *Advance Am. Servicing of Ark., Inc. v. McGinnis, 526 F.3d 1170, 1173 (8th Cir. 2008)* (amount in controversy determined by value of restraining order or injunction to claimant).

(n5)Footnote 4. *Univ. Gardens Apts. Joint Venture v. Johnson, 419 F. Supp. 2d 733, 742 (D. Md. 2006)* .

(n6)Footnote 5. *Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir 1956)* (injunctive relief seeking to prohibit conduct outside of court's jurisdiction should be exercised with great reluctance).

(n7)Footnote 6. *Reebok Int'l, Ltd. v. Marnatech Enters., Inc., 737 F. Supp. 1515, 1519-1521 (S.D. Cal. 1989)* .

(n8)Footnote 7. *Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1342 (11th Cir. 1999)* ; *see Fed. R. Civ. P. 65(d)* (orders granting injunctive relief may bind only parties to action, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice).

(n9)Footnote 1. *Irizarry v. United States, 427 F.3d 76, 79-80 (1st Cir. 2005)* .

(n10)Footnote 2. *Munsell v. Dep't of Agric., 509 F.3d 572, 579 (D.C. Cir. 2007)* ; *see Woodford v. Ngo, 548 U.S. 81, 88-89, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)* .

(n11)Footnote 3. *McKart v. United States, 395 U.S. 185, 194, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)* .

(n12)Footnote 4. *Becker v. Federal Election Comm'n, 112 F. Supp. 2d 172, 176-177 (D. Mass. 2000)* .

(n13)Footnote 5. *Woodford v. Ngo, 548 U.S. 81, 88-89, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)* .

(n14)Footnote 6. *Porter v. Nussle, 534 U.S. 516, 523, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002)* (exhaustion of state administrative remedies is not prerequisite to order of injunctive relief against state officer in civil rights action under *42 U.S.C. § 1983*).

(n15)Footnote 7. *See Woodford v. Ngo, 548 U.S. 81, 89, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)* .

(n16)Footnote 8. *Sampson v. Murray, 415 U.S. 61, 83-84, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* .

(n17)Footnote 1. *Northern Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306, 105 S. Ct. 459, 83 L. Ed. 2d 388 (1984)* ; *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132, 137-138 (3d Cir. 2000)* (dissipation of trust assets could render money damages inadequate).

(n18)Footnote 2. *Sibley v. Lando, 437 F.3d 1067, 1073-1074 (11th Cir. 2005)* .

(n19)Footnote 3. *Rosen v. Cascade Int'l, Inc., 21 F.3d 1520, 1530 (11th Cir. 1994)* (injunctive relief was not proper when plaintiff was permitted to attach defendant's assets).

(n20)Footnote 4. *Pulliam v. Allen, 466 U.S. 522, 537, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984)* (to obtain injunctive relief, plaintiff must show both inadequacy of legal remedies and risk of irreparable injury).

(n21)Footnote 5. *Broadcom Corp. v. Qualcomm, Inc., 543 F.3d 683, 702 (Fed. Cir. 2008)* (lost profits immeasurable when competition was based on "design wins," rather than sales on a unit by unit basis).

(n22)Footnote 6. *B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc., 516 F.3d 18, 25 (1st Cir. 2008)* (damages based on recurring nature of breach).

(n23)Footnote 7. *AMTRAK v. Caln Twp., 2009 U.S. Dist. LEXIS 20239, at *26-*29 (E.D. Pa. Mar. 12, 2009)* (recovery of damages by entity would not compensate for threat of fines to entity's employees).

(n24)Footnote 8. *BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 263 (3d Cir. 2000)* (if competitor's business operation was allowed to operate in violation of plaintiff's intellectual property trade-secret rights, it would cause damage because of public perception that plaintiff was unable to protect its proprietary trade secrets).

(n25)Footnote 1. *See Phelps Roper v. Nixon, 545 F.3d 685, 694 (8th Cir. 2008)* .

(n26)Footnote 2. *See Dresser Rand Co. v. Virtual Automation, Inc., 361 F.3d 831, 848 (5th Cir. Tex. 2004)* .

(n27)Footnote 3. *See* [3], above.

(n28)Footnote 4. *See* [5], *below*.

(n29)Footnote 5. *Eli Lilly & Co. v. Natural Answers, Inc., 2000 U.S. App. LEXIS 29547, *6-*7 (7th Cir. 2000)* .

(n30)Footnote 1. *Illinois Bell Tel. Co. v. Worldcom Techs., 157 F.3d 500, 503 (7th Cir. 1998)* .

(n31)Footnote 2. *Sierra Club v. Franklin County Power of Ill., LLC, 546 F.3d 918, 935 (7th Cir. 2008)* ; *Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 (11th Cir. 2007)* .

(n32)Footnote 3. *United States v. Project on Gov't Oversight, 572 F. Supp. 2d 73, 79 (D.D.C. 2008)* .

(n33)Footnote 4. *SEC v. First City Financial Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989)* .

(n34)Footnote 5. *See United States v. Philip Morris, Inc, 116 F. Supp. 2d 131, 149 (D.D.C. 2000)* .

(n35)Footnote 1. eBay *Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)* .

(n36)Footnote 2. *See Winter v. NRDC, Inc., -- U.S. --, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261 (2008)* (court determines whether equities balance in favor of claimant).

(n37)Footnote 3. *Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545-546, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* .

(n38)Footnote 4. *SG Cowen Securities Corp. v. Messih, 224 F.3d 79, (2d Cir. 2000)* .

(n39)Footnote 5. *Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n40)Footnote 6. *See Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261-263 (2008)* .

(n41)Footnote 7. *Pittman v. Cole, 117 F. Supp. 2d 1285 (S.D. Ala. 2000)* .

(n42)Footnote 1. *Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 436 (2d Cir. 2004)* ; *Petro Franchise Sys., LLC v. All Am. Props., Inc., 2009 U.S. Dist. LEXIS 38145, at *46 (W.D. Tex. Mar. 23, 2009)* .

(n43)Footnote 2. *Estate of Lennon v. Screen Creations, Ltd., 939 F. Supp. 287, 293 (S.D.N.Y. 1996)* .

(n44)Footnote 3. *Jeffries v. Harleston, 828 F. Supp. 1066, 1096 (S.D.N.Y. 1993)* , *vacated on other grounds, 513 U.S. 996 (1994)* .

(n45)Footnote 4. *Duggal v. Krishna, 554 F. Supp. 1043, 1047 (D.D.C. 1983)* .

(n46)Footnote 5. *Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985)* .

(n47)Footnote 6. *Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 494 (6th Cir. 2007)* (one requirement of estoppel is that claimant must have used conduct or language to make representation of material fact, and that party asserting estoppel must have detrimentally and justifiably relied on representation).

(n48)Footnote 7. *Info. Superhighway, Inc. v. Talk Am., Inc., 274 F. Supp. 2d 466, 472 (S.D.N.Y. 2003)* (acquiescence may be implied by active consent, which is conduct on claimant's part which amounts to assurance to other person that claimant would not assert rights against that person).

(n49)Footnote 7.1. *Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007)* (serious delay in raising claim may impact balancing of equities in determining whether injunction should be granted).

(n50)Footnote 8. *Central Point Software, Inc. v. Global Software & Accessories, Inc., 859 F. Supp. 640, 645 (E.D.N.Y. 1994)* .

(n51)Footnote 9. *Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533, 535-536 (2003)* (delay may be considered in multi factored analysis of whether injunctive relief is warranted, based on application of laches and all other equitable doctrines).

(n52)Footnote 10. *Members of Bridgeport Hous. Auth. Police Force v. Bridgeport, 646 F.2d 55, 63 (2d Cir. 1981)* (four-year delay in commencing action did not constitute laches when delay did not prejudice defendant).

(n53)Footnote 1. *Fed. R. Civ. P. 65(c).*

(n54)Footnote 2. *RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1215 (10th Cir. 2009)* .

(n55)Footnote 3. *See* [b], *below.*

(n56)Footnote 4. *Corning, Inc. v. PicVue Elecs., Ltd., 365 F.3d 156, 158 (2d Cir. 2004)* .

(n57)Footnote 5. *Continuum Co. v. Incepts, Inc., 873 F.2d 801, 804 (5th Cir. 1989)* .

(n58)Footnote 6. *Blumenthal v. Merrill Lynch, 910 F.2d 1049, 1055-1056 (2d Cir. 1990)* (former employees who were fully vindicated on central issue in arbitration dispute were entitled to damages shown to have been proximately caused by preliminary injunction and such damages were allowable up to limit of bond).

(n59)Footnote 7. *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* (when enjoined party ultimately prevailed in copyright infringement litigation, recovery on security bond was appropriate).

(n60)Footnote 8. *Fireman's Fund Ins. Co. v. S.E.K. Constr. Co., 436 F.2d 1345, 1351 (10th Cir. 1971)* .

(n61)Footnote 9. *Matek v. Murat, 862 F.2d 720, 734 (9th Cir. 1988)* .

(n62)Footnote 10. *Silvers v. TTC Indus., Inc., 395 F. Supp. 1318, 1322 (E.D. Tenn. 1974)* , *aff'd on other grounds, 513 F.2d 632 (6th Cir. 1975)* .

(n63)Footnote 11. *Nichols v. Alcatel USA, Inc., 532 F.3d 364, 379 (5th Cir. 2008)* (amount of security also provides movant with notice of maximum extent of its potential liability for wrongful injunction).

(n64)Footnote 12. *Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 888 (7th Cir. 2000)* .

(n65)Footnote 13. *See Gateway E. Ry. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1141 (7th Cir. 1994)* ; *see, e.g., Beth Medrash Eeyun Hatalmud v. Spellings, 505 F.3d 139, 142 (2d Cir. 2007)* .

(n66)Footnote 14. *Coquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461, 1462 (10th Cir. 1987)* .

(n67)Footnote 15. *Service Employee Int'l Union v. Los Angeles, 114 F. Supp. 2d 966, 975 (C.D. Cal 2000)* .

(n68)Footnote 16. *Crowley v. Furniture & Piano Moving, Furniture Store Drivers, etc., 679 F.2d 978, 1000 (1st Cir. 1982)* , *rev'd on other grounds, 467 U.S. 526 (1984)* .

(n69)Footnote 17. *Temple Univ. v. White, 941 F.2d 201, 219-220 (3d Cir. 1991)* .

(n70)Footnote 18. *Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782-783 (10th Cir. 1964)* .

(n71)Footnote 19. *Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 136 (2d Cir. 1997)* (injunction issued to stay prosecution of parallel state suits in order to effectuate order compelling arbitration).

(n72)Footnote 20. *Fed. R. Civ. P. 65(c)*; *see 28 U.S.C. § 2408*; *Squaxin Island Tribe v. Washington, 781 F.2d 715, 723-724 (9th Cir. 1986)* .

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART II. FACTORS THAT DETERMINE ISSUANCE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.21

§ 10A.21 Particular Considerations for Temporary Restraining Ordern*

[1] Purpose of Order

A "temporary restraining order" is an order that the court has discretion to use to preserve the status quo until the time the court can hear and determine a motion for a preliminary injunction, provided that the moving party establishes that it may suffer irreparable injury before the court can hear the motion. n1 The court may issue a temporary restraining order if it clearly appears from specific facts shown that the applicant for the order will suffer irreparable injury, loss, or damage before the adverse party or that party's attorney can be heard in opposition. n2 The court may grant a temporary restraining order without written or oral notice to the adverse party or that party's attorney, provided the TRO is based on specific facts shown by affidavit or by the verified complaint, n3 and the moving party's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. n4 A temporary restraining order is an extraordinary remedy n5 that differs from a preliminary injunction in terms of duration, procedural requirements, and appealability. n6 A court that decides to grant a temporary restraining order must fix the duration of the order, not to exceed 14 days. However, a court may extend the temporary restraining order for an additional 14 days for good cause shown or the temporary restraining order may be extended by consent of the restrained party. n7 On the other hand, a preliminary injunction typically is ordered to remain in effect until a final determination on the merits of the claim. n8

[2] Order Generally Requires Notice and Hearing

The court has the option to issue a temporary restraining order without notice to a nonmoving party if certain rigid requirements are met by the moving party. However, when those requirements are not met, the court must require notice and a hearing for the nonmoving party before issuing a temporary restraining order. n1 The circumstances justifying the issuance of an ex parte temporary restraining order are extremely limited. Under federal law, ex parte temporary restraining orders should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer. n2 n3 One example of a situation in which notice is not required is when the non-movant is unidentifiable or cannot be found for purposes of giving notice. n4 However, if the location of the non-movant is known and service may be effected, and the movant fails to demonstrate an immediate injury that renders service impractical, the court will deny a request for an ex parte temporary restraining order. n5

[3] Factors Considered in Ruling on Motion for Temporary Restraining Order

[a] Trial Court's Discretion

The trial court has considerable discretion whether to grant an application for a temporary restraining order. n1 It should also be noted that the degree of discretion is so great that the decision on the TRO does not affect a subsequent decision on a preliminary injunction. Thus, the grant or denial of a temporary restraining order does not preclude the grant or denial of relief on a subsequent motion for a preliminary injunction. n2

The factors that a court must consider in its determination whether to grant a request for a temporary restraining order are substantially similar to the factors considered by the court in determining the merits of a motion for a preliminary injunction. n3 Thus, in determining whether to grant a temporary restraining order, the court must consider whether: n4 (1) there is a strong likelihood of success on the merits by the moving party; (2) irreparable injury would be suffered by the moving party if the relief is not granted; (3) that the threatened injury to the moving party outweighs the harm the relief would inflict on the non moving party; and (4) that entry of the relief would serve the public interest.

Each of these factors is *not* a prerequisite that must be met. Rather, the factors are interrelated considerations that the court must balance together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the moving party will suffer absent the grant of the TRO. n5

[b] Movant's Likelihood of Success on Merits

To make the determination of whether to grant or deny a motion for a temporary restraining order, the court must consider the movant's likelihood of success on the merits of the action. n6 If a movant demonstrates a likelihood of success, the court will weigh that factor in favor of granting a temporary restraining order. n7 On the other hand, if the court finds that a movant is unlikely to prevail on the merits, it will weigh against the granting of a temporary restraining order. n8 In some cases, when the alleged anticipated injury would be severe, the movant need not demonstrate such a high likelihood of success on the merits. n9

[c] Irreparable and Immediate Injury

In making a determination of whether to grant or deny an application for a temporary restraining order, the court must consider whether the movant is facing irreparable injury, and a finding by the court that the risk of irreparable injury is great weighs in favor of granting a temporary restraining order. n10 On the other hand, a finding that the movant does not face irreparable injury will weigh against granting a temporary restraining order. n11 Additionally, if the order is to be issued ex parte, the threatened harm must be immediate. n12

[d] Balance of Hardships Caused by Order

In its assessment, a court must balance the hardships that the grant of a temporary restraining order would impose on the parties. n13 If the harm experienced by the movant would be greater than the harm experienced by the non-movant if no action is taken, that determination will weigh in favor of granting a temporary restraining order. n14 By contrast, if the harm faced by the non-movant would be greater if no action is taken, that determination will weigh against granting a temporary restraining order. n15

[e] Impact of Order on Public Interest

In making its determination on a motion for a temporary restraining order, the court must consider the effect of its ruling on the public interest. n16

This "public interest" factor allows the court to take into account broad observations about conduct that is generally

recognizable as costly or injurious, in contrast to favorable conduct. Furthermore, the court may utilize more precise considerations such as the purposes and interests of any underlying legislative intent, a preference for enjoining inequitable conduct, and the public's interest in minimizing unnecessary expenses that must be paid with public funds. n18

[f] Inadequacy of Remedy at Law

As another factor in making the determination of whether to grant or deny a motion for a temporary restraining order, the court must consider any other applicable equitable principle, n19 including whether the movant has a legal remedy at law. n20 If the movant appears to have alternative legal remedies available to redress its legal grievance, that factor weighs against the request for a temporary restraining order. n21

[4] Grant of Temporary Restraining Order Without Notice

[a] Requirements for Ex Parte Order

The court may grant a temporary restraining order without notice to the adverse party or its counsel under specified exigent circumstances. Before the court may order such an ex parte TRO without notice, the movant must demonstrate to the court by specific facts in an affidavit or a verified complaint that the applicant will suffer immediate and irreparable injury, loss, or damage before the adverse party or the adverse party's attorney may be heard in opposition. n1 If the movant fails to demonstrate immediate and irreparable injury, the court must deny the motion for a temporary restraining order. n2 Additionally, the movant must demonstrate to the court that efforts have been made to provide notice to the non-movant or that the circumstances underlying the request for a temporary restraining order justify granting the order without providing notice to the non-movant. n3 Because an ex parte temporary restraining order provides an exception to the general principle that a court must give notice and an opportunity to be heard to both sides before making an order in a dispute, n4 the requirements of Rule 65(b)(1) must be strictly followed. n5

A party may apply for an ex parte temporary restraining order either by verified complaint or by motion. n6 Furthermore, the application for an ex parte temporary restraining order must disclose facts sufficient to prove that the applicant will suffer immediate and irreparable damage before notice can be served, or the application will be denied. n7

[b] Contents of Ex Parte Order

If the court grants a temporary restraining order without notice, the TRO must state the date and hour of issuance, must be filed in the clerk's office and entered of record, must define the injury and state why it is irreparable, and must state why the order was granted without notice. The court order must also state the duration of a temporary restraining order granted without notice, which may not exceed 14 days. n8 If the order does not state an expiration date, the TRO automatically expires 14 days after entry by the clerk. n9

[c] Extension of Duration of Ex Parte Order

The initial duration of a TRO may be up to 14 days, as specified by the court. However, for good cause shown within the time specified in the initial order, the court may extend the duration for up to 14 additional days. The court must enter the reasons for the extension on the record. An extension may be granted for a longer period if the party against whom the order is directed consents to the extension. n10 However, courts generally are reluctant to grant more than one extension to the initial 14 day period, except by consent of the parties, n11 and therefore most temporary restraining orders will be limited to 28 days. n12

If a temporary restraining order would remain in effect beyond 14 days, it may be deemed a preliminary injunction for purposes of its appealability. This is because one of the primary distinctions between a TRO and a preliminary

injunction is the limited duration of the TRO. n13 It is also clear that an order granting a preliminary injunction is immediately appealable, while an order granting a TRO is not. n14 Nevertheless, a district court has the power to continue a temporary restraining order for the purpose of reserving its decision on a motion for a preliminary injunction. n15

[d] Ex Parte Order Requires Expeditious Hearing on Preliminary Injunction

The purpose of a TRO is for the court to maintain the status quo while it has a decision on a preliminary injunction under consideration. n16 Because an the issuance of an ex parte TRO is a curtailment of the due process normally accorded a party, when a TRO is granted ex party without notice, the motion for a preliminary injunction must be scheduled for hearing at the earliest possible time, and the scheduling of the motion on the preliminary injunction takes precedence over all matters except older matters of the same character. n17 Furthermore, at the preliminary injunction hearing, the party who obtained the temporary restraining order must proceed with the application for a preliminary injunction and, if the party does not proceed, the court must dissolve the temporary restraining order at that time. n18

[5] Modification or Dissolution of Temporary Restraining Orders

A party that is the subject of a temporary restraining order may appear before the court and move for dissolution or modification of the TRO on two days' notice, or on any shorter notice that the court specifies, to the party who obtained the temporary restraining order. The court must promptly hear and determine the motion to modify or dissolve a TRO. n1 Because a TRO is always based on changing and temporary conditions or circumstances, the issuing court may modify the injunctive relief to reflect such changing events. n2 A modification or dissolution may be granted if the restrained party establishes to the court's satisfaction that the circumstances of the case have changed or that it would be severely injured by the injunctive relief. n3

If the restrained party is able to demonstrate to the court that circumstances have changed so that there is no need for a temporary restraining order or that the movant abused the court's order by seeking an unnecessary extension, the court may dissolve the order. n4 The determination of the court in assessing whether to modify an injunctive order is whether the original purpose of the injunctive relief would be furthered. n5 Furthermore, a court may modify or dissolve an order if the underlying law supporting the original injunction was amended or repealed. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.30 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 107 (2d Cir. 2009)* ; *Chi. United Indus. v. City of Chi., 445 F.3d 940, 942-944 (7th Cir. 2007)* .

(n3)Footnote 2. *Fed. R. Civ. P. 65(b)(1),(2).*

(n4)Footnote 3. *Fed. R. Civ. P. 65(b)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 15(b)(1)(B).*

(n6)Footnote 5. *Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634, 637 (4th Cir. 1999)* (TRO is extraordinary remedy involving exercise of far reaching power that may be applied only in limited circumstances which clearly demand it); *Home Line Furniture Indus., Inc. v. Banner Retail Mktg., LLC, 631 F. Supp. 2d 628, 632 (E.D. Pa. 2009)*

(TRO is extraordinary remedy to be granted only in limited circumstances).

(n7)Footnote 6. *Cathedral Rock of North College Hill, Inc. v. Shalala, 223 F.3d 354, 362 (6th Cir. 2000)* .

(n8)Footnote 7. *Fed. R. Civ. P. 15(b)(2).*

(n9)Footnote 8. *See Cathedral Rock of North College Hill, Inc. v. Shalala, 223 F.3d 354, 362 (6th Cir. 2000)* ; *Bear, Stearns & Co. v. Sharon, 550 F. Supp. 2d 174, 175-176 (D. Mass. 2007)* ; *see also Fed. R. Civ. P. 15(a)(2).*

(n10)Footnote 1. *See Fed. R. Civ. P. 65(b)(1),(2)*; *see also* [4], *below.*

(n11)Footnote 2. *Reno Air Racing Ass'n v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006)* .

(n12)Footnote 3. [RESERVED]

(n13)Footnote 4. *First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 650 (6th Cir. 1993)* (normal circumstance for which district court would be justified in proceeding ex parte is where notice at that time to adverse party is impossible, as in case where adverse party is unknown or is unable to be found).

(n14)Footnote 5. *American Can Co. v. Mansukhani, 742 F.2d 314, 321-322 (7th Cir. 1984)* (district court erred in granting ex parte temporary restraining order when identity of adverse party was known and time was not crucial factor).

(n15)Footnote 1. *Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2d Cir. 1994)* ; *Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)* (trial court's decision may be overturned only for abuse of discretion, which is defined as definite and firm conviction that trial court committed clear error of judgment).

(n16)Footnote 2. *Interox Am. v. PPG Indus., Inc., 736 F.2d 194, 198 (5th Cir. 1984)* (temporary restraining order was granted, preliminary injunction was denied).

(n17)Footnote 3. *See Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006)* ; *see also* Baker Elec. Co op. v. *Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994)* (primary distinctions between TRO and preliminary injunction are 10-day (now 14-day) maximum duration of TRO and fact that order granting preliminary injunction is immediately appealable, while TRO is not).

(n18)Footnote 4. *Summit County Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 550 (6th Cir. 2009)* .

(n19)Footnote 5. *Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-1226 (11th Cir. 2005)* .

(n20)Footnote 6. *Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir. 1995)* , *cert. denied, 517 U.S. 1135 (1996)* .

(n21)Footnote 7. *Kansas Hosp. Ass'n v. Whiteman, 835 F. Supp. 1548, 1553-1554 (D. Kan. 1993)* (movant seeking to enjoin increase in medicaid co-pay fee demonstrated likelihood of success on merits).

(n22)Footnote 8. *D.J. Miller & Assocs., Inc. v. Ohio Dep't of Administrative Services, 115 F. Supp. 2d 872, 882-883 (S.D. Ohio 2000)* (minority-owned business that established likelihood of success on merits on its civil rights claim arising from alleged unlawful termination of its contract with state agency was entitled to temporary restraining order barring award of contract to other individual or entity); *Mayo v. United States Govt. Printing Office, 839 F. Supp. 697, 700 (N.D. Cal. 1992)* , *aff'd on other grounds, 9 F.3d 1450 (9th Cir. 1993)* (movant requesting restraint against conduct of Government Printing Office failed to demonstrate likelihood of success on merits).

(n23)Footnote 9. *Towers Financial Corp. v. Dunn & Bradstreet, Inc., 803 F. Supp. 820, 823 (S.D.N.Y. 1992)* .

(n24)Footnote 10. *United States v. Jenkins, 974 F.2d 32, 35 (5th Cir. 1992)* , *cert. denied, 507 U.S. 985 (1993)* .

(n25)Footnote 11. *Berman v. Lamer, 874 F. Supp. 102, 106 (E.D. Pa. 1995)* .

(n26)Footnote 12. *Fed. R. Civ. P. 65(b)*; *Gullo Produce Co. v. A.C. Jordan Produce Co., 751 F. Supp. 64, 67 (W.D. Pa.1990)* .

(n27)Footnote 13. *National Football League Players Ass'n v. Pro-Football, 849 F. Supp. 1, 1-2 (D.D.C. 1993)* (court denied temporary restraining order in case after considering that loss to football league would outweigh harm to union); *ZAS Int'l Agric., B.V. v. ZAS USA, Inc., 1998 U.S. Dist. LEXIS 12330, *3 (E.D. Pa. 1998)* (denying plaintiff's request for an ex parte temporary restraining order because court was unwilling to effectively close down defendants' businesses and endanger existing trust assets absent specific showing that assets were actually threatened with dissipation).

(n28)Footnote 14. *D.J. Miller & Assocs., Inc. v. Ohio Dep't of Administrative Services, 115 F. Supp. 2d 872, 882-883 (S.D. Ohio 2000)* (district court held that: potential harm to minority-owned business if state awarded contract to another individual outweighed any delay that state might experience while court made its determination on merits); *Heather K. v. City of Mallard, 887 F. Supp. 1249, 1260-1261 (N.D. Iowa 1995)* (balance of equities favored movant seeking to enjoin municipality from burning waste).

(n29)Footnote 15. *National Football League Players Ass'n v. Pro-Football, 849 F. Supp. 1, 2 (D.D.C. 1993)* .

(n30)Footnote 16. *Goshen Rd. Envt'l. Action v. United States Dept. of Agric., 891 F. Supp. 1126, 1132 (E.D.N.C. 1995)* .

(n31)Footnote 18. *Wachovia Sec., L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1048 (N.D. Iowa 2008)* .

(n32)Footnote 19. *See Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n33)Footnote 20. *See Our Co. v. Eagle Snacks, Inc., 812 F. Supp. 6, 7-8 (D. Me. 1993)* .

(n34)Footnote 21. *Our Co. v. Eagle Snacks, Inc., 812 F. Supp. 6, 7-8 (D. Me. 1993)* (TRO inappropriate when alleged injuries could be remedied by award of money damages).

(n35)Footnote 1. *Fed. R. Civ. P. 65(b)(1)(A)*.

(n36)Footnote 2. *Belgard v. Hawaii, 883 F. Supp. 510, 517 (D. Haw. 1995)* (inmate failed to demonstrate immediate and irreparable injury of denial of constitutional right to exercise religious beliefs, warranting denial of request for temporary restraining order).

(n37)Footnote 3. *Fed. R. Civ. P. 65(b)(1)(B)*.

(n38)Footnote 4. *United States v. Kaley, 579 F.3d 1246, 1264 (11th Cir. 2009)* .]

(n39)Footnote 5. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (noting stringent restrictions imposed by Rule 65 on availability of ex parte temporary restraining orders).]

(n40)Footnote 6. *Fed. R. Civ. P. 65(b)(1)(A)*; *In re President of Georgetown College, 331 F.2d 1000, 1001 n.2 (D.C. Cir. 1964)* .

(n41)Footnote 7. *Fed. R. Civ. P. 65(b)(1)(A)*; *Sampson v. Murray, 415 U.S. 61, 91-92, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* .

(n42)Footnote 8. *Fed. R. Civ. P. 65(b)(2)*.

(n43)Footnote 9. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 425-428, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (construing former time periods).

(n44)Footnote 10. *Fed. R. Civ. P. 65(b)(2)*.

(n45)Footnote 11. *See R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 6 (1st Cir. 2009)* (construing former time periods).

(n46)Footnote 12. *See Fed. R. Civ. P. 65(b)(2)* (court may extend for "like period").

(n47)Footnote 13. *AT&T Broadband v. Tech Communs., Inc., 381 F.3d 1309, 1314 (11th Cir. 2004)* .

(n48)Footnote 14. *Baker Elec. Co-op. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994)* .

(n49)Footnote 15. *SEC v. Unifund SAL, 910 F.2d 1028, 1034 (2d Cir. 1990)* (district court is not prevented from continuing temporary restraining order while reserving decision on motion for preliminary injunction).

(n50)Footnote 16. *Chi. United Indus. v. City of Chi., 445 F.3d 940, 942-944 (7th Cir. 2007)* .

(n51)Footnote 17. *Fed. R. Civ. P. 65(b)(3)*.

(n52)Footnote 18. *Fed. R. Civ. P. 65(b)(3)*; *see Hudson v. Barr, 3 F.3d 970, 975-976 (6th Cir. 1993)* (any delay in holding hearing to determine merits of motion for preliminary injunction requires dissolution of temporary restraining order).

(n53)Footnote 1. *Fed. R. Civ. P. 65(b)(4)*.

(n54)Footnote 2. *See, e.g., Gilmore v. California, 220 F.3d 987, 1000 (9th Cir. 2000)* (under provision of Prison Litigation Reform Act, district court is bound to modify any injunctive order necessary to correct current and ongoing violation of federal right, provided that relief is limited to enforcing the constitutional minimum); *Nicacio v. INS, 797 F.2d 700, 706 (9th Cir. 1985)* (court that issues injunctive relief retains jurisdiction to modify terms of relief if change in circumstances requires modification).

(n55)Footnote 3. *See Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363, 365 (9th Cir. 1990)* (appellant in trademark and copyright infringement action was required to demonstrate substantial change in circumstance to justify modification of order).

(n56)Footnote 4. *New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 967-970 (2d Cir. 1983)* , *cert. denied, 464 U.S. 915 (1983)* ; *see O'Brien v. Moore, 395 F.3d 499, 501-502 (4th Cir. 2005)* .

(n57)Footnote 5. *Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38-39 (2d Cir. 1993)* , *cert. denied, 513 U.S. 809 (1994)* (injunctive relief may be modified or vacated when original objectives of injunction have been satisfied).

(n58)Footnote 6. *See, e.g., Protectoseal Co. v. Barancik, 23 F.3d 1184, 1187 (7th Cir. 1994)* (injunctive relief was dissolved when Clayton Act underlying original injunction order was amended).

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART II. FACTORS THAT DETERMINE ISSUANCE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.22

§ 10A.22 Particular Considerations for Preliminary Injunctionn*

[1] Purpose

A preliminary injunction is an extraordinary equitable remedy that a court has discretion to order to prevent irreparable injury to any party during pending litigation until final judgment n1 and to protect the court's ability to render a meaningful decision on the merits of the litigation. n2 Usually, this purpose is furthered by preservation of the status quo between parties before the dispute, n3 but this is not always true. If the currently existing status quo itself is causing one of the parties irreparable injury, the court must make an affirmative order that alters the situation to prevent injury, either by returning to the last uncontested status quo between the parties, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. n4 Consequently, when courts refer to a status quo with respect to a preliminary injunction, they are referring to the last uncontested status of the parties which preceded the pending dispute. n4.1 Because a decision whether to grant a preliminary injunction is a decision that has only temporary effect, and does not constitute an adjudication on the merits, a decision on a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. n5

To preserve the status quo until final adjudication, a trial court may fashion a preliminary injunctive order in any reasonable way the court deems proper; it is not obligated to grant or deny the request for preliminary injunction as a whole. n6 Additionally, a court may condition its grant of a preliminary injunction on the conduct of the moving party. n7 An order granting a preliminary injunction remains effective until final adjudication of the matter on the merits. Thus, following a grant of a preliminary injunction, if a plaintiff withdraws the complaint or the action is dismissed for any reason, the preliminary injunction becomes ineffective. n8

[2] Standards Considered by Court

[a] Court Must Balance Equitable Factors

A plaintiff seeking a preliminary injunction must establish that: n1 (1) the plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief; (2) he or she is likely to succeed on the merits; (3) the balance of equities weighs in the plaintiff's favor; and (4) an injunction is in the public interest. n1.1 After there has been this threshold showing, the district court then balances these four factors to determine if it should issue the preliminary injunction. n2

With minor variations, the courts in all thirteen of the federal circuits use this basic standard to determine whether the court should issue a preliminary injunction. For a complete and detailed discussion of the precise standard used in each circuit, see 13 *Moore's Federal Practice, § 65.22[5]*.

It is important to note that the court must consider all of the factors specified above and any other applicable equitable factors; however, the positives and negatives of each factor must be balanced, and the individual factors do not constitute prerequisites to the grant of an injunction. n3

Several circuits have stated that a heightened standard applies when a movant seeks one of three types of preliminary injunctions that are disfavored by the courts: n3.1 (1) one that disturbs the status quo; (2) one that is mandatory as opposed to prohibitory; or (3) one that grants substantially all the relief the movant could recover at the conclusion of a full trial on the merits. The Tenth Circuit has held that any preliminary injunction fitting within one of the disfavored categories must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course. n3.2

[b] Irreparable Injury

A party seeking preliminary injunctive relief must demonstrate that irreparable injury to the party is likely to result unless the court grants the injunction. Thus, the plaintiff must show a likelihood of irreparable injury rather than just a possibility. Furthermore, the likelihood of irreparable injury is required even if the plaintiff shows likely success on the merits. n4 For preliminary injunction purposes, an "irreparable injury" means an injury that cannot be adequately compensated with a monetary award even if the moving party prevails in the final judgment. On the other hand, an injury is not irreparable if it is remote or speculative. n5 For example, courts have commonly found irreparable harm when a party is likely to lose a business enterprise, because the ability to continue a business is not measurable entirely in monetary terms. n6 Similarly, courts have found irreparable harm in the loss of a relatively unique product. n7 Other injuries that have been held to be irreparable are possible bankruptcy, n8 loss of an opportunity to pursue a tender offer, n9 disclosure of confidential information, n10 deprivation of statutory rights, n11 and deprivation of constitutional rights. n12

Irreparable harm is not difficult to establish when the impairment of *First Amendment* rights is at issue--direct penalization of *First Amendment* rights constitutes irreparable injury for the purpose of granting a preliminary injunction. n13 Furthermore, the loss of *First Amendment* freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction. n14 Another area where irreparable harm is typically found is injury to the environment. The United States Supreme Court has noted that environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, and therefore irreparable. If such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. n15

However, because irreparable injury does not occur when a claimant can be adequately compensated with monetary damages, n16 loss of income or other economic loss that is capable of calculation and compensable by monetary damages ordinarily will not be considered an irreparable injury. n17 A typical example of an injury that courts have deemed not to be irreparable for preliminary injunction purposes is discharge from employment. n18 n19-20

[c] Reasonable Likelihood of Success on Merits

In its determination whether to grant a preliminary injunction, a district court must consider whether the movant has demonstrated that it is likely to prevail on the merits. n21 Likelihood of success on the merits requires that the moving party find support for its position in the law that governs the underlying claim, including a consideration of which party has the burden of proof. Therefore, if the nonmoving party has the burden of proof on a substantive element of a claim or defense and the nonmoving party has not met that burden, the court will decide that the moving party will likely

succeed on its claim for purposes of a preliminary injunction determination. n21.1

In order to weigh in the movant's favor, the movant's success on the merits must be at least sufficiently likely to support the kind of relief that the movant requests. n22 However, while the movant must establish facts to support a likelihood of success, it need not demonstrate a certainty of success. n23 Thus, at the early stage of a preliminary injunction motion, the speculative nature of the "likelihood of success" precludes any automatic or mathematical application of the test. Rather, a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. n24 Thus, the court is not deciding whether the movant for a preliminary injunction will ultimately win. n25

[d] Balancing of Relative Harm to Interested Parties

Another factor the court must consider in its determination of whether it should issue the preliminary injunction is the balance of harm between the parties n26 and whether issuance of a preliminary injunction would cause substantial harm to others. n27 Under this factor, the court must balance the injury faced by the applicant for an injunction and other interested persons against the injury that would be sustained by the defendant if relief were granted. n28 If the hardship experienced by the movant if the injunction were denied outweighs the hardship suffered by the non-movant if the injunction were granted, the court should grant preliminary injunctive relief. n29 On the other hand, if the hardship suffered by the non-movant if the injunction were granted outweighs the likely hardship to the movant if the injunction were denied, the court should deny preliminary injunctive relief. n30 In assessing the balance of hardships between plaintiff and defendant, the court should also must consider potential harm to non-parties. n31

[e] Public Interest

In exercising its discretion whether to grant a preliminary injunction, the district court must pay particular regard to examine the public consequences if an injunction is granted. n32 To resolve this factor, the court should not consider the validity or the merits of the claim. Rather, the court should merely determine whether the public interest would be served by granting the preliminary injunction. n33 In some cases, there may be public policy considerations that weigh both in favor and against the issuance of a preliminary injunction. In such cases, the court must balance the conflicting public interests. n33.1

In cases involving only private interests, this factor is not important as in actions that clearly implicate government policy or regulation, or other matters of public concern. n34 Matters that involve the public interest include policies of Congress, the executive branch, and local governments regarding the environment, n35 law enforcement, n36 issues of employment, n37 regulation of banks and savings and loan institutions, n38 and protection of the public health. n39

[3] Other Equitable Considerations

Because it is an equitable remedy, n1 the district court must consider any pertinent equitable ground in its determination of a motion for a preliminary injunction, in addition to the viability of a plaintiff's claims and the public interest. n2 Rule 65 does not specify a particular standard for the determination of a motion for a preliminary injunction, and therefore the courts have evaluated motions for a preliminary injunction on the basis of such traditional equitable grounds. n3

In almost all cases, the court must consider whether an adequate remedy at law is available. n4 If an adequate remedy at law is available, the courts will deny a request for preliminary injunctive relief. n5 An applicant for a preliminary injunction may show a lack of an adequate remedy at law by showing that any alternative legal remedies are immeasurable or merely speculative. n6 However, while lack of an adequate remedy at law is a necessary condition for a preliminary injunction, it will not, by itself, be sufficient to justify a grant of injunctive relief; all equitable factors

must be considered by the court. n7

In addition to the adequacy of the legal remedy, other equitable considerations that may be relevant to a ruling on a motion for a preliminary injunction include the "unclean hands doctrine," n8 and the doctrines of laches, estoppel, waiver, and acquiescence. n9 Therefore, a movant should commence an action and seek preliminary injunctive relief as soon as he or she has knowledge of defendant's alleged harmful conduct. Any unreasonable delay in commencing the action may bar preliminary injunctive relief on the grounds of laches or acquiescence. n10

[4] Pleadings Related to Preliminary Injunction

A party may request preliminary injunctive relief, and a hearing on whether it should be granted, either in the complaint, by a motion, n1 or by an offer to show cause. n2 If a party submits the allegations in a complaint in support of a motion for a preliminary injunction, the complaint must be verified or the court will not consider the complaint in ruling on the motion. n3 In other words, in an application for a preliminary injunction, the movant must offer proof beyond unverified allegations in the pleadings, or the motion will be denied. n4

[5] Submission of Affidavits and Other Documents

Parties regularly submit affidavits in support of or in opposition to a motion for a preliminary injunction. n1 Affidavits submitted in support of the motion must clearly set forth the basis for its submission. Vague or conclusory affidavits will be disregarded n1.1 or will result in denial if they are the only support for the motion. n2 Although affidavits based on mere belief or hearsay statements may be considered by the trial court in evaluating a request for preliminary injunctive relief, affidavits based on actual personal knowledge are more persuasive to the court. n3 The requirements of Rule 56(e) for affidavits in support of a motion for summary judgment are not applicable to affidavits in support of a preliminary injunction, because injunctive relief is discretionary and not a final decision on the merits. n4

In addition to affidavits, the court may consider other types of written materials in deciding a motion for a preliminary injunction. Thus, the court may consider depositions taken under oath (deposition testimony may be more even persuasive than affidavits, particularly if the deponent was subjected to cross-examination). n5 Transcripts of prior proceedings and hearings may also be considered by the court in support of a motion for a preliminary injunction. n6

[6] Court's Determination of Whether to Grant or Deny Preliminary Injunction

[a] Due Process Generally Requires Notice and Hearing

Generally a court may not grant a preliminary injunction if the movant has failed to provide timely notice to the opposing party. n1 However, Rule 65 does not specify the type of notice required; therefore, whether or not particular notice in the circumstances is adequate is within the discretion of the district court. n2 Furthermore, it is apparent that proper service of the complaint and summons on the adverse party and notice of the time and place of the hearing on the preliminary injunction are sufficient notice. n3

Because the court may not issue a preliminary injunction without notice to the adverse party, there is an implication that the adverse party is entitled to a hearing in which the party will have a fair opportunity to oppose the application and to prepare for such opposition. n4 A hearing is not an absolute requirement and is in the discretion of the court. If an application for a preliminary injunction presents a close factual question and time permits, the district court should conduct an evidentiary hearing before deciding whether to issue the injunction. Thus, if the parties vigorously dispute the material facts, and the record is too meager to allow meaningful assessment of the plaintiff's likelihood of success on the merits, a failure to conduct an evidentiary hearing will constitute a reversible error as an abuse of discretion. n5

On the other hand, a court need not hold a hearing to determine a preliminary injunction if it would be unnecessary because no dispute exists between the parties regarding material facts, n6 or it would be a futile exercise to hold a

hearing. n7 Furthermore, it has been held that a court may grant a preliminary injunction without a hearing if the opposition to the injunction does not request a hearing. n8

[b] Procedural Considerations Regarding Hearing

Either before or after a court begins a hearing on an application for a preliminary injunction, the court has the option to advance and consolidate the trial of the action on the merits with that hearing, provided that the court fulfills two requirements. First, a court may order a consolidation of a hearing and trial on the merits if consolidation would cause a party to be denied the right to a jury trial on the merits of any legal claims. n9 If a party properly asserts a jury trial right, a separate trial must be held on those claims, and the court must separately hear and determine the equitable claims for injunctive relief. n10 The second limitation is that the court may not order consolidation if the court has not provided clear and unambiguous notice of the proposed consolidation and the failure to provide notice would prejudice a party. Indisputably clear notice to the parties before approving a consolidation is required to ensure coverage of all relevant issues and to afford the parties a complete and fair opportunity to present all relevant evidence. n11 Consequently, a party can have the decision of a trial on the merits set aside if the party can show that it was prevented from presenting relevant and admissible evidence because the consolidation was held without the required notice. n12

Consolidation is discretionary, and the trial court may order advancement and consolidation either on the motion of a party, stipulation by all parties, or sua sponte. n13 Consolidation is particularly appropriate when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form that it qualifies for admission on the trial proper. n14

[c] Burden of Proof

To obtain a preliminary injunction, the moving party has the burden of proof to establish the specific harm caused by the opposition and the other necessary elements, including showing irreparable injury, a reasonable likelihood of success on the merits, that the harm to the movant outweighs the possible harm to other interested parties, and any harm to the public interest. n15 However, the Supreme Court has held that, with respect to the likelihood of success on the merits of the claim, the burden of proof for purposes of a preliminary injunction may be altered by the burden of proof associated with the underlying claim. Thus, the party opposing a preliminary injunction may have the ultimate burden to establish that the opposing party will prevail. For example, if the preliminary injunction seeks to prevent an alleged governmental restriction on religious freedom rights, the government in its opposition has the burden to prove that it has a compelling interest to impose the restriction on religion. n16

[d] Testimonial Evidence

The district court has the option to receive testimonial evidence at the hearing on a preliminary injunction, n17 but it is not required to do so unless the court must make credibility determinations to resolve key factual disputes. n18 The parties also have the option to present testimonial evidence in support of or against a motion for a preliminary injunction unless otherwise ordered by the court. n19 When oral testimony is taken, the court will base its decision on the motion for preliminary injunction on the totality of its observation of the witnesses' testimony and the written documents. n20

Depending on the circumstances, the court may order that a motion for preliminary injunction may be determined entirely on a review of the record in the case, including affidavits filed by the parties, or that it be decided wholly or partly on oral testimony. n21 Because a preliminary injunction hearing requires an adequate presentation of the facts, the courts are generally reluctant to decide disputed factual issues on the basis of the record and affidavits alone. n22 Furthermore, if the court is required to make credibility determinations to resolve key factual disputes regarding the preliminary injunction, it is an abuse of discretion for the court to make the determination solely on documentary evidence. n23 However, when the record before the court permits it to conclude that there is no factual dispute that must

be resolved by an evidentiary hearing, a preliminary injunction may be granted or denied without hearing oral testimony. n24 It has also been held that a hearing may be waived by one of the parties. n25 If a party wants to have the court hold an evidentiary hearing, it must make a motion for the hearing in the district court. Even if the district court's decision to hold a hearing is erroneous, it will not be reversed on appeal unless the objection was made in the trial court. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1111 (9th Cir. 2004)* .

(n3)Footnote 2. *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1111 (9th Cir. 2004)* .

(n4)Footnote 3. *LGS Architects, Inc. v. Concordia Homes, 434 F.3d 1150, 1158 (9th Cir. 2006)* .

(n5)Footnote 4. *Mastrovincenzo v. City of New York, 435 F.3d 78, 89 (2d Cir. 2006)* .

(n6)Footnote 4.1. *Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005)* .

(n7)Footnote 5. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 718 (3rd Cir. 2004)* .

(n8)Footnote 6. *Maxam v. Lower Sioux Indian Community, 829 F. Supp. 277, 284 (D. Minn. 1993)* .

(n9)Footnote 7. *Oxford House v. Albany, 819 F. Supp. 1168, 1177-1178 (N.D.N.Y. 1993)* (preliminary injunction was granted to permit continued use of location as group home for drug and alcohol abusers on condition that movant's apply for use variance within 60 days).

(n10)Footnote 8. *Venezia v. Robinson, 16 F.3d 209, 211 (7th Cir. 1994)* , *cert. denied, 513 U.S. 815 (1994)* (preliminary injunction does not survive dismissal of complaint).

(n11)Footnote 1. *See* [b]-[e], *below*.

(n12)Footnote 1.1. *Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261 (2008)* .

(n13)Footnote 2. *BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 263 (3d Cir. 2000)* .

(n14)Footnote 3. *United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)* .

(n15)Footnote 3.1. *Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005)* ; *see Sun Microsystems, Inc. v. Microsoft Corp., 333 F.3d 517, 525 (4th Cir. 2003)* ; *Lake Charles Diesel, Inc. v. GMC, 328 F.3d 192, 196 (5th Cir. 2003)* .

(n16)Footnote 3.2. *Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005)* .

(n17)Footnote 4. *Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 262 (2008)* .

(n18)Footnote 5. *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 706-707 (7th Cir. 2005)* .

(n19)Footnote 6. *See Gateway E. Ry. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1139-1140 (7th Cir. 1994)* .

(n20)Footnote 7. *Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 908-909 (2d Cir. 1990)* .

(n21)Footnote 8. *Seide v. Crest Color, Inc., 835 F. Supp. 732, 738 (S.D.N.Y. 1993)* .

(n22)Footnote 9. *Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982)* (time is of essence in tender offer and plaintiff would suffer irreparable injury if deprived of opportunity guaranteed to tender offerors by statute).

(n23)Footnote 10. *Jak Productions, Inc. v. Wiza, 986 F.2d 1080, 1084 (7th Cir. 1993)* .

(n24)Footnote 11. *United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992)* .

(n25)Footnote 12. *Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 (5th Cir. 1993)* (irreparable injury resulting from violation of establishment of religion clause).

(n26)Footnote 13. *See Butler v. Alabama Judicial Inquiry Comm'n, 111 F. Supp. 2d 1241, 1249 (M.D. Ala. 2000)* .

(n27)Footnote 14. *Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)* .

(n28)Footnote 15. *Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 545, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987)* .

(n29)Footnote 16. *Watkins Inc. v. Lewis, 346 F.3d 841, 844-845 (8th Cir. 2003)* (adequate damages for lost profits).

(n30)Footnote 17. *Hughes Network Sys. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994)* .

(n31)Footnote 18. *Moore v. Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 510-511 (2d Cir. 2005)* .

(n32)Footnote 19-20. [Reserved]

(n33)Footnote 21. *Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261 (2008)* .

(n34)Footnote 21.1. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429-430, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)* ; *see Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)* ; *see* [6][c], *below*.

(n35)Footnote 22. *Curtis 1000 v. Youngblade, 878 F. Supp. 1224, 1247 (N.D. Iowa 1995)* .

(n36)Footnote 23. *Abdul Wali v. Coughlin, 754 F.2d 1015, 1024-1025 (2d Cir. 1985)* (movant need only show that probability of success is more likely than not).

(n37)Footnote 24. *United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998)* .

(n38)Footnote 25. *Glenwood Bridge, Inc. v. Minneapolis, 940 F.2d 367, 371 (8th Cir. 1991)* .

(n39)Footnote 26. *Hughes Network Sys. v. Interdigital Communications Corp., 17 F.3d 691, 693-694 (4th Cir. 1994)* .

(n40)Footnote 27. *Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n41)Footnote 28. *BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 263 (3d Cir. 2000)* .

(n42)Footnote 29. *Statharos v. New York City Taxi & Limousine Comm'n, 198 F.3d 317, 321 (2d Cir. 1999)* ; *Rubbermaid Commercial Prods. v. Contico Int'l, 836 F. Supp. 1247, 1256 (W.D. Va. 1993)* .

(n43)Footnote 30. *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113, 119-120 (4th Cir. 1993)* , *cert. denied, 508 U.S. 960 (1993)* (threat of insolvency by non-movant outweighed threat of lost business and related harms to movant.

(n44)Footnote 31. *See Leary v. Daeschner, 228 F.3d 729, 736-737 (6th Cir. 2000)* .

(n45)Footnote 32. *Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 263-265 (2008)* .

(n46)Footnote 33. *Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1355 (11th Cir. 2005)* .

(n47)Footnote 33.1. *Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 263-265 (2008)* (public interest considerations for secure national military defense outweighed public interest considerations in environmental protection).

(n48)Footnote 34. *Yakus v. United States, 321 U.S. 414, 441, 64 S. Ct. 660, 88 L. Ed. 834, 28 Ohio Op. 220 (1944)* (courts much more likely to deny equitable relief when only private interest is involved).

(n49)Footnote 35. *See Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 545, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987)* ; *American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 967 (9th Cir. 1983)* .

(n50)Footnote 36. *Spiegel v. City of Houston, 636 F.2d 997, 1002-1003 (5th Cir. 1981)* (preliminary injunction was reversed when it would have hindered legitimate law enforcement to detriment of public interest).

(n51)Footnote 37. *EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753-755 (9th Cir. 1991)* (compelling public interest in preventing unlawful employment discrimination and in vindicating right of victims of discrimination warranted departure from clean hands doctrine and favored grant of preliminary injunction).

(n52)Footnote 38. *Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 557-558 (5th Cir. 1987)* (in public interest, court upheld preliminary injunction freezing assets of allegedly wrongdoing officers and directors of savings and loan).

(n53)Footnote 39. *United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 176 (9th Cir. 1987)* (finding that public had strong interest in consuming unadulterated wheat, court reversed denial of preliminary injunction).

(n54)Footnote 1. *See Henderson v. Stalder, 112 F. Supp. 2d 589, 592-593 (E.D. La. 2000)* .

(n55)Footnote 2. *Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005)* .

(n56)Footnote 3. *SEC v. Mono-Kearsarge Consol. Mining Co., 167 F. Supp. 248, 260 (D. Utah 1958)* .

(n57)Footnote 4. *Northern Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306, 105 S. Ct. 459, 83 L. Ed. 2d 388 (1984)* (party seeking injunction from federal court must invariably show that it does not have adequate remedy at law); *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132, 137-138 (3d Cir. 2000)* .

(n58)Footnote 5. *Van Arsdel v. Texas A & M Univ., 628 F.2d 344, 346 (5th Cir. 1980)* (preliminary injunction was properly denied when plaintiff employee could be otherwise compensated by receipt of back pay and reinstatement of teaching position).

(n59)Footnote 6. *Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992)* (loss of customer goodwill

constituted immeasurable damage and therefore complainant had no alternative remedy at law).

(n60)Footnote 7. *Lopez v. Garriga, 917 F.2d 63, 68 (1st Cir. 1990)* .

(n61)Footnote 8. *Duggal v. Krishna, 554 F. Supp. 1043, 1047 (D.D.C. 1983)* .

(n62)Footnote 9. *Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980)* (injunctive relief was precluded by laches when movant delayed seeking remedy for failure to place name on primary ballot for presidential race).

(n63)Footnote 10. *See Acierno v. New Castle County, 40 F.3d 645, 654 (3d Cir. 1994)* (delay of 12 years in commencing action was considered in denial of preliminary injunctive relief).

(n64)Footnote 1. *James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599, 603 n.1 (7th Cir. 1986)* (probably best practice if attorney seeking temporary relief makes motion for preliminary injunction separate from prayer for relief in complaint).

(n65)Footnote 2. *Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 824 (5th Cir. 1969)* (offer to show cause generally constitutes sufficient notice for motion for preliminary injunction).

(n66)Footnote 3. *Gaylor v. Reagan, 553 F. Supp. 356, 358 (W.D. Wis. 1982)* (motion for preliminary injunction was denied when movant submitted unverified complaint).

(n67)Footnote 4. *Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F. Supp. 616, 624 & n.14 (D.N.J. 1989)* .

(n68)Footnote 1. *Stanley v. University of S. Cal., 13 F.3d 1313, 1319-1320 (9th Cir. 1994)* (opponent of preliminary injunction presented evidence to demonstrate it would suffer hardship by employee's affidavit and supporting exhibits; court agreed that affidavit demonstrate that preliminary injunction would cause hardship); *Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987)* (affidavits are often reviewed in preliminary injunction hearings).

(n69)Footnote 1.1. *Tseng v. Home Depot USA, Inc., 2006 U.S. Dist. LEXIS 18546, *7-*8 (W.D. Wash. 2006)* .

(n70)Footnote 2. *Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990)* (district courts must be wary of issuing injunction based solely on allegations and conclusory affidavits).

(n71)Footnote 3. *Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987)* (leniency in preliminary injunction stage allows court to give weight to even inadmissible evidence).

(n72)Footnote 4. *Westpac Audiotext, Inc. v. Wilks, 756 F. Supp. 1267, 1268 (C.D. Cal. 1991)* (evidentiary requirements for preliminary injunctions are not as rigid as those in motions for summary judgment); *see Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987)* (preliminary injunction may be granted on less formal procedures than trial on merits).

(n73)Footnote 5. *Kelly v. Gilbert, 437 F. Supp. 201, 210 (D. Mont. 1977)* (court may consider deposition testimony in support of motion for preliminary injunctive relief, especially when witnesses are unavailable or facts of action are complex); *Beauboeuf v. Delgado College, 303 F. Supp. 861, 862 (E.D. La. 1969)* , *aff'd on other grounds, 428 F.2d 470 (5th Cir. 1970)* (court may determine motion for preliminary injunction on basis of adversary depositions).

(n74)Footnote 6. *Redac Project 6426, Inc. v. Allstate Ins. Co., 402 F.2d 789, 789-790 (2d Cir. 1968)* (transcript of prior hearing permitted in proceeding on motion for preliminary injunction); *see Silverman ex rel. NLRB v. Imperia Foods, Inc., 646 F. Supp. 393, 394 (S.D.N.Y. 1986)* (court considered transcript of prior proceedings in lieu of

evidentiary hearing); *International Bhd. of Elec. Workers v. Eli, 307 F. Supp. 495, 505 (D. Haw. 1969)* (transcript of previous hearing may be admitted in deciding preliminary injunction motion).

(n75)Footnote 1. *Fed. R. Civ. P. 65(a)(1)* (no preliminary injunction may be issued without notice to adverse party); *Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000)* , *cert. denied, 534 U.S. 833 (2001)* (in advance of pretrial conference at which district court considered filing injunction, party opposing injunction was entitled to notice sufficient to allow party to prepare response).

(n76)Footnote 2. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1153-1154 (10th Cir. 2001)* .

(n77)Footnote 3. *People ex rel. Hartigan v. Peters, 871 F.2d 1336, 1339-1341 (7th Cir. 1989)* .

(n78)Footnote 4. *FTC v. Enforma Natural Prods., 362 F.3d 1204, 1217 (9th Cir. 2004)* .

(n79)Footnote 5. *Rosario-Urdaz v. Rivera-Hernandez, 350 F.3d 219, 222-224 (1st Cir. 2003)* .

(n80)Footnote 6. *In re Aimster Copyright Litig., 334 F.3d 643, 653-654 (7th Cir. 2003)* .

(n81)Footnote 7. *Charette v. Town of Oyster Bay, 159 F.3d 749, 755 (2d Cir. 1998)* (evidentiary hearing is not required if relevant facts have been clearly demonstrated in prior proceedings in the case or are capable of complete resolution on written record).

(n82)Footnote 8. Drywall Tapers and Pointers, *Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n, 954 F.2d 69, 77 (2d Cir. 1992)* .

(n83)Footnote 9. *Fed. R. Civ. P. 65(a)(2).*

(n84)Footnote 10. *Bowles v. Bennett, 629 F.2d 1092, 1095 (5th Cir. 1980)* ; *see Block v. Mollis, 618 F. Supp. 2d 142, 144 (D.R.I. 2009)* (if no jury is demanded, court may make decisions on both consolidated non-jury trial and injunction hearing).

(n85)Footnote 11. *Sanchez v. Esso Std. Oil Co., 572 F.3d 1, 15 (1st Cir. 2009)* .

(n86)Footnote 12. *D.L. Cromwell Invs. v. NASD Regulation, 279 F.3d 155, 160-161 (2d Cir. 2002)* .

(n87)Footnote 13. *Henderson v. Stalder, 112 F. Supp. 2d 589, 592 n.2 (E.D. La. 2000)* .

(n88)Footnote 14. *Fed. R. Civ. P. 65(a)*, Advisory Committee Note to 1966 Amendments.

(n89)Footnote 15. *Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 149 (2d Cir. 1999)* ; *National Wildlife Fed'n. v. Burford, 878 F.2d 422, 432 (D.C. Cir. 1989)* ; *Kraft General Foods v. Allied Old English, 831 F. Supp. 123, 127 (S.D.N.Y. 1993)* .

(n90)Footnote 16. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428-430, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)* ; *see Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)* (at preliminary injunction stage, government had same burden as it would at trial: that of showing constitutionality of content-based restrictions on speech).

(n91)Footnote 17. *BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 268 (3d Cir. 2000)* .

(n92)Footnote 18. *Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004)* .

(n93)Footnote 19. *Cobb v. Supreme Judicial Court, 334 F. Supp. 2d 50, 54 (D. Mass. 2004)* .

(n94)Footnote 20. *Farina v. Board of Educ., 116 F. Supp. 2d 503, 513 (S.D.N.Y. 2000)* .

(n95)Footnote 21. *Fed. R. Civ. P. 43(c).*

(n96)Footnote 22. *Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575-1576 (Fed. Cir. 1990)* .

(n97)Footnote 23. *Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004)* .

(n98)Footnote 24. *Commerce Park v. Mardian Constr. Co., 729 F.2d 334, 341 (5th Cir. 1984)* (testimonial hearing not required when preliminary injunction was denied on undisputed facts); *Syntex Ophthalmics, Inc. v. Tsuetaki, 701 F.2d 677, 682 (7th Cir. 1983)* (preliminary injunction was properly granted without evidentiary hearing when there was sufficient evidence before district court to allow it to conclude that plaintiff had reasonable likelihood of success on merits).

(n99)Footnote 25. *FTC v. Gregory Bryant, JR., 2004 U.S. Dist. LEXIS 23315, at *5 (M.D. Fla. 2004)* .

(n100)Footnote 26. *Sunseri v. Macro Cellular Partners, 412 F.3d 1247, 1250 (11th Cir. 2005)* .

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART II. FACTORS THAT DETERMINE ISSUANCE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure § 10A.23

§ 10A.23 Particular Considerations for Permanent Injunctionn*

When a party makes an application for a permanent injunction, the party must satisfy a four-factor test before a court will order the permanent injunction. The party must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. n1 These four requirements must be satisfied in every case, and satisfaction of the four part test is not necessarily dependent on statutory elements or presumptions that are applicable to a particular underlying claim for relief. In other words, to order a permanent injunction, the court must examine the four requirements independent of the merits of a statutory claim based on the factual circumstances of the case. n2 Courts have noted that the requirements for a permanent injunction are nearly identical with those for a preliminary injunction; however, a permanent injunction has the added requirement of success on the merits. n3 In other words, the applicant must establish not just a substantial likelihood of success on the merits but must demonstrate actual success on the merits. n4

Because permanent injunctive relief is an equitable remedy, the decision to grant or deny relief is an act of equitable discretion by the district court, and is reviewable on appeal for abuse of discretion. n5 The court should order a permanent injunction only after taking into account all of the circumstances related to the need for prospective relief. A court should be particularly cautious when contemplating relief that implicates public interests. Because permanent injunctive relief is drafted in light of what the court believes will be the future course of events, a court must never ignore recent significant changes in the law or circumstances underlying an injunction. n6 As a corollary to this rule, another rule has developed that once a court has rendered a decision on the merits regarding a particular matter, the court may not order a preliminary injunction on that matter, but may grant only a permanent injunction. n7

Because it is the most extreme injunction in terms of its duration, a permanent injunction must be particularly tailored to the purpose of the relief, so that it is not too broad in scope. Therefore, the scope of the mandate of a permanent injunction must be as limited as practicable with respect to the parties and the activities enjoined; the scope must be narrowly tailored to protect the rights covered by the application for the injunction and the needs of the particular case. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent Injunctions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice*, § 65.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. eBay *Inc. v. MercExchange, L. L. C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)* .

(n3)Footnote 2. *Monsanto Co. v. Geertson Seed Farms, ___ U.S. ___, 130 S. Ct. 2743, 177 L. Ed. 2d 461, 476-477 (2010)* .

(n4)Footnote 3. *See Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 185 n.5 (3d Cir. 2006)* .

(n5)Footnote 4. *Amoco Production Co., 480 U.S. 531, 546, n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* .

(n6)Footnote 5. eBay *Inc. v. MercExchange, L. L. C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)* .

(n7)Footnote 6. *Salazar v. Buono, ___ U.S. ___, 130 S. Ct. 1803, 176 L. Ed. 2d 634, 646 (2010)* .

(n8)Footnote 7. *Golden Gate Hotel v. City & County of San Francisco, 836 F. Supp. 707, 709 (N.D. Cal. 1993)* , *vacated on other grounds, 18 F.3d 1482 (9th Cir. 1994)* (preliminary injunction is inappropriate after court grants summary judgment).

(n9)Footnote 8. *Ayotte v. Planned Parenthood, 546 U.S. 320, 330, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)* (rather than utilizing most blunt remedy of permanently enjoining enforcement of entire state statute, court should have limited scope to those particular provisions of statute that were unconstitutional); *see also Tory v. Cochran, 544 U.S. 734, 738, 125 S. Ct. 2108, 161 L. Ed. 2d 1042 (2005)* (permanent injunction as written constituted overly broad prior restraint on speech).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART II. FACTORS THAT DETERMINE ISSUANCE OF INJUNCTIVE RELIEF

1-10A Moore's Manual--Federal Practice and Procedure §§ 10A.24 through 10A.39

[Reserved]

§§ 10A.24[Reserved]

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART III. SCOPE AND ENFORCEMENT OF INJUNCTIVE ORDERS

1-10A Moore's Manual--Federal Practice and Procedure § 10A.40

§ 10A.40 Requirements for Injunctive Ordersn*

[1] Every Injunctive Order Must Contain Specific Items

Each temporary restraining order and each order granting an injunction must set forth particular written statements, n1 including: the reasons for issuance of the order, n2 specific terms that give the substance of the order, n3 and a description, in reasonable detail, of the acts that are restrained or required by the order. n4 These requirements of Rule 65(d)(1) must be strictly followed because the terms of the injunction must provide a clear basis for any subsequent efforts to enforce it by contempt proceedings or otherwise n5 and to ensure that the courts and parties have knowledge of its exact scope and meaning. n6 Rule 65(d)(1) also requires the court to set out the injunction in a self-contained document. Thus, its required terms may not be specified by incorporating another document by reference. n7

However, a failure to comply with the requirements of Rule 65(d) does not render the injunction void. n8 It is still enforceable if the injunction is sufficiently definite to meet the requirements for a contempt proceeding. n9 Nonetheless, if the injunctive order fails entirely to set out a required statement, it is subject to an order of dissolution. n10 Furthermore, if the duties imposed by the injunction are not ascertainable, the appellate court may vacate or reverse the injunctive order. n11 Alternatively, a nonconforming injunction or restraining order may be remanded for clarification. n12

[2] Reasons and Findings for Order

Every order that a court makes granting an injunction and every restraining order must specify in detail the reasons the court is issuing the injunctive relief. n1 To satisfy this requirement, the court should directly address the key issue or issues and how the factual circumstances require a grant or denial of injunctive relief based on a resolution of the issues. n2 Some courts have noted that there are similar requirements for both Rules 65(d)(1) and 52(a). n3 However, even though a court's thorough written statement of findings and conclusions required by Rule 52(a)(1) or Rule 52(a)(2) may also satisfy the statement of reasons required by Rule 65(d)(1)(A), the court should not rely on one statement to comply with both rules. The best practice is for the court to make a separate statement of findings and conclusions and also a separate statement of the reasons for grant or denial of each injunction or restraining order. n4

[3] Order Must Be Specific

A restraining order or injunction must be specific in its terms. n1 The purposes of this specificity requirement are (1) to prevent uncertainty and confusion on the part of those who are subject to an injunctive order, so that they can avoid a possible contempt citation on a decree too vague to be understood; n2 (2) to provide a solid base for any subsequent efforts to enforce the injunction by contempt proceedings or otherwise; n3 and (3) to facilitate logical and informed review by an appellate court. n4 Consequently, if the court does not make its order specific, n5 the injunctive relief is not enforceable. n6

[4] Order Must Describe Acts Prohibited or Required

A restraining order or injunction must describe in reasonable detail the act or acts sought to be restrained or required. n1 The injunctive order may not make the description by reference to the complaint or other document. n2 The purpose of this requirement is to make the court frame its injunctions or restraining orders so that those who must obey them will know precisely what the court intends to forbid or require. n3 The injunction must also be detailed enough to provide a clear basis for any subsequent efforts to enforce the injunction by contempt proceedings. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsContempt

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.60 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 65(d)(1).*

(n3)Footnote 2. *See* [2], *below.*

(n4)Footnote 3. *See* [3], *below.*

(n5)Footnote 4. *See* [3], *below.*

(n6)Footnote 5. *Marseilles Hydro Power, LLC v. Marseilles Land and Water Co., 299 F.3d 643, 646 (7th Cir. 2002) .*

(n7)Footnote 6. *Schmidt v. Lessard, 414 U.S. 473, 476-477, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) .*

(n8)Footnote 7. *Fed. R. Civ. P. 65(d)(1)(C); see Kennedy Bldg. Assocs. v. CBS Corp., 576 F.3d 872, 876 n.4 (8th Cir. 2009) .*

(n9)Footnote 8. *Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000) , cert. denied, 534 U.S. 833 (2001) .*

(n10)Footnote 9. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 647 (7th Cir. 2002)* (injunction enforceable by contempt if there is core ascertainable duty imposed by injunction).

(n11)Footnote 10. *Centennial Broad., LLC v. Burns, 433 F. Supp. 2d 730, 735-736 (W.D. Va. 2006) .*

(n12)Footnote 11. *Mishawaka v. American Elec. Power Co., 616 F.2d 976, 991 (7th Cir. 1980) , cert. denied, 449 U.S. 1096 (1980)* (injunction vacated because trial court did not specify details but merely incorporated broad language of statute).

(n13)Footnote 12. *Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 800 (5th Cir. 1990)* (when injunction merely made reference to other documents it was on its face insufficiently specific; however, court of appeals allowed

injunction to remain in effect but remanded to enable district court to reform injunction to comply with Rule 65(d)).

(n14)Footnote 1. *Fed. R. Civ. P. 65(d)(1)(A).*

(n15)Footnote 2. *Dexia Credit Local v. Rogan, 602 F.3d 879, 884 (7th Cir. 2010)* .

(n16)Footnote 3. *Compare Fed. R. Civ. P. 52(a)(1),(2) with Fed. R. Civ. P. 65(d)(1).*

(n17)Footnote 4. *See Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 104-105 (2d Cir. 2009)* .

(n18)Footnote 1. *Fed. R. Civ. P. 65(d)(1)(B)*; *see Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002)* (injunction order insufficient because it failed to include crucial details); *Centennial Broad., LLC v. Burns, 433 F. Supp. 2d 730, 735-736 (W.D. Va. 2006)* (injunction was sufficiently specific because it provided detailed, descriptive definition of type of television programming prohibited).

(n19)Footnote 2. *Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000)* (because injunctive order prohibits conduct under threat of judicial punishment, fairness requires that litigants receive explicit notice of precisely what conduct is outlawed).

(n20)Footnote 3. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002)* (even though "injunction" consisted of statement that plaintiff was entitled to enter on defendant's property in order to repair wall, it omitted crucial details, such as plaintiff's duty to purchase insurance against damage to the defendant company's property from repair activity).

(n21)Footnote 4. *Schmidt v. Lessard, 414 U.S. 473, 476-477, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974)* (citing **Moore's Federal Practice**; if trial court has not carefully framed its order of injunctive relief, it is impossible for appellate court to know precisely subject of appeal); *Fonar Corp. v. Deccaid Services, Inc., 983 F.2d 427, 429-430 (2d Cir. 1993)* (specific, detailed order for injunctive relief is necessary for appellate review).

(n22)Footnote 5. *See* Indian Educators Fed'n Local 4524 of the *AFT, AFL-CIO v. Kempthorne, 590 F. Supp. 2d 15, 20 (D.D.C. 2008)* .

(n23)Footnote 6. *Florida Ass'n of Rehabilitation Facilities v. Florida Dep't of Health & Rehabilitative Servs., 225 F.3d 1208, 1222 (11th Cir. 2000)* (preliminary injunction lacked precision and specificity necessary for it to be enforceable prospectively from date of its entry); *see Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974)* (lack of specificity hinders effective enforcement).

(n24)Footnote 1. *Fed. R. Civ. P. 65(d)(1)(C)*; *see Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002)* (injunction order insufficient because it failed to include required as well as prohibited conduct); *Centennial Broad., LLC v. Burns, 433 F. Supp. 2d 730, 735-736 (W.D. Va. 2006)* (injunction provided detailed description of type of conduct that was prohibited).

(n25)Footnote 2. *Fed. R. Civ. P. 65(d)(1)(C).*

(n26)Footnote 3. *Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000)* , *cert. denied, 534 U.S. 833 (2001)* (because injunctive order prohibits conduct under threat of possible contempt, fairness requires that litigants receive detailed notice of precisely what conduct is prohibited).

(n27)Footnote 4. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002)* .

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART III. SCOPE AND ENFORCEMENT OF INJUNCTIVE ORDERS

1-10A Moore's Manual--Federal Practice and Procedure § 10A.41

§ 10A.41 Persons Bound by Injunctive Ordern*

[1] Parties to Action

An injunctive relief order binds only the following who receive actual notice of the order by personal service or otherwise: (1) the parties; n1 (2) the parties' representatives, including parties' officers, agents, servants, employees, and attorneys; n2 and (3) other persons who are in active concert or participation with parties or their representatives. n3 With respect to representatives, n4 the rule is a codification of the common-law rule allowing the court to hold a nonparty in contempt for violating the terms of an injunction when the nonparty is legally identified with the party in interest, in privity with the party, representing the party, or subject to the party's control. n5

A restraining order or injunction is an "in personam" mandate or prohibition issued against a person over whom the court has acquired in personam jurisdiction. n6 Consequently, the court may not order injunctive relief in a purely in rem proceeding, which is a proceeding in which the court's jurisdiction is directed against specific property rather than a person such as an individual or corporation. n7 Thus, a court may enter an injunction or a restraining order against a person only if the court has personal jurisdiction over the person. n8

[2] Persons Acting in Concert With Party

Even a nonparty may be bound by the terms of an order granting a restraining order or injunction if the nonparty is in active concert or participation with the party. n1 The purpose of this rule is to ensure that defendants do not nullify an injunctive order by carrying out prohibited acts through aiders and abettors even though they were not parties to the original proceeding. The rule is a codification of the common-law rule allowing the court to hold a nonparty in contempt for violating the terms of an injunction when the non-party aids or abets the violation of an injunction. n2 For example, an injunction barring fraudulent transfer of assets was properly applied to the defendant's wife, because the wife had actively assisted the husband in the fraudulent transfers. n3 Similarly, an injunctive order was binding on Arizona corrections officials who were deemed to be acting in concert with Iowa corrections officials on the matter in question. n4 On the other hand, a nonparty who has acted independently of an enjoined or restrained party will not be bound by the injunction, and, if the nonparty has had no opportunity to contest its validity, may not be found in contempt without a separate adjudication. n5

[3] Requirement of Notice

A party, a party's representative, or a person acting in concert with a party is bound by an injunctve order only if the person has received actual notice of the order. Actual notice may be by personal service or by any other means. n1 Under the rule, a person has actual notice and may be held in contempt of an injunctive order if the person in fact has knowledge of the order by any means. n2 Generally, formal notice of the order need not be given to persons in privity with the defendant because such persons are deemed to have actual notice because of the nature of their relationship with the party. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.61 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 65(d)(2)(A).*

(n3)Footnote 2. *Fed. R. Civ. P. 65(d)(2)(B).*

(n4)Footnote 3. *Fed. R. Civ. P. 65(d)(2)(C)*; *see* [2], *below.*

(n5)Footnote 4. *Fed. R. Civ. P. 65(d)(2)(B).*

(n6)Footnote 5. *Tesmer v. Granholm, 333 F.3d 683, 702-703 (6th Cir. 2003)* .

(n7)Footnote 6. *R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 957 (4th Cir. 1999)* .

(n8)Footnote 7. *United States v. Casey, 444 F.3d 1071, 1075 (9th Cir. 2006)* (it would not make sense for court to direct property to refrain from acting or to act in particular way).

(n9)Footnote 8. *United States v. AMC Entm't, Inc., 549 F.3d 760, 774 (9th Cir. 2008)* (court may command person subject to personal jurisdiction to perform specific acts, even outside of court's territorial jurisdiction).

(n10)Footnote 1. *Fed. R. Civ. P. 65(d)(2)(C).*

(n11)Footnote 2. *Illinois v. United States Dept. of Health & Human Servs., 772 F.2d 329, 332 (7th Cir. 1985)* .

(n12)Footnote 3. *FDIC v. Faulkner, 991 F.2d 262, 267-268 (5th Cir. 1993)* .

(n13)Footnote 4. *Sisneros v. Nix, 884 F. Supp. 1313, 1349-1352 (S.D. Iowa 1995)* .

(n14)Footnote 5. *Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 43 (1st Cir. 2000)* (such a rule safeguards the rights of those who truly are strangers to an injunctive decree).

(n15)Footnote 1. *Fed. R. Civ. P. 65(d)(2).*

(n16)Footnote 2. *See Katie A. v. Los Angeles County, 481 F.3d 1150, 1162 (9th Cir. 2007)* .

(n17)Footnote 3. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 550-551 (4th Cir. 1994)* (injunction barring co-owners of residential apartment buildings applied to all owners even though only one co-owner was named in complaint).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART III. SCOPE AND ENFORCEMENT OF INJUNCTIVE ORDERS

1-10A Moore's Manual--Federal Practice and Procedure § 10A.42

§ 10A.42 Contempt for Violation of Injunctive Ordern*

[1] Enforcement by Contempt in General

Injunctive orders, including temporary restraining orders, preliminary injunctions, and permanent injunctions, are effective remedies particulary because the court has power to punish violations by civil or criminal contempt. n1 Civil contempt is remedial in nature. Civil contempt is designed both to coerce obedience and to compensate the complainant for losses sustained. n2 Consequently, the court may order civil contempt in the form of fines or incarceration until the violating party complies with the injunctive order. n3

On the other hand, the purpose of criminal contempt is to maintain the court's authority and dignity through punishment of the violator. n4 Even though the violation of a restraining order or an injunction typically is enforced through civil contempt, when appropriate it may also be punishable as a criminal contempt. n5 When the court has personal jurisdiction over a restrained or enjoined party, such party is bound by the restraining order or injunction, n6 and the court may utilize its appropriate power to punish for contempt. n7 If the violation of a restraining or injunctive order is punished as a criminal contempt, this adjudication is not affected by the reversal of the order disobeyed or by the basic action becoming moot. n8 However, civil contempt, which is remedial in nature, does necessarily become extinguished with the reversal of the injunction. n9 The essential elements of criminal contempt are a lawful and reasonably specific injunction order of the court and a willful violation of that order. In the context of punishment for violation of an injunction, "willfulness" means a volitional act done by one who knows or should reasonably be aware that his or her conduct is wrongful. n10

[2] Procedure

The federal courts have precisely and concisely outlined the procedure that is to be used for a party to request to have the district court enforce an injunction through the court's contempt power. If the party who obtained the injunction asserts that the enjoined party is failing to comply with the injunction, the party who obtained the injunction may move the court to issue an order to show cause why the enjoined party should not be adjudged in civil contempt and sanctioned. The moving party should specify the injunctive provisions that have been violated and the manner in which the enjoined party has disobeyed the court's restraining order or injunction. n1

If satisfied that the movant's motion states a case of noncompliance, the court will order the enjoined party to show cause why the enjoined party should not be held in contempt, and the court will schedule a hearing for that purpose. At the hearing, if the movant proves what he or she has alleged in the motion, the court then allows a response from the enjoined party. The court then determines whether the enjoined party has complied with the injunction and, if not, whether sanctions including civil or criminal contempt should be imposed as necessary to ensure compliance or as punishment of the violator. n2

[3] Enforcement Against Nonparty for Contempt

When the court has entered an injunctive order against a party over whom the court has personal jurisdiction, and the party has received actual notice of the order, that party is bound by the restraining order or injunction, n1 and the court may use its power to punish for contempt if the party violates the order. n2 However, even nonparties may be held in contempt if the nonparty has aided or abetted a party in a concerted violation of the injunction, provided the nonparty has actual notice of the injunctive order. n3 The purpose of this rule is to prevent nullification of an injunctive order by allowing a party to carry out prohibited acts through nonparty aiders and abettors. n4

The court may hold a nonparty in contempt for violation of an injunction only if the nonparty was in active concert or participation with the party specifically enjoined, usually the named defendant. This requires either that the court determines the nonparty aided and abetted the enjoined party in the enjoined conduct or that the nonparty has a legal relationship with that defendant. n5 The act of aiding or abetting or a legal relationship makes it fair to bind the nonparty, even if the nonparty has not had a separate opportunity to contest the original injunction, because the nonparty's close alliance with the enjoined defendant adequately assures that the nonparty's interests were sufficiently represented. However, a nonparty who has acted independently of the enjoined defendant will not be bound by the injunction, and, if the nonparty has had no opportunity to contest the validity of the injunction, he or she may not be found in contempt without a separate adjudication. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContempt

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 65.80 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 84 F.3d 367, 370 (10th Cir. 1996)* .

(n3)Footnote 2. *Ingalls v. Thompson, 588 F.3d 254, 264 (5th Cir. 2009)* .

(n4)Footnote 3. *Worldwide Moving & Storage, Inc. v. District of Columbia, 445 F.3d 422, 425 (D.C. Cir. 2006)* ; *In re Bernales, 345 B.R. 206, 227 (C.D. Cal. 2006)* .

(n5)Footnote 4. *See Ingalls v. Thompson, 588 F.3d 254, 264 (5th Cir. 2009)* ; *see also 18 U.S.C. § 401.*

(n6)Footnote 5. *See Stein v. Paradigm Mirasol, LLC, 586 F.3d 849, 855-856 (11th Cir. 2009)* .

(n7)Footnote 6. *Fed. R. Civ. P. 65(d)*; *GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386-387, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980)* .

(n8)Footnote 7. *Spallone v. United States, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990)* (in fashioning means to enforce judgment, district court has power to enforce compliance with judgment through civil contempt).

(n9)Footnote 8. *United States v. United Mine Workers, 330 U.S. 258, 294, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

(n10)Footnote 9. *In re Hunt, 754 F.2d 1290, 1293-1294 (5th Cir. 1985)* .

(n11)Footnote 10. *United States v. Hoover, 240 F.3d 593, 596-597 (7th Cir. 2001)* (upholding contempt because injunction order was sufficiently clear and contemnor should reasonably have been aware that his conduct was wrongful).

(n12)Footnote 1. *See Porter v. Shah, 606 F.3d 809, 812 (D.C. Cir. 2010)* .

(n13)Footnote 2. *Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000)* ; *see United States v. Crawford (In re Crim. Contempt Proceedings Against Crawford), 329 F.3d 131, 135 (2d Cir. 2003)* .

(n14)Footnote 1. *Fed. R. Civ. P. 65(d)(2)*.

(n15)Footnote 2. *New York State NOW v. Terry, 886 F.2d 1339, 1351-1352 (2d Cir. 1989)* .

(n16)Footnote 3. *Fed. R. Civ. P. 65(d)*; *see Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 43 (1st Cir. 2000)* .

(n17)Footnote 4. *Independent Fed'n of Flight Attendants v. Cooper, 134 F.3d 917, 920 (8th Cir. 1998)* .

(n18)Footnote 5. *Blockowicz v. Williams, 675 F. Supp. 2d 912, 915 (N.D. Ill. 2009)* (legal relationship such as agent, employee, officer, etc.).

(n19)Footnote 6. *Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 43 (1st Cir. 2000)* ; *see Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency, 533 F.3d 258, 265 (5th Cir. 2008)* (nonparty has standing to appeal injunction that confronted nonparty with choice of either conforming its conduct to mandates of injunction or ignoring injunction and risking contempt proceedings).

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PART III Pleading Stage
CHAPTER 10A INJUNCTIONS
PART III. SCOPE AND ENFORCEMENT OF INJUNCTIVE ORDERS

1-10A Moore's Manual--Federal Practice and Procedure § 10A.43

§ 10A.43 Appeal of Injunctive Ordern*

[1] Appealability of Orders Regarding Injunctive Relief

If an order has the very limited scope and duration of a temporary restraining order, the order is not immediately appealable. n1 An order is not immediately appealable whether the order grants, n2 denies, n3 or dissolves a temporary restraining order. n4 On the other hand, according to an express statutory provision, a district court's determination of an application for a preliminary injunction may be appealed to the court of appeals. n5 There is also a provision allowing direct review of a preliminary injunctive order in the United States Supreme Court, when the injunctive relief has been heard and determined by a district court of three judges. n6 Finally, because a permanent injunction is both an order modifying or resolving an injunction and also a final order on the merits, a permanent injunction is always immediately appealable. n7

It should be noted that the issue of appealability is not necessarily controlled by the terminology or labeling that a trial court uses for an injunctive order. n8 Thus, when a restraining order, even if denoted "temporary," is continued past the period prescribed by Rule 65(b), the courts have held that the restraining order is appealable as a preliminary injunction pursuant to *28 U.S.C. § 1292(a)(1)*. n9 In a similar manner, when a grant or denial of a "temporary restraining order" actually disposes of the action for injunctive relief on the merits, the grant or denial has been held appealable as related to a preliminary injunction. n10

[2] Standard of Review

Because a grant or denial of a motion for injunctive relief is within the sound discretion of the district court, appellate courts generally review determinations whether to grant such relief solely for abuse of discretion. n1 An abuse of discretion means that, in making its determination, the district court has relied on clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. n2 This deferential standard of review n3 is applicable to district court determinations regarding both preliminary injunctions and permanent injunctions. n4 Courts have stated that because of its equitable nature, the district court's decision on the issuance of an injunction will be overruled only in the rarest of cases. n5

If the appellate court concludes that it was erroneous for the lower court to issue a preliminary injunction, the appellate

court will ordinarily reverse the order and remand the case for further proceedings on the merits of the claim for relief. However, the appellate court has the option to decide the merits if the preliminary injunction was based on a question of law and it is plain that the plaintiff cannot prevail on the merits in any event. When the appellate court makes that determination, it may enter judgment for the defending party. n6

Questions of law are reviewed de novo at either a trial on the merits or at a hearing to determine whether to grant preliminary injunctive relief. n7 Also, the court will apply the de novo standard if the district court's preliminary injunction decision was made without a hearing or a documentary record. n8 On the other hand, questions of fact regarding either the merits or an order related to a preliminary injunction are reviewed under "clear error" standard, also referred to as the "abuse of discretion" standard. n9 "De novo" review means that the appellate court may disregard the district court's conclusions of law and formulate its own conclusions of law afresh, and may substitute its own legal conclusions for those of the trial court. The de novo standard is in contrast to the "abuse of discretion" or "clearly erroneous" standard used for review of factual findings. n10 Under the de novo standard, the appellate court is not required to show deference to the trial court's legal analysis and may freely overturn conclusions it considers wrong. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* §§ 65.24, 65.41 (Matthew Bender 3d ed.)

(n2)Footnote 1. *SEIU v. Nat'l Union of Healthcare Workers, 598 F.3d 1061, 1067 (9th Cir. 2010)* .

(n3)Footnote 2. *See Miller v. Mitchell, 598 F.3d 139, 145 (3d Cir. 2010)* .

(n4)Footnote 3. *Petraco-Valley Oil & Ref. Co. v. United States Dep't of Energy, 633 F.2d 184, 199 (Temp. Emer. Ct. App. 1980)* .

(n5)Footnote 4. *Leslie v. Penn C. R. Co., 410 F.2d 750, 751 (6th Cir. 1969)* .

(n6)Footnote 5. *28 U.S.C. § 1292(a)(1)*; *see Wilderness Workshop v. United States Bureau of Land Mgmt., 531 F.3d 1220, 1223 (10th Cir. 2008)* .

(n7)Footnote 6. *28 U.S.C. § 1253*.

(n8)Footnote 7. *See United States v. Trans World Airlines, Incorporated, 18 F.3d 208, 213-214 (3d Cir. 1994)* ; *see also 28 U.S.C.A. § 1292(a)(1)*.

(n9)Footnote 8. *AT&T Broadband v. Tech Communs., Inc., 381 F.3d 1309, 1314-1315 (11th Cir. 2004)* (label placed on order does not control whether order is nonappealable temporary restraining order or appealable preliminary injunction).

(n10)Footnote 9. *Sampson v. Murray, 415 U.S. 61, 86, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* (temporary restraining order that extends in duration beyond time limits of Rule 65(b) must be treated as preliminary injunction for purposes of appealability); *United States v. Crawford, 329 F.3d 131, 136-138 (2d Cir. 2003)* (when district court extends temporary restraining order beyond 20-day period specified by *Fed. R. Civ. P. 65(b)* [10 days plus 10-day

extension], temporary restraining order becomes preliminary injunction for all purposes, including appealability); *Branstad v. Glickman, 118 F. Supp. 2d 925 (N.D. Iowa 2000)* ; *see 28 U.S.C § 1292(a)(1).*

(n11)Footnote 10. *SEIU v. Nat'l Union of Healthcare Workers, 598 F.3d 1061, 1067 (9th Cir. 2010)* (appellate court is not bound by what district court chooses to call TRO; order denominated as TRO that has qualities of preliminary injunction is appealable interlocutory order).

(n12)Footnote 1. *Ashcroft v. ACLU, 542 U.S. 656, 664-665, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)* .

(n13)Footnote 2. *Gonzales v. National Bd. of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000)* .

(n14)Footnote 3. *United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)* .

(n15)Footnote 4. *ACLU v. Taft, 385 F.3d 641, 645 (6th Cir. 2004)* .

(n16)Footnote 5. *See McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997)* .

(n17)Footnote 6. *Munaf v. Geren, 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1, 17-18 (2008)* (review of a preliminary injunction is not confined to act of granting that injunction, but also extends to determining whether there is any insuperable defeat of merits, which permits final judgment dismissing claim).

(n18)Footnote 7. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London, 600 F.3d 562, 569 (5th Cir. 2010)* ; *Teva Pharms. USA. Inc. v. FDA, 441 F.3d 1, 3 (D.C. Cir. 2006)* .

(n19)Footnote 8. *Fireman's Fund Ins. Co. v. Leslie & Elliott Co., 867 F.2d 150, 150-151 (2d Cir. 1989)* (deference provided to lower court under abuse of discretion standard is inappropriate when proceedings in district court did not include evidentiary hearing nor reasons why such hearing was unnecessary).

(n20)Footnote 9. *Miller v. Mitchell, 598 F.3d 139, 145 (3d Cir. 2010)* .

(n21)Footnote 10. *See Sabah Shipyard v. M/V Harbel Tapper, 178 F.3d 400, 404-405 (5th Cir. 1999)* , *cert. denied, 528 U.S. 1048 (1999)* .

(n22)Footnote 11. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 453-454 (4th Cir. 1999)* , *cert. denied, 528 U.S. 923 (1999)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE

1-11 Moore's Manual--Federal Practice and Procedure 11.syn

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§ 11.05 Corporate Disclosure Statement

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART I. NATURE AND TIMING OF DEFENDANT'S RESPONSE

1-11 Moore's Manual--Federal Practice and Procedure § 11.01

§ 11.01 Table of Time Periods for Defending Partyn*

Service of answer or other responsive pleading--	21 days after service of complaint. Rule 12(a)(1)(A)(i).
Service of answer if service of summons was waived	60 days (or 90 days outside U.S.) after date of request of waiver. Rule 12(a)(1)(A)(ii).
United States as defendant	60 days. Rule 12(a)(2), (3).
Eminent domain, answer to complaint or amendment	21 days after service of notice on defendant. Rule 71.1(e), (f).
Answer to amended pleading	14 days from service, or within any time remaining for response to original pleading, whichever is longer. Rule 15(a)(3).
Answer to more definitely stated pleading	14 days after service of more definite statement. Rule 12(a)(4)(B)
Service of summons & complaint on third-party defendant	After commencement of action; but no leave required to make service if third-party complaint filed not later than 14 days after service of original answer. Rule 14(a)(1).
Jury trial demand	Not later than 14 days from service of last pleading directed to issues for jury. Rule 38(b)(1).
Removal notice	30 days after defendant receives initial pleading or 30 days after service of summons; if case not initially removable, 30 days after service of document from which defendant first ascertains that case is removable. 28 U.S.C. § 1446(b).
Motion to strike	Before responding; or if no responsive pleading is permitted, 21 days from service of pleading. Rule 12(f)(2).
Incorrect venue, motion to dismiss or transfer case	Timely. 28 U.S.C. § 1406(a),(b)
Forum non conveniens, transfer to a	At any time for convenience of parties and witnesses, in in-

more convenient forum	terest of justice. 28 U.S.C. § 1404(a).
Motion to dismiss--Generally	Before responsive pleading is served, or at trial if no responsive pleading is required. Rule 12(b)
Lack of subject matter jurisdiction	At any time. Rule 12(h)(3).
Motion for summary judgment	Any time until 30 days after close of all discovery. Rule 56(c)(1)(A).
Opposition to summary judgment motion	Later of: within 21 days after motion is served or time responsive pleading is due. Rule 56(c)(1)(B).
Offer of judgment, Service of	At least 14 days before the date set for trial. Rule 68(a).

FOOTNOTES:

(n1)Footnote *. The times specified in this table are subject to the provisions for the extension of time under Rule 6(b), and to the provision of Rule 6(d) for the addition of 3 days to the period prescribed or allowed in the rules when service is accomplished by any means other than by hand delivery. *See* Fed. R. Civ. P. 6(d); *see also* Fed. R. Civ. P. 5(b)(2)(C)-(F). For discussion of the time periods for pleadings and motions, see Ch. 9, *Pleadings and Motions in General*.

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART I. NATURE AND TIMING OF DEFENDANT'S RESPONSE

1-11 Moore's Manual--Federal Practice and Procedure § 11.02

§ 11.02 Significance of Appearance by Defendantn*

[1] Nature of Appearance in Federal Litigation

A defendant may respond to the service of process by making an appearance. n1 An "appearance" is an open, public act by which a party comes into court and submits itself to the jurisdiction of the court. n2 A party makes an appearance by filing with the court a notice of appearance n3 or some other motion or pleading; however, in the majority of courts it is not necessary to file formal documents in order to make an appearance. The term appearance includes a variety of informal acts on defendant's part which are responsive to plaintiff's formal action in court, and which may be regarded as sufficient to give plaintiff a clear indication of defendant's intention to contest some claim. n4

Federal case law has historically distinguished between a "general appearance," and a "special appearance." A defending party made a general appearance by submitting to the jurisdiction of the court for all purposes, usually indicated by actively defending a claim. n5 On the other hand, by a "special appearance" a person could take several limited, preliminary procedural steps, most importantly to challenge personal jurisdiction, n6 and not submit to the court's jurisdiction. n7 However, the person had to make objections to jurisdiction at the first opportunity, and to otherwise indicate that it was making a special appearance only. n8 In federal court, the special appearance rules have been largely replaced by the civil rule that a defendant consolidate all of its defenses, n9 but the concept is still useful to the extent that it emphasizes that a defending party must object to personal jurisdiction at its earliest opportunity when the defending party makes its appearance. n10

[2] Privileges and Liabilities of Person Making Appearance

[a] Default and Challenge to Personal Jurisdiction

A mere filing of an appearance does not waive the defenses and objections available to a defendant stated in Rule 12. n1 However, an appearance does not insulate a party from being in default. The typical default judgment scenario involves the complete failure of the defendant to appear in the action. Despite valid service of process, the defendant makes no appearance at all and therefore defaults in the action. The clerk enters this default into the docket under Rule 55. n2 However, there are circumstances in which the defendant may initially appear in the action but later be in default. For example, the defendant may choose to appear to challenge personal jurisdiction, venue, or some other preliminary issue,

lose on that issue, and then decline to file an answer in the case. This failure to plead or otherwise defend puts the defendant in default, n3 despite the earlier appearance. n4 Or, default judgment may be ordered by the court as a sanction for the failure to obey a court order with respect to disclosure or discovery. n5 A party that has entered a proper appearance is entitled to the same notice of the proceedings as any party not in default, even though that party may default later from a failure to plead or otherwise defend. On the other hand, a party who is in default for failing to appear is not entitled to notice of any subsequent proceedings in the action. In that event, the defaulting party is entitled to service only of a pleading that contains a new claim, in the same manner provided for service of a summons in Rule 4. n6

[b] Discovery

Prior to any motion or pleading, a defendant making a limited appearance may participate in discovery. That is, the defendant may take depositions, serve interrogatories, serve requests for admissions, or serve objections to interrogatories. In fact, participation in discovery may be made to enable the court to determine a challenge to personal jurisdiction. n7 Additionally, participation in early discover will have no effect upon the right of the defendant to move or answer as provided in the rules. n8 Under some circumstances, the defendant may be required by statute to file a bond in a federal court. For example, the applicable law may permit the defendant to dissolve an attachment by giving bond. The defendant's possible objection to lack of jurisdiction is not waived by giving such a bond in the state court prior to removal or in the federal court after removal. n9 The defendant may attempt to get an agreement for an extension of time for the filing of its motion or answer. When this is done without obtaining an order of the court, it has no effect on the time periods prescribed by Rule 12. Entering into such an agreement, however, does not waive any defense or objection which the defendant might wish to raise at a later time. n10

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 1 Moore's Federal Practice, § 5.03 (Matthew Bender 3d ed.); 2 Moore's Federal Practice, § 12.31 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 5(a)(2), (a)(3), 55(b)(1), (2).*

(n3)Footnote 2. *New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996)* .

(n4)Footnote 3. *Ricotta v. State of California, 4 F. Supp. 2d 961, 988 (S.D. Cal. 1998)* .

(n5)Footnote 4. *Sun Bank v. Pelican Homestead & Sav. Ass'n, 874 F.2d 274, 277 (5th Cir. 1989)* (mailing of motion to dismiss to court clerk constituted an "appearance" for purposes of Rule 55(b)(2) even though clerk refused it and returned it for failure to comply with local rules).

(n6)Footnote 5. *See United States v. Stein, 435 F. Supp. 2d 330, 379 (S.D.N.Y. 2006)* .

(n7)Footnote 6. *See* [2][a], *below*.

(n8)Footnote 7. *See Lee Barnes v. Puerto Ven Quarry Corp., 513 F.3d 20, 24 (1st Cir. 2008)* .

(n9)Footnote 8. *Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 786 (5th Cir. 1990)* .

(n10)Footnote 9. *See Fed. R. Civ. P. 12(g)(2).*

(n11)Footnote 10. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n12)Footnote 1. *Robinson v. Town of Madison, 752 F. Supp. 842 (N.D. Ill. 1990)* (in diversity case, filing of appearance did not waive the right to contest personal jurisdiction).

(n13)Footnote 2. *Fed. R. Civ. P. 55(b)(1).*

(n14)Footnote 3. *Fed. R. Civ. P. 55(a).*

(n15)Footnote 4. *See Beitel v. OCA, Inc., 551 F.3d 359, 374 (5th Cir. 2008)* .

(n16)Footnote 5. *Fed. R. Civ. P. 37(b)(2)(C).*

(n17)Footnote 6. *Fed. R. Civ. P. 5(a)(2).*

(n18)Footnote 7. *Trintec Indus. v. Pedre Promotional Prods., 395 F.3d 1275, 1283 (Fed. Cir. 2005)* .

(n19)Footnote 8. *Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975)* (either party allowed discovery when party moves to dismiss for lack of jurisdiction).

(n20)Footnote 9. *See Branic v. Wheeling Steel Corp., 152 F.2d 887 (3d Cir. 1945)* (appearance and giving bond to dissolve attachment was not a waiver of objection to venue).

(n21)Footnote 10. *Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir. 1944)* (lack of jurisdiction of the person was not waived by a stipulation extending time to answer).

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PART III Pleading Stage
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1-11 Moore's Manual--Federal Practice and Procedure § 11.03

§ 11.03 Raising Defense by Responsive Pleading or by Motionn*

[1] Distinction Between Defensive Pleading and Motion

A person that is a defendant or potential defendant to a federal lawsuit may raise defenses or objections to claims raised by a plaintiff's complaint in two primary ways: by pleading or by a motion. In a defensive context, the primary distinction under the federal rules between a pleading and a motion is the substantive content. n1 A defensive "pleading" is a particular type of document filed with the court, such as an answer or reply, which must be made as a response on the merits to one or more claims for relief made by an opposing party's pleading. n2 On the other hand, a motion is a request or application by a party to the court that the court make a particular order, without responding to a claim for relief. n3 The significance in the distinction between pleadings and motions is that each type of document has different requirements or formalities under the federal rules. n4 These requirements must be met for the document to have a legal effect as a pleading or as a motion. Generally, a pleading must be presented with more formalities, in accordance with special requirements for pleadings specified in Rules 8 through 11. n5 Motions must be drafted in accordance with the requirements for motions prescribed in Rule 7(b). n6

[2] Use of Pleading or Motion to Respond to Plaintiff

In federal litigation, a party that challenges a claim for relief in a pleading such as a complaint may do so in a pleading such as an answer, but does not necessarily have to respond in the form of a pleading; the defending party may respond to a pleading by a motion. n1 Thus, if a responding party successfully makes a motion to dismiss a complaint or a motion for summary judgment that is granted by the court, then the party need not file an answer at all. n2 Rule 12 provides the defendant a menu of the pleading and motion options available, the order in which they should be presented, the time period for the presentation, and the consequences of failing to follow the rule's prescriptions. Rule 12(a) sets out the time periods within which the defendant must respond by pleading to a claiming party's complaint, counterclaim, or crossclaim. These periods vary depending on whether the defendant is the United States or one of its agencies or officers, or on whether any motions have been filed. n3

Before filing an answer, the defendant must also decide whether to object to personal jurisdiction, venue, process, or service. n4 Special appearances are no longer required to object to jurisdiction. In fact, the rules now generally require the defendant to consolidate all objections and defenses into a single motion. n5 Rule 12(b) also expressly requires the

defendant to raise specific matters by motion filed before the answer, but only one such motion is allowed. If the party does file a pre-answer motion, all available objections must be included; the defendant may not raise some in the motion and some in the answer. The following objections may be the grounds for a Rule 12 pre-answer motion to dismiss: n6 (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim on which relief may be granted; and (7) failure to join an indispensable party under Rule 19.

In addition to the pre-answer motion and a motion for judgment on the pleadings, Rule 12 includes other tools for narrowing and clarifying the scope of the litigation before trial. A court may order a more definite statement to clarify vague and ambiguous claims; n7 and redundant, immaterial, impertinent, or scandalous material or insufficient defenses may be stricken by the court. n8 Finally, any party may request a hearing before trial on matters included in a Rule 12(b) motion to dismiss or on a motion for judgment on the pleadings under Rule 12(c). n9

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Port of Stockton v. W. Bulk Carrier KS, 371 F.3d 1119, 1121 (9th Cir. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 7(a)* (specifying only five types of defensive pleading); *see Fed. R. Civ. P. 8(a), 8(b)* (contents of pleadings).

(n4)Footnote 3. *See Fed. R. Civ. P. 7(b)(1)*.

(n5)Footnote 4. *Structural Concrete Prods., LLC v. Clarendon Am. Ins. Co., 244 F.R.D. 317, 324 (E.D. Va. 2007)* .

(n6)Footnote 5. *Warnock v. Pecos County, 116 F.3d 776, 779 (5th Cir. 1997)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 7(b)*.

(n8)Footnote 1. *See Fed. R. Civ. P. 12(b)* (available responsive motions); *see also Fed. R. Civ. P. 7(a)(2), (3), (4), (6), (7)* (specifying available responsive pleadings).

(n9)Footnote 2. *See Marquez v. Cable One, Inc., 463 F.3d 1118, 1120-1121 (10th Cir. 2006)* .

(n10)Footnote 3. *See Fed. R. Civ. P. 12(a)*.

(n11)Footnote 4. *See Fed. R. Civ. P. 12(b)*.

(n12)Footnote 5. *See Fed. R. Civ. P. 12(g)(2)*.

(n13)Footnote 6. *See Fed. R. Civ. P. 12(b)(1)-(7)*.

(n14)Footnote 7. *See Fed. R. Civ. P. 12(e)*.

(n15)Footnote 8. *See Fed. R. Civ. P. 12(f)*.

(n16)Footnote 9. *See Fed. R. Civ. P. 12(i)*.

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PART III Pleading Stage
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1-11 Moore's Manual--Federal Practice and Procedure § 11.04

§ 11.04 Time to Respond to Complaint

[1] Time Period Ordinarily Applicable to Respond

After a plaintiff has made a valid service of a summons and complaint, a defendant other than a federal governmental defendant must generally serve an answer or otherwise respond within 21 days from the date of service. n1 It is important to note that this 21 day time period, and other time periods prescribed in Rule 12(a), are measured from the date the particular document is served on the defendant, and not from the date it is filed. n2

Exceptions to this 21 day time period apply in certain circumstances, including: when the defendant files a motion under Rule 12(b), (e), or (f) within the applicable time period, which triggers a different timetable for any answer that may be required after disposition of the motion; n3 when the claim in the pleading is brought under statutes prescribing their own time limits for responses; when the United States is a defendant; or when actual service by the plaintiff is replaced by a request for waiver of service, followed by the defendant's actual waiver. n4

The same general 21 day time period applicable for response after the effective service of summons and complaint also applies to the after service of an answer to a counterclaim or an answer to a crossclaim. Thus, when served with a pleading containing a crossclaim, the cross defendant has 21 days from the service date to reply. n5 Similarly, when required, the plaintiff must serve a reply to a counterclaim in an answer within 21 days after service of the pleading containing the counterclaim. n6 Also, if a plaintiff amends its complaint under Rule 15(a), and the court requires a response, the defendant must serve a response within any of the 21 days remaining for responding to the original pleading or within 14 days of service of the amendment, whichever is later. n7 If a party files a supplemental pleading, the other party need file a response only if the court orders it, in the time specified in the order to respond. n8 For a discussion of amended and supplemental pleadings, see Ch. 9, *Pleadings and Motions in General*.

[2] Exceptions to Ordinary Time Period to Respond

[a] Exception When Defendant Files Particular Motion Prior to Answering

A defending party has the option to present any type of defense within its own pleading, such as an answer or a reply. Alternatively, Rule 12 permits the defending party to raise certain types of defenses and objections by motion filed

before serving the answer. n1 Rule 12 also requires a party to consolidate many defenses and objections in one motion at the risk of waiving those not included; this requirement prevents abuse of civil motion practice. n2 If a defendant does serve a motion permitted by Rule 12 (such as a motion to dismiss under Rule 12(b)(6) for failure to state a claim), rather than filing an answer, the ordinary time period is altered for filing an answer. If the court denies the motion or postpones its disposition until trial, the defendant then has 14 days after notice of the court's action to serve the answer. n3

If the court grants a motion for a more definite statement filed pursuant to Rule 12(e), the defendant has 14 days from service of the more definite statement. n4 With respect to other Rule 12 motions that typically request dismissal of the action or the portion of the complaint under challenge, granting the motion will dispose of the case or of that portion of the complaint, rendering an answer unnecessary. Similarly, if a Rule 12(f) motion to strike is granted, typically no further action is required of the defendant. If, on the other hand, a motion to dismiss which challenges only a portion of the complaint is denied, or if a full scale motion to dismiss is granted only in part so that some claims remain for further disposition, the defendant must file an answer within 14 days, as potentially extended by Rule 6(a), after receiving notice of the court's order. n5

As usual, if the final day of the time period ends on a Saturday, Sunday, or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday, or legal holiday. n6 Also, if the defendant was served other than by hand delivery, three days is added. n7 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

[b] Other Rules Providing Exceptions to Response Time

The following are other exceptions to the general rule requiring a defendant's response within 21 days of service:

1. Other prevailing rules or statutes. Some other federal rules and federal statutes provide their own time periods for responding, which prevail if different from those prescribed by Rule 12. For example, a defendant is allowed 60 days to answer in a proceeding to cancel a certificate of citizenship. n8 Rule 12 time periods do not affect time periods provided in other rules, such as Rule 56 governing motions for summary judgment and do not apply to court orders, such as an order granting summary judgment. n9

2. Defendant's waiver of formal service. A defendant that timely waives service has 60 days from the date notice was sent to respond to the complaint. If notice was sent to a foreign country, the defendant has 90 days. n10

3. United States as Defendant. When the United States or one of its officers or agencies is the defendant, the answer or other responsive pleading must be served within 60 days of service of the complaint, crossclaim, or counterclaim, a time period that may not be shortened by the court. n11 Even if sued in his or her individual capacity, a government officer is generally entitled to the 60-day answer period if acting under color of law, lawful authority, or office in performing the challenged acts, or if the party is represented by a government attorney. n12

4. Additional three days for response. When the answer, motion, or other responsive pleading is served by mail or electronic transmission, Rule 6(d) generally adds three days to any applicable time period. n13

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 12(a)(1)(A)(i).*

(n2)Footnote 2. *See Fed. R. Civ. P. 12(a)(1)(A)(i); Silva v. Madison, 69 F.3d 1368, 1376 (7th Cir. 1995)* (construing former time periods).

(n3)Footnote 3. *See* [2][a], *below*.

(n4)Footnote 4. *See* [2][b], *below*.

(n5)Footnote 5. *Fed. R. Civ. P. 12(a)(1)(B)*.

(n6)Footnote 6. *Fed. R. Civ. P. 12(a)(1)(C)*.

(n7)Footnote 7. *Fed. R. Civ. P. 15(a)(3)*.

(n8)Footnote 8. *Fed. R. Civ. P. 15(d)*.

(n9)Footnote 1. *Fed. R. Civ. P. 12(b)*.

(n10)Footnote 2. *See Fed. R. Civ. P. 12(g)*.

(n11)Footnote 3. *Fed. R. Civ. P. 12(a)(4)(A)*.

(n12)Footnote 4. *Fed. R. Civ. P. 12(a)(4)(B)*.

(n13)Footnote 5. *Fed. R. Civ. P. 12(a)(4)(A)*.

(n14)Footnote 6. *Fed. R. Civ. P. 6(a)(1)(C)*.

(n15)Footnote 7. *See Fed. R. Civ. P. 6(d)*.

(n16)Footnote 8. *See 8 U.S.C. § 1451*.

(n17)Footnote 9. *Hathaway v. Coughlin, 841 F.2d 48, 50 n.1 (2d Cir. 1988)* (Rule 12(a) time limits inapplicable to motion for summary judgment); *see Fed. R. Civ. P. 56*.

(n18)Footnote 10. *Fed. R. Civ. P. 12(a)(1)(A)(ii)*; *see Fed. R. Civ. P. 4(d)(3)*, discussed in Ch. 6, *Service of Process and Jurisdiction Over the Person*.

(n19)Footnote 11. *Fed. R. Civ. P. 12(a)(2)*.

(n20)Footnote 12. *Fed. R. Civ. P. 12(a)(3)*; *Dickens v. Lewis, 750 F.2d 1251, 1255 (5th Cir. 1984)* .

(n21)Footnote 13. *see Fed. R. Civ. P. 6(d)*, discussed in Ch. 9, *Pleadings and Motions in General*.

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1-11 Moore's Manual--Federal Practice and Procedure § 11.05

§ 11.05 Corporate Disclosure Statementn*

§ 11.05 Corporate Disclosure Statement

[a] Required Disclosure Statement

Each nongovernmental corporate party to an action in a district court, including defending parties, must file two copies of a statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock n1 or (2) states that the corporation has no parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock. n2 The primary purpose of requiring this statement is to enable the district court judge to determine whether he or she has the "financial interest" required to subject the judge to automatic disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges. n3 Some authority indicates that the disclosure statement may be considered by the court for other purposes, such as to determine corporate citizenship in diversity cases. n4

[b] Time for Filing

A nongovernmental corporate party that comes within the rule must file the required disclosure statement in every case. It must file its initial statement with its first appearance, pleading, motion, response, or other request addressed to the court. n1 Additionally, a party must supplement its statement whenever the information that must be disclosed under Rule 7.1 changes. n2 For example, if a nongovernmental corporate party to an action in a district court initially had no parent corporation, but was later acquired by a parent corporation, the party would then have to disclose that information in a supplemental disclosure. n3 An opposition party may make a motion to compel the filing of a disclosure statement by another party. However, the court may not impose sanctions for failure to timely file a disclosure, at least unless the disclosing party has purposely delayed filing the disclosure or prejudiced the opposition by the tardy disclosure. n4

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, §§ 7.1.02, 7.1.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 7.1(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 7.1(a)(2).*

(n4)Footnote 3. *Fed. R. Civ. P. 7.1(a)*, Committee Note.

(n5)Footnote 4. *DirecTV Latin Am., LLC v. Park 610, LLC, 2009 U.S. Dist. LEXIS 22510, at *16 (S.D.N.Y. 2009)* ; *Nipponkoa Ins. Co. v. GlobeGround Servs., 2006 U.S. Dist. LEXIS 76227, at *9-*10 (N.D. Ill. 2006)* .

(n6)Footnote 1. *Fed. R. Civ. P. 7.1(b)(1).*

(n7)Footnote 2. *Fed. R. Civ. P. 7.1(b)(2).*

(n8)Footnote 3. *Fed. R. Civ. P. 7.1(b)*, Committee Note.

(n9)Footnote 4. *Hall v. Tyco Int'l, Ltd., 223 F.R.D. 219, 257 (M.D.N.C. 2004)* .

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1-11 Moore's Manual--Federal Practice and Procedure §§ 11.06 through 11.09

[Reserved]

§§ 11.06[Reserved]

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PART III Pleading Stage
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PART II. CONSOLIDATION AND WAIVER OF DEFENSES

1-11 Moore's Manual--Federal Practice and Procedure § 11.10

§ 11.10 Defenses and Objections Generally Must Be Consolidated in Initial Response or Motionn*

[1] Mandatory Consolidation of Certain Motions

A party must assert in its responsive pleading to any pleading making a claim for relief every legal or factual defense to the claims made, except for the following itemized defenses, which may be raised by motion: n1 (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim on which relief may be granted; and (7) failure to join a party under Rule 19. Such a motion must be made before any responsive pleading is made, and thus it is sometimes referred to as a pre-answer motion. n2

A party may join any motion under Rule 12 with any other motion allowed by Rule 12. n3 Furthermore, a party *must* generally join any motion made under Rule 12 with any other motion provided for in the rule and then available to the party, and prohibits any later motions to raise any omitted defenses or objections. In other words, if a party seeks dismissal in a pretrial motion based on any of the defenses set out in Rule 12(b), the party must include in such motion any other defenses or objections then available that Rule 12 permits to be raised by motion, or the omitted defenses will be waived. n4 This consolidation requirement applies not only to Rule 12(b) defenses, but also to a motion for a more definite statement under Rule 12(e) and to a motion to strike under Rule 12(f). n5 Exceptions to the Rule 12(g)(2) consolidation requirement appear in Rule 12(h)(2) and may be raised in any Rule 7(a) pleading. n6

[2] Rationale for Consolidation

The consolidation requirements are designed to discourage a defending party from using a series of successive motions as a dilatory tactic. n1 When read together, the consolidation and waiver provisions make clear that to avoid making a waiver of most available Rule 12 defenses or objections, a party must raise them in one initial motion or if no motions are filed, in the first responsive pleading. n2

The mandatory consolidation requirement applies only to a defense or objection "that was available to the party." n3 Therefore, for example, if the defendant moves for and obtains a more definite statement and that statement reveals a ground for a motion to dismiss, the defendant may then advance such a motion instead of answering. However, if the plaintiff amends the complaint, the amendment does not revive omitted defenses or objections that the defendant could

have raised in response to the original complaint. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, §§ 12.20, 12.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 12(b).*

(n3)Footnote 2. *See Fed. R. Civ. P. 12(b).*

(n4)Footnote 3. *See Fed. R. Civ. P. 12(g)(1).*

(n5)Footnote 4. *See Fed. R. Civ. P. 12(g)(2)*; § 11.12.

(n6)Footnote 5. *FRA S.P.A. v. Surg-O-Flex of America, Inc., 415 F. Supp. 421, 427 n.5 (S.D.N.Y. 1976)* .

(n7)Footnote 6. *See § 11.12.*

(n8)Footnote 1. *Flory v. United States, 79 F.3d 24, 25 (5th Cir. 1996)* (discussing Rule 12(h)(1) automatic waiver provision).

(n9)Footnote 2. *Armstrong v. Sears, 33 F.3d 182, 188 (2d Cir. 1994)* (all defenses must be consolidated in single *Fed. R. Civ. P. 12* motion, and defense of insufficiency of service of process waived if omitted from initial *Fed. R. Civ. P. 12* motion).

(n10)Footnote 3. *Fed. R. Civ. P. 12(g)*; *see Glater v. Eli Lilly & Co., 712 F.2d 735, 738 (1st Cir. 1983)* .

(n11)Footnote 4. *Church of Scientology v. Linberg, 529 F. Supp. 945, 967 (C.D. Cal. 1981)* .

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1-11 Moore's Manual--Federal Practice and Procedure § 11.11

§ 11.11 Defenses That Are Waived if Not Raised at Earliest Opportunityn*

Under Rule 12(h)(1) a party waives certain defenses omitted from a motion in the circumstances described in Rule 12(g)(2), which refers to a party's motion under Rule 12 that omits a defense "that was available" to the party. n1 When read together, Rule 12 subdivisions (g) and (h) mean that the defendant may preserve any such defense by including it either in its answer or in a Rule 12 motion, but that all such defenses must be included. n2

Rule 12(h)(1) provides for the waiver of the specific Rule 12(b) defenses numbered 12(b)(2)-(5) if they are not raised in the initial motion or responsive pleading: lack of personal jurisdiction, improper venue, and insufficiency of process and service of process. n3 If a party files a pre-answer motion, but fails to include one or more of those defenses, the party waives the omitted defense and may not subsequently raise it in his or her answer or otherwise. n4 Several jurisdictions have held that insufficient service of process may be waived not only by noncompliance with Rule 12(h), but also through conduct that is inconsistent with the defense. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.22 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(g)(2)*; *see § 11.10*.

(n3)Footnote 2. *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1364 (11th Cir. 2006)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 12(h)(1)*.

(n5)Footnote 4. *English v. Dyke, 23 F.3d 1086, 1090 (6th Cir. 1994)* ; *Golden v. Cox Furniture Mfg. Co., 683 F.2d 115, 118 (5th Cir. 1982)* .

(n6)Footnote 5. *Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 734 (7th Cir. 1991)* .

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1-11 Moore's Manual--Federal Practice and Procedure § 11.12

§ 11.12 Exception to Waiver for Fundamental Defensesn*

Certain defenses are considered so fundamental that they may be raised even during trial n1 and Rule 12 provides specific exceptions to the waiver resulting from the Rule 12(g)(2) prohibition against successive motions. n2 These defenses are listed in Rule 12(h)(2), and include the defenses of failure to state a claim on which relief may be granted, n3 failure to join a party indispensable under Rule 19, n4 and also failure to state a legal defense to a claim. n5 If omitted from the initial motion, those matters may not be raised in a successive Rule 12 motion but may be raised in any Rule 7(a) responsive pleading, n6 in a Rule 12(c) motion for judgment on the pleadings, n7 or at trial on the merits. n8 Lack of subject matter jurisdiction, n9 unlike lack of personal jurisdiction and the related defenses of insufficiency of process or service, may not be waived, but may be raised at any time. In fact, the court is obligated on its own initiative to dismiss the action in its absence. n10

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Weaver v. Bowers, 657 F.2d 1356, 1362 (3d Cir. 1981) .*

(n3)Footnote 2. *Fed. R. Civ. P. 12(g)(2).*

(n4)Footnote 3. *See Fed. R. Civ. P. 12(b)(6).*

(n5)Footnote 4. *See Fed. R. Civ. P. 19(b).*

(n6)Footnote 5. *Fed. R. Civ. P. 12(h)(2).*

(n7)Footnote 6. *Fed. R. Civ. P. 12(h)(2)(A).*

(n8)Footnote 7. *Fed. R. Civ. P. 12(h)(2)(B)*; *see Fed. R. Civ. P. 12(c).*

(n9)Footnote 8. *Fed. R. Civ. P. 12(h)(2)(C)*; *Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1228 (10th Cir. 1987) .*

(n10)Footnote 9. *Fed. R. Civ. P. 12(b)(1)*.

(n11)Footnote 10. *Fed. R. Civ. P. 12(h)(3)*; *Arbaugh v. Y & H Corp., 546 U.S. 500, 506-507, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* ; *see § 11.20[1]*.

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1-11 Moore's Manual--Federal Practice and Procedure § 11.13

§ 11.13 Affirmative Defenses Subject to Waiver Under Separate Rulen*

Rule 12's consolidation and waiver provisions apply only to defenses that may be raised by motion under Rule 12(b)(2)-(5). n1 Consequently, they do not govern waiver of affirmative defenses, which are listed in Rule 8(c), and which must be pleaded or waived under the provisions of Rule 8. n2 Unlike the Rule 8(c)(1) affirmative defenses, defenses that may be waived under Rule 12(h) may not be raised in an amended answer. n3 Similarly, motions other than the types specified in Rule 12(h)(1) will not be waived by omitting them from a Rule 12 consolidated pre-answer motion, including motions to stay n4 or motions for transfer based on the convenience of the parties and witnesses. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.24 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(g)(2), (h)(1).*

(n3)Footnote 2. *See § 11.50*, et seq.

(n4)Footnote 3. *Morgan Guaranty Trust Co. v. Blum, 649 F.2d 342, 345 (5th Cir. 1981)* .

(n5)Footnote 4. *Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1475 (9th Cir. 1988)* .

(n6)Footnote 5. *Catalano v. BRI, Inc., 724 F. Supp. 1580, 1583 (E.D. Mich. 1989)* ; *see 28 U.S.C. § 1404(a).*

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1-11 Moore's Manual--Federal Practice and Procedure §§ 11.14 through 11.19

[Reserved]

§§ 11.14[Reserved]

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1-11 Moore's Manual--Federal Practice and Procedure § 11.20

§ 11.20 Lack of Subject Matter Jurisdictionn*

[1] Court or Party May Raise Objection at Any Time

A party may raise a lack of subject matter jurisdiction n1 at any time. n2 In fact, subject matter jurisdiction is such a fundamental requirement under the law that even if the parties do not identify a potential issue in that respect, it is the duty of the court, at any stage of the proceedings to address the issue sua sponte whenever the court perceives the lack of jurisdiction. n3 Therefore, although other defenses and objections are waived if not asserted in an initial Rule 12 motion or in an initial responsive pleading, lack of subject matter jurisdiction challenges the court's statutory or constitutional power to adjudicate the case, and it may not be waived by the parties. n4

If jurisdiction is challenged by a court or party, the party asserting subject matter jurisdiction has the burden of proving its existence. This means the burden is on the plaintiff in cases filed originally in federal court, and the defendant in cases removed from state court. n5

[2] Court's Determination of Issue

[a] Time of Determination

The district court should determine subject matter jurisdictional issues first, because they concern the court's very power to hear the case. n1 However, the truth of jurisdictional allegations need not always be determined with finality at the threshold of the litigation. Rather, the party with the burden must establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements, and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before the court alone. n2 However, because jurisdictional facts in the case may be interrelated with the factual merits of the case, the court may postpone a jurisdictional determination until later in the case, even delaying the jurisdictional determination for trial. n3

[b] Procedure for Determination

Unlike a motion for Rule 12(b)(6) dismissal, the court need not confine its evaluation to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing. n4 Thus, a district court

may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question before trial, if the jurisdictional facts are not intertwined with the merits. n5 When the jurisdictional facts are too interrelated with the merits to permit the determination to be made independently, the court should either employ the standard applicable to a motion for summary judgment (if the material jurisdictional facts are undisputed) or may leave the jurisdictional determination to trial. n6

There are two potential types of subject matter jurisdiction challenges. The first type, known as a facial challenge, accepts that the plaintiff's jurisdictional facts are true but attacks their sufficiency to satisfy each of the statutory requirements. For such a challenge, the court will accept the plaintiff's well-pleaded allegations, draw all reasonable inferences from the facts in the plaintiff's favor, and determine based on those facts whether the plaintiff has propounded an adequate basis for subject matter jurisdiction. The second type of challenge denies the correctness rather than the sufficiency of the jurisdictional facts asserted by the plaintiff. In this type of challenge, the court gives no presumptive weight to the plaintiff's factual assertions and must determine the merits of the jurisdictional claim by deciding the factual disputes between the parties. n7

[c] Effect of Determination

If the court determines to dismiss for lack of subject matter jurisdiction, the dismissal is not a judgment on the merits and, therefore, has no claim preclusive or res judicata effect. n8 Contrast this with a dismissal for failure to state a claim under Rule 12(b)(6), n9 which does constitute a judgment on the merits. When the court dismisses for lack of subject matter jurisdiction, the party will not be precluded from later bringing the claim if at that later time the court has a basis for such jurisdiction. n10

When a court dismisses a claim on a jurisdictional challenge based on the complaint alone or the complaint supplemented by undisputed facts gleaned from the record, the existence of subject matter jurisdiction is a question of law that the appellate courts review under a de novo standard. n11 On the other hand, a district court's dismissal based on a factual challenge is reviewed under the clearly erroneous standard, which means that the appellate court will accept the factual determination that is the basis of the jurisdictional decision, unless it is clear the determination is in error. n12

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.30 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(b)(1).*

(n3)Footnote 2. *Carlisle v. United States, 517 U.S. 416, 434-435, 116 S. Ct. 1460, 1470, 134 L. Ed. 2d 613 (1996)* .

(n4)Footnote 3. *Arbaugh v. Y & H Corp., 546 U.S. 500, 506-507, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* ; *see Fed. R. Civ. P. 12(h)(3).*

(n5)Footnote 4. *FDIC v. Hillcrest Assocs., 66 F.3d 566, 568 (2d Cir. 1995)* (because subject matter jurisdiction concerns the authority of court to decide controversy, it may not be conferred or waived even by express consent).

(n6)Footnote 5. *Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)* .

(n7)Footnote 1. *Arbaugh v. Y & H Corp., 546 U.S. 500, 506-507, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* .

(n8)Footnote 2. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 535-539, 115 S. Ct. 1043, 1050, 130 L. Ed. 2d 1024 (1995)* .

(n9)Footnote 3. *Valentin v. Hospital Bella Vista, 254 F.3d 358, 364, n.3 (1st Cir. 2001)* .

(n10)Footnote 4. *Hammond v. Clayton, 83 F.3d 191, 192 (7th Cir. 1996)* .

(n11)Footnote 5. *Barrera-Montenegro v. DEA, 74 F.3d 657, 659 (5th Cir. 1996)* .

(n12)Footnote 6. *Barrett v. United States, 853 F.2d 124, 131 (2d Cir. 1988)* .

(n13)Footnote 7. *Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 300 (3d Cir. 2002)* .

(n14)Footnote 8. *Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994)* .

(n15)Footnote 9. *Fed. R. Civ. P. 12(b)(6).*

(n16)Footnote 10. *Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987)* .

(n17)Footnote 11. *King v. United States, 301 F.3d 1270, 1273 (10th Cir. 2002)* .

(n18)Footnote 12. *Filetech S.A. v. France Telecom S.A., 304 F.3d 180, 181 (2d Cir. 2002)* .

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1-11 Moore's Manual--Federal Practice and Procedure § 11.21

§ 11.21 Lack of Personal Jurisdictionn*

[1] Motion to Challenge Personal Jurisdiction Places Burden on Plaintiff

A court must have jurisdiction over a person to adjudicate the rights and liabilities of that person in any judgment entered by the court. n1 A defending party may make a motion for dismissal of an action or claim if the court has no personal jurisdiction over that party. n2 While a defendant may submit voluntarily to a court's jurisdiction, the court ordinarily must obtain jurisdiction through proper service of process. n3 If a defending party challenges personal jurisdiction through a motion to dismiss, the party asserting personal jurisdiction (the person making the claim) has the burden of proving its existence, just as is the case with subject matter jurisdiction. n4

Rule 12(b)(2) challenges the grounds asserted for jurisdiction over the person, rather than challenging the method by which jurisdiction was obtained through service of process. n5 Although Rule 12(b)(2) provides the procedural vehicle for challenging personal jurisdiction, its existence will be determined on constitutional, statutory, and other substantive authority, such as whether the defendant had requisite contacts with the forum. n6 Formerly, the defendant could make only a "special appearance" for the purpose of objecting to personal jurisdiction waived the right to be sued in the proper federal district court. However, the current Federal Rules of Civil Procedure have abolished the technical distinction between general and special appearances. n7 Now, in all federal courts, including those exercising diversity jurisdiction, the method for challenging the grounds for a court's jurisdiction over the person of a defendant is a Rule 12(b)(2) motion. n8

[2] Defense Waived if Not Made in Timely Manner

A party defending against a claim must object to the court's exercise of personal jurisdiction at the party's earliest opportunity, n1 either in its first Rule 12 motion or in its first pleading, such as an answer or in a reply ordered by the court. If the defending party fails to raise the issue at that time, it is considered waived unlike for challenges to subject matter jurisdiction. n2 There is some authority that allows a defendant to amend or supplement its initial Rule 12 motion or its answer to add the defense of lack of personal jurisdiction. However, the defendant is not entitled to amend or correct its initial Rule 12 motion or answer as a matter of course at any time, and a defendant may not amend an answer or Rule 12 motion merely because the defendant decides to change tactics or strategy. n3 Raising lack of personal jurisdiction in an answer, without further pursuing the defense has also been held to constitute waiver. Defenses referred

to in Rule 12(h)(1), including lack of personal jurisdiction, also may be waived by formal stipulation, or by waiver through conduct in submitting to the court's jurisdiction. n4

[3] Court's Determination of Issue

The court has discretion to rely on written submissions or to hold a full evidentiary hearing in order to make its determination with respect to the existence of personal jurisdiction. n1 If the court chooses not to hold a hearing, the party need make only a prima facie case that personal jurisdiction exists. n2 As with challenges to subject matter jurisdiction, the court will accept plaintiff's jurisdictional allegations as true and will resolve any factual disputes in the plaintiff's favor. n3 A prima facie case is established if the plaintiff presents sufficient evidence to defeat a motion for directed verdict. n4 Before it decides the issue, the district court may allow a party asserting jurisdiction to conduct discovery to help establish the jurisdictional facts. n5 If the party must prove jurisdiction by a preponderance of the evidence and the facts are in dispute, the court should allow discovery. n6

If the court denies the motion to dismiss, the defendant may proceed to trial on the merits without waiving the jurisdictional challenge. n7 If the court holds an evidentiary hearing, or if the issue is litigated at trial, the party asserting jurisdiction must demonstrate its existence by a preponderance of the evidence. In other words, the facts must show by a preponderance that the prima facie case for personal jurisdiction has been made. n8 If the court decides that it lacks personal jurisdiction, generally the court will dismiss the action. However, the court also has the option to transfer the action. n9

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.31 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Vax-D Med. Techs., LLC v. Tex. Spine Med. Ctr., 485 F.3d 593, 596-597 (11th Cir. 2007)* ; *see* Ch. 6, *Personal Jurisdiction and Service of Process*.

(n3)Footnote 2. *Fed. R. Civ. P. 12(b)(2)*.

(n4)Footnote 3. *McCurdy v. American Board of Plastic Surgery, 157 F.3d 191 (3rd Cir. 1998)* .

(n5)Footnote 4. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996)* .

(n6)Footnote 5. *Santos v. State Farm Fire and Casualty Co., 902 F.2d 1092, 1095 (2d Cir. 1990)* (Rule 12(b)(2) motion challenges whether court has power over defendant, while Rule 12(b)(4) or 12(b)(5) motion raises procedural defects in manner in which defendant was served).

(n7)Footnote 6. *Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033 (11th Cir. 1991)* .

(n8)Footnote 7. *SEC v. Wencke, 783 F.2d 829, 832 n.3 (9th Cir. 1986)* .

(n9)Footnote 8. *Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 490 (5th Cir. 1974)* .

(n10)Footnote 1. *Rates Tech., Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1308-1309 (Fed. Cir. 2005)* .

(n11)Footnote 2. *LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921-922 (7th Cir. 1997)* .

(n12)Footnote 3. *Nycal Corp. v. Inoco PLC, 949 F. Supp. 1115, 1119-1120 (S.D.N.Y. 1997)* .

(n13)Footnote 4. *LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir. 1997)* (defendant made waiver by actively proceeded with defense.

(n14)Footnote 1. *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 171-172 (5th Cir. 1994)* .

(n15)Footnote 2. *Rano v. Sipa Press, Inc., 987 F.2d 580, 587 n.3 (9th Cir. 1993)* .

(n16)Footnote 3. *Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 255 (11th Cir. 1996)* .

(n17)Footnote 4. *Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 855 (11th Cir. 1990)* .

(n18)Footnote 5. *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994)* .

(n19)Footnote 6. *Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 540 (9th Cir. 1986)* (discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary).

(n20)Footnote 7. *Stewart v. Ragland, 934 F.2d 1033, 1036 n.5 (9th Cir. 1991)* .

(n21)Footnote 8. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996)* .

(n22)Footnote 9. *Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39, 42 (1962)* ; *see, e.g., 28 U.S.C. § 1406.*

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1-11 Moore's Manual--Federal Practice and Procedure § 11.22

§ 11.22 Improper Venuen*

[1] Burden is on Defendant to Establish Impropriety

A defendant may challenge the propriety of a plaintiff's chosen venue n1 by moving to dismiss the action under Rule 12. n2 The venue selected by the plaintiff may also be considered improper because of the effect of a forum selection clause. n3

Although Rule 12(b) provides the procedural vehicle for challenging venue and dismissing the claim if improper, the substantive standard for determining the propriety of venue appears in the venue statute, n4 or within convenience of forum statute. n5 The party challenging venue has the burden to demonstrate affirmatively that the plaintiff filed the claim in an improper venue. n6 As with objections to subject matter jurisdiction or personal jurisdiction under Rule 12(b)(1) and (2), respectively, the court may permit discovery to aid its factual determination. Because venue determinations are often fact specific, they will generally be reviewed under the deferential abuse of discretion standard. n7

[2] Defense Waived if Not Made in Timely Manner

An objection to venue will be waived if not raised in a timely manner at the earliest opportunity in a Rule 12 motion or in the defending party's answer or reply, n1 unlike some of the Rule 12(b) defenses, such as lack of subject matter jurisdiction n2 or failure to state a claim. n3 For example, the defense of improper venue is waived by a defendant's failure to object in response to an original complaint. n4 Improper venue may also be waived by the defendant's agreement to transfer the case. n5 However, if the defendant relies on the district court's opinion determining a particular jurisdiction as the proper forum, the defendant does not waive improper venue by failing to raise objection to venue explicitly under Rule 12(b)(3). n6

[3] Court's Determination of Issue

A court may not dismiss a case based on improper venue without providing notice and an opportunity to be heard. n1 This allows the defendant to waive the defense and allows the plaintiff to respond to the merits of the defense. n2 A court that makes a determination that venue is improper may dismiss the case, but such a dismissal for improper venue

does not constitute a judgment on the merits. n3 The court also has the option of transferring a case that is brought in the wrong district. n4 When an action is filed with venue in the wrong district, if the court decides that transfer is in the interest of justice, it may transfer it to any district or division in which it could have been brought. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.32 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. §§ 1391, 1404.*

(n3)Footnote 2. *Fed. R. Civ. P. 12(b)(3).*

(n4)Footnote 3. *See Rainforest Cafe, Inc. v. EklecCo, L.L.C., 340 F.3d 544, 546 (8th Cir. 2003) .*

(n5)Footnote 4. *See 28 U.S.C. §§ 1391, 1404.*

(n6)Footnote 5. *See 28 U.S.C. §§ 1391, 1404.*

(n7)Footnote 6. *Int'l Truck and Engine Corp. v. Quintana, 259 F. Supp. 2d 553, 558 (N.D. Tex. 2003) .*

(n8)Footnote 7. *In re Cuyahoga Equip., Corp., 980 F.2d 110, 116 (2d Cir. 1992) .*

(n9)Footnote 1. *See Fed. R. Civ. P. 12(h)(1); Fed. R. Civ. P. 12(b)(3); Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006) .*

(n10)Footnote 2. *Fed. R. Civ. P. 12(b)(1).*

(n11)Footnote 3. *Fed. R. Civ. P. 12(b)(6).*

(n12)Footnote 4. *Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108, 112 (2d Cir. 1987) .*

(n13)Footnote 5. *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1137 (5th Cir. 1992) .*

(n14)Footnote 6. *See American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd. 364 F.3d 884, 887-888 (7th Cir. 2004) .*

(n15)Footnote 1. *Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986) .*

(n16)Footnote 2. *Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257, 1259 (11th Cir. 1988) .*

(n17)Footnote 3. *Concha v. London, 62 F.3d 1493, 1507-1508 (9th Cir. 1995)* (dismissal for improper venue is final judgment, but is without prejudice); *see 28 U.S.C. § 1406(a).*

(n18)Footnote 4. *28 U.S.C. § 1406(a); see Trujillo v. Williams, 465 F.3d 1210, 1216 (10th Cir. 2006) .*

(n19)Footnote 5. *Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39, (1962) .*

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1-11 Moore's Manual--Federal Practice and Procedure § 11.23

§ 11.23 Improper Form of Process or Service of Processn*

[1] Two Types of Motions Available

The defendant has two types of motions available to challenge the form or service of process. The first type of motion is a motion for insufficient process, n1 which means that the form of the summons is incomplete or improper as specified in Rule 4(a) and 4(b). Errors in the form of process may include errors in naming the proper defendant, failing to state the number of days allowed for the defendant to answer, or failure to obtain a court signature. n2 A motion challenging sufficiency of process under Rule 12(b)(4) must point out specific instances where the plaintiff has failed to comply with the requirements of Rule 4. n3

The second type of motion is a motion for insufficient service of process, n4 which means that, even though the summons was in correct form, the manner of service was improper, usually because it was not served within the appropriate time limit as specified in Rule 4(m). A motion challenging sufficiency of service of process under Rule 12(b)(4) must point out the specific circumstances that show a failure to comply with the requirements of Rule 4. n5 Other examples of improper service include: serving the wrong person, serving an individual not authorized to accept service on behalf of a corporation, and improper mailing procedure. n6

Thus, although Rule 12(b)(2) challenges the existence of jurisdiction over the person served, Rule 12(b)(4) challenges the form of process, and Rule 12(b)(5) challenges the method of serving process on the persons sued. n7 Although some courts may treat Rule 12(b)(4) and 12(b)(5) as interchangeable, attorneys should always make complete and specific motions according to the type of challenge. n8 In all challenges to the sufficiency of either the summons or service of process, the burden of establishing insufficiency lies with the party raising the challenge. n9

[2] Motion Must be Made in Timely Manner

A defendant's option to make a motion under Rule 12(b)(4) or 12(b)(5) is waived if not asserted at the proper time, which must be in the first Rule 12 motion filed or in the first responsive pleading. n1 The rules no longer require a special appearance to contest process; therefore, making a general appearance does not alone constitute a waiver. Pleading insufficiency of process at the first opportunity preserves the objection even if it is not argued before other motions, such as one for summary judgment. n2 In practice, a defendant objecting to the form or service of process will

often fail to appear, preferring to challenge the process or service after the entry of default judgment. Some courts have held, however, that if the defendant has actual notice of the suit and if any noncompliance with Rule 4 is merely technical, a defendant may waive the objection by failing to appear and challenge sufficiency of the process or service. n3

[3] Court's Determination of Issue

On making a determination that either process or service of process was insufficient, the court has discretion to either dismiss the action without prejudice, n1 or to nullify service and direct the plaintiff to effect service within a specified period of time. n2 However, on a showing of good cause, the court must extend the time for service for an appropriate period. n3 Ordinarily, a dismissal without prejudice means that the claimant may refile the action in order to properly complete service of process, if the statute of limitation has run by the time of the dismissal, the dismissal constitutes a final judgment. n4

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(b)(4).*

(n3)Footnote 2. *See Fed. R. Civ. P. 4(a), (b).*

(n4)Footnote 3. *O'Brien v. R.J. O'Brien Assocs., 998 F.2d 1394, 1400 (7th Cir. 1993)* .

(n5)Footnote 4. *Fed. R. Civ. P. 12(b)(4).*

(n6)Footnote 5. *Shipley v. Orndoff, 491 F. Supp. 2d 498, 502-503 (D. Del. 2007)* .

(n7)Footnote 6. *See, e.g., Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 885 (8th Cir. 1996)* .

(n8)Footnote 7. *McCurdy v. American Board of Plastic Surgery, 157 F.3d 191, (3rd Cir. 1998)* .

(n9)Footnote 8. *O'Brien v. R.J. O'Brien Assocs., 998 F.2d 1394, 1400 (7th Cir. 1993)* .

(n10)Footnote 9. *Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 404 (7th Cir. 1986)* (defendant bears burden of proof when challenging sufficiency of service of process).

(n11)Footnote 1. *Armstrong v. Sears, 33 F.3d 182, 188 (2d Cir. 1994)* .

(n12)Footnote 2. *Flory v. United States, 79 F.3d 24, 25-26 (5th Cir. 1996)* .

(n13)Footnote 3. *See McGann v. New York, 77 F.3d 672, 674 (2d Cir. 1996)* .

(n14)Footnote 1. *Betty K Agencies, Ltd. v. M/V Monada, 432 F.3d 1333, 1340-1342 (11th Cir. 2005)* ; *Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir. 1996)* .

(n15)Footnote 2. *McGann v. New York, 77 F.3d 672, 674 n.2 (2nd Cir. 1996)* (quoting *Fed. R. Civ. P. 4(m)*).

(n16)Footnote 3. *See Fed. R. Civ. P. 4(m).*

(n17)Footnote 4. *Umbenhauer v. Woog, 969 F.2d 25, 31 (3d Cir. 1992)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART III. DEFENSES AND OBJECTIONS THAT MAY BE RAISED BY MOTION

1-11 Moore's Manual--Federal Practice and Procedure § 11.24

§ 11.24 Failure to State Claim for Reliefn*

[1] Defendant Must Show Failure to State A Claim

Any party defending a claim, counterclaim, crossclaim or a third-party claim may make a motion to dismiss under Rule 12(b)(6) for failure to state a claim on which relief can be granted. n1 A defending party will not prevail on a Rule 12(b)(6) motion if the claiming party has made a short and plain statement of the claim showing the pleader is entitled to relief. n2 However, the Supreme Court has stated that liberal construction regarding a motion to dismiss is not unlimited. Thus, it is not a sufficient statement of a claim to merely state conclusory assertions regarding a legal theory, without any reference to the factual circumstances. Without any factual assertions supporting a claim for relief, the court must grant the Rule 12(b)(6) motion. n3

[2] Plaintiff Allowed to Amend Complaint After Motion to Dismiss

If a pleading is one to which a responsive pleading is required, the pleading party may amend its pleading once as a matter of course at the expiration of the earlier of two time periods: n1 21 days after receiving service of a responsive pleading, or 21 days after receiving service of a motion under Rule 12(b) (motion presenting defenses), 12(e)(motion for more definite statement), or 12(f) (motion to strike). The purpose of giving the party serving a complaint time to amend until 21 days after a responsive pleading or motion has been served is that the pleader moving for amendment will have time to read the response to the pleading, and adjust the amendment accordingly. Thus, the responsive pleading or motion may indicate issues that the original pleader had not considered and also indicate to the pleader how to draft an appropriate amendment. n2

After 21 days has elapsed since service of a responsive pleading, when required, the pleader's right to amend its pleading without leave of court is terminated. However, the pleading may then be amended with leave of court or by consent of the opposition. n3 Although the decision to grant or deny leave to amend is entrusted to the sound discretion of the district court, n4 that discretion is limited by the dictate of Rule 15(a) that the court must give leave freely given when justice so requires. n5 Accordingly, unless the facts alleged in the complaint clearly show that the plaintiff has no legitimate claim, courts ordinarily will allow the plaintiff leave to amend the complaint. n6 Appropriate grounds for denying a request to amend include untimeliness, undue delay, bad faith, dilatory motive, prejudice to the other party, and futility. n7

[3] Court's Decision on Motion to Dismiss

[a] Matters Considered By Court

In making the determination of whether to dismiss for failure to state a claim, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice. n1 The courts may consider the following:

1. Documents attached to complaint. n2

2. Undisputed documents alleged or referenced in complaint. n3

3. Public records. n4

However, in its determination of a motion to dismiss, the court may not consider any other matters outside the pleadings themselves, n5 For example, the court may not consider documents attached to a Rule 12(b)(6) motion to dismiss because that motion does not constitute a pleading; the court may consider such documents only if the documents are incorporated by reference into the complaint itself. n6 Similarly, the court may not consider any facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a). n7 If the court does consider any such matters outside of the pleadings, the motion to dismiss is automatically converted to a motion for summary judgment and must be determined according to summary judgment standards. n8

[b] Consideration of Other Matters Converts Motion to Motion for Summary Judgment

A party making a motion to dismiss for failure to state a claim faces a higher burden than a party proceeding on a motion for summary judgment because in a motion to dismiss the court may generally only consider matters in favor of the party making the claim. n9 Consequently, if a court considers matters other than those in the pleadings, or those that may be judicially noticed, Rule 12 expressly gives the court discretion to accept and consider extrinsic materials offered in conjunction with the motion. However, such a motion is no longer considered a Rule 12(b)(6) motion, but is deemed a motion for summary judgment, and disposed of as provided in Rule 56. n10 Because a Rule 12(b)(6) motion must usually be filed early in the case, the option of converting it to a Rule 56 summary judgment motion tends to have limited utility. Courts will be more likely to use the conversion option only in situations in which the materials extrinsic to the pleadings are incontrovertible and pose discrete and dispositive issues. Examples of such extrinsic material include things such as a plaintiff's deposition that establishes a limitations bar, n11 a stipulation that is incorporated into a court order in previous litigation, n12 and a handbook that establishes the absence of an employment contract as a matter of law, n13

When considering a converted Rule 12(b)(6) motion to dismiss as a motion for summary judgment, the court must give all parties notice and reasonable opportunity to present all material then made pertinent by Rule 56. n14 An oral hearing is not required; however, under Rule 56(c), a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; n15 then, the movant may file a reply within 14 days after the response is served. n16

For a further discussion of the conversion option, see Ch. 17, Summary Judgment.

[c] Court's Decision on Motion to Dismiss

When considering a motion to dismiss, the court must assume that all well-pleaded facts in the complaint are true and interpret the allegations in a light most favorable to the plaintiff to determine whether the allegations are sufficient to establish any claim on which relief may be granted. n17 However, the court is not required to accept as true the legal

conclusions or unwarranted deductions of fact drawn by the non-moving party. n18 A court may grant the motion to dismiss only if it clearly appears that the plaintiff would be unable to prove any set of facts under the pleadings that would entitle the plaintiff to recover. n19 Thus, the court may grant the motion if either the complaint lacks an allegation regarding an element necessary to obtain relief n20 or the allegations of the complaint fail to show that the plaintiff has standing to bring the claim for relief. n21

Courts have consistently held that claims premised on a federal statute, but that fail properly to allege a claim for relief, should be dismissed under Rule 12(b)(6), rather than under Rule 12(b)(1). n22 Although labeling a motion incorrectly will not affect a movant's right to relief, dismissing it under the wrong provision will, because Rule 12(b)(6) dismisses a claim on its merits, n23 whereas Rule 12(b)(1) does not. n24 A court may also dismiss under Rule 12(b)(6) when a successful affirmative defense or other bar to relief appears on the face of the complaint, such as the absolute immunity of a defendant, claim preclusion, or the statute of limitations. n25 The court may also dismiss if the complaint itself sets forth facts showing that qualified immunity applies, the court may properly dismiss the claim. n26 On the other hand, if a defense requires a factual review to establish the defense the action should not be dismissed for failure to state a claim. n27

[4] Effect of Grant of Dismissal

[a] Judgment on Merits

Unlike a dismissal for lack of subject matter or personal jurisdiction, improper venue, or failure to join proper parties under Rule 19, a dismissal for failure to state a claim under Rule 12(b)(6) constitutes a judgment on the merits with prejudice unless the order explicitly states otherwise. n1 This means that a grant of a motion for dismissal for failure to state a claim for relief has a claim preclusive effect under the law of judgments, and anyone who is properly a party to the case will be barred from bringing a later action on the same claim for relief. n2 The doctrine of claim preclusion is also referred to as res judicata and, with respect to dismissal for failure to state a claim, n3 means that the parties or their privies may not initiate subsequent litigation arising out of the same transaction or series of transactions and are barred from relitigating the demand for damages or other relief encompassed by the claim. n4

[b] Appellate Review

When a district court dismisses a case under Rule 12(b)(6), the dismissal is subject to de novo review in the court of appeals, and the reviewing court must generally apply the same standard of review as the district court. Thus, the reviewing court must determine whether the moving party has shown beyond doubt that there are no set of facts in support of the claiming party's claim that would entitle the claiming party to relief. n5 In making its decision, the reviewing court must accept the claiming party's factual allegations and take them in the light most favorable to the claiming party. n6

However, if the district court has considered matters outside of the pleadings in making its ruling, the appellate court should deem the motion to dismiss as having been converted to a motion for summary judgment and, therefore, may review the dismissal under the standard of review applicable to summary judgment, regardless of how the district court characterized the motion. n7 5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 12(b)(6).*

(n3)Footnote 2. *See Fed. R. Civ. P. 8(a)(2)*; *see Arar v. Ashcroft, 585 F.3d 559, 617 (2d Cir. 2009)* .

(n4)Footnote 3. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-887 (2009)* (only well pleaded factual

allegations are entitled to assumption of truth, not mere conclusory statements or recitals of elements of cause of action).

(n5)Footnote 1. *See Fed. R. Civ. P. 15(a)(1)(B)*; *see also § 9.51* (discussion of amended pleadings).

(n6)Footnote 2. *Fed. R. Civ. P. 15(a)(1)*, Committee Note to 2009 Amendments.

(n7)Footnote 3. *Fed. R. Civ. P. 15(a)(2)*; *see* [4], *below*.

(n8)Footnote 4. *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 815 (2d Cir. 1996)* .

(n9)Footnote 5. *Rolf v. City of San Antonio, 77 F.3d 823, 826 (5th Cir. 1996)* (Rule 15(a) is biased in favor of granting leave to amend.

(n10)Footnote 6. *Health Cost Controls v. Skinner, 44 F.3d 535, 538 (7th Cir. 1995)* .

(n11)Footnote 7. *Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996)* .

(n12)Footnote 1. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-323, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* ; *Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-1018 (5th Cir. 1996)* .

(n13)Footnote 2. *Taylor v. Appleton, 30 F.3d 1365, 1370 (11th Cir. 1994)* .

(n14)Footnote 3. *Fecht v. The Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995)* .

(n15)Footnote 4. *Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992)* .

(n16)Footnote 5. *Fed. R. Civ. P. 12(d)*.

(n17)Footnote 6. *Chambers v. Time Warner, Inc., 282 F.3d 147, 152-155 (2d Cir. 2002)* .

(n18)Footnote 7. *Lockert v. Faulkner, 574 F. Supp. 606, 609 n.3 (N.D. Ind. 1983)* .

(n19)Footnote 8. *Fed. R. Civ. P. 12(d)*; *see* [b], *below*.

(n20)Footnote 9. *McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)* (citing **Moore's Federal Practice**).

(n21)Footnote 10. *Fed. R. Civ. P. 12(d)*; *see Collins v. Red Roof Inns, Inc., 248 F. Supp. 2d 512, 515-516 (S.D. W. Va. 2003)* ; *see also Fed. R. Civ. P. 56* (summary judgment motion).

(n22)Footnote 11. *Alioto v. Marshall Field's & Co., 77 F.3d 934, 936 (7th Cir. 1996)* .

(n23)Footnote 12. *Property Management & Invs., Inc. v. Lew, 752 F.2d 599, 604-605 (11th Cir. 1985)* .

(n24)Footnote 13. *Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 913 (11th Cir. 1993)* .

(n25)Footnote 14. *Fed. R. Civ. P. 12(d)*; *see Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689 (2d Cir. 1990)* (citing **Moore's Federal Practice**).

(n26)Footnote 15. *Fed. R. Civ. P. 15(c)(1)(B)*).

(n27)Footnote 16. *Fed. R. Civ. P. 15(c)(1)(C)*.

(n28)Footnote 17. *Mueller v. Gallina, 311 F. Supp. 2d 606, 608 (E.D. Mich. 2004)* .

(n29)Footnote 18. *Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 137 (2d Cir. 2004)* .

(n30)Footnote 19. *Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 618, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003)* .

(n31)Footnote 20. *Pyles v. United Air Lines, Inc., 79 F.3d 1046, 1049 (11th Cir. 1996)* .

(n32)Footnote 21. *Kaliski v. Bacot (In re Bank of N.Y. Derivative Litig.), 320 F.3d 291, 297-298 (2d Cir. 2003)* .

(n33)Footnote 22. *Health Cost Controls v. Skinner, 44 F.3d 535, 537-538 (7th Cir. 1995)* .

(n34)Footnote 23. *See CNA v. United States, 535 F.3d 132, 140 (3d Cir. 2008)* .

(n35)Footnote 24. *Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995)* .

(n36)Footnote 25. *Kansa Reins. Co. v. Congressional Mortgage Corp., 20 F.3d 1362, 1366 (5th Cir. 1994)* .

(n37)Footnote 26. *Flinn v. Gordon, 775 F.2d 1551, 1552 (11th Cir. 1985)* .

(n38)Footnote 27. *Young v. Selsky, 41 F.3d 47, 54 (2d Cir. 1994)* .

(n39)Footnote 1. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* ; *Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1189-1190 (11th Cir. 2003)* .

(n40)Footnote 2. *Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1189-1190 (11th Cir. 2003)* .

(n41)Footnote 3. *Stewart v. United States Bancorp, 297 F.3d 953, 957 (9th Cir. 2002)* .

(n42)Footnote 4. *See* Ch. 30, *Res Judicata and Related Doctrines*; *see also Rivet v. Regions Bank, 522 U.S. 470, 476, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* .

(n43)Footnote 5. *Andrews v. State of Ohio, 104 F.3d 803, 806 (6th Cir. 1997)* (circuit court applied summary judgment standard of review to district court's dismissal of action for failure to state claim when district court had considered matters outside pleadings); *see* [1], *above*.

(n44)Footnote 6. *Christopher v. Harbury, 536 U.S. 403, 406, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)* .

(n45)Footnote 7. *Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 177 (1st Cir. 1997)* (circuit court applied summary judgment standard of review to district court's dismissal of action for failure to state claim when district court had considered matters outside pleadings); *see* [3][b], *above*.

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1-11 Moore's Manual--Federal Practice and Procedure § 11.25

§ 11.25 Failure to Join Partyn*

A party may make a motion for dismissal under Rule 12(b)(7) if a person required to be joined by Rule 19 has not been included in a pleading. n1 As with a motion for failure to state a claim under Rule 12(b)(6), a defensive motion for failure to join may be raised in any pleading permitted or ordered under Rule 7(a), n2 by a motion for judgment on the pleadings under Rule 12(c), n3 or at the latest, at trial on the merits. n4 Any party making a motion under Rule 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by the absent party and that the protection of that interest will be impaired by the absence. n5 Furthermore, the moving party may not obtain a dismissal by merely asserting that there are some persons required under Rule 19; the party must state the name or otherwise identify each absent person. n6

A dismissal for failure to join a person under Rule 19 does not operate as an adjudication on the merits. n7 Furthermore, as a practical matter, rather than dismiss the action, the court will usually allow the party to be joined, or grant the dismissal conditioned on reinstating the case once joinder of the absent party is secured. If the party is considered "indispensable" to the action and cannot be joined, the court should dismiss. n8

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.35 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 12(b)(7)*; *see Fed. R. Civ. P. 19(a)*; *see also* Ch. 14, *Multiple Party Practice*.

(n3)Footnote 2. *Fed. R. Civ. P. 12(h)(2)(A)*.

(n4)Footnote 3. *Fed. R. Civ. P. 12(h)(2)(B)*.

(n5)Footnote 4. *Fed. R. Civ. P. 12(h)(2)(C)*; *Lonberg v. City of Riverside, 571 F.3d 846, 849 (9th Cir. 2009)* .

(n6)Footnote 5. *West Peninsular Title Co. v. Palm Beach County, 41 F.3d 1490, 1492 (11th Cir. 1995)* ; *Thompson v. Jiffy Lube Int'l, Inc., 505 F. Supp. 2d 907, 917 (D. Kan. 2007)* .

(n7)Footnote 6. *Raytheon Co. v. Continental Cas. Co., 123 F. Supp. 2d 22, 32-33 (D. Mass. 2000)* .

(n8)Footnote 7. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 571 (5th Cir. 1996)* .

(n9)Footnote 8. *Rhone-Poulenc Inc. v. International Ins. Co., 71 F.3d 1299, 1306 (7th Cir. 1996)* (dismissal for failure to join parties vacated to determine whether parties were truly indispensable).

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1-11 Moore's Manual--Federal Practice and Procedure § 11.26

§ 11.26 Motion for Judgment on Pleadingsn*

[1] Use of Motion

At any time after the pleadings close and before the trial commences, a party may move for a judgment on the pleadings. n1 Unless the court orders a reply to an answer, the pleadings close after the last of the following pleadings in the case has been filed: answer, answer to a counterclaim, answer to a crossclaim, and third-party answer. n2 Although Rule 12(c) does not provide a specific time limit for a motion on the pleadings, the motion must be made within such time as not to delay the trial. n3

At least one court has observed that the Rule 12(c) motion for judgment on pleadings may be used in two ways: (1) after close of the pleadings to raise Rule 12(b) defenses based on procedural defects, in which case the applicable standard is that applied to a corresponding 12(b) motion; or (2) to dispose of the case based on the underlying substantive merits, in which case applicable standard is summary judgment standard, except that court may consider only contents of pleadings. n4

Any party may move for judgment on the pleadings, or the court may act on its own initiative. n5 The only distinction between the 12(b)(6) motion and the 12© motion is a matter of timing. n6 If the defendant files the motion prior to filing an answer, the court may treat it as a motion to dismiss under Rule 12(b)(6). n7 Conversely, a motion to dismiss under Rule 12(b) (6) filed after the pleadings close will be treated as a motion for judgment on the pleadings. n8 In fact, any distinction between them is merely semantic because the same standard applies to motions made under either subsection. n9 Additionally, Rule 12(h)(2) expressly allows the Rule 12(b)(6) motion to be made by motion for judgment on the pleadings. n10

[2] Court's Decision on Motion

As with a Rule 12(b)(6) motion for dismissal for failure to state a claim, a Rule 12(c) motion requires the court to accept the nonmoving party's factual allegations as true, n1 viewing the facts in the light most favorable to the nonmoving party. n2 The court should thus grant judgment on the pleadings if the movant is entitled to judgment as a matter of law. n3 In determining the motion, the court may consider only the pleadings, including the complaint, the answer, any reply and any written instruments attached to them. n4

Whether under Rule 12(b)(6) or 12(c), when the court considers matters outside the pleadings, it must treat the motion as one for summary judgment under Rule 56. n5 All parties must receive notice of the conversion and a reasonable opportunity to present all material made pertinent to the motion by Rule 56. n6 The essential inquiry, when determining if the district court correctly converted a motion to dismiss into a motion for summary judgment, is whether the nonmovant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings. n7 Because a motion for failure to state a claim under Rule 12(b)(6) is analogous to the motion for judgment on the pleadings under Rule 12(c), n8 14 most of the voluminous authority on Rule 12(b)(6) applies to Rule 12(c), and the cases often discuss both motions. n9

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(c).*

(n3)Footnote 2. *Geltman v. Verity, 716 F. Supp. 491, 491 (D. Colo. 1989)* .

(n4)Footnote 3. *Leslie v. St. Vincent New Hope, Inc., 873 F. Supp. 1250, 1252 (S.D. Ind. 1995)* .

(n5)Footnote 4. *Carver v. Nall, 986 F. Supp. 1134, 1137 (C.D. Ill. 1997)* .

(n6)Footnote 5. *Ledford v. Sullivan, 105 F.3d 354, 358 (7th Cir. 1997)* .

(n7)Footnote 6. *Burbach Broad. Co. v. Elkins Radio Corp., 278 F.3d 401, 405-406 (4th Cir. 2002)* .

(n8)Footnote 7. *Seber v. Unger, 881 F. Supp. 323, 325 n.2 (N.D. Ill. 1995)* .

(n9)Footnote 8. *Joe Hand Promotions, Inc. v. Lott, 971 F. Supp. 1058, 1060 (E.D. La. 1997)* .

(n10)Footnote 9. *GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* .

(n11)Footnote 10. *Fed. R. Civ. P. 12(h)(2)(B)*; *National Ass'n of Pharm. Mfrs. v. Ayerst Lab., 850 F.2d 904, 909 n.2 (2d Cir. 1988)* .

(n12)Footnote 1. *Simmons v. Galvin, 575 F.3d 24, 30 (1st Cir. 2009)* .

(n13)Footnote 2. *Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008)* .

(n14)Footnote 3. *Tucker v. Middleburg Legacy Place, LLC, 539 F.3d 545, 549-550 (6th Cir. 2008)* .

(n15)Footnote 4. *Surgical Synergies, Inc. v. Genessee Assocs., Inc., 432 F.3d 870, 873-874 (8th Cir. 2005)* .

(n16)Footnote 5. *Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 (6th Cir. 1997)* .

(n17)Footnote 6. *Fed. R. Civ. P. 12(c).*

(n18)Footnote 7. *Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689 (2d Cir. 1990)* .

(n19)Footnote 8. *Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983)* .

(n20)Footnote 9. *Menominee Indian Tribe of Wis. v. Thompson, 943 F. Supp. 999, 1005 (W.D. Wis. 1996)* .

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1-11 Moore's Manual--Federal Practice and Procedure § 11.27

§ 11.27 Motion For More Definite Statementn*

[1] Use of Motion

A defending party may make a motion to have the court order a claimant to make a more definite statement with respect to a pleading that allows a responsive pleading. The court will grant the motion when the pleading is so vague or ambiguous that the party cannot reasonably prepare a response. The defending party must make the motion before filing a responsive pleading and must specify the defects complained of and the details desired. If the court orders a more definite statement and the pleader does not obey within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order. n1 A court may order that a plaintiff or other claimant provide a more definite statement in two situations. First, if a pleading does not contain allegations of each element of the claim as required under Rule 8, and if the deficiency is not so material that the pleading should be dismissed under Rule 12(b)(6), the court may order a more definite statement. n2 Second, a court may order a more definite statement if a complaint is tedious prolonged or confusingly complex, if a more definite statement can assist the court in clarifying the unintelligible claims. n3 The court also has the power to order a more definite statement on its own initiative. n4

[2] Motion Disfavored

Except when it is particularly useful, for example to assist the district court to maintain progress in a legal action, n1 the motion for a more definite statement is not favored, because the court is generally required to liberally construed pleadings. n2 Therefore, although they come within the court's discretion, n3 courts grant the motions sparingly. n4 The standard under Rule 12(e) is designed to correct unintelligibility, rather than lack of detail. n5 If a plaintiff presents proper, although general, allegations, the court will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining more detailed information. n6

Despite the courts' general disfavor toward granting motions for more definite statement, the liberal construction called for by the Rules' concept of notice pleading n7 makes such motions preferable to dismissal under Rule 12(b) when the complaint will survive the threshold test for dismissal as one for a more definite statement. n8

[3] Effect of Grant of Motion

If the court grants a motion for more definite statement, the pleader then must amend the offending pleading within 14 days of the court's order to provide the more definite statement and information as stated in the order. n1 If the pleader fails to amend the pleading as stated in the order, the court may then strike the pleading or issue any other appropriate order, n2 including dismissing the case. n3 The court may also impose sanctions for noncompliance with it's order. n4 If a pleading amended by a more definite statement raises new defenses or objections, the defendant may file an additional pre-answer Rule 12 motion with respect to matters in the amended pleading. However, any newly asserted defense or objection must not have been available to the party before the amendment, or the new motion will be denied. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.36 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(e)*; *see Thomas v. Independence Twp., 463 F.3d 285, 302 (3d Cir. 2006)* (construing former time periods).

(n3)Footnote 2. *Kelly v. L.L. Cool J., 145 F.R.D. 32, 36 (S.D.N.Y. 1992)* (copyright infringement claim complaint must allege four basic elements)).

(n4)Footnote 3. *Anderson v. Board of Trustees, 77 F.3d 364, 367 (11th Cir. 1996)* .

(n5)Footnote 4. *Spencer v. Bumyong Lee, 864 F.2d 1376, 1377 (7th Cir. 1989)* .

(n6)Footnote 1. *Bennett v. Schmidt, 153 F.3d 516, 518-519 (7th Cir. 1998)* .

(n7)Footnote 2. *BB in Tech. Co. v. JAF, 242 F.R.D. 632, (S.D. Fla. 2006)* (plaintiff generally should not be required to modify its complaint if sufficient to withstand motion to dismiss).

(n8)Footnote 3. *Old Time Enters. v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989)* .

(n9)Footnote 4. *In re Hanford Nuclear Reservation Litig., 780 F. Supp. 1551, 1583 (E.D. Wash. 1991)* .

(n10)Footnote 5. *FDIC v. Wise, 758 F. Supp. 1414, 1418 (D. Colo. 1991)* .

(n11)Footnote 6. *A.G. Edwards & Sons, Inc. v. Smith, 736 F. Supp. 1030, 1032 (D. Ariz. 1989)* .

(n12)Footnote 7. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)* .

(n13)Footnote 8. *American Nurses' Ass'n v. Illinois, 783 F.2d 716, 725 (7th Cir. 1986)* (when defendant is unclear about meaning of particular allegation in complaint, proper course is not to move to dismiss, but to move for more definite statement).

(n14)Footnote 1. *Fed. R. Civ. P. 12(e)*; *see McClellon v. Lone Star Gas Co., 66 F.3d 98, 103 (5th Cir. 1995)* (construing former time periods).

(n15)Footnote 2. *Fed. R. Civ. P. 12(e)*.

(n16)Footnote 3. *See M.K. v. Tenet, 99 F. Supp. 2d 12, 19 (D.D.C. 2007)* (dismissal proper only if less drastic means would be unsuccessful).

(n17)Footnote 4. *McHenry v. Renne, 84 F.3d 1172, 1173 (9th Cir. 1996)* .

(n18)Footnote 5. *Harris Bank Naperville v. Pachaly, 902 F. Supp. 156, 157 (N.D. Ill. 1995)* (amended complaint

does not revive right to present defenses that were available before amendment but not asserted).

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1-11 Moore's Manual--Federal Practice and Procedure § 11.28

§ 11.28 Motion to Striken*

[1] Use of Motion

The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, either on the courts own initiative, or the motion made by a defending before responding to a pleading. n1 If the defendant wants the court to remove any such material from a pleading, it must make a motion to strike before filing an answer, or if no response is allowed to the offending pleading, within 21 days of service of that pleading. n2 The court has discretion to extend the time for a party to file a motion to strike. n3

Only material included in a "pleading" may be the subject of a motion to strike, and courts have not construed that term broadly. n4 Consequently, motions, briefs or memoranda, n5 objections, n6 or affidavits may not be attacked by the motion to strike. n7 Courts disfavor the motion to strike, because it utilizes a drastic remedy. n8 Despite its disfavor with trial courts, however, the ruling on a motion to strike will not be overturned on appeal except for an abuse of discretion. n9

Because the motion to strike is disfavored, if the contents of a pleading are legally sufficient, but improper for some other reason, a motion to strike should be granted only when the moving party shows that the inclusion of the disputed claims or defenses would cause it prejudice. n10 If the moving party does not show prejudice, the Court should defer action on the motion and leave the sufficiency of the allegations for determination on the merits. n11

[2] Court's Decision on Motion

The court may remove material from a pleading that it finds "redundant, immaterial, impertinent, or scandalous." n1 To prevail on this motion to strike, the movant must clearly show that the challenged matter has no relevance to the subject matter of the litigation and that its inclusion will prejudice the defendants. n2 Several grounds listed in the rule for granting a motion to strike may overlap. However, as a general matter, courts will strike a claim as "redundant" when it essentially repeats another claim in the same complaint. n3 An allegation is "impertinent" or "immaterial" when it is neither responsive nor relevant to the issues involved in the action. n4 Pleadings containing unnecessary allegations, conclusions, or evidence beyond a short and plain statement of the grounds for relief may be challenged as impertinent by a motion to strike. n5 The court should allow the party to amend the pleading rather than dismiss the claim or

complaint in such cases, unless the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance cannot be determined. n6 "Scandalous" means an allegation that unnecessarily reflects on the moral character of an individual or states anything in offensive language that detracts from the dignity of the court. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.37 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 12(f).*

(n3)Footnote 2. *Fed. R. Civ. P. 12(f)(2).*

(n4)Footnote 3. *See Fed. R. Civ. P. 6(b)(1)*; *see Key v. Robertson, 626 F. Supp. 2d 566, 575 (E.D. Va. 2009)* .

(n5)Footnote 4. *Hrubec v. National R.R. Passenger Corp., 829 F. Supp. 1502, 1506 (N.D. Ill. 1993)* .

(n6)Footnote 5. *Board of Educ. v. Admiral Heating and Ventilation, Inc., 94 F.R.D. 300, 304 (N.D. Ill. 1982)* .

(n7)Footnote 6. *Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co., 747 F. Supp. 1299, 1303 (S.D. Ill. 1990)* .

(n8)Footnote 7. *Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co., 747 F. Supp. 1299, 1303 (S.D. Ill. 1990)* .

(n9)Footnote 8. *NOW, Inc. v. Scheidler, 897 F. Supp. 1047, 1087 n.28 (N.D. Ill. 1995)* .

(n10)Footnote 9. von Bulow v. von *Bulow, 657 F. Supp. 1134, 1146 (S.D.N.Y. 1987)* .

(n11)Footnote 10. *See In re Gabapentin Patent Litig., 648 F. Supp. 2d 641, 648 (D.N.J. 2009)* .

(n12)Footnote 11. *Abbott v. Abbott, 495 F. Supp. 2d 635, 641 (W.D. Tex. 2007)* .

(n13)Footnote 1. *Fed. R. Civ. P. 12(f).*

(n14)Footnote 2. *Abbott v. Abbott, 495 F. Supp. 2d 635 (W.D. Tex. 2007)* .

(n15)Footnote 3. *Davidson v. John Deere & Co., 644 F. Supp. 707, 712-713 (N.D. Ind. 1986)* .

(n16)Footnote 4. *Williams v. Jader Fuel Co., 944 F.2d 1388, 1399 (7th Cir. 1991)* .

(n17)Footnote 5. *Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 246 (E.D. N.Y. 1993)* .

(n18)Footnote 6. *Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)* .

(n19)Footnote 7. *Cobell v. Norton, 224 F.R.D. 1, 5 (D.D.C. 2004)* (citing **Moore's Federal Practice**).

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1-11 Moore's Manual--Federal Practice and Procedure § 11.29

§ 11.29 Procedural Considerations For Motions Raising Defenses and Objections

[1] Hearing is Optional for Court n*

A defendant may assert Rule 12(b) defenses and a Rule 12(c) motion for judgment on the pleadings before trial on the merits, and thus the court may hold a hearing and determination of jurisdictional or other issues in advance of trial. n1 When a motion relies on facts outside of the record, the court may hear the matter wholly or partly on oral testimony, or on depositions or affidavits. n2 The district court has discretion to decide the most appropriate course procedurally, because neither the federal rules nor the statutes prescribe that defenses be decided in a pretrial hearing or at trial. n3 The court's decision whether to hold a pretrial hearing or to defer the matter to trial on the merits may be set aside on appeal only for abuse of discretion. n4

When the court conducts a hearing on personal jurisdiction, the plaintiff must demonstrate personal jurisdiction by a preponderance of the evidence. If the court may decide the question instead based on the pleadings, affidavits, and supporting materials, the plaintiff need make only a prima facie showing of jurisdiction. n5 If the court initially relies on the prima facie case, the plaintiff must eventually establish jurisdiction by a preponderance of the evidence either at a pretrial hearing or at trial. n6 The court generally should not grant dismissal on a Rule 12 motion without a hearing; n7 however, the hearing need not be oral. n8

[2] Effect of Granting Defensive Motion n*

If a court grants a defendant's motion to dismiss under Rule 12, the dismissal may have varying effects on the present and future litigation of plaintiff's claims, depending on the type of motion involved and the scope of the motion and order of dismissal. If a motion to dismiss under any subsection of Rule 12 does not cover all plaintiffs and all their claims, the court will not dismiss the entire case, but only those claims affected. Similarly, a motion to dismiss brought by fewer than all defendants will not fully dispose of the case. For example, in granting a motion to dismiss for lack of personal jurisdiction (Rule 12(b)(2)) over one of multiple defendants, all claims against that defendant will be dismissed, whereas the claims against the other defendants remain. n1 Even if all the parties and all the claims are implicated by a Rule 12 motion, a dismissal for lack of jurisdiction, improper venue, or failure to join an indispensable party is typically without prejudice and does not have a preclusive effect. After curing any defects, the plaintiff may refile the plaintiff's claims. n2 In the case of a motion to dismiss for failure to state a claim under Rule 12(b)(6), if the

court finds beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle the plaintiff to relief n3 and that failure applies to all plaintiff's claims, the entire case will be dismissed. Because a dismissal under that rule is considered an adjudication on the merits, the dismissal is with prejudice and has a claim preclusive effect on future litigation. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.50 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Cruz v. Sullivan, 802 F. Supp. 1015, 1016-1017 (S.D.N.Y. 1992)* .

(n3)Footnote 2. *Fed. R. Civ. P. 43(c).*

(n4)Footnote 3. *CutCo Indus. Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986)* .

(n5)Footnote 4. *Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, 817 F. Supp. 326, 331 (E.D. N.Y. 1993)* .

(n6)Footnote 5. *Nelson by Carson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983)* .

(n7)Footnote 6. *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)* .

(n8)Footnote 7. *Commodities Export Co. v. United States Customs Serv., 888 F.2d 431, 436 (6th Cir. 1989)* .

(n9)Footnote 8. *CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986)* (hearing may be based solely on papers).

(n10)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 12.51 (Matthew Bender 3d ed.)

(n11)Footnote 1. *House v. Belford, 956 F.2d 711, 716 (7th Cir. 1992)* (dismissal of one party without entry of partial final judgment prevents order from becoming appealable until judgment as to all).

(n12)Footnote 2. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 571 (5th Cir. 1996)* .

(n13)Footnote 3. *Wagner v. Devine, 122 F.3d 53, 55 (1st Cir. 1997)* .

(n14)Footnote 4. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 570 (5th Cir. 1996)* .

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[Reserved]

§§ 11.30[Reserved]

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1-11 Moore's Manual--Federal Practice and Procedure § 11.40

§ 11.40 Denialsn*

[1] Standard of Pleading for Denial

A "denial" is a statement by a defending party that an allegation contained in the claim against the defending party is not true. In responding to a pleading, a party must admit or deny each the allegations asserted against it by an opposing party. n1 A defending party must also state in short and plain terms the party's defenses to each claim asserted by the opposition. n2 A denial must fairly respond to the substance of each allegation. n3 A defendant has three choices when answering an allegation made in a complaint: (1) admit the allegation; (2) deny the allegation; n4 (3) state that it is without knowledge or information sufficient to form a belief as to the truth of the allegation, which has the effect of a denial; n5 and (4) deny a part or a qualification of an allegation; in such circumstances the defendant should specify so much of the allegation as is true and material and deny the remainder. n6 A party may make alternative and hypothetical denials. n7 Under liberal federal pleading standards, a denial is judged by the same standard as a claim for relief, that a denial will be deemed sufficient provided that the substance what is being denied may be gleamed from the denial, and fair notice is given to the opposing party. n8

[2] Use of Specific Denials

When a defendant cannot either admit or deny all of the allegations in the preceding pleading, which is usually the case, the defendant should make specific denials of the allegations. Specific denials are denials that address distinct components of statements alleging many facts. A specific denial may be made for each component of a statement that is denied, with the remaining components admitted. n1 Alternatively, if a more "simple, concise and direct" responsive pleading will result, n2 a specific notation of each component admitted may be made, with all other components then denied. n3

[3] Use of General Denials

A general denial is a good faith denial of each and every allegation, including allegations of jurisdiction, within a statement in an affirmative pleading. n1 Because of the very broad nature of a general denial, as well the duty to respond in good faith after reasonable inquiry, general denials are rarely appropriate responses to multi-faceted statements within claims for relief when numerous facts are alleged together. However, a defendant may respond with a

general denial to all of the specific allegations in a particular paragraph in a complaint, when the defendant is able to deny each and every specific contained in that paragraph. n2

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 8(b)(1)(B).*

(n3)Footnote 2. *Fed. R. Civ. P. 8(b)(1)(A).*

(n4)Footnote 3. *Fed. R. Civ. P. 8(b)(2).*

(n5)Footnote 4. *Fed. R. Civ. P. 8(b)(1)(B).*

(n6)Footnote 5. *Fed. R. Civ. P. 8(b)(5).*

(n7)Footnote 6. *Fed. R. Civ. P. 8(b)(4).*

(n8)Footnote 7. *Fed. R. Civ. P. 8(e)(2).*

(n9)Footnote 8. *In re Handy Andy Home Improvement Centers, Inc., 222 B.R. 571, 574 (N.D. Ill. 1998)* .

(n10)Footnote 1. *Fed. R. Civ. P. 8(b)(3)* (defendant may make denials as specific denials of designated allegations).

(n11)Footnote 2. *Fed. R. Civ. P. 8(d)(1).*

(n12)Footnote 3. *Fed. R. Civ. P. 8(b)(3)* (defendant may generally deny all the allegations except those designated allegations that the defendant expressly admits).

(n13)Footnote 1. *Fed. R. Civ. P. 8(b)(3).*

(n14)Footnote 2. *Federal Deposit Insurance Corp. v. Grant, 8 F.Supp.2d 1275, 1289 (N.D. Okla 1998)* (when plaintiffs amended complaint to add specific items to paragraph that defendant has generally denied, defendants have opportunity to supplement their general denials with regard to the specific items added).

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1-11 Moore's Manual--Federal Practice and Procedure § 11.41

§ 11.41 Failure to Deny Allegations in Pleadings

If a defendant fails to deny an allegation in a pleading to which a responsive pleading is required, such as a complaint, the denial is deemed an admission, except for allegations concerning the amount of damages. If a responsive pleading is not required, an allegation is considered denied or avoided. n1 Responsive pleadings are required to a complaint, a counterclaim designated as a counterclaim, a crossclaim a third-party complaint, and an answer if the court orders a reply to an answer. n2 Thus, a defendant is not required to respond to answers and third-party answers that the defendant receives from other parties, except those containing counterclaims denominated as such or crossclaims. n3 Therefore, defenses, including affirmative defenses, found in these pleadings are deemed denied or avoided. n4 An equivocal or otherwise improper denial, such as when a defendant attempts to evade the pleading requirements of Rule 8, will be deemed an admission. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(b)(6).*

(n2)Footnote 2. *Fed. R. Civ. P. 7(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 7(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 8(b)(6).*

(n5)Footnote 5. *Fed. R. Civ. P. 8(b)(5).*

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1-11 Moore's Manual--Federal Practice and Procedure § 11.42

§ 11.42 Responses in Pleadings By Defendantn*

[1] Defendant Pleading Lack of Knowledge or Insufficient Information

If a defendant is without knowledge or information sufficient to form a belief as to the truth of an allegation in a pleading, the defendant must state that fact in the answer or other responsive pleading. Denial based on lack of knowledge or information has the same effect as a denial. n1 Disclaimers of "knowledge" alone are insufficient to obtain the benefit of a deemed denial under Rule 8(b), as are disclaimers of "knowledge or information" alone, without the defendant stating that any level of knowledge or information possessed by the defendant would not support a belief. n2

[2] Defendant Must Answer in Good Faith

Because all pleadings must be certified under Rule 11, defending parties may not respond to claims for relief by presenting answers and other responsive pleadings for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. n1 Defendants must have evidentiary support for their factual contentions n2 and nonfrivolous arguments for their defenses and legal contentions. n3 Defending parties must undertake an inquiry reasonable under the circumstances before presenting any responsive pleading. The inquiry must enable the defendant to certify that the pleading presented represents the best of the pleader's knowledge, information and belief. n4

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 8(b)(5).*

(n3)Footnote 2. *Gilbert v. Johnston, 127 F.R.D. 145, 146 (N.D. Ill. 1989)* (pleader of information and belief must follow conditions as specified in Rule 8(b).

(n4)Footnote 1. *Fed. R. Civ. P. 11(b)(1).*

(n5)Footnote 2. *Fed. R. Civ. P. 11(b)(4).*

(n6)Footnote 3. *Fed. R. Civ. P. 11(b)(2).*

(n7)Footnote 4. *Fed. R. Civ. P. 11(b).*

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1-11 Moore's Manual--Federal Practice and Procedure §§ 11.43 through 11.49

[Reserved]

§§ 11.43[Reserved]

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1-11 Moore's Manual--Federal Practice and Procedure § 11.50

§ 11.50 Requirement That Defendant Must Plead all Affirmativen*

[1] Specification of Required Affirmative Defenses

In its answer reply, a defendant must set forth affirmatively all the defenses enumerated in Rule 8(c) and any other matter constituting an avoidance or affirmative defense. n1 An "affirmative defense" is a defendant's assertion raising new facts and arguments different from the opposition's claim for relief, which if true will defeat the opponent's claim for relief, even if all the allegations in the pleading are true. n2 The purpose of requiring a defendant to pleading affirmative defenses and avoidances is to prevent surprise for the opposition and to give the opposition an opportunity to respond. n3 If an affirmative defense or avoidance is accepted by the court, it will defeat an otherwise legitimate claim for relief. n4

There are 18 affirmative defenses specifically listed in Rule 8: n5

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;

- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

Although the affirmative defense that an action is barred by a statute of limitation must be pleaded in an answer by the defendant, it need not be pleaded with specificity. The defense of statute of limitations is raised sufficiently by merely asserting it. n6

A defending party has the option to raise an affirmative defense in a motion filed prior to its answer or other initial responsive pleading. However, it is not obligated to do so and does not waive an affirmative defense provided the party specifies the affirmative defense in its initial responsive pleading. n7

[2] Plaintiff Must Plead Other Matters of Avoidance

In addition to affirmative defenses specifically listed in the Federal Rules of Civil Procedure, a plaintiff must plead in its initial responsive pleading all other matters of avoidance. n1 An "avoidance" is any matter asserted by the defense that effectively precludes the pleader's ability to recover on the claim. n2 The courts have held that all of the following constitute affirmative defenses or matters of avoidance:

Courts have held that the following constitute affirmative defenses, even though they are not enumerated in Rule 8(c):

- Failure to mitigate damages. n3
- Failure to exhaust state remedies. n4 18
- Novation in breach of contract. n5
- Common law immunity. n6
- Statutory immunity. n7
- Hindrance of contract. n8
- Statutory limitations on damages. n9

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.07[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 8(c).*

(n3)Footnote 2. *Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 271 (4th Cir. 2003)* .

(n4)Footnote 3. *Std. Waste Sys. v. Mid-Continent Cas. Co., 612 F.3d 394, 398 (5th Cir. 2010)* .

(N5)Footnote 4. *See Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 350, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)* .

(n6)Footnote 5. *Fed. R. Civ. P. 8(c)(1).*

(n7)Footnote 6. *Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 360 (8th Cir. 1997)* (defendant sufficiently raised limitations defense by boilerplate statement that plaintiff's claims were barred by applicable statutes of limitations).

(n8)Footnote 7. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**); *see § 11.51.*

(n9)Footnote 1. *Fed. R. Civ. P. 8(c)(1).*

(n10)Footnote 2. *See Marsh v. Butler County, 268 F.3d 1014, 1022 (11th Cir. 2001)* ; *Quiller v. Barclays American/Credit, 727 F.2d 1067, 1069 (11th Cir. 1984)* .

(n11)Footnote 3. *999 v. C.I.T. Corp., 776 F.2d 866, 870 n.2 (9th Cir. 1985)* (failure to mitigate damages is affirmative defense under in claim for breach of agreement to provide financing).

(n12)Footnote 4. *Santos v. Alaska Bar Ass'n, 618 F.2d 575, 576-577 (9th Cir. 1980)* .

(n13)Footnote 5. *Able Int'l Corp. v. B.P. Chems. Am., 145 F.3d 67, 68-69 (1st Cir. 1998)* .

(n14)Footnote 6. *Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)* .

(n15)Footnote 7. *Troxler v. Owens-Ill., Inc., 717 F.2d 530, 532-533 (11th Cir. 1983)* (statutory immunity to workers' compensation claim is Rule 8(c) affirmative defense).

(n16)Footnote 8. *Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d 1373 1377 (7th Cir. 1990)* .

(n17)Footnote 9. *Simon v. United States, 891 F.2d 1154, 1156-1157 (5th Cir. 1990)* .

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1-11 Moore's Manual--Federal Practice and Procedure § 11.51

§ 11.51 Waiver By Failure to Raise Affirmative Defensen*

[1] Circumstances of Waiver

If a defendant fails to raise an affirmative defense by presenting it in the initial responsive pleading, the defendant is generally deemed to have waived the defense. n1 The Supreme Court has held that the initial responsive pleading required by the rule is the one following the events that give rise to the defense. n2 It should be noted that a party has the right to raise an affirmative defense in a motion filed prior to its initial pleading; however, it is not required to do so and is only required to raise affirmative defenses in its initial pleading. n3 The effect of a waiver of an affirmative defense is that evidence relating solely to the defense may not be admitted at any later trial, summary judgment hearing, or similar proceeding. n4

[2] Exception to Waiver Rule

There are several exceptions to the rule that the defendant waives an affirmative defense that is not presented in the initial response to a claim. The most common method for a defending party to preserve an affirmative defense is by raising it in a motion, such as, a motion to dismiss prior to filing the party's initial responsive pleading. Note, however, that even though it has the right to do so, a defending party need not raise an affirmative defense in a motion filed prior to its initial pleading, provided it includes affirmative defenses in its initial pleading. n1

A defense that has not been pleaded may be raised later in a several ways. Waiver of an affirmative defense because of failure to plead it under Rule 8(c) may be avoided if the defense is tried by the express or implied consent of the parties under Rule 15(b). n2 Accordingly, if a defending party introduces evidence related solely to an unpleaded affirmative defense at trial, and the claimant fails to object, the waiver is negated. n3 Additionally, the defendant may be permitted to raise the defense before trial by motion in limine. n4 Waiver of an unpleaded affirmative defense may also be avoided by a motion to amend the responsive pleading under Rule 15(a) to include the defense. A motion to amend will be denied if the claimant would be unduly prejudiced. The court will not find prejudice if the amendment does not surprise the opposing party, for example when the motion to amend is made following discovery undertaken on issues solely related to the defense. n5

A defendant does not waive an affirmative defense if the defendant has actually raised the defense, but has

mischaracterized it. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, must treat the pleading as if there had been a proper designation. n6 Finally, an appellate court may consider an affirmative defense not raised in the district court if consideration of the defense will give the appellate court different or additional grounds on which to affirm the district court. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.07[3] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 8(c)(1)*; *First Union Nat'l Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 622 (8th Cir. 2007)* .

(n3)Footnote 2. *Arizona v. California, 530 U.S. 392, 408-410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n4)Footnote 3. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Venters v. City of Delphi, 123 F.3d 956, 968 (7th Cir. 1997)* .

(n6)Footnote 1. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**); *see § 11.52*.

(n7)Footnote 2. *See Ringuette v. City of Fall River, 146 F.3d 1, 4-5 (1st Cir. 1998)* .

(n8)Footnote 3. *United States v. Certain Real Property, 945 F.2d 1252, 1257 (2d Cir. 1991)* .

(n9)Footnote 4. *Casas Office Machs. v. Mita Copystar Am., 961 F. Supp. 353, 356-357 (D. P.R. 1997)* (defendant permitted to raise unpleaded defenses of release and res judicata by motion in limine when it gave plaintiff sufficient notice of defenses through objections to interrogatories).

(n10)Footnote 5. *Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 500, 503 (2d Cir. 1989)* .

(n11)Footnote 6. *Fed. R. Civ. P. 8(c)(2)*; *Reiter v. Cooper, 507 U.S. 258, 263, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)* .

(n12)Footnote 7. *Bechtold v. City of Rosemount, 104 F.3d 1062, 1068 (8th Cir. 1997)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART V. AFFIRMATIVE DEFENSES

1-11 Moore's Manual--Federal Practice and Procedure § 11.52

§ 11.52 Affirmative Defense May Be Raised By Motionn*

A defendant may raise an affirmative defense even before filing an answer, for example, in a Rule 12(b)(6) motion to dismiss for failure to state a claim. n1 Another method for a defendant to raise an affirmative defense before filing an answer is in a Rule 56 motion for summary judgment that is asserted before the answer is filed. n2 Waiver occurs only if defending party fails to raise the defense in its initial *pleading*. n3

Even though an affirmative defense may be raised in a pre-answer motion, there is authority for the proposition that the defense may not be raised in post-answer motion unless the defense was first pleaded in the answer. n4 This position is based on the rationale that the failure to plead an affirmative defense in the answer results in a waiver or forfeiture of the defense unless the court permits the defendant to amend its answer. n5 Other courts are not so strict. They do permit a defendant to raise an affirmative defense for the very first time in a post-answer motion if the defense is raised in sufficient time so that there is no prejudice to the opposing party merely because of the delay. n6

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.07[2] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Vernon v. Heckler, 811 F.2d 1274, 1278 (9th Cir. 1987)* (statute of limitations defense allowed in motion to dismiss when running of statute clear from complaint).

(n3)Footnote 2. *See Fed. R. Civ. P. 56(b)* (defending party may move for summary judgment at any time).

(n4)Footnote 3. *Hoang Van Tu v. Koster, 364 F.3d 1196, 1200 (10th Cir. 2004)* (citing **Moore's Federal Practice**); *see § 11.51*.

(n5)Footnote 4. *Harris v. Secretary, United States Dep't of Veterans Affairs, 126 F.3d 339, 343-345 (D.C. Cir. 1997)* .

(n6)Footnote 5. *See United States v. Shanbaum, 10 F.3d 305, 312 (5th Cir. 1994)* (affirmative defense not raised in pleading not waived if raised at pragmatically sufficient time and there is no prejudice).

(n7)Footnote 6. *Rycoline Products v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART V. AFFIRMATIVE DEFENSES

1-11 Moore's Manual--Federal Practice and Procedure § 11.53

§ 11.53 Affirmative Defenses Governed By Federal or State Substantive Lawn*

If a plaintiff's claim in federal court is based on substantive state law grounds, federal procedural law and the state substantive law must be followed with respect to affirmative defenses. n1 For example, because exhaustion of remedies is an affirmative defense provided by state law, application of the defense in litigation in federal court is governed by federal procedural law, and state substantive law. n2 Even if a claim is based on federal law grounds, affirmative defenses under state law are applicable if the relevant federal law incorporates state law defenses. For example, in a civil rights claim involving deprivation of federal constitutional rights by state governmental officers, n3 state statutes of limitation for personal injury actions are applicable. n4 Furthermore, when state law governs an affirmative defense in a civil action in a federal district court, the defense must be pleaded under Rule 8(c). n5

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 Moore's Federal Practice, § 8.07[4] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Palmer v. Hoffman, 318 U.S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* (Rule 8(c) covers only manner of pleading, and contributory negligence was state substantive law that federal court must apply under *Erie*).

(n3)Footnote 2. *Legal Aid Soc'y v. City of New York, 114 F. Supp. 2d 204, 222 (S.D.N.Y. 2000)* .

(n4)Footnote 3. *See 42 U.S.C. § 1983*.

(n5)Footnote 4. *Wilson v. Garcia, 471 U.S. 261, 280, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985)* (for section 1983 claims, forum state's personal injury statute of limitation must be applied).

(n6)Footnote 5. *Simon v. United States, 891 F.2d 1154, 1156 (5th Cir. 1990)* ; *see Santos v. District Council of New York City, 619 F.2d 963, 967 (2d Cir. 1980)* (although state limitations period applied, federal rules determined whether defense timely raised).

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PART III Pleading Stage
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1-11 Moore's Manual--Federal Practice and Procedure §§ 11.53 through 11.59

[Reserved]

§§ 11.53[Reserved]

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VI. COUNTERCLAIMS

1-11 Moore's Manual--Federal Practice and Procedure § 11.60

§ 11.60 Characteristics of Counterclaimn*

[1] Counterclaims May Be Compulsory or Mandatory

A counterclaim is any claim for relief, n1 other than an original claim, that one party has against an opposing party. Thus, any claim which a defending party has against a plaintiff is a counterclaim; and any claim which a third-party defendant has against the third-party plaintiff is a counterclaim. n2 *Rule 13 of the Federal Rules of Civil Procedure*, which governs use of the counterclaim, must be liberally construed to achieve the general objectives of the rules of procedure to avoid multiplicity of litigation, minimize circuity of actions, and foster judicial economy. n3 Counterclaims may be either compulsory or permissive. A compulsory counterclaim is a counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require adding another party who is not subject to the jurisdiction of the court. n4 A permissive counterclaim is any claim that a party has against an opposing party any that is not compulsory. n5

[2] Scope of Counterclaims Authorized by Rule

Counterclaims may state independent and affirmative claims for relief, and need not diminish or defeat the recovery sought by the opposing party. A counterclaim may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party. n1 Under the federal rules, a pleading must state any compulsory counterclaim, and may state any permissive counterclaim, that the pleader has against the opposing party. n2 Consequently, counterclaims are not limited to seeking the same type of relief as that sought in the claim of the opposing party. n3

A counterclaim may request injunctive relief if the requirements for pleading an injunction are otherwise met. n4 Similarly, a counterclaim may demand declaratory relief if the requirements for pleading the existence of a case or controversy between the parties are otherwise met. n5 However, the court may still refuse to grant declaratory relief on a counterclaim if the declaratory judgment counterclaim is either redundant, or if the main claim has been resolved, unnecessary and moot in the sense of no longer presenting a case or controversy as to the issues adjudicated in that claim. n6

[3] Assertion of Counterclaim Obtained After Filing of Defendant's Initial Pleading

The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading. n1 A counterclaim acquired or maturing after the initial pleading is not considered compulsory under Rule 13, and will not be barred in a subsequent action if not pleaded in the initial action during which the claim arose or was acquired. n2 Rule 13(e) is the counterclaim counterpart to Rule 15(d) for claims, which allows a party to serve a "supplemental pleading" to state out any transaction, occurrence, or event that happened after the date of the initial pleading. n3

Courts may consider whether supplementation to add a counterclaim will cause inconvenience or confusion in the litigation proceeding. n4 Similarly, a court has discretion to refuse to allow an unrelated supplemental counterclaim if allowing the claim will create inconvenience and confusion. n5 A court is more likely to permit an after-acquired or late maturing claim if it otherwise meets the compulsory counterclaim requirements by arising out of the same transaction or occurrence as the main claim. n6

[4] Court's Discretion to Allow Counterclaim Omitted From Defendant's Initial Pleading

The court may permit a defendant to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires. n1 Rule 13(f) is the counterclaim counterpart to Rule 15(a) for claims, which allows a party to amend its initial pleading. n2 Rule 13(f) permits a defendant to raise by amendment a counterclaim omitted from the defendants initial pleading in two situations.

The first situation where the court may allow a pleader to raise by amendment is when the defendant has omitted a counterclaim through oversight, inadvertence, or excusable neglect. n3 The primary factors courts consider in determining whether to allow an omitted counterclaim by amendment include the good faith of the claimant, n4 the danger of prejudice to the opposing party, n5 and the timeliness or extent of delay in raising the claim. n6 Another significant factor to be considered is whether the counterclaim is compulsory; the risk of the claim being barred in a subsequent action especially supports a liberal amendment standard to include omitted compulsory counterclaims. n7 On the other hand, a court may deny a motion to amend if the counterclaim is meritless and the amendment would prove futile. n8

The second situation in which the court may allow the defendant to raise an omitted counterclaim by amendment when justice requires. n9 This language taken from Rule 15(a) illustrates the interplay and harmony between the amendment and omitted counterclaim rules, and provides that leave to amend should be freely granted in the absence of a showing of undue delay, bad faith, or prejudice to opposing party. n10

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 Moore's Federal Practice, §§ 13.40 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed. 2d 604, 614-616 (1993)* .

(n3)Footnote 2. *Fed. R. Civ. P. 13(a),(b).*

(n4)Footnote 3. *Hoffman v. Wisner Classic Mfg. Co., Inc., 927 F. Supp. 67, 74 (E.D. N.Y. 1996)* .

(n5)Footnote 4. *Fed. R. Civ. P. 13(a).*

(n6)Footnote 5. *Fed. R. Civ. P. 13(b)*; *Iglesias v. Mutual Life Insurance Company of New York, 156 F.3d 237, 241 (1st Cir. 1998)* .

(n7)Footnote 1. *Fed. R. Civ. P. 13(c)*; *see Styler v. Jean Bob, Inc., 154 B.R. 581, 586 n.4 (D. Utah 1993)* (citing **Moore's Federal Practice**).

(n8)Footnote 2. *Fed. R. Civ. P. 13(a),(b).*

(n9)Footnote 3. *United States v. Snider, 779 F.2d 1151, 1156-1158 (6th Cir. 1985)* (Rule 13(a) permits but does not require defendant who was sued only for declaratory and injunctive relief to file counterclaim to recover money damages arising out of claim).

(n10)Footnote 4. *Baker by Thomas v. GMC, 522 U.S. 222, 226, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) .*

(n11)Footnote 5. *See Iowa Prot. & Advocacy Servs. v. Tanager, Inc., 427 F.3d 541, 543 (8th Cir. 2007) .*

(n12)Footnote 6. *Tenneco, Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375, 1379 (7th Cir. 1985)* (when one party to contract seeks declaration of contract's meaning, another party's counterclaim to enforce contract is repetitious and unnecessary).

(n13)Footnote 1. *Fed. R. Civ. P. 13(e); see Am. Home Assur. Co. v. Pope, 487 F.3d 590, 604 n.6 (8th Cir. 2007) .*

(n14)Footnote 2. *Stone v. Dep't of Aviation, 453 F.3d 1271, 1280 (10th Cir. 2006) .*

(n15)Footnote 3. *See Fed. R. Civ. P. 15(d); Keller v. Davidson, 299 F. Supp. 2d 1171, 1178-1179 (D. Colo. 2004) .*

(n16)Footnote 4. *Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 360-361 (7th Cir. 1990)* (permission to add Rule 13(e) claim will be denied if litigation will be unduly disrupted).

(n17)Footnote 5. *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate-Palmolive Co., 152 F.R.D. 202, 204-205 (D. Kan. 1993)* (in breach of distributorship action, court denied defendant's motion to add supplemental fraud counterclaim under state law as counterclaim did not arise out of same transaction or occurrence as main claim, would complicate trial preparation, result in delay and inject numerous issues unduly extending length of trial).

(n18)Footnote 6. *Skaro v. Eastern Sav. Bank, 866 F. Supp. 229, 233-234 (W.D. Pa. 1994) .*

(n19)Footnote 1. *Fed. R. Civ. P. 13(f).*

(n20)Footnote 2. *See Fed. R. Civ. P. 15(a); see also Bank of New York v. Sasson, 786 F. Supp. 349, 352 (S.D.N.Y. 1992)* (liberal policies that support amended pleadings apply to omitted counterclaim; Rule 13(f) and Rule 15(a) are entirely consistent in their facilitation of amended pleadings).

(n21)Footnote 3. *Fed. R. Civ. P. 13(f).*

(n22)Footnote 4. *United Servs. Auto. Ass'n v. Foster, 783 F. Supp. 916, 919-921 (M.D. Pa. 1992) .*

(n23)Footnote 5. *Frank M. McDermott, Ltd. v. Moretz, 898 F.2d 418, 420-421 (4th Cir. 1990) .*

(n24)Footnote 6. *McLemore v. Landry, 898 F.2d 996, 1003 (5th Cir. 1990) .*

(n25)Footnote 7. *Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1035 n.35 (4th Cir. 1983) .*

(n26)Footnote 8. *United Servs. Auto. Ass'n v. Foster, 783 F. Supp. 916, 921 (M.D. Pa. 1992) .*

(n27)Footnote 9. *Fed. R. Civ. P. 13(f); Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993) .*

(n28)Footnote 10. *Cooper Dev. Co. v. Employers Ins. of Wausau, 765 F. Supp. 1429, 1432 (N.D. Cal. 1991) .*

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VI. COUNTERCLAIMS

1-11 Moore's Manual--Federal Practice and Procedure § 11.61

§ 11.61 Compulsory Counterclaimsn*

[1] Defendant Must Plead Compulsory Counterclaim

A defending party must plead as a counterclaim any claim that, at the time of its service, n1 the pleader has against an opposing party if the claim:

1. arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; n2 and

2. does not require adding another party over whom the court cannot acquire jurisdiction. n3

It is important to distinguish between the compulsory counterclaim and the permissive counterclaim, which is any claim that a party has against an opposing party any claim that is not compulsory. n4 The primary distinction is whether the claim and the counterclaim arise out of the transaction or occurrence. n5 The terms "transaction" and "occurrence" are not mutually exclusive, and describe a broad category of situations in which there may be a relationship between the claim and counterclaim. n6 Consequently, the courts have developed several tests used to determine whether a counterclaim is compulsory or permissive, including: (1) whether there is any logical relation between claim and counterclaim; (2) whether substantially the same evidence will support or refute the plaintiff's claim as well as defendant's counterclaim; (3) whether issues of fact and law raised by claim and counterclaim are largely the same, and (4) whether res judicata would bar subsequent suit on defendant's claim absent the compulsory counterclaim rule. n7 The first two of these tests are elaborated on below in subsections [2] and [3], below, because they have been recognized by most of the circuits. n8 The tests should not be rigidly applied however, because too mechanistic a comparison of the events causing a claim and counterclaim could lose sight of the policies underlying the compulsory counterclaim rule of achieving economy, fairness, and consistency by requiring both to be determined in a single suit. n9

[2] Logical Relationship Test

One widely recognized test of whether a counterclaim is compulsory is whether there is a logical relationship between the claim and counterclaim. n1 The claims are logically related if the essential facts alleged by the plaintiff constitute, at

least in part, the basis of the defendant's counterclaim. In developing the rule, the Supreme Court noted that the word "transaction" may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as on their logical relationship. n2 Under the logical relation test, a counterclaim qualifies as "compulsory" only if it arises out of the same aggregate of operative facts as the original claim in two respects: (1) that the same aggregate of operative facts serves as the basis of both claims, or (2) that the aggregate core of facts on which the original claim rests activates additional legal rights in the defendant that would otherwise remain dormant. n3

[3] Same Evidence Test

The courts have developed a refined version of the logical relationship test in which the claim and counterclaim are logically related if: (1) the facts necessary to prove the two claims substantially overlap and (2) the preclusive effect of a judgment for the plaintiff in the first action would bar the putative counterclaimant from raising the claim in a subsequent action. n1 This test, while not administered rigidly, gives weight to consideration of the same evidence and claim preclusion factors, and is known as the "same evidence test." n2 In this test, the. n3 Some courts have emphasized the utility of the same evidence test, noting that it accomplishes the purposes of the compulsory counterclaim rule by preventing the relitigation of the same set of facts. Another circuit has focused on the overlap of legally relevant facts underlying the claims with a view toward trying them in the same suit, n4 while another circuit makes use of both the same evidence factor and the claim preclusion factor. n5 Finally, some courts have described the test as whether the same evidence would substantially dispose of the issues raised by the opposing claims. n6

The same evidence test seeks to achieve the Rule 13 goals of judicial economy n7 and finality of federal court adjudication, n8 because the compulsory counterclaim Rule was drafted to limit the number of lawsuits that could be brought in connection with one controversy. Furthermore, it was designed to balance the interest of the counterclaimant in prosecuting the counterclaim in a forum of its own choosing n9 28 against the interest in conserving judicial resources by resolving all disputes arising out of common matters in a single action. n10

[4] Counterclaims Are Compulsory Only if Counterclaim Exists At Time Pleading Is Served

A pleading must state as a counterclaim any claim the pleader has against any opposing party at the time of serving the pleading. n1 Thus, a counterclaim that arose from the same transaction or occurrence as the primary claim, but did not accrue or mature until after service of the answer is not compulsory in the action. n2 Before it is mature for purposes of the compulsory counterclaim rule, the counterclaim must be completely vested at the time the pleader serves the responsive pleading, and not merely contingent or likely to arise in the future. n3 For example, a claim for abuse of process that is contingent on the resolution of another lawsuit not yet terminated at the operative filing time is not a mature compulsory counterclaim. n4 Once the claim matures, however, the defendant may have the option, provided the defendant gets leave of court, to bring the claim as a permissive counterclaim. n5

[5] Rule Applicable to Responsive Pleading Only

A claim that should have been pleaded as a compulsory counterclaim in a first suit will only be barred in a subsequent action if a responsive pleading, such as an answer, was required to be or was served in the earlier action. n1 Federal courts deciding the issue have uniformly held that a motion to dismiss pursuant to Rule 12 is not a responsive pleading. n2 As one court stated, to hold otherwise would inappropriately punish a litigant for interposing a successful motion to dismiss before answering by stripping it of the right to bring claims that in retrospect could or should have been brought had the motion to dismiss failed. n3

[6] Exceptions to Rules Requiring Pleading of Counterclaims

[a] When Claim is Subject of Another Suit

A defendant need not plead as a compulsory counterclaim any claim that is already the subject of another action that

was pending prior to the institution of the current action, even if the claim arises from the same transaction or occurrence as the claim in the initial action. n1 Thus, the defendant may, but is not required to, file a counterclaim in the second action. n2 If the defendant chooses to file the counterclaim in the subsequent action, it would be able to invoke the supplemental jurisdiction normally accorded to compulsory counterclaims. n3 Alternatively, the defendant may elect to raise the claim in the first-filed action. It is important to note, however, that in either scenario, the first action to go to final judgment will be dispositive as to those issues in the still pending action. n4 The exception applies whether the initial action was filed in state court n5 or in federal court. n6

[b] When Court Lacks Jurisdiction Over Indispensable Party to Claim

A defendant is not required to assert a claim as a counterclaim if the claim requires the addition of another person over whom the court is unable to obtain jurisdiction. n7 Rule 13 allows the joinder of parties required for granting complete relief in a counterclaim, if jurisdiction of the parties can be obtained, and their joinder will not deprive the court of jurisdiction over the action. n8 However, there is an exception to the compulsory counterclaim rule when a court is unable to obtain personal jurisdiction over the additional required defendants. n9 This exception is required by basic considerations of fairness, because a party should not be required to litigate its counterclaim in a forum in which it cannot bring in indispensable parties. n10 Inability to join indispensable parties may arise (1) because their joinder would destroy diversity jurisdiction, (2) personal jurisdiction cannot be obtained over them, or (3) joinder would destroy venue in the action. A lack of subject matter jurisdiction over indispensable parties cannot be waived by agreement of the parties. Courts have also noted that lack of personal jurisdiction cannot be waived. n11

[c] Claim In Suit by Attachment or Other Process Lacking In Personam Jurisdiction

A defendant need not state a claim as a counterclaim if the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule. n12 If the defendant does decide to raise a claim as a counterclaim in such circumstances, the defendant is required to raise as counterclaims any claims that the defendant has arising from the same transaction or occurrence as the main claim. n13

If a defendant elects not to appear in an in rem action, a judgment for the plaintiff binds the res only, and the defendant will be free to bring a subsequent, independent action on a claim arising out the of same transaction or occurrence that is the subject matter of plaintiff's claim. n14 On the other hand, if a defendant in an action over which the court has only in rem or quasi in rem jurisdiction elects to appear in the action and defend against the plaintiff's claim, the defendant is not required to plead compulsory counterclaims, but may reserve them and assert them in a subsequent, independent action. n15 For example, if the defendant in a quasi in rem attachment action appeared to challenge the validity of the attachment and also had a counterclaim, which would otherwise be compulsory, against the plaintiff for breach of contract, the defendant would have the option to assert the counterclaim in a subsequent action because it would subject the defendant to in personam jurisdiction. n16

[7] Effect of Failure to Plead Compulsory Counterclaim

If a pleading party fails to plead a claim against an opposing party when that claim counstitutes a compulsory counterclaim, the pleader waives the right to bring that claim at a later time, n1 and the claim is barred even in subsequent litigation. n2 In other words, Rule 13(a) bars litigation for the first time on a subject that could have been asserted in a counterclaim. Typically, the timing of a counterclaim and its classification as compulsory do not become crucial until a second action is brought on the same claim, in which the pleader attempts to raise a claim based on the same transaction or occurrence which was the basis of the first suit, and the opposing party moves to dismiss it as barred. n3 While the text of Rule 13 does not explicitly state the prohibition, a claim that was compulsory in a prior suit is barred in a subsequent action based on the same claim. n4

Courts have also barred subsequent use of a compulsory counterclaim in the same action after the defendant failed to plead that counterclaim in an earlier pleading. n5 When a defendant took a default judgment in an earlier action on a claim that was compulsory in that earlier action, the defendant was barred from asserting the claim in any subsequent proceeding. n6 In another example, the court barred a claim in a post-default hearing on damages by a defaulting defendant who had failed to file a responsive pleading containing that claim as a counterclaim. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 Moore's Federal Practice, §§ 13.10 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See* [4], *below*.

(n3)Footnote 2. *Fed. R. Civ. P. 13(a)(1)(A)*.

(n4)Footnote 3. *Fed. R. Civ. P. 13(a)(1)(B)*; *see* [6], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 13(b)*.

(n6)Footnote 5. *Fed. R. Civ. P. 13(a)(1)(A)*.

(n7)Footnote 6. *Moore v. New York Cotton Exch., 270 U.S. 593, 609-610, 46 S. Ct. 367, 70 L. Ed. 750 (1926)* .

(n8)Footnote 7. *Iglesias v. Mutual Life Insurance Company of New York, 156 F.3d 237, 241 (1st Cir. 1998)* .

(n9)Footnote 8. *See Yoon Ja Kim v. Sara Lee Bakery Group, Inc., 412 F. Supp. 2d 929, 935 (N.D. Ill. 2006)* ; *Harrison v. Grass, 304 F. Supp. 2d 710, 713 (D. Md. 2004)* .

(n10)Footnote 9. *Moore v. New York Cotton Exch., 270 U.S. 593, 609-610, 46 S. Ct. 367, 70 L. Ed. 750 (1926)* .

(n11)Footnote 1. *Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1195-1196 (9th Cir. 2005)* .

(n12)Footnote 2. *Moore v. New York Cotton Exch., 270 U.S. 593, 609-610, 46 S. Ct. 367, 70 L. Ed. 750 (1926)* .

(n13)Footnote 3. *Iglesias v. Mutual Life Insurance Company of New York, 156 F.3d 237, 242 (1st Cir. 1998)* ; *Eon Labs., Inc. v. SmithKline Beecham Corp., 298 F. Supp. 2d 175, 179 (D. Mass. 2003)* .

(n14)Footnote 1. *Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 445, 447 (7th Cir. 1994)* (court should examine totality of two claims, including their nature, their legal basis for recovery, their respective facts, and underlying substantive law.

(n15)Footnote 2. *Harrison v. Grass, 304 F. Supp. 2d 710, 713 (D. Md. 2004)* .

(n16)Footnote 3. *Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 445, 447-448 (7th Cir. 1994)* .

(n17)Footnote 4. *Adam v. Jacobs, 950 F.2d 89, 92 (2d Cir. 1991)* .

(n18)Footnote 5. *Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1251-1253 (9th Cir. 1987)* .

(n19)Footnote 6. *Bose Corp. v. Consumers Union of the United States, Inc., 384 F.Supp. 600, 602-603 (D. Mass. 1974)* .

(n20)Footnote 7. *Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991)* .

(n21)Footnote 8. *Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 445, 447-448 (7th Cir. 1994)* .

(n22)Footnote 9. *Burlington N. R. Co. v. Strong, 907 F.2d 707, 710 (7th Cir. 1990)* .

(n23)Footnote 10. *Southern Constr. Co. v. Pickard, 371 U.S. 57, 60, 83 S. Ct. 108, 9 L. Ed. 2d 31 (1962)* .

(n24)Footnote 1. *Fed. R. Civ. P. 13(a)(1)*.

(n25)Footnote 2. *Dillard v. Security Pac. Brokers, Inc., 835 F.2d 607, 609 (5th Cir. 1988)* .

(n26)Footnote 3. *Steinberg v. St. Paul Mercury Ins., 108 F.R.D. 355, 358 (S.D. Ga. 1985)* (citing **Moore's Federal Practice**).

(n27)Footnote 4. *Young v. City of New Orleans, 751 F.2d 794, 801 (5th Cir. 1985)* .

(n28)Footnote 5. *See Fed. R. Civ. P. 13(b),(e)*.

(n29)Footnote 1. *United States v. Snider, 779 F.2d 1151, 1157 (6th Cir. 1985)* (defendant's counterclaim to recover money damages arising out of same transaction was not compulsory when defendant was not required to serve responsive pleading in first action).

(n30)Footnote 2. *Fed. R. Civ. P. 12(b)*.

(n31)Footnote 3. *Mutual Fire, Marine and Inland Ins. Co. v. Adler, 726 F. Supp. 478, 483 (S.D.N.Y. 1989)* .

(n32)Footnote 1. *Fed. R. Civ. P. 13(a)(2)(A)*; *St. Paul Fire and Marine Ins. Co. v. Seafare Corp., 831 F.2d 57, 58 (4th Cir. 1987)* .

(n33)Footnote 2. *Old Hickory Barge and Fleeting, Inc. v. Barge M-553, 107 F.R.D. 689, 691 (M.D. La. 1985)* .

(n34)Footnote 3. *Brach v. Amoco Oil Co., 677 F.2d 1213, 1218 (7th Cir. 1981)* .

(n35)Footnote 4. *Hastings v. Seattle-First Nat'l Bank, 40 Fed. R. Serv. 2d 669, 673 (M.D. Fla. 1984)* .

(n36)Footnote 5. *United States v. Sarman, 699 F.2d 469, 470 (9th Cir. 1983)* .

(n37)Footnote 6. *Hastings v. Seattle-First Nat'l Bank, 40 Fed. R. Serv. 2d 669, 673 (M.D. Fla. 1984)* .

(n38)Footnote 7. *Fed. R. Civ. P. 13(a)(1)(B)*.

(n39)Footnote 8. *Fed. R. Civ. P. 13(h)*.

(n40)Footnote 9. *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, 712 F. Supp. 732, 733-734 (D. Minn. 1989)* .

(n41)Footnote 10. *Cf. Fed. R. Civ. P. 19(b)*.

(n42)Footnote 11. *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, 712 F. Supp. 732, 734-735 (D. Minn. 1989)* .

(n43)Footnote 12. *Fed. R. Civ. P. 13(a)(2)(B)*.

(n44)Footnote 13. *See Fed. R. Civ. P. 13(a)(2)(B)* (exception is applicable only if pleader refrains from asserting counterclaim).

(n45)Footnote 14. *Cargill, Inc. v. Sabine Trading & Shipping Co., 756 F.2d 224, 229 (2d Cir. 1985)* .

(n46)Footnote 15. *Old Hickory Barge and Fleeting, Inc. v. Barge M-553, 107 F.R.D. 689, 690 (M.D. La. 1985)* .

(n47)Footnote 16. *Cargill, Inc. v. Sabine Trading & Shipping Co., 756 F.2d 224, 229 (2d Cir. 1985)* .

(n48)Footnote 1. *Polymer Indus. Prods. v. Bridgestone/Firestone, Inc., 347 F.3d 935, (Fed. Cir. 2003)* .

(n49)Footnote 2. *Ross v. Bd. of Educ., 486 F.3d 279, 284 (7th Cir. 2007)* .

(n50)Footnote 3. *Crown Life Ins. Co. v. American Nat'l Bank and Trust Co., 35 F.3d 296, 300 (7th Cir. 1994)* .

(n51)Footnote 4. *Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974)* .

(n52)Footnote 5. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 160 (2d Cir. 1992)* .

(n53)Footnote 6. *Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 38-39 (1st Cir. 1987)* .

(n54)Footnote 7. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 160 (2d Cir. 1992)* .

Moore's Manual--Federal Practice and Procedure

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VI. COUNTERCLAIMS

1-11 Moore's Manual--Federal Practice and Procedure § 11.62

§ 11.62 Permissive Counterclaimsn*

[1] Nature of Permissive Counterclaims

A "permissive counterclaim" is any claim against an opposing party other that does not come within the definition of a compulsory counterclaim. n1 Therefore, a permissive counterclaim is one that either does not arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim, n2 requires the addition of another party over whom the court cannot acquire jurisdiction, n3 or comes within one of the other exceptions to the compulsory counterclaim rule. n4

Thus, a claim that does not meet the test for a compulsory counterclaims is a permissive counterclaim, that the defending party may plead but need not plead if the defending party chooses not to do so. Furthermore, a failure to plead a compulsory counterclaim does not result in a bar on future litigation of that claim. n5 Subject to jurisdictional limitations, a defendant has the option to bring its permissive counterclaims either in the same action in which the opposing party raised its primary claims against the defendant, or in a separate action. Unlike compulsory counterclaims, permissive counterclaims are not barred for failure to assert them in the first action. n6 The text of Rule 18(a) makes it clear that the defendant may bring any permissive counterclaims that the pleader has against the opposing party, subject to the rules governing joinder of claims. n7 The permissive counterclaim rule is based on judicial economy. n8

[2] Use of Permissive Counterclaims

Permissive counterclaims generally do not arise from the same transaction or occurrence as the main claim, and if they do not are not within the court's supplemental jurisdiction, and require an independent basis for subject matter jurisdiction in the federal court. n1 A defendant may join additional parties to permissive counterclaims, subject to the Rules governing joinder of parties. n2 Supplemental jurisdiction by statute is extended to claims involving the joinder of additional parties. n3

Claims for defensive setoff for a liquidated or otherwise ascertained amount which are pleaded solely to diminish or reduce a judgment for the opposing party provide an exception to the rule that permissive counterclaims require an independent basis for jurisdiction. n4 Claims for setoff arise from a separate transaction than the subject matter of the

opposing party's claim. n5 The traditional distinction between claims in recoupment and setoff is reflected in the division between compulsory and permissive counterclaims. n6 Claims for setoff are permissive counterclaims. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 Moore's Federal Practice, §§ 13.30, 31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 13(b).*

(n3)Footnote 2. *See Fed. R. Civ. P. 13(a)(1)(A).*

(n4)Footnote 3. *See Fed. R. Civ. P. 13(a)(1)(A).*

(n5)Footnote 4. *See Fed. R. Civ. P. 13(a)(2).*

(n6)Footnote 5. *Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974)* ; *see* [2], *below.*

(n7)Footnote 6. *Schwinn Bicycle Co. v. TI Reynolds 531 Ltd., 182 B.R. 526, 531 (Bankr. N.D. Ill. 1995)* .

(n8)Footnote 7. *Fed. R. Civ. P. 18(a)*; *Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 418 (S.D. W. Va. 1994)* .

(n9)Footnote 8. *O'Bryant v. United States, 839 F. Supp. 1321, 1329 (C.D. Ill. 1993)* .

(n10)Footnote 1. *Consolidated Freightways Corp. v. Coast Freightways, Inc., 628 F. Supp. 894, 897 (C.D. Cal. 1986)* .

(n11)Footnote 2. *Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 418 (S.D. W. Va. 1994)* ; *see Fed. R. Civ. P. 13(h), 18(a).*

(n12)Footnote 3. *See 28 U.S.C. § 1367(a).*

(n13)Footnote 4. *United States ex rel D'Agostino Excavators, Inc. v. Heyward-Robinson Co, 430 F.2d 1077, 1081 n.1 (2d Cir. 1970)* .

(n14)Footnote 5. *Concept Clubs, Inc. v. Jean Bob Inc., 154 B.R. 581, 587 (D. Utah 1993)* .

(n15)Footnote 6. *FDIC v. F.S.S.S., 829 F. Supp. 317, 322 (D. Alaska 1993)* .

(n16)Footnote 7. *Steinberg v. St. Paul Mercury Ins. Co., 108 F.R.D. 355, 359 (S.D. Ga. 1985)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
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1-11 Moore's Manual--Federal Practice and Procedure § 11.63

§ 11.63 Counterclaims by or Against United Statesn*

[1] Counterclaim Rule Does Not Abolish Sovereign Immunity

The Federal Rules of Civil Procedure do not expand the right to assert a counterclaim or to claim a credit against the United States or a United States officer or agency. n1 This means that a defendant may assert a counterclaim in actions that the government files only when the government has waived its immunity from suit on that claim. n2 A waiver of sovereign immunity cannot be implied and Congress must express the waiver unequivocally. In the case of a counterclaim, the defendants bear the burden to show the express waiver. n3 When the United States does explicitly waive its immunity, however, the waiver applies to counterclaims asserted by a defending party. n4 There are a number of statutes dealing with the right to counterclaims or credits against the United States.

In addition to the substantive limitations on counterclaims imposed by the doctrine of sovereign immunity, a pleading asserting a counterclaim against the United States also raises the issue of whether the United States is an opposing party for purposes of the compulsory counterclaim rule. Even if the counterclaim is, after statutory construction, deemed to be a waiver or partial waiver of sovereign immunity, a court may find that the pleader brought the counterclaim against the United States in a different capacity than that in which it brought suit, and disallow the claim. n5

[2] United States Waives Sovereign Immunity for Recoupment Claims

The mere act of filing suit by the United States does not waive sovereign immunity to counterclaims brought by a defendant. However, when the United States brings a suit, it does waive its sovereign immunity as to any recoupment claims of the defendant. n1 Recoupment has been strictly construed in the sovereign immunity context to include only those claims that arise from the same transaction or occurrence as the government's claim, seek relief of the same kind or nature and seek an amount not in excess of the opposing claim. n2 However, courts have become more liberal in permitting a defendant to assert by way of recoupment any claim arising out of the same transaction or occurrence as the original claim in order to reduce or defeat the government's recovery. n3 While compulsory counterclaims meet this test, permissive counterclaims do not, and require an independent basis of waiver of sovereign immunity. n4

[3] Express Statutory Waiver of Sovereign Immunity by United States

Under the Federal Tort Claims Act, n1 the United States waives its immunity with respect to tort claims brought under the Act against the government. n2 The statutory waiver also applies to counterclaims asserted by a defending party in a suit by the government. n3 The claims must comply with the procedural and substantive provisions of the Act to take advantage of the waiver. n4 Under the Tucker Act, the United States waives its immunity as to certain claims against the government for money damages not arising out of tort. n5 The statutory waiver applies to counterclaims asserted by a defending party in a suit by the government. n6 In another example, the Bankruptcy Code waives sovereign immunity in bankruptcy cases as to compulsory counterclaims to governmental claims and permissive counterclaims to governmental claims, with a maximum setoff limitation. n7

[4] United States May Assert Counterclaims

The provision of Rule 13 provision regarding sovereign immunity and counterclaims against the United States is not applicable to counterclaims brought by the United States. n1 The United States as a party, however, it is subject to the same pleading requirements for compulsory counterclaims as any other defendant, and therefore must plead any counterclaim that is compulsory under Rule 13(a), and may plead any permissive counterclaim under Rule 13(b). n2

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 Moore's Federal Practice, § 13.50 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 13(d).*

(n3)Footnote 2. *United States v. Neary (In re Armstrong), 206 F.3d 465, 473 (5th Cir. 2000)* .

(n4)Footnote 3. *United States v. Royal Geropsychiatric Services, Inc., 8 F.Supp.2d 690, 693-694* (N.D. Ohio 1998.).

(n5)Footnote 4. United States v. 255. *21 Acres in Anne Arundel County, Md., 722 F. Supp. 235, 236-238 (D. Md. 1989)* .

(n6)Footnote 5. *In re Sunrise Sec. Litig., 818 F. Supp. 830, 835-836 (E.D. Pa. 1993)* (limited waiver of sovereign immunity for recoupment claims did not apply).

(n7)Footnote 1. *FDIC v. FSSS, 829 F. Supp. 317, 321-322 (D. Alaska 1993)* .

(n8)Footnote 2. *FDIC v. Hulsey, 22 F.3d 1472, 1487 (10th Cir. 1994)* .

(n9)Footnote 3. *United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1551 (E.D. Cal. 1993)* .

(n10)Footnote 4. *FDIC v. Hulsey, 22 F.3d 1472, 1487 (10th Cir. 1994)* .

(n11)Footnote 1. *28 U.S.C. § 1346(b).*

(n12)Footnote 2. *United States v. Yellow Cab Co., 340 U.S. 543, 556-557, 71 S. Ct. 399, 95 L. Ed. 2d 523 (1951)* .

(n13)Footnote 3. United States v. 255. *21 Acres in Anne Arundel County, Md., 722 F. Supp. 235, 238 (D. Md. 1989)* .

(n14)Footnote 4. *United States v. Montrose Chem. Corp. of Cal., 788 F. Supp. 1485, 1490-1491 (C.D. Cal. 1992)* .

(n15)Footnote 5. *28 U.S.C. § 1491 et seq.*

(n16)Footnote 6. *United States v. City of Kansas City, 761 F.2d 605, 607 (10th Cir. 1985)* .

(n17)Footnote 7. *11 U.S.C. § 101 et seq*; *see In re Price, 42 F.3d 1068, 1072 (7th Cir. 1994)* .

(n18)Footnote 1. *Fed. R. Civ. P. 13(d).*

(n19)Footnote 2. *United States v. Cawley, 821 F. Supp. 1219, 1223 (E.D. Mich. 1993)* , aff'd, *16 F.3d 1221 (6th Cir. 1994)* (action by United States to collect on defaulted student loan was not compulsory in student's action for alleged torts and constitutional violations arising out of student's research at university, and thus was not precluded in subsequent action).

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
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1-11 Moore's Manual--Federal Practice and Procedure § 11.64

§ 11.64 Procedural Considerations for Counterclaimsn*

[1] Jurisdiction

[a] Compulsory Counterclaims

A compulsory counterclaim is included within the supplemental jurisdiction of the court, n1 and therefore the court does not require an independent basis of subject-matter jurisdiction to hear the claim. n2 Under the supplemental jurisdiction statute, a district court may exercise supplemental jurisdiction over claims that form part of the same case or controversy as the original claim over which the court has original jurisdiction. n3 In construing the statutory language, courts have held that any factual connection between the claims can be enough to form a single case or controversy for supplemental jurisdiction purposes. n4 The statute also authorizes courts to decline to exercise supplemental jurisdiction under certain circumstances. n5

[b] Permissive Counterclaims

Permissive counterclaims, unlike compulsory counterclaims, do not usually fall within the court's supplemental jurisdiction, and require an independent basis of subject matter jurisdiction to be heard by the federal court, n6 unless they arise from the same transaction or occurrence as the main claim. n7 Under the expansive *Gibbs* test codified in the supplemental jurisdiction statute, a federal court may have supplemental jurisdiction over a permissive counterclaim if it is so related to the main claim that it forms part of the same constitutional case or controversy. n8

[c] Jurisdiction Over Counterclaims May Be Based on Diversity of Citizenship

Under the supplemental jurisdiction statute, a district court has supplemental jurisdiction over claims that form part of the same case or controversy as the original claim over which the court has original jurisdiction. n9 Supplemental jurisdiction is not limited to federal question cases, and may be invoked when the court's original basis of jurisdiction is diversity of citizenship. n10 The statute provides that the court will not have supplemental jurisdiction over claims by plaintiffs against certain third or joined parties if joinder would be inconsistent with the jurisdictional requirements of Section 1332. However, the text of the statute does not prohibit supplemental jurisdiction for claims or defendants asserting counterclaims. n11 Unless it falls within the supplemental jurisdiction of the court, a counterclaim in an action

based on diversity must satisfy the jurisdictional amount. n12 However, if the counterclaim forms part of same case or controversy as the main claim, one circuit has held that under the supplemental jurisdiction statute the court in its discretion may exercise supplemental jurisdiction over a counterclaim not meeting the jurisdictional amount. n13

[d] Personal Jurisdiction

A court has personal jurisdiction over the opposing party of a counterclaim who has submitted to the jurisdiction of the court by bringing suit as the plaintiff. n14 Another personal jurisdiction consideration is whether a defendant waives jurisdictional defenses by asserting a counterclaim. Many courts now hold that a defendant does not waive jurisdictional defenses by asserting a compulsory counterclaim. n15 Some courts also have found that jurisdictional defenses are not waived by filing permissive counterclaims. n16

[e] Venue

By filing suit against a defendant, the plaintiff waives the right to object to the venue as to compulsory or permissive counterclaims. n17 Furthermore, the waiver extends to parties joined to a compulsory counterclaim under supplemental jurisdiction, but does not extend to permissive counterclaims. n18 A related issue is whether a defendant waives venue defenses by asserting a counterclaim. It is currently held that a defendant does not waive venue defenses by asserting a compulsory counterclaim. n19

[2] Counterclaim Constitutes Affirmative Claim for Relief By Defendant

A counterclaim is an affirmative claim for relief, asserting a right to payment or other right by a defendant against the claims of the plaintiff or other opposing party. n1 Counterclaims are affirmative claims that either arise from the same transaction or occurrence as, or exist independently of, the subject matter of the original pleader's underlying claim. n2 The counterclaim is broader than the common law devices of both recoupment and setoff, because it permits independent claims for relief. n3 Counterclaims are distinguishable from affirmative defenses, which challenge the plaintiff's legal right to bring an action but, unlike counterclaims, do not allow for independent recovery. n4 Furthermore, a counterclaim is offensive in nature; an affirmative defense is defensive. Counterclaims are also distinguishable from crossclaims, which are claims brought by a party against a co-party. n5 A counterclaim is not a separate pleading, but must be made in a responsive pleading such as an answer. n6

Only defending parties may assert counterclaims. Defending parties are parties against whom a claim has been filed. A party is a defending party in one (or more) of the following four circumstances: n7

1. Defending against a claim in the complaint action; this party is known simply as the defendant. n8

2. Defending against a counterclaim. n9

3. Defending against a crossclaim. n10

4. Defending against a third-party complaint. n11

[3] Counterclaim Is Asserted Only Against Opposition Party

A defendant must file any compulsory counterclaims and may file any permissive counterclaims that the party has against an "opposing party." n1 Although Rule 13 itself does not define the term, opposing parties are parties that formally aligned against each other with respect to the pleaded claim. n2 The term also includes any party who has previously asserted a claim against a counterclaimant. For example, when a plaintiff asserts a claim, the plaintiff becomes an opposing party to the party against whom the claim is brought--the defendant. The defendant is then eligible to bring a counterclaim against the plaintiff. On the other hand, co-parties are considered to be any parties that

are not opposing parties, and are usually parties on the same side of the primary litigation, such as co-defendants. The term "opposing party" also includes an original defendant in the main litigation when that defendant files a counterclaim in its answer against the original plaintiff, who becomes eligible to assert a counterclaim in its reply. n3

A defending party must assert a compulsory counterclaim only against an existing party. The defendant may not confer compulsory status on a claim by using it as a basis for impleading third-party defendants not currently parties to the action. n4 Even though it was forbidden in pre-Rule practice, courts have allowed intervenors under Rule 24 to bring counterclaims against an existing party to the action. n5 Defendants in an interpleader action under Rule 22 have also been permitted to file compulsory counterclaims to assert their right to the contested fund. Thus, once the stakeholder joins the claimants in interpleader action, a claimant may file a counterclaim against the stakeholder as an opposing party. n6

"Opposing parties" are not limited to plaintiffs and defendants in the main action, but include third-party plaintiffs and the third-party defendants they have joined. n7 For example, a third-party defendant who is impleaded by an existing defendant/third-party plaintiff must file any compulsory counterclaims, and may file any permissive counterclaim it has against that defendant. n8 A third-party defendant may not assert a counterclaim against an original plaintiff before the original plaintiff files a claim against it; however, it may bring any claims authorized by Rule 14 against the original plaintiff. n9 The original plaintiff in the action must then file any compulsory counterclaims it has against that third-party defendant. n10 Once the original plaintiff in the action files any claims it has against the third-party defendant, the third-party defendant must then assert any compulsory counterclaim it has against the original plaintiff, and may file any permissive concentration it has against the original plaintiff. n11 For further discussion, see Ch. 14, *Multiple Party Practice*.

[4] Designation as Counterclaim

A defendant should clearly plead and designate a counterclaim as such. n1 because otherwise the opposing party does not necessarily have to answer to the counterclaim in a pleading. n2 However, this rule is not rigidly enforced, and a court will treat an improperly labeled counterclaim as if it had been designated appropriately, and will not penalize the pleader for improper labeling. n3 Thus, if a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, if justice requires the court must treat the pleading as though it were correctly designated, and may impose terms for doing so. n4 However, if a responsive pleading fails to give the opposing party fair notice, a court is less likely to redesignate an improperly labeled pleading. n5

[5] Statutes of Limitation

Counterclaims are generally subject to the operation of applicable statutes of limitations. n1 If the main action is timely, a claim for recoupment that arises out of the same transaction or occurrence as the main claim and does not seek affirmative relief nor relief different from that sought in the main claim, relates back to the filing of the plaintiff's claim and is not time barred. n2 Even if compulsory, counterclaims for affirmative relief generally will be time barred. n3 However, an amendment to add a compulsory counterclaim arising out of the same transaction alleged in a timely and previously filed answer relates back to the filing of the answer and is not time barred. n4 Statutes of limitations are considered substantive law and accordingly, in diversity actions, or when the court has supplemental jurisdiction over a state-law claim, the state statute of limitations and related principles of tolling and relation back apply to the actions. n5

[6] Separate Judgment

A court may enter a separate, final judgment on any claim or counterclaim after making an express determination that there is no just reason for delay. n1 The power of the court is discretionary and should be exercised in light of judicial administrative interests as well as the equities involved, giving weight to the federal policy against piecemeal appeals. n2 The court may enter a separate judgment on a compulsory counterclaim if the claim is legally distinct and involves at

least some separate facts. n3 Provided that a court has jurisdiction, it may hear and render a separate judgment on a counterclaim even if the opposing party's claim has been dismissed. n4

[7] Other Procedural Issues

The following issues on occasion will appear in a case involving a counterclaim:

1. Service requirements. Counterclaims are generally asserted in the answer, which must be served on a party or the party's attorney in accordance with the Rules governing service. n1 An objection to insufficient service of process is not waived by filing it with a compulsory counterclaim in the answer. n2

2. Demand for jury trial. A party must file a demand for a jury trial, and a general demand by plaintiff for trial of all issues does not necessarily encompass counterclaims in the action. n3 A general demand may encompass compulsory counterclaims. n4

3. Separate trials. A court may sever counterclaims for separate trial in furtherance of judicial convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy. n5 The issue to be tried must be so distinct and separate from others that trial of it alone may be had without injustice. n6

4. Appeal. A party may seek an immediate appeal from a separate judgment on a counterclaim that was certified under the Rules; other separate appeals from orders regarding counterclaims are generally interlocutory. n7 An appellate court determines de novo whether the district court erred in finding an untimely or barred compulsory counterclaim. n8

5. Treatment as Other Claims for Relief. Except as specified in the federal rules which make unique provision for a counterclaim, n9 a counterclaim is treated as any other claim for relief in a pleading, such as in a complaint. For example, a counterclaim may be subject to a Rule 12(b)(6) in the same manner as a claim. n10

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 Moore's Federal Practice, §§ 13.90 et seq., 13.110 et seq (Matthew Bender 3d ed.)

(n2)Footnote 1. *Murphy v. Fla. Keys Elec. Coop. Ass'n, 329 F.3d 1311, 1319* (th Cir. 2003).

(n3)Footnote 2. *Centennial Sch. Dist. v. Independence Blue Cross, 885 F. Supp. 683, 685 (E.D. Pa. 1994)* .

(n4)Footnote 3. *28 U.S.C. § 1367*.

(n5)Footnote 4. *Channell v. Citicorp Nat'l Servs., 89 F.3d 379, 385-386 (7th Cir. 1996)* .

(n6)Footnote 5. *Channell v. Citicorp Nat'l Servs., 89 F.3d 379, 385-386 (7th Cir. 1996)* (court may decline to exercise supplemental jurisdiction over counterclaims if under *28 U.S.C. § 1367(c)* counterclaims would substantially predominate over plaintiff class's claims or if there were other compelling reasons for declining jurisdiction).

(n7)Footnote 6. *Iglesias v. Mutual Life Insurance Company of New York, 156 F.3d 237, 241-242 (1st Cir. 1998)* .

(n8)Footnote 7. *Shamblin v. City of Colchester, 793 F. Supp. 831, 833 (C.D. Ill. 1992)* (in action for compensation under Fair Labor Standards Act, *29 U.S.C. § 201*, defendant city's state law claim for breach of fiduciary duty was

permissive counterclaim, was not entitled to supplemental jurisdiction, and was be dismissed).

(n9)Footnote 8. *Channell v. Citicorp Nat'l Servs., 89 F.3d 379, 385-386 (7th Cir. 1996)* .

(n10)Footnote 9. *28 U.S.C. § 1367.*

(n11)Footnote 10. *Shanaghan v. Cahill, 58 F.3d 106, 109-111 (4th Cir. 1995)* .

(n12)Footnote 11. *See 28 U.S.C. § 1367(b).*

(n13)Footnote 12. *Kuhn v. Account Control Technology, Inc., 865 F.Supp. 1443, 1446 (D. Nev. 1994)* (permissive counterclaim must meet jurisdictional amount).

(n14)Footnote 13. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 930-931 (7th Cir. 1995)* (*28 U.S.C. § 1367(a)* allows suit by pendent plaintiff who satisfies diversity requirement but not jurisdictional amount).

(n15)Footnote 14. *See Adam v. Saenger, 303 U.S. 59, 67-68, 58 S. Ct. 454, 82 L. Ed. 649 (1938)* (by filing a lawsuit plaintiff consents to jurisdictional power of state and cannot contest personal jurisdiction against counterclaim filed by defendant).

(n16)Footnote 15. *Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147, 1149 (5th Cir. 1987)* (owners of vessel in admiralty action did not waive personal jurisdiction defense by filing action impleading third-party; filing of counterclaim does not operate as waiver of objection).

(n17)Footnote 16. *Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984)* (in action for unauthorized use of trademark and interference with contract, assertion of permissive counterclaim for improper termination of distributorship agreement and defamation did not waive personal jurisdiction defense).

(n18)Footnote 17. *General Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 435, 53 S. Ct. 202, 77 L. Ed. 408 (1932)* (setting up of counterclaim against one already in court of his own choosing is very different in respect to venue from bringing him into that court).

(n19)Footnote 18. *Hansen v. Shearson/American Express, Inc., 116 F.R.D. 246, 251 (E.D. Pa. 1987)* (citing **Moore's Federal Practice** for proposition that although ability of party to compulsory counterclaim who was joined under ancillary jurisdiction to object to venue is limited, party to permissive counterclaim may make timely objection on grounds of venue).

(n20)Footnote 19. *Queen Noor, Inc. v. McGinn, 578 F. Supp. 218, 220 (S.D. Tex. 1984)* (defendant did not waive objection to venue by including counterclaim in answer).

(n21)Footnote 1. *National Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 396 (3d Cir. 1994)* .

(n22)Footnote 2. *FDIC v. FSSS, 829 F. Supp. 317, 321-322 (D. Alaska 1993)* .

(n23)Footnote 3. *Concept Clubs, Inc. v. Styler, 154 B.R. 581, 586 n.4 (D. Utah 1993)* .

(n24)Footnote 4. *National Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 395 (3d Cir. 1994)* .

(n25)Footnote 5. *See* Ch. 14, *Multiple Party Practice.*

(n26)Footnote 6. *Bernstein v. IDT Corp., 582 F. Supp. 1079, 1089 (D. Del. 1984)* (counterclaims are not pleadings but must be served in responsive pleading).

(n27)Footnote 7. *See Fed. R. Civ. P. 13*; *Earle M. Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472, 474*

(E.D. Pa. 1991) .

(n28)Footnote 8. *See Fed. R. Civ. P. 7(a)(2).*

(n29)Footnote 9. *See Fed. R. Civ. P. 7(a)(3).*

(n30)Footnote 10. *See Fed. R. Civ. P. 7(a)(4).*

(n31)Footnote 11. *See Fed. R. Civ. P. 7(a)(6).*

(n32)Footnote 1. *Fed. R. Civ. P. 13(a)(1)*; *American Triticale, Inc. v. Nytco Servs., Inc., 664 F.2d 1136, 1148 (9th Cir. 1982)* .

(n33)Footnote 2. *Rainbow Management Group, Ltd. v. Atlantis Submarines Haw., L.P., 158 F.R.D. 656, 659-660 (D. Haw. 1994)* ; *see Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384, 389-393 (3d Cir. 2002)* ("opposing party" should be construed liberally to promote judicial economy).

(n34)Footnote 3. *Frank Briscoe Co. v. Clark County, 857 F.2d 606, 610 (9th Cir. 1988)* .

(n35)Footnote 4. *Birmingham Fire Ins. Co. v. Winegardner and Hammons, Inc., 714 F.2d 548, 552 (5th Cir. 1983)* .

(n36)Footnote 5. *Tenneco, Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375, 1379 (7th Cir. 1985)* .

(n37)Footnote 6. *New York Life Insurance Company v. Deshotel, 142 F.3d 873, 882 (5th Cir. 1998)* .

(n38)Footnote 7. *Finkle v. Gulf & Western Mfg. Co., 744 F.2d 1015, 1018 (3d Cir. 1984)* .

(n39)Footnote 8. *Kane v. Magna Mixer Co., 71 F.3d 555, 562 (6th Cir. 1995)* .

(n40)Footnote 9. *Gilbane Bldg. Co. v. Nemours Found., 606 F. Supp. 995, 998 (D. Del. 1985)* .

(n41)Footnote 10. *Gilbane Bldg. Co. v. Nemours Found., 606 F. Supp. 995, 998 (D. Del. 1985)* .

(n42)Footnote 11. *Pitcavage v. Mastercraft Boat Co., 632 F. Supp. 842, 849-850 (M.D. Pa. 1985)* .

(n43)Footnote 1. *Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7, 747 F.2d 1195, 1197-1198 (8th Cir. 1984)* (pleading must give opposing party fair notice of claim asserted, and if counterclaim is to be asserted it must be designated and pleaded as such).

(n44)Footnote 2. *See Fed. R. Civ. P. 7(a)(3).*

(n45)Footnote 3. *Fed. R. Civ. P. 8(c)*; *Reiter v. Cooper, 507 U.S. 258, 263, 113 S. Ct. 1213, 122 L. Ed. 2d 604, 614 (1993)* .

(n46)Footnote 4. *Fed. R. Civ. P. 8(c)(2)*; *see Dubied Mach. Co. v. Vermont Knitting Co., 739 F. Supp. 867, 871 (S.D.N.Y. 1990)* .

(n47)Footnote 5. *Shelter Mutual Ins. Co. v. Public Water Supply Dist. No. 7, 747 F.2d 1195, 1198 (8th Cir. 1984)* (counterclaims were dismissed for failure to plead clearly so that court could not ascertain whether compulsory or permissive; pleading must give opposing party fair notice of claim asserted).

(n48)Footnote 1. *Hurst v. United States Dep't of Educ., 901 F.2d 836, 837 (10th Cir. 1990)* (government's compulsory counterclaim for collection of student loan was barred by pertinent six-year statutory limitations period for

federally funded student loans).

(n49)Footnote 2. *Wells v. Rockefeller, 728 F.2d 209, 213-214 (3d Cir. 1984)* .

(n50)Footnote 3. *Wells v. Rockefeller, 728 F.2d 209, 214 (3rd Cir. 1984)* .

(n51)Footnote 4. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank, 744 F.2d 237, 243 (2d Cir. 1984)* .

(n52)Footnote 5. *Fluor Eng'rs and Constructors, Inc. v. Southern Pac. Transp. Co., 753 F.2d 444, 448 (5th Cir. 1985)* .

(n53)Footnote 1. *Fed. R. Civ. P. 54(b).*

(n54)Footnote 2. *Fed. R. Civ. P.13 (i), 54(b)*; *see Vann v. Glen Ellyn Sav. and Loan Ass'n, 151 F.R.D. 692, 695-697 (M.D. Fla. 1993)* .

(n55)Footnote 3. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1367-1368 (7th Cir. 1990)* .

(n56)Footnote 4. *Scott v. Long Island Sav. Bank, 937 F.2d 738, 743 (2d Cir. 1991)* .

(n57)Footnote 1. *Fluor Eng'rs and Constructors, Inc. v. Southern Pac. Transp. Co., 753 F.2d 444, 449 (5th Cir. 1985)* .

(n58)Footnote 2. *Campbell v. Bartlett, 975 F.2d 1569, 1574 n.8 (10th Cir. 1992)* (in personal injury action based on diversity jurisdiction, compulsory counterclaim for negligence did not waive Rule 12(b) objections for insufficient service of process).

(n59)Footnote 3. *Fed. R. Civ. P. 38*; *see Sound Video Unltd., Inc. v. Video Shack Inc., 700 F. Supp. 127, 145-146 (S.D. N.Y. 1988)* .

(n60)Footnote 4. *Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053, 1057-1058 (5th Cir. 1992)* (test for determining whether request for jury on counterclaim entitles party to jury on complaint is whether counterclaim is compulsory).

(n61)Footnote 5. *Leon Tempelsman and Son v. TECC Corp., 107 F.R.D. 384, 385 (N.D. Tex. 1985)* .

(n62)Footnote 6. *Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985)* (district court did not abuse discretion in ordering separate trials of counterclaims for malpractice from collection action for attorney's fees under Rule 42(b), because most of the issues were different, severance served judicial efficiency, and trial would have been unnecessarily delayed without severance).

(n63)Footnote 7. *Snellman v. Ricoh Co. Ltd., 836 F.2d 528, 532 (Fed. Cir. 1987)* .

(n64)Footnote 8. *Avemco Ins. Co. v. Cessna Aircraft Co., 11 F.3d 998, 999-1000 (10th Cir. 1993)* .

(n65)Footnote 9. *See Fed. R. Civ. P. 13.*

(n66)Footnote 10. *See PFS Distrib. Co. v. Raduechel, 574 F.3d 580, 598-599 (8th Cir. 2009)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
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[Reserved]

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VII. OFFER OF JUDGMENT

1-11 Moore's Manual--Federal Practice and Procedure § 11.70

§ 11.70 Purpose of Offer of Judgmentn*

[1] Effect of Offer of Judgment

Until 14 days before the date set for trial, a party defending against a claim for relief may serve on an opposing party claimant an offer to allow judgment against the defending party on specified in the offer, including costs then accrued. If, the opposing party claimant serves written notice accepting the offer within 14 days after being served, the clerk will enter judgment on that offer. n1

On the other hand, if the opposing party claimant does not accept the offer, and later obtains a judgment that is not more favorable than the offer, the opposing party claimant must pay all costs incurred after the offer was made. n2 Thus, the purpose of Rule 68 is to provide an incentive for the opposing party claimant to settle and accept reasonable offers. n3 Rule 68 does so by creating an exception to the general rule in most types of litigation that allows a prevailing party to recover its costs n4 by requiring a prevailing plaintiff who recovers less than a rejected Rule 68 offer to pay post-offer costs. n5 In effect, when a defending party has made a valid Rule 68 offer, the "prevailing" plaintiff must obtain a judgment more favorable than the offer in order to remain entitled to a discretionary award of post-offer costs. n6

[2] Unaccepted Offer

The offeree of a Rule 68 offer, the opposing party claimant, has 14 days to accept the offer after being served with the offer by the defending party. n1 If the offeree does not accept the offer during that time, the unaccepted offer is considered withdrawn; however that withdrawal does not prevent the offeror from making another, later offer. n2

Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. n3 However, an unaccepted offer may be considered by the court to determine procedural matters, such as to determine whether there is a justiciable case or controversy. On the other hand, an offer of judgment cannot be used to support or challenge the merits of a claim and to influence the trier of fact. n4 Furthermore, the unaccepted Rule offer may not be used to prove the amount of the offer, except when the amount of the offer is to be compared with the amount of the judgment that the offeree finally obtained to determine whether the judgment is not more favorable than the unaccepted offer. n5

[3] Purpose of Rule is to Promote Settlements

The primary purpose of the offer of judgment rule is to promote settlements and avoid protracted litigation, in that if an offer is accepted it terminates the case. n1 Although both parties always have an incentive to settle in advance of trial due to the adverse consequences of potential defeat, the offer of judgment provides an additional inducement when, at a time before trial, there is a strong likelihood that the plaintiff will obtain a judgment, but the amount of recovery is uncertain. n2 The making of an offer of judgment shifts to the claimant some of the risk of proceeding with a lawsuit, given the possibility of having to pay post-offer costs. n3 The offer of judgment rule gives incentive to both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success on trial on the merits. n4 The effect of an offer of judgment on the recovery of post-offer costs (*see* [1], *above*) gives defendants an incentive to make serious rather than tactically deceptive offers. An offer must be realistic for the offeror to get the benefit of Rule 68 cost-shifting. n5 Plaintiffs also have an incentive to respond seriously rather than with a hard-line approach. A serious Rule 68 offer may threaten to raise the expense of holding out imprudently by shifting costs to a prevailing party who recovers less than the offer. n6

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, § 68.02 (Matthew Bender 3d ed.)]

(n2)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 68(d)*; *see Bogan v. City of Boston, 489 F.3d 417, 430-431 (1st Cir. 2007)* .

(n4)Footnote 3. *Lohman v. Duryea Borough, 574 F.3d 163, 168 (3d Cir. 2009)* ; *see* [3], *below*.

(n5)Footnote 4. *See, e.g., Fed. R. Civ. P. 54(d)(1).*

(n6)Footnote 5. *Grosvenor v. Brienen, 801 F.2d 944, 945 (7th Cir. 1986)* ; (Rule 68 modifies Rule 54(d)(1).

(n7)Footnote 6. *See Jason D. W. V. Houston Independent School District, 158 F.3d 205, 207-208 (5th Cir. 1998)* .

(n8)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n9)Footnote 2. *Fed. R. Civ. P. 68(b).*

(n10)Footnote 3. *Fed. R. Civ. P. 68(b)*; *see Berkla v. Corel Corp., 302 F.3d 909, 922 (9th Cir. 2002)* (unaccepted offer is only admissible in a cost proceeding if it is a formal Rule 68 offer of judgment).

(n11)Footnote 4. *O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 574-575 (6th Cir. 2009)* ; *see Fed. R. Civ. P. 68(b).*

(n12)Footnote 5. *Fed. R. Civ. P. 68(d).*

(n13)Footnote 1. *Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1043 (7th Cir. 2007)* .

(n14)Footnote 2. *Delta Airlines, Inc. v. August, 450 U.S. 346, 352* & n.8, *101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* (citing **Moore's Federal Practice**.

(n15)Footnote 3. *Mallory v. Eyrich, 922 F.2d 1273, 1278 (6th Cir. 1991)* .

(n16)Footnote 4. *Marek v. Chesny, 473 U.S. 1, 5, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* (using cost-benefit analysis to validate lump-sum offer).

(n17)Footnote 5. *See Lohman v. Duryea Borough, 574 F.3d 163, 168 (3d Cir. 2009)* .

(n18)Footnote 6. *See Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998)* (Rule 68 offer imposes certain consequences that can be costly for plaintiff who declines offer, and is thus designed to put significant pressure on plaintiff to consider likely value of its claim as compared to defendant's offer).

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VII. OFFER OF JUDGMENT

1-11 Moore's Manual--Federal Practice and Procedure § 11.71

§ 11.71 Availability of Offer of Judgment Rulen*

[1] Offer Made by Defending Party

By its terms, Rule 68 only applies to a party defending against a claim. n1 Thus, the rule is generally inapplicable to offers made by plaintiffs, n2 except in situations where a plaintiff is defending against a counterclaim or crossclaim and is making a offer of judgment with respect to that claim. n3

A defending party also has the option to make an offer of judgment even after the defending party's liability has been determined, when the extent of the liability, such as damages, remains to be determined by further proceedings. Such an offer must be served within a reasonable time, but at least 14 days before the date set for the hearing to determine the extent of liability. n4

In cases when there are multiple parties making claims for relief, the defending party must specify an allocation of the total offer to each plaintiff. An unallocated offer of judgment to multiple plaintiffs is not effective to trigger the cost-shifting provision of Rule 68, because it does not permit any single plaintiff to assess the offer's value in relation to the merits of that particular plaintiff's case. Additionally, an unallocated offer deprives the court of a precise figure against which to compare each plaintiff's judgment so in the determination of whether Rule 68's cost-shifting provision is triggered. n5

The language of Rule 68 contains no exception for particular kinds of actions. However, it is disputable whether the offer of judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement, because the offer of judgment rule presumes that the offeree (and not the court) has authority to accept or reject the terms of a formal offer. n6 Some courts have held that Rule 68, does apply, but in a modified way so that after a class claim has been filed, all of the named plaintiffs cannot be "picked off," at least until a reasonable amount of time is allowed for the court to make a determination of class certification. n7

[2] Applicable Law

Some state litigation systems have offer of judgment rules that are similar to the federal rule specified in Rule 68. In many cases, there is no functional difference between the state and federal rules, so cases involving an Erie doctrine

choice between Federal Rule 68 and a state provision are not numerous. However, when state offer of judgment rules or statutes have different consequences from the federal rule courts must choose whether to apply the state or the federal rule. The majority rule in such cases seems to be that state offer of judgment rules will apply when they permit offers by plaintiffs. Thus, the most common situation in which a state offer of judgment rule might apply in federal court is when state law authorizes offers by plaintiffs and provides a consequence, such as enhanced costs or prejudgment interest, if a defendant rejects the offer but fails to do better at trial. Some courts apply the state rule in a state-law case, finding no direct conflict between the federal and state rules. n1 However, one circuit has applied Federal Rule 68 in a state-law case to bar an offer made by a plaintiff-offeror. n2 On the other hand, another circuit has permitted a defendant to recover attorney fees under a state offer of judgment rule permitting defendants to recover attorney fees when plaintiffs unreasonably reject settlement offers. n3

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, § 68.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n3)Footnote 2. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 350, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

(n4)Footnote 3. *Simon v. Intercontinental Transp. (ICT) B.V., 882 F.2d 1435, 1439 (9th Cir. 1989)* .

(n5)Footnote 4. *Fed. R. Civ. P. 68(c).*

(n6)Footnote 5. *Thomas v. National Football League Players Ass'n, 273 F.3d 1124, 1130 (D.C. Cir. 2001)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 68(a).*

(n8)Footnote 7. *Weiss v. Regal Collections, 385 F.3d 337, 345-348 (3d Cir. 2004)* (relation-back doctrine prevented mooting of class action by Rule 68 offer of judgment to named plaintiff, even though no motion for certification had been filed, when there was no undue delay in moving for certification).

(n9)Footnote 1. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 309-312 (7th Cir. 1995)* (state law providing for double costs plus interest from date of demand when defendant rejects plaintiff's demand and plaintiff wins judgment larger than demand applied).

(n10)Footnote 2. *Home Indem. Co. v. Lane Powell Moss and Miller, 43 F.3d 1322, 1331-1332 (9th Cir. 1995)* (refusing to award plaintiff-offeror enhanced prejudgment interest under state offer of judgment statute on ground that Federal Rule 68 governed and did not authorize plaintiff offers or provide for enhanced interest).

(n11)Footnote 3. *Tanker Management, Inc. v. Brunson, 918 F.2d 1524, 1528-1529 (11th Cir. 1990)* (finding no direct conflict with Federal Rule 68.

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1-11 Moore's Manual--Federal Practice and Procedure § 11.72

§ 11.72 Requirements for Offern*

[1] Service and Filing Requirements

Rule 68 specifies that a defending party must serve an offer of judgment on an adverse party. n1 Because service is required, a Rule 68 offer must be in writing, and an verbal offer of judgment is invalid. n2 Service of an offer of judgment is governed by Rule 5. n3 Under Rule 5(d), when a paper must be served, the paper must also be filed with the court, along with a certificate of service, within a reasonable time after service. n4 This Rule 5 filing requirement is not applicable to a Rule 68 offer of judgment; rather, the offer must be filed only when it is accepted. Thus, if within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, along with proof of service. The clerk must then enter judgment. n5

Thus, the court is not to be notified of an offer of judgment unless it has been accepted or after a verdict if the offer had been rejected. Except in a proceeding to determine costs, it is improper for a defendant to file a Rule 68 offer of judgment with the court before plaintiff accepts. n6 Preventing the filing of unaccepted Rule 68 offers avoids possible undue influence. The court's knowledge of what amount of recovery would avoid or trigger liability for post-offer costs under Rule 68, especially in a non-jury trial, could potentially influence its judgment. n7

[2] Time of Offer and Revocability

A defendant may serve an offer of judgment at any time more than 14 days before the date set for trial. n1 Former Rule 68 permitted the defending party to serve an offer of judgment more than 10 days before the trial begins or before a hearing to determine damages. The time is now measured from the date set for trial or hearing because it may be difficult to know in advance when trial will begin or when a hearing will be held. If the date for trial or hearing is reset, the date establishes a new time for serving the offer. The former 10 day periods have been extended to 14 days to reflect the change in the Rule 6(a) method for computing time periods. n2

Most courts have held that, once accepted, Rule 68 offers of judgment may not be revoked, even during the 14 day time period set by the Rule. This is because when a party has filed the offer, notice of acceptance, and proof of service, the clerk must then enter judgment. In other words, a Rule 68 offer of judgment is self executing. n3 However, some courts permit revocation or rescission of an offer and acceptance of judgment for good cause shown, for example, in the event

of fraudulent conduct by the offeree, n4 or to correct an obvious mistake with prompt communication to the offeree. n5

[3] Amount of Offer

A defendant must make an offer of judgment which specifies the terms of the judgment to be taken against the defending party, with costs accrued at that time. n1 Lump-sum offers are permitted, because if defendants were not allowed to make lump-sum offers that would represent their total liability if accepted, they would understandably be reluctant to make settlement offers. n2 The Supreme Court has identified several of the issues that can arise concerning the content of a valid offer. A defendant need not itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs. n3 The critical feature of this portion of Rule 68 is that the offer be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued. n4 In other words, the drafters' concern was not so much with the particular components of offers, but with the judgments to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount that in its discretion it determines to be sufficient to cover the costs. n5 Thus, a valid Rule 68 offer may not explicitly exclude costs. n6

[4] Application of Contract Principles to Terms of Offer

Although contract principles permitting do not necessarily govern the issue of revocation before acceptance formal Rule 68 offers, n1 general principles of contract law otherwise do apply when interpreting offers of judgment. n2 For example, ambiguities may invalidate an offer or be construed against the offeror. n3 However, a court may also limit the interpretation of a Rule 68 judgment to its terms and decline to give it effect beyond its scope. n4 The consequences of accepting or rejecting an offer of judgment mean that the offeree needs to have a clear understanding of the terms of the offer in order to make an informed decision whether to accept it. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, § 68.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 68.*

(n3)Footnote 2. *Clark v. Sims, 28 F.3d 420, 424 (4th Cir. 1994)* (settlement proposal discussed by parties' counsel cannot constitute formal Rule 68 offer).

(n4)Footnote 3. *Magnuson v. Video Yesteryear, 85 F.3d 1424, 1429 (9th Cir. 1996)* ; *see Fed. R. Civ. P. 5(a).*

(n5)Footnote 4. *Fed. R. Civ. P. 5(d).*

(n6)Footnote 5. *Fed. R. Civ. P. 68(a).*

(n7)Footnote 6. *Webb v. James, 172 F.R.D. 311, 312 n.1 (N.D. Ill. 1997)* .

(n8)Footnote 7. *Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 295 (6th Cir. 1989)* (if judge or jury is unaware of offer of judgment it ensures that trier of fact will not be influenced by any knowledge of a rejected offer or its consequences).

(n9)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n10)Footnote 2. *Fed. R. Civ. P. 68(a)*, Committee Note to 2009 Amendments.

(n11)Footnote 3. *Ramming v. Natural Gas Pipeline Co. of Am., 390 F.3d 366, 370-371 (5th Cir. 2004)* ; *see* [4],

below (contract principles applied to offer of judgment).

(n12)Footnote 4. *Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1240 (4th Cir. 1989)* .

(n13)Footnote 5. *Cesar v. Rubie's Costume Co., 219 F.R.D. 257, 259 (E.D.N.Y. 2004)* .

(n14)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n15)Footnote 2. *Marek v. Chesny, 473 U.S. 1, 6, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

(n16)Footnote 3. *See Marek v. Chesny, 473 U.S. 1, 6-7, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

(n17)Footnote 4. *See Fed. R. Civ. P. 68(a),(d).*

(n18)Footnote 5. *Marek v. Chesny, 473 U.S. 1, 7, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

(n19)Footnote 6. *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc., 298 F.3d 1238, 1241 (11th Cir. 2002)* .

(n20)Footnote 1. *See* [2], *above.*

(n21)Footnote 2. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 369 F.3d 91, 95 (2d Cir. 2004)* ; *Scosche Indus., Inc. v. Visor Gear Inc., 121 F.3d 675, 678 (Fed. Cir. 1997)* .

(n22)Footnote 3. *Arkla Energy Resources v. Roye Realty & Dev., Inc., 9 F.3d 855, 867 (10th Cir. 1993)* .

(n23)Footnote 4. *Scosche Indus., Inc. v. Visor Gear Inc., 121 F.3d 675, 677-679 (Fed. Cir. 1997)* .

(n24)Footnote 5. *Radecki v. Amoco Oil Co., 858 F.2d 397, 403 (8th Cir. 1988)* .

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PART III Pleading Stage
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1-11 Moore's Manual--Federal Practice and Procedure § 11.73

§ 11.73 Requirements for Acceptancen*

[1] Service and Timing Requirements

The offeree plaintiff or claimant, as the opposing party of the defending party, may accept the offer only by serving written notice of acceptance of the offer within 14 days after service of the offer. Either party may then file the offer and notice of acceptance together with proof of service of the offer and acceptance the clerk will then enter judgment. Acceptance of an offer of judgment must be in writing. n1

It appears that the trial court has authority to extend the time for accepting an offer of judgment under Rule 6(b)(1), which authorizes courts to extend the period of time for an act required or allowed by the Rules of Civil Procedure for good cause established by the moving party. n2 The other view is that courts have no authority to extend the time for accepting an offer of judgment because to do so would undercut the purpose underlying Rule 68 of letting a defending party reduce the risk of being responsible for post-offer costs. n3

[2] Application of Contract Principles to Terms of Offer

As is the case with respect to an offer, general contract principles govern the acceptance of an offer of judgment. n1 For example, for a valid offer and acceptance there must be a meeting of the minds. n2 A claimant's acceptance of an offer of judgment may not be partial. n3 The primary reason that courts refuse to treat partial or selective acceptances as valid is that plaintiffs should not be allowed to impose on defendants settlements to which they have not agreed. n4 Thus, the central concern with partial acceptance remains that settlements require assent of both parties, and a partial settlement may not be what the defending party is seeking. n5

[3] Filing and Entry of Judgment on Accepted Offer

After a claimant timely accepts a valid offer either party may then file the offer and notice of acceptance plus proof of service of the offer and notice of acceptance, and then the clerk is required to enter judgment. n1 Therefore, Rule 68 judgments are self-executing, and once the parties agree on the terms of a Rule 68 judgment, the court has no discretion to withhold its entry or otherwise to modify the terms of the agreement. The clerk's function in entering judgment on an accepted offer under the Rule is clerical, and it is an abuse of discretion for the district court to do anything but enter

judgment once an offer has been accepted. n2 For the parties, acceptance of a Rule 68 offer and entry of judgment has the effect of cutting off the right to appeal from an earlier action by the district court. n3 A plaintiff with a statutory fee entitlement who accepts a valid Rule 68 offer, even one for a small amount, is the "prevailing party" for purposes of a statute under which such parties are entitled to attorney fees. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, § 68.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n3)Footnote 2. *See Fed. R. Civ. P. 6(b)(1), 6(b)(2)* (although Rule 6(b)(2) does not apply to certain specified rules, Rule 68 is not mentioned).

(n4)Footnote 3. *Staffend v. Lake Central Airlines, 47 F.R.D. 218, 219-220 (N.D. Ohio 1969)* .

(n5)Footnote 1. *Whitaker v. Associated Credit Servs., Inc., 946 F.2d 1222, 1226 (6th Cir. 1991)* .

(n6)Footnote 2. *Stewart v. Professional Computer Centers, Inc., 148 F.3d 937, 939 (8th Cir. 1998)* (there is no binding agreement if parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other).

(n7)Footnote 3. *Whitcher v. Town of Matthews, 136 F.R.D. 582, 585 (W.D. N.C. 1991)* .

(n8)Footnote 4. *Freeman v. B&B Associates, 790 F.2d 145, 152 (D.C. Cir. 1986)* .

(n9)Footnote 5. *See Stewart v. Professional Computer Centers, Inc., 148 F.3d 937, 939 (8th Cir. 1998)* .

(n10)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n11)Footnote 2. *Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991)* .

(n12)Footnote 3. *Dugas v. Trans Union Corp., 99 F.3d 724, 728-729 (5th Cir. 1996)* .

(n13)Footnote 4. *Cleary v. Martino, 982 F. Supp. 639, 641 (E.D. Wis. 1997)* .

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VII. OFFER OF JUDGMENT

1-11 Moore's Manual--Federal Practice and Procedure § 11.74

§ 11.74 Effect of Plaintiff's Failure to Accept Valid Offern*

[1] When Defendant Prevails

Rule 68 does not apply when a defendant-offeror prevails at trial. n1 This result is based on a literal reading by the Supreme Court of the language of Rule 68, which refers to the judgment that the offeree finally obtains. n2 The Supreme Court stated that the plain language of Rule 68 confines its effect to cases in which the plaintiff has obtained a judgment, but for an amount less favorable than the defendant's settlement offer. Thus, all cases in which the court enters judgment in favor of the defendant are excluded from applicability the purview of Rule 68. Although this reading of Rule 68 is subject to criticism, it has the virtue of eliminating the temptation for defendants who expect to win to make sham offers for very small amounts solely to obtain the mandatory cost-shifting benefits of Rule 68. 7 Defendants who can expect no benefit from sham or token offers might as well make serious offers or none at all. n3

[2] When Plaintiff Prevails

There are no cost-shifting consequences to a plaintiff's failure to accept an offer of judgment when the plaintiff-offeree wins a judgment "more favorable" than the offer. If the judgment finally obtained by the offeree is not more favorable than the offer, the plaintiff offeree must pay the costs incurred after the making of the offer. n1 Thus, when a plaintiff rejects the offer of judgment, or does not accept it in timely fashion, the case proceeds to trial, and there is a verdict for the plaintiff in an amount not greater than the defendant's offer. n2

[3] Cost Shifting is Mandatory

When a court compares an offer of judgment with the plaintiff's judgment, and finds that the judgment is not more favorable than the offer, Rule 68 requires that the offeree must pay the costs incurred after the making of the offer. n1 It is well settled that this language makes the imposition of Rule 68's cost consequences mandatory. n2 Although the trial judge has considerable leeway in a hard-comparison case to determine whether the judgment is more favorable than the offer, a determination that the judgment is not more favorable than the offer automatically triggers the cost-shifting specified by Rule 68. n3

[4] Determination of Whether Judgment is Not More Favorable Than Offer

[a] In General

In many cases the court's determination of whether the judgment finally obtained by the offeree is not more favorable than the offer n1 is relatively easy if the plaintiff is seeking only monetary damages, and the costs are small. n2 The defendant will have made an offer of judgment for a sum of money, either including plaintiff's costs thus far accrued or explicitly or implicitly allowing an addition for those costs. Except in cases involving substantial pre-offer attorney fee awards, these pre-offer costs are likely to be relatively small and to have no effect on the comparison. In many cases, the monetary value of the judgment entered can be straightforwardly compared with the offer to determine whether the cost-shifting consequences of Rule 68 are Triggered. n3

[b] Consideration of Attorney Fees

However, things are more complicated if pre-offer attorney fees statutorily defined as costs are involved. In such cases, the inclusion of pre-offer fees as part of the judgment finally obtained favors plaintiffs, to the extent that it increases the value of the judgment and makes it less likely that the defending party's offer will be more favorable. Thus, courts have held that pre-offer attorney's fees must be added to the judgment award for the purposes of determining whether the result obtained by a plaintiff is more favorable than the offer of judgment he rejected. n4 The rationale for the rule allowing pre-offer fees to increase the value of the judgment is that to make a proper comparison between the offer of judgment and the judgment obtained like 'judgments' must be evaluated; because the offer includes costs then accrued, to determine whether the judgment obtained is "more favorable," the judgment must be defined on the same basis: verdict plus costs incurred as of the time of the offer of judgment. n5

[c] Consideration of Nonmonetary Relief

Cases involving nonmonetary relief also pose comparison problems because of the difficulties of evaluating different types of declaratory or equitable relief, such as a declaratory judgment vindicating an intellectual property right, but granting no monetary relief. There is rigid objective method for determining whether a purely monetary offer is less favorable than a declaratory judgment, an injunction, or equitable relief combined with a smaller damage award. Thus, courts have dealt with these problems on a case by case basis. Nearly all the cases try to take nonmonetary relief into account, and often courts find nonmonetary relief sufficient to offset a substantial difference between a money offer and a judgment that mixes damages and nonmonetary relief. n6

[5] Costs That Are Shifted

[a] In General

Although this is not explicitly stated by the text of the Rule, one of the cost-shifting consequences of Rule 68 is that the plaintiff-offeree must both bear its own post-offer costs, and pay those of the offeror. n1 It is well settled that a plaintiff who refuses an offer of judgment, and later fails to obtain a more favorable judgment, must pay the defendant's post-offer costs. n2 The post-offer costs recoverable, though, in the usual case are only those listed in *28 U.S.C. § 1920*, which enumerates several items that are mostly relatively minor, including fees for clerk and marshal, court reporter, printing, witnesses, copying, docket charges, court-appointed experts, and interpreters. n3

[b] Attorney Fees

The cost-shifting consequences of Rule 68 do not apply to attorney fees that are not costs as defined by statute. Thus, a claimant who obtains a judgment not more favorable than a Rule 68 offer may still recover such post-offer attorney fees. n4 However, in this situation, the court may consider the plaintiff's rejection of an offer of judgment in determining the amount of fees to be awarded, or whether to award fees to the prevailing party at all. n5

If no applicable statute defines attorney fees as part of "costs," Rule 68 has no effect on entitlements to and liabilities for

attorney fees. However, if fees included in "costs" in the applicable underlying statute, they are part of "costs" within the scope of the Rule 68 cost-shifting. n6 The Eleventh Circuit has held that a rejecting offeree who did not obtain a more favorable judgment must pay the offeror's post-offer attorney fees if the statute underlying the action defines "costs" as including attorney fees. n7 This fee liability is especially likely if a court finds that the plaintiff's rejection of the offer of judgment was frivolous, unreasonable, or without foundation. n8

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, §§ 68.06-68.08 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 351, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

(n3)Footnote 2. *Fed. R. Civ. P. 68(d).*

(n4)Footnote 3. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 353-356, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* (literal reading of Rule 68 avoids problem of sham offer).

(n5)Footnote 1. *Fed. R. Civ. P. 68(d).*

(n6)Footnote 2. S *ee* Local 32B-32J, *Service Employees International Union, AFL-CIO v. Port Authority of New York and New Jersey, 180 F.R.D. 251, 253* (S.D. N.Y. 1998.

(n7)Footnote 1. *Fed. R. Civ. P. 68.*

(n8)Footnote 2. *United States v. Trident Seafoods Corp., 92 F.3d 855, 859 (9th Cir. 1996)* .

(n9)Footnote 3. *Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 295-296 (6th Cir. 1989)* .

(n10)Footnote 1. *Fed. R. Civ. P. 68.*

(n11)Footnote 2. *Marek v. Chesny, 473 U.S. 1, 7, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* (post-offer costs merely offset part of expense of continuing litigation to trial, and should not be included in calculus.

(n12)Footnote 3. *In re Water Valley Finishing, Inc. 139 F.3d 325, 326-327 (2nd Cir. 1998)* .

(n13)Footnote 4. *Marryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993)* (when evaluating "judgment finally obtained," it must include not only the verdict of the jury but also the costs actually awarded by the court for period that preceded the offer).

(n14)Footnote 5. *Marryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993)* .

(n15)Footnote 6. *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc., 749 F. Supp. 331, 333 (D. Mass. 1990)* , *rev'd in part o.g., 940 F.2d 744 (1st Cir. 1991)* (judgment of $653,682 plus three-year retention of service station franchise was more favorable than offer of $700,000).

(n16)Footnote 1. *Fed. R. Civ. P. 68(d)* (offeree must pay costs incurred after making of offer).

(n17)Footnote 2. *Crossman v. Marcoccio, 806 F.2d 329, 333 (1st Cir. 1986)* (plaintiff who fails to recover more favorable judgment is responsible for defendant's post offer costs as well as his own).

(n18)Footnote 3. *Knight v. Snap-On Tools Corp., 3 F.3d 1398, 1404 (10th Cir. 1993)* (plaintiff held liable for defendant's post-offer costs as enumerated in *28 U.S.C. § 1920*).

(n19)Footnote 4. *Dalal v. Alliant Techsystems, Inc., 927 F. Supp. 1374, 1381 (D. Colo. 1996)* (Rule 68 does not bar recovery of attorney fees under Fair Labor Standards Act for services rendered after offer of judgment made, even though plaintiff recovers less than amount offered in settlement).

(n20)Footnote 5. *Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332, 1337 (4th Cir. 1996)* .

(n21)Footnote 6. *Marek v. Chesny, 473 U.S. 1, 12, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1984)* .

(n22)Footnote 7. *Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997)* (Copyright Act defines "costs" as including attorney fees).

(n23)Footnote 8. *See EEOC v. Bailey Ford, Inc., 26 F.3d 570, 571 (5th Cir. 1994)* (defendant's attorney fees are among properly recoverable costs with determination that action was frivolous, unreasonable, or without foundation).

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PART III Pleading Stage
CHAPTER 11 DEFENDANT'S RESPONSE
PART VII. OFFER OF JUDGMENT

1-11 Moore's Manual--Federal Practice and Procedure § 11.75

§ 11.75 Appealn*

[1] Postjudgment Relief

Rule 68 is mandatory in nature. Therefore, a trial court will rarely grant relief under Rule 60 following entry of judgment on an accepted Rule 68(a) offer, or following entry of a Rule 68(d) cost order based on entry of a judgment not more favorable then the offer of judgment. However, some courts have noted that when exceptional circumstances exist, such as the nonexistence of an valid offer and acceptance under Rule 68, those circumstances justify relief from a judgment under Rule 60(b), n1 and it is proper for the trial court to grant a motion to vacate a judgment. n2 Thus, postjudgment relief appears available in exceptions circumstances, for example, if a consequential typographical error in an offer affects whether there was a meeting of the minds of the parties regarding the offer and acceptance. n3 Other cases reflect appellate disapproval of trial courts' efforts to use postjudgment relief powers to let parties escape what seem to be the unduly harsh consequences of the Rule's otherwise proper operation. n4

[2] Appellate Review

The standard of appellate review of trial court rulings on Rule 68 matters depends on the type of issue involved. With aspects of the rule that are mandatory, such as entry of judgment on an accepted offer or imposition of the cost-shifting consequences on a rejecting plaintiff, the appropriate standard is de novo review. n1 Similarly, issues relating to the legal construction of Rule 68 offers are reviewed de novo. n2 On the other hand, controverted factual questions are reversed only for clear error. These factual findings could relate to, for example, the circumstances under which the offer was made, whether an acceptance and offer were inconsistent; and whether a trial court's offer-judgment comparisons for purposes of determining whether the judgment was more favorable than the offer. n3

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 Moore's Federal Practice, §§ 68.09-68.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 60(b)* ().

(n3)Footnote 2. *Stewart v. Professional Computer Centers, Inc., 148 F.3d 937, 939-940 (8th Cir. 1998)* .

(n4)Footnote 3. *Whitaker v. Associated Credit Servs., Inc., 946 F.2d 1222, 1226 (6th Cir. 1991)* .

(n5)Footnote 4. *Mallory v. Eyrich, 922 F.2d 1273, 1279-1280 (6th Cir. 1991)* (reversing Rule 60(b) grant of relief from entry of judgment on accepted Rule 68 offer when composition of board of elections changed and defendants sought adjudication on merits).

(n6)Footnote 1. *Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997)* (because district court has no discretion in applying Rule 68, proper interpretation of Rule 68 is legal question that is reviewed de novo).

(n7)Footnote 2. *Jason D. W. V. Houston Independent School District, 158 F.3d 205, 207-208 (5th Cir. 1998)* ; *Erdman v. Cochise County, 926 F.2d 877, 879 (9th Cir. 1991)* .

(n8)Footnote 3. *Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997)* (disputed fact findings concerning events surrounding Rule 68 offer are reviewed for clear error).

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PART III Pleading Stage
CHAPTER 12 PLAINTIFF'S RESPONSE

1-12 Moore's Manual--Federal Practice and Procedure 12.syn

§ 12.syn Synopsis to Chapter 12: PLAINTIFF'S RESPONSE

§ 12.01 Table of Times for Plaintiff Required to Respond

§ 12.02 Reply

[1] Use of Reply

[2] Reply Required to Counterclaim

[3] Reply by Order of Court

[a] Discretion of Court to Order Reply

[b] Contents of Reply Ordered by Court

§ 12.03 Motions Available to Plaintiff Making Response

[1] Use of Motions in General

[2] Motion to Strike Insufficient Defense

§ 12.04 Counterclaim in Reply

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PART III Pleading Stage
CHAPTER 12 PLAINTIFF'S RESPONSE

1-12 Moore's Manual--Federal Practice and Procedure § 12.01

§ 12.01 Table of Times for Plaintiff Required to Respondn1

Pleading/ The Reply	
Reply required because answer contains counterclaim.....	21 days after being served with pleading that states counterclaim. Rule 12(a)(1)(B).
Reply required because amended answer contains counterclaim	14 days after being served with amended answer, or within time remaining to respond to original answer, whichever is later; or as ordered by court. Rule 15(a)(3).
Reply required by United States or United States agency or officer.....	60 days after being served with answer. Rule 12(a)(2), (3).
Reply required by order of court.....	21 days after being served with order, unless court specifies different time. Rule 12(a)(1)(C).
Motions by Plaintiff Related to Reply	
Motion for more definite statement.....	Before filing reply. Rule 12(e).
Motion to strike answer.....	Before filing reply, or if reply not allowed, within 21 days after being served with answer. Rule 12(f)(2).
Motion for judgment on pleadings.....	Any time after pleadings are closed, but not so close to trial date that trial would be delayed. Rule 12(c).
Motion for summary judgment	Any time until 30 days after close of all discovery. Rule 56(c)(1)(A).

Opposition to summary	
judgment motion.....	Later of: within 21 days after motion is served or time responsive pleading is due. Rule 56(c)(1)(B).
Reply to opposition to summary	
judgment motion.....	Within 14 days after defendant's opposition is served. Rule 56(c)(1)(C).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote 1. The times specified in this table are subject to the provisions for the enlargement of time for good cause or excusable neglect under Rule 6(b)(1) and to the provision of Rule 6(d) for the addition of 3 days to the period prescribed or allowed in the rules when service is accomplished by any means other than by hand delivery. *See* Fed. R. Civ. P. 6(d); *see also* Fed. R. Civ. P. 5(b)(2)(B)-(F). Additionally, the time periods concerning the service of a reply are altered if the party making a reply serves a motion allowed under Rule 12. Generally the party required to reply is given 14 days after any denial of the motion. Fed. R. Civ. P. 12(a)(4)(A). However, if the court grants a motion for a more definite statement, the party has 14 days after the more definite statement is served. Fed. R. Civ. P. 12(a)(4)(B). For discussion of time periods for pleadings and motions, *see* Ch. 9, *Pleadings and Motions in General*.

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PART III Pleading Stage
CHAPTER 12 PLAINTIFF'S RESPONSE

1-12 Moore's Manual--Federal Practice and Procedure § 12.02

§ 12.02 Reply

[1] Use of Reply

After the defendant files the answer, the plaintiff may be required by rule or by court order to respond, either by pleading or by making certain motions. A *reply* is a response in the form of a pleading by a plaintiff to an answer filed by the defendant. n1 A response is not always required to the defendant's answer, but when a response is required or permitted, the plaintiff may file a reply or one of several types of motions, which are discussed below. n2 The reply is a vestige of pre-1938 common-law and code pleading which has expressly been preserved in the current civil rules, for use in certain circumstances, n3 such as when the defendant has made a counterclaim, n4 or when the court orders that the plaintiff reply to the defendant's answer. n5 The fact that a reply is a pleading, and that it is the last pleading permitted, becomes important in determining whether further pleadings may be filed or whether a demand for a jury trial is timely. n6

When no reply is ordered or permitted by the court, pleadings terminate when a party files an answer to a complaint, n7 an answer to a counterclaim designated as a counterclaim, n8 an answer to a crossclaim, n8.1 or an answer to a third-party complaint. n8.2 When the pleadings are terminated, all allegations and defenses in such pleadings are automatically deemed denied or avoided. n8.3

A plaintiff's reply may only respond to the defendant's answer and may not bring up new matters. A plaintiff may not, for example, include a permissive counterclaim in a reply to a defendant's counterclaim; in that situation, the plaintiff must move for leave to amend its complaint. n9

If a party files an unauthorized reply, the court will treat the pleading as a nullity. n10 However, counsel for the plaintiff should not file a reply without caution, because even though it is a nullity as a pleading, the court may consider the substance of an unauthorized reply as an admission against the party making the reply. n11

[2] Reply Required to Counterclaim

A party must generally respond by answer to allegations in any claim for relief against that party, or the failure is deemed an admission of the allegation. n1 Thus, a party must file an answer to a complaint, n2 an answer to a counterclaim designated as a counterclaim, n3 an answer to a crossclaim, n4 or an answer to a third-party complaint. n5

In turn, if ordered by the court, a party must file a reply to any of these answers which contain an affirmative claim for relief. n6 If the party fails to do so, it is an admission of the allegations in the claim. n7 On the other hand, if an answer contains only defensive allegations, no reply is required because the answer does not contain a counterclaim. n7.1 In such circumstances, the defendant is not prejudiced by the plaintiff's failing to reply, because in fact the defendant never presented an actual counterclaim to the plaintiff. n8

In litigation, it is often difficult in making a clear-cut distinction in an answer between claims for relief and affirmative defenses. Consequently, the rules provide that a plaintiff only need reply to an answer containing a counterclaim designated as such, n9 or when ordered by the court. n10 Furthermore, if a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, if justice requires the court must treat the pleading as though it were correctly designated, and require that the parties plead accordingly. n11 For example, when a plaintiff files a complaint against a public official, and the defendant responds with a qualified immunity defense for the official, the trial court may exercise its discretion to order a reply to the defendant's answer. n12

[3] Reply by Order of Court

[a] Discretion of Court to Order Reply

When an answer does not contain a counterclaim designated as such or some other claim for relief, n1 no further pleading is allowed except by court order that specifies that the opposition must file a reply. n2 The court has discretion to order a reply, and will usually require a reply, when an answer contains a counterclaim, a crossclaim or a third-party claim. n3 However, if the answer contains only defensive allegations, the court will order a reply only on a showing of extraordinary circumstances or necessity, n4 for example, to plead and respond to complex affirmative defenses such as qualified immunity. n5 A plaintiff may not use a reply as a substitute for discovery or a pretrial hearing. n6 However, it is important to remember that the court has discretion to order a reply even when a counterclaim obviously is not involved, especially if the reply would promote a just, speedy, and inexpensive determination, or serve important public and private interests. n7

In its order, a court may specify in detail the nature of the reply that is required. n7.1 For example, the court may require that a plaintiff put forward specific, nonconclusory factual allegations, such as allegations that establish improper motive causing cognizable injury in a case where a qualified immunity defense is in issue. n8

[b] Contents of Reply Ordered by Court

A reply ordered by the court is a responsive pleading, rather than one that sets forth a claim. Consequently, Rule 8(a)(2)'s "short and plain" standard does not place a limit on a Rule 7 reply. n9 The only civil rule which controls the content of a reply is Rule 8(d)(1), which requires that each allegation of a pleading be simple, concise, and direct. n10 However, these rules do not impose a strict limit on the length of the reply, and in appropriate circumstances, the court may require that the plaintiff reply to a defense in considerable detail. n11

The most common situation in which a court will order a reply for a purely defensive answer is when the answer raises the defense of qualified immunity for a public official. In such cases, the plaintiff must prove wrongful motive. Consequently the court may exercise its discretion to order a reply under Rule 7(a)(7) so that officials are not subject to unnecessary and burdensome discovery or trial proceedings. The order will require that the reply set out specific, nonconclusory factual allegations that establish improper motive causing injury in order to survive a pre-discovery motion for dismissal or summary judgment. n12 By definition, the reply must be tailored to the assertion of qualified immunity and must fairly respond to each allegation of qualified immunity. This means that a defendant has an incentive to plead an immunity defense with some particularity, because it has the practical effect of requiring particularity in the reply. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7(a)(7)*; *see Garner v. Morales, 237 F.R.D. 399, 400 (S.D. Tex. 2006)* (whenever any type of answer has been filed by any defending party, court has option, but is not required, to order that party which has been served with answer file a reply in response to answer).

(n2)Footnote 2. *See § 12.03*.

(n3)Footnote 3. *See Fed. R. Civ. P. 7(a)*; *see also Schultea v. Wood, 47 F.3d 1427, 1433-1434 (5th Cir. 1995)* (court has discretion to order detailed reply when public official pleads affirmative defense of qualified immunity in civil rights case).

(n4)Footnote 4. *See* [2], *below*.

(n5)Footnote 5. *See* [3], *below*.

(n6)Footnote 6. *Curry v. Pyramid Life Ins. Co., 271 F.2d 1, 6 (8th Cir. 1959) , cert. denied, 361 U.S. 933 (1960) .*

(n7)Footnote 7. *Fed. R. Civ. P. 7(a)(2)*.

(n8)Footnote 8. *Fed. R. Civ. P. 7(a)(3)*.

(n9)Footnote 8.1. *Fed. R. Civ. P. 7(a)(4)*.

(n10)Footnote 8.2. *Fed. R. Civ. P. 7(a)(6)*.

(n11)Footnote 8.3. *Fed. R. Civ. P. 8(b)(6)*; *see* [2], *below*.

(n12)Footnote 9. *Turner & Boisseau v. Nationwide Mut. Ins. Co., 175 F.R.D. 686, 687 (D. Kan. 1997)* ; *see § 12.04*.

(n13)Footnote 10. *United States Plywood Corp. v. Hudson Lumber Co., 17 F.R.D. 258, 262-263 (S.D. N.Y. 1955) .*

(n14)Footnote 11. *Berger v. State Farm Mut. Auto Ins. Co., 291 F.2d 666, 668 n.1 (10th Cir. 1961) .*

(n15)Footnote 1. *Fed. R. Civ. P. 8(b)(6)*.

(n16)Footnote 2. *Fed. R. Civ. P. 7(a)(2)*.

(n17)Footnote 3. *Fed. R. Civ. P. 7(a)(3)*.

(n18)Footnote 4. *Fed. R. Civ. P. 7(a)(4)*.

(n19)Footnote 5. *Fed. R. Civ. P. 7(a)(6)*.

(n20)Footnote 6. *Fed. R. Civ. P. 7(a)(7)*.

(n21)Footnote 7. *Fed. R. Civ. P. 8(b)(6)*.

(n22)Footnote 7.1. *See Fed. R. Civ. P. 7(a)(3)*.

(N23)Footnote 8. *Flynn v. Vevelstad, 230 F.2d 695, 703 (9th Cir. 1956)* (failure to reply to pleading denominated as counterclaim was not admission of facts alleged in pleading, when those facts were in reality only affirmative denials of allegations of complaint).

(n24)Footnote 9. *Fed. R. Civ. P. 7(a)(3)*.

(n25)Footnote 10. *Fed. R. Civ. P. 7(a)(7)*.

(n26)Footnote 11. *Fed. R. Civ. P. 8(c)(2)*; see [3], below.

(n27)Footnote 12. *Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 1596-1597, 140 L. Ed. 2d 759 (1998)* .

(n28)Footnote 1. *Fed. R. Civ. P. 7(a)(2),(3),(4),(6)*.

(n29)Footnote 2. *Fed. R. Civ. P. 7(a)(7)*; *Goad v. Mitchell, 297 F.3d 497, 503-504 (6th Cir. 2002)* .

(n30)Footnote 3. *Fed. R. Civ. P. 7(a)(7)*, Committee Note to 1997 Amendments.

(n31)Footnote 4. *Daniel v. Callet, 2007 U.S. Dist. LEXIS 53065, at * 2 (E.D. Mo. 2007)* (citing **Moore's Federal Practice**).

(n32)Footnote 5. *Goad v. Mitchell, 297 F.3d 497, 503-504 (6th Cir. 2002)* .

(n33)Footnote 6. *Moviecolor, Ltd. v. Eastman Kodak Co., 24 F.R.D. 325, 326 (S.D.N.Y. 1959)* .

(n34)Footnote 7. *Cf. Whiting v. Tunica County, 222 F. Supp. 2d 809, 814 n.1 (N.D. Miss. 2002)* (after ordering reply to obtain detail, summary judgment used to avoid delay and expense).

(n35)Footnote 7.1. *See Schultea v. Wood, 47 F.3d 1427, 1433-1434 (5th Cir. 1995)* .

(n36)Footnote 8. *Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 1596-1597, 140 L. Ed. 2d 759 (1998)* ; *see* [b], *below*.

(n37)Footnote 9. *Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995)* (*Fed. R. Civ. P. 8(a)* applies only to the subset of pleadings that set forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim; Rule 8(a) does not encompass pleadings that it does not list, including Rule 7 replies).

(n38)Footnote 10. *Fed. R. Civ. P. 8(d)(1)*.

(n39)Footnote 11. *Schultea v. Wood, 47 F.3d 1427, 1433-1434 (5th Cir. 1995)* (court has discretion to order detailed reply when public official pleads defense of qualified immunity in civil rights case).

(n40)Footnote 12. *Goad v. Mitchell, 297 F.3d 497, 503-504 (6th Cir. 2002)* (alternatively, court may grant defendant's motion for more definite statement under Rule 12(e)).

(n41)Footnote 13. *Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995)* .

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PART III Pleading Stage
CHAPTER 12 PLAINTIFF'S RESPONSE

1-12 Moore's Manual--Federal Practice and Procedure § 12.03

§ 12.03 Motions Available to Plaintiff Making Response

[1] Use of Motions in General

As an alternative to pleading a reply, a plaintiff may make one or more motions. If a reply is precluded because the answer does not itself contain a counterclaim designated as such and the court has refused to order a reply, the pleadings are closed. n1 Because the pleadings are closed, either the plaintiff or defendant may move at any time for judgment on the pleadings, provided that this motion does not delay the trial. n2 Another option is for the plaintiff to file a motion to strike within 21 days of receiving service of the answer. n3

Even if the answer does contain a counterclaim designated as such, and even before it replies, the plaintiff has the option to file several motions: motion to dismiss the counterclaim under Rule 12(b), a motion for more definite statement under Rule 12(e), or a motion to strike under Rule 12(f). After the disposition of any of these pre-reply motions, a plaintiff must serve a reply within 14 days of receiving notice of the court's action. n4 or receiving service of a more definite statement. n5 The pleadings are closed at the time the reply is filed, and after that time the plaintiff or defendant may move for judgment on the pleadings pursuant to Rule 12(c). n7

A plaintiff may also have rights to respond to a defendant's answer under other rules, such as Rule 56, which provides for motions for summary judgment. n8 However, as is the case with a defendant's responsive motions, any of a plaintiff's responsive motions filed prior to a reply, such as a motion to dismiss or a motion for summary judgment, do not constitute responsive "pleadings." Consequently, the filing of any of these pre-reply motions do not cut off the defendant's power to amend the counterclaims in its answer without leave of court, and the defendant may amend its answer as a matter of right until the plaintiff files its reply. n9 For a complete discussion of the pleadings and motions that may be used in response to a pleading that contains an affirmative claim for relief, see Ch. 9, *Pleadings and Motions in General*.

[2] Motion to Strike Insufficient Defense

One method of attacking an insufficient defense is specifically set forth in Rule 12(f), which provides that a motion to strike may be used to defeat any insufficient defense. n1 The plaintiff must make generally make a motion to strike material in an answer within 21 days after the service of the answer. n2 However, because Rule 12(f) authorizes the court to strike sua sponte, n3 the court may consider and grant a motion to strike even if it is technically untimely. n4 A

court will deny a motion to strike a defense if the defense is sufficient as a matter of law or if the defense fairly presents a question of law or fact that the court should hear. n5 In making a determination of whether a motion to strike should be granted, the court should consider the following six factors: n6

1. Whether the defense is unrelated to plaintiff's claims.

2. Whether the defense is so clearly legally insufficient that it is unworthy of the court's consideration. n7

3. Whether there is a factual question present.

4. The nature of the legal question raised in the dispute. n8

5. Whether the defense could succeed under any set of circumstances.

6. Whether failure to grant the motion would prejudice the moving party. n9

Although motions to strike are generally disfavored, the court will grant the motion when a defense is legally insufficient, in order to save the parties unnecessary expenditure of time and money in preparing for trial. n10 When the *Erie* doctrine is applicable, the legal sufficiency of a defense is determined by state law. n11

Generally, well-pleaded facts are accepted as true for purposes of a motion to strike, n12 and matters outside the pleadings will not be considered in support of the motion. n13 When a court grants a motion to strike a defense for insufficiency, it usually grants the amending party leave to amend. A motion to strike by its nature involves an analysis of all of the pleadings, and a plaintiff who moves to strike a defense runs the risk of having any or all of its own claims dismissed or stricken if they are not substantiated. n14 A court's decision on a motion to strike an insufficient defense is not a final decision for purposes of appeal. Such a decision may be reviewed only on interlocutory appeal, n15 or on appeal from the final judgment. n16

Rule 12(h)(2) specifically provides that an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. Rule 12(h)(2) means that once an objection is made either in a pleading, a motion, or at trial the objection is preserved, even if the objection is not ruled on by the trial court. n17 Furthermore, the party may raise the objection for the first time at any time through trial. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See § 12.02.*

(n2)Footnote 2. *See Fed. R. Civ. P. 12(c).*

(n3)Footnote 3. *See Fed. R. Civ. P. 12(f)(2).* A Rule 12(f) motion to strike any redundant, immaterial, impertinent, or scandalous matter is discussed in Ch. 11, *Defendant's Response*. A Rule 12(f) motion to strike an insufficient defense is discussed in [2], *below*.

(n4)Footnote 4. *Fed. R. Civ. P. 12(a)(4)(A).*

(n5)Footnote 5. *Fed. R. Civ. P. 12(a)(4)(B).*

(n6)Footnote 7. *See Fed. R. Civ. P. 12(c)*, discussed in Ch. 16, *Judgment on the Pleadings*.

(n7)Footnote 8. *See* Ch. 17, *Summary Judgment*.

(n8)Footnote 9. *Zaidi v. Ehrlich, 732 F.2d 1218, 1219 (5th Cir. 1984)* .

(n9)Footnote 1. *Holt v. Southern Ry., 51 F.R.D. 296, 299 (E.D. Tenn. 1969)* (when defense and counterclaim contradicted answers to interrogatories served by defendant in another proceeding, it was proper to strike defense and counterclaim pursuant to Rule 12(f)); *Brew, Woltman & Co., Inc. v. Anthony, 94 F. Supp. 955, 957 (S.D. N.Y. 1951)* (motion to strike counterclaim allowed in conjunction with motion to strike defense predicated on same grounds).

(n10)Footnote 2. *Fed. R. Civ. P. 12(f)(2).*

(n11)Footnote 3. *Fed. R. Civ. P. 12(f)(1).*

(n12)Footnote 4. *United States v. Lot 65 Pine Meadow, 976 F.2d 1155, 1157 (8th Cir. 1992)* (construing former time periods).

(n13)Footnote 5. *Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986)* .

(n14)Footnote 6. *Lunsford v. United States, 418 F. Supp. 1045, 1051 (D.S.D. 1976)* , *aff'd on other grounds, 570 F.2d 221 (8th Cir. 1977)* .

(n15)Footnote 7. *See, e.g., Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)* .

(n16)Footnote 8. *See, e.g., William Z. Salcer v. Envicon Equities Corp., 744 F.2d 935, 940 (2d Cir. 1984)* , *vacated on other grounds, 478 U.S. 1015, 106 S. Ct. 3324, 92 L. Ed. 2d 731 (1986)* .

(n17)Footnote 9. *See, e.g., Lunsford v. United States, 418 F. Supp. 1045, 1051 (D. S.D. 1976)* , *aff'd on other grounds, 570 F.2d 221 (8th Cir. 1977)* .

(n18)Footnote 10. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)* (court of appeals affirmed district court's order striking defense that alleged contract sought to be enforced was violative of antitrust laws, because plaintiff's allegedly illegal "tie-in arrangement" was not a defense to suit for fair and reasonable price of work performed); *Federal Deposit Ins. Corp. v. Isham, 782 F. Supp. 524, 528 (D. Colo. 1992)* (in action alleging breach of fiduciary duty of several bank officers and directors, district court held that as matter of law defendants could not maintain defenses by which conduct of federal banking regulators eliminates or reduces defendants' liability; because affirmative defenses could not succeed under any circumstances, they were stricken).

(n19)Footnote 11. *In re All Maine Asbestos Litig., 575 F. Supp. 1375, 1378 (D. Me. 1983)* (in asbestos products liability suit, motion to strike affirmative defense which asserted defendants were free from liability because products had been manufactured in strict compliance with government specifications was denied, because while Maine as forum state had never considered merits of defense, there were substantial issues of law in addition to factual issues to be resolved).

(n20)Footnote 12. *Forseth v. Vill. of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* ; *see Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-887 (2009)* (only well-pleaded factual allegations are entitled to assumption of truth, not conclusory statements or legal recitals).

(n21)Footnote 13. See *Carter v. Stanton, 405 U.S. 669, 671, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972)* .

(n22)Footnote 14. *Durham Indus., Inc. v. North River Ins. Co., 482 F. Supp. 910, 914 (S.D.N.Y. 1979)* (in tort action to recover damages, plaintiff moved to strike affirmative defense of failure to state a claim; court denied motion, and dismissed sua sponte plaintiff's abuse of process claim).

(n23)Footnote 15. *See Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986)* (on interlocutory appeal, court of appeals reversed grant of plaintiff's motion to strike defense of preemption); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982)* (§ 1292(b) interlocutory appeal from district court's order striking defense alleging that contract sought to be enforced was violative of antitrust laws).

(n24)Footnote 16. *Tapley v. Lockwood Green Eng'rs, Inc., 502 F.2d 559, 560 (8th Cir. 1974)* (order striking amendment to complaint increasing amount of damages sought was not "final decision" and substantial rights of party would not be irreparably lost if review were delayed).

(n25)Footnote 17. *Martin v. Southwestern Virginia Gas Co., 135 F.3d 307, 309 n.1 (4th Cir. 1998)* .

(n26)Footnote 18. *Romstadt v. Allstate Ins. Co., 59 F.3d 608, 610-611 (6th Cir. 1995)* .

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PART III Pleading Stage
CHAPTER 12 PLAINTIFF'S RESPONSE

1-12 Moore's Manual--Federal Practice and Procedure § 12.04

§ 12.04 Counterclaim in Reply

A counterclaim is a claim for relief that must be included in a "pleading," such as a reply. n1 Consequently, when a defendant pleads a permissive counterclaim pursuant to Rule 13(b) in an answer, the plaintiff's reply must include as a compulsory counterclaim arising out of the same transaction or occurrence as the defendant's permissive counterclaim. n2 Furthermore, because the plaintiff's counterclaim is compulsory, the defendant may not object to venue. n3

One situation that is not uniform in the case precedent is the right of a plaintiff to assert a permissive counterclaim in the reply. For example, if a plaintiff sues on contract, and the defendant answers and pleads a counterclaim on an unrelated contract, some cases indicate that the plaintiff's reply to the defendant's counterclaim may seek to plead a permissive counterclaim on an entirely unrelated contract. n4 However, the more recent cases indicate that the Federal Rules of Civil Procedure do not allow a plaintiff to file permissive counterclaims in response to a defendant's counterclaim. n5 Some courts have reasoned that, because Rule 7 does not permit pleadings to go beyond the reply stage, if an entirely unrelated claim, such as the contract in the hypothetical case stated above were allowed in a reply, such a reply would not permit the defendant to in turn counterclaim for a claim growing out of the entirely unrelated contract, which Rule 13(a) requires. n6 Consequently, these courts have held that proper procedure requires that a plaintiff may not advance a permissive counterclaim in reply to a defendant's counterclaim. n7 The courts state that the plaintiff's proper course of action in this situation is to make a motion for leave to amend its complaint pursuant to Rule 15(a). n8 If, however, a court construes the rules to permit a plaintiff to reply with a permissive counterclaim on an unrelated claim, the defendant should have the right to object that venue is improper for that claim, just as if it had been set forth in the complaint. Thus, when a plaintiff pleads a permissive counterclaim in the reply, there must be an independent jurisdictional basis for it, or it must be dismissed. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory Counterclaims

FOOTNOTES:

(n1)Footnote 1. *See Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 569 (6th Cir. 2003)* .

(n2)Footnote 2. *Fed. R. Civ. P. 13(a), (b)*; *United Broadcasting Co. v. Armes, 506 F.2d 766, 770 (5th Cir. 1975)* ; *cf. Polymer Indus. Prods. v. Bridgestone/Firestone, Inc., 347 F.3d 935, 938 (Fed. Cir. 2003)* .

(n3)Footnote 3. *Southeastern Indus. Tire Co. v. Duraprene Corp., 70 F.R.D. 585, 588 (E.D. Pa. 1976)* ; *Joseph Bancroft & Sons v. M. Lowenstein & Sons, Inc., 50 F.R.D. 415, 419 (D. Del. 1970)* .

(n4)Footnote 4. *Warren v. Indian Refining Co., 30 F. Supp. 281, 283 (N.D. Ind. 1939)* ; *Bethlehem Fabricators, Inc. v. John Bowen Co., 1 F.R.D. 274, 275 (D. Mass. 1940)* .

(n5)Footnote 5. *Brooks v. Bates, 781 F. Supp. 202, 207 (S.D. N.Y. 1991)* .

(n6)Footnote 6. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 992 F. Supp. 1218, 1223 (D. Nev. 1998)* .

(n7)Footnote 7. *Feed Mgmt. Sys. v. Brill, 518 F. Supp. 2d 1094, 1096-1097 (D. Minn. 2007)* ; *see Davis & Cox v. Summa Corp., 751 F.2d 1507, 1525 (9th Cir.1985)* .

(n8)Footnote 8. *See Turner & Boisseau v. Nationwide Mutual Insurance Company, 175 F.R.D. 686, 687-688 (D. Kan. 1997)* .

(n9)Footnote 9. *Vanderveer v. Erie Malleable Iron Co., 139 F. Supp. 340 (W.D. Pa. 1956)* , *aff'd on other grounds, 238 F.2d 510 (3d Cir. 1956)* (rejecting argument in patent infringement case that defendant's declaratory judgment claim "opened door" to plaintiff's breach of trust claim).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES

2-13 Moore's Manual--Federal Practice and Procedure 13.syn

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART I. REAL PARTY IN INTEREST

2-13 Moore's Manual--Federal Practice and Procedure § 13.01

§ 13.01 Status of Real Party in Interestn*

[1] Persons Who May Qualify as Real Party in Interest

The federal rules provide that a federal civil action must be prosecuted in the name of the real party in interest. n1 Consequently, a "real party in interest" is a person that is entitled by substantive law such as statute or case precedent to bring a particular claim for relief in federal court. n2 There may be more than one real party in interest for a particular claim, and not all real parties must necessarily prosecute a claim. The question whether one or more than one person or entity is a real party in interest with respect to any given claim depends on whether substantive law gives one or more than one person a right to enforce that claim. n3

A real party in interest does not necessarily have to be a plaintiff, because a party other than a plaintiff may assert a claim for relief. For example, a defendant asserts a claim for relief when it files a counterclaim against a plaintiff. n4 or a crossclaim against a co-defendant. n5 However, when a person is responding to a claim or acting in some other purely defensive capacity, the real-party-in-interest provisions of Civil Rule 17(a) do not apply. n6

The concept of the real party in interest is similar to the concept of standing, n7 in that both address a party's right to pursue an action as a claimant. n8 However, the real party test may generally be viewed as the more stringent one. Thus, a real party in interest always has standing to sue n9 but not every party who meets standing requirements is automatically a real party in interest. n10 Also, a person who seeks to intervene as a claimant will not be permitted to join an action unless he or she is a real party in interest. n11 A "required party" is by definition a real party in interest because such a party has an interest in the litigation to the extent that the party's presence is necessary to dispose of the litigation. n12

An attorney-in-fact is not a real party in interest. An attorney-in-fact is merely an agent of the real party in interest and does not possess interests sufficient to qualify for real party in interest status. Therefore, an attorney-in-fact may not bring suit in its own name. This principle conforms to the purposes of the real party in interest rule. Any rights of action of an attorney-in-fact arise solely from the power of attorney. The right does not arise from a chose in action, as is the case for an assignment for collection, nor does it arise from contract, as is the case with a contractual agent. n13

[2] Qualification as Real Party in Interest

[a] Real Party Is Person Entitled to Initiate Claim for Relief

A "real party in interest" is a person that is entitled by substantive law, including statutes or common law, to bring a particular claim for relief in federal court. n1 This right to bring a claim for relief must arise from the substantive law that controls the claim, n2 which must be either state or federal substantive law. n3 There must exist at least one real party in interest or the claim cannot be brought in federal court. n4

A party not possessing a substantive legal right is not the real party in interest with respect to that right for the particular litigation. n5 Thus, one who merely stands tobenefit from an action in an economically general way is not necessarily a real party in interest. n6

Because the right to enforce an action as a real party is conferred by statute or by substantive common law, n7 there may be more than one real party in interest in the same action whose rights are recognized by substantive law. n8 For example, if an insurer has paid the entire loss suffered by the insured, the insurer must sue in its own name because it is the only real party in interest; however, if the insurer has paid only a portion of the loss, both the insurer and the insured have substantive rights against the tortfeasor, and those rights may qualify them both as real parties in interest. n9

It is also important to recognize that, in circumstances specified by statute, a party who might otherwise have no legally protected interest in the litigation, may be designated as a real party in interest by the federal or state statute. For example, a real party may be defined by statute in cases involving workers' compensation, legal capacity, decedents' estates, and wrongful death. n10

[b] Distinguished From Party to Action

A real party in interest is entitled to become a party of record in federal litigation, but does not actually become a party until the person is prosecuting a claim for relief in the action. The Supreme Court has clarified the important distinction between a person entitled to become a party, the real party in interest, and an actual party in the action. The court noted that there are only three methods to become a party to an action: (1) institute a lawsuit by bringing a claim for relief; (2) defend against a claim for relief filed by a claimant such as a plaintiff, and (3) intervene in a proceeding that has already been instituted. n11

The importance of the distinction is that a real party in interest that has not become a party to the action is a "nonparty" for purposes of the rules. Unless the federal rules provide otherwise, only a party is entitled to the protections and is bound by the requirements of the federal rules. For example, even though the United States is a real party in interest under the False Claims Act, if it has not brought the claim or intervened, it is not a "party" to the action; therefore, the 30 day time limit to file a notice of appeal in *Federal Rule of Appellate Procedure 4(a)(1)(A)* applies, rather than the 60 day time limit in Rule 4(a)(1)(B) that applies when the United States is a party. n12

[3] Assignment or Subrogation May Affect Status as Real Party in Interest

[a] Complete Assignment

In a complete assignment, the owner of a right or claim transfers ownership of its entire right or interest to another person. n1 When a person has made a complete assignment, the assignee of the claim becomes the real party in interest for that claim. n2 Subject to the prohibition against collusive assignments, an assignee must sue in its own name and need not join the assignor as a party. Furthermore, after a complete assignment has been made, the assignor may not sue on the claim, because it retains no interest on which to base an action. n3 However, it is important to note that because it is procedural, the "real party in interest" rule does not affect substantive law and thus has no effect on the validity of an assignment, which is determined by federal or state substantive law. n4

The "collusive assignment" rule provides that an assignee does not become a real party in interest if the assignment was collusive, which means that the parties effected the assignment for the purpose of subverting or avoiding jurisdictional or procedural requirements. n5 For example, an assignment is collusive if it was made to satisfy the diversity jurisdiction citizenship requirement or minimum amount in controversy requirement. When a pretextual assignment is asserted, the burden is on the party asserting diversity to demonstrate that the reason given for the assignment is legitimate, not pretextual. Factors that the court may consider regarding a purported assignment include the assignee's lack of a previous connection with the claim assigned; the remittance by the assignee to the assignor of any recovery; whether the assignor actually controls the conduct of the litigation; the timing of the assignment; the lack of any meaningful consideration for the assignment; and the underlyingpurpose of the assignment. n6

[b] Partial Assignment

Courts have consistently recognized as valid assignments that are short of complete assignments, which are referred to as "partial assignments." In a partial assignment, the assignor may retain a fractional part of the interest assigned. n7 Alternatively the assignor may retain a particular type of the interest assigned, such as the legal title to assert the claim or the substantive right to collect on any recovery. When a valid partial assignment of a claim is made, the assignor and assignee are both real parties in interest, each with respect to its portion of the claim. Under general principles of assignment law, the assignee of a partial assignment owns the part assigned to him or her and the assignor the balance; each is a real party in interest as to his or her part of the claim. As in the case of complete assignments, the validity of a partial assignments is governed by the applicable law, state or federal. n8

Under federal procedural law, the assignor and assignee may bring suit together if they satisfy the permissive party joinder requirements. n9 On the other hand, they may sue separately if the suit does not violate compulsory joinder requirements. n10

Two types of partial assignments are worthy of particular discussion. First, an assignment for purposes of collection only is an assignment in which the assignee has a duty to account to the assignor. If an assignment for purposes of collection only is valid under applicable substantive law, it transfers substantive rights to the assignee, and therefore the assignee is a real party in interest even though the assignee must account to the assignor. n11 However, to the extent that the assignment for purposes of collection is partial, both the assignee and assignor will be real parties in interest to the extent of their interests. n12 It should be noted, however, that when an assignment for purposes of collection is made in order to create or destroy diversity jurisdiction, the assignment is invalid as collusive. n13

Second, an assignment of a right of action as collateral security passes title to the assignee. When a complete valid assignment is made, the assignee becomes the sole real party in interest. Alternatively, the assignor may also retain an interest sufficient to qualify as one of two real parties in interest. n14 Again, the validity of an assignment of a claim as collateral security is determined by substantive federal or state law. n15

[c] Assignment of Claims Against United States

The federal Assignment of Claims Act restricts the transfer of claims against the United States. The Act provides that a transfer or assignment of any part of a claim against the United States Government may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. n16 The Act ensures that the United States maintains all set-off and cross-claims against the original claimants, which may not include an assignee of the claim. n17 Thus, the general rule that an assignment ordinarily shifts real party status to the assignee does not apply to assigned claims against the United States. An assignment invalidated by the Assignment of Claims Act nullifies the assignee's claim against the United States; the purported assignee does not acquire any rights in the claim that would support its action, and the assignor remains the real party in interest. n18

In the same manner that an assignment of claims is prohibited, a person may not assign a contract made with the United

States. n19 The language of the Anti-Assignment Act is nearly identical to the Assignment of Claims Act, and courts have noted that violations of either Act are subject to the same principles. n20

There are several exceptions to the general rules stated above. The Assignment of Claims Act does not apply when the assignment is made before the date that the claim arises against the United States. n21 The Act does not prohibit assignments made to financial institutions, an exception intended to encourage financing of government contracts. n22 Furthermore, the Act does not apply to subrogated claims, which are essentially assignments made by operation of law, n23 nor does it apply to transfers thatare analogous to those occurring by operation of law. n24 Finally, the United States may waive the restrictions of the Assignment of Claims Act, either expressly or impliedly. n25

[d] Assignment of Intellectual Property Interests

The owner of a patent, trademark, or copyright has the right to initiate an action for alleged infringement, and thus is a real party in interest for an infringement claim. n26 If the owner of one of these rights completely assigns all its rights, the assignee becomes the real party in interest with respect to infringement claims that arise after the assignment. n27 The assignee may sue in its own behalf as real party in interest and need not join the original owner. n28 If the owner makes a partial assignment, real party status vests in both the assignor and the assignee. n29 In cases of partial assignment, the assignee must bring an infringement action jointly with the original owner-assignor. n30

However, licensees must be distinguished from partial assignees. Mere licensees are not real parties in interest because licensees do not acquire sufficient interests in the license to become real parties in interest. n31 A court must look to the language of the agreement between the inventor and licensee to determine what rights have been granted and the intent of the parties. When the patentee grants an exclusive right to make, use, and sell, either the entire patent or an undivided portion of a patent, or an exclusive right to make, use, and sell within a specific geographical area, the transaction is considered an assignment. This is true despite language in the instrument to the contrary.

On the other hand, if the patentee conveys only the exclusive right to make and sell, but not the right to use, the grant is a license, notwithstanding any language in the instrument to the contrary. Where a patent owner grants an exclusive license to make and sell an invention, but the right to use is not specifically included, the transfer is a "license" and not an "assignment," and therefore the licensee is not a real party in interest sufficient to bring an infringement suit in its own right. n32

[e] Subrogation

[i] Complete Subrogation

A "subrogation" is an agreement in which the "subrogee" is substituted into the place of the subrogor with reference to a lawful claim, demand, or right against the subrogor, so that the subrogee succeeds to the liabilities of the subrogor in relation to the claim or debt, and also the subrogor's rights, remedies, or securities. n33 A "complete subrogation" or "total subrogation" occurs when the subrogee pays or makes whole the entire liability or loss incurred by the subrogor, and has taken all of the right, title, and interest in the claims of the subrogee. n34 For example, in an insurance context "subrogation" is an insurer's right to be put in the position of its insured against third parties legally responsible to the insured for loss which the insurer has both covered and paid the insured. n35 Subrogation may be in effect an assignment that occurs by operation of law, or it may be an "equitable subrogation," which is a subrogation that occurs when equitable principles require that one party (who is not a mere volunteer) pays the debt of another party which, in good conscience, should have been paid by the one primarily liable. n36

Under general principles of subrogation, when one party's claim is completely subrogated to another party, the subrogor relinquishes all interest in the subrogated claim, and, by operation of law, the subrogee becomes the only real party in interest. n37 The substantive law of the existence of subrogation in diversity cases is controlled by state law. n38

However, the procedure for joinder of subrogated parties is controlled by federal law even in cases of diversity. n39 For example, in an action by an insurer in which the insurer is seeking reimbursement for its payment to the insured, the situation in which subrogation most commonly occurs, the insurer subrogee assumes whatever rights the insured possessed. An insurer that has paid the full loss suffered by the insured is subrogated to the insured's entire claim and acquires the status of the sole real party in interest with respect to that claim. n40 The subrogee's right of recovery islimited to that of the subrogor, because the subrogee merely stands in the shoes of the subrogor. n41 However, if subrogation of a claim occurs after an action is commenced in federal court, the procedural question of whose name must be used for prosecution of the action is regulated by Rule 25, which governs substitution of parties during litigation. n41.1

[ii] Partial Subrogation

A partial subrogation is a subrogation in which the subrogee has a right to recover an amount it has paid to the subrogor when that amount is only a portion of the amount that is owed to the subrogor on the claim. n41.2 Thus, both the subrogor and the subrogee retain an interest in the claim in a partial subrogation. n41.3 Although in a complete subrogation the subrogee becomes the only real party in interest on the claim, n41.4 in the case of a partial subrogation both of the subrogee and subrogor are real parties in interest to the extent of its unrecovered amount. n41.5 Any one or all of the partial subrogees as well as the subrogor may sue in their own names. n42 Thus, an insurer which does not pay the entire loss suffered by the insured is subrogated only to that portion actually paid. n43 Subrogor and subrogee may sue the defendant together if they satisfy permissive party joinder requirements. n44 Furthermore, a partial subrogee may protect its interest in any recovery by intervening in an action brought by the other subrogee. n44.1

The circuits are not in agreement about the compulsory joinder requirements with respect to partial subrogation. Thus, in some circuits the courts have held that when there is partial subrogation to an insurer, neither the insured nor the insurer-subrogee is an indispensable party; rather than require dismissal of the action where the insured sues without the subrogated insurer, courts have held that where there is partial subrogation the insured may file suit in its own name for the entire amount of the claim, without naming the insurer as a co-plaintiff. n45 On the other hand, other courts have held that a party who has the status of a partial subrogee under state law in a diversity case is a real party in interest and is required to be joined under Rule 17(a) on the defendant's motion for joinder. n46 The Seventh Circuit takes that view that Rule 17(a) provides an independent authority for compulsory joinder, so that the prerequisites of Rule 19(a) need not be satisfied before joinder is appropriate under Rule 17(a). n47

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.10, 17.11 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 17(a); see, e.g., United States ex rel. Eisenstein v. City of New York, ___ U.S. ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1262-1263 (2009)* (False Claims Act provides that United States Government and individuals are real parties in interest to bring claim under Act).

(n4)Footnote 3. *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd., 411 F. Supp. 2d 458, 462, n.14, 463 (S.D.N.Y. 2006)* (quoting **Moore's Federal Practice** that real parties in interest are persons or entities possessing right or interest to be enforced through litigation).

(n5)Footnote 4. *See Fed. R. Civ. P. 13(a).*

(n6)Footnote 5. *See Fed. R. Civ. P. 13(g).*

(n7)Footnote 6. *University of Texas at Austin v. Vratil, 96 F.3d 1337, 1340 n.2 (10th Cir. 1996)* (requirement of bringing suit in name of real party in interest applies only to party making claim for relief, and differs from capacity to be sued).

(n8)Footnote 7. *In re Maco Homes, Inc, 180 F.3d 163, 165-166 (4th Cir. 1999)* (real party in interest rule used to determine standing to appeal from summary judgment on claim).

(n9)Footnote 8. *Mecklenburg Farm, Inc. v. Anheuser Busch, Inc., 250 F.R.D. 414, 417 (E.D. Mo. 2008)* (quoting **Moore's Federal Practice**).

(n10)Footnote 9. *American National Bank & Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 459 (7th Cir. 1982)* (real party in interest has standing to assert rights or claims of nonparties).

(n11)Footnote 10. *New Orleans Pub. Serv. v. United Gas Pipe Line, 732 F.2d 452, 464 (5th Cir. 1984)* (distinguishing between real party in interest requirements and standing rule that party may not assert right that is actually possessed by another).

(n12)Footnote 11. *United States ex rel. Eisenstein v. City of New York, ___ U.S. ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1261-1262 (2009)* ; *New Orleans Pub. Serv. v. United Gas Pipe Line, 732 F.2d 452, 464 (5th Cir. 1984)* (citing **Moores Federal Practice**).

(n13)Footnote 12. *See Fed. R. Civ. P. 19(a)(1)* (definition of "required party").

(n14)Footnote 13. *Choi v. Kim, 50 F.3d 244, 247 (3d Cir. 1995)* (complaint in creditor's action was proper, even though captioned "by and through" attorney-in-fact, when complaint clearly identified real party in interest as plaintiff, and defendants' answer indicated that defendants knew creditor was plaintiff).

(n15)Footnote 1. *Fed. R. Civ. P. 17(a)*; *see United States ex rel. Eisenstein v. City of New York, ___ U.S. ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1263 (2009)* (False Claims Act provides that United States Government qualifies as real party in interest to bring claim under Act).

(n16)Footnote 2. *Fezler v. Davis (In re Davis), 194 F.3d 570, 577 (5th Cir. 1999)* ; *Mecklenburg Farm, Inc. v. Anheuser Busch, Inc., 250 F.R.D. 414, 417 (E.D. Mo. 2008)* (quoting **Moore's Federal Practice**).

(n17)Footnote 3. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 47-48 (2d Cir. 2005)* .

(n18)Footnote 4. *See Fed. R. Civ. P. 17(a)(3)* (court must dismiss action for failure to prosecute in name of real party in interest if, after reasonable time has been allowed, real party in interest has not ratified, joined, or been substituted into action).

(n19)Footnote 5. *Swanson v. Bixler, 750 F.2d 810, 813-814 (10th Cir. 1984)* (stepson who commenced action for deprivation of stepfather's testamentary wishes and breach of fiduciary duty owed to stepfather did nothold substantive right to be enforced, and was not real party in interest).

(n20)Footnote 6. *South African Marine Corp. v. United States, 640 F. Supp. 247, 251 (Ct. Int. Trade 1986)* (mere possibility of obtaining benefit as result of litigation does not make one real party in interest entitled to sue).

(n21)Footnote 7. *Matter of Davis, 194 F.3d 570, 577-578 (5th Cir. 1999)* .

(n22)Footnote 8. *HB Gen. Corp. v. Manchester Partners, 95 F.3d 1185, 1196 (3d Cir. 1996)* (for particular claim, there may be multiple real parties in interest; however, provided plaintiffs qualify as real parties in interest, Rule 17(a) does not require the joinder or addition of other parties who also qualify).

(n23)Footnote 9. *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd., 79 F.3d 480, 484 (5th Cir. 1996)* (case of partial subrogation on which insurer and insureds were all real parties in interest).

(n24)Footnote 10. *See, e.g., Matter of Davis, 194 F.3d 570, 577-578 (5th Cir. 1999)* (executors and administrators designated as real parties in interest who need not join as plaintiffs persons for whose benefit wrongful death action is brought).

(n25)Footnote 11. *Fed. R. Civ. P. 17(a)*; *see United States ex rel. Eisenstein v. City of New York, ___ U.S. ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1261 (2009)* (False Claims Act provides that United States Government qualifies as real party in interest to bring claim under Act).

(n26)Footnote 12. *Fed. R. Civ. P. 17(a)*; *see United States ex rel. Eisenstein v. City of New York, ___ U.S. ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1264 (2009)* .

(n27)Footnote 1. *Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 434-435 (2008)* .

(n28)Footnote 2. *HB Gen. Corp. v. Manchester Partners, 95 F.3d 1185, 1197 (3d Cir. 1996)* ; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 473 (E.D.N.Y. 2006)* .

(n29)Footnote 3. *Hefley v. Jones, 687 F.2d 1383, 1387-1388 (10th Cir. 1982)* ; *Mecklenburg Farm, Inc. v. Anheuser Busch, Inc., 250 F.R.D. 414, 417 (E.D. Mo. 2008)* (quoting **Moore's Federal Practice**).

(n30)Footnote 4. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 44-45 (2d Cir. 2005)* .

(n31)Footnote 5. *See LaSala v. Needham & Co., 399 F. Supp. 2d 466, 471 (S.D.N.Y. 2005)* ; *Deajess Med. Imaging, P.C. v. Allstate Ins. Co., 381 F. Supp. 2d 307, 310 (S.D.N.Y. 2005)* .

(n32)Footnote 6. *See Boston Post Rd. Med. Imaging, P.C. v. Allstate Ins., 2004 U.S. Dist. LEXIS 6583, *6-*9 (S.D.N.Y. 2004)* ; § 5.50[3][d].

(n33)Footnote 7. *In re Katrina Canal Litigation Breaches, 524 F.3d 700, 706 (5th Cir. 2008)* .

(n34)Footnote 8. *See Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 436-437 (2008)* .

(n35)Footnote 9. *See Fed. R. Civ. P. 20(a).*

(n36)Footnote 10. *Fed. R. Civ. P. 19*; *see HB Gen. Corp. v. Manchester Partners, 95 F.3d 1185, 1195-1197 (3d Cir. 1996)* (noting that Rule 17 does not require joinder of all real parties in interest, but that Rule 19 might).

(n37)Footnote 11. *Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 435-436 (2008)* .

(n38)Footnote 12. *Hefley v. Jones, 687 F.2d 1383, 1387 (10th Cir. 1982)* .

(n39)Footnote 13. *Attorneys Trust v. Videotape Computer Prods., 93 F.3d 593, 597 (9th Cir. 1996)* .

(n40)Footnote 14. *Pacamor Bearings v. Minebea Co., 892 F. Supp. 347, 361 (D.N.H. 1995)* (assignee and assignor were both qualified as real parties in interest when assignor retained interest in percentage of net recovery from claim).

(n41)Footnote 15. *See Federal Deposit Ins. Corp. v. Tisch, 89 F.R.D. 446, 448 (E.D.N.Y. 1981)* (when FDIC assigned claims against debtors to trustee in bankruptcy but retained interest in outcome, both assignor and assignee had status of real parties in interest).

(n42)Footnote 16. *See 31 U.S.C. § 3727.*

(n43)Footnote 17. *Balfour Maclaine Int'l v. Hanson, 876 F. Supp. 52, 57 (S.D.N.Y. 1995)* (assignment by import-export company of its claims against United States Export-Import Bank was void under anti-assignment statute because assignment occurred before claim was allowed and decided).

(n44)Footnote 18. *Saint John Marine Co. v. United States, 92 F.3d 39, 45 (2d Cir. 1996)* .

(n45)Footnote 19. *See* 41 U.S.C. § 15.

(n46)Footnote 20. *See In re Medina, 177 B.R. 335, 346 (D. Ore. 1994)* , *aff'd in part on other grounds, 205 B.R. 216 (9th Cir. 1996)* .

(n47)Footnote 21. *Saint John Marine Co. v. United States, 92 F.3d 39, 46-47 (2d Cir. 1996)* .

(n48)Footnote 22. *See 31 U.S.C. § 3727*; *Bank of Amer. National Trust & Sav. Ass'n v. United States, 23 F.3d 380, 384 (Fed. Cir. 1994)* .

(n49)Footnote 23. *United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 377-381, 70 S. Ct. 207, 94 L. Ed. 171, 40 Ohio Op. 348 (1949)* (subrogation of insurer to claim against government was unaffected by anti-assignment statutes).

(n50)Footnote 24. *Saint John Marine Co. v. United States, 92 F.3d 39, 48 (2d Cir. 1996)* .

(n51)Footnote 25. *Cadwalder v. United States, 45 F.3d 297, 299 (9th Cir. 1995)* (waiver is determined by totality of the circumstances, including factors such as the government's knowledge, assent, or actions consistent with terms of assignment).

(n52)Footnote 26. *See, e.g., 35 U.S.C. § 281* (patent); *U-Haul Int'l v. Jartran, Inc., 793 F.2d 1034, 1038-1039 (9th Cir. 1986)* (trademark); *17 U.S.C. § 106* (copyright).

(n53)Footnote 27. *See, e.g., 37 C.F.R. § 3.71* (patent); *15 U.S.C. § 1060* (trademark); *17 U.S.C. § 204* (copyright).

(n54)Footnote 28. *See Fed. R. Civ. P. 17(a)(1)(F).*

(n55)Footnote 29. *See Walker Mfg. v. Hoffmann, Inc., 220 F. Supp. 2d 1024, 1031-1032 (N.D. Iowa 2002)* .

(n56)Footnote 30. *See Valutron, N.V. v. NCR Corp., 99 F.R.D. 254, 256-257 (S.D. Ohio 1982)* (owners of minority interest in patent who signed assignment restricting their power to license and enforce patent, but who had retained right to make, use, or sell patented invention, were indispensable parties requiring joinder under Rule 19(a).

(n57)Footnote 31. *Abbott Lab. v. Diamedix Corp., 47 F.3d 1128, 1131 (Fed. Cir. 1995)* (mere licensee, who has no right to exclude others from making, using, or selling the licensed product, has no legally recognized interest that entitles it to bring or join an infringement action).

(n58)Footnote 32. *Dr. Fred Hatfield's Sportstrength Training Equipment Co. v. Balik, 174 F.R.D. 496, 499-500 (M.D. Fla. 1997)* ; *see Pfizer, Inc. v. Elan Pharm. Research Corp., 812 F. Supp. 1352, 1371-1374 (D. Del. 1993)* (because patent holder had not transferred substantially all of its rights in patent to exclusive licensee, exclusive licensee was not real party in interest qualified to sue in its own name for infringement of patent).

(n59)Footnote 33. *Morris v. Crete Carrier Corp., 105 F.3d 279, 280 (6th Cir. 1997)* ; *see Lyndon Prop. Ins. Co. v. Duke Levy & Assocs. LLC, 475 F.3d 268, 271 (5th Cir. 2007)* (substitution may also arise under equitable principles).

(n60)Footnote 34. *See Pepsico do BRASIL, LTDA v. Oxy Dry Corp., 534 F. Supp. 2d 846, 848 (N.D. Ill. 2008)* ; *Culp, Inc. v. Cain, 414 F. Supp. 2d 1118, 1130 n.25 (M.D. Ala. 2006)* .

(n61)Footnote 35. *Allstate Ins. Co. v. Gip, 797 F. Supp. 763, 765-766 (N.D. Cal. 1992)* .

(n62)Footnote 36. *First Fed. Sav. Bank of Wabash v. United States, 118 F.3d 532, 533-534 (6th Cir. 1997)* .

(n63)Footnote 37. *Pepsico do BRASIL, LTDA v. Oxy Dry Corp., 534 F. Supp. 2d 846, 848 (N.D. Ill. 2008)* .

(n64)Footnote 38. *Frank v. Hadesman and Frank, Inc., 83 F.3d 158, 159 (7th Cir. 1996)* .

(n65)Footnote 39. *Cars R US Sales & Rentals, Inc. v. Ford Motor Co., 2009 U.S. Dist. LEXIS 51478, at *6 (N.D. Ill. June 18, 2009)* .

(n66)Footnote 40. *United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 380-381, 70 S. Ct. 207, 94 L. Ed. 171, 40 Ohio Op. 348 (1949)* (citing **Moore's Federal Practice** for principle that if subrogee has paid entire loss suffered by insured, it is the only real party in interest and must sue in its own name); *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd., 79 F.3d 480, 484 (5th Cir. 1996)* (general rule in federal court is that if insurer has paid entire claim of its insured, insurer is real party in interest under Rule 17(a) and must sue in its own name).

(n67)Footnote 41. *Cadwalder v. United States, 45 F.3d 297, 301 (9th Cir. 1995)* .

(n68)Footnote 41.1. *See Fed. R. Civ. P. 25(c)*; *see also § 13.30*.

(n69)Footnote 41.2. *New Orleans Assets, L.L.C. v. Woodward, 363 F.3d 372, 375 (5th Cir. 2004)* .

(n70)Footnote 41.3. *Balistreri v. Richard E. Jacobs Group, Inc., 221 F.R.D. 602, 604 (E.D. Wis. 2004)* .

(n71)Footnote 41.4. *See* [i], *above*.

(n72)Footnote 41.5. *Sysco Corp. v. Chi-Chi's, Inc. (In re Chi-Chi's, Inc.), 338 B.R. 618, 623 (Bkrtcy. D. Del. 2006)* ; *see Cars R US Sales & Rentals, Inc. v. Ford Motor Co., 2009 U.S. Dist. LEXIS 51478, at *6 (N.D. Ill. June 18, 2009)* .

(n73)Footnote 42. *United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 381, 70 S. Ct. 207, 94 L. Ed. 171, 40 Ohio Op. 348 (1949)* .

(n74)Footnote 43. *Krueger v. Cartwright, 996 F.2d 928, 932 (7th Cir. 1993)* (insurer that pays only portion of loss of its insured is only partially subrogated to insured's rights).

(n75)Footnote 44. *Fed. R. Civ. P. 20(a)* (rule permits suit by co-plaintiffs whose claims arise from same transaction or occurrence and create at least one common question of law or fact).

(n76)Footnote 44.1. *See Maricco v. Meco Corp., No. 03-71719, 2004 U.S. Dist. LEXIS 7890, *3-*4 (E.D. Mich. May 3, 2004)* (when insured brought suit against tortfeasor, insurer who was partially subrogated had right to intervene

in action to protect its pro rata share of potential recovery).

(n77)Footnote 45. *See Virginia Elec. and Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 81 (4th Cir. 1973)* , *cert. denied, 415 U.S. 935 (1974)* ; *Garcia v. Hall, 624 F.2d 150, 152 (10th Cir. 1980)* .

(n78)Footnote 46. *Wadsworth v. United States Postal Service, 511 F.2d 64, 67 (7th Cir. 1975)* .

(n79)Footnote 47. *Sikora v. AFD Indus., 18 F. Supp. 2d 841, 846 (N.D. Ill. 1998)* (Seventh Circuit decision provides that a partial subrogee must be joined as real party in interest under Rule 17(a)).

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Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART I. REAL PARTY IN INTEREST

2-13 Moore's Manual--Federal Practice and Procedure § 13.02

§ 13.02 Purpose of Designating Real Party in Interestn*

The real party in interest rule is intended to protect defendants from multiple liability in actions by subsequent claimants and to ensure that the judgment in an action will have preclusive res judicata effect. n1 If more than one real party in interest exists with respect to a given claim, a real party who is not joined in the suit and who elects not to intervene or sue separately is bound by the judgment in the original suit. n2 The real party in interest requirement is not based on Article III standing principles but is a prudential standing rule intended to ensure that the party bringing the action is the party entitled to make the claim. Consequently, and because it is intended to protect the defendant, failure to raise the real party in interest objection in a timely manner results in waiver of the objection, and it may not be raised at any time. For example, it may not be raised after trial has started n2.1 or for the first time on appeal. n2.2

When the real party in interest initiates a suit for the benefit of another, a judgment by or against the real party in interest is binding on the person represented. The preclusive effect of the representative's suit protects the defendant from subsequent suits by the one who stands to ultimately benefit from the litigation. n3 Similarly, although not directly involved in a proceeding, a ratifying party is deemed to be a real party in interest to the action and is bound by the outcome. n4

When government officers sue or are sued in their official capacity, the real party in interest is the government. n5 Consequently, a public officer who sues or is sued in an official capacity may be designated by official title rather than by name. However, the court may order that the officer's name be added, for example, when it would facilitate administration of the case. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *National Safe Corp. v. Texidor Sec. Equip., Inc., 101 F.R.D. 467, 470-472 (D.P.R. 1984)*

(discussion of dual purposes of Rule 17 to protect defendant from multiple liability and to ensure preclusive effect of judgment in action); *see Fed. R. Civ. P. 17(a)*, Advisory Committee Note to 1966 Amendments; *see also Coliseum Cartage Co. v. Rubbermaid Statesville, Inc., 975 F.2d 1022, 1024-1025 (4th Cir. 1992)* (in action by collection agent on behalf of carrier to recover underpayment from shipper, joinder of carrier who retained right to attempt collection on its own prevented multiplicity of suits).

(n3)Footnote 2. *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1, 4 (1st Cir. 1980)* (Rule 17 protects defendants from facing subsequent similar action brought by one not party to present proceeding).

(n4)Footnote 2.1. *Ensley v. Cody Resources, Inc., 171 F.3d 315, 319-320 (5th Cir. 1999)* .

(n5)Footnote 2.2. *In re Rodeo Canon Dev. Corp., 362 F.3d 603, 607-608 (9th Cir. 2004)* ; *see § 13.03[1][b].*

(n6)Footnote 3. *Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996)* (guardian's action alleging medical malpractice binding on ward who was incapacitated by stroke).

(n7)Footnote 4. *See Metal Processing, Inc. v. Humm, 56 F. Supp. 2d 455, 462 (D.N.J. 1999)* ; *see § 13.03[1][c][ii].*

(n8)Footnote 5. *Cheney v. United States Dist. Court, 541 U.S. 913, 918, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* .

(n9)Footnote 6. *Fed. R. Civ. P. 17(d).*

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART I. REAL PARTY IN INTEREST

2-13 Moore's Manual--Federal Practice and Procedure § 13.03

§ 13.03 Effects of Status of Real Party in Interestn*

[1] Action Required To Be Brought by Real Party

[a] Only Real Party Entitled to Commence Action on Claim

In general, every action in federal court must be prosecuted in the name of the real party in interest. n1 If an action is commenced by one who is not the real party in interest,the district court must dismiss the action on objection of the opposition. n2 However, a court may not dismiss an action on this ground until a reasonable time has been allowed after objection for the real party to ratify commencement of the action or to be joined or substituted in the action. n3 Thus, ratification, joinder, or substitution has the same effect as if the action had been commenced in the name of the real party in interest. n4

[b] Requirements for Objection to Real Party Status

In order to have a claim dismissed on the ground that it is being prosecuted by one who is not the real party in interest, the party opposing the claim must object in a timely manner. n5 Otherwise, the court may deem the objection waived. n6 A determination of waiver is made on a case-by-case basis at the discretion of the court. n7

Rule 17 does not expressly specify a particular manner or deadline for a defendant to make a real party in interest objection. However, the courts have held that proper timing depends on how one characterizes the particular defense. Thus, a defendant may object to the original plaintiff's failure to prosecute in the name of the real party as an affirmative defense in its answer. n8 If joinder or substitution of the real party destroys subject matter jurisdiction, a defendant may raise the issue in a motion to dismiss, n9 which may be asserted at any time. n10

As a practical matter, a dispute regarding whether a claim is being prosecuted in the name of the real party in interest should be evident to a defendant at the beginning of the suit because the defendant almost always knows whether suit has been filed by the party who "owns" the claim. Therefore, Rule 17(a) suggests that a defendant must object in a timely manner to allow the joinder of the real party in interest. The earlier the defense is raised, the more likely any unnecessary expense of trial preparation for both parties can be avoided if a real party in interest question is determined adversely to a plaintiff. Early objection also furthers the goal of judicial efficiency. n11 The defending party should also

realize that one of the primary factors in the court's determination of whether to dismiss the claim is whether prejudice will result from delay in raising the objection. n11.1

Most courts hold that the court may itself raise the real party objection, n12 and may also, sua sponte, determine that any real party objection has been waived. n13 However, other courts have held that it is the duty of the lawyers, not the court, to raise the objection. n14 The view that allows the trial court to raise real party objections sua sponte appears most consistent with the basic goal of the Rules of Civil Procedure to secure the just, speedy, and inexpensive determination of every action. n15

[c] Exceptions to Dismissal Rule by Cure of Real Party Defect

[i] Options to Cure Real Party Defect

If a claimant is not the real party in interest, the court may not immediately dismiss the claim but must allow a reasonable time to rectify the defect. n16 The purpose of allowing the plaintiff this opportunity to cure is to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. n17

However, it should be noted that Rule 17(a) does not preclude dismissal for failure to sue in the name of the real party in interest. Instead, it simply provides that the claimant will have a "reasonable time" after objection in which to correct the defect. n18 Once a reasonable time has passed, failure to cure the defect is appropriate grounds for dismissal. n19

Rule 17 does not specify the length of a "reasonable time," but leaves that determination to the sound discretion of the court based on the particular procedural circumstances of the case. n20 In any event, the court must allow some time for cure, andin the event the court decides to exercise it discretion to dismiss, the court should set forth its grounds. For example, one circuit court held that the district court abused its discretion when it dismissed an action without explaining why the district court ruled that the less severe alternative of allowing an opportunity for ratification or joinder by the real party trustee was inappropriate. n20.1

[ii] Ratification

One method of curing a real party in interest defect is by ratification, which occurs when the real party in interest ratifies an action taken by another person as a representative of the real party and on behalf of the real party. n21 For example, if a representative party mistakenly sues in his or her own name, the representative is not the real party and has no standing to sue. However, the real party later may later ratify the action of the representative. n22

An effective ratification under Rule 17(a) requires the ratifying party to authorize continuation of the action and to agree to be bound by its result. Thus, the real party in interest may ratify by expressly consenting to the litigation by formally notifying the court n23 or through unambiguous conduct, such as, abandoning claims that are the subject of the lawsuit and allowing the litigation to continue. A ratification has the same effect as if the real party in interest had originally commenced the action. n24

A district court's decision whether a ratification by the real party in interest has occurred is reviewed under the abuse of discretion standard. n24.1

Ratification is not permitted if it would result in evasion of a substantive limitation on assignment of claims. n25 Furthermore, a real party in interest who is made a party after the action has been commenced is subject to jurisdiction requirements. Thus, ratification is not allowed by a real party in interest if it would destroy the court's jurisdiction; similarly, ratification may not be used to retroactively confer diversity jurisdiction. n26

[iii] Joinder of Real Party

The second method to cure a real party defect is to join the person who is the real party in interest. Thus, when a real party in interest has been omitted, the real party may move for his or her own joinder; n27 or, prior to dismissal, the claimant may cure the defect by joining the real party. n28 For example, when it is uncertain which of two claimants is the real party in interest, the court may join both. In such a case, the determination of the proper real party in interest may require an in-depth analysis of the nature of the injury claimed and must be left to the trial court. n28.1 In another example, the court may allow joinder of a purported assignee as a real party, provided that (1) the failure to include the assignee as a party plaintiff from the beginning was not the result of some artifice that resulted in prejudice to the defendant but instead was the result of a mistake as to the legal effectiveness of the documents allegedly assigning the claims to the assignee, (2) the defendant would not be surprised by the joinder, and (3) joinder of the assignee would not alter the complaint's factual allegations or substantially change the issues in the case. n29

[iv] Substitution of Real Party

The third and final option to cure a real party defect is to have the real party in interest substituted for the party named. n30 For example, in one case, the court found that amendments to the complaint would not change the fact that the real party in interest was not named as a party to the suit, and therefore, amending the complaint would be futile. The court concluded that the plaintiff had failed to name the real party in interest, and ordered that in the interest of justice, the court would allow the plaintiff 30 days to substitute the real party or to have that party ratify the commencement of the action. If the plaintiff failed to complete one of the options, the court would dismissthe suit. n31

Substitution under Rule 17 should be distinguished from Rule 25 substitution. Rule 17 applies only when proper parties have not been named in the suit, while Rule 25 applies only when the original parties were proper but a subsequent death or incapacity compelled substitution or there was a transfer of interest. n32 Substitution of plaintiffs under Rule 17 is liberally allowed by the court, especially when the change in parties is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants. n33

[v] Any Cure of Real Party Defect Relates Back to Commencement of Suit

When a real party in interest has been made a party to the action by ratification, joinder, or substitution, the real party is deemed to have commenced the action. n34 Therefore, for statutes of limitation purposes, the entry of the real party as a party to the suit relates back to the date of the original pleading. n35 This curative rule, like similar provisions in Rule 15 regarding relation back of amended pleadings, permits correction of a formal defect without risk that the case will be barred as untimely. n36

The relation back doctrine applies in diversity cases even if a state-law prohibition exists. n37 This is consistent with the Supreme Court's preeminent holding that properly promulgated Federal Rules of Civil Procedure will apply even despite contrary state law. n38

[2] Certain Real Parties Entitled to Sue on Behalf of Another

[a] General Authorization

One of the most important aspects of Rule 17 is that it expressly provides that a person qualifying as a real party in interest may sue on behalf or for the benefit of another without joining the party for whose benefit the action is brought. n1 Rule 17 contains a list of real parties who are specifically authorized to act as representatives, including an executor, administrator, guardian, bailee, trustee of an express trust, or a party with whom or in whose name a contract has been made for the benefit of another; this list is merely illustrative and does not include all of the possible representatives. n2 The following is a list of representatives who are real parties when acting in a representative capacity:

- An executor or administrator may bring suit as the real party in interest on behalf of a decedent's

estate, n3 and, in their state of appointment, executors and administrators must act as claimants for the estate. n4

- If a person lacks legal capacity, such as a minor or incompetent, he or she may be represented by a general guardian, who has power to act in the ward's stead, n4.1 or a guardian ad litem. n5 A guardian may sue in its own name without joining the party for whose benefit the action is brought; n6 however, the real party rule does not affect the legal status of a guardian. The substantive law of guardian and ward determines the rights and duties of a guardian. n7

- A bailee is a real party in interest entitled to sue on behalf of the bailor for a violation of the possessory interest in the bailed goods. n8 Whether or not a person is a bailee is determined according to the law of the state where the federal court is located. n9

- A trustee of an express trust is entitled to sue as a real party in interest on behalf of the trust beneficiaries. n10

- A representative who enters into a contract for the benefit of a third party is areal party in interest entitled to enforce that contract. The third party need not be joined in an enforcement action, even though that person holds the beneficial interest under the contract. n11 However, even though such actions are captioned in the real party representative's name, any recovery accrues to the third-party beneficiary. Counsel should also note that if substantive law confers a legally protected right on the third-party beneficiary, the beneficiary is also entitled to bring suit in its own behalf. n12

- A party authorized by statute. n12.1

- Court appointed receivers are real parties in interest entitled to sue on behalf of the party that they represent. n13

Real party representatives owe a fiduciary duty to parties they represent and have the affirmative obligation to adequately represent the parties' interests. As a real party in interest, a representative designated by statute may bring suit in its own name without joining the person for whose benefit the action is brought. However, although not joined in the suit, represented parties who ultimately benefit from the litigation are nevertheless bound by the judgment. n14

[b] Statutory Designation of Real Party Entitled to Sue in Representative Capacity

The federal rules expressly provide that when a state or federal statute authorizes a person to bring an action for the benefit of another, the person may bring an action in the person's name without joining the beneficiary. n15 When a federal statute provides that an action may be brought for another's use or benefit, the action must be brought in the name of the United States. n15.1 Statutorily defined representatives who fall within the real party in interest provision of Rule 17 include labor unions, n16 employers in workers' compensation cases, n17 bankruptcy trustees, n18 and state appointed representatives as proper claimants in wrongful death actions. n19

Under federal statutory law, certain actions must be brought in the name of the United States. n20 The United States brings these actions for the benefit of a class of citizens whose injury involves a federal interest. n21

A claimant whose case is governed by such a statute may be heard in federal court regardless of citizenship or amount in controversy. n22 Although the United States is the proper named plaintiff in such actions, real party status is a separate determination; whether the United States, the represented party, or both are considered real parties in interest in proceedings under these statutes is evaluated on a case-by-case basis. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 17.10, 17.12 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(a)(1).*

(n3)Footnote 2. *Metal Processing, Inc. v. Humm, 56 F. Supp. 2d 455, 460-461 (D.N.J. 1999)* ; *see* [b], *below* (requirements for objection).

(n4)Footnote 3. *Fed. R. Civ. P. 17(a)(1)*; *see* [c], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 17(a)(1).*

(n6)Footnote 5. *Fed. R. Civ. P. 17(a)* (real party provision permits reasonable time "after objection" for curing real party in interest defect); *see, e.g., In re Rodeo Canon Dev. Corp., 362 F.3d 603, 608 (9th Cir. 2004)* (objection must be raised at early time, because the real party must have the opportunity to step into the "unreal" party's shoes and should not be prejudiced by undue delay).

(n7)Footnote 6. *Rogers v. Samedan Oil Corp., 308 F.3d 477, 484 (5th Cir. 2002)* (defendant waived real party in interest defense under Rule 17(a) by failing to assert it until day before trial); *Federal Deposit Ins. Corp. v. Bachman, 894 F.2d 1233, 1235 (10th Cir. 1990)* (failure to raise real party in interest defense in district court constituted waiver).

(n8)Footnote 7. *Sun Refining & Mktg. Co. v. Goldstein Oil Co., 801 F.2d 343, 345 (8th Cir. 1986)* (objection waived when raised after trial and defendant unable to articulate why it could not have been raised earlier).

(n9)Footnote 8. *See Fed. R. Civ. P. 8(c).*

(n10)Footnote 9. *Fed. R. Civ. P. 12(b)(1).*

(n11)Footnote 10. *Fed. R. Civ. P. 12(h)(3).*

(n12)Footnote 11. *Rogers v. Samedan Oil Corp., 308 F.3d 477, 483-484 (5th Cir. 2002) .*

(n13)Footnote 11.1. *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1431 (3d Cir. 1994)* (defendant's objection deemed waived due to delay and potential prejudice to plaintiff).

(n14)Footnote 12. *Weissman v. Weener, 12 F.3d 84, 85-86 (7th Cir. 1993)* (trial court may raise Rule 17(a) real party objection sua sponte).

(n15)Footnote 13. *Ensley v. Cody Resources, Inc., 171 F.3d 315, 318 (5th Cir. 1999) .*

(n16)Footnote 14. *Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1214 (7th Cir. 1993) .*

(n17)Footnote 15. *See Fed. R. Civ. P. 1.*

(n18)Footnote 16. *Fed. R. Civ. P. 17(a)(3); Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308-309 (5th Cir. 2001) .*

(n19)Footnote 17. *In re Dygert, 232 B.R. 155, 158 (D. Minn. 1999)* .

(n20)Footnote 18. *Fed. R. Civ. P. 17(a)(3)*; *Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308-309 (5th Cir. 2001)* .

(n21)Footnote 19. *Weissman v. Weener, 12 F.3d 84, 87 (7th Cir. 1993)* .

(n22)Footnote 20. *Price v. Crestar Sec. Corp., 44 F. Supp. 2d 351, 355-356 (D.D.C. 1999)* (court allowed 30 days for plaintiffs to join or substitute real party in interest or to have real party in interest ratify commencement of action).

(n23)Footnote 20.1. *Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308-309 (5th Cir. 2001)* .

(n24)Footnote 21. *Metal Processing, Inc. v. Humm, 56 F. Supp. 2d 455, 462 (D.N.J. 1999)* (action brought by owner of tug and barge seeking indemnity from shipper for settlement which owner's insurers paid to third party for lost cargo would not be dismissed even though owner of tug and barge was not the real party in interest--subsequent to trial insurers ratified all actions taken by owner past and future).

(n25)Footnote 22. *Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir. 2004)* .

(n26)Footnote 23. *Icon Group v. Mahogany Run Dev. Corp., 829 F.2d 473, 478 (3d Cir. 1987)* .

(n27)Footnote 24. *Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir. 2004)* .

(n28)Footnote 24.1. *Scheufler v. General Host Corporation, 126 F.3d 1261, 1272 (10th Cir. 1997)* (district court's refusal to allow ratification was not abuse of discretion because under Kansas law, property interests of landowner and tenant are distinct, and one may not recover damages based on another's interests).

(n29)Footnote 25. *Star Mfg. Co. v. Mancuso, 680 F. Supp. 1496, 1499 (D. Kan. 1988)* (ratification denied because it would result in assignment of tort claim in violation of state law).

(n30)Footnote 26. *See Associated Ins. Management Corp. v. Arkansas General Agency, Inc. 149 F.3d 794, 797 (8th Cir. 1998)* (rather than addressing jurisdiction, Rule 17(a)'s allowance of continuation of lawsuit not brought by real party in interest when real party in interest ratifies it, relates only to proper parties).

(n31)Footnote 27. *United States v. Thomas B. Bourne Assocs., 367 F. Supp. 919, 921-922 (E.D. Pa. 1973)* .

(n32)Footnote 28. *Travelers Ins. Co. v. Riggs, 671 F.2d 810, 814 (4th Cir. 1982)* ; *Crown Life Ins. Co. v. Am. Nat'l Bank & Trust Co. of Chicago, 830 F. Supp. 1097, 1100 (N.D. Ill. 1993)* .

(n33)Footnote 28.1. *Bank of Am., F.S.B. v. United States, 51 Fed. Cl. 500, 514-515 (2002)* (when suit is commenced by one who arguably has interest in enforcement of claim and real party in interest is later brought into litigation, joinder of real party in interest relates back for limitations purposes to date of original pleading).

(n34)Footnote 29. *Scheufler v. General Host Corp., 126 F.3d 1261, 1270 (10th Cir. 1997)* (purported assignee allowed to join as real party in interest when joinder (1) would not prejudice defendant, (2) would have no effect on jury's function because parties stipulated they would divide damages between assignor and assignee after trial, and (3) was appropriate to avoid forfeiture of just claims); *see Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 18 (2d Cir. 1997)* (corporation's motion to substitute real parties in interest on securities fraud claims should have been granted when claims and recovery sought were included in original complaint, and there was no indication that mistake as to legal effectiveness of assignment of claims to corporation was deliberate, tactical, or made in bad faith).

(n35)Footnote 30. Cover Note JHB92M10582079 v. *Nautronix, Ltd., 79 F.3d 480, 484 (5th Cir. 1996)* (if named plaintiffs were not real parties in interest at time original suit was filed, trial court's decision to permit substitution of

real parties required by Rule 17(a)).

(n36)Footnote 31. *Price v. Crestar Sec. Corp., 44 F. Supp. 2d 351, 355-356 (D.D.C. 1999)* .

(n37)Footnote 32. *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 672 n.10 (11th Cir. 1991)* .

(n38)Footnote 33. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 20-21 (2d Cir. 1997)* (corporation's motion to substitute selling shareholders as plaintiffs was in essence motion to substitute real parties in interest, and motion should have been granted when claims and recovery sought were included in original complaint, and when there was no evidence that mistake as to legal effectiveness of assignment of claims to corporation was deliberate, tactical, or made in bad faith).

(n39)Footnote 34. *Fed. R. Civ. P. 17(a)(3)*.

(n40)Footnote 35. *Corbin v. Blankenburg, 39 F.3d 650, 654 (6th Cir. 1994)* (substitution of successor trustee relates back under Rule 17(a)).

(n41)Footnote 36. *Fed. R. Civ. P. 15(c)* (rule of relation back of amendments).

(n42)Footnote 37. *Davis v. Piper Aircraft Corp., 615 F.2d 606, 610 (4th Cir. 1980)* (because relation back doctrine is outcome-determinative, federal rule controls).

(n43)Footnote 38. *Hanna v. Plumer, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* (in diversity cases, state law applies to substantive matters and federal rules apply to procedural issues).

(n44)Footnote 1. *Fed. R. Civ. P. 17(a)(1)*.

(n45)Footnote 2. *Fed. R. Civ. P. 17(a)(1)*; Committee Note to 1966 Amendments.

(n46)Footnote 3. *Fed. R. Civ. P. 17(a)(1)(A),(B)*; *Matter of Davis, 194 F.3d 570, 577-578 (5th Cir. 1999)* .

(n47)Footnote 4. *Krier-Hawthorne v. Beam, 728 F.2d 658, 661 (4th Cir. 1984)* (Virginia state law required resident administrator as real party in interest to bring personal injury action).

(n48)Footnote 4.1. *Fed. R. Civ. P. 17(c)(1)*.

(n49)Footnote 5. *Fed. R. Civ. P. 17(c)(2)*.

(n50)Footnote 6. *Fed. R. Civ. P. 17(a)(1)*.

(n51)Footnote 7. *Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996)* (in action for medical malpractice, guardian was real party in interest on behalf of ward who was incapacitated by stroke).

(n52)Footnote 8. *Fed. R. Civ. P. 17(a)(1)(D)*; *Mitchell Coal Co. v. United Mine Workers of America, 313 F.2d 78, 78 (6th Cir. 1963)* .

(n53)Footnote 9. *Naghiu v. Inter-Continental Hotels Group, Inc., 165 F.R.D. 413, 419-420 (D. Del. 1996)* (federal court located in Delaware applied substantive law of Delaware, including Delaware choice of law rules, to determine that Virginia law would control whether plaintiff was in fact bailee of cash when putative corporate bailor was based in Virginia; because plaintiff did not qualify as bailee under Virginia law, plaintiff failed to establish that he was real party in interest).

(n54)Footnote 10. *Fed. R. Civ. P. 17(a)(1)(E)*; *Green v. Lake of the Woods County, 815 F. Supp. 305, 307 (D. Minn. 1993)* .

(n55)Footnote 11. *Fed. R. Civ. P. 17(a)(1)(F)*; *Orthopedic & Sports Injury Clinic v. Wang Labs., 922 F.2d 220, 227 (5th Cir. 1991)* .

(n56)Footnote 12. *New Orleans Pub. Serv. v. United Gas Pipe Line, 732 F.2d 452, 466 n.30 (5th Cir. 1984)* , *cert. denied, 469 U.S. 1019 (1984)* (when parties have agreed that third person is to benefit from contract, third person has relationship necessary to sue for recovery of any contractual benefits).

(n57)Footnote 12.1. *Fed. R. Civ. P. 17(a)(1)(G)*; *see* [b], *below*.

(n58)Footnote 13. *Gross v. Hougland, 712 F.2d 1034, 1039 (6th Cir. 1983)* , *cert. denied, 465 U.S. 1025 (1984)* (receiver appointed for dissolved corporation was entitled to initiate lawsuit on behalf of corporation).

(n59)Footnote 14. *Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996)* (preclusive effect of the representative's suit furthers purpose of real party in interest rule to protect defendant, after representative wins, from subsequent suits by represented party who stands to ultimately benefit from litigation).

(n60)Footnote 15. *Fed. R. Civ. P. 17(a)(1)(G)*.

(n61)Footnote 15.1. *Fed. R. Civ. P. 17(a)(2)*.

(n62)Footnote 16. *29 U.S.C. § 185(b)* (under Labor Management Relations Act, labor union may sue or be sued as entity, and in behalf of employees whom it represents.

(n63)Footnote 17. *33 U.S.C. § 933(b)* (under Longshoremen's and Harbor Workers' Compensation Act, longshoremen's right to sue negligent third party for personal injury is assigned to employer under specified circumstances).

(n64)Footnote 18. *11 U.S.C. § 1109(b)* (any party in interest, including debtor, trustee, creditor, or equity security holder, may raise and appear on any issue in bankruptcy case).

(n65)Footnote 19. *45 U.S.C. § 51* (personal representative of deceased employee entitled to sue carrier for benefit of next of kin); *46 U.S.C. § 761* (authorizing personal representative of decedent for benefit of dependents to sue in admiralty for wrongful death on high seas); *Tex. Civil Practice & Rem. Code § 71.004(c)* (Texas wrongful death statute gives administratrix of estate right to sue for wrongful death on behalf of statutory beneficiaries).

(n66)Footnote 20. *See 40 U.S.C. § 270b(b)* (Miller Act requires naming United States in actions brought on behalf of labormen and materialmen against contractors for federal public buildings and works).

(n67)Footnote 21. *25 U.S.C. § 201* (action brought on behalf of Native American traders).

(n68)Footnote 22. *United States v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1994)* .

(n69)Footnote 23. *See United States v. SCS Business & Technical Institute, Inc., 173 F.3d 870, 883-884 (D.C. Cir. 1999)* (both claimant and United States were real parties in interest in qui tam action brought under False Claims Act, even though Act required that suit be brought in name of United States; procedural question of name in which suit must be brought is distinct from substantive legal question whether plaintiff has cause of action as real party in interest).

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Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART I. REAL PARTY IN INTEREST

2-13 Moore's Manual--Federal Practice and Procedure § 13.04

§ 13.04 Jurisdiction Is Not Based on Real Party in Interest Rulen*

[1] Real Party in Interest Is Procedural Question

A determination of the real party in interest, who is the person under the substantive law who possesses the right under the claim, is a procedural and prudential issue, and is governed by the Federal Rules of Civil Procedure. n1 It is not a jurisdictional issue, n2 and therefore may be waived. n3 The rule relates only to the procedural determination of the proper person to pursue a claim and the authority of the person to sue; however, in a diversity case, this determination must be made with reference to state substantive law. n3.1

Even if a person is the real party in interest with respect to a particular claim, the court must still have jurisdiction over the subject matter of the claim before it can hear it. In other words, the court must be able to exercise subject matter jurisdiction once the real party in interest has ratified or been joined or substituted in the action. n4 If multiple real parties in interest assert separate claims in the same action, each claim must satisfy subject matter jurisdiction independently. n5

[2] Real Party's Citizenship Does Not Necessarily Control for Diversity Jurisdiction Purposes

[a] Real Party Suing On Its Own Behalf

The determination of the parties' citizenship for purposes of diversity jurisdiction is not necessarily controlled by the citizenship of the Rule 17(a) real party in interest, who is the named party; rather, the citizenship of the real party controls provided that the real party is prosecuting the litigation on its own behalf, and not on behalf of another person. n1 The citizenship of a nominal party is disregarded for diversity purposes. Thus, when the question is which of various parties before the court should be considered in determining whether there is complete diversity of citizenship, the answer is generally determined by application of the "real party to the controversy" test: the "real parties to the controversy" are those persons who count for diversity purposes, n1.1 based on which persons could actually benefit, or be subject to liability, from the litigation. n1.2 Diversity must be complete between all of plaintiffs and all of defendants, but if one of the "nondiverse" parties is not a real party to the controversy and is a purely formal or nominal party, that party's presence may be ignored in determining jurisdiction. n2

[b] Real Party Suing On Behalf of Another Person

In contrast to a real party suing in its own behalf, when a real party is suing in a representative capacity, the citizenship of the represented party controls. n2.1 For example, the following scenarios illustrate the rule:

- In suits where a statutorily defined real party brings suit on behalf of someone else, the citizenship of the represented party and not the representative controls. Although the legal representative is the real party in interest, that party is deemed to have the citizenship of the one represented in the action. n3

- In actions by a decedent's estate, the decedent's citizenship controls. Although the decedent's legal representative is the real party in interest, the real party is deemed to have the citizenship of the decedent. n4

- When a real party brings an action on behalf of a person lacking legal capacity, the infant's or incompetent's citizenship controls. As a procedural matter, executors, administrators, and guardians may sue in their own names without joining the party for whose benefit the action is brought. With respect to diversity the legal representative of an infant or incompetent is deemed to be a citizen only of the same state as the represented party, the infant or incompetent. n4.1 Furthermore, the citizenship of a guardian and ward is determined as of the date the guardianship became effective, and the guardian may not establish a new domicile for the ward unless it is shown that the ward had capacity to form the intent to establish a new domicile for diversity purposes. n5

[3] Prohibition Against Collusion to Create Diversity Jurisdiction

[a] Application of Anti-Collusion Statute

A federal district court may not exercise jurisdiction over any civil action in which any party has been improperly or collusively made or joined to invoke the jurisdiction of the court by assignment or other means. n1 This federal anti-collusion statute is aimed at preventing parties from manufacturing diversity jurisdiction to inappropriately channel ordinary business litigation into the federal courts. n2

Collusion in regard to a question of the real party in interest usually arises in the context of an assignment. n2.1 Thus, even though an assignee who holds substantive rights under a valid assignment usually acquires real party status, the assignee will not have real party status if the assignment was merely a subterfuge to obtain federal diversity jurisdiction. In such a case, the citizenship of the assignee will not determine whether diversity of citizenship or alienage jurisdiction exists. n3

[b] Factors Considered by Court to Determine Collusion

Once the question of jurisdiction is raised, the party asserting diversity jurisdiction has the burden of proving the assignment was not collusive. The court may not rely on any single factor to determine whether an assignment was designed to manufacture federal jurisdiction but instead must consider the totality of the circumstances. n4

In making a determination of whether collusion has occurred in an assignment context, the courts consider, among other things, the assignee's lack of a previous connection with the claim assigned, the remittance by the assignee to the assignor of any recovery, whether the assignor actually controls the conduct of the litigation, the timing of the assignment, the lack of any meaningful consideration for the assignment, and the underlying purpose of the assignment. n5 In other words, one of the principal considerations is whether the assignee has received a authentic "stake" in the litigation. n6

[c] Effect of Determination of Collusion

When a court determines that a party has colluded to create diversity jurisdiction, the court will only deny the party a federal forum. The violation does not invalidate an otherwise valid assignment. n7 Furthermore, the anti-collusion statute prohibits collusive assignments intended to create federal jurisdiction but does not specifically apply to findings of collusion, when the collusive action is used in an attempt to destroy, rather than to create, federal jurisdiction. Consequently, some courts have acknowledge that a plaintiff may thwart a defendant's effort to remove a case from state to federal court by various methods, including assigning the claim to a plaintiff whose citizenship is not diverse from that of the defendant. n8

On the other hand, some courts have refused to relinquish jurisdiction when the plaintiff makes a partial assignment to a co-citizen of the defendant solely to defeat federal jurisdiction. n9 Thus, it has been held that federal courts are not required to permit collusive acts to defeat subject matter jurisdiction. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionFamily Law & Probate ExceptionsCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.13 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 48-49 (2d Cir. 2005)* .

(n3)Footnote 2. *Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193-194 (2d Cir. 2003)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Ensley v. Cody Resources, Inc., 171 F.3d 315, 320 (5th Cir. 1999)* (objection to fact that quantum meruit claim belonged to plaintiff's corporation rather than to plaintiff was procedural and not jurisdictional and could be waived).

(n5)Footnote 3.1. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 48 (2d Cir. 2005)* .

(n6)Footnote 4. *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 668 n.3 (11th Cir. 1991)* .

(n7)Footnote 5. *HB Gen. Corp. v. Manchester Partners, 95 F.3d 1185, 1196 (3d Cir. 1996)* .

(n8)Footnote 1. *National Ass'n of State Farm Agents, Inc. v. State Farm Mut. Auto. Ins. Co., 201 F. Supp. 2d 525, 528-529 (D. Md. 2002)* .

(n9)Footnote 1.1. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 163 L. Ed. 2d 415, 2005 U.S. LEXIS 9037, at *20-*21 (2005)* .

(n10)Footnote 1.2. *See* 17th *St. Assocs., LLP v. Markel Int'l Ins. Co., 373 F. Supp. 2d 584, 594-595 (E.D. Va. 2005)* .

(n11)Footnote 2. *Kuntz v. Lamar Corp., 385 F.3d 1177, 1183 (9th Cir. 2004)* ; *Certain Interested Underwriters at Lloyd's v. Layne, 26 F.3d 39, 42 (6th Cir. 1994)* .

(n12)Footnote 2.1. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 163 L. Ed. 2d 415, 2005 U.S. LEXIS 9037, at *24 (2005)* ; *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d 154, 161 (2d Cir. 2001)* .

(n13)Footnote 3. *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1152-1153* (N.D. Cal. 1998 (distributors' association which filed suit seeking declaratory judgment against manufacturer was not "real party to the controversy" involving manufacturer's contracts with distributors; therefore, diversity jurisdiction would be determined based on citizenship of distributors); *National Assn. of Realtors v. Natl. Real Estate Assn., 894 F.2d 937, 941-942 (7th Cir. 1990)* (in action by association of realtors on behalfof its members charging National Real Estate Association with fraud in sale of malpractice insurance to its members, complete diversity could not exist if any individual member was co-citizen of defendant).

(n14)Footnote 4. *Northern Trust Co. v. Bunge Corp., 899 F.2d 591, 594 (7th Cir. 1990)* ; *see James v. Three Notch Medical Center, 966 F. Supp. 1112, 1115-1116 (M.D. Ala. 1997)* (court lacked diversity jurisdiction in wrongful death action, even though personal representative who brought action was citizen of Florida, when decedent and all defendants were citizens of Alabama).

(n15)Footnote 4.1. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 163 L. Ed. 2d 415, 2005 U.S. LEXIS 9037, at *24-*25 (2005)* ; *see also Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 449 (5th Cir. 2003)* .

(n16)Footnote 5. *Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996)* (in medical malpractice action brought by guardian on behalf of ward, evidence supported finding that ward lacked requisite mental capacity to change his domicile for diversity purposes when stroke left ward completely mentally and physically incapacitated and unable to understand or conduct his affairs, and ward's son testified that his father did not participate at all in decision to move him to another state).

(n17)Footnote 1. *28 U.S.C. § 1359*; *Piermont Heights v. Dorfman, 820 F. Supp. 99, 100 (S.D.N.Y. 1993)* (if person takes action other than assignment, such as merger, for purpose of manufacturing diversity jurisdiction, and without a legitimate business purpose apart from the creation of such jurisdiction, *28 U.S.C. § 1359* is violated).

(n18)Footnote 2. *See Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1158-1159 (N.D. Cal. 1998)* ; *Airlines Reporting Corp. v. S & N Travel, 58 F.3d 857, 862 (2d Cir. 1995)* (cautious eye with which courts view assignments creating diversity ensures that parties do not inappropriately channel ordinary tort and contract litigation, essentially disputes of a local nature, into federal courts).

(n19)Footnote 2.1. *See Deajess Med. Imaging, P.C. v. Allstate Ins. Co., 381 F. Supp. 2d 307, 310-311 (S.D.N.Y. 2005)* .

(n20)Footnote 3. *Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 829-830, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969)* (in action involving Panamanian corporation that assigned its claim against another alien to Texas lawyer who paid one dollar for claim and agreed to give assignor Panamanian corporation 95 percent of recovery, Court held that jurisdiction failed because assignment violated statutory prohibition on collusive joinder, even though assignment was valid under state law).

(n21)Footnote 4. *Airlines Reporting Corp. v. S and N Travel, Inc., 58 F.3d 857, 861 n.4 (2d Cir. 1995)* .

(n22)Footnote 5. *Airlines Reporting Corp. v. S & N Travel, 58 F.3d 857, 863 (2d Cir. 1995)* ; *see also Toste Farm Corp. v. Hadbury, Inc., 70 F.3d 640, 643 (1st Cir. 1995)* (to determine whether improper or collusive assignment has occurred, courts will consider whether parties have shown an independent business justification for assigning claim to diverse party); *Pasquotank Action Council v. City of Virginia Beach, 909 F. Supp. 376, 383 (E.D. Va. 1995)* (court must consider whether there was nominal or no consideration involved in transaction and interest retained by assignor); *Haskin v. Corporacion Insular de Seguros, 666 F. Supp. 349, 353-354 (D.P.R. 1987)* (assignee must have some

independent, legitimate interest in dispute that predated assignment and was not complete stranger to transaction).

(n23)Footnote 6. *See Deajess Med. Imaging, P.C. v. Allstate Ins. Co., 381 F. Supp. 2d 307, 311 (S.D.N.Y. 2005)* (court found no collusion when assignee plaintiffs owned claims in issue and if they were not successful in litigation, they would not be compensated for services they had provided).

(n24)Footnote 7. *28 U.S.C. § 1359*; *see Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 829-830, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969)* (in action involving Panamanian corporation that assigned its claim against another alien to Texas lawyer who paid one dollar for claim and agreed to give assignor Panamanian corporation 95 percent of recovery, Court held that jurisdiction failed because assignment violated statutory prohibition on collusive joinder, even though assignment was valid under state law).

(n25)Footnote 8. *Verschell v. Fireman's Fund Ins. Co., 257 F. Supp. 153, 154 (S.D.N.Y. 1966)* (court allowed assignment to defeat diversity of citizenship jurisdiction).

(n26)Footnote 9. *Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181, 186 (5th Cir. 1990)* (stating that because of their similarity, assignments which destroy diversity should be analyzed under the same standard as assignments which create diversity; that is, issue of whether assignment was improperly or collusively made is to be resolved as merely simple question of fact).

(n27)Footnote 10. *McClanahan v. Snodgrass, 319 F. Supp. 913 (N.D. Miss. 1970)* (plaintiffs could not assign nominal interest in cause of action to individual with same citizenship as defendants in order to destroy diversity of citizenship and defeat right of defendants to trial in federal court); *see also Attorneys Trust v. Videotape Computer Prods., 93 F.3d 593, 599 (9th Cir. 1996)* (Taiwanese corporation's assignment solely for collection of action to California collection agency to pursue action against California corporation, in which assignee received twelve percent contingent fee, did not defeat jurisdiction).

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Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART I. REAL PARTY IN INTEREST

2-13 Moore's Manual--Federal Practice and Procedure §§ 13.05-13.09

[Reserved]

§§ 13.05[Reserved]

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART II. CAPACITY TO SUE OR DEFEND ON CLAIM

2-13 Moore's Manual--Federal Practice and Procedure § 13.10

§ 13.10 General Principles Relating to Capacity to Litigaten*

The capacity of an individual or entity to sue or be sued means the legal capability or authority of a particular individual or entity to use, or to be brought into, the courts of a particular forum. n1 The most common examples of deficiencies that take away from a person legal capacity are minority n2 and insanity. Other capacity limitations arise from laws that place limits on the capacity of foreign corporations, n3 and on the capacity of unincorporated association to sue or be sued as an entity. n4

A lack of capacity to sue in federal court does not mean that a person will never have an enforceable remedy in federal court. Thus, even though a district court should dismiss a federal civil action with respect to a person who lacks capacity to sue under a state law, the dismissal should be without prejudice in those instances when it is necessary to preserve a claim that may later develop. Thus, in the case of lack of capacity due to minority, the dismissal should be without prejudice so that the minor may bring the action on reaching the age of majority. n5

Capacity to sue is distinct from real party in interest status, n6 in that capacity is a broader concept, aimed at assessing a party's general ability or power to sue or be sued. n7 The real party in interest inquiry is more specific, aimed at assessing whether the party is the holder of the right to be vindicated in a particular case. While all parties including plaintiffs and defendants must have capacity, only those asserting claims must be real parties in interest. n8

Capacity is also distinguishable from the doctrine of standing. Standing refers to the requirement that a party have a legally protectible and tangible interest at stake in the litigation. Parties with capacity to sue may not have standing to prosecute a particular action. n9

The capacity provision of Rule 17 prescribes which law determines a party's capacity. n10 As a general rule, whether a person has capacity is determined by state law in federal court, even though in particular instances federal law controls the question of capacity. n11 Capacity does not affect the substantive issue of choice of law. n12

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Maysonet-Robles v. Cabrero, 323 F.3d 43, 51 (1st Cir. 2003)* .

(n3)Footnote 2. *See Debellis v. Kulp, 166 F. Supp. 2d 255, 283 (E.D. Pa. 2001)* .

(n4)Footnote 3. *Domino Media, Inc. v. Kranis, 9 F. Supp. 2d 374, 380-381 (S.D.N.Y. 1998)* .

(n5)Footnote 4. *Bradbury Co. v. Teissier-Ducros, 387 F. Supp. 2d 1167, 1176 (D. Kan. 2005)* .

(n6)Footnote 5. *Johns v. County of San Diego, 114 F.3d 874, 877-878 (9th Cir. 1997)* .

(n7)Footnote 6. *Marston v. American Employers Ins. Co., 439 F.2d 1035 (1st Cir. 1971)* (whether executor, administrator, or guardian has power to sue is not affected by real party in interest rule, because that issue is question of capacity; therefore, even though Rule 17(a) provides that executor may sue on behalf of estate, that provision does not apply in local jurisdictions that have contrary laws).

(n8)Footnote 7. *Poole v. Wolke, 58 F.R.D. 110, 112 (E.D. Wis. 1973)* .

(n9)Footnote 8. *See Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1153* (N.D. Cal. 1998.

(n10)Footnote 9. *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 670 (11th Cir. 1991)* .

(n11)Footnote 10. *See Fed. R. Civ. P. 17(b).*

(n12)Footnote 11. *Fed. R. Civ. P. 17(b)*; *see Kivalina Relocation Planning Comm. v. Teck Cominco Alaska, Inc., 227 F.R.D. 523, 526 (D. Alas. 2004)* ; *Fed. R. Civ. P. 81(e).*

(n13)Footnote 12. *See Valedon Martinez v. Hosp. Presbiteriano, 806 F.2d 1128, 1133-1134 (1st Cir. 1986)* .

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2-13 Moore's Manual--Federal Practice and Procedure § 13.11

§ 13.11 Procedural Considerations Regarding Capacityn*

[1] Objection Required to Lack of Capacity

Capacity defects are procedural and not jurisdictional; this means that the court may make rulings regarding a person even though the person lacks capacity to sue or be sued. n1 Claimants are not required to allege capacity. n2 The issue of capacity is raised only if an objecting party raises capacity by specific negative averment, n3 which must include any supporting details that are peculiarly within the pleader's knowledge. n4 If no party raises the issue of capacity, the court may deem the defense waived. n5 Because the determination of capacity is made according to the law of where the federal court sits, n6 capacity may be determined by the court before choice of law. Also, in addition, capacity does not affect the choice of what substantive law to apply to a case. n7

Furthermore, a timely capacity objection does not automatically require immediate dismissal by the court. The party lacking capacity may correct the defect by complying with applicable law, or by substituting a party with capacity. Such curative measures relate back to the time of filing. n8

[2] Loss of Capacity During Litigation

As one court explained, capacity is not only the power to bring an action but also the power to maintain it. Consequently, if a party loses capacity while litigation is pending, the court must dismiss the suit, n1 provided that the opposition objects. n2 For example, a representative's appointment automatically terminates when the person represented is relieved of the disability that led to its need for a representative. n3 Assuming that the claim survives the disability as a matter of substantive law, however, the action readily can be revived. Furthermore, if the capacity defect can be cured, the court should allow the cure, rather than dismiss. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 17.20, 17.28 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 82*; *see Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 194 (2d Cir. 2003)* ; *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1153 (N.D. Cal. 1998)* .

(n3)Footnote 2. *Fed. R. Civ. P. 9(a).*

(n4)Footnote 3. *Tesh v. United States Postal Serv., 215 F. Supp. 2d 1220, 1225-1226 (N.D. Okla. 2002)* .

(n5)Footnote 4. *Fed. R. Civ. P. 9(a)* (governing pleading of capacity).

(n6)Footnote 5. *Swaim v. Moltan Co., 73 F.3d 711, 718 (7th Cir. 1996)* , *cert. denied, 517 U.S. 1244 (1996)* ; see *Masood v. Saleemi, 2009 U.S. App. LEXIS 2170, at **5-**6 (9th Cir. Jan. 20, 2009)* (unpublished opinion; citing **Moore's Federal Practice**).

(n7)Footnote 6. *See Fed. R. Civ. P. 17(b)(3).*

(n8)Footnote 7. *Masood v. Saleemi, 2009 U.S. App. LEXIS 2170, at **6 (9th Cir. Jan. 20, 2009)* (unpublished opinion; citing **Moore's Federal Practice**).

(n9)Footnote 8. *Garbincius v. Boston Edison Co., 621 F.2d 1171, 1174 (1st Cir. 1980)* .

(n10)Footnote 1. *Mather Constr. Co. v. United States, 475 F.2d 1152, 1155 (Ct. Cl. 1973)* (corporation declared incompetent and case dismissed when corporation was suspended under state law for failure to pay taxes).

(n11)Footnote 2. *See* [1], *above.*

(n12)Footnote 3. *JuShu Cheung v. Dulles, 16 F.R.D. 550, 553 (D. Mass. 1954)* (when child reaches age of majority, child was no longer incapacitated individual and party should bring motion requesting court to remove representative).

(n13)Footnote 4. *Buckhannon Bd. & Care Home v. W. Va. Dept. of Health, 19 F. Supp. 2d 567, 575 (N.D. W. Va. 1998)* .

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PART IV Parties
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2-13 Moore's Manual--Federal Practice and Procedure § 13.12

§ 13.12 Capacity of Individual Acting in His or Her Own Behalfn*

[1] Capacity Controlled by Law of Domicile

When not acting in a representative capacity, the capacity of an individual to sue or to be sued is determined by the law of the individual's domicile. n1 An individual's domicile is determined as of the time of filing. n2 A person acquires a domicile within a particular state by being physically present in the state and either having the intention to make his or her home there indefinitely or having the absence of an intention to make his or her home elsewhere. n3 Thus, an individual may have only one domicile at a time. n4

A person may change domiciles only by establishing physical presence in another state and forming the intent to make that state the person's home. The intent part of the test is based on an individual's subjective intent to stay in that state and not to go elsewhere or to return to the old domicile. n5 The domicile test for capacity is the same test used to determine an individual's citizenship for diversity jurisdiction purposes. n6

The purpose of Rule 17(b)'s focus on domicile is to foster uniform treatment of an individual's capacity in all federal courts. Thus, an individual who has legal capacity under the law of the person's domicile state has capacity in every federal district court in the United States. The law of a foreign forum state has no relevance to an individual's competence to litigate. n7

[2] Exception for Suits Based on Federal Law

When a claim is based on a federal right, the rule that the law of the domicile controls capacity may be preempted by the federal law. For example, some courts have held that the policies underlying the federal civil rights statutes mandate exceptions to the rule that an individual's capacity is determined by the law of the state of the person's domicile. Thus, when a state law strips a prisoner of capacity to sue, courts have held that the prisoner is nonetheless guaranteed a right to be heard in federal court on claims of civil rights violations. n1 Similarly, suits to compel arbitration under the Federal Arbitration Act may be brought by persons or entities lacking capacity under state law. n2

This exception may also apply in cases when the defendant is asserting a lack of capacity to be sued. Thus, in a Title VII action against individual county commissioners alleging racial discrimination in hiring, the district court allowed

the plaintiffs to proceed against individual defendants based on civil rights policy grounds even though the local capacity law provided that only the county had the capacity to be sued. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b)(1)*; *see Thomas v. Humfield, 916 F.2d 1032, 1034 (5th Cir. 1990)* (citing **Moore's Federal Practice**); *Bowen v. Rubin, 213 F. Supp. 2d 220, 223 (E.D.N.Y. 2001)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Valedon Martinez v. Hosp. Presbiteriano, 806 F.2d 1128, 1132-1134 (1st Cir. 1986)* (in diversity medical malpractice action, domicile tested at time suit is filed).

(n4)Footnote 3. *Stifel v. Hopkins, 477 F.2d 1116, 1120 (6th Cir. 1973)* .

(n5)Footnote 4. *See Cassens v. Cassens, 430 F. Supp. 2d 830, 834 (S.D. Ill. 2006)* (also noting that intent to change domicile may itself be affected by capacity).

(n6)Footnote 5. *See Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996)* (stroke rendered ward incapable of having capacity to form intent to establish new domicile; therefore, guardian could not establish new domicile for ward).

(n7)Footnote 6. *Certain Interested Underwriters at Lloyd's v. Layne, 26 F.3d 39, 41 (6th Cir. 1994)* (citizenship of natural person is equated with natural person's domicile for purposes of determining diversity).

(n8)Footnote 7. *Urbano v. News Syndicate Co., 358 F.2d 145, 146 (2d Cir. 1966)* , *cert. denied, 385 U.S. 831 (1966)* (under conflict-of-law principles, capacity to sue of plaintiff who is incarcerated for life is determined not by law of state in which prisoner is incarcerated, but by law of state in which prisoner was domiciled before incarceration).

(n9)Footnote 1. *McCollum v. Mayfield, 130 F. Supp. 112, 116 (N.D. Cal. 1955)* (in action by prisoner against state officials for violation of federal constitutional rights, court permitted plaintiff to sue despite civil death statute of plaintiff's domicile which stripped prisoner of capacity while incarcerated).

(n10)Footnote 2. *O & Y Landmark Assocs. of Va. v. Nordheimer, 725 F. Supp 578, 581 (D.D.C. 1989)* (District of Columbia partnership without right under District law could sue in its own name under Federal Arbitration Act).

(n11)Footnote 3. *Wright v. Manatee County, 717 F. Supp. 1493, 1495-1497 (M.D. Fla. 1989)* ; *but see Dean v. Barber, 951 F.2d 1210, 1215 (11th Cir. 1992)* (refusing to extend partnership or other unincorporated association exception of Rule 17(b)(1) to cover county sheriff's department; applying Alabama law, court held that defendant county sheriff's department lacked capacity to be sued and hence federal civil rights claims against it were properly dismissed).

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PART IV Parties
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2-13 Moore's Manual--Federal Practice and Procedure § 13.13

§ 13.13 Capacity of Person Acting in Representative Capacityn*

[1] Capacity Controlled by State Law Where Federal Court is Located

When a party sues in a representative capacity, its capacity to sue on behalf of its members is determined by the law of the state in which the federal district court sits, regardless of whether the party is a corporation or an individual. n1 Because the determination of capacity is made according to the law of where the federal court sits, capacity may be determined by the court even before any choice of law determination. n1.1 The general rule that capacity of a representative is determined by the law of the state in which the federal district sits applies to all fiduciary representatives, including trustees, executors, administrators, guardians and public officers. In its state of appointment, a representative designated by statute has capacity to sue on behalf of the represented person or entity. n2 This rulesacrifices uniform federal court treatment in deference to local law governing capacity of representatives. Thus, a valid state court judgment appointing a fiduciary is binding on the federal court, which may not question the validity the state court's appointment. n3

By statute, some states allow fiduciaries appointed in other states, such as executors, administrators, and guardians, to sue and be sued in their state. Of the states that allow such foreign representatives to sue and be sued in their state, many require the foreign representatives to comply with local qualification requirements. In such states, the foreign representative has capacity to litigate claims arising under the state law in a federal court sitting in that state only if that representative complies with the conditions of the forum state law. n4

[2] Exception for Suits Based on Federal Law

If a claim arises under federal law, federal statutes may govern the issue of representative capacity. n0.1 Thus, if a federal statute specifically grants a representative an enforceable right, the representative seeking to enforce or defend against that right has capacity notwithstanding contrary forum state law. n1 However, in such cases, the representative must still comply with any forum state capacity requirements with respect to any claim arising under state law that are not preempted by federal law. Thus, a representative may have capacity to sue in a foreign forum under a federal law but lack capacity to sue the same claimant on a state law claim. n2

Once a claim is properly brought against a party, that party's capacity is established, and properly joined parties may

assert all claims against their opponents. In other words, once the capacity rule is satisfied, federal joinder rules apply without further inquiry into a party's capacity to assert a particular claim under state law. For example, if applicable state law recognizes the capacity of a fiduciary representative to defend but not to assert claims, the rules permit the fiduciary to assert a counterclaim notwithstanding local law. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.22 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b)(3).*

(n3)Footnote 1.1. *Masood v. Saleemi, 2009 U.S. App. LEXIS 2170, at **5 (9th Cir. Jan. 20, 2009)* (unpublished opinion; citing **Moore's Federal Practice**).

(n4)Footnote 2. *Rives v. Franklin Life Ins. Co., 792 F.2d 1324, 1329 (5th Cir. 1986)* (under Rule 17(b), trusteeappointed in locale of deceased husband's estate had capacity to recover life insurance policy benefits).

(n5)Footnote 3. *Hembree v. Tinnin, 807 F. Supp. 109, 111 (D. Kan. 1992)* (in wrongful death action, holding that district court could not review validity of appointment of decedent's father as administrator of estate).

(n6)Footnote 4. *See, e.g., Davis v. Piper Aircraft Corp., 615 F.2d 606, 609-610 (4th Cir. 1980)* (in wrongful death action brought in North Carolina by executor appointed in Alabama, foreign administrator lacked capacity to prosecute or defend absent qualification as ancillary administrator).

(n7)Footnote 0.1. *Fed. R. Civ. P. 17(b)(3)*

(n8)Footnote 1. *See, e.g., Metropolitan Paving Co. v. Int'l Union of Operating Engineers, 439 F.2d 300, 303 (10th Cir. 1971)* (corporation may maintain action against labor union for violation of federal labor law regardless of forum law); *AM Properties Corp. v. GTE Products Corp., 844 F. Supp. 1007, 1011-1012 (D.N.J. 1994)* (CERCLA preempts state statutes regarding capacity of dissolved corporation).

(n9)Footnote 2. *Adidas America, Inc. v. National Collegiate Athletic Association, 40 F. Supp. 2d 1275, 1287 (D. Kan. 1999)* (although unincorporated associations could be sued in their own names for purposes of enforcing federal right, such associations could not be sued for violations of state law).

(n10)Footnote 3. *Fed. R. Civ. P. 17(b)(3)(A)*; *see Fed. R. Civ. P. 18* (joinder).

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PART IV Parties
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2-13 Moore's Manual--Federal Practice and Procedure § 13.14

§ 13.14 Capacity of Public Officersn*

[1] Capacity of State and Federal Officers

The capacity of an officer of a state, or of a political subdivision of a state, is determined by the law of the state in which the district court is held. n1 In determining what the state law is, the federal court should follow intermediate appellate decisions unless convinced that the highest state court would rule otherwise. n2 To determine the capacity of an officer or entity to sue or be sued under the state law under which the official position or entity was created, the federal court may also rely on precedential decisions of the federal courts that have made that capacity determination under the applicable state law. n3

While the capacity of state and local officers is determined by the law of the state in which the federal court is held, the capacity of federal officers is determined by the federal statutes that confer federal subject matter jurisdiction over cases by and against federal officers. n4 These statutes are a "safety net" that gives district courts general subject matter jurisdiction over actions brought by or against the United States; other special jurisdictional provisions of other federal statutes may also give district courts jurisdiction over some cases brought by the United States. These grants of subject matter jurisdiction also provide federal officers with the requisite capacity to engage in litigation. n5

[2] Effect of Immunity on Official and Individual Capacity

With respect to officers' immunity from suit, statutes may protect a public officer from being sued in an official capacity; however, they do not necessarily protect that same public officer from being sued in a personal, individual capacity for acts performed in an official capacity. n1 Furthermore, when an officer is sued the circumstances may require that the court apply different standards in the case, one standard to determine possible liability of the officer in his or her official capacity and one standard for liability in his or her individual capacity.

To establish liability of an officer in his or her official capacity in a civil rights case under *42 U.S.C. § 1983*, for example, the plaintiff must demonstrate a direct causal link between an unconstitutional governmental policy or custom, and the alleged constitutional deprivation of the plaintiff's civil rights. On the other hand, to establish liability of an officer in his or her individual capacity, the plaintiff must demonstrate that the officer personally caused or participated in an alleged constitutional deprivation, which the plaintiff may establish by demonstrating that the officer acted with a

deliberate or reckless disregard of the plaintiff's constitutional rights or that the conduct causing the constitutional deprivation occurred at the officer's direction or with the officer's knowledge and consent. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & Officials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 17.23, 17.27 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b)*; *Dean v. Barber, 951 F.2d 1210, 1214-1215 (11th Cir. 1992)* (refused to extend "partnership or other unincorporated association" exception of Rule 17(b)(1) to cover county sheriff's department; applying Alabama law, court held that defendant county sheriff's department lacked capacity to be sued, and hence federal civil rights claims against it were properly dismissed).

(n3)Footnote 2. *See Cooper v. American Airlines, Inc., 149 F.2d 355, 357 (2d Cir. 1945)* .

(n4)Footnote 3. *Jacobs v. Port Neches Police Dept., 915 F. Supp. 842, 844 (E.D. Tex. 1996)* (federal court relied on decisions of other federal courts to determine that, under Texas law, county sheriff and police departments generally are not legal entities capable of suing or being sued absent express action by superior corporation--which was county, in case of sheriff's department).

(n5)Footnote 4. *28 U.S.C. §§ 1345, 1346.*

(n6)Footnote 5. *U.S. v. American Druggists' Ins. Co., 627 F. Supp. 315, 319 (D. Md. 1985)* (court had subject matter jurisdiction over action under *28 U.S.C. § 1345*, which confers on district courts general subject matter jurisdiction over suits commenced by United States or by federal agencies or officers authorized to sue by federal statute).

(n7)Footnote 1. *Hafer v. Melo, 502 U.S. 21, 23-29 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)* .

(n8)Footnote 2. *Glass v. Fairman, 992 F. Supp. 1040, 1043-1044 (N.D. Ill. 1998)* (in civil rights action based on alleged inadequate medical treatment of plaintiff's burns incurred while plaintiff was in custody, single instance of allegedly improper medical care was not enough to satisfy requirement of showing governmental policy leading to constitutional deprivation; also, because defendant was not supervisory official responsible for operation of county medical facility at which prisoner suffered allegedly inadequate medical treatment, defendant could not be held liable in his individual capacity).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART II. CAPACITY TO SUE OR DEFEND ON CLAIM

2-13 Moore's Manual--Federal Practice and Procedure § 13.15

§ 13.15 Capacity of Receiversn*

[1] Capacity of Receiver Appointed by State Determined by Law of Forum State

Receivers are fiduciaries appointed to represent entities, such as inoperative business organizations and estates. n1 The capacity of a state-appointed receiver is determined by the law of the state in which the district court is held. n2 Whether litigating federal or state claims, only the law of the state in which the case is pending, and not the state in which the receiver was appointed, may grant capacity. n3 This treatment is consistent with that of fiduciaries such as trustees and executors when suing in their state of appointment, where Rule 17 also adopts local law with respect to issues of capacity. n4

[2] Capacity of Federal Receiver Determined by Federal Law

The capacity of a receiver appointed by a federal court to sue and be sued is governed by the federal statutes discussed in the following paragraphs. n1 Federal receivers have capacity to sue or be sued without ancillary appointment in a district court. n2

Section 754 specifically provides that a receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts is vested with complete jurisdiction and control of all such property with the right to take possession of the property after giving bond as required by the court; the receiver has capacity to sue in any district without ancillary appointment, and may be sued with respect to the property as provided in Section 959. n3

Section 959 provides that receivers may be sued without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with the property. Such actions are subject to the general equity power of the court so far as necessary to the ends of justice but may not deprive a party of the right to trial by jury. n4 It has been held that a receiver appointed by a court in a foreign country also has capacity to sue in a United States federal district court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipReceivershipsGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversPowers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.24 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Gross v. Hougland, 712 F.2d 1034, 1038 (6th Cir. 1983)* (receiver may be viewed as corporate counterpart of administrator; receiver is appointed to represent defunct corporation and may, for example, be responsible for liquidating remaining assets of dissolved corporation).

(n3)Footnote 2. *Fed. R. Civ. P. 17(b)(3).*

(n4)Footnote 3. *Gross v. Hougland, 712 F.2d 1034, 1040 (6th Cir. 1983) .*

(n5)Footnote 4. *See Fed. R. Civ. P. 17(b)(3)*; *see also Estate of Butler v. Maharishi Univ. of Mgmt., 460 F. Supp. 2d 1030, 1036 (S.D. Iowa 2006) .*

(n6)Footnote 1. *Fed. R. Civ. P. 17(b)(3)(B)*; *see 28 U.S.C. § 754*; *28 U.S.C. § 959(a).*

(n7)Footnote 2. *See Fed. R. Civ. P. 66*; *see also 28 U.S.C. § 754*; *28 U.S.C. § 959(a).*

(n8)Footnote 3. *28 U.S.C. § 754.*

(n9)Footnote 4. *28 U.S.C. § 959(a).*

(n10)Footnote 5. *Mentink v. World Time Corp., 131 F.R.D. 210, 211 (S.D. Fla. 1990)* (rationale of Rule 17(b) and *28 U.S.C. § 754* extended to authorize suit without ancillary appointment brought by receiver who had been appointed by High Court of Holland).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
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2-13 Moore's Manual--Federal Practice and Procedure § 13.16

§ 13.16 Capacity of Business Entitiesn*

[1] Capacity of Corporation Acting on Its Own Behalf

[a] Capacity Generally Determined by Law of State of Corporation

When a corporation is acting on its own behalf, its capacity to sue or be sued is determined by the law under which it was organized. n1 Thus, if the corporation is federally incorporated, federal law determines its capacity to sue or be sued. n2 For a private domestic corporation, this provision usually refers to the state in which the company was incorporated.

Subject to local statutes which deny court access to businesses not qualified to do business in the state, a corporation with capacity in its state of incorporation has capacity in every federal district court in the United States. n3 Thus, under Rule 17(b),a corporation organized in State A, having capacity to sue or be sued in the courts of State A, has like capacity in a federal court in State B and State C, irrespective of any restriction on capacity placed on it by the laws of those states. The rule that the capacity of a corporation to sue or be sued must be determined by the law of the state under which it was organized is thus applicable to suits in all federal courts, unless the action is based on some specific federal statute that overrides Rule 17(b). n4

If a corporation has dissolved, it has capacity to litigate only if permitted by the law of its state of incorporation. n5 Similarly, a corporation that has had its charter revoked or forfeited is subject to the capacity rules of its state of incorporation. n6 Such former entities have capacity only if the law of the state of incorporation so provides. Most states limit the capacity of a dissolved corporation, often providing that it may sue or be sued only for a particular, specified period after dissolution. Some states treat defunct corporations as unincorporated associations. n7

[b] Capacity of Corporation Doing Business in Foreign State

In diversity of citizenship cases, corporate capacity is subject to valid statutory provisions of the forum state that deny court access to businesses not qualified to do business in the state; n8 these are known as "door closing" provisions. n9 For example, a corporation incorporated in State A with capacity to sue under the law of State A, might bring suit in a federal court in State B invoking diversity of citizenship jurisdiction. If State B has a statute that denies foreign

corporations the right to sue in State B unless they have qualified to do business in State B, the foreign corporation may not sue in State B's federal court, even though it would otherwise have capacity under Rule 17. In other words, such a corporation would have capacity but no enforceable right. n10

[c] Federal Statute May Prevail Over State Capacity Law

Public policy considerations forming the basis of a federal statute, such as those underlying federal environmental statutes, may provide that the statute will prevail over conflicting state-of-incorporation restrictions on corporate capacity. Thus, even a corporation that lacks capacity to be sued under state law may be sued in a defensive capacity for violations of federal hazardous waste regulations. Most of these cases arise under the Comprehensive Environmental Response Compensation and Liability Act (CERLCA), which imposes joint and several liability on any party involved in the transportation, storage or disposal of toxic waste pollutants. n11 If state capacity law prevailed, a corporation could avoid liability for creating toxic environmental damage pollution by dissolving. n12 However, most courts recognize that if a corporation's assets have been completely distributed, nothing will be recovered from the corporation under CERCLA. n13

[2] Capacity of Corporation Acting in Representative Capacity

When a corporation is acting in a representative capacity, such as when acting as a trustee, executor, administrator, or guardian, its capacity to sue and be sued is determined by the law of the state in which the federal district court is located. n1 This rule also applies when the corporation is acting on behalf of its members. n2 Thus, while the capacity provision of Rule 17 distinguishes between individuals acting as representatives and individuals acting on their own behalf, it makes no such similar distinction regarding corporations. n3

[3] Capacity of Government Corporations and Entities

The federal government forms federal corporations to act as its agencies and toperform many of its functions. The federal government sometimes even forms corporations under state law to perform federal governmental tasks. n1 State and local governments also incorporate agencies for the same purpose. Rule 17 treats such entities in the same way as private corporations; therefore, the capacity of a government corporation is determined by the law under which it as organized. n2

The capacity of a corporation created by federal statute or chartered by another federal corporation is determined by the law under which it is formed. If neither the legislation nor the charter itself contains a restriction on capacity, a court will presume that the federal corporation may sue and be sued in an unrestricted manner. n3 Similarly, the capacity of an entity charted by a state is determined by the state's law creating the entity. n4

Political subdivisions of a state or local government have capacity only if the law creating them recognizes them as separate legal entities having capacity to sue or be sued. n5 The District of Columbia is treated as a state, so a government corporation formed under the general corporation law of the District of Columbia has the same capacity as any other corporation formed under that law. n6

[4] Capacity of Partnerships and Other Unincorporated Entities

[a] Capacity to Litigate State Law Claims

Partnerships are treated differently than corporations because, while a corporation has a distinct legal personality and distinct interests, partnerships and other unincorporated associations remain mere collections of individuals. n1 Partnerships and other unincorporated associations have the capacity to litigate claims in federal court that arise under state law if allowed and as determined by the law of the state in which the district court is held. Thus, some states allow unincorporated associations, such as partnerships and labor unions, to sue and be sued in their common name, and they

have capacity in the federal courts of that state. n2 However, other states follow the common-law rule that prohibits an unincorporated entity to sue or be sued as an entity and requires the joinder of all its members. This issue is determined according to the law of the state where the action is pending and not the law of the state in which the association was formed. n3

[b] Capacity to Litigate Federal Claims

If the law of the state where the district court is located provides that a partnership or other unincorporated association lacks capacity, the entity may still sue or be sued in its common name for the purpose of enforcing, for or against the entity, a substantive right existing under the Constitution or laws of the United States. n4 Under this rule, a partnership or other unincorporated association may sue or be sued on a federal claim in its common name regardless of state law. n5

Whether a federal claim is involved is an inquiry similar to the evaluation of whether a case "arises under" federal law for purposes of invoking federal question jurisdiction. Although the provision applies broadly to a "partnership or other unincorporated association," it does not apply to every entity that is not incorporated; for example, the rule does not apply to an unincorporated governmental entity. n6 The question of what constitutes a partnership or unincorporated association with capacity to bring a federal claim is governed by federal law. n7

The Federal Rules of Civil Procedure allow class action suits by unincorporated associations that would otherwise be prohibited under state law; thus, Rule 23.2 provides that an unincorporated association may bring suit in its common namethrough the named class representatives. n8 Although Rule 23.2 does not confer capacity on an association that it does not otherwise have, it provides the association with another method to litigate its claims through a representative. If the unincorporated association qualifies for treatment as a class and can name as representatives only members who are of diverse citizenship from the opposing party, the association may bring suit in federal court. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposePowersLitigationBusiness & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsFormationCivil ProcedurePartiesCapacity of PartiesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 17.26 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b)(2).*

(n3)Footnote 2. *American National Red Cross v. S.G., 505 U.S. 247, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992) .*

(n4)Footnote 3. *United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 746 (8th Cir. 1986) , cert. denied, 484 U.S. 848 (1987)* (capacity of corporation to sue or be sued is determined by the law under which it is organized).

(n5)Footnote 4. *Citizens Electric Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995)* .

(n6)Footnote 5. *Deerfield Specialty Papers v. Black Clawson Co., 751 F. Supp. 1578, 1581 (S.D.N.Y. 1990)* (because Delaware law permits dissolved corporation period in order to wind up affairs after dissolution, counterclaim against dissolved corporation for contract work in quantum meruit permitted).

(n7)Footnote 6. *F.D.I.C. v. Heidrick, 812 F. Supp. 586, 592-593 (D. Md. 1992)* , *aff'd on other grounds, 995 F.2d 471 (4th Cir. 1993)* (summary judgment granted because Maryland law provided that Maryland corporation with revoked charter lacked capacity to sue).

(n8)Footnote 7. *Committee for Idaho's High Desert v. Yost, 92 F.3d 814, 819-820 (9th Cir. 1996)* (corporation with forfeited charter had capacity as unincorporated association, even though corporation with forfeited charter lacked capacity under state law).

(n9)Footnote 8. *Woods v. Interstate Realty Co., 337 U.S. 535, 538, 69 S. Ct. 1235 (1949)* .

(n10)Footnote 9. *Angel v. Bullington, 330 U.S. 183, 190-191, 67 S. Ct. 657 (1947)* (courts sitting in diversity must apply state "door-closing" statute prohibiting individual's recovery in state court of deficiency judgment under mortgage).

(n11)Footnote 10. *Woods v. Interstate Realty Co., 337 U.S. 535, 538, 69 S. Ct. 1235 (1949)* (in action where state statute barred foreign corporations from bringing in-state suits if not qualified to transact business in forum state, court held that when one is barred from recovery in state court, one is likewise barred in federal court).

(n12)Footnote 11. *See 42 U.S.C. § 9607.*

(n13)Footnote 12. *AM Properties Corp. v. GTE Prods. Corp., 844 F. Supp. 1007, 1011-1012 (D.N.J. 1994)* (CERCLA prevails over state statutes on capacity of dissolved corporation).

(n14)Footnote 13. *Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301-1302 (W.D. Mich. 1991)* (while CERCLA liability may generally be imposed on dissolved corporation, dissolved corporation whose assets have been fully distributed is beyond reach of CERCLA); *see Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1285, 1291 (E.D. Va. 1993)* (distinguishing between "dead" and "dead and buried" corporations, court is compelled to dismiss dissolved corporation that in fact proves that it is dead and buried).

(n15)Footnote 1. *Fed. R. Civ. P. 17(b).*

(n16)Footnote 2. *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1153 (N.D. Cal. 1998)* .

(n17)Footnote 3. *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1153 (N.D. Cal. 1998)* (regardless of whether party is corporation or individual, when party acts in representative capacity, its capacity is determined by law of state in which federal district court sits); *Clarkson Co., Ltd. v. Rockwell Int'l Corp., 441 F. Supp. 792, 795-796 (N.D. Cal. 1977)* (Rule 17(b) has generally been construed to eliminate distinction between individuals acting in representative capacity and corporations acting in representative capacity, with result that question of capacity of any entity acting as representative is governed by law of state in which court presides).

(n18)Footnote 1. *American Nat'l Red Cross v. S.G., 505 U.S. 247, 258-260, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992)* (discussion of functions of federally chartered corporations).

(n19)Footnote 2. *Fed. R. Civ. P. 17(b).*

(n20)Footnote 3. *Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 394-396, 59 S. Ct. 516, 83 L. Ed. 784 (1939)* (governmental corporation held liable for failure to provide adequate food and water to livestock under bailment contract; court found that governmental corporations organized by other federal corporations have capacity in absence of contrary charter provision).

(n21)Footnote 4. *Hoisington v. County of Sullivan, 55 F. Supp. 2d 212, 214 (S.D.N.Y. 1999)* (federal courts must look to state law to determine whether state or local government department may be sued; in this case, municipal department was not amenable to suit under state law which provided that department of municipal entity is merely

subdivision of municipality and has no separate legal existence); *Hearn v. Hudson, 549 F. Supp. 949, 952 n.1 (W.D. Va. 1982)* (under state law, city police department was merely organizational division of city and not independent entity, and therefore lacked capacity to be sued).

(n22)Footnote 5. *Hughson v. County of Antrim, 707 F. Supp. 304, 306 (W.D. Mich. 1988)* (county sheriff's department and prosecutor's office lacked capacity to be sued because sheriff and prosecutor are individual, constitutional officers elected according to state constitution); *Latino Political Action Comm. v. City of Boston, 581 F. Supp. 478, 484 (D. Mass. 1984)* (city council did not have capacity to be sued in suit challenging election district plan because under state law city council lacked its own legal identity).

(n23)Footnote 6. *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549, 570, 42 S. Ct. 386, 66 L. Ed. 762 (1922)* .

(n24)Footnote 1. *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc., 23 F. Supp. 2d 1151, 1155 (N.D. Cal. 1998)* .

(n25)Footnote 2. *Fed. R. Civ. P. 17(b)(3)*; *see Creek v. Village of Westhaven, 80 F.3d 186, 191-192 (7th Cir. 1996)* (Illinois law permits partnership to sue or be sued in own name); *Roby v. Corporation of Lloyd's, 796 F. Supp. 103, 110 (S.D.N.Y. 1992)* (New York law allows suit in common name of insurance association).

(n26)Footnote 3. *Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass., 900 F.2d 476, 477 (5th Cir. 1990)* (under Rule 17(b), capacity of unincorporated association to sue or be sued is determined by law of state in which district court is located); *Country Club Assocs. Ltd. Partnership v. F.D.I.C., 918 F. Supp. 429, 438 (D.D.C. 1996)* (under Rule 17(b), capacity to sue of partnership or unincorporated association is determined by law in district where the court sits; in District of Columbia, partnership is not jural entity capable of suing or being sued).

(n27)Footnote 4. *Fed. R. Civ. P. 17(b)(3)(A)*.

(n28)Footnote 5. *See Bowers v. NCAA, 9 F. Supp. 2d 460, 472 (D.N.J. 1998)* (unincorporated association, including collegiate athletic association, could be sued in its common name for purpose of enforcing against it substantive right existing under federal law or Constitution).

(n29)Footnote 6. *Fed. R. Civ. P. 17(b)(3)(A)*; *see, e.g., Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992)* (in action by prisoner alleging constitutional rights violations, court dismissed claim because Rule 17(b)(1) did not apply to unincorporated sheriff's department that lacked capacity under Alabama law).

(n30)Footnote 7. *Committee for Idaho's High Desert v. Yost, 92 F.3d 814, 820 (9th Cir. 1996)* .

(n31)Footnote 8. *Fed. R. Civ. P. 23.2*.

(n32)Footnote 9. *See Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass., 900 F.2d 476, 478 (1st Cir. 1990)* (Rule 23.2 provides method for association to sue or be sued through representative when state law prevents association from doing so in its own name).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
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2-13 Moore's Manual--Federal Practice and Procedure § 13.17

§ 13.17 Incapacity Due to Infancy or Incompetencyn*

[1] Effect of Incapacity of Infants and Incompetents

[a] Incapacity Allows Appointment of Representative

Under Rule 17(b)(1), an individual's capacity to sue or be sued when not acting in a representative capacity is determined by the law of the individual's domicile. n1 If that law denies capacity to the individual on the grounds of infancy or incompetency, the litigation of the individual's rights in federal court is subject to the provisions of Rule 17(c). n2 Thus, whenever an individual lacks capacity to sue or be sued under the law of the individual's domicile because the individual is underage or is otherwise incompetent, the provisions of Rule 17(c) become effective, and the minor or incompetent person must sue or be sued through his or her legal representative n3 or, if he or she has no legal representative, through a next friend or guardian ad litem. n3.1

In particular, if the minor or other incompetent person has a representative appointed by law, such as a guardian, committee, conservator, or other similar fiduciary, that representative may sue or defend on behalf of the minor or incompetent person. n4 A minor or incompetent who has no properly appointed representative may sue by a next friend or by a guardian ad litem. n5 If a minor or incompetent is sued and is not represented in the action, the court must appoint a guardian ad litem or make some other proper order to protect the minor or incompetent. n6

The function of the representative or guardian ad litem is to make decisions concerning the litigation on behalf of the minor or incompetent person, n7 and not necessarily to represent the person as an attorney. Furthermore, a parent, representative, or guardian ad litem who is not an attorney may not appear as an attorney in the litigation. n8

If a general guardian fails or refuses to sue or defend in a particular case, or if there is a conflict of interest between the minor or incompetent person and the guardian or next friend, federal courts may appoint a guardian or attorney ad litem to protect the interest of the represented party in the case. n9

[b] Court's Decision to Protect Persons Lacking Capacity Is Discretionary

The requirement of Rule 17(c) that the district court must protect the interests of persons lacking legal capacity does not

mean that the court must appoint a representative whenever requested by a party. n9.1 The federal court may make any other order as it deems proper for the protection of the infant or incompetent person. n9.2 The court has discretion to determine if it is necessary to appoint a guardian, and the court need only inquire whether the incompetent's interests are adequately protected. n10 Thus, when a request for a guardian ad litem is made, some action must be taken on the record before a court proceeds on the merits of the claims, but the court need not necessarily appoint a guardian before actually deciding the merits. n11

In some states and in certain circumstances, cases sometimes consider unborn children "infants" whom the court may protect by representation by an appointed guardian. However, the discretion of the court in such situations depends entirely on the facts, and thus involves the protection of the interests of a specific unborn child, for example, under a will, and not unborn children generally. n12

[2] Capacity of Representatives of Infants and Incompetents

The capacity of a guardian is determined by the law of the state of the residence of the ward. n1 Unless it is the forum state, the state of appointment has no relevance to a guardian's capacity. Foreign courts may require a general guardian to meet local qualification requirements. n2

However, guardians ad litem appointed by a federal court under the protective provisions of Rule 17(c) n3 need not meet local qualification requirements when representing a person lacking legal capacity in a foreign forum. On the other hand, if a person simply initiates an action in federal court on behalf of an incompetent as the incompetent's "next friend," without benefit of a formal appointment by a federal court as guardian ad litem, the purported next friend who brings suit bears the burden of proving his or her suitability. This suitability is determined by three general criteria that are independent of the law of the forum state: (1) an adequate explanation of why the minor or incompetent may not bring the suit himself or herself; (2) a true dedication to the best interests of the minor or incompetent represented by the next friend; and (3) some significant relationship with the minor or incompetent. n4

A rule that governs default and default judgments imposes special protection for persons lacking legal capacity. A court may not enter a default judgment against an infant or incompetent person unless the person is represented in the action by a general guardian, committee, conservator, or other such representative who has appeared in the action. n5 Therefore, even if a party meets all of the default rule's general requirements, the clerk may never enter default judgment against an infant or incompetent, n6 and the judge may not do so unless a representative of the infant or incompetent has appeared. Consequently, the court has a responsibility to assess whether entry of default judgment against an infant or incompetent is appropriate. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawGuardiansGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 17.21, 17.25 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b)(1).*

(n3)Footnote 2. *Thomas v. Humfield, 916 F.2d 1032, 1035 (5th Cir. 1990) , aff'd without opinion, 32 F.3d 566 (5th Cir. 1994)* (citing **Moore's Federal Practice** to effect that term "incompetent person" in Rule 17(c) refers to person without capacity to litigate under law of individual's state of domicile, and therefore incorporates concept of

incompetent as defined under Rule 17(b)).

(n4)Footnote 3. *Fed. R. Civ. P. 17(c)(1).*

(n5)Footnote 3.1. *Fed. R. Civ. P. 17(c)(2).*

(n6)Footnote 4. *Fed. R. Civ. P. 17(c)(1)(A)-(D).*

(n7)Footnote 5. *Fed. R. Civ. P. 17(c)(2)*; *see Friends for All Children v. Lockheed Aircraft Corp., 533 F. Supp. 895, 900-901 (D.D.C. 1982)* (appointment of guardian ad litem for orphaned minors injured in airplane crash).

(n8)Footnote 6. *Fed. R. Civ. P. 17(c)(2).*

(n9)Footnote 7. United States v. 30. *64 Acres of Land, 795 F.2d 796, 805 (9th Cir. 1986)* (guardian ad litem may act on behalf of ward and may make all appropriate decisions in course of specific litigation; guardian may make binding contracts for retention of counsel and expert witnesses, and may settle claims on behalf of ward).

(n10)Footnote 8. *Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 230-237 (3d Cir. 1998)* (right to proceed pro se does not give non-lawyer parents right to represent their children in proceedings before federal court nor did Congress intend to create rights under Individuals With Disabilities Education Act for parents that would entitle parents to represent children in IDEA actions).

(n11)Footnote 9. *Fed. R. Civ. P. 17(c)(2)*; *see Hull v. United States, 53 F.3d 1125, 1126-1128 (10th Cir. 1995)* .

(n12)Footnote 9.1. *Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1309 (11th Cir. 2001)* .

(n13)Footnote 9.2. *Fed. R. Civ. P. 17(c)(2).*

(n14)Footnote 10. *Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001)* (district court was not required to appoint guardian ad litem when no conflict of interest existed between minor and her mother who acted as her representative); *see Fed. R. Civ. P. 17(c)(2).*

(n15)Footnote 11. *Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1309 (11th Cir. 2001)* (when court set up mechanism through which plaintiff could select guardian ad litem, court was protecting plaintiff, and fact that plaintiff herself had delayed selection of guardian did not preclude summary judgment on merits before guardian was actually appointed).

(n16)Footnote 12. *See, e.g., Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 565 (D.C. Cir. 1966)* (in action by settlor of spendthrift trust to modify trust, court appointed guardian ad litem on behalf of additional persons, including those unborn, who could be members of class of heirs at time of distribution).

(n17)Footnote 1. *Last v. Elwyn, Inc., 935 F. Supp. 594, 596 (E.D. Pa. 1996)* (in diversity cases, diversity of parties is based on citizenship of ward, not guardian.).

(n18)Footnote 2. *Mann v. De Moss, 323 F. Supp. 1126, 1127-1128 (S.D. Iowa 1971)* (foreign fiduciary's failure to file authenticated copy of appointment at commencement of action or before statute of limitation expired, as required by state law, was fatal defect that prevented fiduciary's representation).

(n19)Footnote 3. *Fed. R. Civ. P. 17(c)(2)*; *see* [1], above.

(n20)Footnote 4. *T.W. v. Brophy, 954 F. Supp. 1306, 1309 (E.D. Wis. 1996)* , *aff'd, 124 F.3d 893 (7th Cir. 1997)* .

(n21)Footnote 5. *Fed. R. Civ. P. 55(b)(2).*

(n22)Footnote 6. *Fed. R. Civ. P. 55(b)(1).*

(n23)Footnote 7. *Fed. R. Civ. P. 55(b)(2).*

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART II. CAPACITY TO SUE OR DEFEND ON CLAIM

2-13 Moore's Manual--Federal Practice and Procedure §§ 13.18 through 13.29

[Reserved]

§§ 13.18[Reserved]

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART III. SUBSTITUTION OF PARTY

2-13 Moore's Manual--Federal Practice and Procedure § 13.30

§ 13.30 Nature and Purpose of Substitutionn*

[1] Distinction Between Substitution and Amendment

If the circumstances of a party change to the extent that the party cannot continue in the litigation, for example, if the party dies, but the party's claim is not extinguished by the change, the court may order substitution of another proper party or parties. n1 It is vital to distinguish between substitution under Rule 25 and an amendment that brings in new parties under Rule 15.

Under Rule 25, substitution applies only to those cases where all of the proper parties have been joined in the action, but because of death, incompetency, transfer of interest by a party, or a person's departure from public office, another party may be substituted. n2 On the other hand, amendment of parties under Rule 15 allows the addition of parties who should or might have been joined originally, or may permit replacement of a party in or against whom the cause of action really lies. n3

The distinction may be illustrated by the following examples. After an action has been brought against an employee who has caused an injury in the course of employment, the employee becomes incompetent. The replacement of the incompetent employee by a personal representative is a question of substitution that is governed by Rule 25. n4 On the other hand, if the plaintiff in such a case determines that the defendant's employer should also be held accountable, the question of whether or not the employer may be joined or may take the employee's place as the defendant is a question of amendment under Rule 15. n5

The distinction between amendment and substitution is important because after substitution, the substituted party steps into the shoes of the person replaced and occupies the same relative position in the continued action as the person replaced. n6 Incontrast, when a party comes into the action by an amended pleading, the cause of action as to the new party may or may not be an entirely new cause of action. n7 Therefore, the court has liberal discretion with respect to amendments; but, because the new party assumes the same position as the old in a substitution, with the same rights, when leave is sought for substitution of a party, the scrutiny must be more careful. n8

[2] Substitution Rule Does Not Affect Substantive Rights

Rule 25 is procedural only and does not affect the substantive law related to a claim in federal court. For example, Rule 25(a) does not affect the law specifying which actions survive the death of a party. This is a function of substantive law and is not determined by Rule 25(a). n1

To determine the substantive rights involved in or as a condition to substitution in a diversity case, the district court must look to state law. n2 In an action based on rights created by federal law, United States statutes and federal common law will determine whether an action abates or survives. n3 Thus, when Congress is silent concerning the survival of an action based on a federal statute, whether the action survives the death of the plaintiff is governed by federal common law. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* §§ 25.02, 25.10, 25.11 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 25(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 25(a)-(d)*; *see International Ass'n of Machinists v. Estate of Dickey, 808 F.2d 483, 485-486 (6th Cir. 1987)* (when decedent was never made party to action on guaranteed obligation, court should not have substituted his estate as defendant after he died).

(n4)Footnote 3. *United States v. Travelers Ins. Co., 40 F.R.D. 316, 317 (D. Colo. 1966)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 25(b).*

(n6)Footnote 5. *Cf. United States v. Travelers Ins. Co., 40 F.R.D. 316, 317 (D. Colo. 1966)* (citing **Moore's Federal Practice**; plaintiff was permitted to amend by making indemnity company defendant, rather than insurance company, when insurance company had treated case as if it were in fact surety on bond named in complaint, and plaintiff had learned true facts as to identity of surety only after period expired to file new action naming indemnity company as defendant).

(n7)Footnote 6. *Brook v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995)* (substitute's status in litigation is same as thatof original parties; substitute takes over without any other change in status of case); *Corbin v. Blankenburg, 39 F.3d 650, 654 (6th Cir. 1994)* , *cert. denied, 513 U.S. 1192 (1995)* (when original trustee in litigation resigned, subject matter jurisdiction was not lost because once it validly exists among original parties, it remains intact after substitution; furthermore, when successor fiduciary steps into shoes of predecessor, substitution relates back to time when original party had standing to sue).

(n8)Footnote 7. *See Hackner v. Guaranty Trust Co., 117 F.2d 95, 99 (2d Cir. 1941)* , *cert. denied, 313 U.S. 559 (1941)* .

(n9)Footnote 8. *United States v. Travelers Ins. Co., 40 F.R.D. 316, 317 (D. Colo. 1966)* .

(n10)Footnote 1. *Fed. R. Civ. P. 25(a)(1).*

(n11)Footnote 2. *First Idaho Corp. v. Davis, 867 F.2d 1241, 1242-1243 (9th Cir. 1989)* (Rule 25(a) is purely procedural; substantive state statute that determines whether judgment may be entered against deceased defendant

controls in action based on state law that was removed to federal court).

(n12)Footnote 3. *Asklar v. Honeywell, Inc., 95 F.R.D. 419 (D. Conn. 1982)* (whether claim under Age Discrimination in Employment Act abates or is subject to revival is question of federal substantive law and is not governed by Rule 25(a); court held in this case that under federal law, deceased employee's action survives death and is subject to revival by his or her legal representative).

(n13)Footnote 4. *Hawes v. Johnson & Johnson, 940 F. Supp. 697, 699-700 (D.N.J. 1996)* (because Congress was silent concerning survival of action based on Age Discrimination in Employment Act, common law controlled and stated that employee's claims for compensatory damages in nature of emotional injuries under Act survived his death; however, employee's claims for liquidated and punitive damages under Act did not survive his death).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART III. SUBSTITUTION OF PARTY

2-13 Moore's Manual--Federal Practice and Procedure § 13.31

§ 13.31 Substitution Does Not Affect Jurisdiction and Venuen*

If a new party comes into an action, subject matter jurisdiction, diversity of citizenship, personal jurisdiction, and venue may all be potentially affected. However, a court's decision to grant substitution under Rule 25 generally does not impact on any of these issues, because these issues are determined at the time the action is commenced. n0.1 First, substitution has no effect on subject matter jurisdiction. Thus, if jurisdiction exists at the time the action is commenced, it is not divested by a later substitution. n1 Even if substitution destroys complete diversity of citizenship, the court retains subject matter jurisdiction provided that proper jurisdiction was previously established by the original parties.

The rationale for this principle was articulated by a court which stated that were this not so, the owners of property could merely transfer legal ownership of the assets from one shell corporation to another in a different jurisdiction, putting a party whose initial suit satisfied the jurisdictional requirements to the immense burden of chasing the involved assets from courtroom to courtroom. n2 The Supreme Court has observed that diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action. A contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation. n3

Personal jurisdiction is another potential issue when a substitution occurs because a court must acquire jurisdiction over the person to be substituted. n4 However, the applicable rules contemplate service and personal jurisdiction over substituted parties. n5 Thus, when a qualified person who is a stranger to litigation wants to be substituted for a deceased party, under Rule 25(a)(1) he or she may voluntarily submit to personal jurisdiction by merely serving the motion and notice of hearing on all parties as provided in Rule 5. n6 When a present party to the litigation wants to substitute a stranger to the litigation, such as an administrator or executor of a deceased party, Rule 25(a)(1) states that the motion for substitution, together with the notice for hearing, must be served on persons not parties in the manner provided in Rule 4 for the service of a summons, n7 and may be served in any judicial district. n8

As is the case with jurisdiction, substitution does generally not have any effect on venue. If venue is proper at the time of the institution of the suit by the original parties, venue rules will not be violated my by later substitution under Rule 25. Just as joinder of a new party does not disturb the district court's jurisdiction, courts have stated that there is no logical rationale for concluding that joinder in any way destroys venue that was properly established initially. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 25.33 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P., 421 F. Supp. 2d 87, 95 (D.D.C. 2006)* (citing **Moore's Federal Practice**).

(n3)Footnote 1. *Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426, 428-429, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* ; *Smith v. Sperling, 354 U.S. 91, 77 S. Ct. 1112, 1119, 1 L. Ed. 2d 1205 (1957)* .

(n4)Footnote 2. *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1263 (Fed. Cir. 1985)* .

(n5)Footnote 3. *Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426, 428-429, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* .

(n6)Footnote 4. *See* LiButti v. United states, *178 F.3d 114, 123-124 (2nd Cir. 1999)* .

(n7)Footnote 5. *Select Creations, Inc. v. Paliafito Am., Inc., 852 F. Supp. 740, 765 (E.D. Wis. 1994)* (if court has personal jurisdiction over predecessor in interest, once successor liability is established, personal jurisdiction over successor in interest necessarily exists).

(n8)Footnote 6. *Fed. R. Civ. P. 25(a)(3)*; *see Fed. R. Civ. P. 5.*

(n9)Footnote 7. *Ransom v. Brennan, 437 F.2d 513, 518-519 (5th Cir. 1971)* , *cert. denied, 403 U.S. 904 (1971)* (Rule 4 service on executrix was essential in order to acquire personal jurisdiction over her).

(n10)Footnote 8. *Ransom v. Brennan, 437 F.2d 513, 518 (5th Cir. 1971)* , *cert. denied, 403 U.S. 904 (1971)* (Rule 25(a)(1) service on executor of named defendant is valid although made beyond territorial limits of state in which district court is held).

(n11)Footnote 9. *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1264 (Fed. Cir. 1985)* (citing **Moore's Federal Practice**).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
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2-13 Moore's Manual--Federal Practice and Procedure § 13.32

§ 13.32 Substitution Due to Death of Partyn*

[1] Discretion of Court to Order Substitution on Party's Death

If a party dies and the claim is not extinguished by the death, the court has discretion to order substitution of the proper party or parties in place of the deceased. n1 By its terms, Rule 25(a)(1) provides for the dismissal of the deceased party unless a motion to substitute has been made within 90 days of the filing of a statement noting death. However, the nature of Rule 25(a)(1) is completely discretionary, as indicated by its use of the discretionary term "may." n2

Because of the extensive discretion that has been placed in the trial court under Rule 25(a)(1), courts vary greatly in the manner in which they treat a party's failure to substitute. Some decisions related to substitution due to death depend on whether the death is of a plaintiff or defendant, and others depend on the circumstances of the particular case. For example, when the plaintiff has died, and a representative of the plaintiff fails to move for substitution within 90 days after defendant files a statement noting death, courts uniformly exercise their discretion and dismiss the action, unless the party has shown some excuse. n3 In contrast, when a defendant dies and the statement noting death is filed, but the motion for substitution has not been made, some courts continue to treat the decedent as a party, n4 while others dismiss the entire action or the claims brought by or against the decedent. n5

Sometimes, in the interest of justice or to promote more efficient litigation, a court will order a substitution on the death of a party even if no party has filed a statement noting death or a motion to substitute. Although there is no express provision in the rules for the court to substitute a party on its own initiative, some courts have exercised their discretion under Rule 25(a)(1) to permit substitution outside the parameters of the rule. n6 Other courts have required strict compliance with the rule. n7

It is important to remember that Rule 25(a), as a procedural rule, controls over any state statutes that provide for a substitution procedure. n8

When an action is brought against a defendant in both the defendant's individual and official capacities, both Rule 25(a) and Rule 25(d) come into play. n9 Thus, with respect to the official capacity claim, the successor is automatically substituted as a party without a motion, as provided in Rule 25(d)(1). n10 However, in order to continue the action

against the deceased defendant in his or her individual capacity, a motion must be made to substitute a representative of the deceased defendant under Rule 25(a)(1). n11

[2] Procedure for Substitution Applicable Only When Party's Death Occurs After Initiation of Action

The substitution procedure under Rule 25(a) applies only if the person to be replaced died after the service and filing of the complaint, n1 because the rule expressly limits its application to circumstances when a person dies after being made a party to the suit. n2 If it is discovered that a party died prior to commencement of the action, the proper procedure is a motion to amend under Rule 15(a) to add as a party the estate of the deceased party. For example, in one case the court denied the motion to substitute because the representative of the deceased defendant did not have knowledge of the institution of the action within the statute of limitation period. Accordingly, the amendment did not relate back under Rule 15(c) to the date of the original filing. n3

[3] Requirement of Filing and Service of Statement Noting Death

[a] Requirement Is First of Two Steps

When a plaintiff or defendant dies during the pendency of an action, the court may order substitution of the proper parties when a two-step process is followed as specified in Rule 25(a): filing and service of statement noting death on the record, n.01 and then filing and service of the motion for substitution. n1 The first of the two steps has two parts: n2 it requires that a party file "statement noting death" on the record, and then to serve the statement on the parties in the same manner as the motion for substitution. n3 Thus, the statement noting death must be served on a representative who has been appointed for the estate of the deceased party in the manner specified in Rule 4. n3.1

The primary significance of the filing and service of the statement noting death is that it commences the 90-day time limit to file a motion of substitution. n3.2 Casual or informal reference to death in other court papers is generally insufficient to trigger the 90-day period within which to file a motion for substitution. Even if the parties have actual knowledge of the death of a party, the 90-day period does not commence unless and until a formal statement noting death is made on the record in the district court in accordance with Rule 25(a). Thus, it has been held that the fact that parties were aware of plaintiff's death from the course of appellate proceedings, the 90-day period under Rule 25(a)(1) was not triggered unless a formal statement noting death was made on the record. n4 Additionally, a court has the discretion to grant an extension of the 90-day time period, either before or after the 90-day period has elapsed. n5

[b] Persons Entitled to File Statement Noting Death

Even though Rule 25 provides that a motion for substitution must be made by any party or by the successors or representatives of the deceased party, the rule makes no statement regarding who may file and serve the statement noting death. n6 Therefore, courts have concluded that the statement noting death need not be filed by a party or formal representative of the decedent. It has been determined that Rule 25 contains no such restriction on who may file the statement noting death. Therefore, for example, it has been held that a decedent's widow who was not a party to the action and who had not been appointed representative of the decedent's estate was entitled to file the statement noting death and trigger the 90-day limitation period of Rule 25. n7

On the other hand there is authority for the proposition that the attorney for a deceased party may not file the statement noting death, on the rationale that the death of the client severs the attorney-client relationship. n8 However, such authority is the minority view, and many other district courts have permitted cases to be dismissed after the decedent's attorney filed either the statement noting death or the motion to substitute. n9

[c] Name of Substitute for Deceased May Be Required

There is no express requirement in Rule 25(a) that the statement noting death identify the representative or successor

who may be substituted as a party in place of the decedent. n10 Consequently, at least one circuit has held that it is not necessary for the statement noting death to name the representative of the estate or the successor of the decedent, and that the rule requires only that the statement noting death be served on the involved parties. The court opined that if there is a problem identifying the legal representative of the estate, a motion may be brought under *Fed. R. Civ. P. 6(b)* to enlarge the time to file the motion for substitution. n11

On the other hand, some courts have held that the statement noting death is insufficient unless it identifies the representative or successor who may be substituted as a party in place of the decedent. n12 This discretionary requirement is imposed by courts apparently to expedite the administration of the litigation. n13

[d] Required Service

Before it will trigger the 90-day limitation period of Rule 25, the statement notingdeath on the record must be served on a representative who has been appointed for the estate of the deceased party. n14 The cases generally strictly construe the provisions of Rule 25(a) as to the specific manner in which service of the statement noting death must be performed; if service has not been effected in accordance with the rule, the 90-day period does not commence. n15 However, courts have held that the personal representative of estate may waive a challenge that service was ineffective when it accepts service as it was performed. n16

The most common error in service occurs when a party merely serves the attorney of the decedent. Rule 25(a), through Rule 4, requires service on non-party successors or representatives of deceased in the manner provided for service of summons. n17 Courts have held that strict compliance with this rule is necessary to alert the nonparty to the consequences of death for a pending suit and to signal the need for action to preserve the claim if the nonparty desires. n18 In addition to insuring that the decedent's representative has notice of the litigation, another reason for rejecting service merely on the decedent's attorney is premised on the law of agency. Because the attorney's power to act ceases with the client's death, counsel has no technical authority to continue or terminate an action on behalf of a dead client. n19

[4] Requirement of Filing and Service of Motion for Substitution

[a] Requirement Is Second of Two Steps

The second prerequisite to a court's order of substitution is that within 90 days of the filing and service of the statement noting death, a party or the decedent's successor or representative must file and serve the motion for substitution. n1 Under the rule, the length of time that a party may delay in filing and serving the statement noting death is irrelevant, provided that the motion for substitution is filed within 90 days after the completion of filing and service of the statement noting death. Thus, in one case, the court of appeals reversed a trial court's denial of a motion for substitution on the grounds that the case had been commenced 14 years earlier; the court of appeals held that the trial court should have allowed the substitution for the named plaintiff because the motion for substitution was timely made in response to the defendants' filing of the statement noting death. While the court of appeals recognized the district court's frustration and the long delay in prosecution of the action that led to the decision rejecting substitution, the court of appeals stated that the motion should have been granted because it was made within the rule's time limits. n2

However, on an appropriate showing, a court may dismiss an action under Rule 41 for failure to prosecute when there has been a delay in moving to substitute. n3

A motion to substitute need only be made within 90 days of filing the statement noting death. The actual substitution order itself need not be entered within 90 days. n4 Furthermore, the court has discretion to allow enlargement of the 90 days before the expiration of the time for good cause shown, or at any time on a showing of excusable neglect. n5

[b] Court Has Discretion to Allow Extension of Time to File Motion

Unless the motion for substitution is made within 90 days after the statement noting death is served, the action must be dismissed as to the deceased party. n6 Based on strict interpretation of this express language of the rule, some courts have dismissed actions when the plaintiff fails to move for substitution for a deceased defendant within 90 days of the filing of the statement noting death. n7 However, the Committee Notes to Rule 25 provide that the 90-day requirement may be extended by *Rule 6(b) of Federal Rules of Civil Procedure*. The Committee notes make clear, however, that whether an action should be dismissed for failure to comply with the 90-day rule lies within the sound discretion of the district court. n8

Rule 6(b)(2) provides that a district court for cause shown may at any time in its discretion on motion made after the expiration of the specified period permit the act to be performed when the failure to act was the result of excusable neglect. n9 Thus, it has been held that the history of Rule 25(a) and Rule 6(b) makes it clear that the 90-day time period was not intended to act as a bar to otherwise meritorious actions, and extensions of the period may be granted in the discretion of the court. n10

When an extension is desired, the best practice is for the party to move for an extension of time under Rule 6(b)(1) before the 90-day period has elapsed. n11 However, the trial court may also enlarge the time limit for a motion for substitution even after the expiration of the 90-day period. n12 A party may obtain relief from the 90-day restriction even after the expiration of the allotted time if one satisfies the court that the delay was the result of excusable neglect and the opponent fails to demonstrate that such relief would work undue prejudice. n13 When making a motion for substitution after expiration of the 90-day period, the party should ensure that the motion is made under both Rule 25(a) and Rule 6(b)(2) or it may be denied as a matter of course. n14

The moving party has the burden of showing that the failure to move for substitution in a timely manner was the result of excusable neglect. This burden requires a demonstration of good faith and a showing of some reasonable basis for noncompliance, rather than mere inadvertence. n15 For example, the court found excusable neglect and allowed enlargement of time, when the plaintiff's widow resided in a foreign country and was unfamiliar with the English language, the executor was unaware of lawsuit because it was not mentioned in the will, and there was a temporary lack of assets for the estate to hire an attorney. n16

On the other hand, the court used its Rule 25(a) discretion to refuse to grant an extension of time when the court found that the reluctance of an heir to become the administratrix of the estate, coupled with counsel's failure to file with the surrogate's court a motion to appoint an administrator of the estate until after defendant's motion to dismiss, did not constitute excusable neglect. In that case, the court also found prejudice to the defendant because the defendant was burdened with defending an action in which the plaintiff's heirs showed little interest for two years after plaintiff died. n17

[c] Party To Be Substituted Must Be Proper Party

Unless the party to be substituted is a proper party with respect to the pending litigation, the court must deny the motion for substitution. For example, the court will not substitute the estate, because the estate is not a proper party; rather, the party seeking substitution must be a legal representative of the estate. n18 The party seeking to be substituted must follow the procedure under federal law to demonstrate that the party is a legal representative and a proper party to be substituted. n19 Generally, for a party to be a legal representative, the party must have been lawfully appointed by the court that has jurisdiction over the estate. n20

Unless the estate has already been distributed at the time of substitution, the proper party is either the executor or administrator. n21 An executor named in the will is considered the legal representative even if the will is never probated. n22 If the estate had been closed, the proper parties would be the distributees of the decedent's estate. n23

[d] Motion for Substitution Must Identify Decedent's Representative and Must Be Properly Served

Like a statement noting death, n24 a motion for substitution must identify the decedent's representative or it will be denied. When a plaintiff made a motion for substitution of the deceased defendant, for example, but the motion failed to name the representatives of the decedent's estate, the trial court properly denied the motion. n25 Furthermore, the motion for substitution, like the statement noting death, n26 must be served on parties in accordance with Rule 5 and on non-parties in accordance with Rule 4. n27

[5] Survival of Action Is Prerequisite to Order of Substitution

[a] Necessity of Survival of Claim

Survival of a claim is a prerequisite to the substitution of parties, because Rule 25(a) provides that a court may order substitution if a party dies and the claim is not extinguished by the death. n1 Rule 25(a) is a procedural rule only and does notsubstantively define or control whether an action survives the death of a party. n2 The determination of whether a claim survives is a function of substantive law regarding the particular claim involved and is unaffected by Rule 25(a). n3 The legal representative of the moving party has the burden of demonstrating that the claim survives. n4 In general, state substantive law governs whether a state law claim survives the death of party, n5 and in the case of a federal question claim, federal substantive law controls. n6

[b] State Substantive Law Controls Survival of State Law Claims

The federal courts apply state law to decide whether a state law claim survives the death of a party. To determine the substantive rights involved in, or as a condition of, substitution in a nonfederal case, the district court must follow the state law. n7 Thus, the district court must apply the appropriate survival statute of the state in which the district court is located. n8 In some cases, a defendant's liability survives, n9 and in other cases, liability does not survive. n10 All state jurisdictions have at least some survival statutes that govern whether the claims brought by a plaintiff or against a defendant survive the party's death. n11

[c] Federal Substantive Law Generally Controls Survival of Federal Claims Based on Federal Question

When a claim is based on a federal question, whether the federal claim survives is governed by federal common law, unless there is an expression of contrary intent in the law. n12 Such expressions of "contrary intent" n13 may be found in the language of the statute or in legislative history. n14 Under some federal statutes, liability may survive the defendant's death, n15 but under other statutes liability does not survive the defendant's death. n16

In general, an action survives the death of a party under the federal common law if it is remedial and not penal in nature. n17 To determine whether a statute is remedial or penal in nature the court must consider three factors (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is disproportionate to the harm suffered. n18

There is an exception to the general rule that federal law determines whether a federal question claim survives. First, whether a claim under a federal civil rights statute, such as *42 U.S.C. § 1983*, survives depends on the law of the forum state. Claims under *42 U.S.C. § 1983* and other federal civil rights statutes depart from the general rule because *42 U.S.C. § 1988* directs federal courts to refer to state law in deciding all matters which the federal civil rights statutes do not address. Therefore, there is no uniform rule as to whether civil rights actions survive the death of a party, because the determination may vary depending on the law of the forum state. n19

While Title VII actions are civil rights actions, and would therefore seem to be governed by the forum state's law as to questions of survival under the above rule, there is a split of authority as to whether a Title VII claim is governed by

state law or federal law. Some courts have applied federal law, n20 while others have applied state law. n21

[6] Effect of Substitution Due to Death

When a party is substituted because of the death of another, the substituted partystands in the shoes of the deceased party; this means the substituted party comes into the case subject to all of the prior judicial orders and rulings. n1 For example, in one case the original party defendant consented to trial before a magistrate judge; the defendant died before trial and his widow was substituted as party defendant. After judgment was entered against the defendant, the defendant appealed, asserting that because the defendant had not consented to trial before a magistrate judge, there was no jurisdiction to enter a judgment. The court of appeals rejected this claim, holding that a successor takes over without any other change in the status of the case. The court noted that the widow entered the litigation as the legal representative of a deceased person and her status in the litigation tracked the position of the original party. n2 The rule of the assumption of identical status likewise continues for the new party; thus if the representative of the estate of the original party subsequently dies, the representative of the representative's estate is then substituted. n3

There are only two exceptions to the status rules specified above. First, if the decedent's death renders a prior determination moot, the determination does not apply to the substitute. For example, the court's order on a motion for expedited trial made by a plaintiff would be rendered moot by the plaintiff's death and would not be binding on a the substituted party. n4 Second, a substituted party is not entitled to continue in a pro se capacity, because to do so would violate the prohibition against the unlicenced practice of law. An executor or administrator is not representing himself or herself, but the estate of the deceased party. n5

[7] Appeal of Order Regarding Substitution Due to Death

If a court denies a motion for substitution, the order denying substitution is a final decision that is appealable under *28 U.S.C. § 1291*, because such an order will result in dismissal of the claim with respect to the representative party. Conversely, because it does not make any final resolution in the case or end the litigation, an order granting substitution is interlocutory, and not immediately appealable. n1 A reviewable decision under Rule 25(a), is made de novo on appeal because it is review of a question of law. This is in contrast to a review of factual findings, which may be reversed only if there is clear error. n2

Attorneys must remember that Rule 25(a) applies only when a case is pending in the district court. If a party dies after the filing of the notice of appeal, the proper procedure is to follow the provisions of Appellate Rule of Procedure 43(a), which is derived from Rule 25(a). n3 Appellate Rule 43(a) provides that if a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals.

If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution must be effected in the court of appeals in accordance with Appellate Rule of Procedure 43(a).

If a party entitled to appeal dies before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative or, if there is no personal representative, by that party's attorney of record. n4 Even if the motion is not made pursuant to Appellate Rule 43, the appellate court may proceed with the appeal. n5 Even if a party dies prior to entry of judgment in the district court without requesting substitution, the appellate court is not divested of jurisdiction. n6

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesSubstitutionsDeath of Party

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* §§ 25.10 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 25(a)(1)*; Rule 25(a)(2), on the other hand, is not really a rule of substitution, because it provides only that if one or more plaintiffs or defendants dies in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate; thus, it is a rule of substitution only in the sense the surviving plaintiffs or defendants are automatically substituted in place of all of the plaintiffs or defendants as they existed before the death. A statement noting death must still be filed. See *Fed. R. Civ. P. 25(a)(2).*

(n3)Footnote 2. *Fed. R. Civ. P. 25(a).*

(n4)Footnote 3. *See Montalvo v. Quigley, 144 F.R.D. 21, 22 (E.D.N.Y. 1992)* .

(n5)Footnote 4. *Rembert v. Holland, 735 F. Supp. 733, 735 n.1 (W.D. Mich. 1990)* (failure of parties to file suggestion of death on record and move for substitution after death of defendant deemed immaterial because of decision granting summary judgment in defendant's favor).

(n6)Footnote 5. *Russell v. City of Milwaukee, 338 F.3d 662, 667-668 (7th Cir. 2003)* (when plaintiff's representative or attorney did not file for substitution of parties within 90 days of filing statement of death, district court properly dismissed case); deceased defendant where defense counsel filed suggestion of death but plaintiff never moved for substitution).

(n7)Footnote 6. *Kynaston v. United States, 717 F.2d 506, 508 (10th Cir. 1983)* (noting that district court sua sponte named widow as personal representative of her husband's estate and ordered substitution before trial).

(n8)Footnote 7. *Al-Jundi v. Estate of Rockefeller, 757 F. Supp. 206, 210 (W.D.N.Y. 1990)* (Rule 25(a)(1) must be strictly observed).

(n9)Footnote 8. *Glassroth v. Houston, 299 F. Supp. 2d 1244, 1246 (M.D. Ala. 2004)* .

(n10)Footnote 9. *Rothschild v. Board of Educ., 778 F. Supp. 642, 644 n.3 (W.D.N.Y. 1991)* .

(n11)Footnote 10. *See Fed. R. Civ. P. 25(d).*

(n12)Footnote 11. *See Fed. R. Civ. P. 25(a).*

(n13)Footnote 1. *Davis v. Cadwell, 94 F.R.D. 306, 307 (D. Del. 1982)* .

(n14)Footnote 2. *Fed. R. Civ. P. 25(a)(1)*; *see International Ass'n of Machinists v. Estate of Dickey, 808 F.2d 483, 485-486 (6th Cir. 1987)* .

(n15)Footnote 3. *See Davis v. Cadwell, 94 F.R.D. 306, 307 (D. Del. 1982)* .

(n16)Footnote .01. *Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994)* (citing **Moore's Federal Practice**); *see Fed. R. Civ. P. 25(a)(1).*

(n17)Footnote 1. *See* [4], *below*; *see also Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1388 (D. Md. 1986)* (allowing suggestion of death on record and motion for substitution to be filed simultaneously).

(n18)Footnote 2. *Ohanian v. Irwin (In re Irwin), 338 B.R. 839, 848 (E.D. Cal. 2006)* .

(n19)Footnote 3. *Fed. R. Civ. P. 25(a)(1)*; *see Fed. R. Civ. P. 25(a)(3)* (service of both statement noting death and motion for substitution).

(n20)Footnote 3.1. *Fed. R. Civ. P. 25(a)(1),(3)*; *see Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994)* (when party dies, it is insufficient to serve suggestion of death solely on party's counsel).

(n21)Footnote 3.2. *Ohanian v. Irwin (In re Irwin), 338 B.R. 839, 848-849 (E.D. Cal. 2006)* .

(n22)Footnote 4. *Grandbouche v. Lovell, 913 F.2d 835, 836 (10th Cir. 1990)* ; *see Henkel v. Stratton, 612 F. Supp. 190, 191 n.1 (N.D. Ohio 1985)* (reference to deceased plaintiff in defendant's brief is insufficient to commence 90-day period).

(n23)Footnote 5. *Fed. R. Civ. P. 25(a)(1)*; *see* [4][b], *below*.

(n24)Footnote 6. *Fed. R. Civ. P. 25(a)(1)*.

(n25)Footnote 7. *Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 469-470 (2d Cir. 1998)* .

(n26)Footnote 8. *Al-Jundi v. Rockefeller, 88 F.R.D. 244, 246 (W.D.N.Y. 1980)* ; *Smith v. Planas, 151 F.R.D. 547, 549 (S.D.N.Y. 1993)* .

(n27)Footnote 9. *Felton v. Board of Comm'rs, 796 F. Supp. 371, 380 (S.D. Ind. 1991)* , *aff'd on other grounds, 5 F.3d 198 (7th Cir. 1993)* ; *United States v. Private Sanitation Indus. Ass'n, 159 F.R.D. 389, 389 (E.D.N.Y. 1994)* , *aff'd without opinion, 47 F.3d 1158 (2d Cir. 1995)* .

(n28)Footnote 10. *See Fed. R. Civ. P. 25(a)*.

(n29)Footnote 11. *Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 470 (2d Cir. 1998)* .

(n30)Footnote 12. *See, e.g., McSurely v. McClellan, 753 F.2d 88, 98 (D.C. Cir. 1985)* (suggestion of death insufficient when it did not identify decedents' representatives); *Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1519 (D. Kan. 1991)* (denying defendant's motion to dismiss action based on plaintiff's failure to file motion for substitution of deceased defendant, because suggestion of death filed by decedent's attorney was defective in that it did not identify decedent's representatives).

(n31)Footnote 13. *McSurely v. McClellan, 753 F.2d 88, 98 (D.C. Cir. 1985*).

(n32)Footnote 14. *Fed. R. Civ. P. 25(a)(3)*; *see Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994)* (suggestion of death was effective only if served on non-party successors or representatives of deceased in manner provided by Rule 4 for service of summons).

(n33)Footnote 15. *Acri v. International Assn. of Mach. & Aerospace Workers, 595 F. Supp. 326, 330 (N.D. Cal. 1983)* , *aff'd on other grounds, 781 F.2d 1393 (9th Cir. 1986)* (90-day period did not commence since service was not in accordance with Rule 25(a)).

(n34)Footnote 16. *Capital Investors Co. v. Executors of the Estate of Morrison, 800 F.2d 424, 429 (4th Cir. 1986)* .

(n35)Footnote 17. *Fed. R. Civ. P. 25(a)(3)*; *Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994)* .

(n36)Footnote 18. *Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4th Cir. 1985)* (citing **Moore's Federal**

Practice).

(n37)Footnote 19. *Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1518 (D. Kan. 1991)* (suggestion of death inadequate when filed by attorney for deceased defendant who did not represent the estate).

(n38)Footnote 1. *Fed. R. Civ. P. 25(a)(1), (3).*

(n39)Footnote 2. *Saylor v. Bastedo, 623 F.2d 230, 237 (2d Cir. 1980)* .

(n40)Footnote 3. *Montalvo v. Quigley, 144 F.R.D. 21, 22-23 (E.D.N.Y. 1992)* (court granted motion to dismiss because (1) action had been pending for nine years, (2) plaintiff had been warned about possibility of dismissal after defendants' prior motion for failure to prosecute, and (3) defendants would be prejudiced by any further delay).

(n41)Footnote 4. *Escareno v. Carl Nolte Sohne GmbH & Co., 77 F.3d 407, 411 (11th Cir. 1996)* .

(n42)Footnote 5. *See* [b], *below.*

(n43)Footnote 6. *Fed. R. Civ. P. 25(a)(1).*

(n44)Footnote 7. *Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1268 (N.D. W.Va. 1982)* .

(n45)Footnote 8. *Fed. R. Civ. P. 25(a)(1)*, Committee Note to 1963 Amendments; *Russell v. City of Milwaukee, 338 F.3d 662, 667-668 (7th Cir. 2003)* .

(n46)Footnote 9. *Fed. R. Civ. P. 6(b).*

(n47)Footnote 10. *Tatterson v. Koppers Co., 104 F.R.D. 19, 20 (W.D. Pa. 1984)* .

(n48)Footnote 11. *Gronowicz v. Leonard, 109 F.R.D. 624, 627 & n.3 (S.D.N.Y. 1986)* .

(n49)Footnote 12. *Zeidman v. General Acci. Ins. Co., 122 F.R.D. 160, 161 (S.D.N.Y. 1988)* (Rule 6(b)(2) works in conjunction with Rule 25(a)(1) to provide flexibility).

(n50)Footnote 13. *Al-Jundi v. Estate of Rockefeller, 757 F. Supp. 206, 209 (W.D.N.Y. 1990)* .

(n51)Footnote 14. *Farrington v. Benjamin, 100 F.R.D. 474, 476 (D.V.I. 1984)* ; *see Zeidman v. General Acci. Ins. Co., 122 F.R.D. 160, 161 (S.D.N.Y. 1988)* (Rule 6(b)(2) works in conjunction with Rule 25(a)(1) to provide flexibility).

(n52)Footnote 15. *Zeidman v. General Accident Ins. Co., 122 F.R.D. 160, 161 (S.D.N.Y. 1988)* (good faith showing).

(n53)Footnote 16. *Knight v. H.E. Yerkes & Assocs., Inc., 135 F.R.D. 67, 72 (S.D.N.Y. 1991)* .

(n54)Footnote 17. *Zeidman v. General Accident Ins. Co., 122 F.R.D. 160, 162 (S.D.N.Y. 1988)* .

(n55)Footnote 18. *F.D.I.C. v. Conner, 20 F.3d 1376, 1384 (5th Cir. 1994)* .

(n56)Footnote 19. *Marcano v. Offshore Venezuela, C.A., 497 F. Supp. 204, 207-209 (E.D. La. 1980)* (denying motion to substitute by Venezuelan national that Venezuelan law permitted to become administratrix of decedent's estate because she had not obtained judicial designation).

(n57)Footnote 20. *Escareno v. Carl Nolte Sohne GmbH & Co., 77 F.3d 407, 409-412 (11th Cir. 1996)* .

(n58)Footnote 21. *Ashley v. Illinois Cent. Gulf R.R. Co., 98 F.R.D. 722, 724 (S.D. Miss. 1983)* .

(n59)Footnote 22. *McSurely v. McClellan, 753 F.2d 88, 97-99 (D.C. Cir. 1985)* , *cert. denied, 474 U.S. 1005 (1985)* .

(n60)Footnote 23. *Gronowicz v. Leonard, 109 F.R.D. 624, 626 (S.D.N.Y. 1986)* (noting that executrix was proper party because she was distributee of estate and that estate had been distributed at time motion for substitution was made).

(n61)Footnote 24. *See* [3][c], *above*.

(n62)Footnote 25. *Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1519 (D. Kan. 1991)* (denying plaintiff's untimely motion for substitution of deceased defendant, on the ground that motion failed to name the representatives of decedent's estate).

(n63)Footnote 26. *See* [3][d], *above*.

(n64)Footnote 27. *Fed. R. Civ. P. 25(a)(3)*.

(n65)Footnote 1. *Fed. R. Civ. P. 25(a)(1)*.

(n66)Footnote 2. *First Idaho Corp. v. Davis, 867 F.2d 1241, 1242-1243 (9th Cir. 1989)* ; *Roberson v. Wood, 500 F. Supp. 854, 858 (S.D. Ill. 1980)* .

(n67)Footnote 3. *Covert v. Liggett Group, Inc., 750 F. Supp. 1303, 1310 (M.D. La. 1990)* (abatement of an action governed by law of sovereign that created course of action).

(n68)Footnote 4. *Marcano v. Offshore Venezuela, C.A., 497 F. Supp. 204, 208 (E.D. La. 1980)* (asserted legal representative of decedent did not meet burden of proving that decedent's claims were not extinguished).

(n69)Footnote 5. *See* [b], *below*.

(n70)Footnote 6. *See* [c], *below*.

(n71)Footnote 7. *Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1387 (D. Md. 1986)* .

(n72)Footnote 8. *See, e.g., Fireman's Fund Mortgage Corp. v. Zollicoffer, 713 F. Supp. 1112, 1113-1116 (N.D. Ill. 1989)* (under Illinois law, causes of action for breach of contract and breach of covenant of good faith and fair dealing survive under common law; claims for conversion and trespass survive under both common law and Illinois Survival Act; statutory claims of forcible entry and violation of statutory remedies survive under Illinois Survival Act, and punitive damages remain available as to those claims that survive at common law).

(n73)Footnote 9. *Conductron Corp. v. Williams, 785 F. Supp. 271, 273 (D.N.H. 1991)* (action under New Hampshire common law and certain New Hampshire statutes survives defendant's death).

(n74)Footnote 10. *Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1521-1522 (D. Kan. 1991)* (in Kansas medical malpractice case, punitive damages do not survive defendant's death).

(n75)Footnote 11. *See, e.g., Md. Code, Cts. & Jud. Proc. § 3-230*; *Va. Code Ann. § 8.01-25*; *W. Va. Code § 55-7-8a*.

(n76)Footnote 12. *Smith v. Department of Human Services, 876 F.2d 832, 834 (10th Cir. 1989)* .

(n77)Footnote 13. *Glanz v. Vernick, 750 F. Supp. 39, 42-45 (D. Mass. 1990)* .

(n78)Footnote 14. *Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 n.3 (4th Cir. 1985)* (citing **Moore's Federal**

Practice; claim under Age Discrimination in Employment Act survives as a matter of federal law).

(n79)Footnote 15. *Neumann v. John Hancock Mut. Life Ins. Co., 736 F. Supp. 182, 185-186 (N.D. Ill. 1990)* (federal securities law claims survive defendant's death).

(n80)Footnote 16. *United States v. Private Sanitation Indus. Ass'n, 159 F.R.D. 389, 390 (E.D.N.Y. 1994)* (injunctive relief under civil RICO claim does not survive defendants' deaths).

(n81)Footnote 17. *International Cablevision, Inc. v. Sykes, 172 F.R.D. 63, 66-67 (W.D.N.Y. 1997)* (cable company's claim for damages against seller of cable television descrambler under statute abated with seller's death, even though statute was designed to address individual wrongs and recovery was intended to run to aggrieved individual, because $10,000 minimum damages prescribed by statute were disproportionate to harm caused to cable company by one cable descrambler at issue, and therefore statute was penal rather than remedial in nature).

(n82)Footnote 18. *Murphy v. Household Fin. Corp, 560 F.2d 206, 209 (6th Cir. 1977)* .

(n83)Footnote 19. *See Robertson v. Wegmann, 436 U.S. 584, 589-90, 98 S. Ct. 1991, 1995, 56 L. Ed. 2d 554 (1978)* .

(n84)Footnote 20. *Khan v. Grotnes Metalforming Sys., Inc., 679 F. Supp. 751, 756-757 (N.D. Ill. 1988)* .

(n85)Footnote 21. *Small v. American Tel. & Tel. Co., 759 F. Supp. 1427, 1428-30 (W.D. Mo. 1991)* (Title VII claim survives plaintiff's death under Missouri law).

(n86)Footnote 1. *Brook v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995)* (substitute's status in litigation is same as that of original parties; substitute assumes prior party's position without any other change in status of case).

(n87)Footnote 2. *Brook v. Coreq, Inc., 53 F.3d 851, 851-852 (7th Cir. 1995)* .

(n88)Footnote 3. *See McSurely v. McClellan, 753 F.2d 88, 98 n.4 (D.C. Cir. 1985)* , *cert. denied, 474 U.S. 1005 (1985)* (court granted motion to substitute representative).

(n89)Footnote 4. *Owens v. Storehouse, Inc., 773 F. Supp. 416, 417-418 (N.D. Ga. 1991)* , *aff'd on other grounds, 984 F.2d 394 (11th Cir. 1993)* .

(n90)Footnote 5. *Diamantis v. Judd-Falk, Inc., 125 F.R.D. 396, 398 (S.D.N.Y. 1989)* (court rejected argument that executrix was representing herself because she was sole residual beneficiary under will).

(n91)Footnote 1. *See Saylor v. Bastedo, 623 F.2d 230, 236 (2d Cir. 1980)* .

(n92)Footnote 2. *Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994)* .

(n93)Footnote 3. *Fed. R. App. P. 43(a)*; *see Fed. R. Civ. P. 25(a)*.

(n94)Footnote 4. *Fed. R. App. P. 43(a)*.

(n95)Footnote 5. *Berlanti v. Bodman, 780 F.2d 296, 297 n. 1 (3d Cir. 1985)* (court, noting that plaintiff died prior to the filing of the appeal and that no substitution was made, allowed appeal to go forward).

(n96)Footnote 6. *Coffee v. Cutter Biological, 809 F.2d 191, 193 n.1 (2d Cir. 1987)* .

Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART III. SUBSTITUTION OF PARTY

2-13 Moore's Manual--Federal Practice and Procedure § 13.33

§ 13.33 Substitution Due to Incompetencyn*

[1] Court's Discretion to Order Substitution Because of Incompetency of Party

If a party becomes incompetent, the court has discretion to order that the action be continued by or against the party's representative, provided that a motion has been served on other parties. n1

For example, the court allowed substitution in one case in which a co-plaintiff became ill and subsequently incompetent after she had filed suit. Following a grant of a motion to substitute, the suit was continued by the representative. n2

Rule 25(b) does not provide a definition of "incompetency." There is no specific authority for a federal court to decide that a party has become incompetent based on federal law. Consequently, state law determines issues of incompetency and the appointment of a guardian. n3 Procedure is governed by the federal rules. With respect to service of a motion to substitute, Rule 25(b) "borrows" from the Rule 25(a) substitution on death procedure, n4 and it is reasonable to conclude that other procedural principles of substitution on death are applicable to substitution on incompetency as well. n4.1

A motion to substitute because of incompetency must be distinguished from a motion to amend a pleading. A motion to substitute for reasons of incompetency is filed when the intervening incompetence of the original plaintiff or defendant necessitates replacement. In contrast, a motion to amend the complaint should be used to allow the addition of parties who should have been named in the original complaint or answer. n5

[2] Procedural Considerations

Rule 25(b) provides specifically that a motion to substitute due to incompetence is to be served in the same manner as provided for a motion to substitute on death under Rule 25(a)(3). n1 Consequently, a motion to substitute for incompetence and notice of a hearing regarding the motion must be served as provided in *Rules 4* and *5 of the Federal Rules of Civil Procedure*. n2

Furthermore, it appears that some of the mechanics of substitution resulting from incompetency function similarly to substitution because of death. For example, all of Rule 25's provisions address changes to a party that occur after a

lawsuit is filed, not before. Only if someone already a party becomes incompetent may the court appoint a substitute representative. n3 The underlying purpose of Rule 25 is to provide for substitutions in case a particular event (death, incompetency, transfer of interest) occurs during the pendency of a suit, not before. In other words, the rule is applicable only if the disabling event occurs after the service or filing of the complaint. n3.1 This is the same rule as for substitution on death. n4

The text of Rule 25(b) does not expressly mention whether there is a 90-day time limit for filing a motion for incompetence, after a finding of incompetence, as there is under Rule 25(a). Although it is arguable that there should be a similar deadline for a motion to substitute on the ground of incompetency, no decision has so held. Rule 25(b) is entirely discretionary, n5 and, unlike Rule 25(a), Rule 25(b) mentions neither a "statement noting incompetence" nor a 90-day time period. Arguably, if the drafters had intended to incorporate such a time-specific 90-day period in the rule, they would have expressly done so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsIncompetency

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 25.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 25(b)* (if party becomes incompetent court "may" allow action to be continued by or against party's representative); *see Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970)* (court denied motion for Rule 25(b) substitution of new guardian of incompetent for former guardian because requested change should have been accomplished by amending complaint under Rule 15); *Schwartz v. Metropolitan Life Ins. Co., 2 F.R.D. 167, 168 (D. Mass. 1941)* (court denied motion to substitute duly appointed guardian as plaintiff for insane ward because ward was incompetent prior to date of filing suit).

(n3)Footnote 2. *Sander v. Kristof, 349 F. Supp. 103, 105 (W. D. Ark. 1972)* (court granted motion to substitute trialattorney as plaintiff for co-plaintiff who had become seriously ill and incompetent during trial; attorney was required to withdraw as trial counsel before order of substitution allowed attorney to be substituted as co-plaintiff).

(n4)Footnote 3. *Fed. R. Civ. P. 17(b)(1)* (capacity to sue or be sued of individual determined by law of individual's domicile).

(n5)Footnote 4. *Fed. R. Civ. P. 25(b)*; *see Fed. R. Civ. P. 25(a)(3).*

(n6)Footnote 4.1. *Cf. Harris v. Nat'l Seal Co. Enhanced Severance Pay Plan, 2007 U.S. Dist. LEXIS 40315, at *7-*8 (S.D. Tex. 2007)* ; *see* [2], *below.*

(n7)Footnote 5. *Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970)* (court denied motion for Rule 25(b) substitution of new guardian of incompetent for former guardian because requested change should have been accomplished by amending complaint under Rule 15).

(n8)Footnote 1. *Fed. R. Civ. P. 25(b)*; *see Fed. R. Civ. P. 25(a)(3).*

(n9)Footnote 2. *Fed. R. Civ. P. 25(b)*; *see Fed. R. Civ. P. 25(a)*; *see also § 13.32[3][d].*

(n10)Footnote 3. *Fed. R. Civ. P. 25(b).*

(n11)Footnote 3.1. *Harris v. Nat'l Seal Co. Enhanced Severance Pay Plan, 2007 U.S. Dist. LEXIS 40315, at *7-*8 (S.D. Tex. 2007) .*

(n12)Footnote 4. *Fed. R. Civ. P. 25(a)(1)*; *see § 13.32[2]*.

(n13)Footnote 5. *Fed. R. Civ. P. 25(b)* (if party becomes incompetent court "may" allow action to be continued by or against party's representative).

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART III. SUBSTITUTION OF PARTY

2-13 Moore's Manual--Federal Practice and Procedure § 13.34

§ 13.34 Substitution Due to Transfer of Interestn*

[1] Court Has Authority to Order Substitution on Transfer of Interest

If a party makes a transfer of interest, the court has discretion to order that the action be continued by or against the original party, or after motion of a party, may direct that the person to whom the interest is transferred is to be substituted in the action or joined with the original party. n1 Courts generally use the expression "transfer of interest" to include most transfers of assets. The types of transfers of interests covered by the rule include: corporate mergers or acquisitions when the original party no longer exists, and another entity has unreservedly assumed its rights and obligations; when a sale or an assignment has been made; n1.1 when a financial instrument has changed hands; or when a receiver or trustee in bankruptcy has succeeded to the assets and liabilities of a debtor. n2 For example, the asset acquisition of a defendant closely held corporation by another closely held corporation falls within the rule. A transfer of interest may also be accomplished by the enactment of legislation. n3

Rule 25(c) does not apply to transfers of interest that occur prior to the filing of the action that is in issue, because substitution expressly applies only to transfers ofinterest that take place during litigation. n3.1 If a transfer occurs before the commencement of suit, the status of the parties is controlled by Rule 17 and Rule 19. Thus, for Rule 25(c) to apply to particular parties, not only must there be an actual transfer of interest between the parties but the transfer must occur during pending litigation. n4

A motion to substitute or join the transferee must be served in the same manner as a motion for substitution on death specified in Rule 25(a)(3). n5 Consequently, the motion must be served on parties in accordance with Rule 5 and on non-parties in accordance with Rule 4. n6

[2] Substitution Because of Transfer of Interest Does not Affect Substantive Rights

Rule 25(c) is procedural only and does not affect the substantive law relating to a claim in federal court. For example, if a claim in federal court is based on an asserted contractual relationship, an assignment of the contractual rights may be the grounds for a substitution under Rule 25(c). However, the procedural act of substitution does not affect the existence or the degree of the liability of any of the parties on the underlying contract. n1 Thus, Rule 25(c) does not substantively determine which actions survive the transfer of an interest; rather, it provides substitution procedures for an action that

does survive. n2

Rule 25(c) is designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit. Accordingly, Rule 25(c) merely sets forth a procedure to permit the continuation of the suit and prevent unnecessary dismissal n3 and does not affect the substantive law concerning the effect of a transfer of interest on the survivability of a claim. The procedural nature of Rule 25(c) means that the impact of a particular transfer will be determined by state substantive law. n4

Because of the purely procedural nature of Rule 25(c), the transferee will be bound by the judgment concerning the interest, regardless of whether the court orders substitution or joinder of the transferee. n5 This result follows from the principle that the rule does not foreclose any substantive rights under the transfer. Furthermore, the binding nature of the transferee's interest prevents double recovery and advances efficiency. n6

[3] Court Has Considerable Discretion to Determine Procedure on Transfer of Interest

The court possesses considerable discretion under Rule 25(c) when ruling on motions to substitute following a transfer of interest, because that court has the opportunity to take into account all the exigencies of the situation. n1 Courts of appeal have fostered this liberal discretion because of the express language of Rule 25(c), which provides two broad alternative courses of action: the trial court may keep the original party in the suit or substitute the transferee. n1.1

The discretionary nature of Rule 25(c) means that a court may decide to grant or deny a motion to substitute a party to whom an interest has been transferred. Following a Rule 25(c) motion seeking either substitution or joinder of the transferee, it is within the power of the court to continue the action in its original posture, to order substitution of the party to whom the interest has been transferred, or to join the transferee as a party. Thus, the court has the option to add the transferee but retain the transferor as a party. For example, in one case the FDIC, after bringing suit as a receiver for a bank, assigned to a bank trustee the rights and interest in claims asserted in the suit. Because the FDIC retained some legal interest in the proceeds of any recovery obtained by the trustee, the court found that joinder of the trustee, rather than outright substitution, was the proper course of action, because both assignor and assignee were still real parties in interest, and participation in the lawsuit by representatives of both was the most efficient way to ensure that all issues would be fully litigated. n2

The discretionary decision whether to grant or deny a motion to join or substitute a transferee party necessarily is based on convenience and efficiency. n2.1 Thus, a court may order joinder under Rule 25(c) when the transferee will be liable and when a multiplicity of suits can be avoided. On the other hand, joinder will be denied if itwould not be beneficial. n3 Furthermore, the discretionary nature of Rule 25(c) means that the motion to substitute following a transfer of interest is not mandatory and is itself within the discretion of the parties. When the parties fail to move for joinder or substitution under Rule 25(c), the court may continue the action in the name of the original parties. When this happens, the judgment binds the successor as though the successor had been joined or substituted. n4

The trial court has discretion under Rule 25(c) to refuse to substitute parties in an action even if it is proper and one of the parties moves for substitution. n5 Furthermore, regardless of whether the court orders a substitution, the litigation may go forward in the names of the original parties. n6

[4] Timing of Motion to Substitute

The rules do not contain any express provision relating to the timing of a motion to substitute following a transfer of interest under Rule 25(c). n1 Therefore it is arguable, that a Rule 25(c) motion may be made at any time. n2 There are no reported cases that deny a Rule 25(c) motion based on a lack of a timely request. However, it is apparent from recent cases that the timeliness of the motion is one of the many factors that the court may consider in its determination of the motion, and that considerations of efficiency caution against untimely filings. n3

[5] Appeal of Order on Motion to Substitute

Orders under Rule 25(c) are inherently discretionary procedural decisions and, consequently, are interlocutory orders that usually may not be immediately appealed. n1 Furthermore, while a party may try to obtain an appeal of an interlocutory order under a writ or other forms of review of non-final orders, such efforts are not likely to be successful. Several courts have rejected the use of mandamus to review Rule 25(c) orders because the issue of joinder of parties can be effectively remedied on appeal. n2

Courts have reached different conclusions on whether to review interlocutory orders under Rule 25(c) through the collateral order doctrine. One circuit, for example, refused to allow an appeal of an order substituting the bankruptcy trustee as a plaintiff for the debtors because the issue of whether the substitution deprived the debtors of a right to jury trial was not an important issue justifying immediate appeal. n3 On the other hand, another circuit allowed appellate review of an order denying substitution in a bankruptcy case, because the order was easily separated from the bankruptcy proceedings and, therefore, had the requisite finality to be reviewed under the collateral order doctrine. n4

When a circuit court does review a Rule 25(c) order, it is reviewing a discretionary, interlocutory order and must use the abuse of discretion standard. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsTransfers of Interests

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* §§ 25.30 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 25(c).*

(n3)Footnote 1.1. *Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 305 F. Supp. 2d 939, 955-956 (E.D. Wis. 2004)* .

(n4)Footnote 2. *Trombino v. Transit Cas. Co., 110 F.R.D. 139, 147 (D.R.I. 1986)* .

(n5)Footnote 3. *F.D.I.C. v. Wrapwell Corp., 922 F. Supp. 913, 917 (S.D.N.Y. 1996)* (FDIC substituted as receiver for plaintiff bank because federal legislation provided that agency was to succeed to all rights, titles, powers and privileges of bank, and authorized agency to collect money that was due to bank).

(n6)Footnote 3.1. *Maysonet-Robles v. Cabrero, 323 F.3d 43, 49 (1st Cir. 2003)* .

(n7)Footnote 4. *Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1358 (11th Cir. 1994)* (substitution of originally named corporation was proper and Rule 25(c) applies, since new party had bought all assets of former party while action was pending); *Unison Realty Corp. v. RKO Theatres, Inc., 35 F.R.D. 232, 233 (S.D.N.Y. 1964)* (Rule 17(a) applied because transfer took place before action was commenced).

(n8)Footnote 5. *Fed. R. Civ. P. 25(c).*

(n9)Footnote 6. *See Fed. R. Civ. P. 25(a)(3)*; *see also § 13.32[3][d].*

(n10)Footnote 1. *Citibank v. Grupo Cupey, Inc., 382 F.3d 29, 32 (1st Cir. 2004)* (citing **Moore's Federal Practice**).

(n11)Footnote 2. *Maysonet-Robles v. Cabrero, 323 F.3d 43, 49 (1st Cir. 2003)* (Rule 25(c) is procedural vehicle

which does not create new relationships among parties to suit; transferee is brought into court solely because it has come to own property in issue, and merits of case and disposition of property are still determined based on relationship of originally named parties).

(n12)Footnote 3. *ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186, 191 (8th Cir. 1995)* .

(n13)Footnote 4. *Explosives Corp. of Am. v. Garlam Enters. Corp., 615 F. Supp. 364, 368 (D.P.R. 1985)* (liability of Washington corporation that was successor to dissolved corporation must be determined according to Washington law).

(n14)Footnote 5. *Kloster Speedsteel AB v. Crucible, Inc., 793 F.2d 1565, 1581-1582 (Fed. Cir. 1986)* , *cert. denied, 479 U.S. 1034 (1987)* (citing **Moore's Federal Practice**).

(n15)Footnote 6. *Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 273 (D. Del. 1989)* (even when transferee company is added or substituted under Rule 25(c), it can be held liable only to extent that transferor corporation would have been liable).

(n16)Footnote 1. *USI Properties Corp. v. M.D. Construction Co., 186 F.R.D. 255, 260 (D.P.R. 1999)* .

(n17)Footnote 1.1. *Fed. R. Civ. P. 25(c)*; *see Citibank v. Grupo Cupey, Inc., 382 F.3d 29, 31 (1st Cir. 2004)* (citing **Moore's Federal Practice**).

(n18)Footnote 2. *Federal Deposit Ins. Corp. v. Tisch, 89 F.R.D. 446, 448 (E.D.N.Y. 1981)* .

(n19)Footnote 2.1. *ISI Int'l v. Borden Ladner Gervais, LLP, 2002 U.S. Dist. LEXIS 2406* (N.D. Ill. 2002.

(n20)Footnote 3. *Wainwright v. Kraftco Corp., 58 F.R.D. 9, 13 (N.D. Ga. 1973)* .

(n21)Footnote 4. *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 71 (3d Cir. 1993)* .

(n22)Footnote 5. *Froning's, Inc. v. Johnston Feed Serv., Inc., 568 F.2d 108, 110 n.4 (8th Cir. 1978)* .

(n23)Footnote 6. *Singer Hous. Co. v. Seven Lakes Venture, 466 F. Supp. 369, 378 (D. Colo. 1979)* .

(n24)Footnote 1. *General Battery Corp. v. Globe-Union, Inc., 100 F.R.D. 258, 261 (D. Del. 1982)* .

(n25)Footnote 2. *USI Properties Corp. v. M.D. Construction Co., 186 F.R.D. 255, 260 (D.P.R. 1999)* (noting that here is no time limit for Rule 25(c) motion); *Air Line Pilots Asso. International v. Texas International Airlines, Inc., 567 F. Supp. 78, 81 (S.D. Tex. 1983)* (allowing substitution after entry of judgment in order to enforce judgment).

(n26)Footnote 3. *USI Properties Corp. v. M.D. Construction Co., 186 F.R.D. 255, 260 (D.P.R. 1999)* .

(n27)Footnote 1. *Bauer v. Commerce Union Bank, Clarksville, Tenn., 859 F.2d 438, 440 (6th Cir. 1988)* , *cert. denied, 489 U.S. 1079 (1989)* .

(n28)Footnote 2. *Hazeltine Corp. v. Kirkpatrick, 165 F.2d 683, 685-686 (3d Cir. 1948)* , *cert. denied, 334 U.S. 819 (1948)* .

(n29)Footnote 3. *Bauer v. Commerce Union Bank, Clarksville, Tenn., 859 F.2d 438, 440 (6th Cir. 1988)* , *cert. denied, 489 U.S. 1079 (1989)* .

(n30)Footnote 4. *In re Covington Grain Co., Inc., 638 F.2d 1357, 1360 (5th Cir. 1981)* .

(n31)Footnote 5. *Burka v. Aetna Life Ins. Co., 87 F.3d 478, 482 (D.C. Cir. 1996)* .

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PART IV Parties
CHAPTER 13 INTERESTS OF PARTIES
PART III. SUBSTITUTION OF PARTY

2-13 Moore's Manual--Federal Practice and Procedure § 13.35

§ 13.35 Substitution of Public Officialsn*

[1] Substitution of Officials is Generally Automatic on Vacancy of Position

When a public officer is a party to an action in an official capacity and, during the pendency of the action, dies, resigns, or otherwise ceases to hold office, the action does not abate, and the officer's successor is automatically substituted as a party. In contrast to the other types of substitution under Rule 25, substitution under Rule 25(d) does not require a formal motion to the court to obtain substitution. Rather, substitution under Rule 25(d) occurs without any action by the court or the parties. n1 Furthermore, there is no negative consequence from the parties' failure to request that the court enter a substitution order. However, some reported decisions demonstrate that both courts and attorneys are under the mistaken impression that affirmative steps must be taken to effect substitution under Rule 25(d). n2

Substitution under Rule 25(d) is automatic provided that the action is by or against a public officer acting in his or her official capacity, n3 as opposed to an action involving the officer's individual or personal capacity. n4

[2] Substitution Procedure

Although it is not technically necessary because no motion is required to achieve automatic substitution involving a public officer, n1 the court sometimes orders substitution sua sponte. n1.1 The court may also take judicial notice of the fact that a public officer has been replaced when it is common knowledge that officer has been succeeded in office. n2 In most cases, substitution under Rule 25(d) is so routine that it is effected as a matter of course, and the court will typically use a footnote to reflect the fact that substitution of the plaintiff or defendant official has occurred. n3

If a permanent successor has not yet been appointed, the court will automatically substitute the individual who becomes the acting public officer. n4 In cases when there is no obvious successor to replace the public officer, the court may dismiss the claim against the defendant official for lack of capacity but must afford parties leave to amend to name successors. n5 The court is not required to make a formal substitution, but, for the record, it should direct the clerk of the court to change the caption of the case to reflect the substitution. n6

In making a substitution of officers, a public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name. n7 Even if a complaint names as a defendant only the category of

the officer sought to be held liable, it is sufficient under Rule 25(d). n8

Furthermore, a public officer who sues or is sued in an official capacity may be designated by official title rather than by name, n9 and when a substitution occurs, it is not necessary for the court to record or note the personal name of the officer at all. n10 Thus, by ordering substitution only in the name of the title of the officer, the court is able to effect substitution even if the successor has not yet been named. n11 However, the court may order that the officer's personal name be added, n12 for example, if it would avoid confusion. n13

Because Rule 25(d) provides that an order of substitution may be entered at any time, n14 substitution may be effected at the time judgment is entered, or even after judgment has been entered. n15 Substitution is even permitted under some circumstances on appeal. n16

[3] Determination of Official Capacity

In some cases, it may not be obvious whether an officer is sued in an individual or in an official capacity, or both. The United States Supreme Court has discussed the differences between individual and official capacity actions and explained the relationship of capacity to substitution. The Court stated that an official-capacity suit is, in all respects other than name, actually a suit against the entity as opposed to a suit against the officer. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit is attempting to recover from the government entity itself.

Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. n1 Therefore, the trial court must consider the nature of the proceeding to determine which type of action the plaintiff intended to bring. n2

If an original official was named as a defendant in both an individual and official capacity, the original official should remain a party, even though the official has resigned or died, and the action will continue against the officer in the officer'sindividual capacity n3 and the successor official will be substituted as a party defendant only in his or her official capacity. n4 The corollary to this rule is that if a public officer dies in office, the official capacity claim is governed by Rule 25(d), while the individual capacity claim is governed by Rule 25(a). n5 With respect to the individual capacity claim, substitution is not automatic, and the procedures under Rule 25(a) must be followed or the claim may be dismissed. n6

[4] Effect of Substitution of Officer

After an automatic substitution under Rule 25(d), the predecessor public officer is no longer a party and has no standing to challenge any future decisions in the action. n1 By operation of law, the official who has been replaced is no longer a party as of the date the official leaves office. n2 A successor defendant who is substituted automatically under Rule 25(d) does not become personally liable, even if the predecessor had been named in his or her personal capacity. n3 When a public officer replaces his or her predecessor, the officer is a party only in his or her official capacity. The new successor defendant may not be personally liable for the conduct committed earlier by the original defendant. n4

However, in his or her official capacity, the newly named official stands in the shoes of the predecessor. n5 Even if a successor official is not substituted until after final judgment is entered, the substituted official is bound by the earlier court order binding his or her predecessor. n6 Similarly, an agency that is substituted for another agency stands in the shoes of the predecessor agency and may be bound by a consent decree. n7

Sometimes the seemingly interminable nature of litigation will mean that agency personnel come and go repeatedly

while a particular action is pending. Thus, if an already substituted public officer is then succeeded in office, the second successor is automatically substituted and the first successor ceases to be a party, and so on. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsPublic Officers

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* §§ 25.40 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 25(d).*

(n3)Footnote 2. *Leslie v. Schweiker, 569 F. Supp. 41, 41 (E.D. Pa. 1983)* (court acknowledged replacement of Secretary of Health and Human Services but declined to change caption because neither party moved to substitute pursuant to Rule 25(d)).

(n4)Footnote 3. *See Hauptmann v. Wilentz, 570 F. Supp. 351, 401-402 (D.N.J. 1983) , aff'd without opinion, 770 F.2d 1070 (3d Cir. 1985)* (court automatically substituted governor and attorney general to the extent that they were sued in their official capacities).

(n5)Footnote 4. *Cheney v. United States Dist. Court, 541 U.S. 913, 918, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004) .*

(n6)Footnote 1. *Fed. R. Civ. P. 25(d); see Cheney v. United States Dist. Court, 541 U.S. 913, 918, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* (substitution is automatic).

(n7)Footnote 1.1. *Glaxo, Inc. v. Bowen, 640 F. Supp. 933, 934 n.1 (E.D.N.C. 1986) .*

(n8)Footnote 2. *N.A.A.C.P., Frederick County Chapter v. Thompson, 648 F. Supp. 195, 196 n.2 (D. Md. 1986)* (court discovered need for substitution from documents filed during pendency of action).

(n9)Footnote 3. *Levinson-Roth v. Parries, 872 F. Supp. 1439, 1444 n.3 (D. Md. 1995)* (court adds successor as a defendant in his official capacity).

(n10)Footnote 4. *Dole v. Compton, 753 F. Supp. 563, 564 n.1 (E.D. Pa. 1990) .*

(n11)Footnote 5. *Board of Sch. Directors v. Wisconsin, 649 F. Supp. 82, 99 (E.D. Wis. 1985) .*

(n12)Footnote 6. *Modern Computer Corp. v. Ma, 862 F. Supp. 938, 950 (E.D.N.Y. 1994) .*

(n13)Footnote 7. *Fed. R. Civ. P. 25(d)(2); Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 31 (1st Cir. 1988)* (action could have been brought directly against Secretary of Agriculture, without including secretary's name).

(n14)Footnote 8. *Lathan v. Block, 627 F. Supp. 397, 405 (D.N.D. 1986)* (caption of complaint that named defendants as "All County Supervisors" was sufficient to identify defendants in official capacity action).

(n15)Footnote 9. *See Fed. R. Civ. P. 17(d).*

(n16)Footnote 10. *York Assocs., Inc. v. Secretary of HUD, 815 F. Supp. 16, 18 n.1 (D.D.C. 1993) .*

(n17)Footnote 11. *Farmland Dairies v. Commissioner of N.Y. Department of Agriculture, 650 F. Supp. 939, 941*

n.2 (E.D.N.Y. 1987) , aff'd, 847 F.2d 1038, 1041-1042 n.3 (2d Cir. 1988) .

(n18)Footnote 12. *See Fed. R. Civ. P. 17(d).*

(n19)Footnote 13. [Reserved].

(n20)Footnote 14. *Fed. R. Civ. P. 25(d).*

(n21)Footnote 15. *Baptist Hosp. E. v. Sullivan, 823 F. Supp. 424, 425 n.2 (W.D. Ky. 1993)* (court substituted successor officer as defendant in connection with plaintiff's motion to enforce prior judgment).

(n22)Footnote 16. *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1458 n.1 (3d Cir. 1994)* (appelate court noted succeeding governor).

(n23)Footnote 1. *Kentucky v. Graham, 473 U.S. 159, 166 & n.11, 105 S. Ct. 309, 3105 & n.11, 87 L. Ed. 2d 114 (1985) .*

(n24)Footnote 2. *Lyon v. Grossheim, 803 F. Supp. 1538, 1557 (S.D. Iowa 1992)* (court substituted successor for defendant official who died in office and determined that there was no individual capacity claim asserted, because complaint did not specify whether defendant was sued in official or individual capacity, and pleadings concentrated on officer's job).

(n25)Footnote 3. *Levinson-Roth v. Parries, 872 F. Supp. 1439, 1444 n.3 (D. Md. 1995)* (official remains defendant in personal capacity but successor is substituted for defendant officer in official capacity).

(n26)Footnote 4. *Aleman v. Milwaukee County, 35 F. Supp. 2d 710, 717-718 (E.D. Wis. 1999)* (action against sheriff could be continued in his individual capacity, even though sheriff left office; however, sheriff's successor was automatically substituted).

(n27)Footnote 5. *Rothschild v. Board of Educ. of City of Buffalo, 778 F. Supp. 642, 644 n.3 (W.D.N.Y. 1991) .*

(n28)Footnote 6. *Scarpino v. Grosshiem, 852 F. Supp. 798, 807 (S.D. Iowa 1994) .*

(n29)Footnote 1. *Armstrong v. Sims, 869 F.2d 410, 412-413 (8th Cir. 1989)* (dismissed defendants could not object to settlement, since current commissioners were real parties in interest).

(n30)Footnote 2. *Baugh v. City of Milwaukee, 829 F. Supp. 274, 276 (E.D. Wis. 1993)* (even though trial court had not entered order of substitution, defendant was no longer party to action by operation of law).

(n31)Footnote 3. *Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986) .*

(n32)Footnote 4. *Cabrera v. Municipality of Bayamon, 622 F.2d 4, 6 (1st Cir. 1980)* (when mayor replaced predecessor under Rule 25(d), mayor was not personally liable, because neither original nor amended complaint contained allegations of wrongdoing against successor mayor in individual capacity).

(n33)Footnote 5. *Baptist Hosp. E. v. Sullivan, 823 F. Supp. 424, 425 n.2 (W.D. Ky. 1993) .*

(n34)Footnote 6. *Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 316 n.2 (1st Cir. 1989) .*

(n35)Footnote 7. *Alberti v. Klevenhagen, 610 F. Supp. 138, 142 n.6 (S.D. Tex. 1985) .*

(n36)Footnote 8. *Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986)* (court noting that all subsequent office holders are substituted as parties only in their official capacities, and only for so long as they hold office).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE

2-14 Moore's Manual--Federal Practice and Procedure 14.syn

§ 14.syn Synopsis to Chapter 14: MULTIPLE PARTY PRACTICE

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
A. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

2-14 Moore's Manual--Federal Practice and Procedure § 14.01

§ 14.01 Purpose of Joinder Required for Just Adjudicationn*

The Federal Rules of Civil Procedure specify when joinder of a person is needed for a just adjudication. The rules provide that in certain specified circumstances a trial court should exercise jurisdiction over a particular person if joinder is feasible, that is, if the person is subject to service of process and if joinder of the person will not deprive the court of jurisdiction over the subject matter of the action. n1 This type of joinder was traditionally referred to by the courts as "compulsory joinder." n2 Because the rules do not use the term compulsory, a more accurate description of this type of joinder would be "feasible joinder." n3 This rule of feasible or "compulsory" joinder is the exception to the otherwise general policy of allowing the plaintiff to decide who will be parties to the lawsuit. n4

Under the current federal rules, the plaintiff's discretion to determine the parties is no longer the primary consideration; the trial court, other parties, and absentees may take several types of steps to override the party structure the plaintiff has chosen for the case. n5 Thus, Rule 19 prescribes the circumstances in which the plaintiff's autonomy to determine party structure must yield to other considerations. n6 In such circumstances, the rules reflect a policy decision that other interests, primarily the protection of other parties and absentees, outweigh the interest in the plaintiff's autonomy. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 19.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 19(a).*

(n3)Footnote 2. *Gwartz v. Jefferson Memorial Hosp., 23 F.3d 1426, 1428 (8th Cir. 1994)* (Rule 19 governs when joinder of a particular person is compulsory).

(n4)Footnote 3. *See Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 n.7 (11th Cir. 1999)* (after joinder of party is determined not feasible under Rule 19(a), trial court will proceed with analysis of Rule 19(b) to determine whether suit should proceed in absence of party).

(n5)Footnote 4. *Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983)* .

(n6)Footnote 5. *Fed. R. Civ. P. 14(a)* (permitting defendant to implead third-party defendants who owe defendant indemnity or contribution for all or part of plaintiff's claim).

(n7)Footnote 6. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993)* .

(n8)Footnote 7. *Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.02

§ 14.02 Traditional Classification of Parties for Joinder Purposesn*

[1] Joinder Rules Traditionally Dependent on Party Classification

Courts have traditionally classified parties into three types for joinder purposes: proper, necessary, and indispensable. Although the current rules do not explicitly use the terms "proper," "necessary," and "indispensable," the courts still use these expressions to analyze and discuss how the "required joinder" rules function. n1 These three categories of parties may be viewed as categories on a continuum from broader to narrower, with the broader types encompassing the narrower. n2 Thus, a "proper party" is the broadest category, defining those parties who may be brought in or left out at the plaintiff's option. n3 As a subcategory of proper parties, "necessary parties" (now referred to in Rule 19 as "required parties") consist of proper parties that are so closely related to the pending litigation that their absence creates a risk of harm, either to another party, or to an absentee. The rules have incorporated a policy that avoiding such harm is more important than giving the plaintiff the autonomy to choose parties. Therefore, the court will order joinder of necessary parties if such joinder can be implemented, or is "feasible." n4 n5 Finally, an "indispensable party" is a subcategory of necessary parties, consisting of necessary parties who cannot be joined and whose absence creates a powerful risk of harm, either to an existing party or to an absentee so that the court will dismiss the pending case rather than take the risk by proceeding without the party. n6

An attorney must remember that the labels used in joinder definitions do not replace proper analysis under the feasible and permissive joinder rules. For example, the term "indispensable" is a label placed on an absentee only after completing an analytical process and concluding that the pending action must be dismissed. n6.1 Thus, "indispensability" becomes relevant only after the court identifies a necessary party whose joinder cannot be effected. n7

[2] Proper Party

Proper parties are those who are encompassed by Rule 20, the permissive party rule; n1 therefore, proper parties are parties who may (but need not) be joined in a particular case. Proper parties are those whose claims arise, or against whom claims arise, from the same transaction or occurrence and will raise at least one common question of law or fact. Rule 20 is optional, however, and a plaintiff remains free to refuse to either join proper parties or to leave them to sue or

be sued in other cases. Because these other cases could involve the same transaction or occurrence as the pending case, failure to join proper parties may cause duplicative litigation. However, because Rule 20 is permissive, the plaintiff is free to join as many or as few proper parties as it desires. n2

For reasons such as limitations on subject matter jurisdiction or litigation strategy, the plaintiff may structure the case without joining all proper parties. The fact that the plaintiff's litigation structure may run the risk of these systemic harms is irrelevant under the permissive party joinder rule. That rule implicitly recognizes that plaintiff autonomy in this regard is a more important goal than avoiding duplicative litigation. n3

[3] Required Party

A "required party" used to be referred to as either a "necessary party" or as a "person needed for a just adjudication." n1 Sometimes courts and attorneys still use the traditional term "necessary party" to refer to this type of absentee person. n2

An absent person is a "required party" if the person is subject to service of process and joinder of the person will not deprive the court of subject-matter jurisdiction. A required party must be joined as a party if one of two circumstances exist:

1) In the person's absence, the court cannot accord complete relief among existing parties; n2.1 or 2) the person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (a) as a practical matter impair or impede the person's ability to protect the interest, n2.2 or (b) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. n2.3

If a required party has not been joined, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff. n2.4

As discussed in [1], *above*, an indispensable party is a subcategory of required party. "Required" refers to those absentees who should be joined in the pending case; if joinder is infeasible, however, the action may continue without required parties. By contrast, an indispensable party refers to an absentee who must be joined in the pending case if it is to go forward; in other words, if joinder is infeasible for an indispensable party the action must be dismissed. n3 Finally, a party is a required party only if complete relief may not be accorded among those who are already parties to the action, the party's interests may not be protected without its presence as a party, and there is a risk of inconsistent judgments. n4

[4] Indispensable Party

An "indispensable party" is a conclusory term applied to a person after the test in Rule 19(b) is applied. n1 Thus the term refers to an absentee and "required party" n2 whose joinder is not feasible and whose absence causes a court to dismiss the case rather than proceed without the required party. A court considers the following four factors in determining whether the court must dismiss the case:

1. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; n3

2. the extent to which any prejudice could be lessened or avoided by: (a) protective provisions in the judgment; (b) shaping the relief; or (c) other measures; n4

3. whether a judgment rendered in the person's absence would be adequate; n5 and

4. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. n6

Thus, required parties are absentees who have an interest in the controversy and who ought to be made parties in order that the court may act; and indispensable parties are absentees who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination would be entirely inconsistent with equity and good conscience. n7 Because Rule 19 is designed to protect the rights of an absentee party, both trial courts and appellate courts should consider on their own initiative whether a person is an indispensable party to litigation, even if it is not raised by the parties to the action, when the possibility of such joinder comes to the attention of the court. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 19.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See MacDermid, Inc. v. Selle, 2008 U.S. Dist. LEXIS 16057, at *10-13 (D. Conn. 2008)* ; *see also Fed. R. Civ. P. 19(a),(b).*

(n3)Footnote 2. *See Davis v. United States, 192 F.3d 951, 959 (10th Cir. 1999)* .

(n4)Footnote 3. *See* [2], *below.*

(n5)Footnote 4. *See* [3], *below*; *see also Fed. R. Civ. P. 19(a).*

(n6)Footnote 5. [Reserved]

(n7)Footnote 6. *See* [4], *below.*

(n8)Footnote 6.1. *Fed. R. Civ. P. 19(b)*, Committee Note to 2007 Amendments.

(n9)Footnote 7. *Kunica v. St. Jean Financial, Inc., 63 F. Supp. 2d 342, 350-351 (S.D.N.Y. 1999)* .

(n10)Footnote 1. *Fed. R. Civ. P. 20* (discussed in *§ 14.20* et seq.).

(n11)Footnote 2. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Surety Co., 177 F.3d 210, 223 (3d Cir. 1999)* .

(n12)Footnote 3. *See Jarriel v. General Motors Corp., 835 F. Supp. 639, 640-641 (N.D. Ga. 1993)* .

(n13)Footnote 1. *See Fed. R. Civ. P. 19(a)(1).*

(n14)Footnote 2. *Picciotto v. Cont'l Cas. Co., 512 F.3d 9, 16-17 (1st Cir. 2008)* .

(n15)Footnote 2.1. *Fed. R. Civ. P. 19(a)(1)(A).*

(n16)Footnote 2.2. *Fed. R. Civ. P. 19(a)(1)(B)(i).*

(n17)Footnote 2.3. *Fed. R. Civ. P. 19(a)(1)(B)(i).*

(n18)Footnote 2.4. *Fed. R. Civ. P. 19(a)(2).*

(n19)Footnote 3. *Davis v. United States, 192 F.3d 951, 957-959 (10th Cir. 1999)* (discussion of distinction between necessary and indispensable parties); *see Fed. R. Civ. P. 19(a)*; *see also* [4], *below*.

(n20)Footnote 4. *Johnson v. Smithsonian Inst., 189 F.3d 180, 188 (2d Cir. 1999)* .

(n21)Footnote 1. *Fed. R. Civ. P. 19(b)*, Committee Note to 2007 Amendments.

(n22)Footnote 2. *See* [3], *above*.

(n23)Footnote 3. *Fed. R. Civ. P. 19(b)(1)*.

(n24)Footnote 4. *Fed. R. Civ. P. 19(b)(2)*.

(n25)Footnote 5. *Fed. R. Civ. P. 19(b)(3)*.

(n26)Footnote 6. *Fed. R. Civ. P. 19(b)(4)*.

(n27)Footnote 7. *Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 440-441 (4th Cir. 1999)* .

(n28)Footnote 8. *Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 382-383 (2d Cir. 2006)* (citing **Moore's Federal Practice**).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.03

§ 14.03 Summary of Analysis Used for Joinder of Required Partyn*

The inquiry regarding joinder of a required party is a three-step process: n1

First, the court must determine if joinder is required; under this step the court must determine whether the absentee should be joined, that is, the absentee is needed for a just adjudication as prescribed in three factual situations: (1) without joinder complete relief cannot be accorded among those already parties; (2) nonjoinder may as a practical matter impair or impede the absentee's ability to protect its interest; or (3) nonjoinder would put a current party to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. n2

Second, if the absentee is necessary under any of the three situations in the first step, the court must determine whether joinder of the absentee is feasible. Several factors affect feasibility of joinder: joinder will not be feasible if it destroys subject matter jurisdiction; joinder will not be feasible if the court cannot exercise personal jurisdiction over the absentee; and finally, if a joined absentee objects to venue as improper with respect to the absentee, the court must treat the case as though joinder were not feasible. n3 If joinder is feasible, the court may order that the absentee be made a party. n4

If joinder is not feasible for any of the three reasons described above, the court must proceed to the third and final step, which essentially is whether even though the absentee is needed for a just adjudication, the court should allow the litigation to proceed without the absentee or should it dismiss the pending suit. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 19.02, 19.03 (Matthew Bender 3d

ed.).

(n2)Footnote 1. *Western M. R. Co. v. Harbor Ins. Co., 910 F.2d 960, 962 n.5 (D.C. Cir. 1990)* (Rule 19 prescribes three-step process even though steps may appear obscured by its language).

(n3)Footnote 2. *Fed. R. Civ. P. 19(a)(1)(A),(B)*; *see § 14.04[1]*.

(n4)Footnote 3. *Fed. R. Civ. P. 19(a)(1),(3)*; *see §§ 14.04[2][b]-[d]*.

(n5)Footnote 4. *Fed. R. Civ. P. 19(a)(2)*; *see § 14.04[2][e]*.

(n6)Footnote 5. *Fed. R. Civ. P. 19(a)*; *see § 14.05*.

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PART IV Parties
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A. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

2-14 Moore's Manual--Federal Practice and Procedure § 14.04

§ 14.04 Court's Determination Whether Party Needed for Adjudication Must Be Joined if Feasiblen*

[1] Persons Needed for Just Adjudication

[a] Three Situations When Absentees Are Needed

The title of Rule 19 refers to "required joinder of parties." Rule 19(a) prescribes three situations in which joinder of an absent person is required: n1

1. Under the "complete relief" clause, the absentee is necessary if without joinder complete relief cannot be accorded among those already parties. n2 This clause reflects the federal system's interest in efficiency and avoidance of inconsistent results. It does not require that the absentee claim an interest in the subject matter of the pending suit. The complete relief clause is not usually the most critical factor; cases relying on this provision to compel joinder usually also rely on at least one of the other joinder clauses. n3

2. Under the "impair or impede" clause, an absentee is needed for a just adjudication if the absentee is so situated that nonjoinder may as a practical matter impair or impede its ability to protect that interest. n4 In other words, this clause is one of the "prejudice" or "harm" bases of compulsory joinder because joinder is required to avoid harm to the absentee's interest. n5

3. Under the "multiple liability" clause, an absentee is needed for adjudication if the absentee's nonjoinder would put a current party (almost invariably the defendant) to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. n6 Under this test, joinder of the absentee is necessary not to avoid harm to the absentee but to the defendant. n7

If an absentee is not needed for a just adjudication under any of the three tests described above, the court may not require that the absentee be joined in the action. n8 Of course, parties who are not needed for a just adjudication also may not be the basis for the dismissal of an action. n9

[b] Inability of Court to Accord Complete Relief

An absentee is needed for a just adjudication if without joinder of the absentee the court cannot accord complete relief among those already parties to the action. n10 Unlike the other two bases for joinder set forth in the rule, this provision does not require that the absentee possess an interest in the subject of the litigation or that nonjoinder result in harm either to the absentee or to an extant party. Rather, this provision is grounded in the federal courts' interest in the comprehensive resolution of disputes and the avoidance of duplicative litigation. n11 The purpose of the "complete relief" clause is to avoid duplicative litigation. The primary concern is in rendering complete justice among those already joined, not in finding that an absentee is necessary simply to avoid multiple litigation. n12 The courts use the clause to ensure that they do not enter partial or "hollow" judgments, that is, judgments which do not effectively resolve the current parties' entire controversy. n12.1

Most courts have interpreted the "complete relief" clause in a narrow manner, which means that the court will require joinder when nonjoinder would preclude the court from effecting relief not in some general sense but specifically between current parties to the action. In other words, joinder will be required only when the absentee's nonjoinder precludes the court from rendering complete justice among parties who have already been joined. n13 Thus interpreted, the rule may not be invoked merely because some absentee may cause future litigation. n14 Thus, the fact that the absentee might later frustrate the outcome of the litigation does not by itself make the absentee necessary for complete relief. n15 Furthermore, the "complete relief" clause does not refer to possible relief against other potential defendants, n16 or other possible remedies. n17 Finally, the "complete relief" provision does not absolutely require final adjudication of all claims even among all of the current parties, provided that the relief actually afforded to the parties in the action is meaningful. n18

[c] Nonjoinder Would Impair or Impede Interest of Absentee

[i] Absentee Must Have Interest in Subject Matter of Litigation

An absentee is deemed a required party if the absentee claims an interest relating to the subject of the action and if that absentee is so situated that nonjoinder would as a practical matter impair or impede the person's ability to protect that interest. n19 The "impair or impede" clause is designed to enable the absentee to protect its own interest. n20 The rule specifically requires that the potential harm threaten an absentee's interest relating to the subject of the action. n21 This interest must be legally protectable not merely a financial interest or interest of convenience. n22

The absentee must have a direct stake in the pending litigation; an interest in related subject matter is not sufficient to support definition as a required party. n23

[ii] Practical Application of "Impair or Impede" Clause

Once it is established that the absentee has a sufficient interest in the litigation, the question then becomes whether nonjoinder of the absentee may as a practical matter impair or impede the absentee's ability to protect that interest. This means that the impact of an adjudication on the absentee's interest must be direct and immediate. Consequently, if the outcome of the litigation may have a practical effect on the absentee's interest, the absentee is a party needed for adjudication. n24 Thus, the assessment of the possible impairment to an absentee's ability to protect its interest is a functional assessment, as opposed to a theoretical one. n25

Rule 19 does not require an absolute showing that the absentee's interest will necessarily be harmed by nonjoinder; rather, it is concerned that nonjoinder "may" result in such harm. On the other hand, the harm cannot be merely conjectural; the mere theoretical possibility of prejudice does not require joinder. n26 Instead, the possibility of harm must be such that nonjoinder would be unfair. n27

The emphasis on practical impairment of an absentee's interest reflects the fact that an absentee's interest is rarely

affected as a matter of law in the res judicata or collateral estoppel sense, because, under due process, persons generally are not bound by a judgment in a suit to which they were not parties. n28 Only on rare occasions will the stare decisis effect of a judgment harm the absentee's ability to protect its interest. n29 However, stare decisis will rarely pose a practical threat to an absentee because the precedential aspect of case law generally applies only to appellate court opinions, and only regarding matters of law. The holdings of a trial court on issues of fact simply do not constitute binding precedent. Second, the use of stare decisis in some instances may violate due process, and judgments in a separate case between different parties do not bind persons who are not joined or represented. n30

[d] Nonjoinder of Absentee Would Make Current Party Subject to Multiple Liabilities

An absentee with a claimed interest in the litigation is a required party if nonjoinder would leave any of the persons already parties (usually the defendant) subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. n31 The "multiple liability" clause does not require that the parties be so situated that nonjoinder of the absentee will necessarily subject a party to a particular risk. It requires merely that there is some substantial risk of harm. n32 However, the risk of multiple obligations must be more than merely possible, n33 and more than conjectural. n34 The inquiry is practical in that it requires a court to consider all relevant factors, including the balance between the plaintiff's choice of forum, on the one hand, and the policies of judicial economy and fairness to other parties, on the other. n34.1

Practitioners should note that the "multiple liability" clause compels joinder of an absentee to avoid inconsistent obligations and not to avoid inconsistent adjudications. n35 Thus, sequential claims for damages do not necessarily pose the necessary risk of harm. For example, if there are several victims of a tortious act and they sue consecutively, one plaintiff may lose, and yet a later plaintiff may win on precisely the same theory. Although the results are inconsistent, the defendant's obligations are not; paying damages to one claimant and not to another is not the sort of inconsistent obligation the clause addresses. Rule 19 is consistent in this regard with the similar provisions applicable to class actions. n36

Furthermore, joint tortfeasors are not necessarily parties needed for a just adjudication. n37 The possibility that because of an absentee joint tortfeasor, a defendant may be liable in the original action and lose a subsequent action for contribution against the joint tortfeasor is not the kind of inconsistency contemplated by the "multiple liability" clause. n38 The "multiple liability" clause does require joinder, however, in those cases when a party complying with one inconsistent court order might breach another inconsistent order. n39

[2] Determination if Joinder is Feasible

[a] Three Situations When Joinder is Not Feasible

If an absent party is a "required party," the court must join the party in the litigation unless joinder is not feasible. Rule 19(a) gives three reasons why joinder may not be feasible: n1 n2

1. If claims by or against the absentee do not invoke federal subject matter jurisdiction. n3 This aspect of the rule refers to the possibility that joining the absentee will destroy diversity of citizenship jurisdiction. The assessment requires the court to align the absentee on the side of the dispute most closely reflecting its interest. n4

2. If the court cannot exercise personal jurisdiction over the absentee. n5 The federal court will make this determination based on considerations such as the absentee's amenability to service of process, and also by state long arm statutes permitting service of process outside the state in which the court sits. n6

3. If the absentee, once joined, objects that venue is improper as to the absentee. n7 This rule is based on the principle that the rule governs only the procedural propriety of joinder and is secondary to requirements such as the venue

statutes governing the proper place of trial in federal court. n8

[b] Claim by or Against is Not Covered by Federal Subject Matter Jurisdiction

Rule 19(a) is a joinder rule that governs only the procedural propriety of joinder and, thus, does not affect the jurisdiction of the federal court. n9 Furthermore, because every claim asserted in federal court must be supported by federal subject matter jurisdiction all claims by or against a party needed for a just adjudication must be supported by subject matter jurisdiction. If any claim is not, joinder is not feasible under the compulsory party joinder rule, and the court may not compel joinder of the absentee. n10 The court must then address the question of whether to proceed without the absentee or to dismiss the pending case. n11

The principal grounds for federal subject matter jurisdiction are either the presence of a federal question or diversity of citizenship. n12 When a claim involving an absentee needed for adjudication invokes federal question jurisdiction, joinder is feasible because subject matter jurisdiction poses no impediment. However, in determining whether joinder is feasible under diversity of citizenship jurisdiction, the court must align the absentee on the proper "side" of the litigation, as is the case in any diversity of citizenship case. The court always has the authority to align parties in accordance with their true interest in the litigation. n13 If the proper alignment of the absentee required party violates the complete diversity rule, joinder is not feasible. n14

Another issue that may arise is that of supplemental jurisdiction, which allows a court to entertain a nonfederal, nondiversity claim if the claim is so closely related to the underlying case, which has already properly invoked some basis of federal subject matter jurisdiction, that the claim constitutes part of the same "case or controversy." n15 However, supplemental jurisdiction is of limited use as a basis of feasible jurisdiction, because courts have generally not exercised supplemental jurisdiction over claims by or against parties needed for a just adjudication, on the grounds that the supplemental jurisdiction statute's exceptions clause removes jurisdiction with regard to specific claims n16 when the underlying basis of federal jurisdiction is diversity of citizenship. n17

Therefore, in cases that invoke diversity of citizenship jurisdiction, supplemental jurisdiction is not available to support claims by a plaintiff joined under the compulsory joinder rule. The statute expressly proscribes supplemental jurisdiction over "claims by persons proposed to be joined as plaintiffs under Rule 19. n18 However, nothing in the supplemental jurisdiction statute precludes supplemental jurisdiction over claims by defendants joined under the compulsory joinder rule. n19 Therefore, a party needed for a just adjudication party joined as a defendant could make a claim against the plaintiff and argue that the statute permits supplemental jurisdiction. n20

[c] Joinder Not Feasible Because Absentee Cannot Be Served With Process

Joinder of an absentee required party is not feasible if the absentee is not subject to service of process in the pending case. n21 Even though a required party, if the absentee cannot be brought within the personal jurisdiction of the district court, joinder is not feasible, and the court must then decide whether to proceed without the absentee, or dismiss the pending case. n22

Rule 4 governs service of process in virtually every civil action in federal court, including the joinder of parties needed for a just adjudication. Rule 4 permits service of process anywhere within the territory of the state in which the federal court sits and permits service outside that state only if state law provides. Thus, federal courts may avail themselves of state long-arm provisions. n23 Rule 4 also expressly permits service outside the forum state to accomplish joinder of necessary parties. n24 This permits service of process on the necessary party within 100 miles of the federal courthouse in which the action is pending. n25 While this provision is applicable in major metropolitan areas that encompass more than one state, it is not used that often because of general expansion in availability of extraterritorial service under state long-arm statutes. n26

[d] Joinder Not Feasible Because Absentee Objects to Improper Venue

If the court finds that an absentee is a required party, the court must order that the absentee be made a party, if feasible. n27 If an absentee who has been joined as a required party objects to venue, and joinder of that party would make the venue of the action improper, that party must be dismissed from the action. n28 The Judicial Code provides generally that venue may be laid in civil cases either in any district in which all defendants reside or in any district in which a substantial part of the claim arose. n29 Accordingly, an absentee required party who is dismissed because of a venue objection is treated as one who cannot be made a party. In other words, the objection to venue makes joinder of the absentee not feasible. n29.1

The terms of Rule 19(a), however, do not preclude a court from transferring a case to a proper venue where the absentee can then be compelled to join as a required party, n30 provided that it is a federal district in which all parties and the absentee could be subject to personal jurisdiction and in which venue would be proper. Alternatively, because the absentee has been joined and then objects to venue, it can be argued that venue in the case as a whole is improper, and that the case can be transferred. n31

[3] Court Must Join Required Parties When Feasible

When the court finds an absent person is a required party and that joinder of the absentee is feasible, it must give the plaintiff an opportunity to add the absentee as a party. n1 If the plaintiff refuses or otherwise fails to join the person, the court may dismiss the action because of plaintiff's failure to comply, n2 or the court must itself order that the absentee be made a party. n3

When it orders a party joined, the court must determine the absentee's proper alignment in the controversy. n4 If it determines that the absentee should be joined as a plaintiff, the court must issue an order to that effect, and the party must be served with process. If the absentee declines the offer to participate as a plaintiff, the absentee may be made a defendant, or in a proper case, an involuntary plaintiff. n5 If the absentee is subject to personal jurisdiction, the court will order the absentee joined and served as a defendant. It may then realign the absentee as a plaintiff for diversity of citizenship purposes. n6 Even though these issues are matters only of civil procedure, the court must accord the absentee all appropriate procedural safeguards, including a meaningful opportunity to be heard. If the court fails to do so, any action it takes may be invalidated as a violation of the absentee's due process rights. n7

As noted above, Rule 19(a) provides that the court has the authority to order an absentee joined as an involuntary plaintiff in a "proper case," n7.0.1 which is not defined in the rule. However, the involuntary plaintiff doctrine is disfavored. Consequently, the courts have developed a test that requires that the absent person (1) has an obligation to permit its name or title to be used to protect rights asserted in the action; (2) is beyond the jurisdiction of the court; and (3) has refused to voluntarily join in the action following notification. n7.1 The rule clearly does not mean that whenever an absent party is properly alignable as a plaintiff in a lawsuit, the absent party may be brought in under Rule 19(a) as an involuntary plaintiff. n8 The courts have found such a relationship to exist in cases involving exclusive licensees of patents and beneficial owners of copyrights. n9

Under the involuntary plaintiff doctrine, an involuntary plaintiff may be bound by the judgment even though it never consented to join the case and was not served with process. In fact, the doctrine is available only if the involuntary plaintiff is beyond the personal jurisdiction of the court. n10 However, there must have been an attempt to notify the involuntary plaintiff of the action and offer the opportunity to join before the court will order an involuntary plaintiff joinder. n11 Furthermore, the current plaintiff must have standing to sue. n12 The court itself has discretion to notify a necessary absentee of the pendency of the case. n12.1 The current plaintiff or defendant has the burden of proving that the conditions for using the involuntary plaintiff doctrine are satisfied. n13 In this regard, a defendant who wishes to assert a counterclaim against an absentee is allowed to prove that the involuntary plaintiff doctrine applies, in the same manner as the current plaintiff could. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 19.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 19(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 19(a)(1)(A).*

(n4)Footnote 3. *See* [b], *below.*

(n5)Footnote 4. *Fed. R. Civ. P. 19(a)(1)(B)(i).*

(n6)Footnote 5. *See* [c], *below.*

(n7)Footnote 6. *Fed. R. Civ. P. 19(a)(1)(B)(ii).*

(n8)Footnote 7. *See* [d], *below.*

(n9)Footnote 8. *Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982)* (it is a misapplication of Rule 19(a) to require joinder of parties who are not needed for a just adjudication, and who have a separate cause of action entirely).

(n10)Footnote 9. *See Fed. R. Civ. P. 19(b).*

(n11)Footnote 10. *Fed. R. Civ. P. 19(a)(1)(A).*

(n12)Footnote 11. *Fed. R. Civ. P. 19(a)*, Advisory Committee Note to 1966 Amendments; *see Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 850 (11th Cir. 1999)* .

(n13)Footnote 12. *Friends of the E. Lake Sammamish Trail v. City of Sammamish, 361 F. Supp. 2d 1260, 1271 (W.D. Wash. 2005)* .

(n14)Footnote 12.1. *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983)* .

(n15)Footnote 13. *Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 705 (3d Cir. 1996)* (completeness of relief is determined on basis of those persons who are already parties and not as between party and absent person whose joinder is sought).

(n16)Footnote 14. *Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108 (4th Cir. 1980)* (United States Navy was not party needed for adjudication in contract action between airport contractors merely because defendant theorized possibility that Navy would institute suit against defendant).

(n17)Footnote 15. *Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1255 (9th Cir. 1983)* (in ejectment action between tribe and port to settle title to property, joinder of State of Washington not required even though state might subsequently challenge tribe's title).

(n18)Footnote 16. *Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 705-706 (3d Cir. 1996)* .

(n19)Footnote 17. *Gwartz v. Jefferson Memorial Hosp., 23 F.3d 1426, 1429 (8th Cir. 1994)* (in action by doctor

against hospital for wrongful termination, fact that doctor sought only personal damages and not those accruing to his absentee professional corporation meant that corporation was not necessary party).

(n20)Footnote 18. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1054 n.5 (3d Cir. 1988)* .

(n21)Footnote 19. *Fed. R. Civ. P. 19(a)(1)(B)(i).*

(n22)Footnote 20. *Marra v. Burgdorf Realtors, Inc., 726 F. Supp. 1000, 1004 (E.D. Pa. 1989)* (in action by asserted property owner against real estate agent and firm for fraud and misrepresentation in sale of plaintiff's property, plaintiff's son as record title holder was necessary party under Rule 19(a)(2)(i) because litigation would determine ownership).

(n23)Footnote 21. *Fed. R. Civ. P. 19(a)(1)(B)(i).*

(n24)Footnote 22. *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983)* , *cert. denied, 464 U.S. 849 (1983)* .

(n25)Footnote 23. *Atlantic Aero, Inc. v. Cessna Aircraft Co., 93 F.R.D. 333, 335 (M.D.N.C. 1981)* (when plaintiff claimed that plane crashed due to defendant's faulty parts and defendant countered that absent pilot was indispensable because pilot's suit against defendant might be impeded by finding that pilot caused crash, court held that pilot was not necessary under Rule 19(a) because plaintiff's suit would have no preclusive effect on pilot's suit and pilot had no suitable interest in plaintiff's suit).

(n26)Footnote 24. *Davis v. United States, 192 F.3d 951, 957-959 (10th Cir. 1999)* ; *see B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 544-545 (1st Cir. 2006)* (noting similarity between Rule 19(a)(2)(i) and Rule 24(a)(2) governing intervention; both require "impair or impede" analysis); *see also § 14.103* (intervention requirements).

(n27)Footnote 25. *Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 29 (C.D. Cal. 1983)* (interest requirement not limited to theoretical legal interest based on adoption of strict legal definitions and technicalities; rather, interest is to be determined from practical perspective).

(n28)Footnote 26. *Cortez v. County of Los Angeles, 96 F.R.D. 427, 430 (C.D. Cal. 1983)* .

(n29)Footnote 27. *Bennett v. Tucker, 827 F.2d 63 (7th Cir. 1987)* (Rule 19(a)(2)(i) requires persons to be joined if the judgment in pending action would so definitively establish their legal rights, that it would be inequitable not to join them).

(n30)Footnote 28. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 410 (3d Cir. 1993)* .

(n31)Footnote 29. *See, e.g., Jansen v. City of Cincinnati, 904 F.2d 336, 342 (6th Cir. 1990)* .

(n32)Footnote 30. *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 98 (2d Cir. 1990)* (doctrine of stare decisis generally does not control future, related actions by absentees).

(n33)Footnote 31. *Fed. R. Civ. P. 19(a)(1)(B)(ii).*

(n34)Footnote 32. *See Fed. R. Civ. P. 19(a)(1)(B)(ii); Int'l Gamco, Inc. v. Multimedia Games, Inc., 504 F.3d 1273, 1278 (Fed. Cir. 2007)* .

(n35)Footnote 33. *Temple Univ. Hosp., Inc. v. Group Health, Inc., 413 F. Supp. 2d 420, 426-427 (E.D. Pa. 2005)* .

(n36)Footnote 34. *Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc., 787 F. Supp. 706, 715 (E.D. Mich. 1992)* (citing **Moore's Federal Practice**).

(n37)Footnote 34.1. *Field v. Volkswagenwerk AG, 626 F.2d 293, 302 (3d Cir. 1980)* ; *Temple Univ. Hosp., Inc. v. Group Health, Inc., 413 F. Supp. 2d 420, 427 (E.D. Pa. 2005)* .

(n38)Footnote 35. *Micheel v. Haralson, 586 F. Supp. 169, 171 (E.D. Pa. 1983)* (rule protects against obligations that are inconsistent rather than adjudications that are inconsistent).

(n39)Footnote 36. *Fed. R. Civ. P. 23*.

(n40)Footnote 37. *Temple v. Synthes Corp., 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990)* .

(n41)Footnote 38. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 411 (3d Cir. 1993)* ; *see Temple Univ. Hosp., Inc. v. Group Health, Inc., 413 F. Supp. 2d 420, 427 (E.D. Pa. 2005)* .

(n42)Footnote 39. *Micheel v. Haralson, 586 F. Supp. 169, 171 (E.D. Pa. 1983)* (under multiple liability clause, person is protected against situations in which there would be two court orders and compliance with one might breach the other).

(n43)Footnote 1. *Fed. R. Civ. P. 19(a)(1)*.

(n44)Footnote 2. [Reserved]

(n45)Footnote 3. *Fed. R. Civ. P. 19(a)(1)*.

(n46)Footnote 4. *See* [b], *below*.

(n47)Footnote 5. *Fed. R. Civ. P. 19(a)(1)*.

(n48)Footnote 6. *See* [c], *below*.

(n49)Footnote 7. *Fed. R. Civ. P. 19(a)(3)*.

(n50)Footnote 8. *See* [d], *below*.

(n51)Footnote 9. *Fed. R. Civ. P. 82*.

(n52)Footnote 10. *Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 440-441 (4th Cir. 1999)* .

(n53)Footnote 11. *Fed. R. Civ. P. 19(b)*; *see § 14.05*.

(n54)Footnote 12. *See 28 U.S.C. § 1331* (federal question); *28 U.S.C. § 1332(a)(2)* (diversity).

(n55)Footnote 13. *Keith v. Volpe, 858 F.2d 467, 476 (9th Cir. 1988)* (in determining existence of diversity jurisdiction, court is not bound by plaintiff's alignment of parties in original pleading).

(n56)Footnote 14. *Fed. R. Civ. P. 19(a)(1)*; *see Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 440-441 (4th Cir. 1999)* .

(n57)Footnote 15. *Allendale Mut. Ins. Co. v. Excess Ins. Co., 62 F. Supp. 2d 1116, 1127-1128 (S.D.N.Y. 1999)* .

(n58)Footnote 16. *See 28 U.S.C. § 1367(b)*.

(n59)Footnote 17. *Murphy v. Newport Waterfront Landing, Inc., 806 F. Supp. 322, 325 (D.R.I. 1992)* (nondiverse party's joinder was not feasible in tort action against bar owner by injured patron).

(n60)Footnote 18. *28 U.S.C. § 1367(b)*; *see Fed. R. Civ. P. 19*.

(n61)Footnote 19. *See Fed. R. Civ. P. 19*.

(n62)Footnote 20. *28 U.S.C. § 1367*.

(n63)Footnote 21. *Fed. R. Civ. P. 19(a)(1)*.

(n64)Footnote 22. *Fed. R. Civ. P. 19(b)*; *Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915, 917 (4th Cir. 1999)* ; *see also § 14.05*.

(n65)Footnote 23. *Fed. R. Civ. P. 4(k)(1)(A)*.

(n66)Footnote 24. *Fed. R. Civ. P. 4, 19(a)*.

(n67)Footnote 25. *Fed. R. Civ. P. 4(k)(1)(B)*.

(n68)Footnote 26. *Freiman v. Lazur, 925 F. Supp. 14, 26 (D.D.C. 1996)* .

(n69)Footnote 27. *Fed. R. Civ. P. 19(a)*.

(n70)Footnote 28. *Fed. R. Civ. P. 19(a)(3)*; *see EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005)* .

(n71)Footnote 29. *28 U.S.C. § 1391(a)(1)*; (2) (venue in diversity of citizenship cases); *28 U.S.C. § 1391(b)(1)*; (2) (venue in federal question cases).

(n72)Footnote 29.1. *Fed. R. Civ. P. 19(a)*, Advisory Committee Note to 1966 Amendments; *Tick v. Cohen, 787 F.2d 1490, 1493 (11th Cir. 1986)* (venue limitations may be basis to bar joinder).

(n73)Footnote 30. *Pauley v. Pauley, 58 F.R.D. 386, 387 (D. Md. 1972)* (if party needed for just adjudication cannot be joined, case may be dismissed or transferred).

(n74)Footnote 31. *28 U.S.C. § 1406(a)* (in interest of justice, court may transfer case from improper venue to proper venue).

(n75)Footnote 1. *See Fed. R. Civ. P. 19(a)(2)*; *Sladek v. Bell Sys. Management Pension Plan, 880 F.2d 972, 980 (7th Cir. 1989)* .

(n76)Footnote 2. *Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 714 (4th Cir. 1996)* (if court agrees that absentee is required party and joinder feasible, plaintiff is given choice of amending its complaint to add indispensable second defendant or suffering dismissal of its complaint).

(n77)Footnote 3. *See Fed. R. Civ. P. 19(a)(2)*; *RPR & Assocs. v. O'Brien/Atkins Assocs., 921 F. Supp. 1457, 1463 (M.D.N.C. 1995)* , *aff'd without opinion, 103 F.3d 120 (4th Cir. 1996)* .

(n78)Footnote 4. *See* [2][b], *above*.

(n79)Footnote 5. *Fed. R. Civ. P. 19(a)(2)*.

(n80)Footnote 6. *Babcock v. Maple Leaf, Inc., 424 F. Supp. 428 (E.D. Tenn. 1976)* .

(n81)Footnote 7. *Eakins v. Reed, 710 F.2d 184, 187 (4th Cir. 1983)* .

(n82)Footnote 7.0.1. *Fed. R. Civ. P. 19(a)(2)*.

(n83)Footnote 7.1. *See South Dakota ex rel. South Dakota R.R. Auth. v. Burlington N. & Santa Fe R.R. Co., 280 F. Supp. 2d 919, 935 (D.S.D. 2003)* .

(n84)Footnote 8. *Promatek Indus. v. Equitrac Corp., 185 F.R.D. 520, 522-523 (N.D. Ill. 1999)* (when recovery systems manufacturer commenced action against competitor alleging federal antitrust violations, deceptive trade practices, tortious interference with business relationships, unfair competition, and misappropriation of trade secrets, independent distributor of plaintiff's products was not proper party for involuntary plaintiff status).

(n85)Footnote 9. *Ferrara v. Rodale Press, Inc., 54 F.R.D. 3 (E.D. Pa. 1972)* (applied involuntary plaintiff doctrine in copyright action).

(n86)Footnote 10. *Dublin Water Co. v. Delaware River Basin Comm'n, 443 F. Supp. 310, 315 (E.D. Pa. 1977)* .

(n87)Footnote 11. *Babcock v. Maple Leaf, Inc., 424 F. Supp. 428, 431 (E.D. Tenn. 1976)* .

(n88)Footnote 12. *Coast v. Hunt Oil Co., 195 F.2d 870, 872 (5th Cir. 1952)* .

(n89)Footnote 12.1. *Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 383 (2d Cir. 2006)* .

(n90)Footnote 13. *Followay Prods., Inc. v. Maurer, 603 F.2d 72, 75 (9th Cir. 1979)* (citing **Moore's Federal Practice**).

(n91)Footnote 14. *Studebaker Corp. v. Algripco, Inc., 331 F. Supp. 375, 378 (N.D. Ohio 1970)* (defendant permitted to amend answer to add counterclaim charging licensee and patent owner with fraud and antitrust violations and to join patent owner as new party plaintiff).

Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
A. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

2-14 Moore's Manual--Federal Practice and Procedure § 14.05

§ 14.05 Court's Determination Whether to Dismiss Action When Joinder of Necessary Party is Not Feasiblen*

[1] Equity and Good Conscience Determine Whether Dismissal Is Proper

[a] Court Considers Four Factors to Determine Equity and Good Conscience

If the court determines that an absentee is a required party n1 but that joinder of the absentee is not feasible, n2 the court must either proceed with the pending litigation or it must dismiss the case. The court must base its decision whether to proceed or dismiss on "equity and good conscience." Rule 19 lists four factors listed below for the court to consider in its determination. The factors are not arranged in order of importance, and no factor is determinative or necessarily more important than another; furthermore, the four factors are not exclusive. n3

The primary issue is equity and good conscience, which permits the court to consider all circumstances relating to the fairness and advisability of either proceeding or dismissing. n4 The multiple factors must bear on the decision whether to proceed without a required person. This decision must be based on factors varying with each different case, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19(b) cannot be applied in a vacuum, and it may require some preliminary assessment of the merits of certain claims. For example, a court must examine to some extent the claims presented and the interests likely to be asserted both by the joined parties and the absent entities or persons. n5

The four factors listed below overlap with each other, n6 and also may overlap with the factors considered by the court to determine whether the absentee was a person initially needed for a just adjudication. n6.1 However, the fact that the considerations are similar does not dispense with the required analysis for each step. n7

The four factors that the court must consider to make its ultimate decision to proceed or dismiss are: n7.1

1. The extent to which a judgment rendered without the absentee might be prejudicial. n8

2. Whether the court can shape the litigation to avoid the sort of prejudice assessed in the first factor. n9 Under this factor, the court should consider whether prejudice could be lessened or avoided by: including protective provisions in

the judgment; shaping the relief; or taking other measures. n9.1

3. Whether the judgment will be adequate without joinder of the absentee. n10

4. Whether the plaintiff would have an adequate remedy should the case be dismissed. n11

[b] Balancing Test

In its determination of whether in equity and good conscience the suit should proceed without the necessary party, the court balances the four factors that are specified in Rule 19(b). n12 The analysis of whether to proceed or dismiss also balances the various interests of the parties based on the particular facts of each case. n13 Thus, in addition to the four factors specified in Rule 19(b), the court must consider the underlying interests sought to be protected by the rule: the interest of the plaintiff in having a forum, the interest of the defendant in avoiding multiple litigation and inconsistent judgments, the interest of the absentee in avoiding prejudicial impact of a judgment to which it cannot be made a party, and the public and judicial interest in complete, consistent, and efficient resolution of disputes. n14 In deciding whether to proceed or dismiss, the court should keep interests such as those in mind. n15

The balancing test is flexible and must be made in a practical matter. n16 The issue of whether to proceed or dismiss is vested in the discretion of the district judge, n17 whose determination will not be overturned on appeal unless the court has abused its discretion. n18 When a court does determine that the case should be dismissed for nonjoinder, it should ensure that it creates a sufficient written record to permit appellate review of the dismissal. n19

[2] Whether Judgment Would Have Prejudicial Effect on Absentee or Party

[a] Court's Determination of Prejudicial Effect

The first factor listed in Rule 19(b) that the court must use to determine whether to proceed with or dismiss the case is the extent to which a judgment rendered in the person's absence might be prejudicial to the absentee or those who are already parties. n1 This factor is a determination of degree and is an assessment of the extent of the prejudice that will result from proceeding without the absentee, n1.1 because failure to join an absentee must cause at least some hardship either on the absentee or on a party; otherwise the absentee would not have been held necessary in the first place. However, only when the prejudice would be to the degree that it would offend equity and good conscience should the court use prejudice as a basis of dismissal, taken in consideration with the other factors enumerated in the rule. n2

Sometimes, nonjoinder of an absentee will cause prejudice to both the absentee and the defendant. n3 However, such dual prejudice is not required to warrant either a holding that the absentee is needed for adjudication under Rule 19(a) or a dismissal for nonjoinder if the absentee cannot be joined under Rule 19(b). The analysis of the rule considers the alternative of harm either to the absentee or to the defendant. Furthermore, because all factors are considered, the court need not base its decision solely on prejudice. n4

[b] Minimization of Prejudicial Effect by Party or Absentee May Allow Court to Proceed

In its determination of the extent of prejudice, n5 the court may properly consider whether the absentee's interest is fully represented by the parties already in the suit; n5.1 such representation could mitigate the potential harm to the absentee. n6 However, when considering the effect of representation, mere similarity of interest is not sufficient to prevent prejudice; the interest of the party and the absentee must be the same. n7

With respect to the absentee, the court may consider the absentee's ability to protect itself from prejudice. Furthermore, an absentee's refusal to intervene may be considered in calculating prejudice should the case proceed without the absentee. n8 Courts interpret a decision not to intervene as an indication that the absentee evaluates its interests as not being threatened by the litigation. The absentee's refusal to intervene in such a circumstance may justify the court's

decision to proceed rather than dismiss, unless, of course, other factors (such as harm to the defendant) dictate dismissal. n9 The court may refuse to require the absentee to protect its own interest by intervention if it would result in the absentee's waiving an immunity to suit, n10 and in such circumstances, the court may well conclude that the action should be dismissed. n11

With respect to potential for harm to the defendant, the court may properly consider the defendant's options for avoiding prejudice. For example, if the defendant has a claim against an absentee for indemnity or contribution for all or part of plaintiff's claim in the pending case, it can implead the absentee. n12 Furthermore, a defendant sued regarding ownership of the res in property may invoke defensive interpleader to join all claimants to the pending case, and a defendant's failure to use this option when available would justify the court's refusal to dismiss the pending case. n13

[3] Minimization of Prejudicial Effect by Provisions of Court Order

The second factor in Rule 19(b) that the court must use to determine whether to proceed with or dismiss the case is the extent to which prejudice n1 may be lessened or avoided by: including protective provisions in the judgment; n2 shaping the relief; n2.1 or taking other measures. n2.2 For example, when specific performance or rescission of a contract will harm an absentee, the court may lessen the prejudicial effect by awarding monetary relief to the successful plaintiff. n3 If the case involves a dispute of a particular fund of money, the court could order that some amount sufficient to satisfy a subsequent claim by the absentee be left undistributed in the present action, or that a party post security for a particular amount).

In any event, the court should at least explore the option of adjusting or limiting its judgment in some way so that it does not affect the interests of the absentee before it dismisses the litigation. Other factors being equal, however, the district court may grant a dismissal if it cannot fashion a judgment to prevent prejudice. n4

[4] Whether Judgment Without Absentee Would Be Adequate

The third factor listed in Rule 19(b) that the court must use to determine whether to proceed with or dismiss the case is whether a judgment rendered in the person's absence will be adequate. n1 Under this factor, the court must examine the potential outcome if the court decides to proceed rather than dismiss; in contrast, the fourth factor requires the court to consider the potential effect of dismissing. n2 Both considerations thus reflect not only the interest of protecting parties and absentees but also the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. n3

If a judgment would have to be essentially hollow without the absentee, the court should dismiss rather than proceed. n4 For example, if a plaintiff seeks relief that will require an affirmative act by an absentee who cannot be joined it may make little sense to proceed. n5 Cases of this type are very similar to cases in which the plaintiff sues the wrong defendant and might be dismissed for failure to state a claim on which relief could be granted. n6

The "adequacy of judgment" consideration may operate in conjunction with the other considerations enumerated in the rule, especially the "shaping of relief" consideration of the second factor. If the court finds that proceeding without the absentee would cause a serious risk of prejudice, the court may examine the possibility of shaping relief to lessen the harmful effect and then consider the propriety of awarding relief that is less than complete. n7 Another potential interaction is the relationship between the adequacy of judgment and adequacy of remedy considerations. Thus, even if the court can award some relief, dismissal may be the superior disposition if there is an alternative forum in which all interested persons can be joined in a single case. It is appropriate to weigh the advantages of complete relief available in another forum against the concerns of duplicating expense and effort in light of the time and resources already expended in the pending case. n8

[5] Whether Remedy is Adequate If Case Were Dismissed

[a] Necessity of Adequate Remedy

The fourth factor listed in the Rule 19(b) "dismiss or proceed" analysis is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. n1 Under this factor, the court is required to consider the consequences of dismissing the pending case. This "adequacy of remedy" consideration complements the third factor, the adequacy of judgment analysis, which requires the court to consider the consequences of proceeding in the pending litigation and reflects the public interest i n resolving disputes completely, efficiently, and consistently. n2 This factor acknowledges that the decision to dismiss the pending case has direct effect on the plaintiff, who will have to take other steps to vindicate its rights. n2.1

Under the "adequacy of remedy" consideration, the court must assess what those steps might be and their probable effectiveness. The primary consideration under this factor is whether there is a satisfactory alternative forum in which the plaintiff can proceed. Such an alternative forum will only be superior to the present federal forum if all interested persons can be joined in a single case there. Otherwise, the alternative forum will be facing the same problem the court faces in the pending case. n3 In assessing the adequacy of the alternative forum, the court must determine whether the plaintiff is entitled to an adequate remedy, and not necessarily to precisely the same remedy that it sought in federal court. n4 Furthermore, there is no requirement that the plaintiff must proceed in a court in the United States. The preferred alternative forum may be in a foreign country. n5

[b] Adequacy of Remedy in Alternative State or Foreign Jurisdiction

When there is an alternative forum in which joinder can be achieved, it will usually be in a state court (or in a foreign court). n6 In such circumstances, many federal courts are willing to dismiss for nonjoinder of a necessary absentee when all interested persons, including the absentee, can be joined in state court. n7

However, if the absentee cannot be joined due to lack of personal jurisdiction, the plaintiff usually does not have an adequate remedy in the state court in the forum where the federal court sits because that court has no more power to exercise personal jurisdiction than the federal court had. n8 On the other hand, if all parties and the absentee are subject to personal jurisdiction in another state, the court may transfer the case to a federal district court in that state, rather than dismiss. If an absentee is joined under the compulsory party joinder rule but raises a valid objection to venue, it may also be possible to transfer the action to a federal district that meets venue restrictions. n8.1

In most cases discussing the "adequacy of remedy" factor, joinder of the absentee is not feasible because it would deprive the court of subject matter jurisdiction. In these cases, no other federal court would be a better alternative because no federal court will have subject matter jurisdiction over the claims involving all parties and the absentee. n9

If a court dismisses a federal case to allow complete resolution in state court, the decision often serves the interest of justice, furthers conservation of resources by avoiding duplicative litigation, and may further the policy interest of protecting the absentee and defendant by allowing joinder to avoid the harm which threatened them. The fourth factor also recognizes the plaintiff's right to seek redress. The practical effect of the rule is to force the plaintiff to share the litigation with others and to litigate in state court. While some plaintiffs may prefer that their cases go forward only in federal court, most courts reject unequivocally arguments that a state court will be less favorable to a plaintiff's claims. n10

The focus on an adequate alternative forum can thus channel the overall dispute to the only court that can handle it as a single unit. Furthermore, in diversity of citizenship cases state substantive law governs, which means that the rule also channels the case to the court most expert in the applicable law. n11

The fact that there is an alternative forum in which joinder of all parties can be achieved does not automatically warrant dismissal of the pending case. n12 As with other determinations under Rule 19, the court must consider all the facts of

the particular case. Other factors under the indispensability analysis may require that the court proceed with the case. n13 Furthermore, problems with an alternative forum may make the alternative forum an inadequate remedy. For example, the commencement of litigation in the alternative forum may involve inordinate delay. n14 Courts will also take into consideration whether proceeding in the alternative forum would impose substantially greater expense on the plaintiff. n15 By contrast, the mere existence of a backlog in state court is not a compelling reason to retain the case in federal court. n15.1

[c] Adequacy of Remedy May be Affected by Statute of Limitation

In making a determination of the adequacy of the remedy on whether to proceed or dismiss, an important consideration for the court is whether a statute of limitation has expired in the other forum. n16 If so, dismissing the pending case may leave the plaintiff without a remedy. The court must assess whether a savings or tolling statute applies. n17 Furthermore, the defendant may be willing to waive a statute of limitation defense to secure dismissal of the federal action. Also, if the preferred alternative forum is another federal district court, transfer to that court will obviate the statute of limitation problem. n18

[6] Effect of Court's Decision Whether to Proceed or Dismiss

If the court decides in equity and good conscience that it should not dismiss the pending case, the litigation continues without the joinder or presence of the absentee. However, the judgment in the pending case generally will not bind an absentee. n1 Even if the absentee rejected a right to intervene, n2 the absentee is generally not bound by the judgment. n3

If the court decides in equity and good conscience that it should dismiss the pending case, rather than proceed without the absentee, the court must enter the action after it labels the absentee as "indispensable." The traditional label of indispensable party is given to the absentee merely to indicate that the court has made the finding that it will dismiss the action because it cannot effect joinder of the absentee who is a party needed for a just adjudication. Thus, it is a conclusory label that is applied retroactively. It becomes appropriate, if ever, only after the court has decided (1) the absentee is needed for a just adjudication; (2) the absentee's joinder is not feasible; and (3) the case should be dismissed. The labeling of a party as indispensable is the consequence of the analysis and not a measure of the evaluation as to whether the action should proceed. n4 The concept of indispensability addresses the court's ability to make an equitable adjudication in the absence of a particular person. n5

A court's order of dismissal for failure to join an indispensable party does not constitute an adjudication on the merits. n6 Furthermore, a dismissal for failure to join an indispensable party is not a jurisdictional dismissal; this misconception may have occurred because some courts have permitted the defense to be raised for the first time on appeal. However it is clear under current jurisprudence that a dismissal on these grounds is not jurisdictional. n7 In other words, if a court continues to judgment in the absence of someone who would have been found indispensable, the judgment is not subject to collateral attack. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 19.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 19(a)(1)*; *see also § 14.04[1].*

(n3)Footnote 2. *See Fed. R. Civ. P. 19(a),(b)*; *see also § 14.04[2]*.

(n4)Footnote 3. *Fed. R. Civ. P. 19(b)*; *see Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 143 (2008)* .

(n5)Footnote 4. *Fed. R. Civ. P. 19(b)*; *see Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 143-144 (2008)* .

(n6)Footnote 5. *Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 144, 147 (2008)* .

(n7)Footnote 6. *General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 320 (3d Cir. 2007)* .

(n8)Footnote 6.1. *See, e.g., Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1497, 310 U.S. App. D.C. 66 n.9 (D.C. Cir. 1995)* (Rule 19(a)(1)(B)(i) consideration very similar to Rule 19(b)(1) and (2)).

(n9)Footnote 7. *Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 143-144 (2008)* .

(n10)Footnote 7.1. *Fed. R. Civ. P. 19(b)(1)-(4)*.

(n11)Footnote 8. *See* [2], *below*.

(n12)Footnote 9. *See* [3], *below*.

(n13)Footnote 9.1. *Fed. R. Civ. P. 19(b)(2)(A)-(C)*.

(n14)Footnote 10. *See* [4], *below*.

(n15)Footnote 11. *See* [5], *below*.

(n16)Footnote 12. *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 (11th Cir. 1999)* .

(n17)Footnote 13. *Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 144 (2008)* .

(n18)Footnote 14. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* .

(n19)Footnote 15. *Klockner Stadler Hurter, Ltd. v. Insurance Co. of Pa., 785 F. Supp. 1130, 1133 (S.D.N.Y. 1990)* .

(n20)Footnote 16. *Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986)* (four factors specified in Rule 19(b) are not rigid, technical tests, but rather guides to determine equity and good conscience).

(n21)Footnote 17. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 405 (3d Cir. 1993)* (district court makes discretionary determination under Rule 19(b)).

(n22)Footnote 18. *Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 804 (3d Cir. 1994)* .

(n23)Footnote 19. *Davis v. United States, 192 F.3d 951, 961 (10th Cir. 1999)* (without factual findings court of appeals could not determine whether analysis of four Rule 19(b) factors compelled dismissal of case).

(n24)Footnote 1. *Fed. R. Civ. P. 19(b)(1)*; *Thompson v. Jiffy Lube Int'l, Inc., 505 F. Supp. 2d 907, 919 (D. Kan. 2007)* (absentee would not suffer prejudice); *Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 457 (E.D.N.Y. 1990)* , *aff'd on other grounds, 931 F.2d 7 (2d Cir. 1991)* (absentee would be prejudiced by judgment because current defendants had little incentive to protect absentee's interest).

(n25)Footnote 1.1. *Pettiford v. City of Greensboro, 556 F. Supp. 2d 512, 523 (M.D.N.C. 2008)* .

(n26)Footnote 2. *Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 147-148 (2008)* (court must give sufficient weight to likely prejudice to absentees should case proceed in their absence, and balance it against prejudice to parties, and against other factors).

(n27)Footnote 3. *Martin v. Wilks, 490 U.S. 755, 766-769, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* .

(n28)Footnote 4. *Fed. R. Civ. P. 19(b)*, Advisory Committee Note to 1966 Amendments.

(n29)Footnote 5. *See* [a], *above*.

(n30)Footnote 5.1. *See Extra Equipamentos E Exportacao Ltda. v. Case Corp., 361 F.3d 359, 364 (7th Cir. 2004)* , *rev'd in part, 541 F.3d 719 (7th Cir. 2008)* .

(n31)Footnote 6. *Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc., 787 F. Supp. 706, 713 (E.D. Mich. 1992)* (single most important consideration in determining whether person's absence will prejudice his or her interests could be whether the interests are adequately protected by the current parties; when there is considerable representation, such absence will have little effect).

(n32)Footnote 7. *Burger King v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 678 (N.D. Ill. 1988)* (mere similarity of interest will not do; there must be an identity of interest between absent party and one already party to action).

(n33)Footnote 8. *Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 820 n.5 (9th Cir. 1985)* (absent party's opportunity to intervene may be considered in calculating prejudicial effect to party).

(n34)Footnote 9. *See Burger King Corp. v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 678 (N.D. Ill. 1988)* .

(n35)Footnote 10. *Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991)* .

(n36)Footnote 11. *Burger King Corp. v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 679 (N.D. Ill. 1988)* .

(n37)Footnote 12. *Pasco Int'l (London), Ltd. v. Stenograph Corp., 637 F.2d 496, 500 (7th Cir. 1980)* (court refused to find absentee indispensable because defendant could implead absentee).

(n38)Footnote 13. *Kelly v. Commercial Union Ins. Co., 709 F.2d 973, 977-978 (5th Cir. 1983)* (court refused to find absentees indispensable and dismissed case because defendant could have interpleaded them).

(n39)Footnote 1. *See* [2], *above*.

(n40)Footnote 2. *Fed. R. Civ. P. 19(b)(2)(A)*.

(n41)Footnote 2.1. *Fed. R. Civ. P. 19(b)(2)(B)*.

(n42)Footnote 2.2. *Fed. R. Civ. P. 19(b)(2)(C)*.

(n43)Footnote 3. *Campbell v. Triangle Corp., 56 F.R.D. 480, 482 (E.D. Pa. 1972)* (any prejudice to absentee's interests could be avoided by limiting relief to money damages should plaintiff prevail).

(n44)Footnote 4. *Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 2188-2189, 171 L. Ed. 2d 131 (2008)* .

(n45)Footnote 1. *Fed. R. Civ. P. 19(b)(3).*

(n46)Footnote 2. *See* [5], *below.*

(n47)Footnote 3. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* (whether judgment issued in absence of nonjoined person will be adequate refers to public interest in settling disputes whenever possible entirely rather than partially).

(n48)Footnote 4. *Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 55 (D.D.C. 1999)* (on balance, court found in this case that adequacy of potential judgment rendered in state's absence would not be so hollow as to warrant dismissal).

(n49)Footnote 5. *Kalinsky v. Long Island Lighting Co., 484 F. Supp. 176, 180 (E.D.N.Y. 1980)* (in action by electricity user against power company for declaration that it was exempt from rate structure, case was dismissed for nonjoinder of commission that set pricing rate).

(n50)Footnote 6. *See Fed. R. Civ. P. 12(b)(6).*

(n51)Footnote 7. *Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 55-56 (D.D.C. 1999)* .

(n52)Footnote 8. *See Fed. R. Civ. P. 19(b)* (third and fourth factors).

(n53)Footnote 1. *Fed. R. Civ. P. 19(b)(4)*; *see Davis v. United States, 343 F.3d 1282, 1289-1294 (10th Cir. 2003)* (fourth factor probably is most important factor).

(n54)Footnote 2. *See Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 (11th Cir. 1999)* ; *see* [4], *above.*

(n55)Footnote 2.1. *Fed. R. Civ. P. 19*, Committee Notes to 1966 Amendments.

(n56)Footnote 3. *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 (11th Cir. 1999)* (court must determine whether plaintiff has available other viable avenues of redress); *see* [b], *below.*

(n57)Footnote 4. *Kickapoo Tribe v. Babbitt, 43 F.3d 1491, 1499 (D.D.C. 1995)* .

(n58)Footnote 5. *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 (11th Cir. 1999)* (plaintiff had alternative remedy in United Kingdom); *see* [b], *below.*

(n59)Footnote 6. *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 848 (11th Cir. 1999)* (plaintiff would have alternative remedy were case dismissed for nonjoinder, and dismissal of federal action would be appropriate, because plaintiff court still raised complaint with United Kingdom's Secretary of State for Transport).

(n60)Footnote 7. *Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 706-707 (3d Cir. 1996)* (Rule 19(b) required dismissal because receiver, who was non-diverse intervenor of right, was necessary and indispensable under Rule 19(a) and plaintiff had adequate remedy in existing state court action which involved all parties which plaintiff sought to join in federal action).

(n61)Footnote 8. *See Fed. R. Civ. P. 4(k)(1)(A)* (territorial limitation for service of process in federal court may match those in state courts); *see also Fed. R. Civ. P. 19(b)(4).*

(n62)Footnote 8.1. *Pauley v. Pauley, 58 F.R.D. 386, 387 (D. Md. 1972)* ; *see 28 U.S.C. § 1406(a)* (transfer from improper venue to proper venue in interest of justice).

(n63)Footnote 9. *See Fed. R. Civ. P. 19(a)(1)*; *see also Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815,*

820 n.5 (9th Cir. 1985) (citing **Moore's Federal Practice**, when nondiverse employer was indispensable, only adequate alternative forum was provided by state court).

(n64)Footnote 10. *Walsh v. Centeio, 692 F.2d 1239, 1244 n.5 (9th Cir. 1982)* .

(n65)Footnote 11. *Ranger Fuel Corp. v. Youghiogheny & Ohio Coal Co., 677 F.2d 378, 381 (4th Cir. 1982)* , *cert. denied, 459 U.S. 836 (1982)* (state court as capable as federal court to compel arbitration, because of state law governs enforcement of agreements to arbitrate).

(n66)Footnote 12. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1055 (3d Cir. 1988)* (citing **Moore's Federal Practice**).

(n67)Footnote 13. *Fed. R. Civ. P. 19(b).*

(n68)Footnote 14. *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank, 659 F.2d 234, 241-242 (D.C. Cir. 1981)* .

(n69)Footnote 15. *Coalition on Sensible Transp. Inc. v. Dole, 631 F. Supp. 1382, 1386 (D.C. Cir. 1986)* .

(n70)Footnote 15.1. *Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24 (C.D. Cal. 1983)* .

(n71)Footnote 16. *See Fed. R. Civ. P. 19(b)(4)*; *see, e.g., Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 663 (S.D.N.Y. 2005)* .

(n72)Footnote 17. *Jenkins v. Reneau, 697 F.2d 160, 163 (6th Cir. 1983)* (although dismissed for lack of jurisdiction in federal court, right of plaintiff to sue in state court was preserved by Tennessee statute of limitation).

(n73)Footnote 18. *See Fed. R. Civ. P. 19(b)(4).*

(n74)Footnote 1. *See § 14.04[1][c][ii].*

(n75)Footnote 2. *See Fed. R. Civ. P. 24(a)(2).*

(n76)Footnote 3. *Martin v. Wilks, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* (court rejected argument that failure to intervene bound absentee to judgment; person is not bound by judgment unless joined as party or in privity with party).

(n77)Footnote 4. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* (to say that court must dismiss in absence of indispensable party and that it cannot proceed without party puts matter wrong way around; court does not know whether particular person is 'indispensable' until it has examined situation under Rule 19(a) and 19(b) to conclude it cannot proceed without party and must dismiss).

(n78)Footnote 5. *Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 438 (4th Cir. 1999)* (when party cannot be joined because its joinder destroys diversity, court must determine whether proceeding can continue in its absence, or whether action must be dismissed because party is indispensable pursuant to Rule 19(b)).

(n79)Footnote 6. *Fed. R. Civ. P. 41(b).*

(n80)Footnote 7. *Fed. R. Civ. P. 19(a)*, Advisory Committee Note to 1966 Amendments (even if court is mistaken in its decision to proceed in absence of interested person, it does not by that token deprive itself of the power to adjudicate as between parties already before it through proper service of process).

(n81)Footnote 8. *Felzen v. Andreas, 134 F.3d 873, 876 (7th Cir. 1998)* , *aff'd, California Pub. Employees' Retirement Sys. v. Felzen, 525 U.S. 315 (1999)* (citing **Moore's Federal Practice**).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
A. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

2-14 Moore's Manual--Federal Practice and Procedure § 14.06

§ 14.06 Procedural Considerationsn*

[1] Procedural Nature of Decision to Proceed or Dismiss

Whether the court should dismiss or proceed with the case when joinder of a party needed for adjudication is not feasible is a matter of procedural law governed by the Federal Rules of Civil Procedure. However, federal substantive law, or state substantive law in diversity of citizenship cases, determines the rights and interests of the persons who are already parties to the action, as well as their relationship with those rights and interests of persons not before the court. n1 This means that although it is a procedural issue whether an absentee is needed for a just adjudication, or whether the court should proceed with or dismiss a case because of nonjoinder of such a party, that issue is determined in light of the parties' substantive interests and rights; however, the issue in federal court is governed by Rule 19, even in the face of contrary state procedural law. n2 This principle is based on the Supreme Court's consistent holdings that federal courts must apply properly promulgated provisions of the rules that apply to the issue at hand, even though they may differ from state law. n3

[2] Raising Issue of Joinder of Persons Needed for Just Adjudication

[a] Court May Raise Issue On Its Own Initiative

The federal district court may raise, on its own initiative, the issue of whether party joinder is needed. n1 However, the court will rarely exercise that option because the court usually lacks familiarity with the background facts of the dispute and of the parties' relationships until such information is raised by a party. The court may become apprized of information about the parties when the pleadings required by Rule 19(c) give the court information about persons needed for a just adjudication, and the reasons why they are not joined. n2 In cases in which the court does become aware of an absentee who may be needed for a just adjudication, the court may have a duty to avoid prejudice by determining whether the court should proceed with the case or dismiss because of nonjoinder of that absentee. The court's obligation to act on its own initiative is especially important in cases in which nonjoinder would impair or impede the absentee's interest, because the absentee has no representative acting on its behalf. n3

[b] Defendant May Raise Issue in Answer or Separate Motion

Typically, the defendant is the party that raises the issue of joinder of an absentee needed for a just adjudication. Rule 12(b), which controls the manner in which defenses are presented, specifically provides that the defendant may raise the defense of failure to join a party under Rule 19 either in its responsive pleading or by motion to dismiss under Rule 12(b)(7). n4 If the pleadings are closed, the defendant may at its option style the motion as one for judgment on the pleadings. n5 This provision covers both a failure to join a party needed for a just adjudication and a dismissal for failure to join such a party, because both constitute a "failure to join a party under Rule 19." n6

As a general rule, a defendant should raise the issue of joinder of a party needed for adjudication as early as possible; it appears the court is entitled to consider the issue waived if not included in the answer or an amendment to the answer. On the other hand, failure to join a necessary party is not expressly listed in the list of defenses waived if not included in the first defensive response. n7 Thus, failure to join a person required by Rule 19(b) may be raised in any pleading, by a motion under Rule 12(c), or at trial. n8 Thus, the party joinder rule states in mandatory terms that a necessary party must be joined if feasible, n9 and Rule 21 permits the court to drop or add parties at any stage of the proceeding on terms that are just. n9.1 Consequently, courts will generally address the issue after the pleadings are closed; this fact does not create a license to delay, however, because the court will always be guided by the underlying policies of the compulsory party joinder rule. Thus, courts should be especially willing to address the issue after the pleading stage if joinder is necessary to avoid harm to the absentee rather than the defendant. n10

A court's determinations of whether an absentee is needed for a just adjudication and, if so, whether joinder is feasible, must be made by the court based on the state of the pleadings at the time the motion is brought. n11 A court that decides the case should be dismissed for nonjoinder should ensure that it has made a sufficient factual record to permit appellate review of the dismissal. n12

[3] Pleading Requirements Regarding Joinder

A party asserting a claim for relief must state: (1) the name of any person known to the claimant who is required to be joined if feasible but is not joined; n1 and (2) the reasons for not joining that person. n1.1 The rule applies not only to plaintiffs, but to all claimants, including defendants who file counterclaims, cross-claims, and other affirmative pleadings. However, it imposes no duty on defendants who do not file an affirmative claim, even though such parties often are in a position to know of absentees who satisfy Rule 19's necessary party provision. n2

The purpose of the pleading provision contained in Rule 19(c) is to provide a process for notifying absentees about pending litigation where the absentee may be a "required party" and to allow the absentee to intervene to protect its interests. n3 An absentee whose interest may as a practical matter be impaired or impeded by a pending suit generally may intervene as of right. n4 However, because a right to intervene is useless without any knowledge of the litigation, the court should direct a letter or other informal notice to the absentee. n5 Furthermore, intervention as of right offers little protection for an absentee whose joinder would destroy diversity of citizenship jurisdiction, because the supplemental jurisdiction statute prohibits supplemental jurisdiction over claims by plaintiff intervenors and against defendant intervenors. n6

If a party fails to inform the court as required under Rule 19(c), the failure is grounds for dismissal of the action. n7 However, courts appear reluctant to use this option; for example, some courts will not dismiss a claimant's failure to plead under Rule 19(c) if the failure was based on its good faith belief that there were no necessary absentees. n8 Furthermore, a claimant can easily correct a violation of the joinder pleading requirement through amendment. n9

[4] Inapplicability of Compulsory Joinder When Class Action Rules Control

All of the provisions of Rule 19 are expressly subject to the rule governing class actions. n1 This means that persons who would otherwise be regulated by the principles regarding persons needed for a just adjudication n2 and dismissal

because of nonfeasibility of joinder n3 are not subject to those principles when the rules for class actions apply. n4 In other words, the court is not required to join absentees needed for a just adjudication in a class action. n5 However, the courts may use compulsory joinder provisions to the extent they do not conflict with class action provisions, n6 but may not allow the compulsory party joinder rule to interfere with the proceedings in the class action. The same apparently is also true for shareholder derivative suits and unincorporated association litigation. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 19.02, 19.07, 19.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Provident Tradesmens Bank& Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* (Rule 19 does not preclude assertion of compelling substantive interests; it merely commands courts to examine each controversy to determine which interests really exist).

(n3)Footnote 2. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* ; *Swerhun v. General Motors Corp., 141 F.R.D. 342, 344 (M.D. Fla. 1992)* .

(n4)Footnote 3. *Hanna v. Plumer, 380 U.S. 460, 464, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n5)Footnote 1. *Fed. R. Civ. P. 19(a)(2)*; *see Gonzalez v. Cruz, 926 F.2d 1, 5 n.6 (1st Cir. 1991)* .

(n6)Footnote 2. *Fed. R. Civ. P. 19(c).*

(n7)Footnote 3. *Enterprise Management Consultants, Inc. v. United States, 883 F.2d 890, 892-893 (10th Cir. 1989)* (issue of whether party is indispensable is not waivable, and reviewing court has independent duty to raise issue sua sponte); *Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 161 n.3 (E.D. Ark. 1993)* (both trial court and appellate court have power and duty to act sua sponte to protect rights of absent person, whether by ordering that absent party be joined or, if that is not feasible, by dismissing action).

(n8)Footnote 4. *Fed. R. Civ. P. 12(b)(7)*; *see RPR & Assocs. v. O'Brien/Atkins Assocs., P.A., 921 F. Supp. 1457, 1463 (M.D.N.C. 1995)* , *aff'd without opinion, 103 F.3d 120 (4th Cir. 1996)* (on motion under Rule 12(b)(7), court initially determines if absent party should be joined as party in accordance with criteria specified in Rule 19(a)).

(n9)Footnote 5. *See Fed. R. Civ. P. 12(c)*; *see, e.g., Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)* (motion for judgment on pleadings under Rule 12(c) for failure to join indispensable party in breach of contract action).

(n10)Footnote 6. *Fed. R. Civ. P. 19(a), (b).*

(n11)Footnote 7. *Fed. R. Civ. P. 12(h)(1)*; *see Fed. R. Civ. P. 12(b)(7).*

(n12)Footnote 8. *Fed. R. Civ. P. 12(h)(2).*

(n13)Footnote 9. *Fed. R. Civ. P. 19(a),(b).*

(n14)Footnote 9.1. *Fed. R. Civ. P. 21.*

(n15)Footnote 10. *See Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 161 n.3 (E.D. Ark. 1993)* .

(n16)Footnote 11. *Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1124 (2d Cir. 1990)* .

(n17)Footnote 12. *Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982)* .

(n18)Footnote 1. *Fed. R. Civ. P. 19(c)(1)*.

(n19)Footnote 1.1. *Fed. R. Civ. P. 19(c)(2)*.

(n20)Footnote 2. *See* [2], *above*; *see also Fed. R. Civ. P. 19(a)*.

(n21)Footnote 3. *See S & S Mach. Corp. v. General Motors Corp., 1994 U.S. Dist. LEXIS 13677, at *10 (S.D.N.Y. 1994)* .

(n22)Footnote 4. *See Fed. R. Civ. P. 24(a)(2)*.

(n23)Footnote 5. *Fed. R. Civ. P. 19(c)*, Committee Note to 1966 Amendments.

(n24)Footnote 6. *28 U.S.C. § 1367(b)*.

(n25)Footnote 7. *William Chris Trucks & Equip. Brokers v. First Canadian Bank, 98 F.R.D. 584, 586 (N.D. Ill. 1983)* (failure to comply with Rule 19(c) has been found to be sufficient grounds for dismissal on determination that joinder of a necessary party is not feasible and absentee cannot be made a party within the meaning of Rule 19(b)).

(n26)Footnote 8. *See Jones v. International Union of Operating Engn'rs, 524 F. Supp. 487, 493 (S.D. Ill. 1981)* (although defendants acting as claimants failed to join absent contractors who might have been necessary parties, defendants had joined as many contractors as possible based on available information; therefore, court denied plaintiff's motion to dismiss under Rule 19(c)).

(n27)Footnote 9. *In re Forty-Eight Insulations, Inc., 109 B.R. 315, 316 n.1 (N.D. Ill. 1989)* (any violation of Rule 19(c) was cured by plaintiff's amended complaint); *see Fed. R. Civ. P. 15*.

(n28)Footnote 1. *Fed. R. Civ. P. 19(d)*; *see Fed. R. Civ. P. 23*.

(n29)Footnote 2. *Fed. R. Civ. P. 19(a)*.

(n30)Footnote 3. *Fed. R. Civ. P. 19(b)*.

(n31)Footnote 4. *In re Lloyd's Am. Trust Fund Litig., 954 F. Supp. 656, 675-676 (S.D.N.Y. 1997)* (court may eliminate need to determine whether absentee is an indispensable party under Rule 19(b), and thus whether or not to dismiss an action, when plaintiff can properly amend complaint to include all such absentees in class definition of class action).

(n32)Footnote 5. *Shimkus v. Gersten Cos., 816 F.2d 1318, 1321 (9th Cir. 1987)* .

(n33)Footnote 6. *Shimkus v. Gersten Cos., 816 F.2d 1318, 1321 (9th Cir. 1987)* .

(n34)Footnote 7. *Fed. R. Civ. P. 19(d)*; *Fed. R. Civ. P. 23.1*; *Fed. R. Civ. P. 23.2*.

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
A. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

2-14 Moore's Manual--Federal Practice and Procedure §§ 14.07through 14.19

[Reserved]

§§ 14.07[Reserved]

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
B. PERMISSIVE JOINDER

2-14 Moore's Manual--Federal Practice and Procedure § 14.20

§ 14.20 Nature and Purpose of Permissive Joindern*

[1] Two Requirements for Permissive Joinder in Federal Court

"Permissive joinder" of parties is a rule that allows the plaintiff to liberally join multiple parties, aligned on either the plaintiff's side or the defendant's side, provided that a two-part test is satisfied: n1 the claims of the parties on either side must (1) arise out of the same transaction, occurrence, or series of transactions or occurrences; n2 and (2) present some question of law or fact in common. n3

Thus, persons may join in one action as *plaintiffs* if: (1) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; n4 and (2) any question of law or fact common to all plaintiffs will arise in the action. n5

In a similar way, persons may be joined in one action as *defendants* if: (1) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; n6 and (2) any question of law or fact common to all defendants will arise in the action. n7

Rule 20 is applied flexibly. Therefore neither any plaintiff nor any defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities. n8

[2] Purposes of Permissive Joinder

The well established policy underlying permissive joinder is to promote trial convenience and expedite the resolution of lawsuits. n1 Thus, the Supreme Court has stated that the motivation behind Rule 20(a) is toward entertaining the broadest possible scope of action consistent with fairness to the parties; therefore, joinder of claims, parties, and remedies is strongly favored. n2 The permissive party joinder rule emphasizes practical application to achieve its purposes of efficient and economical resolution of litigation; therefore, permissive joinder is based not on arcane historic formulations of legal relationships but on a common sense, fact-based analysis of the tests specified in the rule. n3

In addition to the basic purposes of the permissive joinder rule to promote trial convenience and expedite the resolution of lawsuits, there are several other purposes. The rule avoids inconsistent outcomes by requiring that all interested parties are bound by a single judgment. n4

The rule is also easily applied because of its focus on transactional relatedness of the claims; the rule is thus consistent with the basic definition of a civil action in federal court: federal courts use the "transaction or occurrence" test to define the litigative unit. For example, claim preclusion doctrines apply a transactional definition of a case. n5 For years, the Supreme Court has employed such a transactional test to define the scope of a "case or controversy" under Article III of the Constitution. n6 Additionally, the "supplemental jurisdiction" statute incorporates a transactional standard in addressing the scope of civil litigation. n7

By emphasizing the transactional relationship between claims, permissive party joinder also promotes trial convenience for the court and parties. n8 Consequently, the permissive party joinder rule is liberally construed to encompass a broad scope of litigation. n9

[3] Permissive Joinder is Procedural Device Only

Permissive joinder of parties is procedural only and is concerned with the pleadings, rather than the substantive rights asserted by the claimants in the case. n1 Thus, when there are multiple defendants, each must be defending against a claim common to all, either in law or in fact. n2 However, any one defendant need not be interested in defending against all the relief demanded, and the court may grant judgment against each defendant according to its individual liabilities. n2.1

Although joinder at common law was affected by the nature of the legal relationship between the parties and whether liability was joint or several, the permissive party joinder rule has discarded these concerns in favor of its practical dual requirement test. Provided that the parties joined satisfy the rule's requirements, it is irrelevant whether the claims are for joint, several, or alternative liability. n3

The following three consequences flow from the fact that the permissive joinder rule is procedural only:

1. The substantive rights of the parties remain separate and are treated as though prosecuted separately. n4 For example, a plaintiff suing multiple defendants will recover only from those defendants that the plaintiff is able to state a substantive claim against. n5 Therefore, provided that the claims meet the two permissive party joinder requirements, transactional relatedness and commonality, n6 joinder is proper even if the claims are legally unrelated. n7 Rule 20(a) provides that each party "need not be interested in obtaining or defending against all the relief demanded." The rule also provides that the court may grant judgment to each of the plaintiffs according to their rights, and against each of the defendants according to their liabilities. n8 There is no requirement that each of multiple plaintiffs must seek the same relief against each defendant. Each plaintiff recovers according to the rights it establishes, n9 and each defendant is liable according to the respective liabilities proven in litigation. n10

2. In a diversity of citizenship case, the permissive party joinder rule applies in federal court despite any contrary state law joinder procedure. n11 This principle is based on the *Erie* doctrine, which states that federal courts must apply state substantive law, but federal procedural law, in diversity of citizenship cases. n12 Courts recognize an exception to this principle if joinder will affect substantive rights or liabilities under state law; in such cases, joinder will not be permitted. n13 As is the case with other federal rules, the permissive party joinder rule governs joinder in all federal question cases.

3. Because the permissive party joinder rule provides only a procedural mechanism for joinder of parties, it does not affect the substantive law of jurisdiction or venue. n14 Before a party may be joined, the claims asserted between the

current party and the party to be joined must have a basis of federal subject matter jurisdiction. n15 Additionally, the court must have personal jurisdiction over all defendants to be joined, n16 and venue must be proper for each defendant. n17 While defendants may waive objections to personal jurisdiction and venue, n18 the parties may not waive a lack of subject matter jurisdiction; it may be raised by a party or by the court at any point in the proceedings. n19 Therefore, even though the permissive party joinder rule may permit joinder of multiple parties as a procedural matter, a defendant may seek timely dismissal for lack of personal jurisdiction or venue. Furthermore, regardless of whether a party raises the issue, the court must make a determination at any time whether there is subject matter jurisdiction over the case as the plaintiff has structured it. If the plaintiff joins parties in violation of diversity of citizenship precepts, the parties who have been joined that destroy diversity will be dismissed, n20 unless supplemental jurisdiction is available. n21

[4] Interaction of Permissive Joinder With Other Rules

The following are several rules that interact closely with the permissive joinder rule:

1. Once parties are properly joined under Rule 20, Rule 18 permits any claimant to assert all claims that it has against any joined defending party. n1 It is important to note that the party joinder must occur first; parties must be proper under Rule 20(a) before they are allowed to join all claims under Rule 18. n2

2. The "compulsory" party joinder rule prevails over the permissive party joinder rule. The compulsory joinder rule defines parties who must be joined if feasible because the parties are needed for a just adjudication. n3 On the other hand, the permissive party joinder rule defines proper parties, which consists of those who may, but need not, be joined in a particular case. n4

3. If parties are joined before the court but have not met the requirements of the two-part test of Rule 20(a), n5 the court may sever the parties or order separate trials. n6 "Severance" under Rule 21 is a distinct order from an order of separate trials under Rule 20(b). n7 Thus, severed claims become entirely independent actions to be tried, and the court may enter judgment on such claims entirely independently of the other claims. On the other hand, separate trials usually result in one judgment. n8 If the court orders severance, claims against misjoined parties will be dropped and must be pursued in a separate action or actions. n9 On the other hand, an order of separate trials will not require the filing of separate cases because party joinder is proper under Rule 20. n10 Instead, it simply leads to a separate factual inquiry of claims or issues in the context of a single, properly joined case. No matter how many separate trials the court may order, they remain part of a single case. n11

4. If cases are pending in the same district and involve a common question of law or fact, the district court may consolidate multiple cases for any purpose. n12 The requirement of Rule 42(a) is the same as the commonality requirement for permissive party joinder. n13 Therefore, a claim that does not meet the transactional relatedness requirement may nevertheless be consolidated for various purposes, including trial. Therefore, this is a method for a party who has been denied joinder to bring claims together in a consolidated trial. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 20(a)*; *see Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc., 186 F.R.D. 581, 583 (N.D. Cal. 1999)* .

(n3)Footnote 2. *See § 14.21.*

(n4)Footnote 3. *See § 14.22.*

(n5)Footnote 4. *Fed. R. Civ. P. 20(a)(1)(A).*

(n6)Footnote 5. *Fed. R. Civ. P. 20(a)(1)(B).*

(n7)Footnote 6. *Fed. R. Civ. P. 20(a)(2)(A).*

(n8)Footnote 7. *Fed. R. Civ. P. 20(a)(2)(B).*

(n9)Footnote 8. *Fed. R. Civ. P. 20(a)(3).*

(n10)Footnote 1. *Puricelli v. CNA Ins. Co., 185 F.R.D. 139, 142 (N.D.N.Y. 1999)* .

(n11)Footnote 2. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 1137, 16 L. Ed. 2d 218 (1966)* .

(n12)Footnote 3. *See Puricelli v. CNA Ins. Co., 185 F.R.D. 139, 141 (N.D.N.Y. 1999)* .

(n13)Footnote 4. *United States v. Tri-State Design Constr. Co., 899 F. Supp. 916, 918-919 (N.D.N.Y. 1995)* (joinder binds all potentially liable parties to single judgment); *Jonas v. Conrath, 149 F.R.D. 520, 523-524 (S.D. W. Va. 1993)* (Rule 20(a) avoids multiple suits by binding all interested parties, and thus expedites final determination).

(n14)Footnote 5. *Marrapese v. Rhode Island, 749 F.2d 934, 936 (1st Cir. 1984)* , *cert. denied, 474 U.S. 921 (1985)* ("transaction" is basis of litigative unit or entity).

(n15)Footnote 6. *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* (court examines common nucleus of facts and substance of federal claim).

(n16)Footnote 7. *See 28 U.S.C. § 1367(a).*

(n17)Footnote 8. *California Union Ins. Co. v. American Diversified Sav. Bank, 914 F.2d 1271, 1274 (9th Cir. 1990)* (joinder avoids piecemeal litigation).

(n18)Footnote 9. *Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc., 186 F.R.D. 581, 583 (N.D. Cal. 1999)* (requirements of Rule 20(a) are construed liberally in order to promote the broadest scope of action consistent with fairness to the parties); *Hohlbein v. Heritage Mut. Ins. Co., 106 F.R.D. 73, 78 (E.D. Wis. 1985)* (Rule 20(a) should be liberally interpreted and applied in practice when consistent with convenience in disposition of litigation).

(n19)Footnote 1. *Hohlbein v. Heritage Mut. Ins. Co., 106 F.R.D. 73, 78 (E.D. Wis. 1985)* (Rule 20(a) concerns procedure and pleading of case, not substantive rights).

(n20)Footnote 2. *Fed. R. Civ. P. 20(a)(2)(B).*

(n21)Footnote 2.1. *Fed. R. Civ. P. 20(a)(3).*

(n22)Footnote 3. *See Fed. R. Civ. P. 20(a).*

(n23)Footnote 4. *Gates v. L. G. De Witt, Inc., 528 F.2d 405, 413 (5th Cir. 1976)* .

(n24)Footnote 5. *Vargas v. California State Auto. Ass'n. Inter-Ins. Bureau, 788 F. Supp. 462, 464-465 (D. Nev.*

1992) (plaintiff could not recover against insurance agent as defendant because no claim could be stated under state law against that agent).

(n25)Footnote 6. *See* [1], *above*.

(n26)Footnote 7. *Patterson v. Winthrop-Breon Labs., 115 F.R.D. 478, 483 (E.D. Wash. 1986)* (hospital and drug manufacturer properly joined by plaintiff as defendants even though plaintiff asserted liability on different theories relating to personal injuries from administration of drug).

(n27)Footnote 8. *Fed. R. Civ. P. 20(a)(3)*.

(n28)Footnote 9. *Hohlbein v. Heritage Mut. Ins. Co., 106 F.R.D. 73, 78-79 (E.D. Wis. 1985)* (joinder permitted although not all plaintiffs interested in seeking same relief).

(n29)Footnote 10. *White v. Kelsey, 935 F.2d 968, 970 (8th Cir. 1991)* (in action against several doctors who treated plaintiff, court required to render judgment according to individual liabilities of defendants).

(n30)Footnote 11. *Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 708 (5th Cir. 1967)* .

(n31)Footnote 12. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n32)Footnote 13. *Lee v. Hunt, 431 F. Supp. 371, 374 (W.D. La. 1977)* (when federal jurisdiction is based on diversity, state law determines personal jurisdiction).

(n33)Footnote 14. *Fed. R. Civ. P. 82*.

(n34)Footnote 15. *See Greene v. Mobil Oil Corp., 66 F. Supp. 2d 822, 823 (E.D. Tex. 1999)* ; *see also § 14.24*.

(n35)Footnote 16. *Lee v. Hunt, 431 F. Supp. 371, 374 (W.D. La. 1977)* (when federal jurisdiction is based on diversity, state law determines personal jurisdiction).

(n36)Footnote 17. *See 28 U.S.C. § 1391*; *see also § 14.25*.

(n37)Footnote 18. *Fed. R. Civ. P. 12(h)(1)* (personal jurisdiction and venue defenses waived if not raised in first defensive response under Rule 12).

(n38)Footnote 19. *Fed. R. Civ. P. 12(h)(3)* (the court is required to dismiss for lack of subject matter jurisdiction whenever it is established).

(n39)Footnote 20. *Fed. R. Civ. P. 13(h)*.

(n40)Footnote 21. *See 28 U.S.C. § 1367*; *see also § 14.24*.

(n41)Footnote 1. *Fed. R. Civ. P. 18(a)*.

(n42)Footnote 2. *Intercon Research Assocs., Ltd. v. Dresser Indus., Inc., 696 F.2d 53, 57-58 (7th Cir. 1982)* .

(n43)Footnote 3. *Fed. R. Civ. P. 19(a)*.

(n44)Footnote 4. *Fed. R. Civ. P. 20(a)*.

(n45)Footnote 5. *See §§ 14.23*, *14.24*.

(n46)Footnote 6. *See Fed. R. Civ. P. 21*; *see § 14.40* et seq.

(n47)Footnote 7. *Fed. R. Civ. P. 20(b).*

(n48)Footnote 8. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1122 n.5 (7th Cir. 1999)* .

(n49)Footnote 9. *See Fed. R. Civ. P. 21.*

(n50)Footnote 10. *Fed. R. Civ. P. 20(a).*

(n51)Footnote 11. *Fed. R. Civ. P. 20(b).*

(n52)Footnote 12. *Fed. R. Civ. P. 42(a).*

(n53)Footnote 13. *See Fed. R. Civ. P. 20(a).*

(n54)Footnote 14. *Kenvin v. Newburger, Loeb & Co., 37 F.R.D. 473, 475 (S.D.N.Y. 1965)* (precluding joinder of claims but suggesting appropriateness of joint trial).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART I. JOINDER
B. PERMISSIVE JOINDER

2-14 Moore's Manual--Federal Practice and Procedure § 14.21

§ 14.21 Requirement of Transactional Relationshipn*

[1] Permissive Joinder of Parties Requires Claim Based on Same Transaction

A court may order permissive joinder of persons as plaintiffs or as defendants in one action only if the persons assert a claim or are defending a claim jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences. n1 There is no hard and fast definition of the terms "transaction," "occurrence," or "series." n2 Rather, courts will examine the facts and circumstances of each case individually to determine whether transactional relatedness exists in the case. The courts' flexible approach to transactional relatedness is designed to determine whether, in view of the theories asserted and the facts alleged, joinder is fair. In other words, the case is proper for joinder if the claims involve enough related facts to make joinder in a single case fair, even though different occurrences might be involved. n3 On the other hand, because of the flexible nature of the test, courts may properly refuse joinder of claims that are legally similar if the claims are factually distinct. n4

[2] Tests for Other Rules May Provide Precedents for Joinder Purposes

The federal rules governing cross-claims and compulsory counterclaims employ the same basic test as the permissive joinder rule: such claims must arise from the same "transaction or occurrence" as the underlying case. n1 It has been held that, due to the similarity of purpose of these federal rules, cases construing these other rules provide guidance for interpretation of the function of Rule 20. n2 Furthermore, although the language of the permissive party joinder rule seems broader than that used for compulsory counterclaims and cross-claims because it contains the extra phrase "or series of transactions or occurrences" in addition to the basic requirement of "transaction or occurrence," in practice, the permissive party joinder rule is not interpreted more broadly than the other rules. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 20(a)(1)(A), (a)(2)(A); see Burns v. W. S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D. W.Va. 2004)* .

(n3)Footnote 2. *Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974)* (no hard and fast rules); *Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 418-419 (S.D. W. Va. 1994)* (transaction is concept of flexible meaning).

(n4)Footnote 3. *Scott v. Fairbanks Capital Corp., 284 F. Supp. 2d 880, 888 (S.D. Ohio 2003)* .

(n5)Footnote 4. *Abdullah v. Acands, Inc., 30 F.3d 264, 269 n.5 (1st Cir. 1994)* (joinder not allowed in action by sailors alleging asbestos exposure but not alleging that plaintiffs served on same vessel during same period, or were exposed to same machinery); *Saval v. BL, Ltd., 710 F.2d 1027, 1031 (4th Cir. 1983)* (in action alleging breach of federal warranty claims involving automobiles, claims were not transactionally related merely because plaintiffs alleged similar defects).

(n6)Footnote 1. *Compare Fed. R. Civ. P. 20(a)* (permissive joinder), *with Fed. R. Civ. P. 13(a)* (counterclaim), *and Fed. R. Civ. P. 13(g)* (crossclaim).

(n7)Footnote 2. *Puricelli v. CNA Ins. Co., 185 F.R.D. 139, 142 (N.D.N.Y 1999)* .

(n8)Footnote 3. *Cf. Moore v. New York Cotton Exch., 270 U.S. 593, 610, 46 S. Ct. 367, 70 L. Ed. 750 (1926)* ("transaction" is word of flexible meaning and may connote series of many occurrences, depending not so much on immediateness of their connection as on their logical relationship).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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B. PERMISSIVE JOINDER

2-14 Moore's Manual--Federal Practice and Procedure § 14.22

§ 14.22 Requirement of Commonalityn*

A court may order permissive joinder of persons as plaintiffs in one action only if any question of law or fact common to all these persons will arise in the action. Similarly, a court may order permissive joinder of persons as defendants in one action only if any question of law or fact common to all the defendants will arise in the action. n1 The purpose of the commonality requirement is to ensure that only those parties are joined which either assert or defend against claims that can be tried together in an expeditious and convenient manner. Whether the commonality test is met is made on a case-by-case basis, with the burden on the party that is requesting joinder to establish commmonality. n2

The commonality element is relatively easy to establish because, if claims arise from the same transaction or occurrence, the claims almost certainly present at least some common questions. n3 Three additional factors that make the commonality prong easy to establish are: first, the test requires only a single common question, not multiple common questions; n4 second, the common question may be one of either law or of fact, not necessarily both; n5 and third, the common question need not be the most important, or even the predominant, issue in the case. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 4 *Moore's Federal Practice,* § 20.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 20(a)(1)(B), (a)(2)(B).*

(n3)Footnote 2. *DirecTV, Inc. v. Lewis, 2004 U.S. Dist. LEXIS 8864, at *23 (W.D.N.Y. 2005) .*

(n4)Footnote 3. *See DirecTV, Inc. v. Lewis, 2004 U.S. Dist. LEXIS 8864, at *7-*10 (W.D.N.Y. 2005)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Puricelli v. CNA Ins. Co., 185 F.R.D. 139, 142-143 (N.D.N.Y. 1999)* .

(n6)Footnote 5. *In re Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 145 n.39 (S.D.N.Y. 2001)* .

(n7)Footnote 6. *Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.23

§ 14.23 Joinder Considerations When Claim Involves United States Governmentn*

[1] General Considerations

Unless the United States government has waived its sovereign immunity, persons may not bring claims against it, and procedural rules such as joinder rules do not affect that limitation. n1 In other words, a claimant may join claims against the United States, even after permissive joinder requirements are met, only if the government has expressly waived its sovereign immunity by statute. Therefore, even if the United States were properly joined as a co-plaintiff, it would not be subjected to counterclaims or other claims falling within its sovereign immunity. However, when the United States has waived sovereign immunity expressly, the permissive joinder rule does apply and the United States may be joined as a co-defendant with a private party defendant. n2

Ordinarily, sovereign immunity protects the United States from direct suits, as well as having claims joined against it in any form, whether asserted as an independent action, counterclaim, cross-claim, third-party claim, or claim in intervention. Some statutes waive all immunity of the United States. However, some statutes expressly waive immunity only with respect to joinder, as opposed to a complete waiver of all immunity. For example, such a statute may grant consent to join the United States in an action between other parties when the action requires construction of a transaction that involves the government, and joinder of the United States is necessary to permit a complete adjudication of rights of the other parties. n3

[2] Joinder of United States Under Federal Tort Claims Act

The United States has by statute expressly waived sovereign immunity for torts caused by government employees acting within the scope of their employment. Federal district courts have exclusive jurisdiction over such tort claims for damages under the Federal Tort Claims Act. n1 Under the Act, multiple plaintiffs may join to assert tort claims against the United States. n2 Provided that there is subject matter jurisdiction for claims against a private party defendant, the permissive party joinder rule also permits plaintiffs to join the United States with the private party as co-defendants. If no subject matter jurisdiction exists, the claim may be heard by the federal court only under the doctrine of supplemental jurisdiction. n3

[3] Joinder of United States for Non-Tort Claims

Pursuant to the Tucker Act, the United States has waived its sovereign immunity in certain monetary suits that do not sound in tort. n1 In general, the Tucker Act permits claims against the United States for damages in contract. However, if the plaintiff's claim in such an action exceeds $10,000, the case is in the exclusive jurisdiction of the United States Claims Court. n2 Plaintiffs may not join a private party as a co-defendant with the United States in a Tucker Act case involving more than $10,000, because the Claims Court has exclusive jurisdiction over these cases, and the Claims Court has no jurisdiction to hear actions between private parties. n3 Even in Tucker Act cases involving $10,000 or less, a plaintiff suing in the Claims Court may not join a co-defendant. Although jurisdiction is not exclusive, the Claims Court simply has no jurisdiction over actions between private parties. n4

Similarly, Tucker Act cases involving $10,000 or less brought in a district court also prohibit plaintiffs from joining co-defendants. n5 Even though a plaintiff's claims against the United States and another party satisfy the dual requirements for permissive party joinder, the plaintiff is required to bring two separate suits. n6

It should be noted that the Tucker Act only prohibits joinder of the United States as a co-defendant with a private party. It does not apply when the multiple joinder is of plaintiffs. n7 Accordingly, multiple plaintiffs may be joined to assert claims under the Tucker Act against the United States as the only defendant either in the Claims Court or in the district court. n8 Furthermore, the Tucker Act does not prohibit consolidation of separate cases. n9 Consequently, to avoid the joinder prohibition, a plaintiff may file suit against the United States in one action and the private defendant in another action in the same district court, and then move for consolidation under Rule 42. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *First Ala. Bank, N.A. v. United States, 981 F.2d 1226, 1228 (11th Cir. 1993)* .

(n3)Footnote 2. *Orff v. United States, 545 U.S. 596, 2005 U.S. LEXIS 5013, at *9-*10 (2005)* ; *see* [2], *below*.

(n4)Footnote 3. *Orff v. United States, 545 U.S. 596, 2005 U.S. LEXIS 5013, at *10-*12 (2005)* (such statutory provision does *not* provide consent by United States to itself become defending party on claim).

(n5)Footnote 1. *28 U.S.C. § 1346(b)*.

(n6)Footnote 2. *De Weese v. United States, 419 F. Supp. 147, 148 (D. Colo. 1974)* , *aff'd, 576 F.2d 802 (10th Cir. 1978)* (several airline passengers joined as plaintiffs in suit arising from aircraft disaster); *Wisniewski v. United States, 416 F. Supp. 599, 600 (E.D. Wis. 1976)* (spouses joined as plaintiffs in malpractice case).

(n7)Footnote 3. *See Diminnie v. United States, 728 F.2d 301, 306 (6th Cir. 1984)* , *cert. denied, 469 U.S. 842 (1984)* (claim against federal employee based on independent ground of jurisdiction may be joined with claim against United States under Federal Tort Claims Act).

(n8)Footnote 1. *28 U.S.C. § 1346(a)*; *28 U.S.C. § 1491(a)*.

(n9)Footnote 2. *28 U.S.C. § 1491(a)*.

(n10)Footnote 3. *28 U.S.C. § 1491(a)(1)*; *see United States v. Sherwood, 312 U.S. 584, 588, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)* .

(n11)Footnote 4. *Sauders v. South Carolina Public Serv. Auth., 856 F. Supp. 1066, 1075 (D.S.C. 1994)* (there is no jurisdiction in district court because Claims Court has exclusive jurisdiction of nontort claims against United States exceeding $10,000).

(n12)Footnote 5. *United States v. Sherwood, 312 U.S. 584, 591, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)* .

(n13)Footnote 6. *Fed. R. Civ. P. 20(a)*.

(n14)Footnote 7. *28 U.S.C. § 1346(a)*; *28 U.S.C. § 1491(a)*.

(n15)Footnote 8. *See Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 25 (3d Cir. 1975)* .

(n16)Footnote 9. *United States v. Louisville & Nashville R.R. Co., 221 F.2d 698, 702 (6th Cir. 1955)* .

(n17)Footnote 10. *See Fed. R. Civ. P. 42(a)*.

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.24

§ 14.24 Subject Matter Jurisdiction Required for Joindern*

[1] Claims Regarding Each Joined Party Must Be Based on Federal Subject Matter Jurisdiction

Permissive joinder rules do not supercede or even affect the jurisdiction of the federal courts. n1 The permissive party joinder rule, like the other federal joinder rules, prescribes only the procedural circumstances in which multiple parties may be joined on either or both sides of litigation. Each claim asserted by multiple plaintiffs or against multiple defendants in federal court must have a basis of federal subject matter jurisdiction. n2 The primary, though not exclusive, bases of federal subject matter jurisdiction n3 are federal question n4 and diversity of citizenship. n5

[2] Supplemental Jurisdiction Doctrine May Allow Joinder in Some Circumstances

The assessment of whether an entire case may be heard involves consideration of whether an individual claim asserted invokes a basis of federal subject matter jurisdiction. No case may be heard by a federal court unless at least one claim invokes an independent basis of subject matter jurisdiction, such as federal question or diversity of citizenship jurisdiction. n1 After jurisdiction is established with respect to one claim, the federal court may entertain additional claims under the supplemental jurisdiction doctrine. n2

Supplemental claims that do not have an independent basis of subject matter jurisdiction may be combined with the claim establishing jurisdiction if all claims are sufficiently related. n3 The supplemental jurisdiction statute requires that the supplemental claim share a "common nucleus of operative fact" with the claim establishing jurisdiction. n4 The courts equate "common nucleus of operative fact" with "same transaction or occurrence," a phrase that is also employed in the permissive joinder rule. n5 While the supplemental jurisdiction statute grants a broad exception to the normal requirement of jurisdiction, it provides for specific limitations, including claims by plaintiffs against parties joined under Rule 20. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePartiesJoinderGeneral

OverviewCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.07 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 82.*

(n3)Footnote 2. *Greene v. Mobil Oil Corp., 66 F. Supp. 2d 822, 823 (E.D. Tex. 1999)* .

(n4)Footnote 3. *Greene v. Mobil Oil Corp., 66 F. Supp. 2d 822, 824 (E.D. Tex. 1999)* .

(n5)Footnote 4. *See 28 U.S.C. § 1331.*

(n6)Footnote 5. *See 28 U.S.C. § 1332(a)(2).*

(n7)Footnote 1. *Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc., 186 F.R.D. 581, 582-583 (N.D. Cal. 1999)* .

(n8)Footnote 2. *Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc., 186 F.R.D. 581, 583 (N.D. Cal. 1999)* ; *see 28 U.S.C. § 1367* (supplemental jurisdiction); *Fed. R. Civ. P. 20(a)* (permissive party joinder).

(n9)Footnote 3. *28 U.S.C. § 1367.*

(n10)Footnote 4. *28 U.S.C. § 1367*; *see United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n11)Footnote 5. *Aetna Cas. & Sur. Co. v. Spartan Mechanical Corp., 738 F. Supp. 664, 668-670 (E.D.N.Y. 1990)* .

(n12)Footnote 6. *28 U.S.C. § 1367(b).*

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2-14 Moore's Manual--Federal Practice and Procedure § 14.25

§ 14.25 Venue For Multiple Defendantsn*

As is the case with jurisdiction, the permissive joinder rules do not affect the statutory provisions concerning venue. n1 The general venue statute provides that venue is proper n2 in either a district where all the defendants reside or a district in which a substantial part of the claim arose. n3 If no district in the United States can satisfy either of these tests, venue is treated differently for federal question cases and diversity of citizenship cases. In diversity cases, venue is proper in any district in which any defendant is subject to personal jurisdiction. n4 In a federal question case, venue can be laid in any district where any defendant is found. n5

It is important to note in a multiple defendant situation that the wording of Section 1391(a)(3) was changed from "any district in which the defendants are subject to jurisdiction" to "any district in which any defendant is subject to jurisdiction." The purpose of this change was to avoid any possible implication that Section 1391(a)(3) requires that all defendants be subject to personal jurisdiction in the same district before venue is proper. Thus, under the 1995 amended version of Section 1391(a)(3), a district is proper venue if any of the defendants is subject to personal jurisdiction in that district; if any one of the defendants is subject to jurisdiction in the district, the district is a proper venue for all of the defendants. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMultiparty LitigationCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 82.*

(n3)Footnote 2. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1065 (S.D. Tex. 1996)* (unless balance of factors strongly favors party moving for venue transfer, plaintiff's choice of forum generally should not be disturbed).

(n4)Footnote 3. *28 U.S.C. § 1391(a), (b).*

(n5)Footnote 4. *28 U.S.C. § 1391(a)(3).*

(n6)Footnote 5. *28 U.S.C. § 1391(b)(3).*

(n7)Footnote 6. *See 28 U.S.C. § 1391(a)(3).*

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2-14 Moore's Manual--Federal Practice and Procedure § 14.26

§ 14.26 Persons Entitled to Initiate Joindern*

[1] Plaintiff

[a] Plaintiff's Option to Specify Parties

The permissive party joinder rule generally provides the plaintiff with the option to structure litigation according to the terms of the complaint. n1 It permits the plaintiff to join multiple parties on either the plaintiff's or the defendant's side. However, the plaintiff is not required to join parties and may decide not to join parties for strategic or tactical reasons. n2 The defendant has no right to require the plaintiff to join all persons who could be joined under the permissive party joinder rule. n3 However, if the defendant files a counterclaim or cross-claim in the pending action, the defendant may join parties to that pleading. n4

[b] Joinder by Amendment of Complaint

A plaintiff will typically use permissive party joinder at the initiation of the lawsuit by naming as many plaintiffs and defendants as the plaintiff considers appropriate. n5 If a plaintiff does not effect proper permissive joinder in the complaint, the plaintiff may join additional parties later in the litigation by amending the complaint. n6 If the defendant has not yet served a responsive pleading, the plaintiff has a right to amend and need not seek leave of court to join permissive parties. If the defendant has served a responsive pleading, however, the plaintiff must make a motion to amend to perform joinder. n7

When a party makes a motion to join additional parties in a proposed amended complaint under Rule 15(a), the court, in deciding whether to grant that motion, must also find that the requirements of Rule 20(a) have been satisfied. n8 Thus, a court determining whether to grant a motion to amend to join additional plaintiffs must consider both the general principles of amendment provided by Rule 15(a) and also the more specific joinder provisions of Rule 20. Satisfying the joinder requirements is necessary to the court's subject matter jurisdiction. n9

First, the court must consider the general requirements of Rule 15. Although amendments are liberally allowed under Rule 15, the trial court has an obligation to deny the amendment if it would not be in the interest of justice. n10 Thus,

for example, the court will deny joinder that might have been proper in the original complaint if the plaintiff has delayed excessively in making a motion for the new joinder, or if the joinder would prejudice the interests of an existing party. n11

Before joining by amendment, the court must also consider whether the requirements of Rule 20(a) have been satisfied; whether the claims of the current parties and proposed joined parties arise out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. n11.1 In this regard, the court must consider whether the joining parties participated in the same kind of transaction in which the current plaintiffs had participated and that all the transactions involved similar transactions with the defending parties; whether the joining parties also alleged the same or similar types of violations committed by the defending parties in these transactions; and whether it appears that similar principles of law would have been applicable to both the original plaintiffs and the joined parties. n11.2

The court may also deny joinder if the applicable statute of limitation has expired with respect to the parties to be joined. n12 Furthermore, if the grounds for an asserted motion to amend to add parties is that a change in circumstance has occurred after commencement of the action, the proper motion for the plaintiff to file is a motion to supplement the pleadings. n13

[2] Defendant

If a defendant is pursuing an affirmative claim for relief, the defendant may be able to permissively join parties to the action. Thus, if a defendant files a counterclaim n1 or cross-claim n2 in a pending case, the defendant is treated as a plaintiff for purposes of permissive party joinder. n3 In other words, defendants who are claimants for relief are on the same footing as original plaintiffs in choosing party organization and joinder. n4 Except when making a claim, defendants may be able to alter the plaintiff's choice of party structure only by impleading third-party defendants n5 or by moving for the joinder of absentees needed for a just adjudication under Rule 19; n6 defendants have no general right to insist that the plaintiff join all persons who might be joined under permissive party joinder requirements. n7

A defendant has a right to file a counterclaim or cross-claim with its responsive pleading. As stated above, a defendant who makes such a claim has the right to join additional parties at the time of filing the counterclaim or cross-claim without leave of court. n8 However, a defendant who fails to raise a counterclaim or cross-claim with its responsive pleading, or who raises such a claim but fails to move for the joinder at the time of the claim, must seek leave of court either to file or amend the pleading. n9 If the additional parties are joined because of events occurring after commencement of the action, the proper motion for the defendant is one to supplement the pleadings. n10

[3] Other Persons

A nonparty may not use the permissive party joinder rule. n1 Also, a nonparty may not file cross-claim and attempt to join additional parties under Rule 13(h), because only parties may file cross-claims. n2 A nonparty that wants to enter a civil action should do so through a motion to intervene. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983)* .

(n3)Footnote 2. *Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 574 (5th Cir. 1995)* (permissive joinder under Rule 20 is generally at option of plaintiffs).

(n4)Footnote 3. *Field v. Volkswagenwerk AG, 626 F.2d 293, 299 (3d Cir. 1980)* (while defendant may move for joinder of necessary party under Rule 19, defendant has no right to demand that plaintiff join all parties satisfying Rule 20(a).

(n5)Footnote 4. *Fed. R. Civ. P. 13(h)*; *FDIC v. Bathgate, 27 F.3d 850, 873-874 (3d Cir. 1994)* (additional parties may be joined to counterclaim or cross-claim against existing party); *see* [2], *below*.

(n6)Footnote 5. *See Fed. R. Civ. P. 20(a)*.

(n7)Footnote 6. *See Fed. R. Civ. P. 15*.

(n8)Footnote 7. *Fed. R. Civ. P. 15(a)*; *Fed. R. Civ. P. 20(a)*.

(n9)Footnote 8. *Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611, 618 (4th Cir. 2001)* ; *see Fed. R. Civ. P. 15(a)*; *Fed. R. Civ. P. 20(a)*.

(n10)Footnote 9. *Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611, 618 (4th Cir. 2001)* .

(n11)Footnote 10. *National Union Fire Ins. Co. v. Continental Ill. Corp., 113 F.R.D. 527, 531 (N.D. Ill. 1986)* (even if proposed joinder would satisfy requirements Rule 20(a), court has discretion to deny amendment to avoid delay, expense or prejudice).

(n12)Footnote 11. *National Union Fire Ins. Co. v. Continental Ill. Corp., 113 F.R.D. 527, 531 (N.D. Ill. 1986)* (court denied motion for joinder when it was made after extensive discovery had been completed, because joinder of additional parties at that time would cause undue burden, expense, and delay, and serious prejudice both to parties to be joined and present litigants); *McBride v. Routh, 189 F.R.D. 48, 49-50 (D. Conn. 1999)* .

(n13)Footnote 11.1. *Fed. R. Civ. P. 20(a)*.

(n14)Footnote 11.2. *Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611, 618 (4th Cir. 2001)* .

(n15)Footnote 12. *Fed. R. Civ. P. 15(c)*; *Copsey v. Swearingen, 36 F.3d 1336, 1348 (5th Cir. 1994)* (court denied motion to add party after expiration of statute of limitation).

(n16)Footnote 13. *See Fed. R. Civ. P. 15(d)*; *Pratt v. Rowland, 769 F. Supp. 1128, 1131 (N.D. Cal. 1991)* (motion to file supplemental complaint to add new defendants).

(n17)Footnote 1. *See Fed. R. Civ. P. 13(a), (b)*.

(n18)Footnote 2. *See Fed. R. Civ. P. 13(g)*.

(n19)Footnote 3. *See Fed. R. Civ. P. 13(h)*.

(n20)Footnote 4. *FDIC v. Bathgate, 27 F.3d 850, 873-874 (3d Cir. 1994)* ; *Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 418 (S.D. W. Va. 1994)* .

(n21)Footnote 5. *Fed. R. Civ. P. 14(a)*.

(n22)Footnote 6. *See Fed. R. Civ. P. 19(a)*.

(n23)Footnote 7. *Field v. Volkswagenwerk AG, 626 F.2d 293, 299 (3d Cir. 1980)* .

(n24)Footnote 8. *Northfield Ins. Co. v. Bender Shipbuilding & Repair Co., 122 F.R.D. 30, 31 (S.D. Ala. 1988)* (citing **Moore's Federal Practice**).

(n25)Footnote 9. *Independent Liberty Life Ins. Co. v. Fiduciary & Gen. Corp., 91 F.R.D. 535, 537 (W.D. Mich. 1981)* (court granted defendant's motion to join additional parties to counterclaim under Rules 13(h) and 20(a)).

(n26)Footnote 10. *See Fed. R. Civ. P. 15(d).*

(n27)Footnote 1. *Thompson v. Boggs, 33 F.3d 847, 858 (7th Cir. 1994)* , *cert. denied, 514 U.S. 1063 (1995)* .

(n28)Footnote 2. *City of Tampa v. Fourth Tug/Barge Corp., 163 F.R.D. 622, 624 (M.D. Fla. 1995)* ; *see Fed. R. Civ. P. 13(h).*

(n29)Footnote 3. *Fed. R. Civ. P. 69(a)*; *see § 14.90* et seq.

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2-14 Moore's Manual--Federal Practice and Procedure § 14.27

§ 14.27 Claims Asserted By and Against Joined Personsn*

When multiple plaintiffs or multiple defendants are properly joined under the permissive party rules, claims by joined plaintiffs or against the joined defendants may be asserted jointly, severally, or in the alternative. n1 The phrase "jointly, severally, or in the alternative" emphasizes that the rights and liabilities of parties permissively joined depend on practical factors based on the factual circumstances of the parties' relationships and not on whether liability technically falls under the label joint, several, or in the alternative. n2 The express provision for pleading in the alternative is consistent with the modern pleading principles of the federal rules which liberally allow claims for relief in the alternative. n3 However, it should be noted that at least one of the persons joined to make a claim for relief must state some claim for relief against each of the persons defending the claim. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 20.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 20(a).*

(n3)Footnote 2. *Henkel v. ITT Bowest Corp., 872 F. Supp. 872, 878 (D. Kan. 1994)* (joinder of passengers proper in case of liability arising from bus collision).

(n4)Footnote 3. *Fed. R. Civ. P. 8(a)* (pleading may set forth claim for relief that demands relief in the alternative, or relief of several different types).

(n5)Footnote 4. *Chase Manhattan Bank, N.A. v. Flexwatt Corp., 139 F.R.D. 573, 575 (D. Mass. 1991)* (alternative pleadings allowed so long as at least one plaintiff states claim against each defendant).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.28

§ 14.28 Court Rulings Related to Joindern*

[1] Discretion to Order Joinder

A party that has established the permissive party joinder requirements is not automatically entitled to an order of joinder; the determination is at the discretion of the trial court. Thus, the trial court's denial of joinder will be reversed on appeal only on a showing that it abused its discretion. n1 For example, the trial court may deny a motion for joinder if it would not be in the interest of justice. n2 The court may deny the motion to avoid delay, expense, or prejudice. n3

Under the permissive joinder rule, the court also has discretion to order joinder of multiple parties on either or both the plaintiff side and the defense side of the litigation. n3.1 Furthermore, the court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities. n3.2 To provide for relief for all of the various claims, the court may also enter separate judgments on claims involving different parties. n4

[2] Discretion to Order Separate Trials

Once a party has effected proper permissive party joinder of multiple parties and their claims in a single case, n1 it does not necessarily follow that the trial court must try all claims together. Under other federal rules, the court has the power to order separate trials, for example, to prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party. n1.1 The potential for the jury to be confused by multiparty, multiclaim litigation is another reason the court may order separate trials. n2

The court may order a separate trial on its own initiative or any party may move for a separate trial. The court's discretion whether to order separate trials must be decided on the facts and circumstances of each case, n3 which is decided on its unique facts based on a balancing of the competing interests of all parties. n4

In any case in which joinder is proper, an order of separate trials will result in some inefficiency because of the repetition in the presentation of evidence. Consequently, the burden is on the party seeking the separate trial to show that the interest of judicial economy should give way to protect the party's interest. The moving party must show a

substantial risk of harm from a joined rather than a separate trial. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 4 *Moore's Federal Practice,* § 20.09 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Saval v. BL, Ltd., 710 F.2d 1027, 1031 (4th Cir. 1983)* (standard of review is whether district court abused discretion by denial of joinder).

(n3)Footnote 2. *National Union Fire Ins. Co. v. Continental Ill. Corp., 113 F.R.D. 527, 531 (N.D. Ill. 1986)* .

(n4)Footnote 3. *Fed. R. Civ. P. 20(b).*

(n5)Footnote 3.1. *Fed. R. Civ. P. 20(a)(1), (a)(2).*

(n6)Footnote 3.2. *Fed. R. Civ. P. 20(a)(3).*

(n7)Footnote 4. *Fed. R. Civ. P. 54(b)* (court may expressly enter separate judgment as to separate parties).

(n8)Footnote 1. *Ginett v. Computer Task Group, Inc., 962 F.2d 1085, 1095 (2d Cir. 1992)* (discussing underlying interrelationship of claims between parties in multiparty civil action).

(n9)Footnote 1.1. The court may also order separate trials or make other orders to prevent delay or prejudice. *Fed. R. Civ. P. 20(b).*

(n10)Footnote 2. *Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1421-1422 (S.D.N.Y. 1989)* (confusing nature of multiple plaintiffs asserting multiple claims against multiple defendants justifies separate trial in jury trials but not bench trials).

(n11)Footnote 3. *Independent Liberty Life Ins. Co. v. Fiduciary and Gen. Corp., 91 F.R.D. 535, 539 (W.D. Mich. 1981)* (district court's discretion to order separate trial to avoid prejudice).

(n12)Footnote 4. *United States ex rel.. Saunders Concrete Co. v. Tri-State Design Constr. Co., 899 F. Supp. 916, 919 (N.D.N.Y. 1995)* (balancing competing factors of prejudice and juror confusion against efficiency).

(n13)Footnote 5. *Dillard v. Crenshaw County, 640 F. Supp. 1347, 1371 (M.D. Ala. 1986)* (moving party did not meet burden to show inconvenience and inefficiency, which was outweighed by interest in economy).

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[Reserved]

§§ 14.29[Reserved]

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2-14 Moore's Manual--Federal Practice and Procedure § 14.40

§ 14.40 Nature of Misjoinder and Nonjoindern*

Rule 21 of the Federal Rules of Civil Procedure prescribes the options that the court may take in the event of "misjoinder and non-joinder" of parties. However, Rule 21 does not define either of those terms. n1 Case law has developed meanings for those terms by referring to the rules governing joinder of parties. The most common example of misjoinder occurs when a plaintiff structures the case in violation of permissive party joinder prerequisites. n2

The rule governing permissive party joinder defines those parties who may properly be joined in a single action. Claims by co-plaintiffs or against co-defendants must arise from the same transaction or occurrence and must give rise to at least one common question. n3 If a party fails to satisfy either of these prerequisites for permissive joinder, the party has been misjoined. n4

The plaintiff may also commit misjoinder through a filing mistake, for example, by filing a claim even though the plaintiff is not the real party in interest or by naming parties who have no interest in the dispute. n5 Another example of misjoinder is a plaintiff's violation of a statutory ban on joinder. For example, the Tucker Act allows prosecution of non-tort cases against the United States, but does not extend jurisdiction to claims against private parties, and joinder of an individual with the United States in a Tucker Act case constitutes misjoinder. n6

In contrast to misjoinder, which is improper joinder, non-joinder may be described as a failure to join an absentee (one who currently is not a party) when required by the federal rules. This may occur in several ways. The most important example is a plaintiff's failure to join an absentee who is needed for a just adjudication; the court must order joinder of such a party whenever it is feasible to do so and failure to do so constitutes non-joinder. n7 Nonjoinder may also occur when a person with a partial interest in property has not been properly joined in a suit filed by the other person with the partial interest in the same property. For example, only a patentee (the owner of the patent) may bring an action for patent infringement, and a licensee may bring suit in its own name only if the licensee holds "all substantial rights" in the patent. Therefore, if a licensee without substantial rights in the patent does not join the patentee, the licensee does not have standing to sue, and the suit may not proceed until the patentee is joined. n7.1

When a party has been misjoined or nonjoined, the federal rules give the court discretion to make three types of orders

to remedy the situation. Generally, the court may add or drop parties "on such terms as are just" to remedy misjoinder or non-joinder. Specifically, the court may add parties to cure non-joinder, or dismiss parties to cure misjoinder. In lieu of dismissing parties in cases of misjoinder, the court also has the option to order severance of the claims by or against misjoined parties. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 21.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 21.*

(n3)Footnote 2. *Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996)* (although federal rules do not define misjoinder, cases make clear that misjoinder of parties occurs when they fail to satisfy the conditions for permissive joinder under Rule 20(a)).

(n4)Footnote 3. *Fed. R. Civ. P. 20(a).*

(n5)Footnote 4. *Jonas v. Conrath, 149 F.R.D. 520, 523 (S.D. W. Va. 1993)* (misjoinder occurs when asserted claims do not arise out of same transaction or occurrence or do not present common questions of law or fact).

(n6)Footnote 5. *See Fed. R. Civ. P. 17(a)* (requirement that every action shall be prosecuted in the name of the real party in interest).

(n7)Footnote 6. *Cf. United States v. Sherwood, 312 U.S. 584, 591, 61 S. Ct. 767, 85 L. Ed. 1058 (1941) .*

(n8)Footnote 7. *See Fed. R. Civ. P. 19(b).*

(n9)Footnote 7.1. *Mentor H/S, Inc. v. Medical Device Alliance, Inc., 240 F.3d 1016, 1018-1019 (Fed. Cir. 2001) .*

(n10)Footnote 8. *Fed. R. Civ. P. 21.*

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.41

§ 14.41 Initiation of Remedies for Misjoinder and Nonjoindern*

[1] Requirement of Motion Made to Court

As a general rule, the parties do not have the power to effect remedies for misjoinder and nonjoinder under Rule 21; remedies permitted under the rule usually must be made by court order. A party may move for an order under Rule 21, or the court may issue an order on its own initiative. n1 However, in appropriate circumstances, a plaintiff may use an amendment as of right under Rule 15 to add or drop parties or to sever claims without the need for a court order. For example, plaintiffs have a right to amend without leave of court before the defendant serves a responsive pleading. n2 A party should caption its motion as one to add parties, to dismiss parties, or for severance of claims, as appropriate.

With the exception of cases involving non-joinder of a party needed for a just adjudication, n3 an order under Rule 21 may not result in dismissal of the pending case. Consequently, the timing limitations imposed on motions to dismiss do not apply except in such circumstances. n4 Instead, Rule 21 allows the court to make orders adding or dismissing parties at any stage of the action, including after trial, after notice of appeal has been filed, or even on appeal. n5 The fact that a motion under Rule 21 may be brought at any time during the case does not mean that the court is required to grant it; the issue is determined in the sound discretion of the trial court (*see* [4], *below*), and a party's delay in bringing a motion for remedy for misjoinder or nonjoinder may weigh against granting the motion. n6

In cases involving non-joinder of a party needed for a just adjudication, the moving party should raise the issue in a motion to dismiss. n7 Such a motion is timely if made no later than the trial on the merits. n8 Furthermore, there is even authority to the effect that a party may make a motion regarding non-joinder of a party needed for a just adjudication for the first time on appeal. n9

Thus, the appellate court may consider issues of nonjoinder or misjoinder on appeal. Usually if the plaintiff that filed the initial claim for relief does not have standing to bring the claim alone, the claim should be dismissed. However, the language that parties may be dropped or added by order of the court on motion of any party or on the court's own initiative at any stage of the action and on such terms as are just applies equally to the appellate court. For example, the appellate court may condition a plaintiff's maintenance of an appeal on the plaintiff's filing a motion pursuant to Rule 21

to add a necessary party plaintiff, and to file a brief in support of the motion. The defending party is then given an opportunity to respond to the plaintiff's motion and brief, if any. If the plaintiff fails to file a motion for joinder in the appellate court, the plaintiff's appeal will be dismissed. n10

[2] Alternative Motion for Amendment

All of the remedies that may be obtained by motion for court order under Rule 21 may also be accomplished by a motion for amended pleadings. n1 A court order is usually required to effect any change in the structure of a pending case, including an amendment of the pleadings. Therefore, as a practical matter, there is no difference whether the moving party seeks relief under Rule 15 governing amendment of pleadings or under Rule 21 for addition or dismissal of parties. n2

However, a party does not always need to obtain leave to amend its pleadings; under Rule 15, a defending party may amend its answer once as a matter of course or without leave of court, n3 provided that the amendment is made within 21 days after giving service of the answer. n4 Most courts have found that the parties may not use this automatic right to amend to add or dismiss parties through a court order under Rule 21, and that changing the party structure of the action requires a court order. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinderCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesMisjoinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 21.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 21.*

(n3)Footnote 2. *Fed. R. Civ. P. 15(a).*

(n4)Footnote 3. *See § 14.43[2].*

(n5)Footnote 4. *Fed. R. Civ. P. 12(h)(3).*

(n6)Footnote 5. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (Rule 21 gives district court authority to drop dispensable nondiverse party at any time, even after judgment has been rendered); *Mentor H/S, Inc. v. Medical Device Alliance, Inc., 240 F.3d 1016, 1019 (Fed. Cir. 2001)* (court of appeals invited plaintiff to file motion under Rule 21 in court of appeals to join co-owner party that was necessary to provide standing for plaintiff to maintain suit); *Kalman v. Berlyn Corp., 914 F.2d 1473, 1479-1480 (Fed. Cir. 1990)* (district court abused discretion in denying leave to amend complaint because Rule 21 provides that parties may be dropped or added at any time on such terms as are just).

(n7)Footnote 6. *Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987) , cert. denied, 493 U.S. 851 (1989)* (court should consider whether party was tardy in requesting permissive joinder of new party).

(n8)Footnote 7. *Fed. R. Civ. P. 12(b)(7).*

(n9)Footnote 8. *Fed. R. Civ. P. 12(h)(2).*

(n10)Footnote 9. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108-109, 88 S. Ct. 733, 19*

L. Ed. 2d 936 (1968) .

(n11)Footnote 10. *Mentor H/S, Inc. v. Medical Device Alliance, Inc., 240 F.3d 1016, 1019 (Fed. Cir. 2001)* .

(n12)Footnote 1. *See Fed. R. Civ. P. 15.*

(n13)Footnote 2. *Health Research Group v. Kennedy, 82 F.R.D. 21, 29 (D.D.C. 1979)* (both Rule 15 and Rule 21 give court broad discretion to grant leave to add or dismiss parties and in both instances court's decision is guided by related considerations of timeliness and prejudice to opposing party; substitution of one plaintiff for another has been found to be permissible under either rule).

(n14)Footnote 3. *See Dimaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1303 (11th Cir. 2008)* .

(n15)Footnote 4. *Fed. R. Civ. P. 15(a)(1)(A)*; *see* Ch. 9, *Pleadings and Motions in General.*

(n16)Footnote 5. *See, e.g., Streeter v. Sheriff of Cook County, 256 F.R.D. 609, 613 (N.D. Ill. 2009)* ; *Horton v. Scripto Tokai Corp., 878 F. Supp. 902, 908, 910 (S.D. Miss. 1995)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.42

§ 14.42 Court's Discretion to Order Remediesn*

The court may make orders to add or dismiss parties to remedy misjoinder or nonjoinder on any terms that are just. n1 The provision has been held to provide the trial court with considerable discretion in determining whether to add or dismiss parties, or to order severance. n2 While each case must be addressed on its particular facts and circumstances, the court in exercising its discretion must consider principles of fundamental fairness and judicial efficiency. n3

As part of this inquiry, the court should consider whether an order under Rule 21 would prejudice any party, n4 would result in undue delay, n5 and the possibility of jury confusion. n6 Although the court should consider the likelihood of being able to avoid duplicative litigation, n7 it should sever claims when the claims are based on different factual situations from that of the main action. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* §§ 21.02, 21.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 21.*

(n3)Footnote 2. *Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 574 (5th Cir. 1995)* (district court has discretion to sever an action if it is misjoined or might otherwise cause delay or prejudice).

(n4)Footnote 3. *Stark v. Independent School District No. 640, 163 F.R.D. 557, 564 (D. Minn. 1995)* (court has obligation to balance competing considerations when considering motion to add or dismiss parties); *German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* (to decide if severance is appropriate, court should generally consider whether (1) issues sought to be tried separately are significantly different from one another,

(2) separable issues require testimony of different witnesses and different documentary proof, (3) party opposing severance will be prejudiced if it is granted, and (4) party requesting severance will be prejudiced if it is not granted).

(n5)Footnote 4. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n6)Footnote 5. *Hawkins v. Fulton County, 95 F.R.D. 88, 91 (N.D. Ga. 1982)* (defendant would not be unduly prejudiced or delayed by joinder of plaintiffs on plaintiff's motion during initial stages of discovery).

(n7)Footnote 6. *CVI/Beta Ventures v. Custom Optical Frames, Inc., 896 F. Supp. 505, 506-507 (D. Md. 1995)* (in action by patentees against competitors alleging infringement of patent for eyeglass frames, court severed counterclaim for patent infringement on different eyeglass frames because any commonality that could exist among patents was far outweighed by potential for jury confusion).

(n8)Footnote 7. *Brown v. Southern Pac. Transp. Co., 132 F.R.D. 451, 454 (E.D. Tex. 1990)* .

(n9)Footnote 8. *Demboski v. CSX Transp., Inc., 157 F.R.D. 28, 30 (S.D. Miss. 1994)* (court found trying four separate cases together would jeopardize fairness to all parties and would impose burden on defendant to defend four substantially different sets of facts and law in only one forum that would far outweigh any practical benefits that might accrue to parties and court in conservation of judicial, prosecutorial, and defensive resources).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.43

§ 14.43 Orders of Court for Misjoinder and Nonjoindern*

[1] Remedies for Misjoinder

The typical case of misjoinder under Rule 21 occurs when the plaintiff attempts to join a co-plaintiff or a defendant who fails to satisfy the requirements for permissive joinder under Rule 20(a) n1 The permissive party joinder rule generally gives the plaintiff considerable leeway in choosing the party structure of the lawsuit. The plaintiff's choice not to join some proper party is generally respected unless there is a contrary provision in the rules, such as when the absentee is needed for a just adjudication, in which case the court is required to join the absentee. n2 Absentees who would merely be proper parties under the permissive joinder rules have no way to enter the suit except when they can intervene in appropriate circumstances. n3

The court may cure misjoinder of parties in one of two ways. First, the court may dismiss misjoined parties on terms that the court deems are just. Dismissal of a misjoined party under Rule 21 is without prejudice, which means that a claim by or against such a party may be refiled as a separate suit. n4

The court's second option is to sever claims that relate to the misjoined party. n5 By eliminating the claims of improperly joined parties, the court cures the misjoinder problem and retains jurisdiction over the main action. n6 For a discussion of severed claims, see [3], *below*.

It is important to note that misjoinder of parties is not grounds for dismissal of an action. n7 This is a significant change over common law joinder rules, which required dismissal of some cases for misjoinder. n8 However, while dismissal is not a remedy for misjoinder, the court may use that option for non-joinder of parties. Thus, if an absentee needed of just adjudication of the pending suit is determined to be "indispensable," n9 the pending action must be dismissed. n10

[2] Remedies for Nonjoinder

The most common example of non-joinder occurs when the plaintiff or the court fails to join someone needed for a just adjudication of the pending litigation. The failure to join such a party may be raised by motion to add the party under Rule 21. The absentee must be joined in the pending case if such joinder is feasible. n1 The plaintiff's failure to join

such an absentee constitutes non-joinder, and may be cured under Rule 21 by a motion and court order to join the absentee. n2

However, if joinder of an absentee needed for a just adjudication is not feasible, the court may have to dismiss the action. Joinder is not feasible, for example, when the court cannot obtain personal jurisdiction over the necessary party, when the necessary party's joinder would destroy diversity of citizenship jurisdiction, or when the necessary party has a valid objection to venue. n3 In such a situation, the court has only two choices: it must either proceed without joinder of the necessary party or dismiss the pending case. n4 Thus, the court must dismiss the case if there is an absentee whose presence is needed for a just adjudication, whose joinder is not feasible, and in whose absence the court decides to dismiss rather than proceed. n5 Thus, non-joinder of such an absentee may not be cured by ordering addition of the absentee under Rule 21, but the case must be dismissed under Rule 19(b). n6

[3] Severance

[a] Severance of Claim Results in Distinct Lawsuit

Under Rule 21, the court has the power to order that any claim against any party be severed and proceeded with separately. n1 Although courts generally use the terms "sever" and "separate trials" interchangeably, they are analytically and fundamentally unique: the severance procedure authorized by Rule 21 should be distinguished from the separate trial procedure under Rule 42(b). Severed claims become entirely independent actions to be tried and judgment entered on the claim as a distinct case; on the other hand, separate trials usually result in one judgment for all of the claims. In other words, severance under Rule 21 results in separate actions.

A single claim that is severed from a multiple claim action may be proceeded with separately. This means that the severed claim proceeds as a discrete, independent suit. It and the original case result in their own separate final judgments from which appeals may be taken. If a severed claim is one of multiple claims asserted by a single plaintiff against a single defendant neither party is severed from the original action. Rather, both parties are involved in two separate actions.

In contrast, an order of separate trials does not result in the filing of separate cases. Instead, it simply leads to two or more separate factual inquiries in the context of a single, properly joined case. No matter how many separate trials the court may order, they remain part of a single case. n2 While judgment on a severed claim is final for purposes of appeal, judgment on a claim tried separately is not an appealable final judgment unless certified for immediate appeal under Rule 54. n2.1

[b] Courts Discretion to Order Severance or Separate Trial

The question of whether to enter a severance order under Rule 21 is left to the sound discretion of the district court. n3 In deciding whether severance is appropriate, the trial court should generally consider whether: (1) the issues sought to be tried separately are significantly different from one another, (2) the separable issues require the testimony of different witnesses and different documentary proof, (3) the party opposing the severance will be prejudiced if it is granted, and (4) the party requesting the severance will be prejudiced if it is not granted. n4

When deciding whether to order separate trials, a court generally will consider the same factors listed above for severance. n5 However, courts tend to be more liberal in their grant of separate trials, because it is not as drastic a measure as ordering an entirely new case. Courts will order separate trials when there will be little overlap in testimony and evidence between the two proceedings, when the issues to be decided at trial are complex and the factfinder is likely to become confused, when bifurcation will promote settlement, and when a single trial will cause unnecessary delay.

None of these factors are determinative. A court must take into account the overall equities of a case in ruling on a

motion for separate trials. Complexity and delay, must be balanced against the fact that a bifurcated trial would result in duplicative testimony and evidence. In addition, the court must consider the effect on settlement that bifurcation would have. The court may reserve the right to revisit the possibility of bifurcation sua sponte should it determine that the situation has changed. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 21.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Moubry v. Kreb, 58 F. Supp. 2d 1041, 1047 (D. Minn. 1999)* (Rule 21 is the proper vehicle for dismissing parties who were improperly joined because they failed to satisfy any of the conditions of permissive joinder under Rule 20(a)); *see Fed. R. Civ. P. 20(a), 21.*

(n3)Footnote 2. *Fed. R. Civ. P. 19(a).*

(n4)Footnote 3. *See Fed. R. Civ. P. 24*; § 14.90 et seq.

(n5)Footnote 4. *Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674 (6th Cir. 1988)* ; *Stark v. Independent Sch. Dist. No. 640, 163 F.R.D. 557, 564 (D. Minn. 1995)* .

(n6)Footnote 5. *Fed. R. Civ. P. 21.*

(n7)Footnote 6. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1062 (S.D. Tex. 1996)* (because claims are asserted by parties, there will be instances where severing claim also severs a party from the original litigation; for example, if claim to be severed happens to be only claim asserted by one of multiple plaintiffs, then severing claim will have effect of severing that plaintiff from action); *Baker v. Barnard Constr. Co., 860 F. Supp. 779, 779-780 (D.N.M. 1994)* (proper remedy for misjoinder under Rule 20(a) would be to sever codefendant from other defendants in this action).

(n8)Footnote 7. *Lamar Advertising v. City of Lakeland, 980 F. Supp. 1455, 1459 (M.D. Fla. 1997)* (motion to dismiss denied because misjoinder is not grounds for dismissal; rather, court granted motion to strike names of improperly joined defendants).

(n9)Footnote 8. *United States v. Commercial Bank of N. Am., 31 F.R.D. 133, 135 (S.D.N.Y. 1962)* (Rule 21 was intended to minimize the harsh results of misjoinder under common law).

(n10)Footnote 9. *Fed. R. Civ. P. 19(b).*

(n11)Footnote 10. *See* [2], *below.*

(n12)Footnote 1. *Fed. R. Civ. P. 19(a).*

(n13)Footnote 2. *Fed. R. Civ. P. 21.*

(n14)Footnote 3. *Fed. R. Civ. P. 19(a).*

(n15)Footnote 4. *Fed. R. Civ. P. 19(b).*

(n16)Footnote 5. *Enza, Inc. v. We The People, Inc., 838 F. Supp. 975, 977-978 (E.D. Pa. 1993)* .

(n17)Footnote 6. *Moubry v. Kreb, 58 F. Supp. 2d 1041, 1048 (D. Minn. 1999)* .

(n18)Footnote 1. *Fed. R. Civ. P. 21.*

(n19)Footnote 2. *Houseman V. United States Aviation Underwriters, 171 F.3d 1117, 1122-1123 (7th Cir. 1999)* .

(n20)Footnote 2.1. *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., 813 F.2d 81, 84 (5th Cir. 1987)* (severed claim becomes entirely separate suit or judicial unit, so that final adjudication of it is appealable, notwithstanding that there remain unresolved claims pending in original action from which severance was granted and that no Rule 54(b) certificate has been issued); *see Fed. R. Civ. P. 54(b)*

(n21)Footnote 3. *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988)* , *cert. denied, 488 U.S. 848 (1988)* .

(n22)Footnote 4. *German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* ; *see Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc., 49 F. Supp. 2d 709, 720-721 (D.N.J. 1999)* (court will decline to sever claims pursuant to Rule 21 when parties fail to persuade court that it should transform claims into entirely independent action with independent case number and independent judgment).

(n23)Footnote 5. *Morris v. Northrop Grumman Corp., 37 F. Supp. 2d 556, 580 (E.D.N.Y. 1999)* .

(n24)Footnote 6. *Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc., 49 F. Supp. 2d 709, 721-722 (D.N.J. 1999)* .

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2-14 Moore's Manual--Federal Practice and Procedure §§ 14.44through 14.49

[Reserved]

§§ 14.44[Reserved]

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART II. IMPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.50

§ 14.50 Nature and Purpose of Impleadern*

[1] Party Structure for Impleader

Impleader, or third-party practice, is a procedural device for use by a person who is currently a party to an action to bring in an additional party and assert a claim against that additional party because of a claim that is being asserted in the action against the original party. Third-party practice under Federal Rule 14 is usually referred to as impleader. n1 The original party who is defending against a claim and who is instituting impleader is called the third-party plaintiff. n1.1 The nonparty joined by impleader is called the third-party defendant. n1.2 The pleading asserting the impleader claim is called the third-party complaint. n2 In addition, when a third-party defendant is made a litigant against whom an affirmative claim for relief is pending, the third-party defendant is a "defending party" and clearly is entitled to assert impleader. n2.1 Such assertions by a third-party defendant are often called "fourth-party claims." n3

Rule 14(a) expressly provides for direct claims between a plaintiff and a third-party defendant; however, these claims do not have commonly accepted names, and courts have not applied consistent labels. These claims should not be referred to as counterclaims, because counterclaims must be between "opposing" parties, n4 and until one asserts a claim against the other, the plaintiff and third-party defendant simply are not opposing parties. n5 Similarly, the claims are not cross-claims, because cross-claims are between co-parties. n6 However, because they are created by a specific rule, in this chapter they are referred to as such: the Rule 14(a) plaintiff against third-party defendant claim, and the Rule 14(a) third-party defendant against plaintiff claim. *See § 14.54* for a discussion of these claims.

Rule 14(b) provides that a plaintiff may join a third-party through impleader if a counterclaim has been asserted against the plaintiff. n7 The apparent purpose of this provision is to allow a plaintiff who has become, in effect, a defendant to the counterclaim to implead a third-party who is or may be liable to it on that counterclaim. n8 However, the fact that the impleader rule itself permits any "defending party" to assert impleader arguably renders Rule 14(b) superfluous, because if any defending party may assert an impleader claim, it should not be necessary to state that a plaintiff against whom a counterclaim has been asserted may do so also. n9 However, courts have not attached any significance to this apparently extraneous provision, and merely refer to it as a claim under Rule 14(b). n10

[2] Purposes of Impleader

The third party practice rule, also known as the impleader rule, permits a party who is defending against a claim (referred to as the third-party plaintiff) n1 to bring a new party (referred to as the third-party defendant) n1.1 into the pending case, provided that the third party is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party. n1.2 The joinder provisions of the federal rules generally give the plaintiff considerable discretion to select the party structure of litigation. The impleader rule is a limitation on that right in the narrow circumstances prescribed in the rule. Thus, impleader gives some control to a defending party to bring in parties; in essence, impleader permits a defending party to join a third party for the purpose of transferring to that third party all or part of the defending party's potential liability to the party that is making the underlying claim. Typically, this transference of liability will be based on an assertion that the third party owes the defending party a duty of indemnity or contribution. n2

By allowing the potentially liable party to bring in the third party into the suit, the claim is more efficiently adjudicated because the underlying claim for liability and any claim for indemnity or contribution are all considered in a single case. n3 This inclusive combining of claims saves the judicial system and the parties the time and expense of multiple suits.

Impleader also avoids the possibility of inconsistent judgments. Joinder of all persons interested in the ultimate resolution of the dispute binds them to a single judgment. Without such joinder, the defendant who loses on the underlying dispute must bring a separate action for indemnity or contribution because the alleged indemnitor or contributor would not be bound by the judgment in the first case because it was not a party. n4 Even if the defendant is successful in the second suit, it will be required to pay for separate litigation and may suffer adverse consequences because of the delay between judgments in the two suits. Effecting joinder of the indemnitor or contributor in a single case thus promotes judicial economy and fosters a consistent outcome that allows the defendant to avoid the potential harms of inconsistent results from identical or similar evidence, n5 and delay between the entry of an unfavorable judgment and the entry of a judgment against the third-party defendant. n6

[3] Impleader Is Permissive Rather than Mandatory

The impleader rule provides that a defending party may implead a party when the conditions are satisfied, not that it must implead; n1 because of this language, impleader claims are permissive and not compulsory. n2 Consequently, if a defending party fails or declines to use impleader, or if the court refuses to let it use impleader, the defending party may nevertheless sue the third-party separately at a later time to assert a right of indemnity or contribution. In such a case, the third-party would not be bound by any findings from the original case, because it was not a party to that action. n3

Similarly, because impleader is permissive, if a party asserts an impleader claim in state court, it is in effect manifesting its desire to litigate in state court and waives its right to remove the case to federal court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* §§ 14.02, 14.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Brown v. Shredex, Inc., 69 F. Supp. 2d 764, 766-767 (D.S.C. 1999) , dismissed on other grounds sub nom. Brown v. Geha-Werke GmbH, 69 F. Supp. 2d 770 (D.S.C. 1999) .*

(n3)Footnote 1.1. *Fed. R. Civ. P. 14(a)(1).*

(n4)Footnote 1.2. *Fed. R. Civ. P. 14(a)(2).*

(n5)Footnote 2. *See Royal Ins. Co. of Am. v. Southwest Marine, 194 F.3d 1009, 1017 (9th Cir. 1999)* ; *Thomas v. Barton Lodge II, Ltd., 174 F.3d 636, 652 (5th Cir. 1999)* .

(n6)Footnote 2.1. *Fed. R. Civ. P. 14(a)(5).*

(n7)Footnote 3. *Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806 (8th Cir. 1993)* (referring to impleader by third-party defendant as fourth-party claim).

(n8)Footnote 4. *Fed. R. Civ. P. 13(a), (b)*; *Finkel v. United States, 385 F. Supp. 333 (S.D.N.Y. 1974)* (citing **Moore's Federal Practice**).

(n9)Footnote 5. *Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 169 (3d Cir. 1999)* (third-party defendant joined under Rule 14 does not become defendant as against original plaintiff, so that federal jurisdiction is not destroyed where those parties are citizens of the same state).

(n10)Footnote 6. *Fed. R. Civ. P. 13(g)* (cross-claims between co-parties).

(n11)Footnote 7. *Fed. R. Civ. P. 14(b).*

(n12)Footnote 8. *In re Dept. of Energy Stripper Well Exemption Litig., 968 F.2d 27, 32 (Temp. Emer. Ct. App. 1992)* (proper invocation of Rule 14 by plaintiff who was also counterclaim defendant).

(n13)Footnote 9. *See Fed. R. Civ. P. 14(a).*

(n14)Footnote 10. *Chase Manhattan Bank, N.A. v. Aldridge, 906 F. Supp. 866, 867 (S.D.N.Y. 1995)* (if counterclaim has been asserted against plaintiff, plaintiff may bring in third party under same circumstances that defendant would be entitled to; in insured's suit against insurer to recover on policy, insured was entitled to bring in and seek indemnity from third party on insurer's counterclaim for declaratory judgment that policy had been validly rescinded because of misrepresentations made by third party).

(n15)Footnote 1. *Fed. R. Civ. P. 14(a)(1).*

(n16)Footnote 1.1. *Fed. R. Civ. P. 14(a)(2).*

(n17)Footnote 1.2. *Fed. R. Civ. P. 14(a)(1).*

(n18)Footnote 2. *See Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 69 F. Supp. 2d 678, 681-684* (M.D. Pa. 1999 (after toilet partition manufacturer brought action against competitor and others for antitrust violations and other trade violations, competitor brought third-party complaint against toilet partition manufacturers' group for contribution and indemnity, as well as fraud and negligent misrepresentation).

(n19)Footnote 3. *Hood v. Security Bank of Huntington, 562 F. Supp. 749, 751 (S.D. Ohio 1983)* (impleader avoids circuity of actions and multiple suits; it also saves time and eliminates unnecessary expense).

(n20)Footnote 4. *Martin v. Wilks, 490 U.S. 755, 761-762, 109 S. Ct. 2180, 2184, 104 L. Ed. 2d 835 (1989)* (only parties actually joined and nonparties represented by them are bound by judgment).

(n21)Footnote 5. *Stiber v. United States, 60 F.R.D. 668, 670 (E.D. Pa. 1973)* .

(n22)Footnote 6. *See In re Dept. of Energy Stripper Well Exemption Litig., 968 F.2d 27, 32 (Temp. Emerg. Ct. App. 1992)* .

(n23)Footnote 1. *See Fed. R. Civ. P. 14(a)(1), (5).*

(n24)Footnote 2. *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* (third-party complaint is permissive pleading).

(n25)Footnote 3. *Richards v. Jefferson County, Alabama, 517 U.S. 793, 116 S. Ct. 1761, 1765, 135 L. Ed. 2d 76 (1996)* (because of due process constraints, judgment may only bind parties to litigation and those represented by parties to litigation, even if nonparties share essentially identical interests with those who were joined as parties).

(n26)Footnote 4. *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* ; *see California Republican Party v. Mercier, 652 F. Supp. 928, 931 (C.D. Cal. 1986)* (citing **Moore's Federal Practice**; filing impleader claim in state court waives right to remove because impleader is permissive claim).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART II. IMPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.51

§ 14.51 Only Defending Parties Entitled to Implead Third Partyn*

The impleader rule limits those persons who may assert an impleader claim to defending parties. n1 While the scope of this reference includes the defendant, it also includes any other party against whom an affirmative claim for relief is pending. The impleader rule expressly reiterates this principle by stating that a third-party defendant is entitled to proceed under the rule to implead an absentee who may be liable to indemnify or contribute to a judgment. This provision seems redundant in view of the general language that impleader is available to any defending party. Because a third-party defendant is a litigant against whom an affirmative claim for relief is pending, the third-party defendant is a defending party and clearly is entitled to assert impleader. n2 Such claims by a third-party defendant are called "fourth-party claims." n3

There is a similarly redundant provision regarding third-party claims made by a plaintiff. The plaintiff impleader rule expressly provides that when a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so. n4 This subdivision is also unnecessary because it is obvious that a plaintiff against whom a counterclaim has been asserted is a "defending party," who is able to implead under the general language of the impleader rule. However, it appears that the provision was included to re-emphasize that the plaintiff may use the impleader rule only when it is acting as a defendant. n5

A litigant may lose its status as a defending party in an action and therefore its entitlement to use impleader in that action. For example, if a defendant is granted summary judgment, its impleader claim is rendered moot. n6 Also, a defendant that defaults in a case is no longer a defending party, because there is no affirmative claim pending against it; consequently the defaulting party may not implead a third-party. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.03[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a)(1), (3), (5).*

(n3)Footnote 2. *Fed. R. Civ. P. 14(a)(5).*

(n4)Footnote 3. *See, e.g., Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 169 (3d Cir. 1999)* .

(n5)Footnote 4. *Fed. R. Civ. P. 14(b).*

(n6)Footnote 5. *Cf. Chase Manhattan Bank v. Aldridge, 906 F. Supp. 866, 867 (S.D.N.Y. 1995)* (if counterclaim has been asserted against plaintiff, plaintiff may bring in third party under same circumstances that defendant would be entitled to).

(n7)Footnote 6. *Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982)* .

(n8)Footnote 7. *Newhouse v. Probert, 608 F. Supp. 978, 985 (W.D. Mich. 1985)* .

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.52

§ 14.52 Requirements for Impleadern*

[1] Impleader Must be Based on Third Party's Liability to Defending Party

A defending party may use an impleader claim only to assert that the third-party is liable to the defending party that is impleading the third party. n1 Therefore, it is improper for the defendant to implead a third party on the basis of the third-party defendant's direct liability to the plaintiff; courts properly reject such attempts and limit impleader to those third parties who are derivatively liable to the defendant. n2 A third-party complaint must set forth a claim of secondary liability such that, if the third-party plaintiff is found liable, the third-party defendant will be liable to the third-party plaintiff under a theory of indemnification, contribution, or some other theory of derivative liability recognized by the relevant substantive law. Any third-party complaint which does not facially meet this test is not proper under Rule 14. n3

A third-party claim is improper if neither the third party's liability is in any way dependent on the outcome of the main claim nor the third party is secondarily liable to defendant. n4 For example, when a defendant vehicle manufacturer asserted a third-party complaint against the driver of a vehicle, it was held an improper impleader because the complaint asserted only that the third-party driver was liable to the plaintiff and not to the defendant manufacturer. n5

[2] Third-Party's Liability Must Be for Plaintiff's Underlying Claim

An impleader claim is not proper unless the liability of the third-party defendant to the third-party plaintiff is for losses sustained by the third-party plaintiff as a result of the plaintiff's claim; unrelated liability to the defendant is not a basis for impleader. n1 However, in this regard it is important to note that the term "claim" is no longer used in the federal rules as a "cause of action"; rather, a claim refers to the transaction or occurrence that is the basis of the pleading; it has nothing to do with the legal theory on which a party relies. Thus, the fact that a third-party complaint may be based on a different legal theory from the underlying case does not bar impleader. n2

Similarly, the type of relief sought by the plaintiff in the underlying action will not deprive the defendant of its ability to implead. n3 Therefore, a liberal concept of "claim," combined with a strong policy in favor of efficiency and consistency through inclusive joinder, has freed impleader from historical limitations inherent in classic indemnity theories. Courts have construed the impleader rule liberally to achieve its goal of efficient and consistent resolution of

multiparty disputes. n4 However, the fact that impleader need not be based on the same legal theory as the plaintiff's claim does not negate the requirement that impleader must be based on derivative liability. n5

[3] Impleader Must Be Based on Derivative Liability

Although the impleader rule is liberally construed to avoid duplicative litigation and refers to the term claim, which is defined transactionally in the federal rules, n1 the test for joinder of a third party under the impleader rule is the same transactional test as for compulsory counterclaims and cross-claims, which are appropriate only if they arise from the same "transaction or occurrence" as the underlying suit. n2 Impleader is a narrower test because impleader must be based on the transference to the third-party of all or part of the liability asserted against the defendant; in other words, it must be an assertion of the third-party defendant's derivative liability to the third-party plaintiff. n3 An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a)(1)* (party defending on claim, as a third-party plaintiff, may cause complaint to be served on third-party defendant who may be liable to third-party plaintiff for all or part of such claim).

(n3)Footnote 2. *Carriere v. Cominco Alaska, Inc., 823 F. Supp. 680, 691 (D. Alaska 1993)* (nonadmiralty impleader may not be based on third-party defendant's liability to plaintiff).

(n4)Footnote 3. *Santana Prods. v. Bobrick Washroom Equip., Inc., 69 F. Supp. 2d 678, 688* (M.D. Pa. 1999).

(n5)Footnote 4. *FDIC v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994)* .

(n6)Footnote 5. *Bike v. American Motors Corp., 101 F.R.D. 77, 78-82 (E.D. Pa. 1984)* .

(n7)Footnote 1. *Johnson v. Rank, 110 F.R.D. 99, 101-102 (N.D. Cal. 1986)* (impleader improper because third-party's liability not dependent on defendant/third-party's liability to plaintiff).

(n8)Footnote 2. *Crude Crew v. McGinnis & Assocs., Inc., 572 F. Supp. 103, 109 (E.D. Wis. 1983)* , *appeal dismissed, 762 F.2d 1015 (1985)* (impleader proper despite different legal theories where underlying claim and third-party claim arose from same transaction).

(n9)Footnote 3. *Eastern Enters. v. Shalala, 942 F. Supp. 684, 689 (D. Mass. 1996)* , *aff'd on other grounds sub nom. Eastern Enters. v. Chater, 110 F.3d 150 (1st Cir. 1997)* (impleader not limited to cases in which underlying claim is for damages; proper in declaratory judgment cases).

(n10)Footnote 4. *Federal Deposit Ins. Corp. v. Loube, 134 F.R.D. 270, 272 (N.D. Cal. 1991)* .

(n11)Footnote 5. *See* [3], *below*.

(n12)Footnote 1. *See* [2], *above*.

(n13)Footnote 2. *Fed. R. Civ. P. 13(a)* (compulsory counterclaim); *Fed. R. Civ. P. 13(g)* (cross-claim).

(n14)Footnote 3. *Kenneth Leventhal & Co. v. Joyner Wholesale Co., 736 F.2d 29, 30-32 (2d Cir. 1984)* ; *Watergate Landmark Condominium Unit Owners' Ass'n v. Wiss, Janey, Elstner Assocs., 117 F.R.D. 576, 577 (E.D. Va. 1987)* .

(n15)Footnote 4. *Southeast Mortgage Co. v. Mullins, 514 F.2d 747, 749-750 (5th Cir. 1975)* ("but for" causation not sufficient for impleader).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.53

§ 14.53 Impleader is Procedural Device Onlyn*

[1] Impleader Rule Does Not Affect Substantive Rights

Impleader is a procedural device only and is governed by the Federal Rules of Civil Procedure. The impleader rule does not create or effect any substantive rights; n1 however, impleader is a process for presenting claims recognized by substantive law. n2

Federal substantive law, or state substantive law in diversity of citizenship cases, determines the rights and interests of the third-party plaintiff and third-party defendant with respect to the impleaded claim. This means that although it is a procedural issue whether impleader is proper in a particular case, that issue is determined in light of the substantive interests and rights. The impleader rule may not be used to assert a claim that does not exist under the substantive law. It is available only if the controlling substantive law gives a right to pursue a derivative claim from the third-party defendant. n3

Even though federal substantive law, or state substantive law in diversity of citizenship cases, governs the derivative lawsuit rights of a defending party to seek impleader, the method of the presentation of impleader is properly regarded as procedural for *Erie* purposes. n4 Thus, when a federal procedural rule regarding impleader conflicts with state procedure, the federal rule of procedure controls. The federal impleader rule properly applies to allow a third-party claim under federal procedure, even if state law does not permit accrual or assertion of impleader until after the defendant has incurred an actual loss. n5

[2] Federal Substantive Law Controls in Federal Question Cases

Federal law may create substantive claims for indemnification or contribution that may be asserted through impleader. These claims are usually promulgated in statutes but occasionally are the product of federal common law. n1 Thus, a right to indemnity or contribution exists when a federal statute specifically provides for it, n2 or a statutory provision may imply a right to indemnity or contribution. n3 Federal common law may also be a source of a substantive right to indemnification or contribution, although this source is limited, because it is usually permitted in the few instances in which a federal rule of decision is necessary to protect uniquely federal interests or where Congress has given the courts the power to develop substantive law. n4

[3] State Substantive Law Controls in Diversity Cases

Every claim asserted in federal court, including an impleader claim, must have a basis of federal subject matter jurisdiction. n1 When an impleader claim is based on diversity of citizenship jurisdiction n2 or on supplemental jurisdiction, n3 the *Erie* doctrine n4 requires federal courts to apply state law to determine whether there is a substantive right to be enforced through impleader. In other words, the question of whether there is a claim for derivative liability against the third-party defendant is a matter of substance for *Erie* purposes. n5

The fact that a case is brought in federal court on the basis of federal question jurisdiction does not mean that state law on indemnification or contribution is irrelevant. If the third-party claim itself is not based on federal law, state law will govern, even if the original jurisdiction-invoking claim in the case is a federal question. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2072* (impleader rule, like all federal rules, is procedural, and does not create or modify any substantive rights); *McLaughlin v. Biasucci, 688 F. Supp. 965, 967 (S.D.N.Y. 1988)* (impleader is procedural mechanism for asserting claim to indemnification or contribution recognized by substantive law).

(n3)Footnote 2. *See Connors v. Suburban Propane Co., 916 F. Supp. 73, 76 (D.N.H. 1996)* (impleader does not create causes of action, it merely prescribes manner for bringing substantive claims already recognized under applicable statutory or common law); *cf. Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 394-395 (1st Cir. 1999)* (primary purpose of impleader rule is to avoid unnecessary duplication of action regarding substantive claims).

(n4)Footnote 3. *Kim v. Fujikawa, 871 F.2d 1427, 1434 (9th Cir. 1989)* (ERISA provides no substantive basis for process of impleader); *Connors v. Suburban Propane Co., 916 F. Supp. 73, 76 (D.N.H. 1996)* (Rule 14 does not operate to create causes of action; it merely prescribes a method for bringing causes of action already recognized under applicable statutory or common law).

(n5)Footnote 4. *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n6)Footnote 5. *Montgomery County, Maryland v. Jaffe, Raitt, Heuer & Weiss, P.C., 897 F. Supp. 233, 238 (D. Md. 1995)* (Rule 14 addresses procedural issue and governs in diversity of citizenship case).

(n7)Footnote 1. *Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 101 S. Ct. 1571, 1580, 67 L. Ed. 2d 750 (1981)* .

(n8)Footnote 2. *See, e.g., 15 U.S.C. § 78i(e).*

(n9)Footnote 3. *See Santana Prods. v. Bobrick Washroom Equip., Inc., 69 F. Supp. 2d 678, 680-681 (M.D. Pa. 1999)* ; *cf. Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 101 S. Ct. 1571, 1580-1581, 67 L. Ed. 2d 750 (1981)* .

(n10)Footnote 4. *See* Hricik, *Remedies of the Infringer: The Use by the Infringer of Implied and Common Law Federal Rights, State Law Claims, and Contract to Shift Liability for Infringement of Patents Copyrights and Trademarks, 28 Tex. Tech. L. Rev. 1027, 1058*-1060 (1997).

(n11)Footnote 1. *See § 14.57.*

(n12)Footnote 2. *See 28 U.S.C. § 1332(a)(1).*

(n13)Footnote 3. *See 28 U.S.C. § 1367.*

(n14)Footnote 4. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938)* (with respect to decisions on substantive issues in cases other than federal question cases, federal courts must apply state law).

(n15)Footnote 5. *See Hiatt v. Mazda Motor Corp., 75 F.3d 1252, 1255 (8th Cir. 1996)* (citing **Moore's Federal Practice**); *United States Surgical Corp. v. John K. Pulsifer & Co., 119 F.R.D. 18, 19 (D. Md. 1988)* (citing **Moore's Federal Practice**).

(n16)Footnote 6. *Rodolico v. Unisys Corp., 189 F.R.D. 245, 252-253 (E.D.N.Y. 1999)* (in suit by former employee union members who were laid off against their former employer for violations of Age Discrimination in Employment Act, employer had option to file third-party claim against union based on New York Human Rights Law).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.54

§ 14.54 Claims Between Plaintiff and Impleaded Third Partyn*

[1] Claims Between Plaintiff and Third Party After Impleader

To initiate impleader, a defending party joins a third party who is or may be liable to the defending party for all or part of the claim pending against it. n1 Thus, the impleader claim joins the third party to the pending case. After the third party is impleaded, and is therefore joined to the case, the rule allows the third-party defendant to assert a claim directly against the plaintiff, provided that the claim arises from the same "transaction or occurrence" as the underlying case. The rule also permits the plaintiff to assert a claim directly against the third-party defendant, provided that the claim arises from the same "transaction or occurrence" as the underlying case. n2

However, these claims do not have commonly accepted names, and courts have not applied consistent labels. These claims should not be referred to as counterclaims, because counterclaims must be between "opposing" parties, n3 and until one asserts a claim against the other, the plaintiff and third-party defendant simply are not opposing parties. n4 In this chapter, these claims are referred to using the status of the claiming party first: the third party-plaintiff claim is a claim made by the third party, and the plaintiff-third party claim is a claim made by the plaintiff.

[2] Manner of Initiating Claim

Rule 14(a) does not specify the manner in which a third party or a plaintiff should make a claim after impleader has occurred. It appears that the third party or the plaintiff should request leave of court to assert such a claim. n1 Similarly, plaintiffs in this situation commonly seek leave of court to amend their complaint to add the claim. n2

However, it is not necessary for a plaintiff to file a formal amendment of the plaintiff's complaint asserting causes of action against a party impleaded under Rule 14(a) provided that the third-party is effectively on notice that it will be held liable on the plaintiff's claims and the two proceed at trial against one another in an adverse manner. n3 Some courts have indicated that the plaintiff may proceed against the impleaded third party by filing a new pleading against the third party. Thus, there is authority for the practical position that the plaintiff may assert the plaintiff-third party Rule 14(a) claim in a separate pleading, without amending the original complaint and without having to seek the court's permission. n4 It also seems clear that the plaintiff should not have to wait for the third-party defendant to respond to the third-party complaint before filing the plaintiff's pleading against the third party. Additionally, provided that the

impleaded third party is effectively on notice that it will be held liable on the plaintiff's claims and the plaintiff and third party proceed against one another in an adverse manner at trial, the district court may permitting the plaintiff to amend its complaint to conform to the evidence at trial. n5 On the other hand, the plaintiff may not assert a plaintiff-third party Rule 14(a) claim after the underlying case between plaintiff and defendant has been terminated. n6

Any Rule 14(a) claim between the plaintiff and the third party must arise from the same transaction or occurrence as the underlying dispute between the original plaintiff and the original defendant. n7 Thus, if the third party-plaintiff claim or the plaintiff-third party claim is not transactionally related to the underlying dispute, it may not be asserted in the pending case. n8 Once the plaintiff or third party does assert a proper Rule 14(a) claim, however, it may use the unlimited claim joinder rule to join any claims, even ones that are transactionally unrelated, in the pending case. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a)(1), (2).*

(n3)Footnote 2. *Fed. R. Civ. P. 14(a)(2)(C), (D), (a)(3); see Project Hope v. M/V Ibn Sina, 250 F.3d 67, 76 (2d Cir. 2001)*

(n4)Footnote 3. *Fed. R. Civ. P. 13(a),(b); Finkel v. United States, 385 F. Supp. 333 (S.D.N.Y. 1974)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 169 (3d Cir. 1999)* (third-party defendant joined under Rule 14 does not become defendant as against original plaintiff, so that federal jurisdiction is not destroyed where those parties are citizens of the same state).

(n6)Footnote 1. *Finkel v. United States, 385 F. Supp. 333, 336 (S.D.N.Y. 1974)* (denying leave to file Rule 14(a) third party-plaintiff claim).

(n7)Footnote 2. *Martin v. Lociccero, 917 F. Supp. 178, 184 (W.D.N.Y. 1995)* (parties and courts usually deal with issue through motion for leave to amend); *Straub v. Desa Indus., Inc., 88 F.R.D. 6, 8 (M.D. Pa. 1980)* (liberal amendment policies support assertion of plaintiff-third party Rule 14(a) claim).

(n8)Footnote 3. *Project Hope v. M/V Ibn Sina, 250 F.3d 67, 76-77 (2d Cir. 2001) .*

(n9)Footnote 4. *Northbrook Nat'l Ins. Co. v. J&R Vending Corp., 167 F.R.D. 643, 647 (E.D.N.Y. 1996)* (citing **Moore's Federal Practice**); *Dysart v. Marriott Corp., 103 F.R.D. 15, 18 (E.D. Pa. 1984)* (plaintiff does not need court permission to file claim against third-party defendant before running of statute of limitation).

(n10)Footnote 5. *Project Hope v. M/V Ibn Sina, 250 F.3d 67, 76 (2d Cir. 2001) .*

(n11)Footnote 6. *Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970) .*

(n12)Footnote 7. *Fed. R. Civ. P. 14(a)(3).*

(n13)Footnote 8. *Finkel v. United States, 385 F. Supp. 333, 336 (S.D.N.Y. 1974)* (denying leave to file third party-plaintiff Rule 14(a) claim because claim did not arise from the same transaction or occurrence as the underlying dispute between plaintiff and defendant).

(n14)Footnote 9. *See Fed. R. Civ. P. 18(a)* (joinder of claims).

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.55

§ 14.55 Common Types of Impleadern*

[1] Impleader of Insurer

The nature of an insurance contract is indemnification. In most cases it will not be necessary for the defendant to implead an insurance company because usually the insurer will admit coverage and provide the defense for the defendant. However, the issue of impleader of an insurance company may arise when an insurer disclaims liability n1 or in circumstances involving multiple coverage. n2 In any event, a defending party may not implead an insurer unless the insurer "is or may be liable" to the defendant. n3 Therefore, impleader is not proper unless there is some plausible theory of the insurance company's liability to the defendant for all or part of the claim by the plaintiff against the defendant. n4

On the other hand, an insurer may not prevent impleader by including a provision in the policy that no action will lie against the insurer until judgment has been rendered against the insured and has been paid by the insured. The goals of third-party practice would be defeated if a "no-action" clause were held to preclude impleader. n5

Even where impleader is proper, the court has discretion to deny impleader when there is risk of prejudice if the jury should learn that the defendant is insured. n6 On the other hand, when it is common knowledge that a party is covered by insurance, or if that fact is introduced into the litigation, the court may properly allow impleader because of the slight danger of prejudice resulting from impleading the insurer. n7 For example, courts have allowed impleader after noting that it is common knowledge among jurors that common carriers insure their cargo. n8

[2] Impleader of Joint Tortfeasor

When more than one person perpetrates some tortious act, the law of most jurisdictions recognizes that one joint tortfeasor has some right of indemnity or contribution against the other joint tortfeasors. n1 Because impleader is proper only if the substantive law recognizes a derivative claim against the third-party defendant, one common impleader issue is whether a joint tortfeasor sued by the plaintiff in a particular case has a right to contribution from its joint tortfeasors. While at common law there was generally no right to contribution between joint tortfeasors, in most American jurisdictions that rule has been changed either by statute or by judicial decision. n2 The common law does recognize a right of indemnity, however, where one tortfeasor is primarily liable and the other is secondarily liable to the injured

party. The secondarily liable actor is entitled to full indemnity from the primarily liable actor for any damages which it sustains in a suit by the victim. n3 However, impleader based on diversity jurisdiction is still improper on the basis of contribution among joint tortfeasors in the jurisdictions adhering to the common-law no-contribution rule. n4

Even among those states that recognize contribution among joint tortfeasors, there is not a uniform approach regarding the time and manner for asserting a contribution claim. In some states, joint tortfeasors in pari delicto have a right of contribution among themselves but only to the extent that the plaintiff chose to join them in the original action. In other states, a joint tortfeasor against whom judgment has been entered may sue the other joint tortfeasors for contribution but usually not until after it pays the judgment. If the actors are separate, and not joint, tortfeasors, substantive law generally does not recognize a right of contribution, and impleader is improper.

Even in states in which there is no right to contribution, a defendant can implead a joint tortfeasor if there is some other ground for a recovery against the third-party; n5 for example, comparative fault provisions of state law may provide a substantive reason for impleader to determine attribution of fault. n6 When the governing substantive law permits contribution among joint tortfeasors regardless of whether plaintiff has sued the joint tortfeasors initially, the defendant can implead the joint tortfeasors to enforce its claim for contribution. n7 Provided that the governing substantive law recognizes a claim, impleader is proper even if the claim does not arise until one joint tortfeasor discharges the common liability to the plaintiff. n8

[3] Impleader Involving United States as Party

[a] Availability of Impleader

The impleader rule, as well as the other Federal Rules of Civil Procedure, applies to civil actions by or against the United States; however, the rule's application is limited by the principle of sovereign immunity, which restricts the situations in which the United States is required to defend a claim.

When the United States is a defending party, impleader may be used by the United states against a third-party in the circumstances that satisfy the impleader rule. n1 In the most common example, the United States is sued under the Federal Tort Claims Act, and the United States then impleads a joint tortfeasor for indemnity or contribution. n2 In such cases, because the United States is the third-party plaintiff, there is no problem of sovereign immunity, in that the sovereign is the claimant. Furthermore, the doctrine that the United States may not be made a codefendant in district court under the Tucker Act does not impair the government's ability to implead a third-party. That doctrine merely establishes circumstances in which the United States may be sued and is not applicable to a case in which the government is asserting a claim. n3 For purposes of the impleader rule, courts have concluded that a state is a "person," and the United States may therefore implead a state on an assertion of derivative liability. n4

In certain circumstances, a person defending a claim may assert an impleader claim against the United States. In such circumstances, sovereign immunity is an issue because the United states is not making a claim, but is merely acting in a defensive capacity. For example, in a tort case the Federal Tort Claims Act permits a private party who is defending a tort claim to implead the United States as an alleged joint tortfeasor. n5 While the United States may be named as a third-party defendant under the Federal Tort Claims Act, an attempt by the plaintiff to amend its complaint to state a claim directly against the United States is precluded by the requirement under that Act that the plaintiff file a timely administrative claim. Failure to file deprives the district court of an independent basis of jurisdiction over such a direct claim, because filing of an administrative claim is a jurisdictional prerequisite. n6

In another example, the United States may also be impleaded under the Suits in Admiralty Act, even in cases when the underlying claim is cognizable on the law side of the court, and the third-party claim is triable in admiralty. n7

[b] Substantive Law for Impleader Involving United States

Impleader involving the United States may raise issues of what substantive law governs the various claims, including the impleader claims against a third-party defendant. With respect to the Federal Tort Claims Act, the liability of the United States is governed by state law. n8 Consequently, its liability as a third-party defendant is also governed by state law, n9 as well as the United States government's ability to implead a third-party defendant. n10

Federal common law may also be a source of substantive law used in conjunction with impleader claims by or against the United States. In one case, for example, the Supreme Court extrapolated a comparative negligence theory from a standard government contract clause used in the case where the clause provided for indemnification of the United States. The Supreme Court adopted a comparative negligence theory under which the contractor would be partially liable for indemnification to the extent that its negligence caused the damages. n11 In cases involving substantially similar clauses, the United States as the sole defendant should be able to implead the contractor on the basis of this federal common law of comparative negligence. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* §§ 14.07-14.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Tourangeau v. Uniroyal, Inc., 189 F.R.D. 42, 44 (D. Conn. 1999)* .

(n3)Footnote 2. *Cf. Emons Indus., Inc. v. Liberty Mut. Fire Ins. Co., 481 F. Supp. 1022, 1027-1028 (S.D.N.Y. 1979)* (in suit on product liability policy, defendant insurer could have impleaded other insurers that had covered plaintiff, except that plaintiff had discontinued the insured activity).

(n4)Footnote 3. *Fed. R. Civ. P. 14(a)(1).*

(n5)Footnote 4. *Forum Ins. Co. v. Ranger Ins. Co., 711 F. Supp. 909, 915 n.21 (N.D. Ill. 1989)* (impleader denied because no showing third-party defendant could be liable).

(n6)Footnote 5. *Colton v. Swain, 527 F.2d 296, 301-303 (7th Cir. 1975)* (citing **Moore's Federal Practice** for proposition that no action clause does not bar impleader where insurer refuses to defend).

(n7)Footnote 6. *Green v. Shepherd Constr. Co., 46 F.R.D. 434, 437-438 (N.D. Ga. 1969)* .

(n8)Footnote 7. *Baker v. Moors, 51 F.R.D. 507, 509 (W.D. Ky. 1971)* (rule against revealing existence of insurance in automobile cases is for protection of defendants, and therefore may be waived by them).

(n9)Footnote 8. *Rosalis v. Universal Distribs., Inc., 21 F.R.D. 169, 172 (D. Conn. 1957)* .

(n10)Footnote 1. *Rodolico v. Unisys Corp., 189 F.R.D. 245, 250 (E.D.N.Y. 1999)* .

(n11)Footnote 2. *Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 87, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981)* (helpful discussion of history and different approaches by the states).

(n12)Footnote 3. *Con-Tech Sales Defined Ben. Trust v. Cockerham, 715 F. Supp. 701, 705, 710 (E.D. Pa. 1989)* .

(n13)Footnote 4. *Johnson v. Serra, 521 F.2d 1289, 1297 (8th Cir. 1975)* .

(n14)Footnote 5. *Robbins v. Yamaha Motor Corp., 98 F.R.D. 36, 39 (M.D. Pa. 1983)* .

(n15)Footnote 6. *Tietz v. Blackner, 157 F.R.D. 510, 512-514 (D. Utah 1994)* (although Utah law precluded impleader based on indemnity or contribution, impleader allowed to permit court to determine relative fault).

(n16)Footnote 7. *Park v. Didden, 695 F.2d 626, 631-632 (D.C. Cir. 1982)* .

(n17)Footnote 8. *Williams v. Ford Motor Credit Co., 627 F.2d 158, 160 (8th Cir. 1980)* .

(n18)Footnote 1. *See Fed. R. Civ. P. 14(a)*; *Brown v. Shredex, Inc., 69 F. Supp. 2d 764, 766-767 (D.S.C. 1999)* .

(n19)Footnote 2. *See, e.g., Brown v. Shredex, Inc., 69 F. Supp. 2d 764, 766-767 (D.S.C. 1999)* (when federal employee's minor child sued United States government under Federal Tort Claims Act for injuries minor sustained from paper shredder at government workplace, government was entitled to implead employee for contribution and indemnification); *Collins v. General Motors Corp., 101 F.R.D. 4, 6-7 (W.D. Pa. 1983)* (government impleaded van manufacturer for indemnity or contribution).

(n20)Footnote 3. *United States v. Sherwood, 312 U.S. 584, 61 S. Ct. 767, 771-772, 85 L. Ed. 1058 (1941)* .

(n21)Footnote 4. *Palmer v. United States, 652 F.2d 893, 895-896 (9th Cir. 1981)* , *overruled on other grounds sub nom. White v. McGinnis, 903 F.2d 699 (9th Cir. 1990)* .

(n22)Footnote 5. *United States v. Yellow Cab Co., 340 U.S. 543 (1951)* (citing **Moore's Federal Practice**; court held that Federal Tort Claims Act permits impleader of the United States as if it were a private individual); *Boone v. Du Bose, 718 F. Supp. 479, 486-487 (M.D. La. 1988)* (impleader by defending party against United States for indemnity or contribution).

(n23)Footnote 6. *See 28 U.S.C. § 2675(a)*.

(n24)Footnote 7. *Orion Shipping & Trading Co. v. United States, 247 F.2d 755, 757 (9th Cir. 1957)* .

(n25)Footnote 8. *Richards v. United States, 369 U.S. 1, 82 S. Ct. 585, 589-591, 7 L. Ed. 2d 492 (1962)* .

(n26)Footnote 9. *Berger v. Winer Sportswear, Inc., 394 F. Supp. 1110, 1113 (S.D.N.Y. 1975)* (applying Massachusetts law under provision of Federal Tort Claims Act that requires application of whole law of state where act or omission occurred).

(n27)Footnote 10. *Estate of Warner v. United States, 669 F. Supp. 234, 236 (N.D. Ill. 1987)* (court dismissed government's impleader claim because Illinois law did not create claim for contribution on facts of case).

(n28)Footnote 11. *United States v. Seckinger, 397 U.S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970)* .

(n29)Footnote 12. *Barron v. United States, 654 F.2d 644, 648 (9th Cir. 1981)* .

Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART II. IMPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.56

§ 14.56 Procedural Considerationsn*

[1] Complaint Against Third-Party Defendant

[a] Timing

A defending party asserting an impleader claim need not obtain leave of court to serve the third party summons and complaint provided that the party files the third party complaint not later than 14 days after serving its original answer. n1 On the other hand, after the specified 14 day period, the party asserting the impleader claim must obtain leave of court on motion and notice to all parties to the action. n2 Even if the defending party does file within the 14 day period, however, the impleader rule provides that the other parties may move to strike the impleader claim. n3

Additionally, the court is not required to allow the impleader complaint, and the issue of whether an impleader complaint should proceed is dependent on the district court's discretion. n4 Accordingly, even when an impleader complaint is filed in a timely manner, the court has considerable discretion to enter any order it deems appropriate to facilitate the litigation and avoid prejudice. n5

[b] Contents

The contents required in a third-party complaint are specified in official Form 16 of the Appendix of Forms to the Federal Rules of Civil Procedure. n6 Under Rule 84, use of the form is sufficient to satisfy the pleading requirements of the federal rules. n7 The third-party complaint must contain a statement of the claim in favor of the defending party against the third-party defendant. A copy of the original complaint should be attached as an exhibit to the third-party complaint. n8

Form 16 contains no allegation of subject matter jurisdiction, n9 as is required for an original complaint. n10 However, it is good practice to include such an allegation, whether the pleader is relying on an independent basis of subject matter jurisdiction, including federal question jurisdiction, diversity jurisdiction, or supplemental jurisdiction. n11

Because the general pleading rule permitting alternative pleading applies to third-party complaints, there is no requirement that the defendant must plead its third-party complaint in a manner consistent with its answer. n12

[2] Motion for Leave of Court to File Third-Party Claim

[a] Timing

A defending party asserting an impleader claim must obtain leave of court to serve a third party complaint if the party files the third party complaint later than 14 days after serving its original answer. n1 Leave of court must be obtained on motion and notice to all current parties to the action. n2 In deciding whether to grant a motion for leave to file an impleader complaint, the court has considerable discretion to enter any order it deems appropriate to facilitate the litigation and avoid prejudice. n3 In the exercise of its discretion, the court should consider the following factors: (1) whether the moving party deliberately delayed or was derelict in filing the motion; (2) whether the impleader would unduly delay or complicate trial; (3) whether the impleader would prejudice the third party defendant; and (4) whether the third party complaint states a claim upon which relief can be granted. n4

Although the impleader rule does not set a time in which a motion for leave must be brought, undue delay is one factor on which the court may rely to deny the motion. Other factors include whether the delay in seeking leave was excusable and would prejudice a party. n5 Delay may be excused, for example if the party seeking impleader did not know of the existence of, or a basis for joining, a third-party defendant. However, the party must not delay any longer after the basis for impleader becomes clear. n6 The question of whether to permit impleader will depend on the individual facts of the case and is within the sound discretion of the trial court. n7

Another consideration in the timeliness of a motion to implead is the effect of local rules. Thus, a local rule may provide that impleader must be sought within six months of the defendant's service of its original answer. n8 However, such time frames are generally considered one factor to consider in exercising the court's discretion. n9

[b] Contents

If the third-party plaintiff does not file its third-party complaint within 10 days after serving its original answer, the third-party plaintiff must bring a motion to permit it to proceed with an impleader claim. n10 The contents of such a motion are specified in Form 16 of the Appendix of Forms to the Federal Rules of Civil Procedure. n11 Although use of the form is not mandatory, under Rule 84, the form is deemed sufficient to satisfy the pleading requirements of the federal rules. n12 Form 16 requires the moving party to attach a complaint to the motion. This practice provides the court and other parties with notice of the type of claim proposed against the proposed third-party defendant and allows a more meaningful assessment of the propriety of the impleader motion. n13 Although the impleader rule does not set a time for bringing the motion for leave to implead, a defendant's delay in seeking leave may be considered by the court in ruling on the motion. n14

[c] Service On Current Parties to Action

The impleader rule requires that notice of the motion be served on all parties to the action. n15 This provision is repetitious because Rule 5 requires notice to be given to all other parties for every written motion. n16 In any event, the reference to parties in Rule 14(a) includes only those parties that are already joined; n17 such parties are entitled to present objections to the impleader at the hearing on the motion. Because the third-party defendant is not yet a party to the action, however, it is not entitled to notice of the motion for leave to implead or to object at the hearing on the motion. Rather, if impleader is granted, the third-party defendant receives notice by service of the third-party complaint and may move to vacate the order permitting it. n18

[3] Procedural Rights of Third-Party Defendant

[a] Court May Not Order Impleader Unless Third-Party Defendant is Subject to Personal Jurisdiction

The third-party plaintiff must serve the third-party complaint and summons on the third-party defendant under the

general service of process rule. n1 Service of process is required because impleader joins a new party to the case, and the third-party defendant, who has been a nonparty to this point, must be brought before the jurisdiction of the court. n2 The court may exercise its personal jurisdiction over the third-party defendant only through service of process. n2.1 The general rule is that a federal district court may exercise personal jurisdiction throughout the state in which it sits and may serve process out of state only to the same extent as the courts of that state. n3 Thus, if a state long-arm statute allows for service of process out of state and the exercise satisfies due process, the court has power to exercise personal jurisdiction over the third-party defendant. n4

In some instances, a federal statutory provision may permit nationwide service of process over a third-party defendant, n5 and the service of process rule specifically refers to the possibility of using such federal statutes. n6

It is important to remember that, unlike subject matter jurisdiction, lack of personal jurisdiction and improper service of process are defenses that may be waived. Therefore, if a third-party defendant fails to assert the defense in a timely and proper manner, the third party may be deemed to have submitted to personal jurisdiction voluntarily. n7

[b] Third-Party Defendant's Motion to Strike Improper Impleader

If a defending party attempts to implead a third party defendant more than 14 days after serving its answer without seeking leave of court, n8 the third party defendant may move to strike the third party complaint. n9 Furthermore, even though the third party defendant is not entitled to notice of a motion for leave to implead, if the motion is improperly granted, the objecting third party defendant should make a motion to vacate the order granting impleader. Although the impleader rule does not expressly provide for a motion to vacate, courts have recognized the district court's power to consider such a motion. It is part of the court's underlying discretion to allow or deny impleader. n10 Thus the rules clearly contemplate the possibility of two rulings on the question of whether impleader is proper. If the third party plaintiff fails to implead within 14 days after serving its original answer, the third party plaintiff must obtain leave to implead on motion and notice to all parties to the action. If leave is granted, the third party defendant's motion to vacate will present the same issue of an abuse of discretion by the court in granting leave. n11

[c] Third-Party Defendant's Response to Impleader Complaint

The third-party defendant must respond to the third-party complaint in the same manner as a defendant to a complaint; the impleader rule provides that the third-party defendant must make any defenses to the impleader claim as provided in Rule 12. n12 Therefore, the third party defendant has 21 days after service of the summons in which to answer or file an appropriate motion. n13 If the third party defendant is the United States government or an agency or officer of the government, the time in which to respond is 60 days after service on the United States attorney. n13.1

Failure to answer or otherwise respond under Rule 12 entitles the third-party plaintiff to demand entry of default. The third-party defendant has the choice to either "answer," or may instead choose to defend in any way permitted under Rule 12. Thus, the third-party defendant may move to dismiss under any of the bases allowed under Rule 12(b), n14 such as lack of subject matter jurisdiction, failure to state a claim on which relief may be granted, lack of personal jurisdiction, or other motion to dismiss. n15

The third-party defendant also has the option to make any other appropriate motion, such as a motion for a more definite statement, n16 motion to strike, n17 or motion for summary judgment. n18 If the third-party defendant fails to respond, it is subject to the waiver provisions of Rule 12. n19

[d] Third-Party Defendant's Response to Underlying Complaint of Plaintiff

The third-party defendant may move to dismiss not only the third-party complaint but also the plaintiff's underlying complaint as well because, once impleaded, the third-party defendant is a party to the litigation. The third-party

defendant enjoys the benefits and must abide by the consequences of party status, and because it has been joined and brought before the jurisdiction of the court, the third-party defendant is bound by the judgment in the case. n20 This means that the third-party defendant is bound by the outcome of the underlying claim by the plaintiff against the defendant who impleaded the third-party defendant. Therefore, the rule specifically provides that the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. n21

In addition to being permitted to assert defenses available to the defendant that impleaded it, the third-party defendant must be accorded the procedural rights of a party. For example, it will be allowed to introduce evidence on relevant issues and to cross-examine witnesses in the main action. n22 These rights protect the impleaded third-party defendant when the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. n23

Although the plaintiff and the third-party defendant are not technically opposing parties, n24 the impleader rule recognizes the derivative nature of the third-party defendant's potential liability and permits it essentially to stand in the defendant's shoes and assert its defenses. n25 On the other hand, if the third-party defendant has no opportunity to litigate the result in the underlying action, for example if the plaintiff and defendant enter a consent judgment, the third-party defendant will not be bound. n26

[4] Permissive Joinder of Claims After Impleader

After properly asserting an impleader claim, the defending party may use the permissive claim joinder rule to join any other claims, regardless of whether transactionally related, against the third-party defendant. n1 Additionally, because the impleaded person is now a party, the other parties have the right to file any appropriate counterclaims and cross-claims. n2 The impleader rule expressly provides that the third-party defendant may assert counterclaims against the third-party plaintiff and cross-claims against other third-party defendants. n3 Consequently, the third-party defendant must assert compulsory counterclaims n4 and may assert permissive counterclaims n5 against the third-party plaintiff. And the third-party defendant may file cross-claims against other third-party defendants. n6

Furthermore, the courts apply the impleader joinder of claims rules liberally to include many types of claims by parties against other parties after impleader occurs, to further the underlying purpose of the federal rules to promote efficiency in litigation and to secure the just, speedy, and inexpensive determination of every action. For example, it has been held that when a plaintiff is making a claim directly against the third-party defendant who has been impleaded under Rule 14(a), a formal amendment of the plaintiff's complaint to assert the cause of action against the impleaded party is not necessary, provided that the third-party defendant is effectively on notice that he or she will be held liable on the plaintiff's claims and the two proceed against one another in an adverse manner. n7 It has been held in another case that under Rule 14(a), a third-party defendant may file a cross-claim against an original defendant, even if it would be inappropriate to characterize the third-party defendant as a co-defendant of the original defendant. n8

[5] Statute of Limitation

The applicable statute of limitation for a third-party claim depends on the substantive law of the claim. If the third-party claim arises under federal law, a federal statute of limitation will govern. n1 If there is no federal statute of limitation and the claim is one at law, the state statute of limitation applicable to a similar claim will govern. n2 In many third-party cases, of course, the third-party claim does not arise under federal law; rather, it may be based on state law because the claim is asserted under diversity of citizenship jurisdiction or supplemental jurisdiction. For these claims, state statutes of limitation will govern, regardless of whether the claim is one at law or in equity. n3

With respect to impleader, the defendant may not assert a third-party claim if the statute of limitation has run for the claim against the third party. n4 However, because the statute of limitation is an affirmative defense, the third-party defendant must raise the issue or else waive it. n5

The applicable statute of limitation is the statute prescribed for the substantive claim by the defendant against the third-party defendant. As a general rule, that statute will not start to run on a claim for indemnification or contribution until judgment has been entered against the defendant, or until the defendant has paid the judgment and thus suffered the loss it seeks to transfer to the third-party defendant through impleader. n6 Consequently, a defendant may implead a third party to enforce a right of contribution against the third party, even if the statute of limitation has expired on any claim the plaintiff could assert directly against the third party. n7

Other claims related to impleader are also subject to an applicable statute of limitation, such as, a claim by the plaintiff against the third-party defendant. n7.1 Furthermore, the fact that the defendant has filed an impleader claim against the third-party defendant does not toll the running of the statute of limitation on plaintiff's claim against the third-party defendant. n8

[6] Motion for Separate Trial or Severance of Impleader Claim

After an impleader claim has been made, any party may move for separate trial or severance of the impleader claim. n1 This provision is repetitious of other rules that give the district court authority to order severance n2 and separate trials. n3 Technically, severance is for use by the court to cure misjoinder of parties. It results in two separate lawsuits with separate judgments. On the other hand, an order of separate trials separates issues or claims for different fact finding, but the claims remain in a single case that results in a single judgment. n4

The district court has wide discretion to order severance or separate trials, either on motion or on its own initiative. The court will consider several factors in the exercise of its discretion: (1) whether the issues sought to be tried separately are significantly different from one another; (2) whether the separable issues require the testimony of different witnesses and different documentary proof; (3) whether the party opposing the severance will be prejudiced if it is granted; and (4) whether the party requesting the severance will be prejudiced if it is not granted. n5 Some older cases suggest that there would be not be a strong reason to permit impleader unless the issues could be adjudicated in one trial. n6 However, an order of separate trials of the underlying claim and the impleader claim may be appropriate when confusion might otherwise result; but impleader would still be appropriate to take advantage, even if separate trials are ordered, of having all claims asserted in a single case before a single judge. n7

[7] Appeal of Trial Court Order Regarding Impleader

The general rule is that a party may take an appeal only from a final judgment, which is a judgment that decides all issues relating to the merits in the case. Thus, interlocutory orders generally may not be raised until the entire case is concluded by judgment. n1 There are two exceptions to this general "final judgment rule." The first exception is a statutory permission for interlocutory appeal of issues that have been certified by the court. n2 The other exception is Rule 54(b), which allows entry of a final judgment on fewer than all claims. n3 Absent one of these exceptions, a ruling on a motion for leave to implead is not appealable, because it is not final. n4

Therefore, if the court grants a defendant's motion to implead a third party over the plaintiff's objection, the plaintiff may not appeal; nor may the third party appeal from the order impleading it or from denial of its motion to dismiss the third-party proceeding. Furthermore, resolution of a third-party complaint while the main action is pending is ordinarily not appealable, because it is not a final judgment; n5 neither is resolution of the main claim while the third-party complaint is pending. Similarly, an order dismissing a third-party complaint is not appealable if the main action remains pending. On the other hand, an order dismissing the third-party claim after the main case has been settled or otherwise disposed of is a final and appealable decision because all claims would have been resolved. n6

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* §§ 14.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 14(a)(1)*; *see* [2], *below.*

(n4)Footnote 3. *Fed. R. Civ. P. 14(a)(4).*

(n5)Footnote 4. *Fed. R. Civ. P. 14(a)*, Advisory Committee Note to 1963 Amendments.

(n6)Footnote 5. *See Rodolico v. Unisys Corp., 189 F.R.D. 245, 250 (E.D.N.Y. 1999)* (to promote judicial efficiency, court should freely grant timely motions for leave to implead non-parties, unless to do so would prejudice plaintiff, unduly complicate the trial, or would foster an obviously unmeritorious claim); *see also Eastman Chem. Int'l Ltd. v. Virginia Nat'l Bank, 94 F.R.D. 21, 22 (E.D. Tenn. 1981)* .

(n7)Footnote 6. Fed. R. Civ. P. Form 16.

(n8)Footnote 7. *Fed. R. Civ. P. 84.*

(n9)Footnote 8. Fed. R. Civ. P. Form 16.

(n10)Footnote 9. *See* Fed. R. Civ. P. Form 16.

(n11)Footnote 10. *See Fed. R. Civ. P. 8(a)(1).*

(n12)Footnote 11. *See Willy v. Coastal Corp., 503 U.S. 131, 134-135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* .

(n13)Footnote 12. *See Fed. R. Civ. P. 8(e).*

(n14)Footnote 1. *Fed. R. Civ. P. 14(a)(1)*; *see* [1][a], *above.*

(n15)Footnote 2. *Fed. R. Civ. P. 14(a)(1)*; *see* [3][b], *below.*

(n16)Footnote 3. *See Too, Inc. v. Kohl's Dep't Stores, Inc., 213 F.R.D. 138, 140 (S.D.N.Y. 2003)* ; *Rodolico v. Unisys Corp., 189 F.R.D. 245, 250 (E.D.N.Y. 1999)* .

(n17)Footnote 4. *Devon Mobile Communs. Liquidating Trust v. Adelphia Communs. Corp., 324 B.R. 492, 495 (S.D.N.Y. 2005)* .

(n18)Footnote 5. *Hornsby v. Johns-Manville Corp., 96 F.R.D. 367, 368 (E.D. Pa. 1982)* (court granted motion for impleader despite substantial delay because defendants' delay was excusable, there was no prejudice to third-party defendants, and trial would not be unduly delayed or complicated).

(n19)Footnote 6. *Jagielski v. Package Mach. Co., 93 F.R.D. 431, 432 (E.D. Pa. 1981)* (court permitted impleader despite 18-month delay, because of recent discovery of basis for impleader, and defendant was not dilatory or derelict in pursuing matter after discovery).

(n20)Footnote 7. *Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 393 (1st Cir. 1999)* (determination of whether to permit impleader is left to informed discretion of district court, which should allow impleader on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice ongoing proceedings).

(n21)Footnote 8. *See, e.g., Insurance Co. of N. Am. v. Morrison, 148 F.R.D. 295, 296 (M.D. Fla. 1993)* .

(n22)Footnote 9. *Con Tech Sales Defined Ben. Trust v. Cockerham, 715 F. Supp. 701, 703 (E.D. Pa. 1989)* (local rule providing for motion not later than 90 days after serving answer did not automatically bar impleader nine months after serving answer, because court should consider prejudice).

(n23)Footnote 10. *Fed. R. Civ. P. 14(a)(1)*.

(n24)Footnote 11. Fed. R. Civ. P. Form 16.

(n25)Footnote 12. *Fed. R. Civ. P. 84*.

(n26)Footnote 13. *Cf. Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80, 84 (S.D. Ohio 1981)* .

(n27)Footnote 14. *See* [a], *above*.

(n28)Footnote 15. *Fed. R. Civ. P. 14(a)(1)*; *see Fed. R. Civ. P. 6(c)(1)*.

(n29)Footnote 16. *Fed. R. Civ. P. 5(a)*.

(n30)Footnote 17. *Fed. R. Civ. P. 14(a)(1)*.

(n31)Footnote 18. *Harries v. General Motors Corp., 786 F. Supp. 446, 447-449 (M.D. Pa. 1992)* (motion to strike impleader claim).

(n32)Footnote 1. *Fed. R. Civ. P. 14(a)(1)*.

(n33)Footnote 2. *See Santana Prods., Inc. v. Bobrick Washroom Equip., 14 F. Supp. 2d 710 (M.D. Pa. 1998)* .

(n34)Footnote 2.1. *See NASCAR v. Doe, 584 F. Supp. 2d 824, 829-830 (W.D.N.C. 2008)* .

(n35)Footnote 3. *See Fed. R. Civ. P. 4(k)(1)(A)*; *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (due process limitation on state's authority to exercise personal jurisdiction).

(n36)Footnote 4. *Sonnabend v. Sorrentino, 866 F. Supp. 651, 653 (D. Mass. 1994)* (discussion of personal jurisdiction over third-party defendant pursuant to Massachusetts long-arm statute).

(n37)Footnote 5. *Pensacola Const. Co. v. St. Paul Fire & Marine, 705 F. Supp. 306, 315 (W.D. La. 1988)* , *dismissed on other grounds by* United States ex rel. Pensacola Constr. Co. v. St. Paul Fire & marine *Ins. Co., 710 F. Supp. 638 (W.D. La. 1989)* .

(n38)Footnote 6. *Fed. R. Civ. P. 4(k)(1)(D)*.

(n39)Footnote 7. *See Fed. R. Civ. P. 12(h)(1)*; *see also Clark v. Associates Commercial Corp., 149 F.R.D. 629, 632 (D. Kan. 1993)* (third-party defendant waived personal jurisdiction defense by failure to include it with initial motion for more definite statement).

(n40)Footnote 8. *See Fed. R. Civ. P. 14(a)(1)*.

(n41)Footnote 9. *See Fed. R. Civ. P. 14(a)(4)*; *Richmond, Fredericksburg & Potomac R.R. Co. v. Davis Industries, Inc., 787 F. Supp. 572, 574 (E.D. Va. 1992)* .

(n42)Footnote 10. *City of Orange Beach v. Scottsdale Ins. Co., 166 F.R.D. 506, 509 (S.D. Ala. 1996)* .

(n43)Footnote 11. *See Fed. R. Civ. P. 14(a)(1), (a)(4).*

(n44)Footnote 12. *Fed. R. Civ. P. 14(a)(2)(A)*; *see Fed. R. Civ. P. 12.*

(n45)Footnote 13. *Fed. R. Civ. P. 12(a)(1)(A)(i).*

(n46)Footnote 13.1. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n47)Footnote 14. *See Cargill Ferrous Int'l v. M/V Anatoli, 935 F. Supp. 833, 835 (E.D. La. 1996)* (third-party moved to dismiss for failure to state claim).

(n48)Footnote 15. *See Fed. R. Civ. P. 12(b).*

(n49)Footnote 16. *Fed. R. Civ. P. 12(e).*

(n50)Footnote 17. *Fed. R. Civ. P. 12(f).*

(n51)Footnote 18. *Fed. R. Civ. P. 56.*

(n52)Footnote 19. *Clark v. Associates Commercial Corp., 149 F.R.D. 629, 632 (D. Kan. 1993)* (third-party defendant waived affirmative defense by failure to include it with initial motion for more definite statement).

(n53)Footnote 20. *Martin v. Wilks, 490 U.S. 755, 761-762, 104 L. Ed. 2d 835 (1989) .*

(n54)Footnote 21. *Fed. R. Civ. P. 14(a)(2)(C).*

(n55)Footnote 22. *Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972)* (because third-party defendant will be bound by judgment on underlying claim, it must be protected by taking part in trial, including examination and cross-examination of witnesses).

(n56)Footnote 23. *Fed. R. Civ. P. 14(a)*, Advisory Committee Note to 1963 Amendments.

(n57)Footnote 24. *See Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 169 (3d Cir. 1999) .*

(n58)Footnote 25. *Oyster v. Bell Asbestos Mines, 568 F. Supp. 80, 82 (E.D. Pa. 1983) .*

(n59)Footnote 26. *Dewald v. Minster Press Co., 494 F.2d 795, 797-798 (6th Cir. 1974)* (third-party defendant not bound by consent decree of underlyi ng case between plaintiff and defendant).

(n60)Footnote 1. *Fed. R. Civ. P. 18(a)*; *see, e.g., Stiber v. United States, 60 F.R.D. 668, 670 (E.D. Pa. 1973) .*

(n61)Footnote 2. *Thomas v. Barton Lodge II, Ltd., 174 F.3d 636, 652 (5th Cir. 1999)* (third-party defendant may assert claims arising out of transaction against original plaintiff, counterclaims against third-party plaintiff, and cross claims against a co-party).

(n62)Footnote 3. *Fed. R. Civ. P. 14(a)(2)(B)*; *Fed. R. Civ. P. 13.*

(n63)Footnote 4. *Fed. R. Civ. P. 13(a).*

(n64)Footnote 5. *Fed. R. Civ. P. 13(b).*

(n65)Footnote 6. *Fed. R. Civ. P. 13(g).*

(n66)Footnote 7. Project Hope v. M/V IBN SINA, (2d Cir. 2001).

(n67)Footnote 8. *Thomas v. Barton Lodge II, Ltd., 174 F.3d 636, 652 (5th Cir. 1999)* (because Rule 14(a) allows third-party defendants to join additional parties to lawsuit to resolve claims related to claim made against third-party defendants, it would not make sense to conclude that third-party defendants could not bring those claims against parties already involved in suit).

(n68)Footnote 1. *See 28 U.S.C. § 1658* (all claims arising under federal statutes enacted after December 1, 1990, which do not provide a limitation period are subject to a four-year statute of limitation).

(n69)Footnote 2. *See North Star Steel Co. v. Thomas, 515 U.S. 29, 34-36, 115 S. Ct. 1927, 132 L. Ed. 2d 27 (1995)* .

(n70)Footnote 3. *Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945)* .

(n71)Footnote 4. *Bishop v. Atmos Energy Corp., 161 F.R.D. 339, 340 (W.D. Ky. 1995)* .

(n72)Footnote 5. *See Fed. R. Civ. P. 8(c)* (statute of limitation is affirmative defense); *see Colonial Refrigerated Transp., Inc. v. Worsham, 705 F.2d 821, 826 (6th Cir. 1983)* (affirming judgment in diversity case against third-party defendant that failed to assert apparently meritorious statute of limitation defense).

(n73)Footnote 6. *Sea-Land Serv., Inc. v. United States, 874 F.2d 169, 171 (3d Cir. 1989)* (citing **Moore's Federal Practice**); *ITT Rayonier, Inc. v. Southeastern Maritime Co., 620 F.2d 512, 514 (5th Cir. 1980)* (citing **Moore's Federal Practice**).

(n74)Footnote 7. *Wandrey v. McCarthy, 804 F. Supp. 1384, 1386 (D. Kan. 1992)* (court may allow impleader even if original plaintiff is barred by statute of limitation from bringing action directly against third-party defendant).

(n75)Footnote 7.1. *See Santiago v. United States, 884 F. Supp. 45 (D.P.R. 1995)* (noting that impleader would be timely even though statute of limitation had run on plaintiff's right to proceed against third party).

(n76)Footnote 8. *Scharrer v. Conrail, 792 F. Supp. 170, 172 (D. Conn. 1992)* .

(n77)Footnote 1. *Fed. R. Civ. P. 14(a)(4).*

(n78)Footnote 2. *See Fed. R. Civ. P. 21.*

(n79)Footnote 3. *See Fed. R. Civ. P. 42(b).*

(n80)Footnote 4. *See Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1122-1123 (7th Cir. 1999)* .

(n81)Footnote 5. *Morris v. Northrop Grumman Corp., 37 F. Supp. 2d 556, 580 (E.D.N.Y. 1999)* (separate trial); *German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* (severance).

(n82)Footnote 6. *Gladden v. Cia Commercio y Vapores, S.A., 26 F.R.D. 155, 156-157 (E.D. Pa. 1960)* (impleader should result in single trial).

(n83)Footnote 7. *Beights v. W.R. Grace & Co., 62 F.R.D. 546 (W.D. Okla. 1974)* (court allowed impleader but ordered separate trial because of differences in basic issues between underlying claim for personal injury and impleader claim of warranty).

(n84)Footnote 1. *United States v. Olavarrieta, 812 F.2d 640, 642 (11th Cir. 1987) , cert. denied, 484 U.S. 851 (1987)* .

(n85)Footnote 2. *See 28 U.S.C. § 1292(b).*

(n86)Footnote 3. *See Fed. R. Civ. P. 54(b).*

(n87)Footnote 4. *Minnesota v. Pickands Mather & Co., 636 F.2d 251, 252-255 (8th Cir. 1980)* (order denying leave to file third-party complaint does not fall within the exception and is unappealable).

(n88)Footnote 5. *Allegheny Airlines, Inc. v. LeMay, 448 F.2d 1341 (7th Cir. 1971) , cert. denied, 404 U.S. 1001 (1971) .*

(n89)Footnote 6. *See In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338, 1340 (11th Cir. 1982)* (order dismissing third-party complaint did not constitute final judgment while other claims remained pending).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART II. IMPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.57

§ 14.57 Subject Matter Jurisdictionn*

[1] Each Claim Must Have Basis in Subject Matter Jurisdiction

The impleader rule specifies the procedural circumstances in which the impleader claims may be asserted. n1 However, in addition to satisfying the procedural prerequisites, every impleader claim asserted in federal court must invoke a basis of federal subject matter jurisdiction. The federal rules do not affect subject matter jurisdiction. n2 Therefore, after determining whether one of the third-party practice claims is procedurally proper under the impleader rule, the court must then assess whether each claim is supported by subject matter jurisdiction. n3

The principal, although not exclusive bases for subject matter, are federal question jurisdiction and diversity of citizenship jurisdiction. To invoke federal question jurisdiction, the claimant must assert a claim that arises under federal law. n4 To invoke diversity of citizenship jurisdiction, every claimant must be a citizen of a different state from every defendant, and the amount in controversy must exceed $75,000. n5 Once federal subject matter jurisdiction is established over the underlying case, other impleader claims may, in general, be asserted only if they individually invoke a basis of subject matter jurisdiction; in other words, subject matter jurisdiction must exist for each and every individual claim asserted in federal court. If an impleader claim fails to invoke an independent basis of subject matter jurisdiction, the court may still hear the claim under the doctrine of supplemental jurisdiction. n6

[2] Exception for Cases of Supplemental Jurisdiction

A federal district court may not hear a case unless at least one claim invokes an independent basis of subject matter jurisdiction, such as federal question or diversity of citizenship jurisdiction. n1 However, after that requirement is met, the joinder rules, including the impleader rule, may allow assertion of other claims and joinder of additional parties that do not have an independent basis of subject matter jurisdiction. n2

Under the principle of supplemental jurisdiction, a federal district court has power to exercise supplemental jurisdiction over a third-party claim that does not have an independent basis of subject matter jurisdiction, if the third-party claim derives from the nucleus of operative fact common to the jurisdiction-conferring claim. n3 The basic impleader claim must itself pass the test, because the impleader rule allows the defending party to implead the third-party defendant only if the third party is or may be liable to the defendant for all or part of the underlying claim by the plaintiff against the

defendant. Thus, because the liability of the third-party defendant to the defendant on the impleader claim is derivative of the defendant's underlying liability to the plaintiff in the underlying case, the impleader claim by definition is concerned with the same transaction or occurrence, or common nucleus of operative fact, as the underlying suit.

Two other types of impleader claims, a claim by the plaintiff against the third-party defendant and a claim by the third-party defendant against the plaintiff, also pass the supplemental jurisdiction test, because the impleader rule itself expressly prescribes a transactional test for these claims. n4 However, there is an exception to this general rule for impleader claims based solely on diversity; the district courts do not have supplemental jurisdiction over claims by the plaintiff against third-party defendants if exercising supplemental jurisdiction over such a claim would be inconsistent with diversity requirements. n5 Thus, the supplemental jurisdiction statute has reversed the prior common practice and precludes supplemental jurisdiction over impleader claims by plaintiffs, even when the plaintiff is acting in a defensive posture. n6 Similarly, in diversity of citizenship cases, the statute prohibits supplemental jurisdiction for Rule 14(a) claims by a plaintiff against a third-party defendant. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.41 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 82.*

(n4)Footnote 3. *Harry Winston, Inc. v. Kerr, 72 F. Supp. 2d 263, 265 (S.D.N.Y. 1999)* (fact that third-party defendant's claim against plaintiff arose out of same transaction as plaintiff's claim against defendant, and was thus within federal procedure rule governing third-party practice, did not in itself provide federal district court subject matter jurisdiction over claim).

(n5)Footnote 4. *See 28 U.S.C. § 1331.*

(n6)Footnote 5. *See 28 U.S.C. § 1332(a)(1).*

(n7)Footnote 6. *See 28 U.S.C. § 1367*; *see also* [2], *below.*

(n8)Footnote 1. *See* [1], *above.*

(N9)Footnote 2. *See 28 U.S.C. § 1367.*

(n10)Footnote 3. *See 28 U.S.C.A. § 1367(a).*

(n11)Footnote 4. *Fed. R. Civ. P. 14(a)(2)(D), (a)(3).*

(n12)Footnote 5. *See 28 U.S.C.A. § 1367(a).*

(n13)Footnote 6. *Chase Manhattan Bank v. Aldridge, 906 F. Supp. 866, 868, 869 (S.D.N.Y. 1995)* ; *Guaranteed Systems, Inc. v. American Nat'l. Can Co., 842 F. Supp. 855, 856-858 (M.D.N.C. 1994)* .

(n14)Footnote 7. *Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct. 2396, 2399-2400, 57 L. Ed. 2d 274 (1978)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.58

§ 14.58 Venuen*

[1] Defending Party's Claim Against Third Party

Generally, venue is proper where all defendants reside or in any district in which a substantial part of the claim arose. n1 It has been argued with success that the venue statutes apply only to the original jurisdiction-invoking claim by the plaintiff against the defendant, and that an impleader claim should not have to satisfy the provisions of the venue statutes. Because impleader claims are so closely related to the underlying dispute that they may invoke supplemental subject matter jurisdiction, they do not need to satisfy an independent basis of subject matter jurisdiction. n2 Therefore, the federal courts have used a concept of "ancillary venue" over impleader claims. n3

While some early cases refused to do so, n4 the majority of courts presently use the concept of ancillary venue, which means that the impleader claim need not satisfy the venue statutes. n5 Under ancillary venue, the impleader claim simply need not satisfy the venue provisions that would apply were the claim asserted as an original action. Thus, the third-party defendant may not object to its impleader on venue grounds. n6

It should be noted that an impleaded third-party defendant is protected against an inconvenient forum because the court has the authority to take account of venue considerations as one of the factors to consider when it exercises its discretion to decide whether to allow impleader. n7

[2] Other Impleader Claims

The impleader rule permits the assertion of transactionally related claims by the third-party defendant against the plaintiff and by the plaintiff against the third-party defendant. Under this provision, the plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff (defendant in main action); in addition, the rule gives the third-party defendant a parallel right to assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff (defendant in main action). n1

It could be argued that if this claim is independent for jurisdictional purposes it should be regarded as independent for purposes of venue so that the party proceeded against, whether plaintiff or third-party defendant, as the case may be,

may move for dismissal unless the venue is proper for the institution of an original action on the claim. However, no substantial purpose would be served by carrying over the jurisdictional rule, by analogy, into the domain of venue.

The additional claims that Rule 14 authorizes the plaintiff to make against the third-party defendant, or vice versa, are factually related to the underlying litigation, because they must arise "out of the transaction or occurrence that is the subject matter" of the claim on which plaintiff instituted the original action. n2 It is arguable that this requirement affords considerable safeguards to either the plaintiff or the third-party defendant that the forum is reasonably related to the additional claim. Furthermore, because these additional claims are not being asserted in an original action, a court may arguably hold the venue statutes inapplicable. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMultiparty LitigationCivil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 14.41 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1391(a), (b).*

(n3)Footnote 2. *See § 14.57[2].*

(n4)Footnote 3. *Petrizzo v. United States, 492 F. Supp. 752, 755 (D.N.J. 1980)* .

(n5)Footnote 4. *See Manley v. Standard Oil Co., 8 F.R.D. 354, 356 (E.D. Tex. 1948)* (third-party defendant could object to lack of proper venue if claim against third-party was not related to any recovery sought by plaintiffs).

(n6)Footnote 5. *See Carcella v. L & L Coach Lines, Inc., 591 F. Supp. 1272, 1278-1279 (D. Md. 1984)* ; *F & D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F. Supp. 44, 45 (S.D. Tex. 1982)* .

(n7)Footnote 6. *See ABCKO Music, Inc. v. Beverly Glen Music, Inc., 554 F. Supp. 410, 412-413 (S.D.N.Y. 1983)* ; *Kotsonis v. Superior Motor Express, Inc., 539 F. Supp. 642 (M.D.N.C. 1982)* .

(n8)Footnote 7. *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc., 85 F.3d 201, 210 (5th Cir. 1996)* .

(n9)Footnote 1. *Fed. R. Civ. P. 14(a)(2)(D).*

(n10)Footnote 2. *See Fed. R. Civ. P. 14(a)(2)(D), (a)(3).*

(n11)Footnote 3. *Thompson v. United Artists Theatre Circuit, Inc., 43 F.R.D. 339, 342 (S.D.N.Y. 1967)* .

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.59

§ 14.59 Impleader of Admiralty Claimsn*

[1] General Impleader Rule May Be Applied to Admiralty Claims

The merging of general civil practice and admiralty practice resulted in significant changes in the third-party practice rule to accommodate and continue some of the traditional admiralty procedures. Consequently, the term "defending party" was substituted in Rule 14(a) for the term "defendant"; and a provision was added to Rule 14(a) specifically dealing with procedures for the assertion of third-party in rem claims within the admiralty and maritime jurisdiction. n1 Additionally, Rule 14(c) was added to retain special admiralty procedures allowing third-party claims based on liability to the original plaintiff.

Unlike general civil practice, admiralty practice allowed impleader on the ground that the third-party defendant was solely liable to the plaintiff. When unification was implemented, the general civil practice was retained in Rule 14(a), so that a party could assert maritime third-party claims in general civil actions; n2 at the same time, Rule 14(c) was added to supplement the civil practice and preserve the former, more expansive admiralty impleader practice for suits brought originally within the admiralty jurisdiction. n3

The final result of the amendments is that under the general impleader rule, a defending party in a civil case may assert an impleader claim that arises under admiralty law, n4 or in an admiralty case, the defendant may implead a third-party defendant on a nonadmiralty theory. n5 In other words, when an admiralty claim is involved, the impleading party may proceed under the general provisions of Rule 14(a), or if the impleading party desires, may use any optional admiralty procedures specified in Rule 14(a) and (c) that are applicable to the facts of the case. n6

Plaintiff impleader pursuant to Rule 14(b) n7 also applies in all cases, whether general civil or admiralty. Therefore, a plaintiff who is defending against either an admiralty or nonadmiralty counterclaim may implead a third-party defendant under circumstances to the same extent a defendant may under the general impleader rule. This in turn means that the impleader claim itself may arise under admiralty or any other law. n8

[2] Application of Optional Admiralty Impleader Rules

If a third-party complaint is within the admiralty and maritime jurisdiction, the defending party may make the

third-party claim in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem. In such cases, references to admiralty and maritime terminology are read into Rule 14(a). Thus, the references in the impleader rule to the "summons" are read to encompass the "warrant of arrest," and references to "third-party plaintiff" or "defendant" include, when appropria te, the "claimant of the property arrested." n1

When a claim is an admiralty claim, the impleading party also has the option to employ the provisions of Rule 14(c). n2 However, this admiralty impleader rule n3 applies only in cases in which a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h). n4

When a plaintiff does assert a proper admiralty or maritime claim, the admiralty impleader rule supplements the general impleader rule by providing that the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to "the plaintiff or to the third-party plaintiff," by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. The quoted portion of this provision reflects traditional admiralty practice, and is broader than the general right to implead, because it permits joinder of a third-party defendant on the basis of its direct liability to the plaintiff, not just to the defendant. n5

The admiralty impleader rule also provides that in such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff and that the third-party defendant must make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12. The action must then proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff, n6 and in such cases, the court may enter judgment for the plaintiff directly against the third-party defendant, even if the former did not assert a claim against the latter. n7

It is not precisely clear what language is necessary for the third-party plaintiff to "demand" judgment against the third-party defendant in favor of the plaintiff. Any language indicating a demand should be sufficient, because Rule 14(c) must be liberally construed. Consequently, it was held in one case that a third-party claim had a sufficient demand when the third-party complaint contained language requesting judgment against the third-party defendant in favor of the plaintiff, prayed that the third-party defendant answer and respond to the complaint of plaintiff in accordance with Rule 14(c), and explained how and why the third party was directly liable to plaintiff. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleader

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 3 *Moore's Federal Practice,* § 14.50 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 14(a)(6).*

(n3)Footnote 2. *See Fed. R. Civ. P. 14(a)(6).*

(n4)Footnote 3. *Parker v. Gulf City Fisheries, Inc., 803 F.2d 828, 828-829 (5th Cir. 1986)* (nonadmiralty impleader claim in admiralty case).

(n5)Footnote 4. *Swans v. United States Lines, Inc., 407 F. Supp. 388, 393 (E.D. Pa. 1975) .*

(n6)Footnote 5. *Parker v. Gulf City Fisheries, Inc., 803 F.2d 828, 829 (5th Cir. 1986) .*

(n7)Footnote 6. *See Fed. R. Civ. P. 14(a), (c)*; *see also Royal Ins. Co. of Am. v. Southwest Marine, 194 F.3d 1009, 1017 (9th Cir. 1999)* ; *Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1160 (5th Cir. 1995)* .

(n8)Footnote 7. *See Fed. R. Civ. P. 14(b).*

(n9)Footnote 8. *See Fed. R. Civ. P. 14(a)(6).*

(n10)Footnote 1. *Fed. R. Civ. P. 14(a)(6)*; *see also Riverway Co. v. Spivey Marine & Harbor Serv. Co., 598 F. Supp. 909 (S.D. Ill. 1984)* .

(n11)Footnote 2. *Harrison v. Glendel Drilling Co., 679 F. Supp. 1413, 1422 (W.D. La. 1988)* (because Rule 14(c) may be invoked only if plaintiff's claim is explicitly brought under Rule 9(h), or it is apparent that admiralty provides the only basis for jurisdiction, defendant in an action for injuries suffered by plaintiff during transfer from a barge to shore could not implead third-party under Rule 14(c) when complaint properly alleged that it was brought under Jones Act).

(n12)Footnote 3. *Fed. R. Civ. P. 14(c)(1).*

(n13)Footnote 4. *See Fed. R. Civ. P. 9(h).*

(n14)Footnote 5. *In re Oil Spill by the Amoco Cadiz, 699 F.2d 909, 914 (7th Cir. 1983)* .

(n15)Footnote 6. *Fed. R. Civ. P. 14(c)(2).*

(n16)Footnote 7. *Ohio River Co. v. Continental Grain Co., 352 F. Supp. 505, 511-512 (N.D. Ill. 1972)* .

(n17)Footnote 8. *See Royal Ins. Co. of Am. v. Southwest Marine, 194 F.3d 1009, 1018 (9th Cir. 1999)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART II. IMPLEADER

2-14 Moore's Manual--Federal Practice and Procedure §§ 14.60through 14.69

[Reserved]

§§ 14.60[Reserved]

Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART III. INTERPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.70

§ 14.70 Nature and Purpose of Interpleadern*

[1] Definition and Purpose

Interpleader is a form of joinder for use by a person who does not know to which of more than one claimant the person is liable. n1 Thus, interpleader is a procedural device used when more than one person must resolve conflicting claims to distinct money or property, known as the "stake." n2 It enables a person or entity in possession of a tangible res or fund of money (the "stakeholder") to join in a single suit two or more "claimants" asserting mutually exclusive claims to that stake. n3 The stakeholder institutes interpleader, usually as an initial proceeding, by filing a complaint and joining the claimants. n3.1 A stakeholder who has already been sued, however, may institute interpleader defensively, n3.2 by filing a counterclaim or cross-claim to which it joins the additional claimants. n4

Interpleader originated as an equitable remedy to protect a stakeholder from having to defend against multiple suits and from the risk of multiple liability or inconsistent obligations when several claimants assert rights to a single stake. n5 Thus, the purpose of interpleader is to resolve a multiple party dispute to the stake economically and efficiently in a single proceeding, n6 and to relieve the stakeholder from the obligation of determining who has the rightful claim to the money or property. n7 Additionally, the stakeholder can avoid potential multiple liability resulting from inconsistent judgments to different claimants in different suits. n8

Conflicting claimants to the stake may also benefit from interpleader, because all conflicting claims are resolved in a single action and a limited fund can be distributed equitably. n9 Finally, interpleader often eliminates the need to find and execute on the debtor's assets, because the contested stake typically must be deposited with the court. n10

[2] Distinction Between True Interpleader and Action in Nature of Interpleader

In a "true interpleader" action, the plaintiff is a disinterested stakeholder, rather than one of the claimants to the stake. On the other hand, in an "action in the nature of interpleader," the plaintiff-stakeholder also makes an affirmative claim to the stake. In true interpleader, the plaintiff-stake holder runs the risk, but for determination in interpleader, of multiple liability when several claimants assert rights to the single stake. n1 True interpleader is also known as strict interpleader; in this type of action the stakeholder is neutral and asserts no claim to the stake. n1.1 In a proceeding deemed in the nature of interpleader, on the other hand, the stakeholder claims an interest in all or part of the stake, and

may deny liability to one or more of the claimants. n2

Although historically courts recognized only true interpleader, in current federal practice either a disinterested stakeholder or an interested stakeholder may invoke interpleader. If the stakeholder has an interest in the stake, the stakeholder may recover funds that are not awarded to the other claimants. n3 However, a disinterested stakeholder still may be required for statutory interpleader. n4 Furthermore, the fact that a stakeholder may have a claim to the stake may still be important with respect to the question of whether the interested stakeholder's citizenship may be used to create diversity for jurisdictional purposes in statutory interpleader. n5 In strict or true interpleader, the stakeholder's citizenship is irrelevant for the purpose of establishing minimal diversity. n5.1

[3] Distinction Between Rule Interpleader or Statutory Interpleader

In federal court, a stakeholder has two alternatives for initiating the procedure of interpleader, through "rule interpleader" or through "statutory interpleader." n1 Rule 22 interpleader is merely a procedural device for joinder of claimants and does not confer federal jurisdiction over a claim; therefore, an interpleader brought under Rule 22 must fall within one of the general statutory grants of federal jurisdiction, such as federal question jurisdiction or diversity jurisdiction. n1.1 Statutory interpleader confers jurisdiction on federal courts over certain specific interpleader claims. n2 The Federal Interpleader Act consists of three separate statutes providing not only a procedural vehicle for joinder but also special provisions for subject matter jurisdiction, n3 venue, n4 and service of process and injunctions against duplicative actions. n5 Statutory interpleader specifies each of its requirements. For example, before discharge under Section 1335, the interpleader plaintiff (stakeholder) must establish that there is a fund greater than $500; the two interpleader defendants (adverse claimants) are of diverse citizenship; the fund is deposited in court; and the stakeholder is disinterested. n5.1

The two types of interpleader are designed to promote the same policies and perform the same function, economy and efficiency. n6 In many cases the stakeholder could have the option of invoking the provisions of either type. It is important to keep in mind that the two types of interpleader actions differ in subject matter jurisdiction, venue, service of process, and injunctions; thus, attorneys must be careful to determine which, if either, is available in a given case. This chapter points out all of the differences. n7

[4] Interpleader Proper Even if Claims Against Stake Are Prospective

A stakeholder has a right to bring an interpleader case even if some or all of the claims against the stake are prospective in nature. n1 Statutory interpleader provides that interpleader is proper when two or more adverse claimants are claiming or may claim an interest in the stake. n2 The "may claim" terminology of the statute allows consideration of prospective claims for purposes of determining whether the requisite claims are involved for interpleader. Thus, the Supreme Court noted that persons with unliquidated tort claims against an insurance fund are claimants for purposes of the interpleader statute. n3

The operative language for rule interpleader under Rule 22 differs from that of the statute. Specifically, it does not provide that anyone who "may claim" against the res is an adverse claimant who may resort to interpleader as a remedy. Nevertheless, Rule 22 does provide that interpleader is available for a stakeholder who "may be exposed" to multiple liability, n4 and courts have held that this language to allow consideration of prospective claims for rule interpleader. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 22.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Amoco Prod. Co. v. Aspen Group, 59 F. Supp. 2d 1112, 1114 (D. Colo. 1999)* .

(n3)Footnote 2. *See Airborne Freight Corp. v. United States, 195 F.3d 238, 240 (5th Cir. 1999)* .

(n4)Footnote 3. *Chase Manhattan Bank v. Mandalay Shores Coop. Hous. Ass'n, 21 F.3d 380, 383 (11th Cir. 1994)* (interpleader is means by which innocent stakeholder, who typically claims no interest in asset and does not know asset's rightful owner, may avoid multiple liability by asking court to determine asset's rightful owner); *White v. FDIC, 19 F.3d 249, 252 (5th Cir. 1994)* (citing **Moore's Federal Practice** to define interpleader as procedural device that entitles person holding money or property to join two or more persons that assert mutually exclusive claims to such money or property in single suit).

(n5)Footnote 3.1. *Fed. R. Civ. P. 22(a)(1).*

(n6)Footnote 3.2. *Fed. R. Civ. P. 22(a)(2).*

(n7)Footnote 4. *See, e.g., Collins v. Teachers Ins. & Annuity Ass'n of Am., 587 F. Supp. 403, 405-406 (D.R.I. 1984)* .

(n8)Footnote 5. *First Trust Corp. v. Bryant, 410 F.3d 842, 853-855 (6th Cir. 2005)* ; *Hussain v. Boston Old Colony Ins. Co., 311 F.3d 623, 631 (5th Cir. 2002)* ; *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (D.P.R. Cir. 1992)* .

(n9)Footnote 6. *Presidential Comm'n on Good Gov't v. United States Dist. Court for the Dist. of Haw. (In re Republic of the Phil.), 309 F.3d 1143, 1153 (9th Cir. 2002)* (if less than all significant claimants are joined in interpleader action, purpose of interpleader is materially frustrated); *American Int'l Speciality Lines Ins. Co. v. National Ass'n of Bus. Owners & Professionals, 253 F. Supp. 2d 468, 476 (E.D.N.Y. 2003)* (purpose of federal interpleader statute is to provide remedial device that allows person holding stake to compel two or more parties asserting mutually exclusive rights to stake to join and litigate their respective claims in one action); *Companion Life Ins. Co. v. Schaffer, 442 F. Supp. 826, 830 (S.D.N.Y. 1977)* (insurer sought interpleader against several parties claiming proceeds of same life insurance policy.).

(n10)Footnote 7. *6247 Atlas Corp. v. Marine Ins. Co., 155 F.R.D. 454, 462 (S.D.N.Y. 1994)* .

(n11)Footnote 8. *Texas v. Florida, 306 U.S. 398, 407, 59 S. Ct. 563, 83 L. Ed. 817 (1939)* (interpleader avoids possibility of recovery in more than one suit when only one party is entitled to recover).

(n12)Footnote 9. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* ; *Presidential Comm'n on Good Gov't v. United States Dist. Court for the Dist. of Haw. (In re Republic of the Phil.), 309 F.3d 1143, 1153 (9th Cir. 2002)* (interpleader action must generally resolve all significant claimants to res (stake) that is subject of action, because core purpose of interpleader action is to resolve all competing claims to stake).

(n13)Footnote 10. *Amoco Prod. Co. v. Aspen Group, 59 F. Supp. 2d 1112, 1114 (D. Colo. 1999)* (interpleading party deposited royalty payments and any future royalty payments at issue into registry of court).

(n14)Footnote 1. *Airborne Freight Corp. v. United States, 195 F.3d 238, 240 (5th Cir. 1999)* .

(n15)Footnote 1.1. *Brotherhood Mut. Ins. Co. v. United Apostolic Lighthouse, Inc., 200 F. Supp. 2d 689, 695 (E.D. Ky. 2002)* (in proceeding for "strict" or "true" interpleader, stakeholder disavows interest in stake).

(n16)Footnote 2. *Texas v. Florida, 306 U.S. 398, 406-407, 59 S. Ct. 563, 83 L. Ed. 817 (1939)* (plaintiff asserted no interest in fund in strict interpleader but in bill in nature of interpleader, plaintiff claimed interest in fund at issue);

American Family Mut. Ins. Co. v. Roche, 830 F. Supp. 1241, 1243 (E.D. Wis. 1993) (discussion of strict interpleader and bill in nature of interpleader).

(n17)Footnote 3. *Reliance Nat'l Ins. Co. v. Great Lakes Aviation, Ltd., 430 F.3d 412, 417 (7th Cir. 2005)* (citing **Moore's Federal Practice**).

(n18)Footnote 4. *See* [3], *below*.

(n19)Footnote 5. *American Family Mut. Ins. Co. v. Roche, 830 F. Supp. 1241, 1248 (E.D. Wis. 1993)* (citizenship of interested stakeholder does not create interpleader jurisdiction); *Mt. Hawley Ins. Co. v. Federal Sav. & Loan Ins. Corp., 695 F. Supp. 469, 473 (C.D. Cal. 1987)* (insurer-stakeholder's citizenship used to satisfy diversity jurisdiction).

(n20)Footnote 5.1. *Brotherhood Mut. Ins. Co. v. United Apostolic Lighthouse, Inc., 200 F. Supp. 2d 689, 695 (E.D. Ky. 2002)* .

(n21)Footnote 1. *See Fed. R. Civ. P. 22* (allowing plaintiff to join defendants when their claims are such that the plaintiff is or may be exposed to double or multiple liability); *28 U.S.C. § 1335* (granting original jurisdiction to the district courts in any civil action of interpleader or in the nature of interpleader, if two or more adverse claimants are claiming or may claim to be entitled to such money or property that has been pleaded into court).

(n22)Footnote 1.1. *Correspondent Servs. Corp. v. First Equities Corp., 338 F.3d 119, 124 (2d Cir. 2003)* .

(n23)Footnote 2. *Selective Ins. Co. of Am. v. Norris, 209 F. Supp. 2d 580, 582 (E.D.N.C. 2002)* .

(n24)Footnote 3. *28 U.S.C. § 1335*.

(n25)Footnote 4. *28 U.S.C. § 1397*.

(n26)Footnote 5. *28 U.S.C. § 2361*.

(n27)Footnote 5.1. *28 U.S.C. § 1335*; *see Advantage Title Agency, Inc. v. Rosen, 297 F. Supp. 2d 536, 538-539 (E.D.N.Y. 2003)* .

(n28)Footnote 6. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 529 n.3, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (differences between venue and service requirements of two types of interpleader discussed); *Fidelity Brokerage Servs., LLC v. Bank of China, 192 F. Supp. 2d 173, 177-180 (S.D.N.Y. 2002)* (whether pursuant to rule or statute, interpleader is designed to protect stakeholders from defending multiple claims against same fund and to relieve stakeholder from determining meritorious claim among many claims).

(n29)Footnote 7. *See § 14.73*; *see also Wittry v. Northwestern Mut. Life Ins. Co., 727 F. Supp. 498, 500 (D. Minn. 1989)* (differences between statutory and Rule 22 interpleader are primarily, procedural requirements such as jurisdiction, venue, service of process, and amount in controversy).

(n30)Footnote 1. *Texas v. Florida, 306 U.S. 398, 406, 59 S. Ct. 563, 83 L. Ed. 817 (1939)* (because of purposes of interpleader, plaintiff need not wait until claimants have actually instituted independent suits; it is enough if plaintiff shows that conflicting claims are asserted and that consequential risk of loss is substantial).

(n31)Footnote 2. *28 U.S.C. § 1335(a)(1)*.

(n32)Footnote 3. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 532-533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* .

(n33)Footnote 4. *Fed. R. Civ. P. 22(a)(1), (2)*.

(n34)Footnote 5. *6247 Atlas Corp. v. Marine Ins. Co., 155 F.R.D. 454, 463 (S.D.N.Y. 1994)* .

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.71

§ 14.71 Initiation of Interpleadern*

Only the stakeholder may activate the interpleader procedure. n1 Usually, the stakeholder commences interpleader as a plaintiff by naming interpleader defendants. n2 However, a defendant stakeholder may commence an interpleader proceeding as a counterclaim against the plaintiff and may join additional parties by a cross claim under the joinder provisions of Rules 19 and 20. n2.1 A counterclaim will lie only against an opposing party, and therefore may only be asserted by the defendant stakeholder against the plaintiff claimant who sued the stakeholder. n3 By contrast, a cross-claim will lie only against a "co-party," and thus must be asserted by the defendant stakeholder against a co-defendant claimant to the stake. n4

In either case, the defendant-stakeholder will be asserting the interpleader claim against a person who is already an existing party to the original action, n5 and that party will not be the only claimant to be joined in interpleader; therefore, there must be a process by which the stakeholder can join additional claimants to the counterclaim or cross-claim. That process is Rule 13, which permits the counterclaimant or cross-claimant to join additional parties who satisfy either the compulsory party joinder provisions of Rule 19 or the permissive party joinder provisions of Rule 20. n6 In most circumstances, the absentee claimants to be joined by the counterclaim or cross-claim interpleader will satisfy Rule 19 because their nonjoinder threatens the stakeholder with multiple or inconsistent obligations. n7 An interpleading party may use interpleader by counterclaim or cross-claim under either rule or statutory interpleader. n8 Rule 22 expressly provides that a defendant exposed to double or multiple liability may obtain such interpleader by way of cross-claim or counterclaim. n9

The joinder provisions of the Federal Rules of Civil Procedure apply in interpleader cases just as they would in any other civil action in federal court. n10 Therefore, once a stakeholder joins the claimants to the stake, the parties may file counterclaims and cross-claims under appropriate circumstances. Counterclaims are asserted against an opposing party. They are either compulsory, if they arise from the same transaction or occurrence as the underlying claim, n11 or permissive, if they are transactionally unrelated to the underlying dispute. n12 Cross-claims are asserted against a co-party, and must arise from the same transaction or occurrence as the underlying dispute. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 4 *Moore's Federal Practice,* § 22.02[4] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Progressive Cas. Ins. Co. v. Belmont Bancorp, 199 F.R.D. 219, 226 (S.D. Ohio 2001)* .

(n3)Footnote 2. *See, e.g., Rhoades v. Casey, 196 F.3d 592, 595 (5th Cir. 1999)* , *cert. denied, 531 U.S. 924 (2000)* (stakeholder filed interpleader action, deposited fund into registry of court, and named those interested in fund as defendants).

(n4)Footnote 2.1. *Fed. R. Civ. P. 22(a)(2)* (defendants to original action who are exposed to liability to potentially more than one other person may obtain interpleader against such persons by way of cross-claim or counterclaim); *see Coastal Rehab. Servs., P.A. v. Cooper, 255 F. Supp. 2d 556, 559 (D.S.C. 2003)* (citing **Moore's Federal Practice**); *see, e.g., Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675, 683 (2d Cir. 1989)* (after author of book sued publishers for proceeds from licensing agreement, publisher's creditor intervened, and publisher filed interpleader cross-claim against other claimants to proceeds of licensing agreement).

(n5)Footnote 3. *See Fed. R. Civ. P. 13(a)(1).*

(n6)Footnote 4. *See Fed. R. Civ. P. 13(g).*

(n7)Footnote 5. *See Bankers Trust Co. v. Manufacturers Nat'l Bank, 139 F.R.D. 302, 308 (S.D.N.Y. 1991)* .

(n8)Footnote 6. *Fed. R. Civ. P. 13(h).*

(n9)Footnote 7. *See Fed. R. Civ. P. 19(a)(1)(B)(ii)*; *see also § 14.01* et seq.

(n10)Footnote 8. *Bankers Trust Co. v. Manufacturers Nat'l Bank, 139 F.R.D. 302, 308 (S.D.N.Y. 1991)* .

(n11)Footnote 9. *Fed. R. Civ. P. 22(a)(1).*

(n12)Footnote 10. *See Fed. R. Civ. P. 22(b)* (stating that provisions of interpleader rule supplement and do not in any way limit joinder of parties).

(n13)Footnote 11. *Fed. R. Civ. P. 13(a).*

(n14)Footnote 12. *Fed. R. Civ. P. 13(b).*

(n15)Footnote 13. *Fed. R. Civ. P. 13(g).*

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2-14 Moore's Manual--Federal Practice and Procedure § 14.72

§ 14.72 Two Stages of Interpleader Actionn*

[1] First Stage Is Court's Determination Whether Interpleader Requirements Have Been Met

[a] Court's Discretion to Determine Whether Requirements Are Met

An interpleader action typically involves two stages. In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a single fund at issue and whether there are adverse claimants to that fund. n1 If the district court finds that the interpleader action has been properly brought, the district court will then proceed to the second stage, which is a determination of the respective rights of the claimants. n2 Interpleader litigation has two stages whether initiated by complaint or initiated defensively. In proceedings in the nature of interpleader, rather than true interpleader, the stakeholder claims an interest in the stake and thus is a party to the second stage. n2.1 On the other hand, in "true" interpleader, the stakeholder does not claim ownership of the stake and thus is discharged after the first stage of litigation. n3

Because interpleader is procedural, its availability does not depend on the merits of the claims asserted against the stakeholder. So long as the stakeholder is confronted with multiple adverse claims or liability, interpleader is proper, even if the stakeholder does not believe that all the claims against the stake are meritorious. n4

The court has considerable discretion in its determination of whether the requirements of interpleader have been met. Generally, interpleader is a favored remedial joinder device that is efficient and avoids multiple liability and inconsistent obligations. These positive principles mean that courts will construe interpleader provisions liberally. n5 This liberal interpretation reflects a modern trend toward increased availability of interpleader and relaxation of historic restrictions on its use. n6

On the other hand, the court has discretion to deny interpleader if its purposes of economy and efficiency are not met. n7 For example, the court may refuse interpleader if a single case will not settle all outstanding claims among the parties, n8 if a pending state action will provide an adequate remedy, n9 if the stakeholder controls one of two claimants, and thus does not have a bona fide fear of multiple and vexatious litigation, n10 or when it is used as a ruse to forum shop when a party's other attempt at litigation has failed. n11

[b] Requirements Regarding Claims to Stake

Before the court will order interpleader, it should make the following determinations regarding the claims to the stake:

1. Whether the stake has been deposited with the court. The provisions governing statutory interpleader require the stakeholder to deposit the stake with the court or to post bond in the amount determined by the court. n12 Rule interpleader does not impose this requirement, n13 although the court has discretion to require the stakeholder to do so under Rule 67. n14

2. The stakeholder must have a legitimate fear of multiple litigation or multiple liability. In determining whether interpleader is proper, the court must determine whether the stakeholder legitimately fears multiple liability resulting from multiple litigation directed at a single stake. n15 In most cases, this requirement is not difficult for the stakeholder to meet, because the courts generally require merely that the stakeholder's concern in this regard be more than conjectural. n16

3. The claims must be adverse to the stake and to each other. Interpleader is proper only if the claims against the stake are adverse to each other and adverse to the stake itself. n17 For example, claims are adverse to each other if each claimant asserts sole right to the fund. n18 Claims are also considered adverse if one claimant admits that the stakeholder has an obligation to another claimant but asserts its claim through an attachment or garnishment. n19 Even if claims are not mutually exclusive, they are adverse if the total amount of combined claims exceeds the stake. n20 Furthermore, interpleader claims are not precluded merely because claims against the stake arise out of distinct and unrelated legal obligations. n21

[c] Requirement of Personal Jurisdiction Over Claimants

Even though it is arguable that interpleader is a quasi-in-rem proceeding because the claim involves ownership of a stake, the Supreme Court has held that interpleader is an in personam proceeding. n22 Thus, the stakeholder must comply with the applicable provisions concerning service of process in federal court, so that the court will have personal jurisdiction over all named claimants. This requirement generally causes no difficulty in statutory interpleader, because that procedure provides for service of process where the claimants reside or may be found. n23 This provision allows nationwide service of process and consequently allows the exercise of personal jurisdiction over any claimant who has established contacts anywhere in the United States, even if that claimant does not have minimum contacts with the forum state in which the federal interpleader court is located.

In contrast, rule interpleader has no special provision for liberalized service of process and thus is treated as a regular proceeding in federal court, with service of process being governed by Rule 4. n24 Rule 4 permits service of process within the state in which the federal court sits and beyond the state boundary only if state law so provides. Thus, under rule interpleader, the district court may exercise personal jurisdiction over claimants only to the same extent as a state court in the forum state. n25

[2] Second Stage Is Adjudication of Adverse Claims and Distribution of Stake

After a court determines in the first stage of interpleader litigation that interpleader is appropriate, including that there is subject matter jurisdiction, and personal jurisdiction over the claimants, the court proceeds to the second stage, in which it adjudicates the claims to the stake and distributes the proceeds. n1 In a true interpleader case, n2 the stakeholder does not claim an interest in the stake, and thus should be dismissed from the case before the second stage proceeds. n3 The court should promptly grant discharge of the stakeholder unless it finds that the stakeholder may be independently liable to a claimant or has failed to satisfy the various requirements of interpleader, including deposit of the stake when required. n4 The court may also delay or deny discharge if it finds that the stakeholder acted in bad faith. n5

In cases in the nature of interpleader, rather than true interpleader, the stakeholder claims an interest in the stake, and therefore, the stakeholder is involved in both stages of the interpleader action. Consequently, the stakeholder is not discharged after the first stage of interpleader. Under either rule or statutory interpleader, the stakeholder remains a party with the other claimants, and litigates its claim in the second stage. n6

The first stage of interpleader, which determines whether interpleader is proper and whether the stakeholder has met the requirements for interpleader, is tried entirely by the court and not a jury, because of the equitable nature of interpleader. n7 However, in the second stage, the court may try the issues to a jury; the court will examine the nature of the merits of the dispute, and if the dispute would be tried by a jury in ordinary civil litigation, a party may have a right to trial by jury. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 22.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Aon Corp. Accidental Death & Dismemberment Plan v. Hohlweck, 223 F. Supp. 2d 510, 514 (S.D.N.Y. 2002)* ; *see* [b] and [c], *below*.

(n3)Footnote 2. *Rhoades v. Casey, 196 F.3d 592, 595 (5th Cir. 1999)* (in second stage, court adjudicates adverse claims and distributes stake); *American Int'l Speciality Lines Ins. Co. v. National Ass'n of Bus. Owners & Professionals, 253 F. Supp. 2d 468, 476 (E.D.N.Y. 2003)* (citing **Moore's Federal Practice**); *see* [2], *below*.

(n4)Footnote 2.1. *See GE Capital Assur. v. Van Norman, 209 F. Supp. 2d 668, 670 (S.D. Tex. 2002)* .

(n5)Footnote 3. *See § 14.70[2].*

(n6)Footnote 4. *Aon Corp. Accidental Death & Dismemberment Plan v. Hohlweck, 223 F. Supp. 2d 510, 514 (S.D.N.Y. 2002)* ; *Travelers Indem. Co. v. Crown Cork & Seal Co., 865 F. Supp. 1083, 1087 (S.D.N.Y. 1994)* (interpleader jurisdiction does not depend on merits of defendants' claims).

(n7)Footnote 5. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (Federal Interpleader Act is remedial and must be liberally construed); *see Hussain v. Boston Old Colony Ins. Co., 311 F.3d 623, 632 (5th Cir. 2002)* .

(n8)Footnote 6. *6247 Atlas Corp. v. Marine Ins. Co., 155 F.R.D. 454, 462 (S.D.N.Y. 1994)* . For a complete discussion of the historical limitations on interpleader, see 4 *Moore's Federal Practice, § 22.07* (Matthew Bender 3d ed.).

(n9)Footnote 7. *Washington Elec. Coop., Inc. v. Paterson, Walke & Pratt, P.C., 985 F.2d 677, 680 (2d Cir. 1993)* .

(n10)Footnote 8. *Wausau Ins. Cos. v. Gifford, 954 F.2d 1098, 1101 (5th Cir. 1992)* .

(n11)Footnote 9. Home Indem. Co. v. Moore, F.2d 1202, 1205-1206 (8th Cir. 1974) (court need not grant interpleader relief when issues in complaint could be adequately resolved in pending state court proceedings).

(n12)Footnote 10. *Bierman v. Marcus, 246 F.2d 200, 203 (3d Cir. 1957)* , *cert. denied, 356 U.S. 933 (1957)* .

(n13)Footnote 11. *American Family Mut. Ins. Co. v. Roche, 830 F. Supp. 1241, 1245, 1249 (E.D. Wis. 1993)*

(citing **Moore's Federal Practice**).

(n14)Footnote 12. *28 U.S.C. § 1335(a)(2)*; *American Family Mut. Ins. Co. v. Roche, 830 F. Supp. 1241, 1244-1245 (E.D. Wis. 1993)* (court has jurisdiction under interpleader statute if, in addition to other requirements, stakeholder has deposited stake with court).

(n15)Footnote 13. *Fed. R. Civ. P. 22(a)(1)*. *John v. Sotheby's, Inc., 141 F.R.D. 29, 33 (S.D.N.Y. 1992)* (deposit of stake not jurisdictional requirement under Rule 22 but court has discretion to allow deposit under Rule 67).

(n16)Footnote 14. *See Fed. R. Civ. P. 67*.

(n17)Footnote 15. *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (1st Cir. 1992)* (primary test for determining propriety of interpleader is whether stakeholder has legitimate fear of multiple litigation directed against single fund).

(n18)Footnote 16. *Abex Corp. v. ABC Rail Corp., 158 F.R.D. 75, 78 (W.D. Pa. 1994)* .

(n19)Footnote 17. *Bradley v. Kochenash, 44 F.3d 166, 168 (2d Cir. 1995)* (claims are not adverse when stakeholder may be liable to both claimants).

(n20)Footnote 18. *Sun Life Assurance Co. v. Thomas, 735 F. Supp. 730, 731-732 (W.D. Mich. 1990)* .

(n21)Footnote 19. *American Airlines, Inc. v. Block, 905 F.2d 12, 13 (2d Cir. 1990)* .

(n22)Footnote 20. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 526, 533 n.15, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (interpleader intended to remedy problem of allocating limited fund among claimants whose claims exceed amount of fund).

(n23)Footnote 21. *28 U.S.C. § 1335(b)* (interpleader action may be entertained although titles or claims do not have common origin or are not identical); *Fed. R. Civ. P. 22(a)(1)(A)* (it is not ground for objection to joinder that claims do not have common source or origin).

(n24)Footnote 22. *New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 521, 36 S. Ct. 613, 60 L. Ed. 1140 (1916)* .

(n25)Footnote 23. *28 U.S.C. § 2361*.

(n26)Footnote 24. *Fed. R. Civ. P. 4(f)*; *Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474, 485 (E.D. La. 1960)* (process may not run beyond the boundaries of the state in which the court sits).

(n27)Footnote 25. *Metropolitan Life Ins. Co. v. Chase, 294 F.2d 500, 502 (3d Cir. 1961)* (interpleader by counterclaim under Rule 22 not available because claimants not amenable to personal service in District of Columbia, where initial litigation was commenced); for further discussion, see 4 *Moore's Federal Practice, § 22.04[3]* (Matthew Bender 3d ed.).

(n28)Footnote 1. *Rhoades v. Casey, 196 F.3d 592, 595 (5th Cir. 1999)* ; *Truck-A-Tune v. Re, 856 F. Supp. 77, 79 (D. Conn. 1993)* , *aff'd on other grounds, 23 F.3d 60 (2d Cir. 1993)* (citing **Moore's Federal Practice**).

(n29)Footnote 2. *See § 14.70[2]*.

(n30)Footnote 3. *Commercial Nat'l Bank v. Demos, 18 F.3d 485, 487 (7th Cir. 1994)* (claimant who has no interest in stake may deposit stake with court and withdraw from proceeding).

(n31)Footnote 4. *Mendez v. Teachers Ins. & Annuity Ass'n & College Retirement Equities Fund, 982 F.2d 783,*

787 (2d Cir. 1992) (before discharging stakeholder court must determine that all requirements of statutory interpleader have been met).

(n32)Footnote 5. *Sun Life Assurance Co. v. Thomas, 735 F. Supp. 730, 733 (W.D. Mich. 1990)* .

(n33)Footnote 6. *Bradley v. Kochenash, 44 F.3d 166, 168 (2d Cir. 1995)* (in case in nature of interpleader, plaintiff stakeholder litigates with rival claimants on issue of entitlement to stake).

(n34)Footnote 7. *Jefferson Standard Ins. Co. v. Craven, 365 F. Supp. 861, 863 (M.D. Pa. 1973)* .

(n35)Footnote 8. *Hyde Properties v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974)* .

Moore's Manual--Federal Practice and Procedure

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART III. INTERPLEADER

2-14 Moore's Manual--Federal Practice and Procedure § 14.73

§ 14.73 Comparison of Different Procedures Under Rule Interpleader and Statutory Interpleadern*

[1] Federal System Has Two Methods of Interpleader

Under the federal litigation scheme, there are two distinct methods of invoking interpleader in the federal courts: n1 rule interpleader under Rule 22, n2 and statutory interpleader under the Federal Interpleader Act. n3 Both types of interpleader serve the same function of joining in a single proceeding two or more adverse claimants to a stake. n4 Both promote efficiency and fairness and protect the stakeholder from multiple litigation and potential multiple liability. n5

However, even though the two types of interpleaders share purposes and goals, they are characterized by procedural differences, particularly with respect to personal and subject matter jurisdiction, service of process, and venue. n6 In general, the procedural provisions for statutory interpleader are more liberal than those for rule interpleader, n7 because, as part of the *Federal Rules of Civil Procedure, Rule 22* does not affect the jurisdiction or venue of the federal courts. n8 Thus, Rule 22 provides only a procedural vehicle for invoking rule interpleader. Subject matter jurisdiction for rule interpleader must be based on Article III of the Constitution and the jurisdictional statutes, federal question and diversity of citizenship jurisdiction. Rule 22 was promulgated to provide interpleader when the interpleading party cannot meet the statutory interpleader requirements but can meet general federal court requirements. n9

On the other hand, statutory interpleader is governed by legislative authorization, and thus sets forth its own provisions concerning subject matter jurisdiction, venue, and personal jurisdiction. In each instance, statutory interpleader features advantages over rule interpleader, as discussed in [2]-[6], below. Rule 22 does not in any way limit the availability of statutory interpleader. Furthermore, statutory interpleader proceedings may take advantage of the various other provisions, including the joinder provisions of the rules. n10 A court may assert jurisdiction under either type of interpleader, even if the complaint asserts the wrong one, provided that the complaint can be construed to confer jurisdiction under one or the other. n11

[2] Federal Subject Matter Jurisdiction

[a] Rule Interpleader

The primary distinction between statutory and rule interpleader involves the requirements for invoking federal subject

matter jurisdiction. n1 Rule interpleader is merely a procedural device and does not confer an independent basis for federal jurisdiction over a claim. Consequently, rule interpleader must fall within one of the general statutory grants of federal jurisdiction: n2 either federal question jurisdiction or diversity jurisdiction, which requires complete diversity of parties and an amount in controversy of at least $75,000. n2.1 On the other hand, statutory interpleader confers on federal courts an independent basis for subject matter jurisdiction over certain interpleader claims. n2.2

Subject matter jurisdiction for rule interpleader must be based on Article III of the Constitution and the jurisdictional statutes. The common bases of federal subject matter jurisdiction are federal question and diversity of citizenship jurisdiction. n3 Few rule interpleader cases invoke federal question jurisdiction, because under the "well-pleaded complaint" rule the plaintiff's claim must arise under federal law. Consequently, if the stakeholder initiates interpleader defensively in a federal question case, the stakeholder probably cannot invoke federal question jurisdiction because the federal question does not appear on the face of the stakeholder's claim; n4 furthermore, because a stakeholder typically seeks discharge, the complaint may not easily be characterized as asserting either federal or state rights. n5

Most rule interpleader cases invoke diversity of citizenship jurisdiction which requires that the amount in controversy must exceed $75,000 and the controversy must be between citizens of different states. n6 This statutory language requires that there be complete diversity, meaning every plaintiff must be a citizen of a different state from every defendant. Under rule interpleader, the complete diversity rule requires that the stakeholder be a citizen of a different state from every claimant. n7

[b] Statutory Interpleader

Statutory interpleader has an entirely different basis of authorization than rule interpleader. Its provisions are found in the Judicial Code, n7.1 not in the Federal Rules of Civil Procedure, and contain an independent grant of federal subject matter jurisdiction. n8 Its statutory provisions are more liberal than those found in the general diversity of citizenship grant, because the amount in controversy needed to invoke statutory interpleader is only $500 or more, rather than the $75,000 or more needed or diversity jurisdiction. n9 In addition, only two or more claimants must be of diverse citizenship. n10 This provision differs from the general diversity of citizenship grant in two significant respects. First, as a general rule, the court looks only to the citizenship of the claimants, and not the citizenship of the stakeholder. n10.1 Second, in assessing the citizenship of the claimants, all that is required is minimal diversity, which means that diversity of citizenship between two or more claimants is all that is required, without regard to the circumstance that other claimants may be co-citizens. n11-12

The definition of a litigant's citizenship for statutory interpleader is the same as that used under the general diversity of citizenship statute. n13 Therefore, the rules for determining the citizenship of the parties are the same in statutory and rule interpleader actions. For example, in either case, a corporation is a citizen of the state of incorporation and its principal place of business, n14 the legal representative of an estate has the same citizenship as the decedent, n15 and the United States and its agencies are not citizens of a state and thus may not sue or be sued. n16

[3] Venue

[a] Venue in Rule Interpleader Proceeding

In rule interpleader, there is no special provision concerning venue because procedural rules may not affect the jurisdiction or venue of the federal courts. n1 Consequently, rule interpleader is treated as a regular civil action for venue purposes and is governed by the general venue statute. n2 For actions invoking diversity of citizenship jurisdiction, which comprise the majority of rule interpleader cases, venue is proper in either (1) any district where all the claimants reside, or (2) any district where a substantial part of the events giving rise to the claim arose. If there is no district in the United States that satisfies either of these alternatives, the stakeholder may lay venue in any district where any claimant is subject to personal jurisdiction. n3 For actions invoking federal question jurisdiction, which rule

interpleader cases do only occasionally, venue is proper in either (1) any district where all claimants reside, or (2) any district where a substantial part of the events giving rise to the claim arose. If there is no district in the United States that satisfies either of these choices, venue is proper in any district where any claimant is found. n4

[b] Venue In Statutory Interpleader Proceeding

Venue in a statutory interpleader action is controlled by the specific venue provision of the Federal Interpleader Act. n5 This venue statute permits a stakeholder invoking statutory interpleader to lay venue in any district in which any claimant resides. n6 Courts have interpreted the phrase "may be brought" to be mandatory and not permissive. Thus, venue in a statutory interpleader proceeding must satisfy the requirement of that statute; the general venue provision does not provide an alternative. n7 For example, a stakeholder may not initiate an interpleader in the district where the underlying action was filed, unless at least one of the claimants resides in that district. n8 In another case, it was held that venue was proper in the district where the interpleader plaintiffs resided, because the plaintiffs were also claimants in this defensive interpleader action, and section 1397 requires the interpleader action to be brought in a district where any claimant resides. n9

[4] Order to Enjoin Other Cases Related to Stake

[a] Injunction for Rule Interpleader Stake

If a court is hearing a rule interpleader case, it may be appropriate or necessary to enjoin the parties from litigating the stake in other courts. n1 However, in rule interpleader, there is no express provision allowing an injunction prohibiting litigation on the stake, as there is for statutory interpleader, n2 and injunctive power provided for statutory interpleader is not available in rule interpleader cases. n3 Furthermore, a request in a rule interpleader case for an injunction against state court proceedings will generally violate the anti-injunction act, which provides that a federal court generally may not enjoin a proceeding in state court. n4

However, exceptions to the Anti-Injunction Act may allow the rule interpleader court to issue an injunction. Thus, the court may issue a preliminary injunction against pending state court proceedings involving the same stake under the "in aid of jurisdiction" exception to the Anti-Injunction Act. Furthermore, the court may issue a permanent injunction at the end of the case to enable it to protect or effectuate its judgment. n5 Additionally the Anti-Injunction Act applies only to pending state court actions; it does not bar a federal court from enjoining parties from commencing a case in state court. n6 Finally, the Anti-Injunction Act does not apply when the overlapping litigation is in another federal, as opposed to a state, court. In such a case, and the federal court may issue an injunction to bar litigation in another court in the federal judicial system. n7

[b] Injunction for Statutory Interpleader Stake

A court hearing a statutory interpleader case may enjoin other proceedings relating to the stake, in either state courts or in other federal districts courts. n8 This statute does not conflict with the Anti-Injunction Act, which provides generally that federal courts may not enjoin state court proceedings, because that statute contains an exception for injunctions expressly authorized by another statute. n9 This exception was created because the usefulness of interpleader as an economical and efficient device for consistent resolution of multiple party litigation would be threatened if several courts could simultaneously attempt to litigate regarding the stake underlying the interpleader case. n10

As is any case involving injunctive relief, the question of whether to issue an injunction in a statutory interpleader action is within the discretion of the court and may be overturned only for an abuse of discretion. n11 However, the court may issue an injunction under the service of process and personal jurisdiction statute for statutory interpleader n12 only if the case properly meets the requirements of statutory interpleader. Therefore, the court must have subject matter jurisdiction under the subject matter jurisdiction statute for statutory interpleader, n13 and the stakeholder must have deposited the stake res with the court or have furnished a bond, because deposit of the stake is a jurisdictional

requirement. n14 Furthermore, it must be remembered that the court's power to enjoin other actions is limited to actions against the stake itself and may not be extended to actions against an insured or other alleged tortfeasors if those suits are not claims against the fund. n15

[5] Deposit of Stake in Court

[a] Court Has Discretion to Order in Rule Interpleader

When using rule interpleader, the stakeholder is not automatically required to deposit the stake with the court. n1 However, in any action involving the disposition of property, Rule 67 allows the parties to voluntarily deposit the stake with the court n2 and provides that the court has discretion to order the party in possession of property to deposit it with the court. Therefore, in rule interpleader the court may order the stakeholder to deposit the stake. n3 With regard to the jurisdictional amount required for rule interpleader, the amount in controversy is determined by the fund as stated by the stakeholder, not by the claimants. n4

[b] Mandatory in Statutory Interpleader

District courts have original jurisdiction for statutory interpleader only if the plaintiff has deposited the money or property with the court, or has paid the amount of the loan or other value of such instrument or the amount due under the obligation into the registry of the court, or has given bond payable to the clerk of the court in an amount and with such surety that the court deems proper. n5 The deposit in court is a jurisdictional requirement, and if an interpleading party fails to give it, the court is precluded from proceeding with statutory interpleader.

Furthermore, the stakeholder must post a bond or deposit the highest amount claimed by any of the claimants, even if that amount exceeds that which the stakeholder contends is at issue. n6 However, the stakeholder is not required to cover by deposit any excess resulting from counterclaims filed by a claimant alleging an independent liability of the stakeholder. n7 Furthermore, if an interested stakeholder deposits the amount demanded by the claimants, that stakeholder does not waive its contention that it is not liable to any of the claimants or that it is not liable for the entire amount deposited with the court. n8 Additionally, although the deposit of the stake is a jurisdictional prerequisite, failure to make an immediate deposit of the correct amount is not fatal to the statutory interpleader action; courts commonly allow the stakeholder to cure the defect by depositing the appropriate stake or procuring a sufficient bond within a reasonable time. n9

[6] Application of Substantive Law

[a] Rule Interpleader

Rule interpleader usually invokes diversity of citizenship jurisdiction. In such cases, the substantive aspects of the litigation, including the determination of the various claims to the stake, liability on counterclaims and cross-claims, and claims of independent liability against the stakeholder are all governed by state law. This principle applies to rule interpleader, as it does to other joinder procedures, because under the *Erie* doctrine, federal courts must apply state substantive law and may apply federal procedural law in diversity of citizenship cases. n1

[b] Statutory Interpleader

It appears that substantive local law also applies in statutory interpleader actions, because although it is based on the subject matter jurisdiction statute for statutory interpleader, statutory interpleader is ultimately a form of diversity of citizenship jurisdiction. n2 Thus, the Supreme Court has held that the choice of law rules of the forum state, as opposed to federal law, govern in statutory interpleader proceedings. n3 The *Erie* doctrine applies in diversity of citizenship cases because the case is in federal court not for vindication of federal policy but simply by virtue of the citizenship of the parties; therefore, the substantive rules should be the same as they would be in the forum state's court.

Because statutory interpleader has more liberal personal and subject matter jurisdiction provisions than rule interpleader, it is not necessarily true that a statutory interpleader case could be brought in state court and application of federal substantive law in statutory interpleader might not result in the sort of forum shopping that *Erie* was designed to prevent. n4 It is therefore arguable that statutory interpleader does not present a compelling case for applying local state substantive law. n5 However, as stated above, the Supreme Court apparently is not receptive to such an argument, at least with respect to choice of law rules. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 22.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Rhoades v. Casey, 196 F.3d 592, 600 (5th Cir. 1999)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 22.*

(n4)Footnote 3. *See 28 U.S.C. § 1335*; *28 U.S.C. § 1397*; *28 U.S.C. § 2361.*

(n5)Footnote 4. *See Airborne Freight Corp. v. United States, 195 F.3d 238, 239-240 (5th Cir. 1999)* .

(n6)Footnote 5. *Washington Elec. Coop., Inc. v. Paterson, Walke & Pratt, P.C., 985 F.2d 677, 679 (2d Cir. 1993)* .

(n7)Footnote 6. *General Accident Group v. Gagliardi, 593 F. Supp. 1080, 1086 (D. Conn. 1984)* , *aff'd without opinion, 767 F.2d 907 (2d Cir. 1985)* .

(n8)Footnote 7. *Perkins State Bank v. Connolly, 632 F.2d 1306, 1310 (5th Cir. 1980)* .

(n9)Footnote 8. *Fed. R. Civ. P. 82* (rules may not be construed to extend or limit the jurisdiction of the United States district courts).

(n10)Footnote 9. *American Family Mut. Ins. Co. v. Roche, 830 F. Supp. 1241, 1244 (E.D. Wis. 1993)* .

(n11)Footnote 10. *Fed. R. Civ. P. 22(b).*

(n12)Footnote 11. *Truck-A-Tune v. Re, 856 F. Supp. 77, 80 (D. Conn. 1993)* , *aff'd on other grounds, 23 F.3d 60 (2d Cir. 1994)* (court asserted jurisdiction under Rule 22 when plaintiff's complaint brought action under interpleader statute but lacked requisite diversity jurisdiction under statutory requirements).

(n13)Footnote 1. *Commercial Union Ins. Co. v. United States, 999 F.2d 581, 584-585 (D.C. Cir. 1993)* (central distinction is basis for federal court's subject matter jurisdiction under each type of interpleader).

(n14)Footnote 2. *Berthoud v. Veselik, 2003 U.S. Dist. LEXIS 4809* at **6 (N.D. Ill. Mar. 25, 2003).

(n15)Footnote 2.1. *Selective Ins. Co. of Am. v. Norris, 209 F. Supp. 2d 580, 581-582 (E.D.N.C. 2002)* .

(n16)Footnote 2.2. *See 28 U.S.C. 1335*; [b], *below.*

(n17)Footnote 3. *See Commercial Nat'l Bank v. Demos, 18 F.3d 485, 488 (7th Cir. 1994)* (Rule 22 provides procedural framework for interpleader action but not subject matter jurisdiction); *Sun Life Assurance Co. v. Thomas, 735 F. Supp. 730, 732 (W.D. Mich. 1990)* (interpleader rule is merely procedural device that does not grant court jurisdiction, which must be based on diversity or federal question).

(n18)Footnote 4. *Bell & Beckwith v. United States, IRS, 766 F.2d 910, 917 (6th Cir. 1985)* .

(n19)Footnote 5. *Commercial Union Ins. Co. v. United States, 999 F.2d 581, 585 (D.C. Cir. 1993)* .

(n20)Footnote 6. *28 U.S.C. § 1332(a)(1).*

(n21)Footnote 7. *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (1st Cir. 1992)* (in rule interpleader, stakeholder must be diverse from all defendants).

(n22)Footnote 7.1. *See 28 U.S.C. § 1335.*

(n23)Footnote 8. *28 U.S.C. § 1335(a)*; *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (1st Cir. 1992)* .

(n24)Footnote 9. *28 U.S.C. § 1335(a).*

(n25)Footnote 10. *28 U.S.C. § 1335(a).*

(n26)Footnote 10.1. *Berthoud v. Veselik, 2003 U.S. Dist. LEXIS 4809* at **6 (N.D. Ill. Mar. 25, 2003); *Selective Ins. Co. of Am. v. Norris, 209 F. Supp. 2d 580, 582 (E.D.N.C. 2002)* .

(n27)Footnote 11-12. [Reserved]

(n28)Footnote 13. *Geler v. National Westminster Bank, 763 F. Supp. 722, 726 (S.D.N.Y. 1991)* (for purposes of both interpleader statute and general diversity jurisdiction statute, administrator of alien's estate is treated as alien for purposes of diversity jurisdiction).

(n29)Footnote 14. *See 28 U.S.C. § 1332(c)(1).*

(n30)Footnote 15. *Geler v. National Westminster Bank, 763 F. Supp. 722, 726 (S.D.N.Y. 1991)* .

(n31)Footnote 16. *Lummis v. White, 629 F.2d 397, 402 (5th Cir. 1980)* , *rev'd on other grounds, 457 U.S. 85 (1982)* .

(n32)Footnote 1. *Fed. R. Civ. P. 82.*

(n33)Footnote 2. *28 U.S.C. § 1391*; *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 529 n.3, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (rule interpleader based on diversity of citizenship may be brought only under § 1391); *Leader Nat'l Ins. Co. v. Shaw, 901 F. Supp. 316, 320 (W.D. Okla. 1995)* .

(n34)Footnote 3. *See 28 U.S.C. § 1391(a).*

(n35)Footnote 4. *See 28 U.S.C. § 1391(b).*

(n36)Footnote 5. *28 U.S.C. § 1397.*

(n37)Footnote 6. *Carolina Cas. Ins. Co. v. Mares, 826 F. Supp. 149, 151 (E.D. Va. 1993)* .

(n38)Footnote 7. *Leader Nat'l Ins. Co. v. Shaw, 901 F. Supp. 316, 320-321 (W.D. Okla. 1995)* ("may" in § 1397 venue provision for statutory interpleader requires that statutory interpleader action be filed only where any claimant

resides).

(n39)Footnote 8. *Watson v. Manhattan & Bronx Surface Transit Operating Auth., 487 F. Supp. 1273, 1276 (D.N.J. 1980)* .

(n40)Footnote 9. *See Doe v. Prudential Ins. Co., 744 F. Supp. 40, 42 (D.R.I. 1990)* ; *see also New Jersey Sports Prods. v. Don King Prods., 15 F. Supp. 2d 534, 540-541 (D.N.J. 1998)* (in action in nature of interpleader in which stakeholder is also claimant, stakeholder's residence is relevant for determining whether venue is proper; venue was proper in this case in district where stakeholder/claimant resided even though none of other claimants resided there).

(n41)Footnote 1. *Sotheby's, Inc. v. Garcia, 802 F. Supp. 1058, 1066 (S.D.N.Y. 1992)* (consistent resolution of a multi-sided dispute would be threatened if several courts simultaneously could litigate stake of interpleader case).

(n42)Footnote 2. *See* [b], *below*.

(n43)Footnote 3. *Geler v. National Westminster Bank, 763 F. Supp. 722, 727 (S.D.N.Y. 1991)* (injunction not available under *28 U.S.C. § 2361* in rule interpleader case because that section applies only to statutory interpleader actions).

(n44)Footnote 4. *28 U.S.C. § 2283*; *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (1st Cir. 1992)* (in rule interpleader actions, injunctions are governed by general anti-suit injunction provision).

(n45)Footnote 5. *General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 707 (7th Cir. 1991)* .

(n46)Footnote 6. *Dombrowski v. Pfister, 380 U.S. 479, 484 n.2, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)* .

(n47)Footnote 7. *Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474, 483 n.46 (E.D. La. 1960)* .

(n48)Footnote 8. *28 U.S.C. § 2361*; *General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 703 (7th Cir. 1991)* .

(n49)Footnote 9. *See 28 U.S.C. § 2283*.

(n50)Footnote 10. *Melton v. White, 848 F. Supp. 1513, 1514 (W.D. Okla. 1994)* (statutory interpleader injunction provision allows court to enjoin other judicial procedures in order to reduce possibility of inconsistent determinations or inequitable distribution of fund).

(n51)Footnote 11. *Boston Old Colony Ins. Co. v. Balbin, 591 F.2d 1040, 1044 (5th Cir. 1979)* (recognizing interpleader's roots in equity courts, district courts have dismissed or stayed interpleader proceeding if action already pending might obviate need for interpleader action).

(n52)Footnote 12. *28 U.S.C. § 2361*.

(n53)Footnote 13. *See 28 U.S.C. § 1335*.

(n54)Footnote 14. *United States v. Major Oil Corp., 583 F.2d 1152, 1157 (10th Cir. 1978)* ; *see* [5], *below*.

(N55)Footnote 15. *State Farm Fire and Cas. Co. v. Tashire, 386 U.S. 523, 533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (although stakeholder-insurer properly invoked interpleader jurisdiction, it was not entitled to injunction restraining suits against it outside limits of interpleader fund).

(n56)Footnote 1. *See Fed. R. Civ. P. 22(a)*; *see also General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 705 n.4 (7th Cir. 1991)* (bond-posting requirement becomes moot when plaintiff does not meet statutory interpleader diversity requirement, and plaintiff instead pursues rule interpleader action under Rule 22).

(n57)Footnote 2. *Fed. R. Civ. P. 67(a)*; *Truck-A-Tune v. Re, 856 F. Supp. 77, 80 n.5 (D. Conn. 1993)* , *aff'd on other grounds, 23 F.3d 60 (2d Cir. 1993)* .

(n58)Footnote 3. *See Fed. R. Civ. P. 67(a)*; *Central Bank v. United States, 838 F. Supp. 564, 566 (M.D. Fla. 1993)* (even though interpleader action was initiated under Rule 22, court ordered deposit of disputed funds into court).

(n59)Footnote 4. *Nationwide Mut. Ins. Co. v. Eckman, 555 F. Supp. 775, 778 (D. Del. 1983)* .

(n60)Footnote 5. *28 U.S.C. § 1335(a)(2)*; *CNA Ins. Cos. v. Waters, 926 F.2d 247, 249 n.6 (3d Cir. 1991)* (stakeholder should have deposited highest amount for which it would be liable but court would allow it to cure defect in amount); *U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 459 (1st Cir. 1992)* (*28 U.S.C. § 1335* requires that stake be deposited with court or appropriate bond be posted).

(n61)Footnote 6. *State Farm Mut. Auto. Ins. Co. v. Brewer, 778 F. Supp. 925, 930 (E.D. Ky. 1991)* (when stakeholder and claimants disagreed on amount of stakeholder-insurer's liability, court indicated it could not take jurisdiction of action as interpleader action until true limits of liability of stakeholder-insurer were determined).

(n62)Footnote 7. *Wayzata Bank & Trust Co. v. A & B Farms, 855 F.2d 590, 593 (8th Cir. 1988)* .

(n63)Footnote 8. *Nationwide Mut. Ins. Co. v. Eckman, 555 F. Supp. 775, 777 (D. Del. 1983)* (in statutory interpleader, deposit of stake does not constitute waiver of interested stakeholder of claim to stake or part of stake).

(n64)Footnote 9. *Abex Corp. v. ABC Rail Corp., 158 F.R.D. 75, 77 (W.D. Pa. 1994)* (party permitted to cure defect in amount of posted bond and make additional deposit with court).

(n65)Footnote 1. *Lincoln Nat'l Life Ins. Co. v. Johnson, 38 F. Supp. 2d 440, 444 (E.D. Va. 1999)* (Virginia law would govern substantive rights of claimants of life insurance proceeds, because district court's jurisdiction over insurer's interpleader action was based on general diversity and situs of actions giving rise to action was Virginia); *see Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n66)Footnote 2. *See 28 U.S.C. § 1335(a)*; *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n67)Footnote 3. *Griffin v. McCoach, 313 U.S. 498, 503, 61 S. Ct. 1023, 85 L. Ed. 1481 (1941)* (in interpleader case, federal courts in diversity of citizenship cases are governed by substantive law rules of courts of states in which they sit).

(n68)Footnote 4. *See Hanna v. Plumer, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

(n69)Footnote 5. *Perkins State Bank v. Connolly, 632 F.2d 1306, 1311 (5th Cir. 1980)* (since there is federal interest in protecting stakeholder, federal law allowing attorney's fees should be applied in statutory interpleader action to determine award to stakeholder).

(n70)Footnote 6. *See Griffin v. McCoach, 313 U.S. 498, 503, 61 S. Ct. 1023, 85 L. Ed. 1481 (1941)* .

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.74

§ 14.74 Application of Equitable Principlesn*

Neither the federal interpleader statute nor Rule 22 interpleader explicitly addresses the application to interpleader of such equitable defenses as laches, n0.01 estoppel, unclean hands, n1 or other lack of equity on the stakeholder's part. However, federal courts apply these equitable principles through their discretionary powers to control interpleader proceedings. n2 For example, some courts may deny interpleader if a stakeholder's wrongdoing has provoked the dispute which led to the interpleader action. n3

However, denying interpleader is a strong sanction for a stakeholder guilty of wrongdoing. Not only does it subject the stakeholder to the possibility of multiple litigation, it burdens the courts with that litigation and creates the risk of inconsistent outcomes. Recognizing this, courts on occasion will look to a lesser sanction for the stakeholder's wrongdoing. For example, a court may permit the interpleader to proceed n4 but deny the stakeholder's motion for an award of attorney's fees and costs. n5 Additionally, the court has the discretion to stay an interpleader proceeding, even when it has personal and subject matter jurisdiction, if a case pending in another court will resolve some or all of the issues in the interpleader case. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 4 *Moore's Federal Practice,* § 22.05 (Matthew Bender 3d ed.).

(n2)Footnote 0.01. *United States Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 208 (3d Cir. 1999)* (noting that although rarely so held, interpleader is properly denied when the stakeholder is guilty of laches); *Metropolitan Life Ins. Co. v. Barretto, 178 F. Supp. 2d 745, 751 (S.D. Tex. 2001)* (because interpleader has its roots in equity, equitable doctrines such as laches apply; three elements support a finding of laches: delay in asserting right, finding that delay was inexcusable; and finding that undue prejudice resulted from such delay).

(n3)Footnote 1. *United States Fidelity & Guaranty Co. v. McGhee, 345 F. Supp. 288, 291 (N.D. Miss. 1972)* .

(n4)Footnote 2. *Abex Corp. v. ABC Rail Corp., 158 F.R.D. 75, 77 (W.D. Pa. 1994)* (because interpleader is equitable in nature, court may deny interpleader if stakeholder's conduct is improper).

(n5)Footnote 3. *Farmers Irrigating Ditch & Reservoir Co. v. Kane, 845 F.2d 229, 232 (10th Cir. 1988)* (it is general rule that party seeking interpleader must be free from blame in causing controversy, and where stakeholder is wrongdoer with respect to subject matter of suit or any claimants, court may deny interpleader relief).

(n6)Footnote 4. *Abex Corp. v. ABC Rail Corp., 158 F.R.D. 75, 77 (W.D. Pa. 1994)* (acknowledging laches, but holding in this case that stakeholder's delay in filing interpleader action close to trial date of state court action involving same claims did not warrant drastic remedy of denying interpleader relief to stakeholder).

(n7)Footnote 5. *See § 14.75.*

(n8)Footnote 6. *Home Indem. Co. v. Moore, 499 F.2d 1202, 1205-1206, 1206 (8th Cir. 1974)* (court not required to grant interpleader relief when issues in complaint could be adequately resolved in pending state court proceedings).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.75

§ 14.75 Costs and Attorney's Feesn*

[1] Court's Discretion to Award Costs and Attorney's Fees to Stakeholder

Even though they are not specifically authorized by the statutory interpleader provisions or Rule 22, the court may award costs and attorney's fees to the stakeholder in an interpleader proceeding n1 based on the statutory provision that a court may make all appropriate orders to enforce its judgment n2 and the Rule 54 provision that gives the district court discretion to award costs, not including attorney's fees, to the prevailing party. n3 Rule 54 applies to statutory as well as to rule interpleader. n4 The trial court has discretion to allow a disinterested stakeholder to recover attorney's fees and costs from the stake itself, in both statutory and rule interpleader. n5

Courts are most likely to make such an award to a disinterested stakeholder who concedes liability completely, deposits the disputed funds with the court, and seeks discharge from the litigation. Courts are less likely to award costs and attorney's fees to an interested stakeholder or to a stakeholder who denies liability in whole or in part. n6 Similarly, courts generally deny an award if the stakeholder denies liability for interest on the fund. n7 Costs and attorney's fees usually are awarded from the stake; n7.1 however, the court has the discretion to award them against a party whose conduct justifies the award. n8 For example, the court may make an award against a claimant who has acted in bad faith n9 or a stakeholder who has acted in bad faith. n10

[2] Limitation of Amount

Because the interpleader plaintiff is supposed to be disinterested in the ultimate disposition of the interpleaded fund, the court may limit attorney's fee awards to those fees that are incurred in filing the action and pursuing the plan's release from liability, and not in litigating the merits of the adverse claimants' positions. For example, compensable expenses may include amounts spent preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the plaintiff from liability and dismissing the plaintiff from the action. Because the scope of compensable expenses is limited, attorney's fee awards to a "interested" interpleader plaintiff may be modest. n1

The precise amount awarded as costs and attorney's fees is a discretionary matter with the court, with the general guide that the award must be reasonable. n2 Within the limitations set out above in the first paragraph of this subsection, the court may consider a number of factors in setting the amount, including the complexity of the interpleader, the nature of

the services performed by the stakeholder for the claimants or the court, the stakeholder's good faith and diligence or lack of diligence, any benefit of the services to the stakeholder, and any responsibility of the claimant in improperly prolonging the proceeding. n3 The burden of establishing entitlement to costs or attorney's fees is on the stakeholder. The stakeholder's counsel is not required to record in great detail how each period of time was expended, but should at least identify the general subject matter of the attorney's time expenditures. Consequently, if the documentation is inadequate, the district court has the option to reduce the amount of the applicant's fee award. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 4 *Moore's Federal Practice,* § 22.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. Trustees of the Dirs. Guild of America-- *Producer Pension Benefits Plan v. Tise, 234 F.3d 415, 426-427 (9th Cir. 2000)* .

(n3)Footnote 2. *See 28 U.S.C. § 2361.*

(n4)Footnote 3. *Fed. R. Civ. P. 54(d)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 22(b).*

(n6)Footnote 5. Trustees of the Dirs. Guild of America-- *Producer Pension Benefits Plan v. Tise, 234 F.3d 415, 426-427 (9th Cir. 2000)* (whether to award costs and fees in interpleader action is committed to sound discretion of district court); *Millers Mut. Ins. Ass'n v. Wassall, 738 F.2d 302, 304 (8th Cir. 1984)* (under common law, courts have long awarded attorney's fees and costs to disinterested stakeholder out of interpleader fund); *but see Croskey v. Ford Motor Company-UAW, 2002 U.S. Dist. LEXIS 8824* at **32 (S.D.N.Y. May 2, 2002) (if stakeholder has engaged in inequitable misconduct, court may deny request for attorneys' fees that could otherwise be awarded against interpleader fund itself).

(n7)Footnote 6. *Perkins State Bank v. Connolly, 632 F.2d 1306, 1311 (5th Cir. 1980)* (plaintiff who enters conflict by contesting ownership of fund or by disputing correct amount of his or her liability will not be awarded any expenses in absence of special circumstances).

(n8)Footnote 7. *Gelfgren v. Republic Nat'l Life Ins. Co., 680 F.2d 79, 81 (9th Cir. 1982)* .

(n9)Footnote 7.1. *See Travelers Ins. Co. v. Estate of Garcia, 2003 U.S. Dist. LEXIS 2828 at 12-14 (E.D.N.Y. Feb. 4, 2003)* .

(n10)Footnote 8. *Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675, 683 (2d Cir. 1989)* .

(n11)Footnote 9. *Prudential Ins. Co. v. Boyd, 781 F.2d 1494, 1497-1498 (11th Cir. 1986)* .

(n12)Footnote 10. *Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1164 (5th Cir. 1976)* .

(n13)Footnote 1. Trustees of the Dirs. Guild of America-- *Producer Pension Benefits Plan v. Tise, 234 F.3d 415, 426-427 (9th Cir. 2000)* (court did not abuse its discretion in awarding stakeholder only $3,000 because unlike neutral stakeholder in typical interpleader action, stakeholder in this case vigorously opposed party's entitlement to the funds).

(n14)Footnote 2. *Corwin Consultants, Inc. v. Interpublic Group of Cos., 375 F. Supp. 186, 193 (S.D.N.Y. 1974)* ,

rev'd on other grounds, *512 F.2d 605 (2d Cir. 1975)* (award sought for attorney's fees in interpleader action must bear reasonable relation to amount of stakeholder's deposit).

(n15)Footnote 3. *Johnson v. Electrolux Corp., 763 F. Supp. 1181, 1189 (D. Conn. 1991)* .

(n16)Footnote 4. Trustees of the Dirs. Guild of America-- *Producer Pension Benefits Plan v. Tise, 234 F.3d 415, 427 (9th Cir. 2000)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.76

§ 14.76 United States as Party to Interpleader Actionn*

A private interpleading party may not interplead the United States as a claimant unless the United States has waived its sovereign immunity. n1 Neither the Federal Interpleader Act nor Rule 22 provides the necessary waiver of sovereign immunity. n2 This is also true when the United States sues a stakeholder who then attempts to counterclaim in interpleader against the United States; the government may not be made a defendant in the interpleader action unless it waives sovereign immunity, even if by filing a counterclaim in interpleader, the interpleading plaintiff is actually providing a more appropriate "defendant" for the government. n3

On the other hand, the United States may use either statutory interpleader or rule interpleader as a remedy when the United States is a stakeholder and is presented with conflicting claims to the stake. The government's use of interpleader, however, is not consent for the joinder of other causes of actions by the claimants in the proceeding against each other. n4 Furthermore, when the United States initiates a statutory interpleader action, it does not have to comply with the jurisdictional requirement to deposit the stake or a bond with the court. n5

One statute specifically authorizes use of interpleader by the United States when it acknowledges liability on a life insurance policy and various claimants dispute the right to the proceeds. Under the statute, the United States may initiate the action in the district court for the District of Columbia or for the district where any one claimant resides. The court may order personal service on any claimant not within the district in which the suit was brought or may order service by publication. n6 Additionally, the court may extend subpoenas for witnesses beyond the usual 100-mile limit for good cause shown. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory InterpleadersGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 4 *Moore's Federal Practice,* § 22.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *United Pac. Ins. Co. v. Laurel County, 805 F.2d 628, 636 (6th Cir. 1986)* (United States may not be required to interplead if it has not waived sovereign immunity).

(n3)Footnote 2. *United States v. Commercial Bank of N. Am., 31 F.R.D. 133, 136 (S.D.N.Y. 1962)* .

(n4)Footnote 3. *See United States v. Dry Dock Sav. Inst., 149 F.2d 917, 919 (2d Cir. 1945)* (government did not impliedly waive sovereign immunity and consent to ancillary bill of interpleader merely because it sought court's aid for collection of indebtedness).

(n5)Footnote 4. *Moreno v. United States, 120 F.2d 128, 129 (1st Cir. 1941)* (United States brought interpleader action when it admitted liability on insurance policy, and brought in additional claimant to policy).

(n6)Footnote 5. *United States v. Herce, 334 F. Supp. 111, 112 (S.D.N.Y. 1971)* (United States not required to deposit valuable painting in its possession with court or to post bond in lieu of painting, as must other plaintiffs in statutory interpleader).

(n7)Footnote 6. *38 U.S.C. § 1984(a)*.

(n8)Footnote 7. *38 U.S.C. § 1984(c)*.

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[Reserved]

§§ 14.77[Reserved]

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A. INTERVENTION OF RIGHT
1. Statutory Right to Intervene

2-14 Moore's Manual--Federal Practice and Procedure § 14.90

§ 14.90 In Generaln*

The court must generally allow an applicant to intervene in an action when the applicant files an application in a timely manner and a statute of the United States confers an unconditional right to intervene. n1 The provision which confers an unconditional right of intervention must be specified in an unequivocal federal statute. Therefore, because a state statute is not a statute of the United States, any state statute conferring a right to intervene will not apply in federal court, even if the language of the state statute appears to grant an unconditional right. Such a state right is subject to the criteria set forth in Rule 24(a)(2), which governs non-statutory intervention as of right. n2 Similarly, an unconditional right to intervene may not be authorized by a federal executive order or administrative regulation. n3

Under Rule 24(a)(1), an applicant for intervention possesses a statutory right to intervene only when a federal statute unambiguously grants the applicant an unconditional right to participate in litigation. If the applicant must fulfill any conditions whatever, such as proving an interest that has been impaired or impeded, then the legislation appears conditional, not unconditional, and Rule 24(a)(1) does not control the determination of the application. n4

Whether a federal statute confers a conditional or unconditional right may not be obvious and may involve a question of statutory construction. n5 Finally, if a statute requires permission to intervene, the intervention must be analyzed under the criteria set forth in Rule 24(b), which governs permissive intervention. For a discussion of statutes conferring a permissive right to intervene, *see § 14.122*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionStatutory Right to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(a)(1).*

(n3)Footnote 2. *Harris v. Reeves, 946 F.2d 214, 222 & n.10 (3d Cir. 1991)* (any state statute conferring right to intervene is subject to Rule 24(a)(2) analysis); *see Fed. R. Civ. P. 24(a)(2)*.

(n4)Footnote 3. *EEOC v. American Tel. & Tel. Co., 506 F.2d 735, 740 (3d Cir. 1974)* (executive orders and regulations are not statutes, and therefore do not confer unconditional right to intervene).

(n5)Footnote 4. *United States v. Union Elec. Co., 64 F.3d 1152, 1157-1168 (8th Cir. 1995)* .

(n6)Footnote 5. *See Ruiz v. Estelle, 161 F.3d 814, 817-827 (5th Cir. 1998)* (court construed Prison Litigation Reform Act as granting individual state legislators unconditional right to intervene in actions involving prisoner release orders).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.91

§ 14.91 Statutory Right of Federal and State Government to Intervene on Constitutional Issuesn*

[1] Federal Government

The United States government has a statutory right to intervene in any case in which the constitutionality of a federal statute affecting the public interest is questioned. If the United States, or one of its agencies, officers, or employees, is not already a party to an action, the court must notify the United States Attorney General and allow the United States to present evidence and argument relating to the constitutionality issue. n1 The requirement of notification, and the order for the Attorney General's intervention, may occur at any stage of the proceeding in which the court determines that such a challenge has been made. n2 Although the court may grant intervention even if the case may be disposed of non-constitutional grounds, the participation of the United States should be limited to the constitutionality issue. n3

[2] State Government

If a party in federal court challenges the constitutionality of a state statute, the district court must notify the state attorney general of the challenge. The state attorney general has a right to intervene and to present evidence, if evidence is otherwise admissible in the case, and to argue on the question of constitutionality. n1 If an agency, officer, or employee of a state is already a party, the attorney general is not entitled to intervene as a matter of right. n2

Because Section 2403(b) is unequivocal, the statute places a mandatory duty on the district court that is not discretionary, n3 even if the claim is frivolous or may be disposed of on other grounds. n4 On the other hand, if there is no issue of constitutionality, there is no right of intervention. n5 There is also no right of intervention when the object of the constitutional challenge is a local ordinance. However, when the local ordinance has been adopted pursuant to a state enabling statute, the state attorney general may intervene when the challenge to the local ordinance is in effect a constitutional challenge to the state statute. n6

[3] Requirement of Notice and Certification of Constitutional Question

[a] Requirement Permits Federal or State Government to Defend Statute

The federal rules require that if a party is litigating the constitutionality of either a federal or state statute, and the applicable federal or state government official is not already a party to the case, then the appropriate federal or state government official must be notified of the constitutional challenge and the court must certify the challenge to the appropriate entity or official. n1 The purpose of these notice and certification requirements is to ensure that the executive branch of the applicable government has notice of the proceeding and an opportunity to intervene and present its arguments regarding its own statute, n2 and to appeal a decision in the event the federal district court determines that the federal or state statute is unconstitutional. n3

The notice and certification requirements are a procedural device designed to give the appropriate government entity the opportunity to defend the statute. n4 Consequently, if a party has a valid constitutional challenge that has been timely asserted, the party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a valid constitutional claim or defense. n5

[b] Required Notice to Government Official

When a party challenges the constitutionality of a federal statute by filing a pleading, written motion, or other paper in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the party must file a written notice of constitutional question which states the question and identifies the paper that raises the question. n6 The party must also serve the notice and paper on the Attorney General of the United States either by certified or registered mail or by sending it to an electronic address designated by the Attorney General for this purpose. n7

Similarly, if a party challenges the constitutionality of a statute of a state by filing a pleading, written motion, or other paper in a proceeding in which neither the state nor its agency, officer, or employee is a party in an official capacity, the party must file a written notice of constitutional question which states the question and identifies the paper that raises the question. n8 The party must also serve the notice and paper on the state attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. n9

[c] Certification of Question by Court

When a constitutional question is raised regarding a federal or state statute, the court must, pursuant to *28 U.S.C. § 2403*, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. n10 The court certification requirement is separate and independent of the party's obligation to serve notice of a constitutional challenge; the court has an obligation to certify whether or not the party making the challenge has filed and served notice. Thus, the court certification is the only notice provided when the constitutionality of a statute is drawn into question by a means other than a party's written pleading, motion, or other paper. n11

This rule provides for certification by the court whether or not the constitutional challenge affects the public interest. Thus, after receiving the notice the federal or state attorney general has the opportunity to determine whether it is in the public interest to defend the challenge. n12

[d] Intervention Procedure

Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge but may not enter a final judgment holding the statute unconstitutional. n13 Therefore, pretrial activities may continue uninterrupted during the period available for intervention, and the court has authority to grant interlocutory relief. However, the court may not enter a final judgment that a statute is

unconstitutional until the attorney general has responded or the intervention period has expired without response from the attorney general. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionStatutory Right to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice*, § 24.02[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2403(a)*; *see Cutter v. Wilkinson, 544 U.S. 709, 717, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)* .

(n3)Footnote 2. *Wallach v. Lieberman, 366 F.2d 254, 257 (2d Cir. 1966)* .

(n4)Footnote 3. *In re Benny, 812 F.2d 1133, 1139-1142 (9th Cir. 1987)* , *cert. denied, 510 U.S. 1029 (1993)* .

(n5)Footnote 1. *28 U.S.C. § 2403(b)*; *see Comfort v. Lynn Sch. Comm., 418 F.3d 1, 9 (1st Cir. 2005)* .

(n6)Footnote 2. *28 U.S.C. § 2403(b)*.

(n7)Footnote 3. *See Hodgkins v. Peterson, 355 F.3d 1048, 1054 (7th Cir. 2005)* .

(n8)Footnote 4. *Merrill v. Town of Addison, 763 F.2d 80, 82 (2nd Cir 1985)* .

(n9)Footnote 5. *See, e.g., Blair v. Shanahan, 919 F. Supp. 1361, 1363 (N.D. Cal. 1996)* (court need not allow intervention when state seeks only to vacate previously litigated judgment of unconstitutionality).

(n10)Footnote 6. *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs., 411 F.3d 777, 796-797 (6th Cir. 2005)* .

(n11)Footnote 1. *See Fed. R. Civ. P. 5.1*; *see also* [b], [c], *below*.

(n12)Footnote 2. *Doe v. Smith, 429 F.3d 706, 709 (7th Cir. 2005)* .

(n13)Footnote 3. *See Tonya K. v. Board of Educ., 847 F.2d 1243, 1247 (7th Cir. 1988)* .

(n14)Footnote 4. *See Fed. R. Civ. P. 5.1*, Committee Note; *see also* [d], *below*.

(n15)Footnote 5. *Fed. R. Civ. P. 5.1(d)*.

(n16)Footnote 6. *Fed. R. Civ. P. 5.1(a)(1)(A)*.

(n17)Footnote 7. *Fed. R. Civ. P. 5.1(a)(2)*.

(n18)Footnote 8. *Fed. R. Civ. P. 5.1(a)(1)(B)*.

(n19)Footnote 9. *Fed. R. Civ. P. 5.1(a)(2)*.

(n20)Footnote 10. *Fed. R. Civ. P. 5.1(a)(2)*.

(n21)Footnote 11. *See Fed. R. Civ. P. 5.1*, Committee Note.

(n22)Footnote 12. *See Fed. R. Civ. P. 5.1*, Committee Note.

(n23)Footnote 13. *Fed. R. Civ. P. 5.1(d).*

(n24)Footnote 14. *See Fed. R. Civ. P. 5.1*, Committee Note.

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2-14 Moore's Manual--Federal Practice and Procedure § 14.92

§ 14.92 Particular Statutes Granting United States Unconditional Right to Intervenen*

The following statutes give an unconditional right to entities of the United States Government to intervene as specified:

1. The Attorney General may intervene in an action involving an alleged violation of the constitutional right to equal protection. n1 To apply for intervention under this statute, the Attorney General must certify that the case is of general public importance; because the government's right to intervene in such cases is absolute, the Attorney General is free to seek whatever relief is desired and may request relief beyond the original scope of the complaint. n2 Furthermore, the Attorney General's right to intervene in such actions does not affect the government's authority to institute any action or proceeding otherwise authorized by law. n3

2. The Secretary of Labor and Secretary of Treasury have an unconditional right to intervene in any Employee Retirement Income Security Act suit by a participant, beneficiary, or fiduciary, other than an action brought solely to recover benefits due under an employee benefit plan. Consequently, a copy of the complaint in any such suit must be served on the Secretary of Labor and the Secretary of the Treasury by certified mail. n4

3. The United States Government has an unconditional right to intervene in a private action under the False Claims Act, if it elects to do so. n5 The False Claims Act governs liability to the United States for knowingly making a false or fraudulent claim when seeking payment from the government, n6 and the Attorney General is responsible for investigating alleged violations and may bring a civil action under the Act. n7 When a private person brings a civil action in the name of the government, the private person must provide the Attorney General with a copy of the complaint and written disclosure of substantially all material evidence, and the Attorney General may elect to intervene within 60 days of receipt of the documentation. n8

4. If an applicant for registration of a trademark is dissatisfied with the decision of the Commissioner of Patents or the Trademark Trial and Appeal Board, the applicant may appeal to the Court of Appeals for the Federal Circuit. n9 Although the Commissioner of Patents need not be a party to that appeal, the court clerk must notify the Commissioner of the filing, and the Commissioner has the right to intervene in the action. n10 The Commissioner also has the right to

intervene in an appeal to the circuit court by a party who is dissatisfied with a decision of the Board of Patent Appeals and Interferences. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionStatutory Right to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.02[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *42 U.S.C. § 2000h-2.*

(n3)Footnote 2. *42 U.S.C. § 2000h-2*; *see Canterino v. Wilson, 538 F. Supp. 62, 63-64 (W.D. Ky. 1982)* .

(n4)Footnote 3. *42 U.S.C. § 2000h-3.*

(n5)Footnote 4. *29 U.S.C. § 1132(h)*; *see, e.g., Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 694-696 (7th Cir. 1986)* (allowing Secretary of Labor to intervene as plaintiff in order to object to terms of proposed settlement).

(n6)Footnote 5. *31 U.S.C. § 3730(b)(2).*

(n7)Footnote 6. *31 U.S.C. § 3729.*

(n8)Footnote 7. *31 U.S.C. § 3730(a).*

(n9)Footnote 8. *31 U.S.C. § 3730(b)(2).*

(n10)Footnote 9. *15 U.S.C. § 1071(a)(1).*

(n11)Footnote 10. *15 U.S.C. § 1071(b)(2).*

(n12)Footnote 11. *35 U.S.C. § 146.*

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2-14 Moore's Manual--Federal Practice and Procedure § 14.93

§ 14.93 Particular Statutes Granting Private Persons Unconditional Right to Intervenen*

The following are examples of statutes that give an unconditional right to private persons to intervene as specified:

1. Interested persons may intervene in Administrative Agency Proceedings and judicial review of Administrative Agency orders under the Administrative Procedure Act, n1 which governs the rights and procedures of participants in administrative hearings. Interested persons are entitled to participate in agency proceedings, provided such participation does not disrupt the orderly conduct of public business. n2 Specific statutes pertaining to the respective agencies may also regulate the right to intervene. For example, the National Labor Relations Act provides that any person aggrieved by a final order of the National Labor Relations Board may seek review in the court of appeals. n3 The Supreme Court has held that the Act, although not express on the subject, confers an absolute right of intervention in the appeal of the party that was successful in the Board proceeding. n4

2. A person aggrieved in a civil rights action by the Equal Employment Opportunity Commission (EEOC) or the Attorney General may intervene in a civil action by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. n5 The person or persons aggrieved plainly include persons who filed the charges of unlawful practices that resulted in the suit. n6 Furthermore, certain powers, remedies, and procedures of the Civil Rights Act were incorporated by reference in the Americans with Disabilities Act of 1990. Consequently, persons alleging discrimination on the basis of disability may also intervene in an applicable action brought by the EEOC or the Attorney General. n7

3. Various environmental statutes permit citizens' intervention in government actions. The statutes also provide private parties the right to enforce the provisions of the statutes. For example, the Clean Water Act contains a citizens' suit provision. n8 Although private actions are not allowed if the responsible governmental entity is diligently prosecuting a suit for the same purpose, a private party may intervene as of right in the government's action if the private party could have brought a private action in the absence of the government's action. n9

4. A person aggrieved in a government action under the Fair Housing Act may intervene. The Fair Housing Act

authorizes the Attorney General to commence a civil action on behalf of a person aggrieved by a violation of the Act, n10 and an aggrieved person may intervene as of right in that civil action. n11 An aggrieved party may also intervene in a civil action brought by the Attorney General alleging discriminatory housing practices that are part of a "pattern or practice" of resistance to the full enjoyment of rights protected under the Constitution or federal laws. n12

5. A corporate shareholder has the right to intervene in an action to recover insider profits if the corporation fails diligently to prosecute an action to recover such profits. *Insider profits* are profits resulting from the sale or purchase of securities on the basis of information obtained by an owner, director, or officer of a corporation by reason of his or her relationship to the issuer of the securities. n13

6. A trustee in a Chapter 11 bankruptcy case may intervene in any tax court action to which the debtor is a party. The trustee's intervention may be made solely on behalf of the debtor's estate. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionStatutory Right to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.02[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *5 U.S.C. § 551 et seq.*

(n3)Footnote 2. *5 U.S.C. § 555(b).*

(n4)Footnote 3. *29 U.S.C. § 160(f).*

(n5)Footnote 4. *International Union, Local 283 v. Scofield, 382 U.S. 205, 212-213, 86 S. Ct. 373, 15 L. Ed. 2d 272 (1965) .*

(n6)Footnote 5. *42 U.S.C. § 2000e-5(f)(1)*; *see EEOC v. American Tel. & Tel. Co., 506 F.2d 735, 740 (3d Cir. 1974) .*

(n7)Footnote 6. *EEOC v. American Tel. & Tel. Corp., 506 F.2d 735, 740 (3d Cir. 1974) .*

(n8)Footnote 7. *See 42 U.S.C. § 12117(a)*; *see also Muth v. Cobro Corp., 895 F. Supp. 254, 255 (E.D. Mo. 1995) .*

(n9)Footnote 8. *33 U.S.C. § 1365.*

(n10)Footnote 9. *United States v. Mississippi, 958 F.2d 112, 115 (5th Cir. 1992)* (any citizen may intervene as a matter of right under § 1365).

(n11)Footnote 10. *42 U.S.C. § 3612(o)(1).*

(n12)Footnote 11. *42 U.S.C. § 3612(o)(1).*

(n13)Footnote 12. *See 42 U.S.C. § 3614.*

(n14)Footnote 13. *15 U.S.C. § 78p(b).*

(n15)Footnote 14. *26 U.S.C. § 7464.*

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure §§ 14.94through 14.99

[Reserved]

§§ 14.94[Reserved]

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.100

§ 14.100 Four Requirements to Establish Person's Right to Interventionn*

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that an applicant is entitled to intervene as of right if, on timely application, the applicant claims an interest relating to the property or transaction which is the subject of the action, and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. n1 The courts have translated this rule into a precise four-element test to determine whether an applicant should be permitted to intervene as a matter of right under Rule 24(a)(2): n2

1. The motion must be timely; n3

2. The applicant must claim a "significantly protectable" interest relating to the property or transaction that is the subject of the action; n4

3. The applicant must be so situated that the disposition of the action may, as a practicable matter, impair or impede the applicant's ability to protect that interest; n5 and

4. The applicant's interest must be inadequately represented by the parties to the action. n6

The applicant has the burden of establishing its right to intervene by satisfying the four elements. n7 These four steps are mandatory and failure to satisfy any one of the criteria, at least to some degree, justifies the court to deny the application to intervene. n8 Although each of the requirements involves distinct issues, the sum of the requirements addresses the basic question of whether the applicant has shown that denial of intervention will have a significant adverse effect on the applicant. The courts have observed that Rule 24(a)(2) is construed broadly in favor of applicants. n9

The inquiry required under Rule 24(a)(2) is a flexible one, and the court should use a practical analysis of the facts and circumstances of each case. n10 Although each of the criteria is independent, practical application of Rule 24(a)(2)

involves a balancing of the independent components. The four elements should not be analyzed in a vacuum, and the criteria should be considered together rather than discretely. Intervention should be granted of right if the interests favoring intervention outweigh those opposed. n11 Thus, other factors may come into consideration, such as judicial efficiency and, in a particular case, a court may refuse intervention to applicants who proffer only duplicative evidence. n12

Private parties may intervene if they meet the requirements of Rule 24, even if they could not have initiated the action because a statute provides for initiation only by a governmental entity. In such cases, intervention is available to private parties only if (1) the statute does not limit the application of the Federal Rules of Civil Procedure in the type of action involved and (2) the statute does not expressly bar private parties from intervening. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(a)(2).*

(n3)Footnote 2. *League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997)* . Another court's version of the four required elements under Rule 24(a) is as follows: (1) timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court. *Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999)* .

(n4)Footnote 3. *See § 14.101.*

(n5)Footnote 4. *See § 14.102.*

(n6)Footnote 5. *See § 14.103.*

(n7)Footnote 6. *See § 14.104.*

(n8)Footnote 7. *United States v. Texas E. Transmission Corp., 923 F.2d 410, 414 (5th Cir. 1991)* .

(n9)Footnote 8. *Security Ins. Co. v. Schipporeit, Inc., 69 F.3d 1377, 1380 (7th Cir. 1995)* (church that met all four requirements was entitled to intervene in insurance company's declaratory judgment action against architectural firm).

(n10)Footnote 9. *Yorkshire v. United States IRS, 26 F.3d 942, 944-945 (9th Cir. 1994)* , *cert. denied, 513 U.S. 989 (1994)* .

(n11)Footnote 10. *Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)* (in making determination whether intervention is appropriate, court is guided primarily by practical and equitable considerations); *Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996)* (practical analysis).

(n12)Footnote 11. *United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984)* , *aff'd on other grounds, 776 F.2d 410 (2d Cir. 1985)* .

(n13)Footnote 12. *See Cajun Elec. Power Coop., Inc. v. Gulf State Utils., Inc., 940 F.2d 117, 120-121 (5th Cir. 1991)* ; *Environmental Defense Fund, Inc. v. Costle, 79 F.R.D. 235, 243 (D.D.C. 1978)* .

(n14)Footnote 13. *Georgia v. Ashcroft, 539 U.S. 461, 476-477, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003)* (private parties may intervene in § 5 Voting Rights Act actions assuming they meet the requirements of Rule 24, even though only state that is subject to voting requirements may institute an action in District Court for District of Columbia for declaratory judgment that voting change comports with Act).

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.101

§ 14.101 Motion for Intervention Must Be Timelyn*

An application to intervene as of right must be timely. n1 A determination of whether an application is timely is essentially discretionary with the trial court. A trial court should determine timeliness from all the circumstances of the application, and unless the trial court's discretion is abused, the court's ruling will not be disturbed on review. Whether a motion to intervene is timely is based on a consideration of four factors: (1) the length of time during which the intervenor applicant actually knew or reasonably should have known of its interest in the action before petitioning for leave to intervene, (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the intervenor applicant's failure to apply for intervention as soon as it actually knew or reasonably should have known of its interest in the action, (3) the extent of the prejudice that the intervenor applicant would suffer if its petition for leave to intervene is denied, and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely, such as personal injury of the applicant. n2 Even though these four factors give structure to the timeliness analysis, timeliness analysis must be based on the context of the particular case and should not be used as a tool to punish tardy intervenor applicants, but rather should function as a method to prevent prejudice against the original parties by an applicant's failure to apply sooner. n2.1

The requirement of timeliness must be considered within the factual context of each case. Thus, the mere passage of a particular length of time does not render an application untimely; n3 rather, the important issue concerns actual proceedings of substance on the merits. For example, in one case, the court held a motion to intervene filed four years after the initial filing of the complaint was timely because when the motion was filed, the case had not progressed in terms of discovery, no dispositive motions had been filed, and no decrees had been entered. n4 In addition, timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening. n5 Furthermore, the requirement that a motion to intervene be timely is not a tool of retribution meant to punish an applicant's tardiness. Rather, the requirement is meant to protect the rights of the original parties to the action. n6

If an application to intervene is made following judgment, the court will view the application with disfavor, because it tends to foster delay and prejudice to existing parties. n7 Furthermore, a motion for post-judgment intervention is particularly disfavored if the applicant had a reasonable basis for knowing before the final judgment that its interests

were at risk. The stage of the proceeding at which an application to intervene is made is related to the issue of potential prejudice to the original parties resulting from the intervenor's delay. The more advanced the litigation, the more intense the scrutiny of the tardiness of the motion. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice*, § 24.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(a)(2).*

(n3)Footnote 2. *NAACP v. New York, 413 U.S. 345, 366-369, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* .

(n4)Footnote 2.1. *Ross v. Marshall, 426 F.3d 745, 754 (5th Cir. 2005)* .

(n5)Footnote 3. *Smith v. Marsh, 194 F.3d 1045, 1050-1051 (9th Cir. 1999)* .

(n6)Footnote 4. *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 369 (3d Cir. 1995)* .

(n7)Footnote 5. *United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181-1182 (3d Cir. 1994)* (citing **Moore's Federal Practice**).

(n8)Footnote 6. *Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994)* .

(n9)Footnote 7. *Minnesota Milk Producers Ass'n v. Glickman, 153 F.3d 632, 646 (8th Cir. 1998)* , *cert. denied, 526 U.S. 1130 (1999)* .

(n10)Footnote 8. *Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227, 1231 (1st Cir. 1992)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.102

§ 14.102 Legal Interest in Subject Matter of Actionn*

[1] General Requirement

The second element that an applicant for intervention must demonstrate is that the applicant has an interest relating to the property or transaction that is the subject of the action. In this regard, the applicant should show some "proprietary interest" or other "significantly protectable legal interest." n1 An applicant's interest must be direct, substantial, and legally protectable. n2 The required interest must consist of some legal right that will be affected by the action. An applicant for intervention has a "significant protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between the legally protected interest and the plaintiff's claims. This relationship exists if the resolution of the plaintiff's claims actually will affect the applicant. n2.1

The "significant protectable interest" test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the "interest" test directs courts to make a practical, threshold inquiry. The sufficiency of an intervenor applicant's interest is a highly fact-specific determination. n2.2 The interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. n3

Applications to intervene in which the proposed intervenor advances a distinct property interest present the easiest cases for intervention. If an action involves a dispute about a particular property or fund, and an applicant claims a direct, substantial, and legally protectable right to the property or fund, the interest is sufficient. n4 Thus, an interest in a specific monetary fund supports intervention in an action affecting that fund. n5

An interest does not need to be a property right in order to qualify for the second requirement, and some non-property interests have been held to satisfy the interest requirement. For example, expectation of promotion within an employment situation was an interest sufficient to support intervention in an action involving promotional exams. n6 However, the employment interest must have some legal basis such as a contractual relationship. Thus, non-minority employees did not have an interest sufficient to support intervention in an action alleging discrimination in hiring and

promotion, because even though the case could affect their seniority rankings, civil servants have no vested legal right in a particular position or appointment. n6.1 Nonetheless, non-property interests do not often support intervention as of right. Many decisions do not find an economic interest alone to be sufficient. n7 Similarly, applicants concerned only about the legal principles that apply to an action may appear as amici curiae, but they are not entitled to intervene as of right. n8

[2] Less Strict Standard for Public Law Issue

Courts have a tendency to judge the property interest requirement by a more lenient standard if the lawsuit involves some public interest issue or is brought by a public interest group. The zone of interests protected by a constitutional provision or statute of general application is perceived as broader than the protectable interests recognized in other contexts. n1 The Supreme Court has also taken a lenient viewpoint regarding the interest requirement in cases involving the public interest. In one antitrust case, for example, the Court permitted intervention by the state of California and several energy companies into an antitrust action brought by the United States. The Court broadly interpreted the interest requirement of Rule 24(a) in holding that non-legally protected interests could qualify for intervention as of right. n2 However, note that all of the requirements of Rule 24(a)(2), including timeliness, must be met even in cases involving issues of public interest. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.03[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Donaldson v. United States, 400 U.S. 517, 530-531, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971)* .

(n3)Footnote 2. *Kleissler v. United States Forest Service, 157 F.3d 964, 972 (3d Cir. 1998)* (intervenors should have interest that is specific to them, is capable of definition, and will be directly affected in substantially concrete fashion by relief sought).

(n4)Footnote 2.1. *Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)* ; *see United States v. New York City Bd. of Educ., 85 F. Supp. 2d 130, 154-156 (E.D.N.Y. 2000)* (in action alleging discrimination in hiring and promotion, non-minority employees did not have an interest sufficient to support intervention, because even though case could affect their seniority rankings, it was not legal interest because civil servant has no vested right in particular position or appointment).

(n5)Footnote 2.2. *San Juan County v. United States, 420 F.3d 1197, 1207 (10th Cir. 2005)* .

(n6)Footnote 3. *Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)* .

(n7)Footnote 4. *Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)* (contingent, unsecured claim against third-party debtor did not satisfy "direct, non-contingent, substantial, and legally protectable" interest required for intervention as matter of right); *United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411, 414-417 (2d Cir. 2001)* (insurance company did not have sufficient interest to intervene in civil forfeiture proceedings when company claimed interest in property on constructive trust theory, but property subject to constructive trust was not readily traceable to property subject to forfeiture; *Gaines v. Dixie Carriers, Inc., 434 F.2d 52, 53-54 (5th Cir. 1970)* (law firm could intervene in former client's action to protect firm's interest in contingent fee award).

(n8)Footnote 5. *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d*

Cir. 1995) .

(n9)Footnote 6. *United States v. City of Chicago, 870 F.2d 1256, 1260 (7th Cir. 1989)* .

(n10)Footnote 6.1. *United States v. New York City Bd. of Educ., 85 F. Supp. 2d 130, 154-156 (E.D. N.Y. 2000)* .

(n11)Footnote 7. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 466 (5th Cir. 1984)* , *cert. denied, 469 U.S. 1019 (1984)* (customers not permitted to intervene in contract dispute regarding price between electric utility and gas supplier).

(n12)Footnote 8. *Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994)* .

(n13)Footnote 1. *Kleissler v. United States Forest Service, 157 F.3d 964, 973 (3d Cir. 1998)* ; *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463-466 (5th Cir. 1984)* , *cert. denied, 469 U.S. 1019 (1984)* .

(n14)Footnote 2. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-136, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967)* .

(n15)Footnote 3. *Lelsz v. Kavanagh, 710 F.2d 1040, 1047 (5th Cir. 1983)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.103

§ 14.103 Disposition of Action Will Impair or Impede Applicant's Ability To Protect Interestn*

After an applicant has established a sufficient interest in the subject of the action, the applicant must demonstrate that disposition of that action may, as a practical matter, impair or impede the applicant's ability to protect the interest. n1 The "impair or impede" element requires a showing by the applicant that the applicant will be injured in a practical sense. n2 The non-party applicant must show that it would be unfair to decide the case and injure the non-party without allowing the non-party to participate in the litigation. n2.1 In its evaluation of the "impair or impede" element, the court is not limited to consequences of a strictly legal nature. To satisfy this element of the intervention test, a would-be intervenor must show only that impairment or impediment of its substantial interest is possible if intervention is denied. n2.2

Thus, an applicant's interest is impaired if disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue its interest. For example, if the doctrine of res judicata would prohibit an applicant from pursuing a claim in a separate action, a total obstruction of the interest would result. n3 Note that under the requirements of the rule, impairment, or a simple decrease in the value of the interest, would also be sufficient. For example, potential harm to a property interest satisfies the rule. n4

An applicant for intervention must establish a practical, rather than theoretical, impairment of its interest. For example, a possible adverse judicial determination, which arguably could be made in the future by a judge on some subjective basis, does not necessarily establish impairment. n5 The practical impairment test is flexible, and its application depends on a functional analysis of the circumstances of a given case. For example, the potential effect on career and promotion opportunities may satisfy the impairment requirement, and an applicant need not demonstrate a vested interest in a promotion. n6

The "impair or impede" determination under Rule 24(a)(2) is the same as the joinder inquiry under Rule 19(a)(2)(i): whether a named party must join a nonparty as needed for just adjudication because disposition of the action would "impair or impede" the nonparty's ability to protect an interest in the litigation. Consequently, cases apply ing Rule 19(a)(2)(i) are helpful in interpreting application of Rule 24(a)(2). n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.03[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(a)(2).*

(n3)Footnote 2. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984)* , *cert. denied, 469 U.S. 1019 (1984)* .

(n4)Footnote 2.1. *See Heaton v. Monogram Credit Card Bank, 297 F.3d 416, 422 (5th Cir. 2002)* .

(n5)Footnote 2.2. *San Juan County v. United States, 420 F.3d 1197, 1210 (10th Cir. 2005)* .

(n6)Footnote 3. *Washington Elec. Coop. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 98 (2d Cir. 1990)* .

(n7)Footnote 4. *NL Indus., Inc. v. Secretary of the Interior, 777 F.2d 433, 440 (9th Cir. 1985)* .

(n8)Footnote 5. *United States v. Texas E. Transmission Corp., 923 F.2d 410, 414 (5th Cir. 1991)* .

(n9)Footnote 6. *Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996)* (en banc) (court allowed intervention by union and police association in civil rights action against city).

(n10)Footnote 7. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 544-545 (1st Cir. 2006)* ; *see § 14.04[1][c]* (joinder requirements).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.104

§ 14.104 Applicant's Interest Inadequately Represented by Current Partiesn*

[1] Required Showing of Inadequacy of Representation

To obtain intervention as of right, the last element that the applicant must show is that the existing parties in the lawsuit inadequately represent the applicant's interests in the action. n1 However, the applicant need not show that the representation by existing parties will definitely be inadequate. The Supreme Court has found that this requirement of Rule 24(a)(2) is satisfied if the applicant shows that the representation of the applicant's interest "may be" inadequate. n2 Some courts have stated that any doubt regarding adequacy of representation should be resolved in favor of the applicant for intervention. n3 The burden on the proposed intervenor to show inadequacy is minimal. If the proposed intervenor can show that the basis for the intervenor's representation and that of the current representation may diverge in the future, even though at the time of the filing they appear to share common ground, the showing of inadequacy is sufficient. n4 Thus, intervention was allowed on appeal when it appeared there was a possibility that representation by the existing plaintiff might become inadequate because of a possibility that the plaintiff would be dissolved in bankruptcy before the appeal was finally resolved. n5

Some showing must be made, however; for example, a mere difference between the existing parties and the applicants to intervene regarding the motive for the litigation does not establish inadequacy of representation in the litigation. n6 Similarly, an applicant's disagreement with an existing party's trial strategy or an existing party's decision whether to appeal an adverse decision generally does not present a sufficient conflict of interest or lack of adequate representation to justify intervention. n7

In order to show inadequacy of representation, the applicants must show that they bring something to the litigation that would otherwise be ignored or overlooked if the matter were left to the already-existing parties. n8

[2] Rebuttable Presumptions of Adequacy of Representation

There are two situations in which there is a rebuttable presumption that the current parties adequately represent the applicant:

1. When there is identity of interest. If an applicant's interests in litigation are the same as one or more of the existing parties, adequate representation is presumed. n1 Thus, there is a presumption of adequate representation if the applicant has the "same ultimate objective" as an existing party. n2 To overcome the presumption, the applicant for intervention must show some conflict of interest with existing parties, or collusion between the existing parties, or dereliction by the existing party that should be representing the applicant's interests. n3

2. If a governmental entity is asserting its status as a guardian or representative of all of its citizens (in the status of parens patriae), n4 the governmental entity is presumed to represent its citizens adequately. n5 However, the presumption is rebuttable, and the effect of the presumption of adequacy of representation by the government is that a somewhat greater showing of inadequacy of representation is required in order to intervene than would otherwise be required. n6 To rebut the presumption, the applicant is not required to demonstrate that there is outright collusion between the governmental entity and the opposing parties; however, the applicant must make a strong showing that the sovereign is not fairly representing the interests of the applicant. n7 The fact that a governmental agency also regulates the proposed intervenors does not necessarily mean that it cannot adequately represent their interests but is a factor to be considered in rebuttal of the presumption. n7.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.03[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(a)(2).*

(n3)Footnote 2. *Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)* .

(n4)Footnote 3. *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993)* .

(n5)Footnote 4. *Heaton v. Monogram Credit Card Bank, 297 F.3d 416, 425 (5th Cir. 2002)* .

(n6)Footnote 5. *Supreme Beef Processors, Inc. v. USDA, 275 F.3d 432, 437-438 (5th Cir. 2001)* .

(n7)Footnote 6. *Washington Elec. Coop. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 98 (2d Cir. 1990)* ; *see, e.g., Curry v. Regents of University of Minnesota, 167 F.3d 420, 423 (8th Cir. 1999)* (applicant campus organizations did not meet their "minimal burden" of showing that university would inadequately represent their interests in action in which several students challenged use of student fees; although the applicants' motives were not the same as the university's, because applicants' were interested in maintaining their funding, and university was merely interested in upholding their current fee system, there was identity of interest because both wanted current fee system upheld).

(n8)Footnote 7. *Chiglo v. City of Preston, 104 F.3d 185, 188 (8th Cir. 1997)* (prospective intervenor may not show inadequacy of representation by merely disagreeing with litigation strategy).

(n9)Footnote 8. *See Hines v. Rapides Parish Sch. Bd., 479 F.2d 762, 765 (5th Cir. 1973)* (if issues intervenors seek to present have been previously determined or if parties in original action were aware of these issues and completely competent to represent interest of new group, court may deny intervention).

(n10)Footnote 1. *Southmark Corp. v. Cagan, 950 F.2d 416, 419 (7th Cir. 1991)* (in foreclosure action, interests of individual investor in real estate partnership adequately represented by receiver of partnership).

(n11)Footnote 2. *Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996)* .

(n12)Footnote 3. *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 215-216 (11th Cir. 1993)* (court allowed intervention because applicant's interests were represented only by combining hostile interests of plaintiff and defendant).

(n13)Footnote 4. *United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984)* , *aff'd on other grounds, 776 F.2d 410 (2d Cir. 1985)* (concept of parens patriae has been expanded to include actions in which government seeks to redress quasi-sovereign interests, such as damage to its general economy or environment).

(n14)Footnote 5. *Wade v. Goldschmidt, 673 F.2d 182, 186 n.7 (7th Cir. 1982)* .

(n15)Footnote 6. *Curry v. Regents of University of Minnesota, 167 F.3d 420, 423 (8th Cir. 1999)* (presumption may be rebutted only by a strong showing of inadequate representation).

(n16)Footnote 7. *United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984, 986 (2d Cir. 1984)* .

(n17)Footnote 7.1. *Massachusetts Food Assn. v. Massachusetts Alcoholic Beverages Control Comm., 197 F.3d 560, 566-567 (1st Cir. 1999)* (alcohol trade association that represented retailers and wholesalers was not allowed to intervene in litigation that had been brought against state alcoholic beverages commission to enjoin enforcement of statute because interests of the trade associations were adequately represented by commission, which, like association, also had strong interest in enforcement of statute).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART IV. INTERVENTION
A. INTERVENTION OF RIGHT
2. Intervention of Right Because Person's Interest Would Be Impaired

2-14 Moore's Manual--Federal Practice and Procedure §§ 14.105through 14.119

[Reserved]

§§ 14.105[Reserved]

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART IV. INTERVENTION
B. PERMISSIVE INTERVENTION

2-14 Moore's Manual--Federal Practice and Procedure § 14.120

§ 14.120 Trial Court's Discretion Whether to Grant Motion for Permissive Interventionn*

[1] Circumstances in Which Court May Grant Permissive Intervention

On timely application of any person, n1 a court may grant permissive intervention pursuant to a federal statute that confers a conditional right to intervene n2 or when the applicant's claim or defense has a question of law or fact in common with the main action. n3 Additionally, state and federal officers and agencies may intervene in an action if an existing party is relying on (1) any statute or executive order administered by the officer or agency or (2) any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order. n4 Rule 24(b) specifically vests discretion in district courts to either grant or deny any person's motion to intervene, even when the person has met the other requirements of the rule; n5 because of the explicit nature of this discretion, courts have described the discretion as "great" n6 or "broad." n7 While a motion to intervene as of right is reviewed under the de novo or error standard, orders regarding permissive intervention are subject to review under the abuse of discretion standard. n7.1

The court's discretion whether to allow permissive intervention is not absolute. The court must always consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. n7.2 In essence, considerations of trial convenience dominate the question of whether to allow permissive intervention. Like motions to intervene as of right, all motions for permissive intervention must be timely. n8 The determination of timeliness is also discretionary. n9

Private parties may intervene if they meet the requirements of Rule 24, even if they could not have initiated the action because a statute provides for initiation only by a governmental entity. In such cases, intervention is available to private parties only if (1) the statute does not limit the application of the Federal Rules of Civil Procedure in the type of action involved and (2) the statute does not expressly bar private parties from intervening. n9.1

[2] Factors Used by Court in Exercise of Discretion

[a] Undue Delay

The first factor for the court to consider in the exercise of its discretion is whether intervention would cause undue delay

to the progression of the proceedings. For example, one indication of undue delay is whether the intervention would greatly widen the scope of the litigation. Introduction of additional issues at a late stage in the proceedings would cause undue delay. n1 If intervention would cause significant delay, or significantly complicate the existing litigation, the filing of a separate suit to assert an applicant's rights may be a more efficient and effective alternative way to protect the applicant's rights. If an adequate remedy is available to the applicant in another action, the effect of denying permissive intervention in an existing action is mitigated. If a court finds there is another remedy available to the applicant to protect its rights, the court will likely deny intervention, especially if such intervention will result in delay in the existing action. n2

Another factor indicative of undue delay is if the intervention would require consideration of new facts that are wholly unrelated to the underlying litigation. In seeking to bring the litigation to an expeditious close, the district court does not abuse its discretion in denying a motion for permissive intervention in such circumstances. n3

[b] Prejudice to Existing Parties

In deciding a motion for permissive intervention, the court must consider prejudice to other parties; thus, the court may consider whether the applicant's addition is likely to make a significant and useful contribution to the development of the underlying factual and legal issues or, alternatively, is likely to be counterproductive. n4 Courts are particularly willing to grant permissive intervention in complex litigation where the applicant may be able to provide unique input that may be of value to the court or the other parties. n5

On the other hand the court may deny permissive intervention if an applicant will not make any unique contribution to the evidence presented at trial. If a potential intervenor will essentially repeat the same types of testimony given by existing parties, intervention is counterproductive since it will only clutter and prolong the litigation unnecessarily. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionPermissive Interventions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.10[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(b)(1), (b)(2)*; *see § 14.121.*

(n3)Footnote 2. *Fed. R. Civ. P. 24(b)(1)(A)*; *see § 14.122.*

(n4)Footnote 3. *Fed. R. Civ. P. 24(b)(1)(B)*; *see § 14.123.*

(n5)Footnote 4. *Fed. R. Civ. P. 24(b)(2).*

(n6)Footnote 5. *Georgia v. United States Army Corps of Eng'rs, 302 F.3d 1242, 1250 (11th Cir. 2002)* (permissive intervention is discretionary even if appropriate because party's claim or defense and main action have question of law or fact in common and intervention will not unduly prejudice or delay the adjudication of rights of original parties).

(n7)Footnote 6. *Ruthardt v. United States, 303 F.3d 375, 386 (1st Cir. 2002) .*

(n8)Footnote 7. *Rosenshein v. Kleban, 918 F. Supp. 98, 106 (S.D.N.Y. 1996) .*

(n9)Footnote 7.1. *Georgia v. United States Army Corps of Eng'rs, 302 F.3d 1242, 1249 (11th Cir. 2002) .*

(n10)Footnote 7.2. *Fed. R. Civ. P. 24(b)(3).*

(n11)Footnote 8. *Fed. R. Civ. P. 24(b)(1)-(3).*

(n12)Footnote 9. *See § 14.121.*

(n13)Footnote 9.1. *Georgia v. Ashcroft, 539 U.S. 461, 476-477, 123 S. Ct. 2498, 156 L. Ed. 2d 428, 449 (2003)* .

(n14)Footnote 1. *Smith v. Marsh, 194 F.3d 1045, 1050-1051 (9th Cir. 1999)* (intervention should be denied when applicants for intervention seek to inject new issues and matters that are well beyond scope of party's claims and defenses, thus expanding scope of litigation and causing delay).

(n15)Footnote 2. *Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290, 293-294 (6th Cir. 1983)* .

(n16)Footnote 3. *Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co., 172 F.3d 385, 389-390 (5th Cir. 1999)* , *cert. denied, 528 U.S. 930 (1999)* .

(n17)Footnote 4. *League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 189 (5th Cir. 1989)* (county not allowed to intervene in action under Voting Rights Act that involved election process rather than individual judges, because its input would not significantly help develop relevant factual issues).

(n18)Footnote 5. *Natural Resources Defense Council, Inc. v. Tennessee Valley Auth., 340 F. Supp. 400, 408-409 (S.D.N.Y. 1971)* (expertise of applicant would help clarify facts and issues).

(n19)Footnote 6. *Getty Oil Co. v. Department of Energy, 865 F.2d 270, 277 (Temp. Emer. Ct. App. 1988)* (when non-party presents no new questions, intervention should be denied; amicus curiae brief would be more efficient).

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PART IV Parties
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2-14 Moore's Manual--Federal Practice and Procedure § 14.121

§ 14.121 Timeliness of Motion for Permissive Interventionn*

A court has discretion to deny a motion for permissive intervention if it is not timely. A trial court should determine timeliness from all the circumstances of the application, and, unless the trial court's discretion is abused, the court's ruling will not be disturbed on review. n1 In determining whether a motion for intervention is timely, a court must consider three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. In measuring any delay in seeking intervention, the inquiry looks to when the intervenor first became aware that its interests would no longer be adequately protected by the parties. n2

The requirement of timeliness must be considered within the factual context of each case. Thus, the mere passage of a particular length of time does not render an application untimely; n3 rather, the important issue concerns actual proceedings of substance on the merits. Timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening. n4 Furthermore, the requirement that a motion to intervene be timely is not a tool of retribution meant to punish an applicant's tardiness. Rather, the requirement is meant to protect the rights of the original parties to an action. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice,* § 24.10[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 24(b)(1), (b)(2)*; San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1100 (9th Cir. 1999)* (if, however, district court did not base its decision on timeliness grounds and did not make any factual findings regarding timeliness, appellate court may consider issue de novo).

(n3)Footnote 2. *See Fed. R. Civ. P. 24(b)(1), (b)(2)*. San Jose Mercury News, Inc. v. United States Dist. Court-- *N.*

Dist., 187 F.3d 1096, 1100-1101 (9th Cir. 1999) (court concluded that motion to intervene was timely when applicant's interests were being effectively represented by plaintiffs up until filing of stipulated protective order, and although applicant waited 12 weeks before seeking to intervene after protective order was entered, this delay was not prejudicial).

(n4)Footnote 3. *Smith v. Marsh, 194 F.3d 1045, 1050-1051 (9th Cir. 1999)* .

(n5)Footnote 4. *United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181-1182 (3d Cir. 1994)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. *Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994)* .

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2-14 Moore's Manual--Federal Practice and Procedure § 14.122

§ 14.122 Conditional Right to Intervene Conferred by Statuten*

On timely application, n1 the court has discretion to permit anyone to intervene in an action when a statute of the United States confers a conditional right to intervene. n2 This means that when a statute grants such a conditional right, the court then has the discretion to determine whether intervention is appropriate under the circumstances. Rule 24(b)(1) does not mean that "permissive intervention" becomes "mandatory" merely because the conditions in a statute are met. A statute that is construed to permit conditional intervention is only a factor to consider in the court's discretion to allow intervention. n2.1 When an applicant relies on a conditional statutory right to intervene under Rule 24(b)(1)(A), n2.2 the applicant is in the same position as a someone seeking intervention under Rule 24(b)(1)(B), the "common question" permissive intervention rule. n2.3

The statute that confers a conditional right to intervene does serve to notify the trial court that Congress thought the intervenor might be in a category for which intervention may be appropriate. The court still has discretion to deny intervention in spite of the federal statute when it is determined that the intervention would cause undue delay or prejudice. n3

The following are examples of statutes that allow conditional intervention:

1. A court that is hearing a case brought under the Bankruptcy Code may permit a party in interest to intervene, either generally or with respect to a specific issue. The applicant must first show cause. n4 The term "party in interest" includes the debtor, the trustees, and the creditor. n5 Because all applicants are required to show cause in order to intervene, the right to intervene is permissive rather than absolute. The bankruptcy court has discretion to deny intervention to persons whose interests are already adequately represented by existing parties. n6

2. An interested party may intervene in a case under the Comprehensive Environmental Response, Compensation, and Liability Act, n7 which governs the clean-up of hazardous waste sites. The Act contains an intervention provision with language almost identical to the criteria set forth in Rule 24(a)(2), which governs non-statutory intervention as of right. n8 The court's "mandatory" evaluation of whether the applicant had met the multiple criteria of the CERCLA intervention statute is actually a condition on the right to intervene and, in reality, creates a permissive, conditional

ability to intervene in such cases. n9

3. The Fair Labor Standards Act, which provides for both private actions and actions by the Secretary of Labor to remedy violations of the Act's provisions, also grants employees the conditional right to intervene in an action brought by a union representative. n10 Private parties may not intervene in an action brought by the Secretary of Labor under the Act. n11

4. The Equal Education Opportunities Act contains a provision conferring a conditional right to intervene in school desegregation proceedings to the parent or guardian of a child. n12 Intervention under this statute must be sought under Rule 24(b)(1), which governs permissive statutory intervention, rather than under Rule 24(a)(1), which governs unconditional statutory intervention as of right. n13

5. The United States may intervene in actions involving property affected by a tax lien. n14 The fact that the relevant statute provides for situations in which the application to intervene is denied indicates that the right to intervene in this context is conditional, rather than an unconditional Rule 24(a)(1) right. n15

6. The Equal Employment Opportunity Commission or the United States Attorney General may intervene in private employment discrimination actions, provided the actions involve issues of general public importance. The court may, in its discretion, set limits or conditions, or deny intervention altogether. n16

7. The United States Attorney General may intervene in actions brought under the Civil Rights of Institutionalized Persons Act, provided that the egregious or flagrant conditions addressed by the actions are pursuant to a pattern or practice of resistance to full enjoyment of the rights, privileges, or immunities protected by the constitution or federal laws. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionConditional Right to Intervene

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 14.121.*

(n3)Footnote 2. *Fed. R. Civ. P. 24(b)(1).*

(n4)Footnote 2.1. *Fed. R. Civ. P. 24(b)(1)(A).*

(n5)Footnote 2.2. *See Fed. R. Civ. P. 24(b)(1)(A).*

(n6)Footnote 2.3. *Fed. R. Civ. P. 24(b)(1)(B).*

(n7)Footnote 3. *See Fed. R. Civ. P. 24(b)*; *see § 14.120[2].*

(n8)Footnote 4. *11 U.S.C. § 1109*; *Fed. R. Bankr. P. 2018(a).*

(n9)Footnote 5. *11 U.S.C. § 1109(b).*

(n10)Footnote 6. *Fuel Oil Supply & Terminaling v. Gulf Oil Corp., 762 F.2d 1283, 1287 (5th Cir. 1985) .*

(n11)Footnote 7. *42 U.S.C. § 9601 et seq.*

(n12)Footnote 8. *Fed. R. Civ. P. 24(a)(2).*

(n13)Footnote 9. *United States v. Union Elec. Co., 64 F.3d 1152, 1160 (8th Cir. 1995)* .

(n14)Footnote 10. *See 29 U.S.C. § 216(b)*; *Mitchell v. McCorstin, 728 F.2d 1422, 1423 (11th Cir. 1984)* (court held that statute confers only permissive, and not unconditional right).

(n15)Footnote 11. *Marshall v. United States Postal Serv., 481 F. Supp. 179, 180 (D.D.C. 1979)* .

(n16)Footnote 12. *20 U.S.C. § 1717.*

(n17)Footnote 13. *See United States v. Mississippi, 958 F.2d 112, 114-115 (5th Cir. 1992)* .

(n18)Footnote 14. *26 U.S.C. § 7424.*

(n19)Footnote 15. *Parker v. Brown, 570 F. Supp. 640, 642 (S.D. Ohio 1983)* .

(n20)Footnote 16. 42 U.S.C. § 2000(e)-5(f)(1); *see General Tel. Co. v. EEOC, 446 U.S. 318, 326, 100 S. Ct. 1698, 1704, 64 L. Ed. 2d 319, 327 (1980)* (EEOC's enforcement authority supplements, rather than replaces, private cause of action).

(n21)Footnote 17. *42 U.S.C. § 1997c(a)(1).*

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2-14 Moore's Manual--Federal Practice and Procedure § 14.123

§ 14.123 Permissive Intervention Based on Common Questions of Law or Factn*

Absent statutory authorization, n1 a court may exercise its discretionary power to grant permissive intervention only if the applicant demonstrates that there is: (1) a common question of law or fact; n2 (2) independent jurisdiction, if jurisdiction in the original action was based on diversity of citizenship; n3 and (3) a timely motion for intervention. n4 The decision whether to grant intervention under Rule 24(b)(1) depends on the facts of each case and is within the court's discretion. n5 Unlike the elements required for intervention as of right under Rule 24(a)(2), it is not necessary under Rule 24(b)(1)(B) that the applicant have an particular "interest" in the subject of the main action. n6

Courts have given the phrase "common question of law or fact" its plain meaning and have read it in the disjunctive. A showing of either a question of law or a question of fact in common between the main action and the applicant's claim or defense is all that is needed to vest judicial discretion to grant permissive intervention. n7 A common question of law exists if the intervenor has a claim against the defendant that is identical to a claim asserted by the existing plaintiff. Such a situation is particularly likely to arise in the context of a class action. n8 A common question of fact exists if evidence on the same issue is relevant to both an intervenor's claim and the claims in the underlying action. n9

In assessing whether the common question requisite is satisfied, a court may use its discretion to assess the potential gains or prejudice that would result if intervention is granted. Perhaps the most obvious benefits of intervention in general are the efficiency and consistency that result from resolving related issues in a single proceeding. Consequently, the goal of preventing a multiplicity of suits that involve common questions of law or fact should be central in any decision to grant or deny permissive intervention. n10

The degree of the "commonality" of law or fact required may depend in part on the nature of the requested intervention. A court may apply a less stringent standard if an applicant seeks intervention for a very limited purpose rather than full participation in the litigation. n11

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionPermissive Interventions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* § 24.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 14.122.*

(n3)Footnote 2. *Fed. R. Civ. P. 24(b)(1)(B)*; San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1101 (9th Cir. 1999)* .

(n4)Footnote 3. *See § 14.124[2].*

(n5)Footnote 4. *See § 14.121.*

(n6)Footnote 5. San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1100-1101 (9th Cir. 1999)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 24(b)(1)(B)*; *SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459, 60 S. Ct. 1044, 1055, 84 L. Ed. 1293, 1306 (1940)* .

(n8)Footnote 7. *McNeill v. New York City Hous. Auth., 719 F. Supp. 233, 250-251 (S.D.N.Y. 1989)* ; *Brooks v. Flagg Bros., Inc., 63 F.R.D. 409, 415 (S.D.N.Y. 1974)* .

(n9)Footnote 8. *Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1278 (4th Cir. 1981)* , *vacated on other grounds, 457 U.S. 1128 (1982)* .

(n10)Footnote 9. *Bureerong v. Uvawas, 167 F.R.D. 83, 86 (C.D. Cal. 1996)* (court granted permissive intervention to government, which intervened to seek stay of civil case and stay of discovery pending criminal trial regarding parallel allegations).

(n11)Footnote 10. *See Security Ins. Co. v. Schipporeit, Inc., 69 F.3d 1377, 1381 (7th Cir. 1995)* .

(n12)Footnote 11. *United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990)* (when collateral party seeks permissive intervention solely to gain access to discovery subject to protective order, no particularly strong nexus of fact or law need exist between two suits).

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2-14 Moore's Manual--Federal Practice and Procedure § 14.124

§ 14.124 Permissive Intervention Proceduresn*

[1] Service of Motion on Existing Parties

Any person who wants to intervene in an action must serve a motion to intervene on the existing parties as provided in Rule 5. n1 The motion must state the grounds for the motion and must be accompanied by a pleading setting forth the claim or defense for which intervention is sought. n2 Unless they are identical, the applicant may not merely adopt the prior pleadings of an existing party. n3 Leave of court is not a prerequisite for the filing of a motion to intervene. However, the intervenor is not considered a party unless leave to intervene is granted. n4

A motion to intervene with the attached pleading must be served on all existing parties in the manner required by Rule 5. n5 Rule 5 provides that service is not required on a party that is in default unless the intervenor's pleading states a claim for relief against the defaulting party; and when relief is sought from a defaulting party, service is governed by Rule 4. n6

Compliance with service requirements is mandatory. However, a court will not necessarily deny a motion for technical noncompliance because a court has discretion to disregard purely formal defects in the absence of prejudice to the parties. n7 Whether to permit a procedurally defective motion to intervene is also within the sound discretion of the district court. n8

[2] Subject Matter Jurisdiction

Petitions to intervene must have an independent basis of subject matter jurisdiction. n1 The intervenor may plead a federal question claim or base jurisdiction on diversity of citizenship. Alternatively, it is sometimes possible for the intervenor who lacks diversity or a federal claim to demonstrate supplemental jurisdiction. n2 Thus, in any civil action in which a district court has original jurisdiction, the court may exercise supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same constitutional case or controversy. n3 Supplemental jurisdiction specifically includes claims such as intervention that involve additional parties. n4

[3] Venue

When a person makes a motion to intervene as a plaintiff or a defendant, the person has no control over venue, and may not object to the venue chosen for the action; because the intervenor specifically invoked the jurisdiction of the court, any potential venue objections are considered waived. Other parties also may not object. If intervention is as of right, existing parties may not object that venue is incorrect as to the intervenor, because the intervenor has a right to participate in the action. However, an applicant seeking permissive intervention may be required to meet the venue requirements. If venue issues would have prevented joinder of a party as a plaintiff under Rule 19, the same issues serve as a barrier to intervention. n1 However, venue is not a jurisdictional prerequisite, and the fact that the venue was incorrect as to the original plaintiff should not prevent intervention by a plaintiff as to whom venue is proper. n2

[4] Court's Discretion to Formulate Intervention Order to Further Purposes of Intervention

The trial court is not required to make an "all or nothing" decision regarding intervention. Thus, a trial court is not restricted to either granting unlimited intervention or denying the motion entirely. The court may grant intervention wit h specific conditions imposed, such as, limits on the intervenor's right to conduct discovery or to assert certain types of claims, n1 provided that the customized order has the effect of minimizing potential delay and confusion and is within the district court's discretion. n2 For example, the district court has the authority to grant a motion for intervention for a specific, limited purpose, such as, for the purpose of modifying a protective order. In such a case, the court may limit the intervenor's access to discovery material that is in controversy to retain protection for items that would not ordinarily be discoverable on account of privileges or irrelevance. n3 Another situation in which the court may grant limited intervention involves intervention by a state attorney general to present a case concerning the constitutionality of a state statute. Intervention for this purpose is authorized pursuant to a federal statute. n4

As an alternative to intervention, a court may allow an applicant to participate as an amicus curiae. Amicus status allows the applicant to present legal arguments, and, in some cases, to call and cross-examine witnesses. n5 Participation as an amicus curiae, rather than as a party, is particularly appropriate if the applicant has an interest in the legal principles that apply to a dispute but has no personal, legally protectable interest in the litigation. n6

[5] Appeals and Intervention

[a] Appealability of Decision on Motion for Intervention

An order must be final in order to be appealable. n1 It has been held that an outright denial of a nonparty applicant's motion to intervene is immediately appealable because it is a final collateral order under section 1291. The rationale for this holding is that once intervention has been denied the putative intervenor may not appeal from any subsequent order or judgment in the proceeding. Thus, in the absence of immediate appellate review, a denial of intervention becomes effectively unreviewable. n2 However, an applicant may not immediately appeal denial of intervention as of right if permissive intervention is granted, even if the court places restrictions on the grant of permissive intervention, at least when the restriction is imposed in an effort to minimize delay and confusion. n3

[b] Standard of Review

The standard of review on appeal is dependent on the type of issue. A determination of the timeliness of a motion to intervene is committed to the discretion of the district court and will not be disturbed on appeal except for an abuse of discretion. n4 This rule results because timeliness is an issue that the court must determine from all the circumstances in the court's exercise of sound discretion. n5 However, if the district court fails to make express findings on the issue of timeliness, a court of appeals must review the ultimate determination under a de novo standard. n6

With regard to the issue of a whether an applicant may intervene as of right under Rule 24(a)(2), Courts of Appeals for the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that intervention as of right decisions are reviewed de novo. n7 On the other hand, the First, Second, Third, and Fourth Circuits use an abuse of discretion

standard. n8 Under this standard, the appellate court will not reverse a determination regarding intervention under Rule 24(a)(2) unless the district court has applied an improper legal standard or reached a decision that is clearly incorrect. n9 The District of Columbia Circuit uses a mixed approach. When the district court's ruling on a motion to intervene as of right is based on questions of law, a de novo standard of review is applied. When the decision is based on questions of fact, it is reviewed for abuse of discretion. n10

With regard to the issue of a whether an applicant may permissively intervene in a case, a district court's denial of permissive intervention under Rule 24(b) will be reversed only for abuse of discretion. n11 However, at least one circuit has held that although the motion for permissive intervention is directed to the sound discretion of the district court, if the district court's decision turns on a legal question, its underlying legal determination is subject to de novo review. n12

[c] Intervention for Purposes of Appealing Trial Court Decision

A court generally will not allow intervention following a judgment; it is disfavored because it tends to foster delay and to prejudice adjudication of the rights of the original parties. n13 However, a court may allow a person to intervene for the purpose of appealing a decision that the existing parties have decided not to pursue, provided the party meets all of the requirements for intervention and acts promptly after the entry of final judgment, n14 and provided that the person had not earlier asserted that the person would not wish to participate in the litigation. n15

When making a motion, the applicant on appeal must move to intervene for the purpose of appeal, rather than merely moving to appeal; as a non-party, the applicant has no right to appeal the judgment unless the court grants intervention. n16 The general rule is that a post-judgment motion to intervene is timely if it is filed promptly after the entry of final judgment, in view of all the circumstances. n17

The timeliness of a motion to intervene must be considered in light of the purpose for which intervention is sought, the need for intervention as a method of preserving the applicant's rights, and the possibility of prejudice to the existing parties. Consequently, postjudgment intervention is often permitted when the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties. n17.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice,* § 24.20, et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 24(c)*; *see Fed. R. Civ. P. 5(a)(1)(D), 24(b)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 24(c).*

(n4)Footnote 3. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 595 (7th Cir. 1993)* (differences between motions to intervene and complaint which applicant attempted to adopt by reference were too significant to allow waiver of Rule 24(c) procedural requirements).

(n5)Footnote 4. *White v. Texas Am. Bank/Galleria, N.A., 958 F.2d 80, 82-84 (5th Cir. 1992)* .

(n6)Footnote 5. *Fed. R. Civ. P. 24(c).*

(n7)Footnote 6. *See Fed. R. Civ. P. 5(a)(1)(D)*; *Fed. R. Civ. P. 4.*

(n8)Footnote 7. *Beckman Indus., Inc. v. International Ins. Co., 966 F.2d 470, 474 (9th Cir. 1992)* , *cert. denied, 506 U.S. 868 (1992)* (failure to submit pleading was not ground for reversal of grant of permissive intervention because applicant's petition had described basis for intervention with sufficient specificity).

(n9)Footnote 8. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 595 (7th Cir. 1993)* (court did not abuse its discretion in denying motions to intervene that were not accompanied by pleadings, despite applicants' attempt to incorporate complaint by reference).

(n10)Footnote 1. *Beckham Indus., Inc. v. International Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992)* , *cert. denied, 506 U.S. 868 (1992)* (intervention requires independent jurisdictional grounds).

(n11)Footnote 2. *28 U.S.C. § 1367.*

(n12)Footnote 3. *See Somerset Pharms., Inc. v. Kimball, 49 F. Supp. 2d 1335, 1344 (M.D. Fla. 1999)* (refusing supplemental jurisdiction because instant case was not closely related to claim in question).

(n13)Footnote 4. *28 U.S.C. § 1367(a).*

(n14)Footnote 1. *Fed. R. Civ. P. 19.*

(n15)Footnote 2. *Hackner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir. 1941)* , *cert. denied, 313 U.S. 559 (1941)* .

(n16)Footnote 1. *Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)* .

(n17)Footnote 2. *See Security Ins. Co. v. Schipporeit, Inc., 69 F.3d 1377, 1381 (7th Cir. 1995)* .

(n18)Footnote 3. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994)* .

(n19)Footnote 4. *See 28 U.S.C. § 2403(b).*

(n20)Footnote 5. *United States v. Brooks, 164 F.R.D. 501, 507 (D. Or. 1995)* (court denied intervention to residuary beneficiary of estate that was sued by government to recover tax refunds paid erroneously but granted amicus participation to applicant).

(n21)Footnote 6. *See Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994)* .

(n22)Footnote 1. *28 U.S.C. § 1291.*

(n23)Footnote 2. *Rhode Island v. EPA, 378 F.3d 19, 26 (1st Cir. 2004)* (citing **Moore's Federal Practice**).

(n24)Footnote 3. *Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)* (grant of permissive intervention with conditions is not immediately appealable).

(n25)Footnote 4. San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1100 (9th Cir. 1999)* .

(n26)Footnote 5. *NAACP v. New York, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* .

(n27)Footnote 6. San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1100 (9th Cir. 1999)* ; *Edwards v. City of Houston, 78 F.3d 983, 999-1000 (5th Cir. 1996)* .

(n28)Footnote 7. *See, e.g., Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 (5th Cir. 1992)* ; *Grubbs v. Norris, 870*

F.2d 343, 345 (6th Cir. 1989) ; *Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992)* ; *League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997)* ; *DeJulius v. New Eng. Health Care Emples. Pension Fund, 429 F.3d 935, 942-943 (10th Cir. 2005)* ; *Walters v. City of Atlanta, 803 F.2d 1135, 1151 n.16 (11th Cir. 1986)* .

(n29)Footnote 8. *See, e.g., International Paper Co. v. Town of Jay, Me., 887 F.2d 338, 344 (1st Cir. 1989)* ; *American Lung Ass'n v. Reilly, 962 F.2d 258, 261 (2d Cir. 1992)* ; *Brody v. Spang, 957 F.2d 1108, 1115 (3d Cir. 1992)* ; *In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991)* .

(n30)Footnote 9. *Brody v. Spang, 957 F.2d 1108, 1115 (3d Cir. 1992)* .

(n31)Footnote 10. *Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998)* (when issues raised on appeal were pure questions of law, court applied de novo standard of review).

(n32)Footnote 11. *DeJulius v. New Eng. Health Care Emples. Pension Fund, 429 F.3d 935, 942-943 (10th Cir. 2005)* ; *Edwards v. City of Houston, 78 F.3d 983, 995, 1006 (5th Cir. 1996)* .

(n33)Footnote 12. San Jose Mercury News, Inc. v. United States Dist. Court-- *N. Dist., 187 F.3d 1096, 1100-1101 (9th Cir. 1999)* ; *cf. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 777 (3d Cir. 1994)* .

(n34)Footnote 13. *Minnesota Milk Producers Ass'n v. Glickman, 153 F.3d 632, 646 (8th Cir. 1998)* .

(n35)Footnote 14. *Ross v. Marshall, 426 F.3d 745, 754-755 (5th Cir. 2005)* (citing **Moore's Federal Practice**).

(n36)Footnote 15. *See Yniguez v. Arizona, 939 F.2d 727, 738 (9th Cir. 1991)* .

(n37)Footnote 16. *Edwards v. City of Houston, 78 F.3d 983, 993 (5th Cir. 1996)* (en banc).

(n38)Footnote 17. *United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-396, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* .

(n39)Footnote 17.1. *Acree v. Republic of Iraq, 370 F.3d 41, 50 (D.C. Cir. 2004)* ; *see Nextel Communs., Inc. v. Town of Hanson, 311 F. Supp. 2d 142, 153 (D. Mass. 2004)* (court should consider following factors in timeliness determination: (1) how long applicant for intervention knew or reasonably should have known that its interests were imperiled; (2) foreseeable prejudice to parties if intervention is allowed; (3) foreseeable prejudice to applicant if intervention is denied; and (4) any exceptional circumstances).

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART IV. INTERVENTION
B. PERMISSIVE INTERVENTION

2-14 Moore's Manual--Federal Practice and Procedure §§ 14.125through 14.139

[Reserved]

§§ 14.125[Reserved]

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART V. CROSS CLAIM

2-14 Moore's Manual--Federal Practice and Procedure § 14.140

§ 14.140 Nature of Cross Claimn*

A cross-claim is an affirmative claim for relief against a co-party. A cross claim may, but need not always, assert a right to indemnification or contribution by the first party against the other. n1 Cross-claims have thus been defined as any claims brought against a co-party to the current litigation. n2

A cross-claim is not a pleading but must be set forth in a pleading. For example, a cross claim is not a pleading such as the defendant's answer n3 and should not be filed as a pleading. Thus, when a document that was labeled simply "Cross-Claims" was filed independently of any other pleading, the court properly struck the document, and the signing attorney was subject to a Rule 11 reprimand. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 13.60 (Matthew Bender 3d ed.).

(n2)Footnote 1. *In re Oil Spill by Amoco Cadiz, 699 F.2d 909, 913 (7th Cir. 1983)* (owner of supertanker causing oil spill permitted to cross-claim against builder of ship for indemnification and contribution).

(n3)Footnote 2. *Federal Land Bank v. Cupples Bro., 116 F.R.D. 63, 65 (E.D. Ark. 1987)* (claim filed against adverse party rather than co-party is not cross-claim); *Earle M. Jorgenson Co. v. T.I.U.S., Ltd., 133 F.R.D. 472 (E.D. Pa. 1991)* (noting that "co-party" is not technically defined by the rules, court concluded that co-party is any party that is not "opposing party" on pleaded claim; therefore, third-party defendant was a co-party of non-impleading-defendant and cross-claim by non-impleading-defendant was proper).

(n4)Footnote 3. *Cf. Bernstein v. IDT Corp., 582 F. Supp. 1079, 1089 (D. Del. 1984)* .

(n5)Footnote 4. *Langer v. Monarch Life Ins. Co., 966 F.2d 786 (3d Cir. 1992)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
PART V. CROSS CLAIM

2-14 Moore's Manual--Federal Practice and Procedure § 14.141

§ 14.141 Requirements for Cross Claimsn*

[1] Same Transaction or Occurrence or Property as Underlying Claim

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the same transaction or occurrence that is the subject matter of the original action or of a counterclaim. n1 Similarly, a pleading may state as a cross-claim any claim by one party against a co-party relating to any property that is the subject matter of the original action. n2 When appropriate, a cross-claim may request declaratory relief if the requirements for pleading the existence of a "case or controversy" between the parties are otherwise met. n3

The analysis for determining whether a cross-claim arises out of the same transaction or occurrence is the same as that for determining whether a counterclaim is compulsory. n4 However, it must be noted that a cross-claim is a permissive claim, and if the pleader chooses not to raise a cross-claim in the original action it will not be barred in a subsequent independent action. n5 A co-party may raise as many cross-claims as it has against another co-party, provided that the transactional requirement of Rule 13(g) is satisfied. n6

[2] Cross Claim May Only be Made Against Co-Party

A party may plead a cross-claim only against co-parties. n1 The term "co-party" is not defined in the rules but several decisions describe a co-party as any party that is not an opposing party. n2 Co-parties have also been described as parties on the same side of the primary litigation. n3 For example, co-defendants are co-parties who are eligible to plead cross-claims against each other. For purposes of the compulsory counterclaim rule, it is important to note that courts have held that once a party brings a cross-claim against a co-party, the cross-claimant becomes an opposing party against whom the defending party must then assert any compulsory counterclaims. n4

A pleading may state as a cross-claim a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. Therefore, a cross-claim is not required to be mature at the time it is originally asserted. n5

Some courts have held that impleaded third-party defendants may be co-parties with the impleading defendant. In other words, courts are in disagreement as to whether co-defendants on different levels of an expanded litigation, such as an

original defendant and a third-party defendant, may plead cross-claims against each other. There are situations where, after a third-party defendant is properly impleaded, either the third-party plaintiff or the third-party defendant may decide to file cross-claims. Some courts permit cross-claims between original defendants and third-party defendants, n6 reasoning that the policy of the rules encouraging the disposition of related claims in a single action encourages the inclusion of such claims, which by definition relate to the same subject matter as the original action and any related counterclaims. n7 Other courts permit an original defendant to cross-claim against a third-party defendant only if the plaintiff impleaded the party or, when the third-party defendant was impleaded by a different existing co-defendant. n8 The principles of sovereign immunity apply to cross-claims against government entities; however, under some circumstances, the government may waive the immunity. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsPermissive Cross-ClaimsCivil ProcedurePleading & PracticePleadingsCross-ClaimsTransactional Requirement

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 13.70 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 13(g).*

(n3)Footnote 2. *Allstate Ins. Co. v. James, 779 F.2d 1536, 1539 (11th Cir. 1986)* (although court used "same transaction or occurrence" language, fact pattern also fell within "relating to any property that is subject matter of original action" basis for allowable cross-claims).

(n4)Footnote 3. *Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1286, 1290 (W.D. Wash. 1994)* (in action challenging legality of forest management plan, cross-claims were permitted for declaratory relief by federal government defendants against intervening timber industry defendants, as claims satisfied "actual controversy" requirement and arose out of occurrence that was subject matter of action).

(n5)Footnote 4. *Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1286, 1290 (W.D. Wash. 1994)* (in action challenging legality of forest management plan, cross-claims for declaratory relief by federal government defendants against intervening timber industry defendants arose out of same occurrence as subject matter of main claim which concerned federal management of forests containing endangered species habitat).

(n6)Footnote 5. *United States v. Confederate Acres Sanitary Sewage & Drainage Sys., Inc., 935 F.2d 796, 799 (6th Cir. 1991)* (potential cross-claims for *Fifth Amendment* taking were not presented by defendant, and court could not compel defendant to litigate such potential claims, because cross-claims are permissive).

(n7)Footnote 6. *Fed. R. Civ. P. 18(a).*

(n8)Footnote 1. *Fed. R. Civ. P. 13(g).*

(n9)Footnote 2. *Earle M. Jorgenson Co. v. T.I.U.S., Ltd., 133 F.R.D. 472 (E.D. Pa. 1991)* ; *Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A., 119 F.R.D. 693, 695 (S.D. Ga. 1988)* .

(n10)Footnote 3. *Federal Land Bank v. Cupples Bro., 116 F.R.D. 63, 65 (E.D. Ark. 1987)* .

(n11)Footnote 4. *Rainbow Management Group, Ltd. v. Atlantis Submarines Haw., L.P., 158 F.R.D. 656, 660 (D. Haw. 1994)* (citing **Moore's Federal Practice**).

(n12)Footnote 5. *Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 823 F. Supp. 1191, 1193 (E.D. Pa. 1993)* (cross-claim may be asserted against co-party who is or may be liable to cross-claimant).

(n13)Footnote 6. *See Fed. R. Civ. P. 14* (third-party practice).

(n14)Footnote 7. *See, e.g., Earle M. Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472, 474 (E.D. Pa. 1991)* .

(n15)Footnote 8. *International Paving Sys., Inc. v. Van-Tulco, Inc., 866 F. Supp. 682, 695 (E.D.N.Y. 1994)* .

(n16)Footnote 9. *See* United States v. 255. *21 Acres in Anne Arundel County, Md., 722 F. Supp. 235, 236 (D. Md. 1989)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.142

§ 14.142 Jurisdictional Issuesn*

[1] Basis of Subject Matter Jurisdiction

Under the supplemental jurisdiction statute, a court has jurisdiction over a cross-claim if it is so related to claims over which the court has original jurisdiction that they form part of the same case or controversy. As cross-claims by definition arise out of the same transaction or occurrence as the main claim, courts have consistently exercised supplemental jurisdiction over them. n1

Supplemental jurisdiction is not limited to federal question cases and may be invoked when the court's original basis of jurisdiction is diversity of citizenship. n2 The statute provides that the court will not have supplemental jurisdiction over claims by plaintiffs against certain third or joined parties if joinder "would be inconsistent with the jurisdictional requirements of § 1332. However, the text of the statute does not prohibit supplemental jurisdiction for claims of defendants asserting cross-claims. n3

Unless it falls within the supplemental jurisdiction of the court, a cross-claim in an action based on diversity jurisdiction must satisfy the jurisdictional amount. n4 However, if the cross-claim forms part of same case or controversy as the main claim, at least one circuit has held that under the supplemental jurisdiction statute the court in its discretion may exercise supplemental jurisdiction over a cross-claim not meeting the jurisdictional amount. n5

[2] Personal Jurisdiction

A court does not necessarily have personal jurisdiction over a cross-defendant, who may raise the same jurisdictional defenses against the cross-claimant as against the plaintiff. n1 Furthermore, some courts have found that jurisdictional defenses are not waived by filing permissive counterclaims or cross-claims. n2 If, however, a court has in personam jurisdiction over a defendant for purposes of the main claim, it will have jurisdiction for purposes of a cross-claim which arises out the same transaction or occurrence as the original action. n3

[3] Joinder of Additional Parties

Rule 13(h) permits the joinder of parties under Rules 19 or 20 required for the granting of complete relief in the

determination of a cross-claim, provided that jurisdiction of the parties can be obtained n1 and their joinder will not deprive the court of jurisdiction over the action. n2

It is important to distinguish when a party may be joined under the provisions of the rules governing joinder of additional parties and when a party may be brought in under the third-party practice rule. n3 In order to bring a third-party complaint, the requirements of the third-party practice rule, Rule 14, must be satisfied. Rule 13(h) does not apply to third-party claims. n4 Rule 13(h) should not be used as an end-run around Rule 14(a). The rule governing joinder of parties to cross-claims and counterclaims authorizes the court only to join additional persons in order to adjudicate a claim that is already before the court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedurePleading & PracticePleadingsCross-Claims

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 13.110 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1367(a)*; *Allstate Ins. Co. v. James, 779 F.2d 1536, 1539 (11th Cir. 1986)* (mortgagee's cross-claims seeking foreclosure against mortgagors defaulting on note arose out of same transaction or occurrence as insurer's declaratory judgment claims regarding fire insurance policy on property and were within ancillary [now supplemental] jurisdiction).

(n3)Footnote 2. *Cam-Ful Indus., Inc. v. Fidelity & Deposit Co., 922 F.2d 156, 160-161 (2d Cir. 1991)* (court had ancillary [now supplemental] jurisdiction to hear cross-claims between contractor and subcontractor for compensation for additional work done at request of contractor, for delays, and for liquidated damages, because cross-claims were logically related to main claim by subcontractor against surety on payment bond and satisfied test for common nucleus of operative facts); *cf. Shanaghan v. Cahill, 58 F.3d 106, 109-111 (4th Cir. 1995)* (supplemental jurisdiction under *28 U.S.C. § 1367* not limited to cases when original basis for jurisdiction was federal question).

(n4)Footnote 3. *28 U.S.C. § 1367(b).*

(n5)Footnote 4. *Kuhn v. Account Control Technology, Inc., 865 F. Supp. 1443, 1446 (D. Nev. 1994) .*

(n6)Footnote 5. *Shanaghan v. Cahill, 58 F.3d 106, 109-111 (4th Cir. 1995) .*

(n7)Footnote 1. *Chemco Int'l Leasing, Inc. v. Meridian Eng'g, Inc., 590 F. Supp. 539, 544 (S.D.N.Y. 1984) .*

(n8)Footnote 2. *Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984) , cert. denied, 471 U.S. 1066 (1985) .*

(n9)Footnote 3. *Chemco Int'l Leasing, Inc. v. Meridian Eng'g, Inc., 590 F. Supp. 539, 544 (S.D.N.Y. 1984)* (court had jurisdiction over cross-claim arising from same transaction as subject matter of original action when plaintiff was properly before court on main claim).

(n10)Footnote 1. *See* [2], *above.*

(n11)Footnote 2. *Fed. R. Civ. P. 13(h), 18, 19*; *Danner v. Himmelfarb, 858 F.2d 515, 521-524 (9th Cir. 1988) , cert. denied, 490 U.S. 1067 (1989)* (although court had jurisdiction to hear state law cross-claims, it did not abuse its

discretion in dismissing them after federal claims were resolved).

(n12)Footnote 3. *See Fed. R. Civ. P. 14.*

(n13)Footnote 4. For a complete discussion of third-party practice, see *§§ 14.50-14.59.*

(n14)Footnote 5. *Fed. R. Civ. P. 13(i); FDIC v. Bathgate, 27 F.3d 850, 873-874 (3d Cir. 1994)* .

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PART IV Parties
CHAPTER 14 MULTIPLE PARTY PRACTICE
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2-14 Moore's Manual--Federal Practice and Procedure § 14.143

§ 14.143 Pleading and Procedural Considerationsn*

The prudent attorney will ensure that all the following considerations have been made before filing a cross claim:

1. When the cross-claim is asserted in the pleading, the pleading must be served on a party or the party's attorney in accordance with the rules governing service. n1

2. Cross-claims for affirmative relief generally are subject to the operation of the applicable statutes of limitation. n2 However, if the main action is timely a claim for recoupment arising out of the same transaction or occurrence as the main claim and not seeking affirmative relief or relief different from that sought in the main claim relates back to the filing of the plaintiff's claim and is not time barred. n3 Statutes of limitation are considered substantive law and accordingly, in diversity actions or when the court has supplemental jurisdiction over a state-law claim, the state statute of limitation and related principles of tolling and relation back apply. n4

3. A court may enter a separate, final judgment on any claim at any time after making an express determination that there is no just reason for delay. n5 The power is discretionary and should be exercised in light of judicial administrative interests as well as the equities involved, giving weight to the historic federal policy against incremental appeals. n6 A cross-claim may survive a separate judgment on, or dismissal of, the main claim as long as the court retains jurisdiction over the claim. n7

4. A court may order cross-claims to be heard in a separate trial, in furtherance of judicial convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy. n8 The issue to be tried must be so distinct and separate from others that trial of it alone may be had without injustice. n9

5. A party may obtain an immediate appeal from a separate judgment on a cross-claim that was certified for appeal under the rules; other separate appeals from orders regarding cross-claims are generally interlocutory. n10

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice,* § 13.91 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 4*; *Fed. R. Civ. P. 5*.

(n3)Footnote 2. *Cf. Berger v. City of N. Miami, Fla., 820 F. Supp. 989, 992 (E.D. Va. 1993)* .

(n4)Footnote 3. *Berger v. City of N. Miami, Fla., 820 F. Supp. 989, 992 (E.D. Va. 1993)* .

(n5)Footnote 4. *Fluor Eng'rs & Constructors, Inc. v. Southern Pac. Transp. Co., 753 F.2d 444, 448 (5th Cir. 1985)* (Texas statute governing tolling of statute of limitation applied to pendent state-law cross-claim).

(n6)Footnote 5. *Fed. R. Civ. P. 54(b)*.

(n7)Footnote 6. *Fed. R. Civ. P. 13(i)*; *see Leon Tempelsman and Son v. TECC Corp., 107 F.R.D. 384, 385 (N.D. Tex. 1985)* (although Rule 13(i) allows court to separate claims for trial and judgment, ultimate purpose is conservation of judicial resources by joining all claims between parties in one law suit).

(n8)Footnote 7. *Molett v. Penrod Drilling Co., 919 F.2d 1000, 1004 (5th Cir. 1990)* (although supplemental claim must be dismissed if principal claims are dismissed for lack of jurisdiction, court may consider supplemental cross-claims after disposing of main claim within court's jurisdiction on diversity grounds).

(n9)Footnote 8. *Fed. R. Civ. P. 13(i)*; *Fed. R. Civ. P. 42(b)*.

(n10)Footnote 9. *Danner v. Himmelfarb, 858 F.2d 515, 522 (9th Cir. 1988) , cert. denied, 490 U.S. 1067 (1989)* (court severed cross-claims under federal securities law pursuant to Rule 42(b) for separate trial before trial of original foreclosure action).

(n11)Footnote 10. *Tenneco, Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375, 1378 (7th Cir. 1985)* (party may obtain immediate appeal from separate judgment of counterclaim or cross-claim certified under Rule 13(i) or Rule 54(b) but not from interlocutory housekeeping order governing timing of disposition of different aspects of dispute).

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART I. FUNCTIONS OF CLASS ACTION IN FEDERAL COURT

1-14A Moore's Manual--Federal Practice and Procedure § 14A.01

§ 14A.01 Purposes and Nature of Class Actionn*

[1] Fundamental Purpose Is to Allow Economical and Fair Presentation of Numerous Claims

A "class action" is a civil action which is brought by one or more representatives on behalf of all members of a "class" who are requesting relief as a class. n1

The primary purpose of a class action is to obviate the need for many similarly situated claimants or defending parties to file or maintain separate lawsuits when impractical to do so. n2 Thus, a class action is a procedural device used by the courts to efficiently join numerous parties from multiple potential suits into a single suit n3 when the parties' claims or defenses have identical or similar questions of law and fact that arise from the same set of facts. n4 The class action procedure is designed to provide an economical, efficient, and expeditious device to litigate multiple claims by proceeding with one lawsuit, rather than prosecuting multiple lawsuits to decide the same issues. n5 Another purpose of the class action mechanism is to advance the efficiency of multi-party litigation by providing a mechanism for litigation of a combination of relatively small claims that no individual plaintiff would have the incentive to bring alone. n6

From the perspective of the defendant, a class action prevents repetitious litigation n7 by requiring a single proceeding for the defendant to litigate the merits of the plaintiffs' claims. A single proceeding also protects the defendant from inconsistent judgments. n8 To ensure the fairness of the class action mechanism, the procedure is also designed to consider fairly and adequately the interests of absentee class members. n9

[2] Representative Aspect of Class Action

Rule 23 of the Federal Rules of Civil Procedure, which controls class action procedure, requires that a class action must be brought by one or more representatives on behalf of all of the members of a "class," n1 who are those persons encompassed by the court's description of the class. n2 Thus, a class action constitutes a procedural exception to the general rule that civil litigation must be conducted by and on behalf of the named parties only. n3 Class actions developed in equity as exceptions to the general rule to cover situations when the parties were extremely numerous and the court ascertained that it would be almost impossible to bring them all before the court and when the question before the court was of general interest and a few representatives could sue or defend on behalf of the whole. Therefore, in promulgating Rule 23, the court sought to draft in "functional" terms those recurrent practical patterns that called for

mass litigation through representative parties. n4

[3] Purpose of Class Action Rule Controls Its Interpretation

The federal courts have consistently held that the courts must construe and interpret the class action procedural rule to facilitate the various purposes of the rule, n1 including to promote judicial efficiency, to provide wronged persons with a remedy when individual litigation is economically unrealistic, and to protect the interests of absentee class members. The underlying objectives of Rule 23 also supply meaningful guidance for courts required to resolve disputes by applying the rule. n2 Furthermore, even though some courts have stated that Rule 23 should be given a liberal construction, and some a strict or narrow construction, n3 the current consensus is that if a court construes Rule 23 according to its purposes, it is not crucial how the construction is characterized. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* §§ 23.02, 23.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(a)*; *see Pate v. United States, 328 F. Supp. 2d 62, 70-71 (D.D.C. 2004)* ; *see also 28 U.S.C. § 1711(2).*

(n3)Footnote 2. *Cummings v. Connell, 2005 U.S. App. LEXIS 4954, at *17 (9th Cir. 2005)* .

(n4)Footnote 3. *Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir 2004)* ; *see Devlin v. Scardelletti, 536 U.S. 1, 11, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)*

(n5)Footnote 4. *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* .

(n6)Footnote 5. *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)* ; *In re Tri-State Crematory Litig., 215 F.R.D. 660, 691-692 (N.D. Ga. 2003)* .

(n7)Footnote 6. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n8)Footnote 7. *Bowlin v. Montanez, 2005 U.S. Dist. LEXIS 4258, at *10 (D. Neb. 2005)* .

(n9)Footnote 8. *United States Parole Comm. v. Geraghty, 445 U.S. 388, 402-403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

(n10)Footnote 9. *Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994)* (Rule 23 procedure ensures both that class action treatment is efficient and that it is fair to absentees under particular circumstances of each case).

(n11)Footnote 1. *Fed. R. Civ. P. 23(a)*; *see also 28 U.S.C. § 1711(2).*

(n12)Footnote 2. *See 28 U.S.C. § 1711(4).*

(n13)Footnote 3. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

(n14)Footnote 4. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 832-833, 119 S. Ct. 2295, 2308, 144 L. Ed. 2d 715 (1999)* .

(n15)Footnote 1. *In re Initial Pub. Offering Sec. Litig., 2004 U.S. Dist. LEXIS 20497, at *71 n.210 (S.D.N.Y. 2004)* , *vacated on other grounds*, *471 F.3d 24 (2d Cir. 2006)* (citing **Moore's Federal Practice**).

(n16)Footnote 2. *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)* ; *see also Fed. R. Civ. P. 1.*

(n17)Footnote 3. *Compare Fisher v. Va. Elec. & Power Co., 217 F.R.D. 201, 210-211 (E.D. Va. 2003) with Clayborne v. Omaha Pub. Power Dist., 211 F.R.D. 573, 580 (D. Neb. 2002)* .

(n18)Footnote 4. *In re Initial Pub. Offering Sec. Litig., 2004 U.S. Dist. LEXIS 20497, at *71 n.210 (S.D.N.Y. 2004) vacated on other grounds*, *471 F.3d 24 (2d Cir. 2006)* (citing **Moore's Federal Practice**).

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART I. FUNCTIONS OF CLASS ACTION IN FEDERAL COURT

1-14A Moore's Manual--Federal Practice and Procedure § 14A.02

§ 14A.02 Interaction of Class Action Procedural Rule With Federal Statutes and Federal Court Local Rulesn*

[1] Substantive Statute's Effect on Applicability of Federal Rules

[a] Certain Statutory Actions Not Controlled by Rule 23

Procedures for a class action are specifically governed by Rule 23. n1 Additionally, Rule 23 and all of the other Federal Rules of Civil Procedure generally apply in all civil actions, n2 including class actions. n3 However, the parties may not maintain a class action under Rule 23 when the rule is inconsistent with the substantive statute under which the action is brought, or if the substantive statute provides a different means for obtaining class or multiple party joint relief. n4 The following statutes are some examples of statutory actions that are not controlled by the provisions of Rule 23:

1. **Claims against the United States in the Court of Federal Claims.** The federal rules do not apply in actions against the United States in the Court of Federal Claims. n5 However, the Court of Federal Claims has adopted its own Rule 23 governing class actions. That Rule 23 is similar, but not identical to, *Rule 23 of the Federal Rules of Civil Procedure*. n6

2. **Fair Labor Standards Act.** The FLSA specifically provides that no person may be bound by or benefit from a judgment unless the person has filed a written consent to become a party, known as an opt-in consent. n7 Because Rule 23 binds absent parties who fall within the certified class unless they have opted out of the action, n8 Rule 23 conflicts with the FLSA and is, therefore, not applicable to class proceedings under the FLSA. n9

3. **Age Discrimination in Employment Act.** The enforcement provision of the ADEA specifies that the Act must be enforced in accordance with the procedures set forth in the Fair Labor Standards Act. n10 Therefore, the Rule 23 procedure for class formation is inapplicable to class actions under the ADEA. n11

4. **Equal Pay Act.** The Equal Pay Act is also governed by the Fair Labor Standards Act, and class actions under the Equal Pay Act must, therefore, be brought in accordance with § 16(b) of the Fair Labor Standards Act, rather than Rule 23. n12

5. **Habeas corpus proceedings.** The Federal Rules of Civil Procedure apply in habeas corpus proceedings only to the extent that the practice in such proceedings is not set forth in other statutes. n13 The Habeas Corpus Act contains no

mention of class actions. However, courts have used their authority under the All Writs Act to allow class actions to be maintained in habeas proceedings using a procedure analogous to Rule 23. Therefore, although Rule 23 technically does not apply to habeas proceedings, the requirements of the rule may provide guidelines for determining the circumstances under which class status is appropriate in habeas cases. n14

6. **Federal Arbitration Act.** The Supreme Court has declined to decide the specific issue of whether a class arbitration is a permissible procedure under the FAA. n15 However, the Seventh Circuit has held that courts may not order an arbitration to proceed as a class action, unless the arbitration agreement expressly provides for class arbitration because the FAA requires the courts to enforce the parties' arbitration agreement without judicial extension. n16

Even though Congress has provided that Rule 23 does not directly apply relative to the statutes listed above, in actions based on those statutes courts may refer to Rule 23 for guidance in interpreting the requirements of the alternative procedure that actually does apply, when the alternate procedure is analogous to Rule 23. n17

[b] Statutes That Vary Use of Rule 23 Class Action Procedure

Congress has made Rule 23 applicable to some statutes on a limited basis. The following substantive statutes are examples of statutes that contain limitations on the availability of class actions pursuant to Rule 23:

1. **Magnuson-Moss Warranty Act.** Rule 23 class action procedures are applicable to actions under the Magnuson-Moss Warranty Act, but the following jurisdictional requirements must be met under the Act in addition to the requirements of Rule 23: n18 (1) the amount of any individual claim must be at least $25; (2) the aggregated value of all claims in the suit must be least $50,000; and (3) there must be at least 100 named class representatives. The purpose of these additional jurisdictional limitations is to prevent trivial disputes from being brought as class actions in federal court. n19

2. **Truth in Lending Act.** The TILA expressly provides for the use of the class action procedure, and the requirements of Rule 23 generally apply to TILA cases. n20 However, recoveries in TILA class actions are limited to the lesser of $500,000 or 1 percent of the creditor's net worth. n21 The Act also provides that the court, in determining the amount to award in a class action, should consider the following factors: (1) the amount of any actual damages incurred by the claimant; (2) the frequency and persistence of failures of compliance by the creditor; (3) the resources of the creditor; (4) the number of persons adversely affected; and (5) the extent to which the creditor's failure to comply with the Act was intentional. n22

3. **Private Securities Litigation Reform Act.** The courts generally require that class actions arising in a private securities litigation context n23 must comply with the Rule 23 provisions governing class actions. n24 Claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 may be brought as class actions. However, a number of special procedural rules apply to these actions, including provisions specifying the manner of appointment of the lead plaintiff. n25

[2] Effect of Local Rules

Local rules of court may impose additional procedural requirements for a plaintiff to initiate and maintain a class action. For example, a local rule may require that the plaintiff file a motion for class certification within 60 days of the filing of the complaint. n26 A local rule may also require the plaintiff to include in the complaint a proposed definition of the proposed class. n27 However, a local rule must not duplicate, and must be consistent with, the subject matter that is covered by a federal rule; in other words, a class action local rule is invalid to the extent it conflicts with a Federal Rule of Civil Procedure. n28

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewGovernmentsFederal GovernmentClaims By & AgainstLabor & Employment LawWage & Hour LawsRemediesClass Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* §§ 23.04, 23.62 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23.*

(n3)Footnote 2. *Fed. R. Civ. P. 1.*

(n4)Footnote 3. *See Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 228* (court noted that class action must meet requirements of all Federal Rules of Civil Procedure and Due Process Clause of Constitution).

(n5)Footnote 4. *LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975)* .

(n6)Footnote 5. *See 28 U.S.C. § 2503.*

(n7)Footnote 6. *See* Ct. Fed. Cl. R. 23.

(n8)Footnote 7. *29 U.S.C. § 216(b).*

(n9)Footnote 8. *See Fed. R. Civ. P. 23(c)(2)(B).*

(n10)Footnote 9. *De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 306 (3d Cir. 2003)* .

(n11)Footnote 10. *See 29 U.S.C. § 626(b).*

(n12)Footnote 11. *Thiessen v. GE Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)* .

(n13)Footnote 12. *Ameritech Benefit Plan Comm. v. Commun. Workers of Am., 220 F.3d 814, 820 (7th Cir. 2000)* , *cert. denied, 531 U.S. 1127 (2001)* .

(n14)Footnote 13. *Fed. R. Civ. P. 81(a)(2).*

(n15)Footnote 14. *Ali v. Ashcroft, 346 F.3d 873, 890-891 (9th Cir. 2003)* , *rev'd on other grounds, 421 F.3d 795 (9th Cir 2005)* .

(n16)Footnote 15. *Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 449-450, 454, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)* .

(n17)Footnote 16. *Champ v. Siegel Trading Co, 55 F.3d 269, 276-277 (7th Cir. 1995)* .

(n18)Footnote 17. *Sperling v. Hoffman-La Roche, Inc., 145 F.R.D. 357, 359 (D.N.J. 1992)* .

(n19)Footnote 18. *15 U.S.C. § 2310(d)*; *see Churchill Vill., L.L.C. v. G, 361 F.3d 566, 574 n.5 (9th Cir. 2004)* .

(n20)Footnote 19. *Walsh v. Ford Motor Co., 807 F.2d 1000, 1008 (D.C. Cir. 1986)* .

(n21)Footnote 20. *Fabricant v. Sears Roebuck & Co., 202 F.R.D. 310, 316-317 (S.D. Fla. 2001)* ; *see 15 U.S.C. § 1640.*

(n22)Footnote 21. *15 U.S.C. § 1640(a)(2).*

(n23)Footnote 22. *15 U.S.C. § 1640(a)*; *see Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 400-401 n.6 (6th Cir. 1980)* .

(n24)Footnote 23. *See 15 U.S.C. §§ 77z-1.*

(n25)Footnote 24. *In re Rent-Way Sec. Litig., 218 F.R.D. 101, 105, 112 (W.D. Pa. 2003)* .

(n26)Footnote 25. *In re Oxford Health Plans Sec. Litig., 182 F.R.D. 42, 45 (S.D.N.Y. 1998)* ; *see* 5 *Moore's Federal Practice, § 23.190 et seq.* (Matthew Bender 3d ed.).

(n27)Footnote 26. *Davis v. Buffalo Psychiatric Center, 613 F. Supp. 462, 464 (W.D.N.Y. 1985)* .

(n28)Footnote 27. *Commander Properties Corp. v. Beech Aircraft Corp., 164 F.R.D. 529, 534 (D. Kan. 1995)* .

(n29)Footnote 28. *See Fed. R. Civ. P. 83(a)(1).*

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART I. FUNCTIONS OF CLASS ACTION IN FEDERAL COURT

1-14A Moore's Manual--Federal Practice and Procedure § 14A.03

§ 14A.03 District Court Has Discretion Regarding Class Action Determinationsn*

The trial court has considerable discretion to determine whether the parties may maintain a suit as a class action, n1 and the procedures the court will use. n2 This discretion generally means that an appellate court will reverse a district court's decision regarding class action procedures only if the district court has abused its discretion, n3 the same standard applicable to decisions regarding all other joinder devices. The district court's discretion is not absolute, however, and must be exercised only after consideration of all of the requisite factors under the class action rule. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Shook v. El Paso County, 386 F.3d 963, 973 (10th Cir. 2004)* ; *see Fed. R. Civ. P. 23(c)(1)*; *see also § 23.30.*

(n3)Footnote 2. *In re BankAmerica Corp. Secs. Litig. v. McColl, 350 F.3d 747, 751-752 (8th Cir. 2003)* ; *see Fed. R. Civ. P. 23(d).*

(n4)Footnote 3. *See In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 296 (3d Cir. 2005)* .

(n5)Footnote 4. *Williams v. Chartwell Fin. Servs., 204 F.3d 748, 759 (7th Cir. 2000)* .

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PART IV Parties
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[Reserved]

§§ 14A.04[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART II. JURISDICTIONAL ISSUES RELATED TO CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.10

§ 14A.10 Plaintiffs in Class Action Must Establish Federal Court Jurisdictionn*

The Federal Rules of Civil Procedure may not either extend or limit the jurisdiction of the district courts. n1 Consequently, Rule 23 does not automatically provide subject matter jurisdiction when the requirements for a class action are met; n2 thus, subject matter jurisdiction must be based on some grounds other than Rule 23, n3 including at least one of the following typical bases for subject matter jurisdiction:

- Federal question jurisdiction; n4

- Jurisdiction under the Class Action Fairness Act of 2005. n5 This Act has broadened the scope of class action subject matter jurisdiction in federal courts by specifying special subject matter jurisdiction parameters for most interstate class actions; n6 or

- Traditional diversity jurisdiction. n7

In addition to subject matter jurisdiction, the plaintiffs must meet the other jurisdictional requirements to file suit in federal court, including standing. n8 This means that an actual "case or controversy" must exist between the named plaintiff and the defendants. n9 Furthermore, if the named plaintiff's claims become moot before certification, so that standing is lacking, the dismissal of both the individual and class claims may be required. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* §§ 23.63, 23.64 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 82.*

(n3)Footnote 2. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612-613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n4)Footnote 3. *Olden v. Lafarge Corp., 383 F.3d 495, 498-499 (6th Cir. 2004)* (existence of subject matter jurisdiction is prerequisite to class certification); *see* Ch. 5, *Original Jurisdiction Over the Subject Matter.*

(n5)Footnote 4. *See § 14A.11.*

(n6)Footnote 5. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., ___ U.S. ___, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 330 n.3 (2010)* .

(n7)Footnote 6. *See § 14A.12.*

(n8)Footnote 7. *See § 14A.13.*

(n9)Footnote 8. *Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003)* (if named plaintiffs purporting to represent class do not establish requisite of case or controversy with defendants, they may not seek relief on their own behalf nor on behalf of any other member of class).

(n10)Footnote 9. *Barr v. Matria Healthcare, Inc., 324 F. Supp. 2d 1369, 1375 (N.D. Ga. 2004)* .

(n11)Footnote 10. *See § 14A.14.*

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART II. JURISDICTIONAL ISSUES RELATED TO CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.11

§ 14A.11 Class Action Based on Federal Question Jurisdictionn*

A plaintiff may bring a class action in federal district court when a federal question is in controversy. n1 A "federal question" is any claim that involves the federal Constitution, statute, or common law. There is no amount in controversy requirement for federal question jurisdiction. n2 The presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal question jurisdiction exists only when the plaintiff's own cause of action is based on federal law, and only when the plaintiff's well-pleaded complaint raises issues of federal law. n3 It is important to note that federal question jurisdiction must be based on a claim which asserts violation of a federal substantive right, rather than mere use of a federal procedural mechanism such, as the Federal Arbitration Act. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.63 (Matthew Bender 3d ed.)

(n2)Footnote 1. *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 292 n.4 (3d Cir. 2004)* .

(n3)Footnote 2. *Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* (Congress amended Section 1331 in 1980 to eliminate former amount in controversy threshold).

(n4)Footnote 3. *Marcus v. AT&T Corp., 138 F.3d 46, 52 (2d Cir. 1998)* .

(n5)Footnote 4. *See U.S. Bank Nat'l Ass'n ND v. Strand, 243 F. Supp. 2d 1139, 1142-1143 (D. Ore. 2002)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART II. JURISDICTIONAL ISSUES RELATED TO CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.12

§ 14A.12 Interstate Class Action Jurisdiction Under Class Action Fairness Actn*

[1] Function and Purpose of Act

[a] Act Expands Federal Court Subject Matter Jurisdiction for Many Interstate Class Actions

The Class Action Fairness Act of 2005 (CAFA) n1 has considerably expanded the availability of diversity jurisdiction for interstate class actions. n2 Rather than requiring complete diversity between the parties, n3 CAFA allows federal district courts to exercise subject matter jurisdiction over class actions based on mere minimal diversity. n4 Additionally, CAFA allows the claims of all class members to be aggregated in measuring whether the required amount in controversy has been met, while at the same time raising the amount in controversy needed for a district court to exercise subject matter jurisdiction over a class action based on limited diversity. n5 Congress has enacted these provisions under CAFA to make it easier for plaintiffs to initiate large, interstate class actions of national importance through the process of diversity jurisdiction in federal court, and to make it easy for defendants to remove such class actions to federal court. n6 It is important to recognize that even if the party seeking subject matter jurisdiction cannot meet the minimum amount in controversy under CAFA the party may still be able to establish federal jurisdiction based on federal question jurisdiction n7 or traditional diversity jurisdiction standards. n8

[b] Jurisdictional Purposes of Class Action Fairness Act

Congress enacted the Class Action Fairness Act after making findings of abuses of the class action procedure that have adversely affected interstate commerce. n9 Some of these abuses include: n10

- Keeping cases of national importance out of federal courts; n11
- Acting in ways that demonstrate bias against out-of-state defendants; n12 and
- Making judgments that impose the state-court view of the law on other states and bind the rights of the residents of those other states. n13

Because of these findings, Congress enacted CAFA with the stated purpose to restore the intent of the framers of the

federal Constitution by providing that, under diversity jurisdiction, the federal courts may hear any interstate class action that is of national importance. Therefore, the Act expands federal court jurisdiction for most interstate class actions. CAFA amended the concept of diversity jurisdiction for class actions to require only minimal diversity, n14 and liberalized requirements for removing class actions to federal courts. n15

[c] Act Provides for Easier Removal of Interstate Class Actions From State Court

In addition to expanding original jurisdiction, CAFA also makes it easier for a defendant to remove an interstate class action from state court to federal court. n16 There are two aspects of the expansion of removal jurisdiction of class actions. First, the Act makes it easier to establish diversity of citizenship subject matter jurisdiction over class actions, which is necessary for removal jurisdiction. n17 Second, the Act has made several modifications to the removal procedures themselves that apply particularly to class actions. n18 For a detailed discussion of the grounds and procedure for removal of an interstate class action under the CAFA, see Ch. 8, *Removal from State Courts*.

[2] Applicability of Act

[a] Act Applies Only to Class Actions and Mass Actions

The provisions of CAFA apply to "class actions," which are: any civil actions filed under federal Rule 23 n1 or any civil actions that are removed to a district court of the United States that were originally filed under a state statute or rule of judicial procedure that authorizes an action to be brought by one or more representative persons as a class action. n2

The jurisdictional provisions of CAFA also apply to "mass actions," n3 which are civil actions other than class actions in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. n4 Thus, a federal district court has subject matter jurisdiction to entertain a "mass action" provided that at least four requirements are met: (1) an amount in controversy requirement of an aggregate of $5,000,000 in claims; (2) a diversity requirement of minimal diversity and a $75,000 claim by at least one plaintiff; (3) a numerosity requirement that the action involve the monetary claims of 100 or more plaintiffs; and (4) a commonality requirement that the plaintiffs' claims involve common questions of law or fact. n5 A mass action does not include any of the following: n5.1

- Any civil action in which all the claims in the action arise from an event or occurrence in the state in which the action was filed and that allegedly resulted in injuries in that state or in states contiguous to that state;

- Any civil action in which all of the claims are joined on motion of a defendant;

- Any civil action in which all of the claims in the action are asserted on behalf of the general public, and not on behalf of individual claimants or members of a purported class, pursuant to a state statute specifically authorizing this type of action; or

- Any civil action in which the claims have been consolidated or coordinated solely for pretrial proceedings.

A federal district court may exercise subject matter jurisdiction over a mass action based on the minimal diversity of citizenship that is sufficient for class actions. n6 However, the court has jurisdiction over a case as mass action only if at least one of the plaintiffs alleges an amount in controversy that satisfies the congressional requirement for diversity jurisdiction provided in Section 1332(a), which is currently an amount more than $75,000. n7

[b] Act Applies Only to Civil Class Actions Filed After Effective Date

CAFA applies only to civil class actions commenced on or after the date of enactment of CAFA, n8 which was February 18, 2005. It has been held that the term "commenced" means the initial filing of an action in either a state or federal court. Consequently, if an action is filed in a state court prior to February 18, 2005, the provisions of CAFA do not apply, even if the action is refiled or removed to federal court after that date. n9

[c] Minimal Diversity Requirement

Rather than requiring complete diversity between the parties, which means that each plaintiff must have a different citizenship from each defendant, n10 CAFA allows federal district courts to exercise subject matter jurisdiction over class actions based on minimal diversity. This means that federal courts have subject matter jurisdiction over class actions in which at least one plaintiff class member is diverse in citizenship from at least one defendant, n11 and where the amount in controversy exceeds $5,000,000. n12

The federal court also has diversity jurisdiction in cases meeting the $5 million minimum amount in two situations involving foreign parties:

- When any member of a class of plaintiffs is a foreign state, or a citizen or subject of a foreign state, and any defendant is a citizen of a state; n13 or

- When any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. n14

Under CAFA, the court determines the "citizenship" of an individual or an entity in the same manner as in other diversity situations n15 However, CAFA provides that an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and also the state in which it is organized. n16 This is in contrast to the ordinary rule which provides that an unincorporated association has the citizenship of each of its members. n17

For purposes of CAFA, the citizenship of the members of a proposed plaintiff class is determined as of the date of filing of the complaint or amended complaint. However, if the claim set forth in the initial pleading is not subject to federal jurisdiction, citizenship is determined as of the date of service by the plaintiffs of an amended pleading, motion, or other paper purporting to establish the existence of federal jurisdiction. n18

[d] Amount in Controversy Requirements

A federal district court has class action subject matter jurisdiction pursuant to CAFA only if the claims in controversy exceed the sum or value of $5,000,000, exclusive of interests and costs n19 and provided that the minimal diversity requirements of the Act are met. n20 In its determination of the $5,000,000 amount in controversy for purposes of CAFA, the claims of all class members must be aggregated. n21 However, when the CAFA action is a "mass action," at least one of the plaintiffs must allege an amount in controversy that exceeds $75,000. n22 These CAFA provisions are significantly less restrictive than the traditional diversity amount in controversy requirement, which provides that either every class member must have a claim worth more than $75,000 or at least one named class member must have an individual claim worth more than $75,000 and the claims of every other class member must satisfy the requirements for supplemental jurisdiction. n23 An action that does not meet the $5,000,000 threshold may not be brought in, or removed to, federal court under the provisions of CAFA. Nevertheless, the action may meet the requirements of federal question jurisdiction n24 or traditional complete diversity jurisdiction. n25

[e] District Court Must Decline Jurisdiction Under Act if Class Action Is Primarily Localized

Even if a party establishes minimal diversity of citizenship and minimum amount in controversy, which gives the court jurisdiction under CAFA, n26 the court must decline jurisdiction if two-thirds or more of the members of all proposed

plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed.

This provision is referred to as "home-state controversy" exception to CAFA. n27 Similarly, under the "local controversy" exception to CAFA, the court also must decline jurisdiction if all of the following are true: n28

- More than two-thirds of the members of all proposed plaintiff classes, in the aggregate, are citizens of the state in which the action was originally filed; and

- There is at least one defendant who is a citizen of the state in which the action was originally filed who is also a defendant from whom significant relief is sought by members of the plaintiff class or classes, and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class or classes; and

- The members of the plaintiff class or classes incurred principal injuries resulting from the alleged conduct, or any related conduct, of each defendant in the state in which the action was originally filed; and

- During the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

[f] District Court Has Discretion to Decline Jurisdiction Under Act if Class Action Is Slightly Localized

Even if a party establishes minimal diversity of citizenship and minimum amount in controversy, which gives the court jurisdiction under CAFA, n29 the district court has discretion to decline to exercise jurisdiction if more than one-third and less than two-thirds of the plaintiff class members and the primary defendants are citizens of the state of the filing of the action. n30 Thus, the only situation in which the court must accept jurisdiction under CAFA occurs when one-third or fewer of the class members are citizens of the state of filing, or the defendants have no connection to the state of filing. n31

In the exercise of its discretion whether to decline jurisdiction, n32 the court should consider the totality of the circumstances and the interests of justice, and in particular should analyze the following matters: n33

- Whether the claims asserted relate to matters of national or interstate interest;

- Whether the claims asserted are governed in the action by laws of the state in which the action was originally filed, or by the laws of other states;

- Whether the class action has been pleaded in a manner that attempts to avoid federal jurisdiction;

- Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

- Whether, in the aggregate, the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and

- Whether during the 3-year period preceding the filing of that class action one or more other class

actions asserting the same or similar claims on behalf of the same or other persons have been filed.

If the requirements for the grant of discretion are met, and if a balance of the factors favors a state court proceeding rather than a federal one, the court may use its discretion to decline to exercise subject matter jurisdiction under CAFA. Note, however, that the federal court may dismiss the action or, if the action was removed to federal court from state court, remand the action to state court, only if there is no other basis for federal court jurisdiction, such as federal question jurisdiction or traditional diversity of citizenship jurisdiction. n34

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass Action Fairness ActCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 15 Moore's Federal Practice, § 102.26 (Matthew Bender 3d ed.).

(n2)Footnote 1. Pub. L. No. 109-2, 119 Stat. 4 (2005); *see 28 U.S.C. § 1332(d)*.

(n3)Footnote 2. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., ___ U.S. ___, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 330 (2010)* .

(n4)Footnote 3. *See § 14A.13*.

(n5)Footnote 4. *See* [3], *below*.

(n6)Footnote 5. *See* [4], *below*.

(n7)Footnote 6. *Tanoh v. Dow Chem. Co., 561 F.3d 945, 952 (9th Cir. 2009)* .

(n8)Footnote 7. *See § 14A.11*.

(n9)Footnote 8. *See § 14A.13*.

(n10)Footnote 9. Pub. L. No. 109-2, § 2(a)(1)(B); 119 Stat. 4 (2005).

(n11)Footnote 10. *Johnson v. Advance Am., 549 F.3d 932, 935 (4th Cir. 2008)* .

(n12)Footnote 11. Pub. L. No. 109-2, § 2(a)(4)(A); 119 Stat. 4 (2005).

(n13)Footnote 12. Pub. L. No. 109-2, § 2(a)(4)(B); 119 Stat. 4 (2005).

(n14)Footnote 13. Pub. L. No. 109-2, § 2(a)(4)(C); 119 Stat. 4 (2005).

(n15)Footnote 14. *Johnson v. Advance Am., 549 F.3d 932, 935 (4th Cir. 2008)* .

(n16)Footnote 15. *Hart v. FedEx Ground Package System, Inc., 457 F.3d 675, 681 (7th Cir. 2006)* (strong preference of Congress that interstate class actions should be heard in federal court if properly removed by any defendant).

(n17)Footnote 16. Pub. L. No. 109-2, § 5; 119 Stat. 4 (2005); *see 28 U.S.C. § 1453*; *Hart v. FedEx Ground Package System, Inc., 457 F.3d 675, 681 (7th Cir. 2006)* .

(n18)Footnote 17. Pub. L. No. 109-2, § 4; 119 Stat. 4 (2005); *see 28 U.S.C. § 1332(d)(2)*; *United Steel v. Shell Oil Co., 602 F.3d 1087, 1090-1091 (9th Cir. 2010)* (CAFA covers more than traditional class actions by providing for removal of mass actions).

(n19)Footnote 18. Pub. L. No. 109-2, § 5; 119 Stat. 4 (2005); *see 28 U.S.C. § 1453*; *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23, 26 (2d Cir. 2010)* .

(n20)Footnote 1. *See Fed. R. Civ. P. 23.*

(n21)Footnote 2. *28 U.S.C. § 1711(2)*; *see 28 U.S.C. § 1332(d)(1)(B).*

(n22)Footnote 3. *28 U.S.C. § 1332(d)(11)(A).*

(n23)Footnote 4. *28 U.S.C. § 1332(d)(11)(B)(i).*

(n24)Footnote 5. *28 U.S.C. § 1332(d)(11)*; *see Tanoh v. Dow Chem. Co., 561 F.3d 945, 952-953 (9th Cir. 2009)* .

(n25)Footnote 5.1. *28 U.S.C. § 1332(d)(11)(B)(ii).*

(n26)Footnote 6. *28 U.S.C. § 1332(d)(11)(A)*; *see 28 U.S.C. § 1332(d)(2)*; *see also* [c], *below.*

(n27)Footnote 7. *28 U.S.C. § 1332(d)(11)(B)(i)*; *see 28 U.S.C. § 1332(a)*; *see also Tanoh v. Dow Chem. Co., 561 F.3d 945, 952-953 (9th Cir. 2009)* .

(n28)Footnote 8. Pub. L. No. 109-2, § 9; 119 Stat. 4 (2005).

(n29)Footnote 9. *Springman v. AIG Mktg., 523 F.3d 685, 687 (7th Cir. 2008)* (noting that events that take place after filing of action may allow removal, such as amendment to pleadings).

(n30)Footnote 10. *See § 14A.13.*

(n31)Footnote 11. *28 U.S.C. § 1332(d)(2)(A)*; *see Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 700 (4th Cir. 2010)* .

(n32)Footnote 12. *28 U.S.C. § 1332(d)(2)*; *see* [d], *below.*

(n33)Footnote 13. *28 U.S.C. § 1332(d)(2)(B).*

(n34)Footnote 14. *28 U.S.C. § 1332(d)(2)(C).*

(n35)Footnote 15. *See* Ch. 5, *Original Jurisdiction over the Subject Matter.*

(n36)Footnote 16. *28 U.S.C. § 1332(d)(10)*; *see Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 704 (4th Cir. 2010)* (for diversity purposes under CAFA, "limited liability company" is included in term "unincorporated association").

(n37)Footnote 17. *Carden v. Arkoma Assoc., 494 U.S. 185, 195-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* .

(n38)Footnote 18. *28 U.S.C. § 1332(d)(7).*

(n39)Footnote 19. *28 U.S.C. § 1332(d)(2).*

(n40)Footnote 20. *28 U.S.C. § 1332(d)(2)(A)*; *see* [c], *above.*

(n41)Footnote 21. *28 U.S.C. § 1332(d)(2)*; *see Moffitt v. Residential Funding Co., LLC, 604 F.3d 156, 158 (4th Cir. 2010)* .

(n42)Footnote 22. *28 U.S.C. § 1332(d)(11)(B)(i)*; *see Tanoh v. Dow Chem. Co., 561 F.3d 945, 952-953 (9th Cir. Cal. 2009)* .

(n43)Footnote 23. *See § 14A.13*.

(n44)Footnote 24. *See § 14A.11*.

(n45)Footnote 25. *See § 14A.13*.

(n46)Footnote 26. *See* [b] and [c], *above*.

(n47)Footnote 27. *Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1022 (9th Cir. 2007)* ; *28 U.S.C. § 1332(d)(4)(B)*.

(n48)Footnote 28. *Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1022 (9th Cir. 2007)* ; *28 U.S.C. § 1332(d)(4)(A)*.

(n49)Footnote 29. *See* [b] and [c], *above*.

(n50)Footnote 30. *28 U.S.C. § 1332(d)(3)*.

(n51)Footnote 31. *Preston v. Tenet Health Systems, 485 F.3d 804, 812 (5th Cir. 2007)* (Congress crafted these CAFA provisions to exclude only narrow category of truly localized controversies).

(n52)Footnote 32. *See Preston v. Tenet Health Systems, 485 F.3d 804, 811 (5th Cir. 2007)* ; *Lucker v. Bayside Cemetery, 262 F.R.D. 185, 188 (E.D.N.Y. 2009)* .

(n53)Footnote 33. *28 U.S.C. § 1332(d)(3)*.

(n54)Footnote 34. *See 28 U.S.C. § 1332(d)(3)* (court's discretion to decline jurisdiction is for jurisdiction provided Section 1332(d)(2), not section 1331 or 1332(a)).

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PART IV Parties
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1-14A Moore's Manual--Federal Practice and Procedure § 14A.13

§ 14A.13 Class Action Jurisdiction Based on Traditional Complete Diversityn*

[1] Citizenship of Parties Based on Named Plaintiffs

As in any other case, a class action may proceed in federal court only if a federal statute provides the court with subject matter jurisdiction. n1 Consequently, if a party cannot base jurisdiction on federal question jurisdiction, n2 or under the more liberal provisions of CAFA, n3 the party may, if possible, base jurisdiction on traditional diversity of citizenship jurisdiction. n4 Diversity jurisdiction requires complete diversity of citizenship between plaintiffs and defendants, which means that the citizenship of each plaintiff must be different from that of each defendant. In a class action suit, only the citizenship of the named parties is considered in determining whether diversity jurisdiction exists. n5 The party relying on traditional diversity jurisdiction bears the burden of proving complete diversity. n6

[2] Traditional Amount in Controversy Requirement for Class Action Claims

[a] Aggregation of Claims

Diversity jurisdiction is applicable to all civil actions, including class actions in which the amount in controversy exceeds the amount or value of $75,000. n1 The party relying on traditional diversity jurisdiction in a class action bears the burden of proving the jurisdictional amount in controversy. n2 Because one of the primary purposes of a class action is to enable litigation of a combination of relatively small claims that no individual plaintiff would have the incentive to bring alone, n3 the issue arises whether the plaintiffs' claims may be aggregated to meet the amount in controversy requirement. The general rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, each demand must be of the prescribed jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, their interests may collectively equal the jurisdictional amount. In this regard, the Supreme Court has held that the diversity jurisdiction statute, rather than Rule 23 or any other rule of procedure, strictly provides that separate and distinct claims may not be aggregated in calculating whether the plaintiffs satisfy the amount in controversy requirement, n4 unless they have a "common and undivided interest." n5

The courts have not clearly defined what constitutes a "common and undivided interest" (rather than a separate and distinct claim), sufficient to permit aggregation of many smaller claims to meet the requisite jurisdictional amount. Most

courts determine its existence from the purpose of the class action. In general, the phrase is used to describe circumstances in which the plaintiffs are attempting to rectify a wrong to all persons in the same situation and are asking for "broad relief" affecting the class as an undivided whole. Thus, a class has a common and undivided interest where only the class as a whole is entitled to the relief requested. n6 In another formulation of the term, a common and undivided interest exists if one plaintiff's failure to collect would increase the recovery of the each of the remaining plaintiffs. n7 Yet another way of expressing the same term is that the more likely a defendant's total liability does not depend on how the recovery of a claim is distributed among the class members, the more likely a court is to conclude that the class has a joint and common interest. n8

[b] Effect of Principle of Supplemental Jurisdiction

The Supreme Court has held that when the other elements of jurisdiction are present, and at least one named plaintiff in the action satisfies the amount in controversy requirement, n9 the supplemental jurisdiction statute n10 authorizes the court to exercise supplemental jurisdiction over the claims of other class members in a class action, even if those claims are for less than the requisite amount in controversy. n11 In its decision, the Supreme Court resolved an issue that had split the circuits: whether a federal court in a diversity action could exercise supplemental jurisdiction over additional plaintiffs whose claims did not satisfy the minimum amount in controversy. The Supreme Court found that even though Section 1367(b) precluded supplemental jurisdiction over claims of plaintiffs joined under the compulsory joinder Rule 19 or over intervenors under Rule 24, n12 nothing in the statute withheld supplemental jurisdiction over claims of plaintiffs certified as class members under Rule 23. n13

The supplemental jurisdiction statute provides that the district courts have supplemental jurisdiction over all claims so related to claims within the courts' original jurisdiction that the claims constitute part of the same case or controversy under Article III of the Constitution. The statute extends to claims involving the joinder or intervention of additional parties. Thus, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy. n14

In order for a federal court to invoke supplemental jurisdiction, it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere. However, provided there is complete diversity, when a well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court has original jurisdiction over that claim, and supplemental jurisdiction of all other claims that are part of the same controversy. n15

[c] Severance of Plaintiffs That Do Not Have Minimum Claim

If certain class members have separate and distinct claims and cannot satisfy the complete diversity requirement nor the requirements for supplemental jurisdiction, n16 the trial court need not dismiss the entire class action for lack of subject matter jurisdiction over those class members with jurisdictional deficiencies. n17 Such members may not participate in the action, but the court may simply sever the members' claims from the action, allowing the court to retain jurisdiction as a class action over the remaining members. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.63 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 1332(d)(4)*; *see § 14A.10*.

(n3)Footnote 2. *See § 14A.11*.

(n4)Footnote 3. *See § 14A.12*.

(n5)Footnote 4. *See 28 U.S.C. § 1332(a)*.

(n6)Footnote 5. *Payton v. County of Kane, 308 F.3d 673, 681 (7th Cir. 2002)* .

(n7)Footnote 6. *Allendale Mutual Ins. Co. v. Excess Ins. Co. Ltd., 62 F. Supp. 2d 1116, 1122 (S.D.N.Y. 1999)* .

(n8)Footnote 1. *28 U.S.C. § 1332(a)*.

(n9)Footnote 2. *Allendale Mutual Ins. Co. v. Excess Ins. Co. Ltd., 62 F. Supp. 2d 1116, 1122 (S.D.N.Y. 1999)* .

(n10)Footnote 3. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n11)Footnote 4. *Smith v. GTE Corp., 236 F.3d 1292, 1300-1303, 1309-1310 (11th Cir. 2001)* .

(n12)Footnote 5. *Snyder v. Harris, 394 U.S. 332, 336-337, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969)* .

(n13)Footnote 6. *Loizon v. SMH Societe Suisse de Microelectronics, 950 F. Supp. 250, 253 (N.D. Ill. 1996)* .

(n14)Footnote 7. *Eagle v. AT&T, 769 F.2d 541, 546-547 (9th Cir. 1985)* (citing **Moore's Federal Practice**).

(n15)Footnote 8. *Dollar v. General Motors Corp., 814 F. Supp. 538, 543 (E.D. Tex. 1993)* .

(n16)Footnote 9. *See 28 U.S.C. § 1332(d)*.

(n17)Footnote 10. *See 28 U.S.C. § 1367*.

(n18)Footnote 11. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *8 (2005)* .

(n19)Footnote 12. *28 U.S.C. § 1367(b)*.

(n20)Footnote 13. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *27 (2005)* .

(n21)Footnote 14. *28 U.S.C. § 1367(a)*; *see* Ch 5, *Original Jurisdiction over the Subject Matter*.

(n22)Footnote 15. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 2005 U.S. LEXIS 5015, at *24-25 (2005)* .

(n23)Footnote 16. *See* [b], *above*.

(n24)Footnote 17. *See Dawalt v. Purdue Pharma, L.P., 397 F.3d 392, 395 (6th Cir. 2005)* .

(n25)Footnote 18. *Riverside Transp. v. Bellsouth Telecommunications, 847 F. Supp. 453, 456-457 (M.D. La. 1994)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.14

§ 14A.14 Mootness Doctrine Applied in Class Actionsn*

A claim becomes moot if the claim was an actual and justiciable "case or controversy" at the time of its initiation but later ceased to exist because events occurred or interim relief was granted that completely and irrevocably eradicated the effects of the alleged wrong which gave rise to the claim. n1 Usually, if a party's claims become moot the court loses jurisdiction over the claims and must dismiss the action. n2 However, the effect of a moot claim on a class action depends on the time the claim becomes moot. Once a class has been certified, mooting of the class representatives' claims does not moot the entire action because the class acquires a legal status separate from the interest asserted by its named plaintiffs. Litigation may continue because the stake of other class members is attributed to the class representatives. On the other hand, when claims of the named plaintiffs become moot before class certification, dismissal of the entire action is required on the grounds of mootness. n3

There is an exception to the mootness rule for claims that are inherently transitory to the extent that a trial court could not have time to rule on a motion for class certification before the named plaintiffs' individual interests expire. In such circumstances, the court will allow the action to continue as a class action, even though it had not yet been certified because the later certification is considered to relate back to the time of filing the complaint. n4 Therefore, the case is considered to be certified before the individual claims become moot, and the action is saved from dismissal. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.63 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Paciello v. Unum Life Ins. Co. of Am., 188 F.R.D. 201, 204 (S.D.N.Y. 1999)* (claim is moot only if there is no reasonable expectation that alleged wrong which gave rise to claim will recur).

(n3)Footnote 2. *Maher v. Hyde, 272 F.3d 83, 87 (1st Cir. 2001)* .

(n4)Footnote 3. *Carroll v. United Compucred Collections, Inc., 399 F.3d 620, 625 (6th Cir. 2004)* .

(n5)Footnote 4. *Weiss v. Regal Collections, 385 F.3d 337, 346-347 (3d Cir. 2004)* .

(n6)Footnote 5. *County of Riverside v. McLaughlin, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)* .

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1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.15through 14A.19

[Reserved]

§§ 14A.15[Reserved]

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.20

§ 14A.20 Summary of Prerequisites to Class Actionn*

Rule 23 specifies the prerequisites that must be satisfied before a party may utilize the class action procedure in federal court. The first prerequisite is based on the nature of the class action itself: n1 one or more persons must be named as representatives, and the representatives must be members of a proposed class n2 that is capable of precise definition by an order of the court. n3 This requirement is discussed in *§ 14A.21*.

Rule 23(a) also specifies four explicit requirements for a party to maintain a class action: (1) numerosity of parties; n4 (2) commonality of legal and factual issues; n5 (3) typicality of claims and defenses of the class representatives; n6 and (4) adequacy of representation. n7

When a party proposes class action treatment, the proposed class must satisfy all four of these requirements before a court will consider it for certification. n8 Finally, before the court may grant certification, an action must qualify within one of the three categories of class actions that are specified in Rule 23(b). n9 These requirements are discussed in *§ 14A.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See § 14A.01*.

(n3)Footnote 2. *Fed. R. Civ. P. 23(a), 23(c)(1)(A)*; *see Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 260 (4th Cir. 2005)* .

(n4)Footnote 3. *Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007)* .

(n5)Footnote 4. *Fed. R. Civ. P. 23(a)(1)*; *see § 14A.22*.

(n6)Footnote 5. *Fed. R. Civ. P. 23(a)(2)*; *see § 14A.23*.

(n7)Footnote 6. *Fed. R. Civ. P. 23(a)(3)*; *see § 14A.24*.

(n8)Footnote 7. *Fed. R. Civ. P. 23(a)(4)*; *see § 14A.25*.

(n9)Footnote 8. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n10)Footnote 9. *Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 339 F.3d 1001, 1011-1012 (8th Cir. 2003)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.21

§ 14A.21 Named Representative Is Member of Defined Classn*

[1] Court Must Precisely Define Class

Before the district court may certify a class action, it must precisely define the class. n1 The class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class. n2 A class must be defined in such a way that the identities of the class members are ascertainable by reference to objective, rather than subjective, criteria. Consequently, a class may not be defined according to the plaintiffs' states of mind, such as those persons who believe or claim that they were discriminated against. Also, a party should not define a class in a way that a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class. For example, a class limited to those who were in fact discriminated against would not be adequately defined. Rather, the class should be defined according to actions taken by the parties or objective factual occurrences. n3 The definition of a class should not be so broad as to include individuals who are without standing to maintain the action on their own behalf. n4 Whether the definition of a class is sufficiently definite to permit ascertainment of the class members must be determined on the facts and circumstances of each case. n5

The requirement that a class must be precisely defined serves several purposes. The primary purpose is to enable the court to correctly determine whether the proposed class, as defined, satisfies the other requirements of Rule 23. n6 Consequently, courts usually analyze whether the class is adequately defined before making determinations of the other requirements for class certification. Other important purposes of a precise definition of the class are to identify which persons are entitled to notice, n7 which persons would be entitled to relief, and which persons will be bound by the judgment. n8 In other words, if a class definition is so vague that it is not readily identifiable, problems may arise regarding the propriety of the class action, the provision of notice, and the binding effect of a judgment. n9

[2] Definition Must Enable Identification of Class Members

To make a determination whether a class is defined with adequate precision, a court analyzes whether it is administratively feasible for the court to determine whether a particular individual is or is not a member of the class. n1 There must not only be a definite class, the class representative must be a member of that class, n2 that is, must have proper standing. In other words, the named representatives must allege and show that they personally have been injured,

not that injury has been suffered by other, unidentified members of the class to which they belong and that they assert to represent. n3 Because standing is the threshold issue in any suit, the court need not reach the class action certification if the named representatives lack standing. n4

The court need not actually identify every member of the class at the commencement of the action; however, the court must be capable of determining whether a particular person is a member of the class at that time. n5 Furthermore, a class may include future members, provided that the court can determine, at any given time, whether a particular individual is then a member of the class. n6 Thus, the particular members of the class may change over time provided that there is an administratively feasible method of identifying the class members at any particular time. n7

[3] Court May Modify Order of Definition

If the court determines that a class definition or description proposed by a party is not sufficiently precise, it need not necessarily deny class certification. n1 Rather, the court has discretion to grant certification of the class with a modification of the definition of the proposed class to provide the necessary precision for the class as certified. n2 In this regard, the court has the ultimate responsibility in its order certifying a class action to precisely define the class, in addition to defining the class claims, issues, or defenses. n3 Additionally, the court has discretion to modify its order defining the class at any time before final judgment, perhaps several times, in order to provide precision as circumstances warrant. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(b)(1)(B)*; *see Mike v. Safeco Ins. Co. of Am., 223 F.R.D. 50, 53 (D. Conn. 2005)* .

(n3)Footnote 2. *Mike v. Safeco Ins. Co. of Am., 223 F.R.D. 50, 53 (D. Conn. 2005)* .

(n4)Footnote 3. *In re Chiang, 385 F.3d 256, 272 (3d Cir. 2004)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Murray v. Auslander, 244 F.3d 807, 810-811 (11th Cir. 2001)* .

(n6)Footnote 5. *Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 617-619 (6th Cir. 2007)* .

(n7)Footnote 6. *Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981)* .

(n8)Footnote 7. *Fed. R. Civ. P. 23(c)(2)(A), 23(c)(2)(A).*

(n9)Footnote 8. *Commander Properties Corp. v. Beech Aircraft Corp., 164 F.R.D. 529, 534 (D. Kan. 1995)* .

(n10)Footnote 9. *Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999)* .

(n11)Footnote 1. *Mike v. Safeco Ins. Co. of Am., 223 F.R.D. 50, 53 (D. Conn. 2005)* .

(n12)Footnote 2. *Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 260 (4th Cir. 2005)* .

(n13)Footnote 3. *Gratz v. Bollinger, 539 U.S. 244, 289, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)* .

(n14)Footnote 4. *Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003)* .

(n15)Footnote 5. *In re Tetracycline Cases, 107 F.R.D. 719, 728 (D. Mo. 1985)* .

(n16)Footnote 6. *Ashe v. Board of Elections, 124 F.R.D. 45, 47 (E.D.N.Y. 1989)* .

(n17)Footnote 7. *Johnson v. Brelje, 482 F. Supp. 121, 123 (N.D. Ill. 1979)* .

(n18)Footnote 1. *Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 618-619 (6th Cir. 2007)* .

(n19)Footnote 2. *Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.), 365 F.3d 408, 414 (5th Cir. 2004)* ; *Streeter v. Sheriff of Cook County, 256 F.R.D. 609, 615 (N.D. Ill. 2009)* .

(n20)Footnote 3. *Fed. R. Civ. P. 23(c)(1)(B).*

(n21)Footnote 4. *Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1133 n.16 (11th Cir. 2004)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.22

§ 14A.22 Impracticability of Joinder of All Members Because of Numerosityn*

[1] Statement of Prerequisite of Impracticability Due to Numerosity

A person or persons may maintain a class action only if the number of persons that fall within the class definition are so numerous that joinder of all members is impracticable. n1 The district court must conduct a numerosity analysis, and in doing so starts with the most important factor, the sheer number of members that makes up the class. n2 However, there is no absolute numerical test for determining impracticability of joinder. The ultimate determination the court must make is whether joinder of all members is practicable, considering all relevant factors in addition to the sheer numbers. n3 Courts have emphasized that joinder need not be impossible but, rather, that joinder must be very difficult or inconvenient. n4 The requirement ensures that a class action will proceed only if there is an actual necessity for the class action procedure. n5

[2] Factors Considered in Determination of Impracticability

The most important factor in the determination of impracticability to support a class is the number of persons in the proposed class. There is no strict or absolute test to determine numerosity to determine impracticability on the basis of the number of members alone. As a basic guide, however, courts have typically referred to the following numbers: less than 21 is not impracticable, more than 40 is impracticable; any numbers falling in between is open to the discretion of the court. n1

The court must consider the number of proposed members in conjunction with all other relevant factors of impracticability that are applicable to the proposed class, such as the following: n2

- The probability of inclusion of future members in the class definition and the ability to identify and locate current and future class members. n3

- Whether joinder of all class members and their claims in one proceeding would be expensive, time-consuming, and logistically difficult. n4

- Whether geographic dispersion of class members makes joinder more difficult. n5

- The ability and motivation of class members to institute individual actions. n6

- The financial resources of class members. Courts consider the less resources potential members have, the greater the impracticability. n7

[3] Burden of Proof of Impracticability

The party requesting class certification has the burden of establishing commonality, as is the case with the other requirements of Rule 23(a). n1 The requesting party need not prove the precise number of class members to a certainty. However, to satisfy the impracticability aspect of Rule 23(a), the party must make some showing to enable the district court to make a supported factual finding that the class actually certified meets the numerosity requirement; a plaintiff must ordinarily present some evidence reasonably indicating the number of purported class members. n2 Therefore, the party seeking certification may not merely rely on conclusory allegations that joinder would be impracticable or on mere speculation that the class has a particular size. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.22 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(a)(1).*

(n3)Footnote 2. *See Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009)* .

(n4)Footnote 3. *See* [2], *below.*

(n5)Footnote 4. *In re Healthsouth Corp. Sec. Litig., 213 F.R.D. 447, 457 (N.D. Ala. 2003)* .

(n6)Footnote 5. *In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* .

(n7)Footnote 1. *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009)* (citing **Moore's Federal Practice**).

(n8)Footnote 2. *Novella v. Westchester County, 443 F. Supp. 2d 540, 546 (S.D.N.Y. 2006)* ; *Matyasovszky v. Hous. Auth. of Bridgeport, 226 F.R.D. 35, 40-41 (D. Conn. 2005)* .

(n9)Footnote 3. *Pederson v. Louisiana State Univ., 213 F.3d 858, 868 (5th Cir. 2000)* ; *Ali v. Ashcroft, 213 F.R.D. 390, 408-409 (W.D. Wash. 2003)* .

(n10)Footnote 4. *McMahon Books, Inc. v. Willow Grove Assocs., 108 F.R.D. 32, 35 (E.D. Pa. 1985)* .

(n11)Footnote 5. *Sanft v. Winnebago Indus., 214 F.R.D. 514, 521 (N.D. Iowa 2003)* .

(n12)Footnote 6. *Luyando v. Bowen, 124 F.R.D. 52, 55 (S.D.N.Y. 1989)* (if individual claims involve small amounts of damages, it is impractical for each person to sue individually).

(n13)Footnote 7. *Haymons v. Williams, 795 F. Supp. 1511, 1519-1520 (M.D. Fla. 1992)* .

(n14)Footnote 1. *Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006)* .

(n15)Footnote 2. *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009)* (citing **Moore's Federal Practice**).

(n16)Footnote 3. *Golden v. City of Columbus, 404 F.3d 950, 966 (6th Cir. 2005)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.23

§ 14A.23 Commonality of Legal or Factual Issuesn*

[1] Factors Used to Determine Commonality

One or more persons may sue or be sued as representative parties of a class only if there are questions of law or fact common to the class. n1 The purposes for the requirement of a common legal or factual question are to ensure fair and adequate representation of the interests of the absentee members and to provide for practical and efficient case management. n2 The commonality requirement is satisfied if there is even one common question of either law or fact among the grievances of the prospective class, n3 and courts have noted that it is not a difficult requirement to satisfy. n4

The commonality test is qualitative rather than quantitative: one significant issue common to the class may be sufficient to warrant certification. In particular, the plaintiffs may demonstrate commonality by showing that class members have shared legal issues but divergent facts or that they share a common basis of facts but base their claims for relief on different legal theories. n5 However, if individual factual determinations dominate the claims, class certification should be denied on the grounds of a lack of commonality. n6

[2] Interaction of Commonality With Other Class Action Requirements

Courts have frequently noted that the commonality requirement tends to overlap with the typicality requirement of Rule 23(a)(3) n1 because both serve as standards for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Despite their similarity, however, the commonality and typicality requirements serve different functions. While the commonality requirement examines the sufficiency of the common aspects among the class itself, the typicality requirement examines the relation between the named representative parties and the class as a whole. n2

Courts have also noted that sometimes the commonality requirement overlaps with the Rule 23(a)(4) "adequacy of representation" requirement n3 because both requirements may consider whether the class representative's claims and the class claims are so similar that the interests of the putative class will be fairly and adequately represented by the plaintiff. However, the two requirements are distinct because the adequacy-of-representation requirement considers additional issues, such as the competency of class counsel and potential conflicts of interest. n4

In many proposed class actions, commonality analysis tends to overlap with portions of the "predominance" test of Rule 23(b)(3), n5 in which class members requesting damages must establish not only the existence of common questions of law or fact but also that the common questions of law or fact predominate over any questions affecting only individual members. n6 Thus, the predominance test necessarily entails the existence of a common question. However, commonality remains a distinct requirement because the predominance test is more stringent; in addition to the existence of common issues of law and fact, predominance requires the common issues to be numerically and qualitatively substantial in relation to individual issues. n7

[3] Burden of Proof of Commonality

The party requesting class certification has the burden of establishing commonality, as is the case with the other requirements of Rule 23(a). n1 The court has considerable discretion in its determination of whether commonality exists, provided that the proponent shows at least one common question of law or fact. n2 Furthermore, if common questions do not arise among the class as defined in the complaint, the court has discretion to redefine the proposed class or create subclasses to make a finding of commonality. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(a)(2).*

(n3)Footnote 2. *Crosby v. Bowater Ret. Plan for Salaried Emples. of Great N. Paper, 212 F.R.D. 350, 355-356 (W.D. Mich. 2003)* .

(n4)Footnote 3. *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 230 (D.N.J. 2005)* .

(n5)Footnote 4. *Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (commonality requirement not demanding because requirement may be satisfied by single common issue).

(n6)Footnote 5. *Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004)* .

(n7)Footnote 6. *In re LifeUSA Holding Inc., 242 F.3d 136, 145-147 (3d Cir. 2001)* (class certification is not proper in mass tort actions that necessitate resolution of individualized questions of liability).

(n8)Footnote 1. *See Fed. R. Civ. P. 23(a)(3).*

(n9)Footnote 2. *Prado-Steiman v. Bush, 221 F.3d 1266, 1278-1279 (11th Cir. 2000)* ; *In re HealthSouth Corp. Sec. Litig., 257 F.R.D. 260, 275 (N.D. Ala. 2009)* .

(n10)Footnote 3. *See Fed. R. Civ. P. 23(a)(4).*

(n11)Footnote 4. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

(n12)Footnote 5. *Unger v. Amedisys Inc., 401 F.3d 316, 320 (5th Cir. 2005)* .

(n13)Footnote 6. *See Fed. R. Civ. P. 23(b)(3)*; *see also § 14A.23[2].*

(n14)Footnote 7. *Wachtel v. Guardian Life Ins. Co., 223 F.R.D. 196, 213 (D.N.J. 2004)* ; *see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (predominance more demanding test because it tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation).

(n15)Footnote 1. *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 35 (2d Cir. 2006)* ; *see Robinson v. Metro North Commuter R.R., 267 F.3d 147, 156 (2d Cir. 2001)* (business policy or practice sufficient to satisfy commonality requirement).

(n16)Footnote 2. *Hodgers-Durgin v. De La Vina, 165 F.3d 667, 676-678 (9th Cir. 1999)* (commonality requirement of Rule 23(a) is met when plaintiffs complain of an unlawful pattern and practice, even if individual factual circumstances are not identical).

(n17)Footnote 3. *Lockwood Motors, Inc. v. Gen. Motors Corp., 162 F.R.D. 569, 575 (D. Minn. 1995)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART III. PREREQUISITES TO ALL CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.24

§ 14A.24 Typicality of Claims and Defenses of Representatives With Those of Classn*

[1] Statement of Typicality Requirement

One or more members of a class may sue or be sued as representative parties only if the claims or defenses of the representative parties are typical of the claims or defenses of the class. n1 The primary purpose of the requirement of typicality is to ensure that the interests of the representative parties, also known as the named plaintiffs or defendants, are substantially in conformance with those of the absent class members. Thus, the typicality requirement is designed to preclude certification in circumstances when the legal theories of the named plaintiffs potentially conflict with those of the absentees, by requiring that the common claims are as comparably key to the claims of the named plaintiffs as to the claims of the absentees. n2 In other words, the determination of whether the named plaintiffs' claims and the class claims are interrelated ensures that the interests of the absent class members will be fairly and adequately protected. n3 Conversely, if the legal theories of the class representatives conflict with those of the absent class members, there is a lack of typicality which precludes certification of the class. n4

[2] Characteristics of Typicality of Claims or Defenses

A class representative's claims or defenses satisfy the typicality requirement if they arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members. n1 The most crucial inquiry regarding typicality is whether the class representatives' claims or defenses have the same essential characteristics as those of the proposed class. n2 If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality. n3 Similarly, the representatives' claims meet the typicality requirement if the factual situation is reasonably co-extensive with those of the class; the legal theories need not be substantially identical. n4

[3] Factors Indicating Lack of Typicality of Claims or Defenses

While mere differences in factual circumstances between members of a class do not defeat typicality, n1 the court may decide typicality is insufficient when factual differences predominate. Thus, if a court must make highly fact-specific or individualized determinations in order to establish a defendant's liability to each class member, the plaintiffs have not established typicality. n2 Similarly, typicality does not exist if the class representatives' claims are subject to one or

more defenses unique to the representatives which will be central to the litigation. n3 The rationale behind this principle is the probability that the class representatives will become distracted by the existence of defenses unique to the representatives and, therefore, compromise the interests of the class. n4 In order to defeat typicality, the specific defense in question must be unique, arguable, and likely to involve a significant portion of the representatives' time and energy. n5 However, if a unique defense is not central to the litigation, the defense does not create a significant danger that the class representative will become distracted and, therefore, does not defeat typicality and prohibit class certification. n6

[4] Interaction of Typicality With Other Class Action Requirements

The determination of whether the typicality requirement is satisfied often overlaps with the analysis of other Rule 23 class action requirements. For example, in deciding whether to certify a class, courts frequently merge the typicality requirement with the commonality requirement of Rule 23(a)(4). n1 However, the commonality and typicality requirements serve different functions. The commonality requirement examines the sufficiency of the class itself, while the typicality requirement examines the relation between the representative parties and the class as a whole. n2

The typicality requirement also overlaps the Rule 23(a)(4) adequacy-of-representation requirement because both examine whether absentee class members will be adequately represented. n3 A lack of typicality may also defeat the adequacy-of-representation requirement because, if the class representatives' claims are not typical of those of other class members, the class representatives have less incentive to represent the claims of the other class members. n4 Despite their similarities, however, these two requirements remain distinct because the adequacy of representation requirement also involves an examination of the competency of class counsel and potential conflicts of interest. Therefore, although typicality overlaps with both commonality and adequacy of representation, courts recognize that each of the three requirements must be satisfied individually. n5

[5] Burden of Proof of Typicality

As with the other requirements of Rule 23, the burden of proving typicality lies with the proponent of class certification. n1 However, the proponent need not show that the facts and legal theories regarding the claims are identical. A class representative's claims meet the typicality requirement if they are reasonably similar to those of the class. n2 Thus, the court has considerable discretion in its determination of whether typicality exists; n3 because the claims only need to share the same essential characteristics and need not be identical, the standard for the typicality requirement is not difficult to satisfy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.24 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(a)(3).*

(n3)Footnote 2. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182 (3d Cir. 2001)* ; *In re Mercedes Benz Tele Aid Contract Litig., 257 F.R.D. 46, 71 (D.N.J. 2009)* (typicality requirement determines whether named plaintiff's individual circumstances with respect to claims are significantly different from class members).

(n4)Footnote 3. *In re Milk Products Antitrust Litig., 195 F.3d 430, 436 (8th Cir. 1999)* .

(n5)Footnote 4. *Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994)* .

(n6)Footnote 1. *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)* .

(n7)Footnote 2. *Montgomery v. New Piper Aircraft, Inc., 209 F.R.D. 221, (S.D. Fla. 2004)* .

(n8)Footnote 3. *See Armstrong v. Davis, 275 F.3d 849, 868-869 (9th Cir. 2001)* (in class action by disabled prisoners asserting discrimination claims, class members suffered from different disabilities, but these differences among alleged injuries were minor and insufficient to defeat typicality).

(n9)Footnote 4. *Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1019-1020 (9th Cir. 1998)* (national class met typicality requirement even though legal theories differed somewhat for various class members in various states).

(n10)Footnote 1. *See* [2], *above*.

(n11)Footnote 2. *Collazo v. Calderon, 212 F.R.D. 437, 443 (S.D.N.Y. 2004)* .

(n12)Footnote 3. *Bishop v. New York City Dep't of Housing Preservation & Develop., 141 F.R.D. 229, 238 (S.D.N.Y. 1992)* (typicality defeated because named plaintiff's demotion presented unique defense to claim of employment discrimination).

(n13)Footnote 4. *Beck v. Maximus, Inc., 457 F.3d 291, 296-297 (3d Cir. 2006)* (citing **Moore's Federal Practice**).

(n14)Footnote 5. *In re Safeguard Scientifics, 216 F.R.D. 577, 582-583 (D.P.R. 2002)* .

(n15)Footnote 6. *A.F.I.K. Holding SPRL v. Fass, 216 F.R.D. 567, 576 (D.N.J. 2003)* .

(n16)Footnote 1. *Bullock v. Sheahan, 225 F.R.D. 227, 229 (E.D. Ill. 2004)* .

(n17)Footnote 2. *Hassine v. Jeffes, 846 F.2d 169, 177 n.4 (3d Cir. 1988)* .

(n18)Footnote 3. *In re Milk Products Antitrust Litig., 195 F.3d 430, 436 (8th Cir. 1999)* (typicality and adequacy requirements both serve as guidelines for determination whether maintenance of class action is economical and whether named plaintiff's claim and class claims are so interrelated that interests of absent class members will be fairly and adequately protected).

(n19)Footnote 4. *In re American Med. Sys., Inc. 75 F.3d 1069, 1083 (6th Cir. 1996)* (without typical claims, class representatives have no incentive to pursue claims of class).

(n20)Footnote 5. *Barabin v. Aramark Corp., 210 F.R.D. 152, 157-158 (E.D. Pa. 2002)* .

(n21)Footnote 1. *Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482, 485 (W.D.N.C. 2003)* .

(n22)Footnote 2. *Schumacher v. Tyson Fresh Meats, Inc., 221 F.R.D. 605, 613 (D.S.D. 2004)* .

(n23)Footnote 3. *In re Milk Products Antitrust Litig., 195 F.3d 430, 436 (8th Cir. 1999)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART III. PREREQUISITES TO ALL CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.25

§ 14A.25 Adequacy of Representationn*

[1] Significance of Adequacy of Representation

One or more members of a class may sue or be sued as representative parties only if the representative parties will fairly and adequately protect the interests of the class. n1 The purpose of the adequacy inquiry under Rule 23(a)(4) is to protect the due process rights of absent class members. Thus, the analysis attempts to uncover any conflicts of interest between the named plaintiffs and the class they seek to represent. n2 Because absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially alert to ensure that the rights of the absent class members are protected through adequate representation at all times. Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only when those differences create conflicts between the named plaintiffs' interests and those of the class members. n3

The adequacy requirement applies to both representative parties and attorneys for the parties. Thus, adequacy of representation under Rule 23(a)(4) is generally measured by three factors: n4

(1) the representative's attorneys must be qualified, experienced, and generally able to conduct the litigation; n5

(2) the representatives must have a sufficient interest in the outcome of the case to ensure vigorous advocacy; n6 and

(3) the representatives must not have interests antagonistic to those of the proposed class. n7

[2] Qualified and Competent Legal Counsel

[a] Adequacy of Class Legal Representation

Rule 23 provides for a separate procedure in which the court specifically approves and appoints class counsel. n1 In typical cases, the attorney most likely to be considered for appointment as class counsel will be the one selected by a named class representative. However, the court may make the choice of counsel on its own initiative. In appointing

class counsel, the court must consider the work that an applying attorney has already done in identifying and investigating the class claim and the extent to which the attorney will fairly and adequately represent the interests of the class. n2

In making its determination to appoint class counsel, the court must consider whether the proposed attorney is competent, qualified, experienced, and able to vigorously conduct the litigation. n3 The court may also consider the experience and record of class counsel in the current case and in prior litigation; n4 the attorney's expertise in the particular type of class action; n5 and any pertinent non-legal resources available to the attorney as well, such as the availability of support staff, discovery and research resources, and the extent of other professional commitments. n6

[b] Class Counsel May Not Have Conflict With Class

The attorney appointed by the court to serve as class counsel must fairly represent the interests of the class. n7 Therefore, a law firm or an attorney may not have any conflicts of interest with the class. n8 An attorney may be disqualified if he or she has some relationship with the class representative, such as that of a relative, associate, or partner. n9 For example, an attorney who represents another class in an unrelated suit against the same defendant may not serve as class counsel. n10 Similarly, the court may deem an attorney's representation unfair if the attorney had an interest in a competitor in the same business as the defendant. n11

[3] Representative's Interest in Outcome to Ensure Vigorous Advocacy

[a] Vigorous Prosecution Indicates Adequate Representation

To qualify as adequate class representatives, the named persons must establish that they have the intent and resources to vigorously prosecute the class action. n1 There are two generally accepted considerations in the vigorous prosecution analysis: whether the representatives have the motivation for vigorous prosecution n2 and the ability of the representatives to finance the litigation. n3

[b] Motivation for Vigorous Prosecution

Courts may consider several factors that indicate either a lack of motivation or an unwillingness to ensure vigorous prosecution of the litigation, including the following:

1. **Progress of the class proceedings.** Delay in seeking class certification, failure to timely prosecute the litigation, or failure to comply with reasonable discovery requests are factors suggesting that the class representative is inadequate. n4 Similarly, a long delay in prosecuting a case demonstrates the plaintiffs' indifference to adequately protect interests of the class. n5

2. **Familiarity with litigation.** To satisfy the adequacy requirement, the class representatives must possess at least a minimal degree of knowledge regarding the class action. n6 The class representatives also should at least have a general understanding of the nature of class action litigation. n7 In this regard, the class representatives may not completely abdicate conduct of the case to counsel. n8 However, a class representative need not be so knowledgeable as to be able to assist counsel with the legal aspects of the litigation, especially in a complex case. n9

3. **Amount of financial interest in outcome.** If a class representative has a significant financial interest in the outcome of the litigation, a court is more likely to find the class representative to be adequate than if the representative has only a small interest. n10 However, because one purpose of a class action is to allow for the efficient adjudication of small individual claims, a class representative will not be inadequate merely because the representative has a small financial interest in the action. n11

4. **Personal factors such as health.** The court may consider a class representative's advanced age or ill health in its

determination of the vigorous prosecution aspect of adequacy of representation. n12 However, some courts are reluctant to find a class representative inadequate based on advanced age or ill health unless there is a specific showing that the representative would be unable to fulfill his or her responsibilities to the class. n13

[c] Ability to Finance Litigation

The court may consider the ability and willingness of class representatives to finance the class litigation because that inquiry is relevant to determining adequacy of representation; if the representatives are not capable of financing the litigation adequately, then they may not prosecute the litigation vigorously. n14 Although class representatives need not pay all of the costs of the litigation, n15 the court may require that the class representatives make an affirmative demonstration of their ability to pay the costs of notice. n16 The court may accept demonstration of this financial-ability requirement by a showing that the class representatives have regularly paid litigation expenses, n17 by a statement of the class representatives that they have the ability to assume the financial obligations, n18 or by a showing that funds have been established to pay the costs of litigation. n19

[4] Absence of Antagonistic or Conflicting Claims with Other Class Members

[a] Requirement Is Based on Fiduciary Nature of Class Representation

To qualify as an adequate representative of a class, the named representative may not have interests that conflict with or are antagonistic to interests of other class members. n1 This requirement is based on the principle that a class representative acts as a fiduciary for the entire class. As a fiduciary, the class representative owes the putative class a duty of loyalty. n2 However, Rule 23(a)(4) does not require that the interests of the class representative and the absentee class members be identical. n3 Furthermore, the named representative needs only to be adequate and not the best of all possible representatives. n4 Courts have also stated that not every potential disagreement between a representative and the class members will preclude a class suit. The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental. n5

[b] Factors That Indicate That Representation Is Adequate Despite Conflict

The following factors indicate that representation is adequate despite a claim of conflict or antagonism:

1. **Insubstantial conflict or antagonism.** If a conflict or antagonism is merely speculative, hypothetical, or minor, it will not cause the named representatives to be inadequate. n6 Thus, disagreements among class members as to the proper type or scope of relief will not create an impermissible conflict of interest if the class members agree that the defendant is liable. n7

2. **Conflict unrelated to subject matter.** A conflict of interest does not preclude class certification if the conflict is unrelated to the subject matter of the litigation. For example, mere personality conflicts among the members of the class will not lead to a finding of inadequacy of representation. n8

3. **Conflict merely regarding propriety of litigation.** The fact that some members of the class object to the litigation is generally insufficient to make the class representative inadequate under Rule 23(a)(4). n9 However, the court may find class representatives to be inadequate if a substantial number of the class members are clearly and vigorously opposed to the litigation. n10

4. **Competition among members.** The mere fact that a class action could create a conflict of economic interests between the class representatives and the remaining class members does not mean their representation is inadequate. Thus, adequacy of representation is not defeated because of potential economic competition with respect to the relief sought. n11

[c] Factors That Indicate That Representation Is Inadequate Due to Conflict

The following factors indicate that representation is inadequate due to conflict or antagonism:

1. **Unique defense that is central to litigation.** If the class representative is subject to a defense unique to the representative that potentially will become a focus of the litigation, the class representative will not satisfy the adequacy of representation requirement. n12 The justification for this principle is that the class representative may become distracted by the presence of a unique defense, causing plaintiff's representation of the class to be placed at a disadvantage. n13

2. **Representative's legal status.** The representative's legal capacity may affect its ability to adequately represent the class. For example, one court has held that a corporation may be inadequate to represent the interest of a class that consists mostly of individuals, at least where the motivations and decision-making processes of the corporation would undermine the interests of individual class members. n14 Depending on the circumstances, an executor or trustee may not satisfy the adequacy-of-representation requirement, at least where the status has a tendency to cause conflict with the class members. n15

3. **Representative's affiliation with class counsel.** The court may find a conflict of interest between the class representative and other class members if the class representative is closely affiliated with class counsel; courts have held class representatives inadequate when they were related to counsel, or a business associate of counsel, such as a partner. n16 The rationale for denying representative status to such class members is that they might sacrifice the interests of the class for the benefit of class counsel. n17

4. **Claims against defendant other than class claims.** If a class representative also has asserted claims against a class action defendant in a second lawsuit separate from the class action, a court may conclude that the class representative has a conflict of interest with the class. n18 In a similar manner, courts have found conflicts of interest in cases in which corporate shareholders attempt to pursue both class and derivative claims in the same action. n19

[5] Interaction of Adequacy Determination With Other Class Action Requirements

Courts have often noted that a determination of the adequacy of representation requirement overlaps with the determination of the commonality requirement of Rule 23(a)(2) n1 because both requirements may consider whether the class representatives' claims and the class claims are so similar that the interests of the proposed class will be fairly and adequately represented by the plaintiffs. n2 The two requirements are distinct, however, because the adequacy of representation requirement considers issues additional to representation of interests, such as the competency of class counsel and potential conflicts of interest. n3

Courts have also noted that judicial determination of the adequacy of representation requirement frequently overlaps with the court's determination of the typicality requirement of Rule 23(a)(3) because the adequacy and typicality tests both serve as guidelines for the determination of whether the named plaintiffs' claims and class claims are so interrelated that interests of absent class members will be fairly and adequately protected. n4 Despite their similarity, however, these two requirements remain distinct because the adequacy-of-representation requirement also involves an examination of the competency of class counsel and potential conflicts of interests. n5

[6] Burden of Proof of Adequacy of Representation

Most courts have held that the party seeking class certification carries the burden of proving that all Rule 23(a) requirements are satisfied, including adequacy of representation. n1 However, some courts have held that unlike the other factors that determine certification, the burden of proof is on the party seeking to establish inadequacy of the representative, rather than on the proponent of class action certification. n2 Thus, when the plaintiffs are requesting

class certification, these courts hold that the defendants must prove that counsel of the plaintiffs is not qualified or competent to adequately represent the proposed class or that the named plaintiffs' interests are antagonistic to the class. n3

[7] Court's Determination of Adequacy of Representation

Whether there is adequate representation of all class members is a question of fact that primarily depends on the circumstances of each case. Consequently, the district court's adequacy determination will be reversed only if the district court abuses its discretion. n1 The trial court will make a determination of the adequacy of representation at all stages of the litigation, to protect absent parties who will be bound by the judgment. n2 Therefore, the court may raise the issue of inadequacy of representation on its own initiative, or any party may raise the issue. n3

If a court concludes before certification that the proposed class representative will not fairly and adequately protect the class's interests, the court may either refuse to certify the class action for inadequacy of representation, n4 or the court may redefine the class before certification to include only those plaintiffs who are adequately represented. n5

If events occur after class certification that render a class representative inadequate, the court has several options: the court may decertify the class, n6 or may remedy the inadequacy by substituting a new representative, n7 excluding those class members who are not adequately represented, certifying subclasses, n8 or bifurcating the trial. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.25 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(a)(4).*

(n3)Footnote 2. *London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253 (11th Cir. 2003) .*

(n4)Footnote 3. *Berger v. Compaq Computer Corp., 257 F.3d 475, 479-480 (5th Cir. 2001) .*

(n5)Footnote 4. *See Berger v. Compaq Computer Corp., 257 F.3d 475, 479-480 (5th Cir. 2001)* ; *Westways World Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 235-236 (C.D. Cal. 2003) .*

(n6)Footnote 5. *See* [2], *below.*

(n7)Footnote 6. *See* [3], *below.*

(n8)Footnote 7. *See* [4], *below.*

(n9)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(B)*; *see Fed. R. Civ. P. 23(g)*; *28 U.S.C. § 1711(3).*

(n10)Footnote 2. *Fed. R. Civ. P. 23(g)(1)(B).*

(n11)Footnote 3. *In re Risk Mgmt. Alternatives, Inc., Fair Debt Collection Practices Act Litig., 208 F.R.D. 493, 504 (S.D.N.Y. 2002) .*

(n12)Footnote 4. *Westways World Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 235-236 (C.D. Cal. 2003) .*

(n13)Footnote 5. *Sebo v. Rubenstein, 188 F.R.D. 310, 317 (N.D. Ill. 1999)* .

(n14)Footnote 6. *Gomez v. Illinois State Board of Education, 117 F.R.D. 394, 401 (N.D. Ill. 1987)* .

(n15)Footnote 7. *Fed. R. Civ. P. 23(g)(1)(B).*

(n16)Footnote 8. *Westways World Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 235-236 (C.D. Cal. 2003)* .

(n17)Footnote 9. *Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978)* .

(n18)Footnote 10. *Sullivan v. Chase Inv. Servs., Inc., 79 F.R.D. 246, 258 (N.D. Ill. 1978)* .

(n19)Footnote 11. *Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978)* .

(n20)Footnote 1. *Lifestar Ambulance Serv. v. United States, 211 F.R.D. 688, 700-701 (M.D. Ga. 2003)* , *rev'd on other grounds*, *365 F.3d 1293 (11th Cir. 2004)* .

(n21)Footnote 2. *See* [b], *below*.

(n22)Footnote 3. *See* [c], *below*.

(n23)Footnote 4. *East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* .

(n24)Footnote 5. *Culver v. City of Milwaukee, 277 F.3d 908, 912 (7th Cir. 2002)* (neither class representative nor class counsel moved suit forward during eight years it had been pending).

(n25)Footnote 6. *Darvin v. International Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985)* (named plaintiff was inadequate when representative's deposition revealed extremely limited or nonexistent knowledge of facts pleaded).

(n26)Footnote 7. *Margolis v. Caterpillar, Inc., 815 F. Supp. 1150, 1154 (C.D. Ill. 1991)* .

(n27)Footnote 8. *Lifestar Ambulance Serv. v. United States, 211 F.R.D. 688, 700-701 (M.D. Ga. 2003)* , *rev'd on other grounds*, *365 F.3d 1293 (11th Cir. 2004)* .

(n28)Footnote 9. *In re Southeast Hotel Properties, Ltd. Partnership Investor Litig., 151 F.R.D. 597, 607 (W.D.N.C. 1993)* .

(n29)Footnote 10. *In re Boardwalk Marketplace Sec. Litig., 122 F.R.D. 4, 8 (D. Conn. 1988)* (representatives who had invested $50,000 in case had substantial interest in vigorously pursuing litigation).

(n30)Footnote 11. *In re Aluminum Phosphide Antitrust Litig., 160 F.R.D. 609, 614 (D. Kan. 1995)* .

(n31)Footnote 12. *Edgington v. R.G. Dickinson & Co., 139 F.R.D. 183, 195 (D. Kan. 1991)* .

(n32)Footnote 13. *Rubenstein v. Collins, 162 F.R.D. 534, 538 (S.D. Tex. 1995)* .

(n33)Footnote 14. *In re Simon II Litig., 211 F.R.D. 86, 190 (E.D.N.Y. 2002)* .

(n34)Footnote 15. *Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991)* .

(n35)Footnote 16. *In re Ind. Gasoline Antitrust Litig., 79 F.R.D. 552, 557 (D. Md. 1978)* .

(n36)Footnote 17. *Esler v. Northrop Corp., 86 F.R.D. 20, 36 (W.D. Mo. 1979)* .

(n37)Footnote 18. *In re Simon II Litig., 211 F.R.D. 86, 190 (E.D.N.Y. 2002)* .

(n38)Footnote 19. *Jansen v. Greyhound Corp., 692 F. Supp. 1022, 1028 (N.D. Iowa 1986)* .

(n39)Footnote 1. *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)* .

(n40)Footnote 2. *Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002)* .

(n41)Footnote 3. *In re Tetracycline Cases, 107 F.R.D. 719, 730 (W.D. Mo. 1985)* .

(n42)Footnote 4. *Ballan v. Upjohn Co., 159 F.R.D. 473, 482 (W.D. Mich. 1994)* .

(n43)Footnote 5. *In re Visa Check/MasterMoney Antitrust Litig. v. Visa, USA Inc., 280 F.3d 124, 143-145 (2d Cir. 2001)* ; *see* [b], *below*.

(n44)Footnote 6. *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)* (only fundamental conflict will defeat certification).

(n45)Footnote 7. *Hispanics United of DuPage County v. Village of Addison, 160 F.R.D. 681, 689-690 (N.D. Ill. 1995)* (fact that some plaintiffs may be entitled to monetary damages does not create conflict between those plaintiffs and others who would be limited to injunctive relief).

(n46)Footnote 8. *Krueger v. New York Tel. Co., 163 F.R.D. 433, 443 (S.D.N.Y. 1995)* .

(n47)Footnote 9. *Horton v. Goose Creek Indep. School District, 690 F.2d 470, 486-487 (5th Cir. 1982)* .

(n48)Footnote 10. *East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* .

(n49)Footnote 11. *Uniondale Beer Co. v. Anheuser-Busch, Inc., 117 F.R.D. 340, 342 (E.D.N.Y. 1987)* (although there might have been economic conflict between competitor class members in antitrust action, representation was adequate because all class members sought to prove that defendants conspired to fix prices).

(n50)Footnote 12. *A.F.I.K. Holding SPRL v. Fass, 216 F.R.D. 567, 576 (D.N.J. 2003)* .

(n51)Footnote 13. *German v. Federal Home Loan Mortgage Corp., 168 F.R.D. 145, 154-155 (S.D.N.Y. 1996)* .

(n52)Footnote 14. *In re LILCO Litig., 111 F.R.D. 663, 672 (E.D.N.Y. 1986)* .

(n53)Footnote 15. *First Interstate Bank v. Chapman & Cutler, 837 F.2d 775, 781-782 (7th Cir. 1988)* (because executor could only act for benefit of creditors and beneficiaries of estate, executor was inadequate class representative).

(n54)Footnote 16. *Susman v. Lincoln Am. Corp., 561 F.2d 86, 95 (7th Cir. 1977)* .

(n55)Footnote 17. *Phillips v. Joint Legislative Com., Etc., 637 F.2d 1014, 1023-1024 (5th Cir. 1981)* .

(n56)Footnote 18. *Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 678-679 (N.D. Ohio 1995)* .

(n57)Footnote 19. *Ryan v. Aetna Life Ins. Co., 765 F. Supp. 133, 135-137 (S.D.N.Y. 1991)* .

(n58)Footnote 1. *Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107, 119 (D.N.J. 2002)* .

(n59)Footnote 2. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20, 117 S. Ct. 2231, 138 L. Ed. 2d 689*

(1997) .

(n60)Footnote 3. *Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107, 119 (D.N.J. 2002)* .

(n61)Footnote 4. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n62)Footnote 5. *Barabin v. Aramark Corp., 210 F.R.D. 152, 157-158 (E.D. Pa. 2002)* .

(n63)Footnote 1. *Berger v. Compaq Computer Corp., 257 F.3d 475, 479 (5th Cir. 2001)* ; *Ogden v. AmeriCredit Corp., 225 F.R.D. 529, 538 (N.D. Tex. 2005)* .

(n64)Footnote 2. *Trautz v. Weisman, 846 F. Supp. 1160, 1167 (S.D.N.Y. 1994)* .

(n65)Footnote 3. *Piper v. Portnoff Law Assocs., 215 F.R.D. 495, 502 (E.D. Pa. 2003)* .

(n66)Footnote 1. *In re Visa Check/MasterMoney Antitrust Litig. v. Visa, USA Inc., 280 F.3d 124, 143-145 (2d Cir. 2001)* .

(n67)Footnote 2. *Foe v. Cuomo, 892 F.2d 196, 198 (2d Cir. 1989)* .

(n68)Footnote 3. *Lewis v. National Football League, 146 F.R.D. 5, 12 (D.D.C. 1992)* .

(n69)Footnote 4. *Roman v. ESB, Inc., 550 F.2d 1343, 1356 (4th Cir. 1976)* .

(n70)Footnote 5. *Adair v. Sorenson, 134 F.R.D. 13, 20 (D. Mass. 1991)* .

(n71)Footnote 6. *Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002)* .

(n72)Footnote 7. *Mississippi Protection & Advocacy Sys., Inc. v. Cotten, 929 F.2d 1054, 1058 (5th Cir. 1991)* .

(n73)Footnote 8. *Welch v. Board of Directors, 146 F.R.D. 131, 136 (W.D. Pa. 1993)* .

(n74)Footnote 9. *Shipes v. Trinity Indus., 987 F.2d 311, 315 (5th Cir. 1993)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART III. PREREQUISITES TO ALL CLASS ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.26through 14A.29

[Reserved]

§§ 14A.26[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART IV. TYPES OF CLASS ACTIONS AVAILABLE

1-14A Moore's Manual--Federal Practice and Procedure § 14A.30

§ 14A.30 Summary of Three Types of Class Actions Under Federal Civil Rulesn*

[1] Three Types of Class Actions Permissible in Federal Court

If all class action prerequisites specified in Rule 23(a) are satisfied, n1 Rule 23(b) provides that the named representatives may prosecute the action as a class action if it falls within any one or more of three categories, n2 which are based on the relationship and interaction between the parties. n3 Many courts refer to these categories of class action as "Type I," "Type II," and "Type III." n4

A Type I class action under Rule 23(b)(1) is proper in two situations: n5 when separate actions would create incompatible standards of conduct for the party opposing the class, n6 or when the interests of members not parties to the litigation would be impeded by individual adjudications. n7 A Type II class action requires that the plaintiff seek primarily injunctive or declaratory relief. n8 A Type III class action requires that common questions of law or fact predominate over any issues affecting only individual members, and, therefore, a class action is superior to other available methods for the fair and efficient adjudication of the controversy. n9

[2] Court's Discretion to Designate Type When Claims Qualify Under More Than One Type of Class Action

In many situations, a case may qualify as more than one of the three types of class actions listed under Rule 23(b). For example, class actions often qualify under both Rule 23(b)(1) and Rule 23(b)(3) n1 or under both Rule 23(b)(2) and Rule 23(b)(3). n2 In such situations, if the court has a choice of certifying a class under either Rule 23(b)(1) or Rule 23(b)(2) on the one hand, and Rule 23(b)(3) on the other hand, the courts will generally exercise their discretion to certify the class action under Rule 23(b)(1) or Rule 23(b)(2). The first reason for this preference is that members of a Rule 23(b)(1) or 23(b)(2) class do not have the option to "opt out" of the class action, while members of a Rule 23(b)(3) class are entitled to opt out. Courts generally prefer the "no opt-out" class action because there is less risk that individual members will pursue separate litigation that could possibly prejudice other class members or the defendant. n3 The second reason for the preference is that mandatory notice to all class members is required only for class actions under Rule 23(b)(3). n4 These preferences in applying the various parts of Rule 23(b) balance an individual's due process rights with the judiciary's policy of expediting the orderly resolution of controversies. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23(a)(1)-(a)(4)*; *see also § 14A.20* et seq.

(n3)Footnote 2. *See Fed. R. Civ. P. 23(b)(1)-(b)(3).*

(n4)Footnote 3. *Gunnells v. Healthplan Servs., 348 F.3d 417, 425-426 (4th Cir. 2003)* .

(n5)Footnote 4. *Alkire v. Irving, 330 F.3d 802, 820 (6th Cir. 2003)* .

(n6)Footnote 5. *Fed. R. Civ. P. 23(b)(1).*

(n7)Footnote 6. *See § 14A.31[1].*

(n8)Footnote 7. *See § 14A.31[2].*

(n9)Footnote 8. *Fed. R. Civ. P. 23(b)(2)*; *see § 14A.32.*

(n10)Footnote 9. *Fed. R. Civ. P. 23(b)(2)*; *see § 14A.33.*

(n11)Footnote 1. *In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989) , cert. denied, 493 U.S. 959 (1989)* (citing **Moore's Federal Practice**).

(n12)Footnote 2. *See Alkire v. Irving, 330 F.3d 802, 820 (6th Cir. 2003)* .

(n13)Footnote 3. *DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995)* (certification under Rule 23(b)(1) or 23(b)(2) is preferable over 23(b)(3), in order to avoid unnecessary inconsistencies and compromises in future litigation).

(n14)Footnote 4. *Fed. R. Civ. P. 23(c)(2)(B).*

(n15)Footnote 5. *In re Dennis Greenman Sec. Litigation, 829 F.2d 1539, 1544 (11th Cir. 1987)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART IV. TYPES OF CLASS ACTIONS AVAILABLE

1-14A Moore's Manual--Federal Practice and Procedure § 14A.31

§ 14A.31 Class Action Commenced to Prevent Inconsistent or Varying Adjudicationsn*

[1] Inconsistent or Varying Adjudications That Would Pose Risk to Party Opposing Class

[a] Requirements for Prosecution of Class Action Based on Risk Posed to Party Opposing Class

Once the prerequisites of Rule 23(a) are met, n1 the representatives of a class may prosecute an action as a class action if the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. n2 Thus, in addition to the general prerequisites of a class action, a Rule 23(b)(1)(A) class action has the following requirements: n3

- An actual risk of separate actions being brought in the absence of a class action; n4
- The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class; n5 and
- The inconsistent or varying adjudications would, in turn, establish incompatible standards of conduct for the party opposing the class. n6

[b] Actual Risk of Initiation of Separate Actions

A party may maintain a class action under Rule 23(b)(1)(A) only if the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class. n7 The risk of the initiation of separate actions must be actual n8 and not hypothetical, speculative, or unlikely. n9 This provision contains language similar to the language used in Rule 19(a) relating to the joinder of parties. Courts have held that under the provision, a party seeking class certification must establish that there is a reasonable possibility that separate actions involving the same subject matter will be brought in the absence of a class action. n10

[c] Separate Action Would Create Risk of Inconsistent or Varying Adjudications

Certification under Rule 23(b)(1)(A) requires that likely separate adjudications will probably result in inconsistent or varying adjudications imposing incompatible standards of conduct on the party opposing the class. n11 Therefore, it is not enough that separate litigation may result in inconsistent adjudications. The mere possibility of varying or inconsistent adjudications in which a party may prevail against a putative class member in one case and lose in a second case to another class member does not in itself impose incompatible standards of conduct on the party in satisfaction of Rule 23(b)(1)(A). n12 Rather, Rule 23(b)(1)(A) is satisfied only if inconsistent judgments in separate suits would place the party opposing the class in the position of being unable to comply with one judgment without violating the terms of another judgment. n13 Thus, Rule 23(b)(1)(A) does not generally apply to actions seeking compensatory damages alone. n14

[d] Inconsistent or Varying Adjudications Would Impose Incompatible Standards of Conduct on Party Opposing Class

A party may maintain a class action under Rule 23(b)(1)(A) only if the inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for the party opposing the class. n15 Therefore, courts have usually certified classes under Rule 23(b)(1)(A) only in cases that requested injunctive or declaratory relief in which the party opposing the class is obligated to provide identical treatment to all class members, so that any action taken with respect to the class will necessarily affect all class members; usually, such certification is most common in litigation involving labor relations, the government, or trustees or administrators of financial accounts. In each of these types of cases, the party may be required to provide identical treatment to all members of a defined group. n16 As examples, class certification pursuant to Rule 23(b)(1)(A) would be appropriate in the following cases: an action to enjoin state officers from terminating unemployment compensation without a hearing, an action for a declaratory judgment with respect to plaintiff's insurance liability on an illegally declared dividend, or an action seeking rescission of purchases of securities that allegedly were made on the basis of fraudulent misrepresentations. n17

[e] Certification of Class of Defendants

The express language of Rule 23(b)(1)(A) encompasses the risk created by the prosecution of separate actions "against individual members of the class;" n18 this means that the court may certify defendant classes under this provision provided that the action satisfies the rule's requirement that individual litigation may establish incompatible standards of conduct for the party plaintiff opposing the proposed class of defendants. However, as with certification of a plaintiff class, the mere fact that the party plaintiff opposing the class of defendants may prevail against one member of the defendant class and not against another does not satisfy the requirements of Rule 23(b)(1)(A), so that without more, the court will deny certification. n19

[f] Notice Is Not Absolute Right of Class Members

Members of a class certified under Rule 23(b)(1)(A) do not have an express right to be notified of the action. n20 However, the court does have discretion to notify members when the court makes certification under Rule 23(b)(1)(A). For this type of class action, the court may direct "appropriate" notice to the class. n21 The court's discretion and flexibility in deciding whether to direct notice in a Rule 23(b)(1) class action extends to the method of giving notice. If the court decides to direct notice, the court may decide that informal methods or methods calculated to reach less than all the class are appropriate. n22 The court also has discretion to issue an order requiring that notice be given to some or all of the members of the class, informing them of a particular step in the action and affording them the opportunity to participate in the action or otherwise present their positions to the court. n23

[g] Class Members Do Not Have Right to Opt Out

Members of a Rule 23(b)(1)(A) class are not entitled to opt out of the action, unlike members of a class certified

pursuant to Rule 23(b)(3). n24 The rationale behind this prohibition is that the very purpose of a Rule 23(b)(1)(A) action would be defeated if a class member could opt out of the litigation and then institute his or her own litigation; separate litigation would expose the party opposing the class to the risk of facing incompatible standards of conduct. n25 However, there is some authority for the proposition that district courts have discretion to grant opt-out rights from classes certified under Rule 23(b)(1) when monetary damages are sought in addition to injunctive or declarative relief. n26

[2] Inconsistent or Varying Adjudications That Would Pose Risk to Members of Class

[a] Requirements for Prosecution of Class Action When Risk Is Posed to Members of Class

Once the prerequisites of Rule 23(a) are met, n1 the representatives of a class may prosecute an action as a class action if the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class, and any such adjudication as a practical matter would be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or would impede their ability to protect their interests. n2 Thus, in addition to the four general prerequisites of a class action, n3 a Rule 23(b)(1)(B) class action has two requirements: n4

- The prosecution of separate actions by or against individual members of the class would create a risk of adjudications involving individual members of the class. A party may invoke Rule 23(b)(1)(B) by showing a potential risk of adjudications, without demonstrating that separate adjudications are probable or even likely. n5

- Any adjudication against members as a practical matter would be dispositive of the interests of other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests. This risk of prejudice to the potential class members need only be practical, not legal or technical. n6

While Rule 23(b)(1)(A) focuses on possible prejudice to the parties opposing the class due to multiple adjudications, n7 Rule 23(b)(1)(B) focuses on possible prejudice to the members of the proposed class and seeks to protect them against situations in which they would be prejudiced by separate adjudication obtained by other class members. Thus, class certification under Rule 23(b)(1)(B) may be appropriate if a separate adjudication could potentially harm, or as a practical matter would be dispositive of, claims by other class members who were not represented in that other adjudication. n8 One important Rule 23(b)(1)(B) action is the "limited fund" class action, where there is a finite amount of money to satisfy all claims, and when one or a few plaintiffs out of a pool of many potential claimants could exhaust the entire fund in a separate adjudication, to the detriment of the other potential claimants. n9

[b] Applicability to Cases Seeking Money Damages From Common, Limited Source of Funds

[i] Limited Fund Class Action Requirements

Courts most commonly certify cases as Rule 23(b)(1)(B) class actions when they are "limited fund" cases. n10 A limited fund action is an action in which any recovery will come from a fixed fund of assets that is, or may be, insufficient to satisfy all of the claims against the fund and in which the fund must be the plaintiffs' sole source of recovery. n11 Thus, if the assets of the defendants and any applicable insurance coverage are insufficient to satisfy all of the plaintiffs' claims, the sum of those assets constitutes a limited fund. n12 Similarly, courts have found a limited fund when the defendant is an insolvent entity that, despite a flow of income, is unable to earn sufficient amounts to pay all present and future claims. n13 The purpose of certification of a limited fund class action is to ensure that allocation of the defendant's finite fund does not depend on which party gets to the courthouse first or chooses a courthouse that may provide faster results than others. n14 Rule 23(b)(1)(B) is thus designed to preserve a limited fund for the benefit of an

entire discernable class, against individual claims of class members that could consume the fund and leave subsequent class member claimants with no remedy. n15

Except for an action seeking damages to be paid out of a common, limited fund, which is in essence considered a request for equitable relief, n16 a court may not certify a class pursuant to Rule 23(b)(1)(B) if the action is seeking only money damages. n17 However, a request for money damages does not preclude certification provided that the plaintiff is also requesting injunctive or declarative relief, and the injunctive or declarative relief is not merely incidental to the action. n18

[ii] Showing Required for Limited Fund Class Action

To obtain certification based on the limited fund doctrine, a party must submit specific evidence establishing that the fund may be depleted by individual litigation before all members' claims can be satisfied. n19 There are three things the proponent must establish. The first is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The second is that the entire inadequate fund would be devoted to the overwhelming claims. Third, the claimants identified by a common theory of recovery are to be treated equitably among themselves. n20

[c] Claimants Requesting Declaratory or Injunctive Relief Regarding Common Right

A second typical case that is commonly certified under Rule 23(b)(1)(B) is one requesting either declaratory or injunctive relief in which one member would be prejudiced through litigation pursued by other proposed class members. n21 However, courts have generally held that if the claims or defenses of members of the proposed class are based on unique facts or individual relationships with the opposing party, certification is inappropriate. n22 Courts deny certification in such cases because different results in factually disparate actions can logically be explained on the basis of such differing facts. n23 Most courts also hold that the mere possibility of a stare decisis effect that adjudication of one member's claims may have on other members' claims is insufficient for a court to grant certification under Rule 23(b)(1)(B) because stare decisis does not bind courts in subsequent cases involving other putative class members. n24

[d] Certification of Class of Defendants

For a defendant class to be certified under Rule 23(b)(1)(B), the individual defendants' interests must be impaired or impeded by separate litigation. Courts rarely certify defendant classes in limited fund cases because plaintiffs rather than defendants are more likely to seek money damages from a limited fund. However, defendant classes may be certified under Rule 23(b)(1)(B) because the language of the Rule refers to the risk created by the prosecution of separate actions "against individual members of the class." n25 For example, a court may certify a defendant class in an interpleader action, in which the plaintiff seeks to distribute money to the defendants from a fund held by members of the defendant class. n26 Courts also certify defendant classes under Rule 23(b)(1)(B) in cases seeking declaratory or injunctive relief, if the defendants have common interests or ties that may be affected by an adjudication against an individual defendant. n27

[e] Notice Is Not Absolute Right of Class Members

Members of a class certified under Rule 23(b)(1)(B) do not have an express right to be notified of the action. n28 However, for this type of class action, the court has discretion to direct "appropriate" notice to the class. n29 The court's discretion and flexibility in deciding whether to direct notice in a Rule 23(b)(1) class action extends to the method of giving notice. If the court decides to direct notice, the court may decide that informal methods or methods calculated to reach less than all the class are appropriate. n30 The court also has discretion to issue an order requiring that notice be given to some or all of the members of the class informing them of a particular step in the action and affording them the opportunity to participate in the action or otherwise present their positions to the court. n31

[f] Class Members Do Not Have Right to Opt Out

In contrast to Rule 23(b)(3), classes certified under Rule 23(b)(1)(B) are more narrow and do not include the right to opt out. n32 However, in cases requesting money damages in addition to injunctive, declaratory, or equitable relief (including limited fund cases), the Due Process Clause of the Constitution may require notice of the action or the opportunity to opt out, even if the case is properly certified as a class action under a provision of Rule 23 that does not expressly authorize opting out, such as Rule 23(b)(1)(B). n33 Furthermore, the Supreme Court has held that a class member lacking minimum contacts with the forum state has a due process right to an opportunity to remove himself or herself from the class in an action seeking money damages. n34

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* §§ 23.41, 23.42 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23(a)(1)-(a)(4)*; *see also § 14A.20* et seq.

(n3)Footnote 2. *Fed. R. Civ. P. 23(b)(1)(A).*

(n4)Footnote 3. *See Doe v. Miller, 216 F.R.D. 462, 466 (S.D. Iowa 2003)* .

(n5)Footnote 4. *See* [b], *below.*

(n6)Footnote 5. *See* [c], *below.*

(n7)Footnote 6. *See* [d], *below.*

(n8)Footnote 7. *Fed. R. Civ. P. 23(b)(1)(A).*

(n9)Footnote 8. *Daly v. Harris, 209 F.R.D. 180, 191 n.7 (D. Haw. 2002)* .

(n10)Footnote 9. *Ruland v. General Elec. Co., 94 F.R.D. 164, 166 (D. Conn. 1982)* .

(n11)Footnote 10. *Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 396 (E.D. Pa. 2001)* .

(n12)Footnote 11. *Fed. R. Civ. P. 23(b)(1)(A).*

(n13)Footnote 12. *McBirney v. Autrey, 106 F.R.D. 240, 245 (N.D. Tex. 1985)* (rule does not apply simply because defendant is liable for damages to one plaintiff but not to another because paying one claimant is compatible with not paying another claimant).

(n14)Footnote 13. *Corley v. Entergy Corp., 222 F.R.D. 316* ; *see Hallaba v. Worldcom Network Servs., 196 F.R.D. 630, (D. Okla. 2000)* (citing **Moore's Federal Practice**).

(n15)Footnote 14. *McBirney v. Autrey, 106 F.R.D. 240, 245 (N.D. Tex. 1985)* (separate actions for compensatory relief would not place defendant in position of complying with one judgment while violating another).

(n16)Footnote 15. *Fed. R. Civ. P. 23(b)(1)(A).*

(n17)Footnote 16. *Doe v. Miller, 216 F.R.D. 462, 466 (S.D. Iowa 2003)* (action against state government by group of sex offenders).

(n18)Footnote 17. *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001)* .

(n19)Footnote 18. *Fed. R. Civ. P. 23(b)(1)(A).*

(n20)Footnote 19. *Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 450-451 (W.D. Wash. 1997)* .

(n21)Footnote 20. *U.S. Trust Co. v. Alpert, 163 F.R.D. 409, 419 (S.D.N.Y. 1995)* .

(n22)Footnote 21. *Fed. R. Civ. P. 23(c)(2)(A).*

(n23)Footnote 22. *Fed. R. Civ. P. 23(c)(2)(A)*, Committee Note to 2003 Amendments.

(n24)Footnote 23. *Fed. R. Civ. P. 23(d)(2).*

(n25)Footnote 24. *Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 120-122, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994)* ; *Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386 (E.D. Pa. 2001)* .

(n26)Footnote 25. *McBirney v. Autrey, 106 F.R.D. 240, 245 (N.D. Tex. 1985)* .

(n27)Footnote 26. *See, e.g., Eubanks v. Billington, 110 F.3d 87, 94-96 (D.C. Cir. 1997)* .

(n28)Footnote 1. *See Fed. R. Civ. P. 23(a)(1)-(a)(4)*; *see also § 14A.20* et seq.

(n29)Footnote 2. *Fed. R. Civ. P. 23(b)(1)(B).*

(n30)Footnote 3. *See Fed. R. Civ. P. 23(a)(1)-(a)(4).*

(n31)Footnote 4. *Fed. R. Civ. P. 23(b)(1)(B).*

(n32)Footnote 5. *Eliasen v. Green Bay & W. R.R., 93 F.R.D. 408, 412 (E.D. Wis. 1982)* .

(n33)Footnote 6. *Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987)* .

(n34)Footnote 7. *See Fed. R. Civ. P. 23(b)(1)(A)*; *see* [1], *above.*

(n35)Footnote 8. *Lloyd v. City of Philadelphia, 121 F.R.D. 246, 251 (E.D. Pa. 1988)* .

(n36)Footnote 9. *Durrett v. John Deere Co., 150 F.R.D. 555, 557 (N.D. Tex. 1993)* ; *see* [b], *below.*

(n37)Footnote 10. *See Oshana v. Coca-Cola Co., 225 F.R.D. 575, 584 (N.D. Ill. 2005)* .

(n38)Footnote 11. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 841, 119 S. Ct. 2295, 2312, 144 L. Ed. 2d 715 (1999)* .

(n39)Footnote 12. *In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D.N.Y. 1983)* .

(n40)Footnote 13. *See Oshana v. Coca-Cola Co., 225 F.R.D. 575, 584 (N.D. Ill. 2005)* .

(n41)Footnote 14. *In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 735 (2d Cir. 1992)* .

(n42)Footnote 15. *Beckert v. TPLC Holdings, Inc. (In re Telectronics Pacing Sys.), 221 F.3d 870, 876-878 (6th Cir. 2000)* .

(n43)Footnote 16. *In re Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710, 832 (S.D.N.Y. 1991)* .

(n44)Footnote 17. *Horowitz v. Pownall, 105 F.R.D. 615, 618 (D. Md. 1985)* .

(n45)Footnote 18. *Robertson v. National Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977)* .

(n46)Footnote 19. *See Oshana v. Coca-Cola Co., 225 F.R.D. 575, 584 (N.D. Ill. 2005)* .

(n47)Footnote 20. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 838-840, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* .

(n48)Footnote 21. *See, e.g., Wyandotte Nation v. City of Kan. City, 214 F.R.D. 656, 665 (D. Kan. 2003)* .

(n49)Footnote 22. *Riordan v. Smith Barney, 113 F.R.D. 60, 65 (N.D. Ill. 1986)* (certification of securities action under 23(b)(1)(B) inappropriate if individual issues exist).

(n50)Footnote 23. *In re Catawba Indian Tribe, 973 F.2d 1133, 1138 (4th Cir. 1992)* .

(n51)Footnote 24. *Employees Ins. of Wausau v. Federal Dep. Ins. Corp., 112 F.R.D. 52, 56 (E.D. Tenn.1986)* .

(n52)Footnote 25. *Fed. R. Civ. P. 23(b)(1)(B).*

(n53)Footnote 26. *United States Trust Co. of N.Y. v. Alpert, 163 F.R.D. 409, 418-419 (S.D.N.Y. 1995)* .

(n54)Footnote 27. *In re Phar-Mor, Inc. Sec. Litig., 875 F. Supp. 277, 280 (W.D. Pa. 1994)* .

(n55)Footnote 28. *Spann v. AOL Time Warner, Inc., 219 F.R.D. 307, 315 (S.D.N.Y. 2003)* .

(n56)Footnote 29. *Fed. R. Civ. P. 23(c)(2)(A).*

(n57)Footnote 30. *Fed. R. Civ. P. 23(c)(2)(A)*, Committee Note to 2003 Amendments.

(n58)Footnote 31. *Fed. R. Civ. P. 23(d)(2).*

(n59)Footnote 32. *Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003)* ; *Spann v. AOL Time Warner, Inc., 219 F.R.D. 307, 315 (S.D.N.Y. 2003)* .

(n60)Footnote 33. *Eubanks v. Billington, 110 F.3d 87, 94-96 (D.C. Cir. 1997)* .

(n61)Footnote 34. *Phillips Petroleum v. Shutts, 472 U.S. 797, 811-812, 105 S. Ct. 2965, 2974, 86 L. Ed. 2d 628 (1985)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART IV. TYPES OF CLASS ACTIONS AVAILABLE

1-14A Moore's Manual--Federal Practice and Procedure § 14A.32

§ 14A.32 Class Action to Obtain Injunctive or Declaratory Relief with Respect to Entire Classn*

[1] Elements of Injunctive or Declaratory Relief Class Action

After the general class action prerequisites of Rule 23(a) have been satisfied, n1 the court may certify a class action if the proponent of the class action for injunctive or declaratory relief establishes the following two elements: n2

- The party opposing the class has acted or refused to act on grounds generally applicable to the class; n3 and

- Because of that action or inaction, final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole. n4

[2] Party Opposing Class Must Have Acted or Refused to Act in Manner Applicable to Class as Group

A court may certify a class action under Rule 23(b)(2) only if a defendant's conduct or failure to act is generally applicable to an entire class of persons. n1 In making its determination, the court will analyze whether the defendant's behavior had a similar effect on all members of the proposed class. n2 Thus, a class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant. n3 However, a defendant's conduct or failure to act need not be directed specifically at each and every member of the class seeking certification, n4 nor need it damage every member of the class. n5 Additionally, a class action may be certified under Rule 23(b)(2) even though the plaintiffs request individual relief, provided that individual relief is requested in addition to a request for declaratory or injunctive relief for the class as a whole. n6

[3] Request for Injunctive Relief Must Predominate

[a] Only Incidental Monetary Damages Permitted

A court may certify a Rule 23(b)(2) class action only if the action or inaction of the opposition parties requires injunctive relief or corresponding declaratory relief that is appropriate with respect to the class as a whole. This means that the requested injunctive or declaratory relief must predominate over any request for monetary damages. In other

words, if money damages are merely incidental to plaintiffs' request for injunctive or declaratory relief, a class action may be certified under Rule 23(b)(2). n1 A court will presume that a request for monetary relief predominates in a class action unless it is clearly incidental to the non-monetary relief sought. n2 Incidental damages are those flowing directly from liability to the class as a whole in connection with claims for injunctive or declaratory relief; incidental damages are to be viewed as a group remedy. n3

[b] Requested Declaratory Relief Must Correspond to Injunction

A party may obtain declaratory relief in a Rule 23(b)(2) class action only if the declaratory relief corresponds to final injunctive relief with respect to the entire class. As a practical matter, declaratory relief corresponds to injunctive relief if a declaratory judgment is essentially injunctive in nature or would lead to the subsequent entry of an injunction. n4 An action seeking declaratory relief is considered injunctive in nature if any final declaratory judgment would have the same effect as an injunction, which specifies the legality of the opposition's behavior and how the opposition must act or refrain from acting in the future, with respect to the class as a whole. n5 In contrast, courts have held that if an action seeks a declaratory judgment regarding liability that would support monetary damages, the action is not proper for certification under Rule 23(b)(2). n6

[4] Function of Injunctive Relief Class Action

The United States Supreme Court has noted that the primary function of actions properly certified under Rule 23(b)(2) is to prosecute civil rights actions against parties charged with unlawful, class-based discrimination. n1 However, Rule 23(b)(2) is not applicable to all class actions related to discrimination. For example, age discrimination claims under the Age Discrimination in Employment Act are controlled by provisions of the Fair Labor Standards Act, n2 rather than Rule 23(b)(2). n3 It should also be noted that class actions under Rule 23(b)(2) are not limited exclusively to civil rights cases and may be maintained in other types of cases including actions involving constitutional claims n4 and claims involving the government. n5 In claims involving a governmental entity, the named class representative must generally exhaust all available administrative remedies before requesting certification under Rule 23(b)(2). n6

[5] Certification of Class of Defendants

Decisions are split on whether a court may certify a defendant class under Rule 23(b)(2). Some courts assert that the language of the rule does not indicate that it contemplates defense classes because of its language describing the opposition as "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Usually, plaintiffs charge defendants with having "acted," or "refused to act," rather than vice versa, and plaintiffs seek to enjoin actions by the defendants. n1 However, some courts have held that defendant class actions are permitted under Rule 23(b)(2), provided that the plaintiffs requested declaratory and injunctive relief against multiple defendants who are engaged in uniform conduct. n2

[6] Notice Is Not Absolute Right of Class Members

Members of a class certified under Rule 23(b)(2) do not have an express right to be notified of the action. n1 However, for this type of class action, the court has discretion to direct "appropriate" notice to the class. n2 The court's discretion and flexibility in deciding whether to direct notice in a Rule 23(b)(1) class action extends to the method of giving notice. If the court decides to direct notice, the court may decide that informal methods or methods calculated to reach less than all the class are appropriate. n3 The court also has discretion to issue an order requiring that notice be given to some or all of the members of the class informing them of a particular step in the action and affording them the opportunity to participate in the action or otherwise present their positions to the court. n4

[7] Class Members Do Not Have Right to Opt Out

In contrast to Rule 23(b)(3), classes certified under Rule 23(b)(2) are more narrow and do not include the right of absent

members to opt out. n1 However, in cases requesting incidental money damages in addition to injunctive or declaratory relief, a court has discretion to allow class members to opt out. n2 Such a right is purely discretionary, and due process does not create any absolute right to opt out in this type of case. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.43 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23(a)(1)-(a)(4)*; *see also § 14A.20* et seq.

(n3)Footnote 2. *Fed. R. Civ. P. 23(b)(2).*

(n4)Footnote 3. *See* [2], *below.*

(n5)Footnote 4. *See* [3], *below.*

(n6)Footnote 1. *Fed. R. Civ. P. 23(b)(2).*

(n7)Footnote 2. *Heastie v. Community Bank, 125 F.R.D. 669, 679-680 (N.D. Ill. 1989)* (because all class members had signed non-responsibility clause, defendant bank had acted on grounds generally applicable to class).

(n8)Footnote 3. *Bolin v. Sears Roebuck & Co., 231 F.3d 970, 975 (5th Cir. 2000)* .

(n9)Footnote 4. *Calkins v. Blum, 511 F. Supp. 1073, 1088-1089 (N.D.N.Y. 1981)* .

(n10)Footnote 5. *Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 454-455 (N.D. Cal. 1994)* .

(n11)Footnote 6. *Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980)* .

(n12)Footnote 1. *Cooper v. Southern Co., 390 F.3d 695, 721 (11th Cir. 2004)* .

(n13)Footnote 2. *Jefferson v. Ingersoll International Inc., 195 F.3d 894, 896-898 (7th Cir. 1999)* .

(n14)Footnote 3. *Cooper v. Southern Co., 390 F.3d 695, 720-721 (11th Cir. 2004)* .

(n15)Footnote 4. *Fed. R. Civ. P. 23(b)*, Committee Note to 1966 Amendments.

(n16)Footnote 5. *Coca-Cola Bottling Co. v. Coca-Cola Co., 98 F.R.D. 254, 271 (D. Del. 1983)* .

(n17)Footnote 6. *Barabin v. Aramark Corp., 210 F.R.D. 152, 160-161 (E.D. Pa. 2002)* .

(n18)Footnote 1. *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n19)Footnote 2. *29 U.S.C. § 216(b).*

(n20)Footnote 3. *Held v. National Passenger Corp., 101 F.R.D. 420, 421-422 (D.D.C. 1984)* .

(n21)Footnote 4. *Petersen v. Talisman Sugar Corp., 478 F.2d 73, 83 (5th Cir. 1973)* .

(n22)Footnote 5. *Brown v. Giuliani, 158 F.R.D. 251, 269 (E.D.N.Y. 1994)* .

(n23)Footnote 6. *Briggs v. Anderson, 796 F.2d 1009, 1018 (8th Cir. 1986)* .

(n24)Footnote 1. *Tilley v. TJX Cos., 345 F.3d 34, 39-41 (1st Cir. 2003)* .

(n25)Footnote 2. *United States v. Rainbow Family, 695 F. Supp. 314, 320-321 (E.D. Tex. 1988)* (court certified defendant class where plaintiff sought declaratory and injunctive relief against uniform conduct by multiple defendants).

(n26)Footnote 1. *Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1995)* .

(n27)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(A)*; *Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst., 221 F.R.D. 464 (S.D. Ohio 2004)* .

(n28)Footnote 3. *Fed. R. Civ. P. 23(c)(2)(A)*, Committee Note to 2003 Amendments.

(n29)Footnote 4. *Fed. R. Civ. P. 23(d)(2)*.

(n30)Footnote 1. *Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003)* ; *Daniels v. City of New York, 198 F.R.D. 409, 415 (S.D.N.Y. 2001)* .

(n31)Footnote 2. *Penson v. Terminal Transp. Co., 634 F.2d 989, 994-995 (5th Cir. 1981)* .

(n32)Footnote 3. *Stewart v. Rubin, 948 F. Supp. 1077, 1089-1091 (D.D.C. 1996)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART IV. TYPES OF CLASS ACTIONS AVAILABLE

1-14A Moore's Manual--Federal Practice and Procedure § 14A.33

§ 14A.33 Class Action Based on Common Questions of Law or Factn*

[1] Statement of Requirements

After the general class action prerequisites of Rule 23(a) have been satisfied, n1 the court may certify a class action if the proponent of the class action establishes two elements: n2

- Common questions predominate over any questions affecting only individual members; this is known as the predominance requirement; n3 and
- Class resolution is superior to other available methods for the fair and efficient adjudication of the controversy; this is known as the superiority requirement. n4

In its determination of both the predominance and superiority requirements, n5 Rule 23(b)(3) requires a court to consider the following four factors before certifying the class action: n6

- The interests of the class members in individually controlling their own litigation; n7
- The nature and extent of any relevant, pending litigation brought by or against members of the class; n8
- The desirability of concentrating the litigation in the particular forum; n9 and
- Any difficulties that the management of the class action is likely to present. n10

[2] Predominance Requirement

[a] Factors Court Should Consider

The proponents of a class action may prosecute a Rule 23(b)(3) class action only if common questions of law or fact predominate over questions affecting only individual members. n1 In making the determination of predominance, the

court should consider any of the following applicable factors, n2 which indicate that predominance exists:

- Resolution of an issue common to the class would significantly advance the litigation. n3
- A common issue constitutes a significant part of each class member's individual case. n4
- Common questions are central to all of the members' claims. n5
- The common questions are related to liability. n6
- The same theory of liability was asserted by class members and all of the defendants raised the same basic defenses. n7
- The substantive elements of the class members' claims would require the same proof for each class member. n8
- The proposed class is bound together by a mutual interest in resolving common questions more than it was divided by individual interests. n9

[b] Court's Determination of Predominance

There is no precise test for determining whether common questions of law or fact predominate. Rather, Rule 23(b)(3) requires a practical evaluation of the entire action and all the factors involved. It should be noted that the predominance requirement is far more demanding than the commonality requirement of Rule 23(a). n10 For a list of predominance factors, see [a], above, and [4], below.

When a party moves for class certification, the court should not decide the merits of the case, nor consider the likelihood of success or failure on the merits, but should accept the substantive allegations contained in the complaint as true. n11 However, the court has discretion to examine factual and legal issues underlying the plaintiffs' cause of action, n12 in order to anticipate the form that a trial on those issues would take. n13 Furthermore, the facts necessary to decide predominance are typically intertwined with the facts relating to the merits, so that some inquiry into the underlying factual issues is required at the certification stage. n14

[3] Superiority Requirement

[a] Factors Court Should Consider When Comparing Class Action to Individual Lawsuits

The proponents of a class action may prosecute a Rule 23(b)(3) class action only if the class action is a superior method to other available methods for a fair and efficient adjudication of the case. n1 This requirement mandates that the class action must be superior to, and not just as good as, the other available methods for handling the controversy. n2 In making this determination, n3 the court may consider all of the follow factors:

1. **The size of the proposed class**. Other things being equal, a class action involving a large class is likely to be superior to more lawsuits and will save more judicial resources than actions involving fewer parties. n4

2. **The extent of commonality of the issues**. The more similar the issues, the more likely the class action will be superior to litigating repetitious individual actions. n5

3. **Whether the court would be required to make many individual determinations of claims and defenses**. Attempting to adjudicate numerous dissimilar claims and defenses through the procedure of a class trial would be

inordinately time consuming and difficult, and may also violate standards of fairness and efficiency. n6

4. **The size of the anticipated recovery for each individual plaintiff**. If the size of any recovery would be small, there is little incentive to bring individual actions, so that a class action will be superior. n7 Conversely, plaintiffs who may recover large judgments have a greater incentive to pursue individual suits. n8

5. **The complexity and expense of litigation**. A class action may be superior if it is likely that individual plaintiffs would not undertake the costs of the litigation. n9 For example, because of the complexity of securities cases and the small individual recoveries that an individual plaintiff usually obtains, courts favor class actions in such cases. n10

[b] Court's Consideration of Alternative Procedural Methods

The court must consider whether the class action is superior to other procedural methods available to resolve the litigation. n11 Such alternatives to the class action include multiple individual actions n12 and the following multiple party procedural devices:

1. **Consolidation**. The consolidation of individual cases provides a method of adjudication that may be superior to a class action if more than one similar case is pending and the consolidated actions could resolve both common and individual questions. n13 However, consolidation may not be a viable alternative if the litigation is at an advanced stage or involves numerous claims and geographically diverse parties. n14

2. **Intervention**. Permitting proposed class members to intervene in a case already brought by another member may offer a superior alternative to a class action. n15 However, the presence of a large class makes intervention a less viable possibility. n16 Furthermore, if the members of the class are unlikely to learn of the existing litigation and are, therefore, unlikely to intervene in that litigation, a class action provides the best method for adjudicating the controversy. n17

3. **Joinder**. Another possible alternative to a class action is joinder of the class members as parties; however, the court should already have decided that joinder is impracticability, which is one of the threshold requirements for maintaining a class action. n18 Nevertheless, it is plausible that even though impracticable, joinder could be superior to the class action, for example, in a case in which the claim is not amenable to the use of an opt out class action under Rule 23(b)(3). n19

[c] Court's Determination of Superiority

When it makes a superiority determination, the court must make an informed consideration of other available methods of adjudication, compare the degree of fairness to all parties whose interests are involved between the class action and any alternative methods, and compare the efficiency of adjudication of each method. n20 Under the superiority test of Rule 23(b)(3), a class action must be better than, and not merely equivalent to, other methods of adjudication. n21 However, the adjudication of a matter through a class action is superior to no adjudication at all. n22

[4] Factors for Court Consideration in Both Predominance and Superiority Determinations

[a] Listed Factors Are Guidelines

In determining predominance and superiority, the court may consider four factors specified by Rule 23(b)(3):

(1) the interests of class members in controlling their own litigation; n1

(2) the nature and extent of any relevant, pending litigation brought by or against members of the class; n2

(3) the desirability of concentrating the litigation in the particular forum; n3 and

(4) any management difficulties the class action is likely to present. n4

These four factors provide suggestive guidelines simply to help the district court determine the benefits of the proposed class action. n5 There is no strict requirement that a court review all of these factors in every case or that the court make findings with respect to them. Furthermore, the four criteria are not exhaustive. A court may also consider any other matters pertinent to predominance and superiority. n6

[b] Individual's Interest in Controlling Separate Litigation

In deciding predominance and superiority, courts may consider an individual's interest in controlling his or her own separate litigation. n7 For example, if class members are likely to be personally or intensely involved in the litigation, the court may conclude that individual lawsuits are superior to a class action. n8 The presence or absence of large individual damage claims has also been considered as important in the motivation for separate litigation, n9 as has the strong interest of members of a proposed class to proceed with their own trial tactics. n10 On the other hand, if all class members' claims involve the same facts and law and each individual is relatively passive in their prosecution of the litigation, the court may determine that individual class members have little interest in controlling their own litigation, and that the predominance and superiority requirements have been met. n11

A court may analyze the interest of potential class members in controlling their own litigation by considering their conduct as well as expressed opinion. For example, if few class members have filed individual lawsuits, a court has discretion to determine that the members do not have a strong interest in controlling their own litigation. n12 Another indication that the class action may be the superior method of litigation is if relative few members indicate that they intend to opt out. n13

[c] Nature and Extent of Pending Litigation Involving Class Members

To determine predominance and superiority, the court may consider the nature and extent of any related litigation that class members already have commenced. n1 If other class actions are already pending regarding the same issues, the court may determine that certification of a class for another such action is not justified. n2 Similarly, if a governmental entity has brought suit on the same issue a court may decide that the proposed class action is unnecessary and an inferior method of adjudication. n3 Additionally, the more parallel lawsuits there are, the more likely it is that other methods of litigation are feasible and that a class action would not be superior for the resolution of the issues. n4

[d] Desirability of Concentrating All Claims in Single Forum

In making its determination of predominance and superiority, the court may consider the desirability of using the device of a class action to concentrate all claims in a single forum. n5 In utilizing this guideline, the court should consider factors similar to those applied in change of venue determinations, such as the accessibility of witnesses and evidence, n6 the burden on the parties, and the existence of a more appropriate forum. n7 A court may find that the geographical dispersion of class members makes it particularly appropriate to use a class action to concentrate the litigation in a particular forum, especially if the court is already familiar with the issues involved. n8

[e] Manageability of Class Action

[i] Discretion of Court

The final guideline for the trial court to consider in determining predominance and superiority is the anticipated difficulty of managing the class action. n9 This guideline is considered by courts as the most important and utilized of

the four guidelines listed under Rule 23(b)(3). n10 Manageability encompasses the entire range of practical problems that could make a class action a burdensome or inappropriate method of adjudicating a particular issue. n11 However, a court may not deny class maintenance because of mere speculation regarding the manageability of a class action. n12 Rather, a court should consider only evidence of actual management problems. n13 This is particularly true with settlement classes because the United States Supreme Court has held that when certification of a class is requested for settlement purposes only, the court need not consider whether a case would be manageable because there will be no trial. n14

Manageability bears on the predominance requirement because it is a consideration of whether the individualized claims of the members predominate and make the case difficult to manage. n15 Courts have also used the manageability guideline in relation to the superiority requirement. Thus, unmanageability may defeat certification of a class when difficulties will make the class action a less fair and efficient procedure than other available methods. n16 A court may also deny certification of a large class if notification and opt-out procedures are likely to be extremely difficult to manage. n17

[ii] Manageability Factors

The following examples are factors that a court may analyze in determining manageability and, in turn, predominance and superiority:

1. **The size of a class and the location of its members.** For example, if class members who live in different states raise pendent state claims, the court may deny certification of the state claims on the ground that application of the varying standards of state-law liability would make the class action unmanageable. n18

2. **The difficulty and expense of communicating with members of the class**. This factor includes the difficulty of providing notice to each of the members. n19 If the members of the class are not identifiable, managing the action may pose insurmountable problems. n20 Similarly, if the names and addresses of all members are not known, the case will be difficult to manage. n21

3. **The number of individualized claims**. The court will consider the number of significant individual liability or defense issues that could would require separate hearings for each class member in order to establish the defendants' liability. For example, if individualized proof required by state statutes or common laws predominate over the common issues in the case, the court may deny class certification. n22

4. **The difficulty in computing damages.** In this regard, the presence of individual issues increases the difficulty of assessing injury and calculating damages. Consequently, some courts have held that if individual issues in the case will require a significant number of separate trials, the class action will be unmanageable. n23 However, if a court can calculate damages by using a mathematical formula or statistical techniques, the existence of individualized damage claims does not pose a barrier to certification. n24

[5] Notice to Members When Class Is Based on Common Questions of Law or Fact

[a] Notice Is Mandatory

When a class is certified under Rule 23(b)(3), the court must direct that notice be given to the class members of the option to be excluded from the class, of the procedural rights in the class action, and of the effect of the judgment. n1 The notice must be the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. n2

The notice required in Rule 23(b)(3) class actions is entirely different from that for classes certified under Rule 23(b)(1)

or (2), in which the court has discretion to give notice and the manner in which notice, if any, is given. n3 Under Rule 23(b)(3), notice of certification and opt-out rights to members of classes certified is "required" and "mandatory," n4 and not in any way discretionary. n5 Mandatory notice is based on constitutional due process, which the Supreme Court has held requires the notice and opt-out procedure specified in Rule 23(c)(2)(B) for money damages class actions certified under Rule 23(b)(3). n6

[b] Required Contents

For any class certified under Rule 23(b)(3), the court must direct to the class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language all six of the following items of information: n7

- The nature of the class action. n8
- The definition of the class certified. n9
- Class claims, issues, or defenses. n10
- That a class member may enter an appearance through counsel if the member desires. n11
- That the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded. n12
- The binding effect of a class judgment on class members. n13

The notice should be drafted in such a manner that it is understandable by the people targeted by the notice, which commonly means that it must be in lay terms. n14 The plain language requirement is a reminder that the court and counsel need to strive to communicate effectively with class members and to provide information about most class actions that is both accurate and easily understood by class members who are not themselves attorneys. n15

If liability is established against a defendant in a money damages class action under Rule 23(b)(3), courts may order additional notice to class members that may include a proof of claim form and that establishes a deadline by which class members must submit proof of their individual damages claims. The notice usually provides that those who fail to submit proof by the time of the notice will be barred from any recovery. n16 However, a court may generally not require class members to file a proof of claim form before a liability determination because courts have generally found the use of such a form to be an improper opt-in requirement in violation of Rule 23(c)(2), at least as a prerequisite to trial. n17

[c] Persons Entitled to Notice

The notice required in Rule 23(b)(3) class actions must be the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. n18 Courts have not stated a precise definition of reasonable effort but, rather, have determined the issue on the circumstances of each case. n19 Generally, the proponent of the class action has the burden to identify class members. n20 However, if the party opposing the class is able to identify and find addresses for class members with less effort or expense than the representative plaintiffs, the district court has discretion to order the defendant to perform the identification. n21

Courts should consider two factors in determining persons to be notified and the type of notice to be given. The first factor is the information available to the parties. If the names and last known addresses of class members either are

known to the parties or are capable of being identified from records available to the parties, the parties must obtain the information and provide it to the court to facilitate notice. n22 The second factor is the expense of notice. In this regard, the court will consider all proposed means to identify and locate class members and weigh the anticipated benefits against anticipated expenses. Proposed methods that have a high expense and low probability of producing identities and addresses of potential class members are not within the scope of reasonable efforts, and the court will not require the implementation of those methods. n23 When absent class members cannot be identified through reasonable efforts, the court may dispense with individual notice, and use, for example, notice by publication. n24

[d] Method of Notification of Class Members

The court must provide Rule 23(b)(3) class members with the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. n25 When the identity and address of class members can be acquired with reasonable effort, the court should send the notice by first-class mail to each class member. n26 The mere fact that not every class member actually receives notice sent by first class mail does not make this type of notice invalid because the best notice practicable standard does not require that each and every class member actually receive notice, n27 provided that the class as a whole received adequate notice. n28

For class members who cannot be identified or located through reasonable efforts, the court may order notice by publication in periodicals that potential class members are most likely to read. n29 However, the court ordinarily may not rely solely on notice by publication; there must also be direct notice to any individual class members that can be identified with reasonable effort. n30 When appropriate, the court may order that individual notice or publication be augmented by other methods, for example, by broadcast in electronic media. n31

[e] Appearance by Counsel

The notice must inform each Rule 23(b)(3) class member that the class member may enter an appearance through individual counsel, if the member so desires. n32 In addition, the notice should usually contain the names and addresses of the attorneys who have been appointed class counsel. n33 This is necessary information for class members to decide whether to retain their own counsel. n34 A class member may want to enter an individual appearance when the member believes that his or her interest is not being adequately represented by the class representative or class counsel, or when the member's interest in the outcome of the class action is so important to the member that the member wants to receive notice of all filings in the case. n35

[f] Right of Member to Opt Out of Class

The court must provide Rule 23(b)(3) class action members with notice that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded. n36 This is commonly known as a member's right to opt out. n37 As a practical matter, detailed explanations of the means for opting out of the class are usually contained in a form that the court supplies for a member to exercise the opt-out right and instructions for completing that form. Such a form is sufficient as an explanation of the mechanism for requesting exclusion from the class. n38

The notice must also clearly explain the member's option to take no action and remain in the class and participate in the class action. Federal class action procedures do not provide for "opt-in" classes in which the class members need to take action to be included in the class. n39 Therefore, a class member may do nothing and rely on the class counsel and class representative to conduct the action, in which case the class member is bound by the judgment. n40

[g] Amendment or Correction of Notice

The court has discretion to issue an amended or modified notice in the event circumstances change n41 or if an error has been included in the actual notice sent to individuals, such as an incorrect date to return the exclusion form or a failure

to include an instruction. The court may remedy the mistake by extending the exclusion period or directing that another notice letter be sent to correct the information. n42 Additionally, if the "best practicable notice" is not actually received by an absent class member until the opt-out deadline has passed, the court has the discretion to allow the class member to opt out after the deadline. n43

[h] Payment of Expense of Notice

The general rule is that the plaintiff class must pay all costs to compile and send the required notice. n44 However, there are some exceptions to the general rule. If a court orders a defendant to perform certain tasks associated with notice, the defendant may also be ordered to pay the cost of notice if the cost to the defendant would be insubstantial. n45 Courts have also required that the defendant must pay the costs if the defendant has requested certification of a plaintiff class, n46 has conducted itself improperly, n47 or has assumed the expenses as part of a settlement agreement. n48

[i] Appeal of Certain Court Orders Regarding Notice

A party may, in some instances, challenge a trial court's class notification order by an interlocutory appeal because the Supreme Court has held that the district court's notice decisions are appealable as final decisions. The rule is applicable only to notice orders that involve a collateral matter unrelated to the merits of the plaintiff's claim and that constitute a final disposition of a claimed right that is not an element of a claim and which does not require direct consideration with the claim. An example of such an order would be one requiring the defendant to pay expenses of giving notice. n49 On the other hand, an order setting forth the method of notification is generally not appealable unless there is a significant likelihood that a substantial portion of the class members will not receive actual notice. n50

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.43 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23(a)(1)-(a)(4)*; *see also § 14A.20* et seq.

(n3)Footnote 2. *See Fed. R. Civ. P. 23(b)(3)*.

(n4)Footnote 3. *See* [2], *below*.

(n5)Footnote 4. *See* [3], *below*.

(n6)Footnote 5. *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*
.

(n7)Footnote 6. *Fed. R. Civ. P. 23(b)(3)*; *see* [4][a], *below*.

(n8)Footnote 7. *Fed. R. Civ. P. 23(b)(3)(A)*; *see* [4][b], *below*.

(n9)Footnote 8. *Fed. R. Civ. P. 23(b)(3)(B)*; *see* [4][c], *below*.

(n10)Footnote 9. *Fed. R. Civ. P. 23(b)(3)(C)*; *see* [4][d], *below*.

(n11)Footnote 10. *Fed. R. Civ. P. 23(b)(3)(D)*; *see* [4][e], *below*.

(n12)Footnote 1. *Fed. R. Civ. P. 23(b)(3)*.

(n13)Footnote 2. *See Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 468 (S.D.N.Y. 2005)* .

(n14)Footnote 3. *Krieger v. Gast, 197 F.R.D. 310, 319 (W.D. Mich. 2000)* .

(n15)Footnote 4. *In re Energy Sys. Equip. Leasing Sec. Litig., 642 F. Supp. 718, 752 (E.D.N.Y. 1986)* .

(n16)Footnote 5. *In re Energy Sys. Equip. Leasing Sec. Litig., 642 F. Supp. 718, 752 (E.D.N.Y. 1986)* .

(n17)Footnote 6. *Gunnells v. Healthplan Servs., 348 F.3d 417, 428 (4th Cir. 2003)* ; *Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 40 (1st Cir. 2003)* .

(n18)Footnote 7. *Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987)* .

(n19)Footnote 8. *Genden v. Merrill Lynch, Pierce, Fenner & Smith, 114 F.R.D. 48, 52 (S.D.N.Y. 1987)* .

(n20)Footnote 9. *Doe v. Guardian Life Ins. Co., 145 F.R.D. 466, 476 (N.D. Ill. 1992)* .

(n21)Footnote 10. *Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 468 (S.D.N.Y. 2005)* .

(n22)Footnote 11. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n23)Footnote 12. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

(n24)Footnote 13. *Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987)* .

(n25)Footnote 14. *See Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n26)Footnote 1. *Fed. R. Civ. P. 23(b)(3).*

(n27)Footnote 2. *Abby v. City of Detroit, 218 F.R.D. 544, 549 (E.D. Mich. 2003)* .

(n28)Footnote 3. *See* [b], *below.*

(n29)Footnote 4. *Goldwater v. Alston & Bird, 116 F.R.D. 342, 356 (S.D. Ill. 1987)* .

(n30)Footnote 5. *Epifano v. Boardroom Bus. Prods., 130 F.R.D. 295, 299 (S.D.N.Y. 1990)* .

(n31)Footnote 6. *In re LifeUSA Holding, Inc., 242 F.3d 136, 147-148 (3d Cir. 2001)* .

(n32)Footnote 7. *Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994)* .

(n33)Footnote 8. *Leszczynski v. Allianz Ins., 176 F.R.D. 659, 676 (S.D. Fla. 1997)* .

(n34)Footnote 9. *Wehner v. Syntex Corp., 117 F.R.D. 641, 645 (N.D. Cal. 1987)* .

(n35)Footnote 10. *Nelsen v. Craig-Hallum, Inc., 659 F. Supp. 480, 487 (D. Minn. 1987)* .

(n36)Footnote 11. *Fed. R. Civ. P. 23(b)(3).*

(n37)Footnote 12. *See* [a], *above.*

(n38)Footnote 13. *Datz v. Whitworth, 144 F.R.D. 426, 427 (N.D. Ga. 1992)* .

(n39)Footnote 14. *Esler v. Northrop Corp., 86 F.R.D. 20, 39 (W.D. Mo. 1979)* .

(n40)Footnote 15. *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001)* .

(n41)Footnote 16. *In re Visa Check/MasterMoney Antitrust Litig. v. Visa, USA Inc., 280 F.3d 124, 135-136 (2d Cir. 2001)* .

(n42)Footnote 17. *McClendon v. Continental Group, Inc., 113 F.R.D. 39, 45 (D.N.J. 1986)* .

(n43)Footnote 18. *Fed. R. Civ. P. 23(a)(1).*

(n44)Footnote 19. *See Christiana Mortgage Corp. v. Delaware Mortgage Bankers Ass'n, 136 F.R.D. 372, 378 (D. Del. 1991)* .

(n45)Footnote 20. *Perez v. Government of Virgin Islands, 109 F.R.D. 384, 390 (D.V.I. 1986)* .

(n46)Footnote 21. *Johnston v. HBO Film Mgmt., 265 F.3d 178, 194 (3d Cir. 2001)* .

(n47)Footnote 22. *In re Tetracycline Cases, 107 F.R.D. 719, 732 (W.D. Mo. 1985)* (citing **Moore's Federal Practice**).

(n48)Footnote 1. *Fed. R. Civ. P. 23(b)(3)(A)*; *see* [b], *below*.

(n49)Footnote 2. *Fed. R. Civ. P. 23(b)(3)(B)*; *see* [c], *below*.

(n50)Footnote 3. *Fed. R. Civ. P. 23(b)(3)(C)*; *see* [d], *below*.

(n51)Footnote 4. *Fed. R. Civ. P. 23(b)(3)(D)*; *see* [e], *below*.

(n52)Footnote 5. *Buford v. H & R Block, 168 F.R.D. 340, 361 (S.D. Ga. 1996)* .

(n53)Footnote 6. *Walco Investments, Inc. v. Thenen, 168 F.R.D. 315, 337 (S.D. Fla. 1996)* .

(n54)Footnote 7. *Fed. R. Civ. P. 23(b)(3)(A).*

(n55)Footnote 8. *In re Three Mile Island Litig., 87 F.R.D. 433, 442 (M.D. Pa. 1980)* .

(n56)Footnote 9. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004)* ; *Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 492 (E.D. Va. 1987)* .

(n57)Footnote 10. *In re Data Corp. Sec. Litig., 116 F.R.D. 216, 223 (D. Minn. 1986)* .

(n58)Footnote 11. *Epstein v. MCA, Inc., 50 F.3d 644, 668 (9th Cir. 1995)* , *rev'd in part on other grounds, 516 U.S. 367 (1996)* .

(n59)Footnote 12. *Tedesco v. Mishkin, 689 F. Supp. 1327, 1336 (S.D.N.Y. 1988)* .

(n60)Footnote 13. *Central Wesleyan Coll. v. W.R. Grace & Co., 143 F.R.D. 628, 640 (D.S.C. 1992)* .

(n61)Footnote 1. *Fed. R. Civ. P. 23(b)(3)(B).*

(n62)Footnote 2. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004)* .

(n63)Footnote 3. *Pennsylvania v. Budget Fuel Co., 122 F.R.D. 184, 185 (E.D. Pa. 1988)* .

(n64)Footnote 4. *Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 680 (N.D. Ohio 1995)* .

(n65)Footnote 5. *Fed. R. Civ. P. 23(b)(3)(C).*

(n66)Footnote 6. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004)* .

(n67)Footnote 7. *Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 266 (S.D. Cal. 1988)* .

(n68)Footnote 8. *In re S.E. Hotel Properties Ltd. Partnership Inv. Litig., 151 F.R.D. 597, 609 (W.D.N.C. 1993)* .

(n69)Footnote 9. *Fed. R. Civ. P. 23(b)(3)(D).*

(n70)Footnote 10. *Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 124 (C.D. Cal. 1978)* .

(n71)Footnote 11. *Gunnells v. Healthplan Servs., 348 F.3d 417, 426 (4th Cir. 2003)* .

(n72)Footnote 12. *In re Relafen Antitrust Litig., 218 F.R.D. 337, 347 (D. Mass. 2003)* .

(n73)Footnote 13. *Bowers v. Jefferson Pilot Fin. Ins. Co., 219 F.R.D. 578, 584* (E.D. Mich. 2004.

(n74)Footnote 14. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n75)Footnote 15. *Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 52 (3d Cir. 1989)* .

(n76)Footnote 16. *Brown v. Cameron-Brown Co., 92 F.R.D. 32, 49 (E.D. Va. 1981)* .

(n77)Footnote 17. *Gaffney v. U.S., 834 F. Supp. 1, 6 (D.D.C. 1993)* ; *see* [ii], *below*.

(n78)Footnote 18. *Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)* .

(n79)Footnote 19. *Mateo v. The M/S Kiso, 805 F. Supp. 761, 774 (N.D. Cal. 1991)* .

(n80)Footnote 20. *Tedesco v. Mishkin, 689 F. Supp. 1327, 1337 (S.D.N.Y. 1988)* .

(n81)Footnote 21. *Riordan v. Smith Barney, 113 F.R.D. 60, 66 (N.D. Ill. 1986)* .

(n82)Footnote 22. *Bowers v. Jefferson Pilot Fin. Ins. Co., 219 F.R.D. 578, 584 (E.D. Mich. 2004)* (significant variations in each states' laws with respect to use of extrinsic evidence).

(n83)Footnote 23. *Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986)* .

(n84)Footnote 24. *Hilao v. Estate of Marcos, 103 F.3d 767, 782-786 (9th Cir. 1996)* .

(n85)Footnote 1. *Fed. R. Civ. P. 23(c)(2)(B)*; *see* [b], *below* (contents of notice).

(n86)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(B).*

(n87)Footnote 3. *See Fed. R. Civ. P. 23(c)(2)(A)*; *In re Elec. Data Sys. Corp. "ERISA" Litig., 224 F.R.D. 613, 632 (E.D. Tex. 2005)* .

(n88)Footnote 4. *In re Elec. Data Sys. Corp. "ERISA" Litig., 224 F.R.D. 613, 632 (E.D. Tex. 2005)* .

(n89)Footnote 5. *Fed. R. Civ. P. 23(c)(2)(B)*, Committee Note to 2003 Amendments.

(n90)Footnote 6. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

(n91)Footnote 7. *Fed. R. Civ. P. 23(c)(2)(B).*

(n92)Footnote 8. *See § 14A.01.*

(n93)Footnote 9. *See § 14A.21[1].*

(n94)Footnote 10. *See § 14A.80.*

(n95)Footnote 11. *See* [e], *below.*

(n96)Footnote 12. *See* [f], *below.*

(n97)Footnote 13. *Fed. R. Civ. P. 23(c)(3)*; *see also § 14A.80* et seq.

(n98)Footnote 14. *Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980)* .

(n99)Footnote 15. *Fed. R. Civ. P. 23(c)(2)(B)*, Committee Note to 2003 Amendments.

(n100)Footnote 16. *Grace v. City of Detroit, 145 F.R.D. 413, 414-415 (E.D. Mich. 1992)* ; *see Fed. R. Civ. P. 23(d)(2)* (court has authority to order notices in addition to initial certification notice).

(n101)Footnote 17. *Enterprise Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980)* .

(n102)Footnote 18. *Fed. R. Civ. P. 23(c)(2)(B)*; *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* (individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort).

(n103)Footnote 19. *In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 449 (S.D.N.Y. 2004)* .

(n104)Footnote 20. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 357, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n105)Footnote 21. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1477, 1484 (E.D.N.Y. 1989)* .

(n106)Footnote 22. *In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977)* .

(n107)Footnote 23. *Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 437 (D.N.M. 1988)* .

(n108)Footnote 24. *In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 548 (N.D. Ga. 1992)* .

(n109)Footnote 25. *Fed. R. Civ. P. 23(c)(2)(B).*

(n110)Footnote 26. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

(n111)Footnote 27. *Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982)* .

(n112)Footnote 28. *Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993)* .

(n113)Footnote 29. *In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 548-553 (N.D. Ga. 1992)* .

(n114)Footnote 30. *Silber v. Mabon, 18 F.3d 1449, 1453 (9th Cir. 1994)* .

(n115)Footnote 31. *In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 169 (2d Cir. 1987)* .

(n116)Footnote 32. *Fed. R. Civ. P. 23(c)(2)(B).*

(n117)Footnote 33. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

(n118)Footnote 34. *Thompson v. Midwest Found. Indep. Physicians Ass'n, 117 F.R.D. 108, 118 (S.D. Ohio 1987)* .

(n119)Footnote 35. *In re Three Mile Island Litig., 87 F.R.D. 433, 442 (M.D. Pa. 1980)* .

(n120)Footnote 36. *Fed. R. Civ. P. 23(c)(2)(B).*

(n121)Footnote 37. *Monumental Life Ins. Co. v. Western & Southern Life Ins. Co., 343 F.3d 331, 337-342 (5th Cir. 2003)* (citing **Moore's Federal Practice**).

(n122)Footnote 38. *Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 690 (11th Cir. 1987)* .

(n123)Footnote 39. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

(n124)Footnote 40. *See Fed. R. Civ. P. 23(c)(3)*; *see also Fed. R. Civ. P. 23(c)(2)(B).*

(n125)Footnote 41. *See Fed. R. Civ. P. 23(d)(2)* (court may re quire that notice be given for the protection of the members of the class or otherwise for the fair conduct of the action).

(n126)Footnote 42. *Blum v. BankAtlantic Fin. Corp., 925 F.2d 1357, 1360 (11th Cir. 1991)* .

(n127)Footnote 43. *Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994)* .

(n128)Footnote 44. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n129)Footnote 45. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 358-359, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n130)Footnote 46. *Argo v. Hills, 425 F. Supp. 151, 159 (E.D.N.Y. 1977)* .

(n131)Footnote 47. *Nagy v. Jostens, Inc., 91 F.R.D. 431, 433 (D. Minn. 1981)* .

(n132)Footnote 48. *Milstein v. Huck, 600 F. Supp. 254, 256 (E.D.N.Y. 1984)* .

(n133)Footnote 49. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n134)Footnote 50. *In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1095 (5th Cir. 1977)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART IV. TYPES OF CLASS ACTIONS AVAILABLE

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.34through 14A.39

[Reserved]

§§ 14A.34[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
A. CERTIFICATION OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.40

§ 14A.40 Pleading May Initiate Class Actionn*

[1] Court's Certification of Based on Allegations of Complaint

When a plaintiff, as a representative of a class, brings an action against a defendant or when a plaintiff brings an action against a defendant, as a representative of a class, the court must determine by order whether to certify the action as a class action. n1 Consequently, a class action may be initiated by a complaint, n2 provided that the complaint establishes that all of the class action requirements have been met, n3 including jurisdictional requirements, n4 the four prerequisites for all class actions, n5 and the requirements for the particular type of class action involved. n6 To obtain certification, the plaintiff must plead more than mere conclusory assertions that the requirements have been met. n7 Rather, the plaintiff must allege facts establishing that all of the requirements for bringing a particular class action have been satisfied. n8

However, even though the plaintiff must allege facts sufficient to show that the requirements of Rule 23 have been satisfied, each and every detail in support of a class action need not be pleaded; for example, when it is unduly burdensome or impracticable for each of the members of the class to be listed in the complaint, the plaintiff need not do so. n9 In such a case, the mere fact that the plaintiff has established the inability to identify all of the class members raises the implication that the plaintiff may be unable to join them and may therefore lead to a finding that the numerosity requirement is met. n10 Also, if a plaintiff fails to allege sufficient facts to satisfy the class action prerequisites in its original complaint, the plaintiff may amend the complaint to the extent permitted by Rule 15 to correct that deficiency. n11 If after amendment, the court determines from the pleadings that the case should not proceed as a class action, Rule 23(d)(4) permits the court to order that the pleadings be amended to eliminate allegations regarding the representation of absent persons and that the action proceed as an individual action rather than a class action. n12

[2] Motion for Class Certification

If a party wants to initiate a class action for claims or defenses but has not done so by the complaint, n1 the party may make a motion to the court for an order certifying the class. n2 The party opposing a request for class action certification by complaint or motion may make a motion for an order denying class certification n3 and add a motion to

dismiss or for summary judgment, if applicable. n4 The moving party should ensure that the motion regarding certification of the class is accompanied by necessary supporting briefs or memoranda and affidavits. If the court grants dismissal or summary judgment but does not formally decide the motion for class certification by written order, the judgment in the case will not be binding on anyone other than the named parties. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertification

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(A)*; *see General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

(n3)Footnote 2. *Lusted v. San Antonio Indep. Sch. Dist., 741 F.2d 817, 820 (5th Cir. 1984)* .

(n4)Footnote 3. *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1078-1079 (6th Cir. 1996)* .

(n5)Footnote 4. *See § 14A.10* et seq.

(n6)Footnote 5. *See § 14A.20* et seq.

(n7)Footnote 6. *See § 14A.30* et seq.

(n8)Footnote 7. *In re American Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)* .

(n9)Footnote 8. *In re American Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)* .

(n10)Footnote 9. *Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968)* .

(n11)Footnote 10. *Doe v. Charleston Area Medical Ctr., 529 F.2d 638, 644 (4th Cir. 1975)* .

(n12)Footnote 11. *Fed. R. Civ. P. 15*; *Voilas v. General Motors Corp., 173 F.R.D. 389, 394, 396 (D.N.J. 1997)* .

(n13)Footnote 12. *Fed. R. Civ. P. 23(d)(4)*; *Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998)* .

(n14)Footnote 1. *See* [1], *above*.

(n15)Footnote 2. *East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 404-405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* ; *Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1459 (10th Cir. 2004)* .

(n16)Footnote 3. *Bryant v. Food Lion, Inc., 774 F. Supp. 1484, 1495 (D.S.C. 1991)* .

(n17)Footnote 4. *Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 476-477 (N.D. Cal. 1978)* .

(n18)Footnote 5. *Besinga v. United States, 923 F.2d 133, 135 (9th Cir. 1991)* , *cert. denied, 513 U.S. 864 (1994)* ; *see § 14A.31*.

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
A. CERTIFICATION OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.41

§ 14A.41 Purpose of Certificationn*

Absent class members may be bound by the judgment in a class action, even if they did not explicitly consent to become a part of the class. n1 Consequently, the certification procedure has been designed to protect absent members, n2 and trial courts must strictly follow the Rule 23 procedural requirements if the class action judgment claim is to have preclusive effect on the entire class. n3 Consequently, if the court fails to certify an action as a class action by formally defining the class and identifying the class claims under the procedures set forth in Rule 23, n4 the action is not a proper class action, n5 and only the named parties will be bound by the judgment. In other words, class certification is necessary so that the parties may proceed with the action under the assumption that the class members will be bound by the judgment resolving the class claims, issues, and defenses. n6 Certification also serves the important function of protecting absent class members whose procedural rights may be directly affected by the class certification. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertification

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* (member of Rule 23(b)(3) class who has not elected to be excluded from class after receiving proper notice is bound by judgment).

(n3)Footnote 2. *Berger v. Compaq Computer Corp., 257 F.3d 475, 479-480 (5th Cir. 2001)* .

(n4)Footnote 3. *Besinga v. United States, 923 F.2d 133, 135 (9th Cir. 1991)* , *cert. denied, 513 U.S. 864 (1994)* .

(n5)Footnote 4. *Fed. R. Civ. P. 23(c)(1)(B).*

(n6)Footnote 5. *Fuller v. Fruehauf Trailer Corp., 168 F.R.D. 588, 605 (E.D. Mich. 1966)* .

(n7)Footnote 6. *Clay v. American Tobacco Company, Inc., 188 F.R.D. 483, 490 (S.D. Ill. 1999)* .

(n8)Footnote 7. *Davis v. Hutchins, 321 F.3d 641, 648-649 (7th Cir. 2003)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
A. CERTIFICATION OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.42

§ 14A.42 Court's Discretion to Grant or Deny Certificationn*

When a request for class action procedure has been initiated, either by pleading or motion, the court must promptly determine by order whether to certify the action as a class action. n1 This means that when class relief is requested or class issues are presented, the court must make a formal written order that states whether the action will proceed under Rule 23 requirements. n2 However, even though the court must make a definite order granting or denying certification, it has considerable discretion in that choice. Rule 23 provides that if the class action criteria are met, an action may, rather than must, be maintained as a class action. n3 If the court determines that relevant factors weigh against the class action procedure, it is appropriate for a district court to refuse to certify or to decertify the class. However, even though the court has broad discretion, certification is generally favored and any doubt as to whether the requirements of Rule 23(a) and (b) have been met should be resolved in favor of class certification. n4

Even though the court's certification determination may be amended or the class decertified at any time before final judgment, n5 a court's certification decision may not be tentative or conditional on later events or findings. If the court is not satisfied that the requirements of Rule 23 are met, the court should refuse certification until they are met. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.80 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(A).*

(n3)Footnote 2. *General Tel. Co. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) .*

(n4)Footnote 3. *Coleman v. GMAC, 296 F.3d 443, 446 (6th Cir. 2004) .*

(n5)Footnote 4. *Klay v. Humana, Inc., 382 F.3d 1241, 1270 (11th Cir. 2004)* .

(n6)Footnote 5. *Fed. R. Civ. P. 23(c)(1)(C)*.

(n7)Footnote 6. *Fed. R. Civ. P. 23(c)(1)*, Committee Note to 2003 Amendments.

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.43

§ 14A.43 Consideration of Merits by Court in Ruling on Certificationn*

The Supreme Court has held that courts do not have authority to conduct a preliminary inquiry into the merits of a case in order to determine if the case may be maintained as a class action. In determining whether to certify a class action, the question is not whether the plaintiffs have stated a valid claim for relief, or who will prevail on the merits, but, rather, whether the proposed class and class representatives meet the requirements for certification under Rule 23(a) and (b). If courts make an extensive analysis of the issues on the merits, the certification decision may become a preliminary advisory opinion on the merits rather than a consideration of certification issues. n1 However, courts are not strictly limited to the pleadings to determine whether the requirements for class certification are satisfied and are permitted to consider other circumstances. n2 Therefore, while not deciding the underlying merits the district court may examine the issues involved in the litigation in order to determine whether to certify a class. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.80 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n3)Footnote 2. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 165-169 (3d Cir. 2001)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Shook v. El Paso County, 386 F.3d 963, 974 (10th Cir. 2004)* (district court should make factual and legal inquiries necessary to resolve certification issues, including issues intertwined with merits of case).

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CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
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A. CERTIFICATION OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.44

§ 14A.44 Certification Proceduresn*

[1] Time of Certification by Court

A court must determine whether to certify the action as a class action at an early practicable time. n1 This means that the court is expected to actively manage the case to ensure that the certification decision is not unjustifiably delayed. n2 The purpose of the early certification requirement is to ensure that the parties understand the scope and the rights potentially affected by the class action and to protect the parties from prejudice. A failure to decide on certification early in the proceeding may leave the parties in confusion in the district court and may make appellate review more difficult. n3 An early decision on certification may also form the foundation for later determinations regarding the proper procedure for handling the claims and defenses of the numerous parties to the action. n4

On the other hand, several considerations may justify some delay in making the certification decision. The court may need sufficient information to conduct an extensive analysis, and more time may be necessary to permit discovery on certification issues. n5 Additionally the court may need time to appoint class attorneys. n6 The district court must balance these and other considerations to ensure that the time for certification is both early and practicable. n7

[2] Court May Allow Discovery on Certification Issues

The trial court has discretion in determining whether, and in what manner, to allow discovery with respect to class certification issues. Discovery should be allowed to enable a party to show the existence of a class. Specifically, discovery should be allowed where there is a need to determine whether Rule 23(a) requirements are met, and whether the action fits into one of the Rule 23(b) categories. However, the party opposing class certification should be protected from overly burdensome or irrelevant discovery. n1 As a general rule, the district court should limit discovery to class certification issues and postpone discovery on the merits of the action until after the certification ruling, except to the extent the types of discovery unavoidably overlap. n2

Rule 23, rather than the general discovery rules, controls requests for information relating to issues of class certification and notification. The court must consider expense as a factor in defining the scope of the discovery because of the impact the allocation of the expense may have on the parties. The courts have less discretion under Rule 23 to allocate

costs than under regular discovery rules; thus, proponents of the class action are usually required to pay the expense of discovery. n3

[3] Hearing to Determine Certification Issues

If the pleadings or motion and other papers set out sufficient uncontested facts from which a court can determine whether the proposed class satisfies the requirements of Rule 23, the court may decide whether to certify the class action without a hearing. n1 Otherwise, the court commonly conducts an evidentiary hearings on the class certification issue. The court should hold an evidentiary hearing if there is any doubt regarding the issue of class certification. n2 A district court's certification decision may be reversed as an abuse of discretion if the court fails to hold an evidentiary hearing on the issue when necessary. n3 However, the failure of a court to hold a hearing does not require reversal unless the party claiming that a hearing was necessary can demonstrate that the party suffered prejudice and that the party requested that the district court hold such a hearing. n4

[4] Reference to Magistrate Judge Regarding Certification Issues

The district court judge may refer the class action to a magistrate judge for the purpose of conducting evidentiary hearings and making recommendations regarding certification. n1 The magistrate judge's report should assist the district court in its determination whether to certify the class, its definition of the class and any necessary subclasses, n2 the specification of notice and opt-out procedures, n3 designation of class representative, and drafting a trial plan. n4

[5] Burden in Certification Determination Is on Proponent of Class Action

The proponent of the class has the burden, either through pleadings or motions or at the hearing, to establish that the four prerequisites for all class actions n1 and the requirements for the particular type of class action involved n2 have been met. n3 However, some courts have stated that when the party opposing certification moves to deny certification, rather than the usual situation in which the proponent moves for certification, the moving party opposing certification has the burden of showing that certification is improper. n4

[6] Order of Court Granting or Denying Certification

[a] Form and Contents of Order

After the court has made its determination whether to grant or deny certification based on the requirements of Rule 23, n1 the court must enter a formal order stating its decision. n2 Even though Rule 23(c)(1) does not expressly state that the order must be in writing, considering the mandatory contents for the certification order, n3 the district court should always enter it in writing in clear and concise language. n4

If the court decides in favor of certification of the class, its order must specify: n5

- The definition of the class; n6
- The class claims, issues, or defenses; n7
- Specification of any sublclasses; n8
- The appointment of class counsel. n9

Although not an express requirement, the order should also specify that all of the requirements of Rule 23(a) have been met and the type of class action under Rule 23(b) that is being certified. n10

If the court decides against certification, its order should specify the factors that were insufficient so as to facilitate potential appeal. n11

[b] Definition of Class

The court's certification order must specify the definition of the class. n12 This rule is based on the fundamental requirement that a class action may not exist unless the class is defined by the court in a way that is specific enough to permit the ascertainment of those persons who qualify as class members and those who do not. n13 If the district court does not properly define the class, the action does not qualify as a class action, n14 and only the named parties are bound by the judgment. n15

[c] Class Claims, Issues, and Defenses

The court's certification order must specify class claims, issues, and defenses. n16 The court must be precise in its identification of the claims, issues, and defenses because when appropriate, a court may certify a class action for particular claims, issues, or defenses. n17 If they seek certification only with respect to particular claims, issues, or defenses, the parties must specify so in the pleading or motion and are required to satisfy the class action requirement of Rule 23(a) and (b) only with respect to those claims, issues, or defenses. The most common example of this type of limitation is a court certification of a class to determine liability only. In such a case, the court will specify that damages for each individual are to be determined in separate litigation. n18 In a similar way, a court may certify a class action limited to trying a particular defense that is common to a large number of asserted class members. n19

[d] Definition of Subclasses

When appropriate, the court may certify a class action by identifying a class and dividing that class into subclasses; in such circumstances, each subclass must be treated as a class, and the provisions of Rule 23 are construed and applied to each subclass. n20 If the court certifies a class into subclasses, each subclass must be treated as a class within the entire class action, n21 and each subclass must independently satisfy the class action requirements of Rule 23 before it may be certified. Thus, if a subclass does not meet one or more of the requirements of Rule 23, the court must deny certification regarding that proposed subclass. n22 The proponent of a subclass has the burden to submit a subclass certification proposal to the court that the subclass meets the requirements of Rule 23. n23 However, the court has the power on its own initiative to redefine or divide a class into a subclass if a class is overly broad and has discretion to certify subclasses under Rule 23(c)(4). A court may redefine a class or create subclasses at any stage of the proceedings. n24

[e] Appointment of Class Counsel

When it certifies a class action, a court must appoint class counsel in its order of certification. The court must make the appointment under Rule 23(g), n25 which specifies the requirements an attorney must satisfy to qualify as class counsel. n26 Basically, the court must evaluate the attorney's ability to conduct class actions and, in particular, whether the attorney is qualified with respect to the particular class that has been certified. n27 The qualifications for class counsel and the procedures for the court to make an appointment on certification of a class n28 are discussed in *§ 14A.50* et seq. When the court rejects the qualification of the named plaintiffs' counsel to serve as class counsel, the court has discretion to appoint some other attorney as class counsel, rather than merely deny certification. n29

[f] Modification of Certification Order and Decertification

The court may alter or amend an order certifying a class action at any time before final judgment in the event circumstances change regarding the class. n30 For example, the court may amend a certification order to redefine or subdivide the certified class, even to redefine or subdivide the original class to conform to the proof presented at trial. n31 The court also has power to decertify the class, which is the equivalent of an amendment of the certification order, if the court finds that certification should not have been granted or is no longer appropriate. n32 The district court's

decision to modify a certification order or to decertify a class, like its decision to certify a class, is committed to its discretion and is reviewed for abuse of discretion. n33

[7] Court's Order Granting or Denying Certification

[a] No Immediate Appeal of Right

A decision by the district court to grant or deny certification under Rule 23 is generally not a "final decision" within the meaning of the United States Code. n1 Consequently, a certification order is not immediately appealable as a matter of right but may be reviewed on appeal from a final judgment in the action. n2 Such an interlocutory appeal is possible only if leave to appeal is granted in the discretion of the court of appeals. n3 When an appellate court does review a district court's certification order, the standard of review is for abuse of discretion. n4

[b] Court of Appeals Has Discretion to Grant Immediate Review of Certification Order

A court of appeals has discretion to permit an immediate appeal from an order of a district court granting or denying class action certification, provided that the appealing party files an application to the court of appeals within 14 days after the district court enters its class certification order. n5 This method of appeal applies only to orders granting or denying certification, not to other types of interlocutory orders in class actions. n6

There are two reasons appellate courts have discretionary immediate appellate jurisdiction over class certification orders. First, if certification is denied, the plaintiff might be unable to secure review of the decision without proceeding to final judgment on an individual claim that by itself would be too insignificant to justify the costs of litigation. Second, if certification is granted, the defendant may be forced to settle rather than incur the costs of defending the class action and the risk of potentially large liability. n7

Under the appellate procedure, a court of appeals has liberal discretion to evaluate any relevant factors in favor of, or against, an interlocutory appeal. n7.1 However, the sheer number of class actions and the lengthy period necessary to complete an appeal has lead most circuits to conclude that Rule 23(f) review should be granted sparingly. n8 Thus, a circuit court will grant a interlocutory appeal in limited circumstances, such as when the certification decision turns on a novel or unsettled question of law or when that decision likely will dispose of the litigation. The district court need not certify this type of order for appeal. However, a district court's statement of reasons for a grant or denial of certification may assist the court of appeals in deciding whether to grant an appeal. n9

[c] Factors Justifying Immediate Review

Several courts of appeals have stated that when exercising its broad discretion on whether to take an immediate appeal from a grant or denial of class certification, a court of appeals should consider the reasons Rule 23(f) was promulgated. These courts have adopted guidelines to specify when Rule 23(f) review should be granted, including when: (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous. These three factors do not constitute an exhaustive list and are not intended to limit the broad discretion granted the courts of appeal by Rule 23(f). n10 Other circuits have adopted similar guidelines. n11

[d] No Automatic Stay if Immediate Appeal Is Allowed

If the court of appeals grants immediate, interlocutory review, proceedings in the district court are not automatically stayed; proceedings are stayed only if the district judge or the court of appeals orders a stay. n12 A party should request a stay first from the district court. If the district court refuses a stay, its action and any explanation of its views will be

considered by the court of appeals. n13 A stay should be issued only when it is demonstrated that the probability of error in the class certification decision is high enough that the costs of proceeding in the district court exceed the costs of delaying. These considerations are similar to those that apply with respect to a stay of a preliminary injunction. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertification

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.81 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(B).*

(n3)Footnote 2. *Fed. R. Civ. P. 23(c)(1)(B)*, Committee Note to 2003 Amendments.

(n4)Footnote 3. *Henry v. Gross, 803 F.2d 757, 769 (2d Cir. 1986)* .

(n5)Footnote 4. *Jones v. Ford Motor Credit Co., 358 F.3d 205, 215-216 (2d Cir. 2004)* .

(n6)Footnote 5. *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1086 (6th Cir. 1996)* .

(n7)Footnote 6. *Fed. R. Civ. P. 23(c)(1)(B)*, Committee Note to 2003 Amendments.

(n8)Footnote 7. *Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273-274 (10th Cir. 1977)* .

(n9)Footnote 1. *Loy v. Motorola, Inc., 2004 U.S. Dist. LEXIS 23753, at *11 (N.D. Ill. 2004)* .

(n10)Footnote 2. *Mueller v. CBS, Inc., 200 F.R.D. 242, 244-245 (W.D. Pa. 2001)* .

(n11)Footnote 3. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n12)Footnote 1. *Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)* .

(n13)Footnote 2. *Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13, 20 (2d Cir. 2003)* .

(n14)Footnote 3. *Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984)* .

(n15)Footnote 4. *Grayson v. K Mart Corp., 79 F.3d 1086, 1099 (11th Cir. 1996)* .

(n16)Footnote 1. *Fed. R. Civ. P. 72(b)*; *see Boskoff v. Yano, 217 F. Supp. 2d 1077, 1084 (D. Haw. 2001)* .

(n17)Footnote 2. *See Fed. R. Civ. P. 23(c)(1)(B).*

(n18)Footnote 3. *See Fed. R. Civ. P. 23(c)(2)(B).*

(n19)Footnote 4. *Munoz v. Orr, 200 F.3d 291, 298 (5th Cir. 2000)* .

(n20)Footnote 1. *Fed. R. Civ. P. 23(a)*; *see § 14A.20* et seq.

(n21)Footnote 2. *Fed. R. Civ. P. 23(a)*; *see § 14A.30* et seq.

(n22)Footnote 3. *Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13, 16 (2d Cir. 2003)* .

(n23)Footnote 4. *Bryant v. Food Lion, Inc., 774 F. Supp. 1484, 1495 (D.S.C. 1991)* .

(n24)Footnote 1. *See § 14A.32*.

(n25)Footnote 2. *Fed. R. Civ. P. 23(c)(1)(A)*.

(n26)Footnote 3. *See Fed. R. Civ. P. 23(c)(1)(B)*.

(n27)Footnote 4. *Sweat v. City of Fort Smith, 265 F.3d 692, 696-697* (8th Cir. 2001.

(n28)Footnote 5. *Fed. R. Civ. P. 23(c)(1)(A)*.

(n29)Footnote 6. *See* [b], *below*.

(n30)Footnote 7. *See* [c], *below*.

(n31)Footnote 8. *See* [d], *below*.

(n32)Footnote 9. *See* [d], *below*.

(n33)Footnote 10. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 794 (3d Cir. 1995)* .

(n34)Footnote 11. *See Jacobs v. Home Depot U.S.A., Inc., 219 F.R.D. 549, 551 (S.D. Fla. 2004)* ; *Fed. R. Civ. P. 23(c)(1)(A)*.

(n35)Footnote 12. *Fed. R. Civ. P. 23(c)(1)(B)*.

(n36)Footnote 13. *Pottinger v. City of Miami, 720 F. Supp. 955, 958 (S.D. Fla. 1989)* .

(n37)Footnote 14. *See § 14A.21*.

(n38)Footnote 15. *Fuller v. Fruehauf Trailer Corp., 168 F.R.D. 588, 605 (E.D. Mich. 1996)* .

(n39)Footnote 16. *Fed. R. Civ. P. 23(c)(1)(B)*.

(n40)Footnote 17. *Fed. R. Civ. P. 23(c)(4)*.

(n41)Footnote 18. *Fed. R. Civ. P. 23(b)*, Committee Note to 1966 Amendments; *see also O'Keefe v. Mercedes-Benz United States, LLC, 214 F.R.D. 266, 292 (E.D. Pa. 2003)* .

(n42)Footnote 19. *In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir. 1987)* .

(n43)Footnote 20. *Fed. R. Civ. P. 23(c)(5)*; *see Rector v. City & County of Denver, 348 F.3d 935, 949-950 (10th Cir. 2003)* .

(n44)Footnote 21. *Foster v. Board of Sch. Comm'rs, 872 F.2d 1563, 1565 (11th Cir. 1989)* .

(n45)Footnote 22. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993)* .

(n46)Footnote 23. *United States Parole Comm. v. Geraghty, 445 U.S. 388, 407-408, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

(n47)Footnote 24. *Fed. R. Civ. P. 23(c)(1)(C)*; *see Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295,*

144 L. Ed. 2d 715 (1999) .

(n48)Footnote 25. *Fed. R. Civ. P. 23(c)(1)(B).*

(n49)Footnote 26. *Fed. R. Civ. P. 23(g)(1).*

(n50)Footnote 27. *See Fed. R. Civ. P. 23(g)(1)(B), 23(g)(4).*

(n51)Footnote 28. *Fed. R. Civ. P. 23(g)(2).*

(n52)Footnote 29. *Fed. R. Civ. P. 23(g)(2).*

(n53)Footnote 30. *Fed. R. Civ. P. 23(c)(1)(C).*

(n54)Footnote 31. *Becher v. Long Island Lighting Co., 172 F.R.D. 28, 30-31 (E.D.N.Y. 1997)* .

(n55)Footnote 32. *International Union of Elec., Elec. Salaried, Machine & Furniture Workers, AFL-CIO v. Unisys Corp., 155 F.R.D. 41, 47 (E.D.N.Y. 1994)* ; *see Fed. R. Civ. P. 23(c)(1)(C)*, Committee Note to 2003 Amendments.

(n56)Footnote 33. *Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38-43 (1st Cir. 2003)* .

(n57)Footnote 1. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* ; *28 U.S.C. § 1291.*

(n58)Footnote 2. *Reinholdson v. State, 346 F.3d 847, 849 (8th Cir. 2003)* .

(n59)Footnote 3. *Fed. R. Civ. P. 23(f)*; *see Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005)* .

(n60)Footnote 4. *Hines v. Widnall, 334 F.3d 1253, 1255 (11th Cir. 2003)* .

(n61)Footnote 5. *Fed. R. Civ. P. 23(f).*

(n62)Footnote 6. *In re Delta Air Lines, 310 F.3d 953, 959 (6th Cir. 2002)* .

(n63)Footnote 7. *Fed. R. Civ. P. 23(f)*, Committee Note to 1998 Amendments.

(n64)Footnote 7.1. *Vallario v. Vandehey, 554 F.3d 1259, 1263-1264 (10th Cir. 2009)* ; see [c], below.

(n65)Footnote 8. *Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005)* .

(n66)Footnote 9. *Fed. R. Civ. P. 23(f)*, Committee Note to 1998 Amendments.

(n67)Footnote 10. *Chamberlan v. Ford Motor Co., 402 F.3d 952, 959-960 (9th Cir. 2005)* (factors are merely guidelines not a rigid test); *In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002)* .

(n68)Footnote 11. *See Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1273 (11th Cir. 2000)* ; *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000)* .

(n69)Footnote 12. *Fed. R. Civ. P. 23(f).*

(n70)Footnote 13. *Fed. R. Civ. P. 23(f)*, Committee Note to 1998 Amendments.

(n71)Footnote 14. *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 140 (2d Cir. 2001)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
A. CERTIFICATION OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.45through 14A.49

[Reserved]

§§ 14A.45[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
B. APPOINTMENT OF CLASS COUNSEL AND AWARD OF ATTORNEY'S FEES IN CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.50

§ 14A.50 District Court Must Appoint Class Counsel on Certification of Class Actionn*

[1] District Court Must Appoint Class Counsel for Each Class or Subclass

At the time it orders a class certification, the district court must in the certification appoint counsel for the class, n1 unless a statute, such as the Private Securities Litigation Reform Act, n2 specifies otherwise. n3 These attorneys are known as "class counsel" n4 and are appointed to represent either a proposed class or a certified class. n5

If the court divides a proposed class into subclasses, n6 the court must order appointment of separate class counsel for each subclass it certifies because of the potential varying interests among class members. n7 Class members may have divergent interests, which call for the creation of subclasses in a number of situations, such as when a proposed class of persons have both present and future claimants. In such a situation, not only must the court create subclasses, it must appoint separate attorneys because a single attorney or firm attempting to represent both subclasses would have a conflict of interest. n8

[2] Court May Appoint Co-Representatives

Although it is possible that the court could appoint only an individual attorney, almost all class actions are complex cases, and, therefore, it is typical that the court appoints a law firm or group of attorneys. n1 The court may also condition the appointment of a law firm or individual attorney on the condition that appointment would be as co-counsel to work in conjunction with another firm or individual attorney; the court may also appoint lead class counsel and liaison class counsel. n2 However, the court should ensure that it does not appoint such an extensive legal staff that the staff is not responsive to the needs of the class or the appointing court. n3 In its determination of the arrangement and number of appointed counsel for a class or subclass, the court's goal is to secure for the class or subclass the best possible representation of its interests. n4

[3] Appointment of Interim Class Counsel

The court has discretion to designate "interim" class counsel, who are appointed even prior to certification, to act on behalf of an asserted class in the early stages of litigation and before the court has decided whether the class will be

certified. n1 Interim class counsel has several duties to perform before the court decides whether to certify the class. Interim class counsel must organize and conduct discovery on the certification questions and file or respond to any certification motions. Additionally, interim class counsel should represent the class at settlement discussions. n1.1

These matters may be accomplished by the attorney who filed the action, and the court need not appoint an interim class counsel to act on behalf of the class in every case. However, when the interest of the class is different than the filing individuals, the court should appoint interim class counsel. Even if the court has not officially appointed the attorney who filed the action as interim class counsel, the attorney should nevertheless take any steps needed to handle the normal precertification matters that typically arise in class actions. n2 It should also be noted that it is not necessary for the court to later appoint an interim class counsel, even one that has performed satisfactorily, as permanent class counsel. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.120, 23.121 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(g)(1).*

(n3)Footnote 2. *28 U.S.C. § 1332(d)* (Act contains mandatory provisions that control process for selecting lead plaintiff in private class actions brought under Act); *see Fed. R. Civ. P. 23(g)(1)(A)*, Committee Note to 2003 Amendments (provisions of Rule 23(g) that relate to selection of class counsel do not apply to actions that are subject to provisions of Securities Act).

(n4)Footnote 3. *Fed. R. Civ. P. 23(g)(1).*

(n5)Footnote 4. *See 28 U.S.C. § 1711(3)*; *see, e.g., In re Elec. Data Sys. Corp. Secs. Litig., 226 F.R.D. 559, 571-572 (E.D. Tex. 2005)* .

(n6)Footnote 5. *28 U.S.C. § 1711(3)*; *see* [3], *below.*

(n7)Footnote 6. *See* § 14A.34[6][d].

(n8)Footnote 7. *Fed. R. Civ. P. 23(c)(4)*, Committee Note to 2003 Amendments.

(n9)Footnote 8. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* .

(n10)Footnote 1. *Fed. R. Civ. P. 23(g)(1)*, Committee Note to 2003 Amendments.

(n11)Footnote 2. *In re Elec. Data Sys. Corp. Secs. Litig., 226 F.R.D. 559, 571 (E.D. Tex. 2005)* .

(n12)Footnote 3. *Fed. R. Civ. P. 23(g)(1)(B)*, Committee Note to 2003 Amendments.

(n13)Footnote 4. *Fed. R. Civ. P. 23(g)(4)*, Committee Note to 2003 Amendments.

(n14)Footnote 1. *Fed. R. Civ. P. 23(g)(3).*

(n15)Footnote 1.1. *In re Air Cargo Shipping Servs. Antitrust Litig., 240 F.R.D. 56, 58 (E.D.N.Y. 2006)* .

(n16)Footnote 2. *Fed. R. Civ. P. 23(g)(3)*, Committee Note to 2003 Amendments.

(n17)Footnote 3. *See In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 224-226 (N.D. Cal 1994)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.51

§ 14A.51 Appointment Must Ensure Class Counsel Will Represent Entire Classn*

An attorney who is appointed class counsel must perform in the interest of the entire class as a whole, n1 not merely in the interest of the named representatives or any other particular members who make up the class. n2 It should be noted that if an attorney who had previously represented a named representative on an individual basis is formally appointed class counsel, there will be some transformation in the attorney's fiduciary duty and allegiance from the attorney's former client (the named plaintiffs) to the attorney's new client (the entire class). n3 Also, because the qualifications of the appointed class counsel are one of the factors the court considers in determining to certify the class, the class representatives do not have authority to terminate, hire, or replace the class counsel. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.120 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(g)(4)*; *see Fed. R. Civ. P. 23(g)(1)(B).*

(n3)Footnote 2. *Fed. R. Civ. P. 23(g)*, Committee Note to 2003 Amendments; *see In re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, at *60-*61 (D. Mass. 2005)* .

(n4)Footnote 3. *Fed. R. Civ. P. 23(g)*, Committee Note to 2003 Amendments.

(n5)Footnote 4. *Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.52

§ 14A.52 Qualifications of Class Counseln*

[1] Court Must Consider Many Factors That Indicate Counsel's Ability to Represent Class

A court must appoint class counsel who are qualified and capable of representing the entire class fairly and adequately. In the process of appointing class counsel, the court must consider several factors enumerated in Rule 23 that indicate the qualifications and abilities of class counsel, including: n1

- The work counsel has performed in identifying or investigating potential claims in the action; n2
- Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; n3
- Counsel's knowledge of the applicable law; n4 and
- The resources counsel will commit to representing the class. n5

In addition to these factors, the court may consider any other factors relevant to counsel's ability to fairly and adequately represent the interests of the entire class. n6

[2] Performance of Counsel on Claims in Current Litigation

In its appointment decision, the court must consider the work that a class counsel applicant has done in identifying or investigating potential claims in the current action. n1 This may include any work that the applicant has performed as interim class counsel, for example. n2 In the case of a plaintiff class, the process of drafting the complaint requires investigatory and analytical effort that strangers to the action will not have undertaken. Therefore, when an attorney has performed these or other investigative and analytical tasks before making the application for appointment to permanent class counsel he or she is generally in a better position to represent the class fairly and adequately than attorneys who have not performed those tasks. n3 However, if the applying attorney filed a simple complaint and did not actually devote substantial efforts to the identification and investigation of potential claims before filing the complaint, the fact

that the applicant filed the action does not carry as much weight. n4

This factor also recognizes that an important consideration in the selection of class counsel is the existing attorney-client relationship between the applying attorney and the proposed class representatives. Because of a continuous professional relationship with the client, the applying attorney will often have considerable information concerning the client's manner of doing business and the industry in which the client does business. n5

[3] Counsel's Experience in Managing Class Actions and Claims Similar to Current Claim

In its class counsel appointment decision, the court must consider the applicant's experience in handling class actions, other complex litigation, and claims of the type asserted in the action in making the appointment of class counsel. n1 Counsel's experience has been one of the factors courts have always considered in assessing the adequacy of the named representative's retained counsel. n1.1 Courts will consider both counsel's experience in other similar cases n2 and counsel's performance to date in the present case. n3

[4] Counsel's Knowledge of Applicable Law

An important factor that the court must consider in its appointment decision is the applicant's knowledge of the applicable law. n1 This knowledge includes that of class actions in general and also the law of the case being heard. n2 Counsel's knowledge has always been a factor that courts have used when assessing the adequacy of the named representative's retained counsel and of the ability of the named representative to protect the class's interests adequately. n3 As is the case with other factors, the applicant's knowledge of the applicable law should not be the sole criterion on which the court makes its appointment decision. n4

[5] Resources Counsel Will Commit to Represent Class

The final mandatory factor that the court must consider in its class counsel appointment decision is the resources counsel will commit to representing the class. n1 This factor requires an evaluation by the court of the applicant's intention and capability to commit staff, research, supplies, and financial resources to the accomplishment of the class's objectives in the litigation, such that the applicant will fairly and adequately represent the class's interests. n2 The intent and ability to devote resources to the litigation is a factor that courts have always used in assessing the adequacy of the named representative's retained counsel. n3 The court in its evaluation may compare the resources of all the applicants. n4 However, the resources counsel has available to commit to the litigation need only be appropriate to the needs of the litigation, and the court should be careful not to limit consideration to lawyers with the greatest resources. n5

[6] Other Factors Indicative of Counsel's Qualifications to Represent Class

In addition to the factors that the court must consider in the appointment of class counsel, the court may consider any other matter relevant to counsel's ability to fairly and adequately represent the interests of the class. n1 One court has stated that these other matters should be considered only if there are multiple attorneys who wish to represent the class, all of whom can establish that they will do so fairly and adequately. n2 The following is a nonexhaustive list of some of the factors courts have traditionally considered in a class counsel appointment:

- Counsel's resolve to vigorously prosecute class claims or defenses. n3
- Counsel's history of litigating class actions. n4
- Lack of conflicts between counsel and any class members; n5 and, conversely, the presence of conflicts may preclude appointment or result in disqualification if counsel has already been appointed. n6
- Counsel's ethical reputation. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.122 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(A).*

(n3)Footnote 2. *See* [2], *below.*

(n4)Footnote 3. *See* [3], *below.*

(n5)Footnote 4. *See* [4], *below.*

(n6)Footnote 5. *See* [5], *below.*

(n7)Footnote 6. *Fed. R. Civ. P. 23(g)(1)(B)*; *see* [6], *below.*

(n8)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(A)(i).*

(n9)Footnote 2. *See Henderson v. Eaton, 2002 U.S. Dist. LEXIS 274, at *10 (E.D. La. 2002) .*

(n10)Footnote 3. *Harrington v. City of Albuquerque, 222 F.R.D. 505, 520 (D.N.M. 2004)* (Rule 23(g) includes presumption that attorneys who have represented party moving for class certification up to that point will be appointed as class counsel because of their experience on case).

(n11)Footnote 4. *Fed. R. Civ. P. 23(g)(1)(A)(i)*, Committee Note to 2003 Amendments.

(n12)Footnote 5. *See In re Air Cargo Shipping Servs. Antitrust Litig., 240 F.R.D. 56, 57-59 (E.D.N.Y. 2006)* ; *see also Fed. R. Civ. P. 23(g)(1)(A)(i)*, Committee Note to 2003 Amendments.

(n13)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(A)(ii).*

(n14)Footnote 1.1. *Fed. R. Civ. P. 23(g)(1)(A)(ii)*, Committee Note to 2003 Amendments.

(n15)Footnote 2. *See Linney v. Cellular Alaska Pshp., 151 F.3d 1234, 1239 (9th Cir. 1998) .*

(n16)Footnote 3. *See Geer v. Cox, 216 F.R.D. 677, 680 (D. Kan. 2003) .*

(n17)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(A)(iii).*

(n18)Footnote 2. *Harrington v. City of Albuquerque, 222 F.R.D. 505, 520 (D.N.M. 2004) .*

(n19)Footnote 3. *See In re Bankamerica Corp. Secs. Litig., 210 F.R.D. 694, 702 (E.D. Mo. 2002) .*

(n20)Footnote 4. *Fed. R. Civ. P. 23(g)(1)(A)(iii)*, Committee Note to 2003 Amendments.

(n21)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(A)(iv).*

(n22)Footnote 2. *In re Emulex Corp. Sec. Litig., 210 F.R.D. 717, 720 (C.D. Cal. 2002) .*

(n23)Footnote 3. *In re NASDAQ Market-Makers Antitrust Litig., 172 F.R.D. 119, 128 (S.D.N.Y. 1997) .*

(n24)Footnote 4. *Harrington v. City of Albuquerque, 222 F.R.D. 505, 520 (D.N.M. 2004)* .

(n25)Footnote 5. *Fed. R. Civ. P. 23(g)(1)(A)(iv)*, Committee Note to 2003 Amendments.

(n26)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(B)*.

(n27)Footnote 2. *Harrington v. City of Albuquerque, 222 F.R.D. 505, 521 (D.N.M. 2004)* .

(n28)Footnote 3. *Rutter & Wilbanks Corp. v. Shell Oil Co. 314 F.3d 1180, 1188 (10th Cir. 2002)* .

(n29)Footnote 4. *In re Managed Care Litig., 209 F.R.D. 678, 685 (S.D. Fla. 2002)* .

(n30)Footnote 5. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* ; *see Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 & n.31 (1999)* (subclasses required separate representation to eliminate conflicting interests of counsel).

(n31)Footnote 6. *In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 161 (3d Cir. 1984)* .

(n32)Footnote 7. *Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 599 (S.D.N.Y. 1992)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.53

§ 14A.53 Procedures for Appointment of Class Counseln*

[1] Court May Require That Counsel Submit Information

To facilitate its appointment of class counsel, the court may direct potential class counsel to provide information on any subject relevant to the appointment. n1 In its order, however, the court should ensure that confidential or privileged information is protected from disclosure, including to other parties. The court may provide protection by combining its orders to produce information with appropriate confidentiality or protective orders, or by providing that any information is produced for review by the court only. n2 For example, the court may request that the potential class counsel provide information concerning any agreements with their clients concerning potential fee awards and recovery of nontaxable costs. Such information may be relevant with regard to the financial resources that the proposed counsel and his or her client are able to commit to the litigation. n3

[2] Court's Appointment of Applicant

[a] Court May Select Only Qualified Applicant for Appointment

When there is only one applicant for appointment as class counsel, for example, the attorney for a named representative or an attorney who has been appointed as interim class counsel, the court may not automatically appoint that applicant. Rather, the court may appoint a sole applicant only after the court considers whether the applicant meets the qualifications specified in Rule 23(g)(1) and 23(g)(4). n1 If there is more than one applicant for appointment as class counsel, the court should first consider all of the applicants using the criteria specified in Rule 23(g)(1) and 23(g)(4) in the same manner as it would evaluate a single application. Then the court should select the most qualified of all the applicants that are qualified under the criteria. n2

[b] Procedure When There Are No Qualified Applicants

The court must appoint class counsel at the time of certification. n3 Consequently, if there are no qualified applicants, the court has the option of denying certification of the class, n4 decertifying a class in the event an unqualified counsel has already been appointed, n5 or provisional options, including the following:

- Inviting additional potential qualified applicants to submit applications for the position of class counsel and selecting the counsel best able to represent the class from among the qualified applicants. n6

- Appointing an applicant after the applicant modifies his or her rejected application, if modification can cure the court's objections. For example, if the court determines that an applicant is unqualified solely because the applicant lacks substantive expertise or experience in the particular class action, the applicant may cure by associating with counsel who has adequate expertise or experience. n7

- Making any other appropriate order regarding the selection and appointment of class counsel. n8 For example, the court may enter a stay in the proceedings for a limited amount of time to permit an otherwise qualified attorney to apply and be appointed as class counsel. n9

[3] Appointment After Competitive Bidding

Some courts have permitted appointment after a process of competitive bidding or "open auction." n1 Typically, the bidding process provides that the court will select class counsel after receiving in camera bids based on the percentage of the judgment they would require as a fee. The bid process must also include information that divulges all of counsel's qualifications. n2 It appears that the class counsel requirements under the current version of Rule 23 do not necessarily preclude such a bidding process, at least to the extent the bidding process ensures that the highest bidder is qualified under the Rule 23 requirement that the court select the counsel best able to represent the class from among the qualified applicants. n3 Commentators have noted that competitive bidding procedures are still in the experimental stage and should be used with caution. n4

[4] Court's Order of Appointment of Class Counsel

The court's order of appointment of class counsel should be set out in the certification order itself, n1 except for appointment of interim counsel. n2 In addition to its order of appointment, the court has discretion to make any other orders in connection with the appointment of class counsel that it deems necessary, n3 such as, any directives it has to the attorneys, or conditions that it is imposing on class counsel to ensure that class counsel provides the best representation for the interests of the class. n4

The order appointing class counsel may also include provisions about the award of attorney's fees or nontaxable costs under Rule 23(h). n5 The inclusion of such fee and cost provisions in the order itself may prevent later disputes on these matters, particularly with respect to any maximum for fee awards or the specification of the precise method for calculating attorney's fees. The court may also specify a mechanism by which it can monitor attorney's fees and costs as the case proceeds and provide guidance for class counsel to control fees. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.120 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(g)(1)(C).*

(n3)Footnote 2. *Fed. R. Civ. P. 23(g)(1)(C)*, Committee Note to 2003 Amendments.

(n4)Footnote 3. *See Warnell v. Ford Motor Co. 205 F. Supp. 2d 956, 958-961 (N.D. Ill. 2002)* ; *Fed. R. Civ. P. 23(g)(1)(C)*, Committee Note to 2003 Amendments.

(n5)Footnote 1. *Fed. R. Civ. P. 23(g)(2)*; *see Harrington v. City of Albuquerque, 222 F.R.D. 505, 521 (D.N.M. 2004)* .

(n6)Footnote 2. *Fed. R. Civ. P. 23(g)(2)*.

(n7)Footnote 3. *Fed. R. Civ. P. 23(g)(1)*.

(n8)Footnote 4. *Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 679 (N.D. Ohio 1995)* .

(n9)Footnote 5. *Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986)* .

(n10)Footnote 6. *Fed. R. Civ. P. 23(g)(1)*, Committee Note to 2003 Amendments.

(n11)Footnote 7. *See In re Ski Train Fire in Kaprun, 220 F.R.D. 195, 212 (S.D.N.Y. 2003)* , *rev'd on other grounds, 393 F.3d 120 (2d Cir. 2004)* .

(n12)Footnote 8. *Fed. R. Civ. P. 23(g)(1)(E)*.

(n13)Footnote 9. *Huston v. Imperial Credit Commercial Mortgage Inv. Corp., 179 F. Supp. 2d 1157, 1181-1182 (C.D. Cal. 2001)* .

(n14)Footnote 1. *In re Cendant Corp. Sec. Litig., 404 F.3d 173, 189 (3d Cir. 2004)* .

(n15)Footnote 2. *See, e.g., In re Lucent Techs., Inc., 194 F.R.D. 137, 156-158 (D.N.J. 2000)* .

(n16)Footnote 3. *Fed. R. Civ. P. 23(g)(2)*.

(n17)Footnote 4. *See* 5 *Moore's Federal Practice, § 23.122[3]* (Matthew Bender 3d ed.).

(n18)Footnote 1. *Fed. R. Civ. P. 23(g)(1)*.

(n19)Footnote 2. *Fed. R. Civ. P. 23(g)(3)*.

(n20)Footnote 3. *Fed. R. Civ. P. 23(g)(1)(E)*.

(n21)Footnote 4. *Fed. R. Civ. P. 23(g)(2)*; *see In re Ski Train Fire in Kaprun, 220 F.R.D. 195, 212 (S.D.N.Y. 2003)* , *rev'd on other grounds, 393 F.3d 120 (2d Cir. 2004)* .

(n22)Footnote 5. *Fed. R. Civ. P. 23(g)(1)(D)*; *see also Fed. R. Civ. P. 23(h)*; § 14A.54.

(n23)Footnote 6. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 201 n.6 (3d Cir. 2000)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.54

§ 14A.54 Class Action Attorney's Fees and Costsn*

[1] Claims Must be Made by Motion at Time Set by Court

For a certified class action, Rule 23(h) provides the procedure for claims for attorney's fees and nontaxable costs. n1 Such claims must be made by motion under Rule 54(d)(2). n2 With respect to class actions, Rule 54(d)(2) is subject to the provisions of Rule 23(h), n3 and the two rules must be read in conjunction because Rule 54(d)(2) applies in all types of actions, and does not necessarily address issues that are peculiar to class actions. Therefore, Rule 54(d)(2) procedures must be supplemented by reference to the provisions of Rule 23. n4 For example, the general 14-day time limit from entry of judgment for a motion for attorney's fees under Rule 54(d)(2) does not apply to fee motions in class actions. By its terms, Rule 23(h) requires the court to set a time limit that is appropriate under the facts and circumstances of the case. n5 The court should set motion deadlines that will permit both reasonable notice to the class and prompt resolution of the fees motion. n6 For a discussion of Rule 54 motions, see Ch. 25, *Judgment*.

[2] Notice of Motion Claiming Fees and Costs Must Be Served on All Parties

An attorney making a motion for fees and costs in a class action must serve notice of the motion on all parties. If the motion is made by class counsel, it must be directed to class members in a reasonable manner. n1 Thus, service must be made on the attorney of record for every party represented by an attorney n2 by one of the means authorized for service of motions under Rule 5(b). n3 For a discussion of service of motions under Rule 5, see Ch. 9, *Pleadings and Motions in General*.

The members of the class are also entitled to receive reasonable notice of any motion made by class counsel for an award of attorney's fees or for reimbursement of nontaxable costs. n4 The rule does not specify the method for providing the notice that class members must receive of fee motions made by class counsel. It need not be the same formal type of notice of motions that the moving attorney must serve on the parties. The court need only direct notice to the class in a reasonable manner. Counsel should ensure that notice is sent sufficiently in advance of the determination of the motion to permit class members to prepare and file meaningful objections to the claim. n5

[3] All Named Parties and Class Members Have Right to Object to Motion

All class members may object to a motion claiming attorney's fees or costs. In addition, all parties that are subject to a motion claiming payment of fees from the parties may object to the motion. n1 For example, class members would most probably object to a motion for fees when the asserted right to payment of fees arose from the creation of a common fund for the benefit of the class. Members of the class who have opted out of the class, or nonsettling defendants who will not be affected by any fees award made in connection with a settlement, do not have standing to object to a motion for fees. n2

Rule 23(h)(2) does not specify a time for filing objections. n3 However, the court should set a deadline for objections in the same manner that the court must set a deadline for making fees motions and providing notice of the motion. Without a deadline, the court cannot manage the rights of parties and class members to object and still resolve fee motions in a prompt and efficient manner. The objection deadline set by the court should provide the eligible parties with an adequate opportunity to review all of the materials that may have been submitted in support of the motion or, in an appropriate case, conduct discovery concerning the fees request. However, the court should not authorize discovery automatically, nor should the court permit discovery without limits. n4

[4] Amount of Fee Award in Class Action

[a] Substantive Grounds for Award of Fees

Rule 23(h) is procedural and does not provide an independent ground for an award of attorney's fees or reimbursement of nontaxable costs. The right to a fees award or costs reimbursement is a matter of the substantive law applicable to the case. n1

There are two general grounds under substantive law for an award of attorney's fees and reimbursement for nontaxable costs to a prevailing party or to that party's counsel:

1. **Fee-shifting statutes.** Although the general rule is that parties must pay their own attorney's fees, there are a number of fee-shifting statutes that change the general rule. These give a party wronged by conduct proscribed by the statutes the right to recover attorney's fees and costs from the defendant if the party prevails in a civil action for damages. n2

2. **Common fund created for benefit of class**. The second substantive ground for an award of attorney's fees and recovery of nontaxable costs is based on equitable principles. When a common fund is created through an attorney's efforts and there is no applicable fee-shifting statute, the attorney is entitled to an award of reasonable fees from the fund. n3

[b] Calculation of Reasonable Fees

There are two general methods for determining the amount of a reasonable award of attorney's fees. n4 Rule 23 does not affect the court's choice in a class action of one or the other of the two methods of setting a reasonable attorney's fee, which are:

1. **Percentage of funds method**. Under this method, the amount of the fee is awarded on the basis of a percentage of the value of the fund. The size of percentage is increased or decreased based on a number of factors discussed below to determine a reasonable fee. The percentage-of-funds approach is appropriate when the result of the action is the creation of a common fund for the benefit of the class. n5

2. **Lodestar method**. Under this method, the court determines the number of hours reasonably expended by counsel on the case and multiplies them by a reasonable hourly rate, to obtain an amount, which is increased or decreased based on a number of factors discussed below to determine a reasonable fee. The lodestar method is typically used in cases in

which the class's right to recover damages is granted by a federal fee-shifting statute. n6

As an adjustment to either one of these bases for attorney's fees, the court may consider a number of factors, as follows:

- A fee agreement of the parties. The court may consider any agreements among the parties regarding the fee motion and agreements between class counsel and others about the fees requested in the motion.

- Value of non-monetary benefits conferred on class. The court should take into account any non-monetary benefits obtained for the class, such as injunctive or declaratory relief.

- Amount of fees charged by other attorneys in the case. The court may consider the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the same case; there should be some fee equity among counsel representing the class and class members.

When the lodestar method is used, the lodestar figure may be adjusted upward or downward through the use of a multiplier. n7 The factors the courts should consider in determining whether to use a multiplier and the amount of the multiplier include the following: n8

- The time and labor that counsel spent on the case.

- The novelty and difficulty of the questions presented.

- The skill required to resolve the issues necessary to a successful conclusion for the class.

- The extent to which the matter precluded counsel from taking other employment.

- Whether counsel's representation in the matter was on a fixed or contingent fee basis.

- The deadline pressures of the case.

- The amount involved and results obtained.

- The experience, reputation and ability of counsel.

- The undesirability of the case.

- The nature and length of counsel's professional relationship with the client.

- The amount of awards made in similar cases.

The factors included in the above lists are not exhaustive of the criteria of reasonableness. Nor are they all necessarily applicable to all reasonableness determinations. The courts may consider any factor that is indicative of reasonableness and need not explicitly consider any listed factor that is not pertinent because of the peculiar circumstances of the case. n9

[c] Calculation of Attorney's Fees in Coupon Settlement Cases

[i] Coupon Settlements Subject to Attorney's Fees

The Class Action Fairness Act of 2005 (the Act) n10 has set limitations and specified requirements for contingent fees

and other attorney's fee awards based on coupon settlements in class actions. n11 The Act applies only to civil class actions commenced on or after the date of enactment of the Act, n12 which was February 18, 2005. For a discussion of the applicability of the Act, see *§ 14A.12[2]*.

The act does not precisely define the term "coupon settlement." n13 However, it uses the term in a general sense to cover situations when a proposed settlement in a class action provides for a recovery of coupons to a class member. n14 Case precedent indicates that a coupon settlement is a settlement in which class action plaintiffs receive coupons instead of cash for their recovery. In other words, the class action plaintiffs each receive coupons that they can redeem for merchandise or services with the settling party. n15

[ii] Limitations on Contingent Fees Related to Coupon Settlement

If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons must be based on the value to class members of the coupons that are actually redeemed. n16 This limitation is designed to prevent abuses in coupon settlements when class counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value. n17 The court, in its discretion and on motion of a party, may receive expert testimony from a witness qualified to provide information on the actual value to class members of the redeemed coupons. n18

[iii] Limitations on Other Attorney's Fees in Coupon Settlements

If a proposed settlement in a class action provides for a recovery of coupons to class members, and any portion of the attorney's fee to be paid to class counsel is not based on the recovery of coupons, the attorney's fee award for that portion must be based on the amount of time class counsel reasonably expended working on the action. n19 Such an award must include any appropriate attorney's fee for obtaining equitable relief, including an injunction. The Act does not prohibit such an award based on the lodestar with a multiplier method of determining attorney's fees. However, any fee award must be approved by the court. n20

[iv] Limitations on Attorney's Fees Calculated on Mixed Basis in Coupon Settlements

If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief, that portion of the attorney's fee to be paid to class counsel which is based on the contingent fee percentage for recovery of coupons must be calculated on the amount of coupons actually redeemed. n21 That portion of the attorney's fee to be paid to class counsel that is not based a contingent fee must be calculated based on the amount of time class counsel reasonably expended working on the action. n22

[5] Discretionary Hearing on Fees Motion

The court has discretion to hold an evidentiary hearing on the motion for an award of fees n1 but need not necessarily hold a hearing. n2 Courts have indicated that there should be a hearing whenever a party disputes the reasonableness of a significant factor in the determination of the fee amount. n3 The type of hearing required depends on the circumstances of the case. n4

[6] Court Must State Findings of Fact and Conclusions of Law on Fees Motion

Whenever a court makes a ruling on a motion claiming attorney's fees or nontaxable costs, the court must state the findings of fact and conclusions of law on which it based its decision. n1 The findings and conclusions must comply with the requirements of Rule 52(a). n2 Thus, after ruling on the fees and costs motion, the court must include on the record a description of the factors the court considered in making its reasonableness determination and an explanation of how each factor resulted in an upward or downward adjustment in the amounts requested in the calculation of any amount finally awarded by the court. n3

[7] Reference to Master or to Magistrate Judge of Determination of Fee and Cost Award

The court has discretion to refer issues related to an award of attorney's fees and nontaxable costs to a master or to a magistrate judge as provided in Rule 54(d)(2)(D), n1 which in turn permits the court to refer issues relating to the value of services to a master without regard to the normal prerequisites for appointment of a master that are contained in Rule 53(a)(1). n2 Therefore, fees motions may be directly referred to a master without the necessity of any preliminary finding of consent by the parties, the existence of an exceptional condition, the ministerial nature of the task, or the unavailability of a district judge or magistrate judge of the district to address the issue in a timely and effective manner. n3 For a discussion of such references, see Ch. 21, *Masters and Magistrate Judges*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselFees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.124 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(h).*

(n3)Footnote 2. *Fed. R. Civ. P. 23(h)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 23(h)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 23(h)(1)*, Committee Note to 2003 Amendments.

(n6)Footnote 5. *Fed. R. Civ. P. 23(h)(1).*

(n7)Footnote 6. *Fed. R. Civ. P. 23(h)(1)*, Committee Note to 2003 Amendments.

(n8)Footnote 1. *Fed. R. Civ. P. 23(h)(1).*

(n9)Footnote 2. *Fed. R. Civ. P. 5(b)(1).*

(n10)Footnote 3. *Fed. R. Civ. P. 5(b)(2).*

(n11)Footnote 4. *Fed. R. Civ. P. 23(h)(1).*

(n12)Footnote 5. *Fed. R. Civ. P. 23(h)(1)*, Committee Note to 2003 Amendments.

(n13)Footnote 1. *Fed. R. Civ. P. 23(h)(2).*

(n14)Footnote 2. *Fed. R. Civ. P. 23(h)(2)*, Committee Note to 2003 Amendments.

(n15)Footnote 3. *Fed. R. Civ. P. 23(h)(2)*, Committee Note to 2003 Amendments.

(n16)Footnote 4. *Fed. R. Civ. P. 23(h)(2)*, Committee Note to 2003 Amendments.

(n17)Footnote 1. *Fed. R. Civ. P. 23(h)(2)*, Committee Note to 2003 Amendments.

(n18)Footnote 2. *See, e.g., 42 U.S.C. § 1988(b)* (prevailing plaintiff in private suit for damages caused by violation of specified civil rights statutes may recover reasonable attorney's fees); *see generally* Derfner & Wolf, Court Awarded Attorney Fees (Matthew Bender).

(n19)Footnote 3. *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-394, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)* .

(n20)Footnote 4. *See Fed. R. Civ. P. 23(h).*

(n21)Footnote 5. *In re Cendant Corp. Prides Litig., 243 F.3d 722, 732 (3d Cir. 2001)* ; *see* [a], *above.*

(n22)Footnote 6. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* .

(n23)Footnote 7. *In re HPL Techs., Inc., 2005 U.S. Dist. LEXIS 7244, at *20 (N.D. Cal. 2004)* .

(n24)Footnote 8. *Paschal v. Flagstar Bank, FSB, 297 F.3d 431, 435 (6th Cir. 2002)* .

(n25)Footnote 9. *See Yong Soon Oh v. AT&T Corp., 225 F.R.D. 142, 146 (D.N.J. 2005)* .

(n26)Footnote 10. Pub. L. No. 109-2, 119 Stat. 4 (2005); *see 28 U.S.C. § 1332(d).*

(n27)Footnote 11. *See 28 U.S.C. § 1712(a).*

(n28)Footnote 12. Pub. L. No. 109-2, § 9; 119 Stat. 4 (2005).

(n29)Footnote 13. *See 28 U.S.C. § 1711.*

(n30)Footnote 14. *See 28 U.S.C. §§ 1712(a), 1712(b)(1).*

(n31)Footnote 15. *See In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002, 1018-1020 (N.D. Ill. 2000)* .

(n32)Footnote 16. *See 28 U.S.C. § 1712(a).*

(n33)Footnote 17. *See* Pub. L. No. 109-2, § 2(a)(3)(A) 119 Stat. 4 (2005).

(n34)Footnote 18. *See 28 U.S.C. § 1712(d).*

(n35)Footnote 19. *See 28 U.S.C. § 1712(b)(1).*

(n36)Footnote 20. *See 28 U.S.C. § 1712(b)(1).*

(n37)Footnote 21. *See 28 U.S.C. § 1712(c)(1)*; *see 28 U.S.C. § 1712(a).*

(n38)Footnote 22. *See 28 U.S.C. § 1712(c)(2)*; *see 28 U.S.C. § 1712(b)(1).*

(n39)Footnote 1. *Fed. R. Civ. P. 23(h)(3).*

(n40)Footnote 2. *Fed. R. Civ. P. 23(h)(3)*, Committee Note to 2003 Amendments.

(n41)Footnote 3. *See Planned Parenthood v. Attorney General of N.J., 297 F.3d 253, 265 n.5 (3d Cir. 2002)* .

(n42)Footnote 4. *Fed. R. Civ. P. 23(h)(3)*, Committee Note to 2003 Amendments; *see Fed. R. Civ. P. 54(d)(2)(D).*

(n43)Footnote 1. *Fed. R. Civ. P. 23(h)(3).*

(n44)Footnote 2. *Fed. R. Civ. P. 23(h)(3)*; *see Fed. R. Civ. P. 52(a)* (Rule 52 requirements are discussed in Ch. 25, *Judgment*).

(n45)Footnote 3. *Planned Parenthood v. Attorney General of N.J., 297 F.3d 253, 266 (3d Cir. 2002)* (district court must provide clear and concise explanation of basis for its fee award).

(n46)Footnote 1. *Fed. R. Civ. P. 23(h)(3).*

(n47)Footnote 2. *Fed. R. Civ. P. 54(d)(2)(D).*

(n48)Footnote 3. *See Fed. R. Civ. P. 53(a)(1).*

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
B. APPOINTMENT OF CLASS COUNSEL AND AWARD OF ATTORNEY'S FEES IN CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.55through 14A.59

[Reserved]

§§ 14A.55[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART V. CLASS ACTION PROCEDURES
C. TRIAL COURT'S ORDERS REGULATING CONDUCT OF CLASS ACTION PROCEEDINGS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.60

§ 14A.60 Types of Orders Expressly Permitted by Rulen*

The court has the authority and broad discretion to make any appropriate orders necessary for the conduct of class action proceedings. n1 The class action rule also enumerates specific types of orders designed for use by the court, as listed below. These Rule 23(d) class action orders may be combined with a pretrial order under Rule 16, n2 which covers the complete range of orders that the court may use for case management, pretrial conferences, and scheduling. n3 The court also has discretion to alter or amend any Rule 23(d) order previously entered, so that the court can expeditiously and efficiently manage the case. n4 For example, the power to alter or amend orders permits a court to vacate a prior class action certification order when appropriate; this modification is known as decertification. n5 Rule 23(d) also gives the court power to change an order regarding notice. n6

The purpose of Rule 23(d) is to provide the court with considerable latitude to facilitate the fair and efficient conduct of a class action. n7 Therefore, while the rule lists some very specific types of orders that may be appropriate in particular circumstances, it also contains a general provision allowing the court to make any other orders necessary to handle procedural matters. n8 The courts liberally apply this catch-all provision to authorize any orders not otherwise listed in the rule that facilitate the fair and efficient conduct of the action. n9 The nonexhaustive list of orders specifically permitted by Rule 23(d) are as follows:

- Orders that determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or an argument. n10

- Orders that require that notice be given to some or all class members regarding: any step in the action, the proposed extent of the judgment, the opportunity to signify whether the members consider the representation fair and adequate, or to intervene and present claims or defenses, or otherwise to come into the action. n11

- Orders imposing conditions on the representative parties or on intervenors. n12

- Orders that require that the pleadings be amended to eliminate allegations as to the representation of

absent persons. n13

- Orders designed to handle similar procedural matters, the catch-all provision. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNotices

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.140 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)*; *see Hevesi v. Citigroup Inc., 366 F.3d 70, 83 (3d Cir. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 23(d).*

(n4)Footnote 3. *Fed. R. Civ. P. 16.*

(n5)Footnote 4. *Fed. R. Civ. P. 23(d).*

(n6)Footnote 5. *Armstrong v. Davis, 275 F.3d 849, 872 (9th Cir. 2001)* .

(n7)Footnote 6. *International Union v. Unisys Corp., 155 F.R.D. 41, 47 (E.D.N.Y. 1994)* .

(n8)Footnote 7. *Hevesi v. Citigroup Inc., 366 F.3d 70, 83 (3d Cir. 2004)* .

(n9)Footnote 8. *See Fed. R. Civ. P. 23(d)(1)(E).*

(n10)Footnote 9. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990)* ; *see § 14A.65.*

(n11)Footnote 10. *Fed. R. Civ. P. 23(d)(1)(A)*; *see § 14A.61.*

(n12)Footnote 11. *Fed. R. Civ. P. 23(d)(1)(B)*; *see § 14A.62.*

(n13)Footnote 12. *Fed. R. Civ. P. 23(d)(1)(C)*; *see § 14A.63.*

(n14)Footnote 13. *Fed. R. Civ. P. 23(d)(1)(D)*; *see § 14A.64.*

(n15)Footnote 14. *Fed. R. Civ. P. 23(d)(1)(E)*; *see § 14A.65.*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.61

§ 14A.61 Orders Regulating Course of Proceedings and Presentation of Evidence and Argumentn*

A court has authority in a class action to issue orders determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument. n1 For example, the court may use this authority to specify the sequence of a class action proceeding and to make orders to simplify the procedure regarding proof and argument. n2 Additionally, a court may use its discretion to order the sequence in which discovery materials must be submitted. n3 The court may also establish the sequence in which the lawyers will be allowed to examine and cross-examine witnesses, to present other evidence at trial, to state and respond to objections, and to make opening and closing arguments. n4

Rule 23(d)(1)(a) orders may also be used for pretrial case management. For example, the court may order a class action stayed based on the abstention doctrine, n5 and courts have ordered class actions separated into phases and defined the issues on which discovery and presentation of evidence may proceed in each phase. n6 Similarly, courts have also ordered separate trials of issues or claims not common among all plaintiffs or defendants. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.140 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(A)*; *see DeLoach v. Philip Morris Cos., 206 F.R.D. 551, 567 (M.D.N.C. 2002)* (court has power to order parties to comply with management of class action proceedings).

(n3)Footnote 2. *Fed. R. Civ. P. 23(d)(1)*, Committee Note to 1966 Amendments.

(n4)Footnote 3. *Biben v. Card, 789 F. Supp. 1001, 1004 (W.D. Mo. 1992)* .

(n5)Footnote 4. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989)* .

(n6)Footnote 5. *Klabo v. Easy Heat, Inc., 2004 U.S. Dist. LEXIS 4459, at *10 (N.D. Ind. 2004)* .

(n7)Footnote 6. *Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 642 (D.S.C. 1992)* .

(n8)Footnote 7. *DeLoach v. Philip Morris Cos., 206 F.R.D. 551, 567 (M.D.N.C. 2002)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.62

§ 14A.62 Orders Controlling Notice Other than Certification and Settlementn*

[1] Types of Notice That Court Has Discretion to Require

The court has discretion to require that any notice be given to protect the members of the class or otherwise to facilitate the fair conduct of the action, n1 even in addition to the ordinary mandatory notice given after certification of the class, or to notify parties and members regarding settlement. n2

The class action rule also expressly provides that the court may require that notice be given about any of the following matters: n3

- Any step in the action;
- The proposed extent of the judgment;
- The opportunity of members to signify whether they consider the representation of the class fair and adequate;
- The opportunity to intervene and present claims or defenses; or
- The opportunity otherwise to come into the action.

[2] Discretion of Court to Require Notice

Notice under Rule 23 may be either mandatory or in the discretion of the court. Notice of certification of a class is generally mandatory only for Rule 23(b)(3) class actions, that is, when questions of law or fact common to the members of the class predominate over any questions affecting only individual members, n1 and for certain Rule 23(b)(2) class actions when the claims are for monetary relief. In the latter instance, due process requires that some form of notice be given before the judgment may bar subsequent monetary claims of absent class members. n2 Rules 23(c)(2)(A) and Rule 23(d)(1)(B) make clear that the court has discretion to require certification notice to members of all types of class

actions when the circumstances warrant notice. n3

Additionally, Rule 23(d)(1)(B) gives the court discretionary power to order that notice be given to some or all of the members of a class in a wide range of class action situations, which are specified in [1], above. Therefore, in any class action, regardless of its type, the court may order notice as it deems necessary to properly protect the members of the class or ensure the fair conduct of the action. n4 For example, the court may order the parties to confer and to draft a proposed notice to the potential class. n5 In another example, the court may order the establishment of a claims notice requirement in which the court orders notice to be given to proposed class plaintiffs that they must return a claim form by a certain date to participate in any distribution to the class. n6

[3] Options for Method of Notice

The court is not required to specify that notice must comply with the formalities for service of process; rather, the court has discretion to adapt the manner of giving notice to meet the particular purpose for the notice. n1 Thus, the court may order notice to go to all the class members or to some designated portion of the class. The sufficiency of Rule 23(d)(1)(B) notice is measured against the minimum standards of constitutional due process, rather than against Rule 23(c)(2), which requires the best notice practicable under the circumstances. n2 Due process requires that the notice be reasonably calculated under the circumstances to inform interested parties of the pending action and afford them an opportunity to present their objections. Courts have frequently held that first class mail and publication are sufficient to satisfy due process notice requirements of Rule 23(d)(1)(B). n3

A court also has discretion under Rule 23(d)(1)(B) to order one of the parties to perform the tasks necessary to send notice. As a general rule, the representative plaintiff, as the party who seeks to maintain the suit as a class action, must send notice to the class. However, district courts have the authority, when appropriate, to order a defendant, rather than a representative plaintiff, to provide and pay for the expense of notice. Rule 23(d) also authorizes district courts, in appropriate circumstances, to order defendants to cooperate in identifying the class members to whom notice must be sent and to draft a proposed notice for the potential class. n4 However, the court's discretion is more limited with respect to allocating the costs of responsibility for notice. A class action plaintiff is ordinarily expected to bear the cost of notice to the class. Only if the cost of the defendant's performance of a particular task is insubstantial may the district court in its discretion order that the cost be paid by the defendant. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsNotices

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.142 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(B).*

(n3)Footnote 2. *See* [2], *below.*

(n4)Footnote 3. *Fed. R. Civ. P. 23(d)(1)(B)(i)-(iii).*

(n5)Footnote 1. *Fed. R. Civ. P. 23(c)(2)(B)*; *see Fed. R. Civ. P. 23(b)(3).*

(n6)Footnote 2. *Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979) .*

(n7)Footnote 3. *Fed. R. Civ. P. 23(c)(2)(A)*; *see Fed. R. Civ. P. 23(d)(1)(B).*

(n8)Footnote 4. *Fed. R. Civ. P. 23(c)(2)(A)*; *see Fed. R. Civ. P. 23(d)(1)(B)(i)-(iii)*; *Cruz v. Am. Airlines, Inc., 356*

F.3d 320, 331, (D.C. Cir. 2004) .

(n9)Footnote 5. *Amone v. Aveiro, 226 F.R.D. 677, 688 (D. Haw. 2005)* .

(n10)Footnote 6. *Kyriazi v. Western Elec. Co., 647 F.2d 388, 396 (3d Cir. 1981)* .

(n11)Footnote 1. *Fed. R. Civ. P. 23(d)*, Committee Note to 1966 Amendments.

(n12)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(B)*; *see Fed. R. Civ. P. 23(d)(1)(B)*.

(n13)Footnote 3. *Simmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1994)* .

(n14)Footnote 4. *Amone v. Aveiro, 226 F.R.D. 677, 688 (D. Haw. 2005)* .

(n15)Footnote 5. *Barahona-Gomez v. Reno, 167 F.3d 1228, 1236-1237 (9th Cir. 1999)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.63

§ 14A.63 Orders Imposing Conditions on Representative Parties and Intervenorsn*

[1] Discretion of Court to Impose Conditions on Representative Parties

The court in a class action has considerable discretion to impose conditions on the representative parties. n1 This rule has been interpreted as permitting the court to issue appropriate orders governing the conduct of parties and counsel. For example, the court may condition the maintenance of the class action on the addition of representative parties to add strength to the representation of the class. n2 However, this authority is not unrestricted; both the federal rules and certain constitutional limitations may restrict the court's authority. n3

Rule 23(d)(1)(C) is normally used in the context of an order by the court which limits a class representative attorney's or a party's communications to potential class members. n4 The communication limitation is designed to prevent possible abuses associated with soliciting participation in the class proceeding. n5 For example, some courts have prohibited parties or attorneys opposing class treatment or settlement from soliciting class members to opt out of the litigation. n6 Furthermore, unapproved communications to class members may lead to confusion or an adverse effect on the administration of justice. Thus, a district court may abuse its discretion by authorizing communication prior to class certification if (1) the communication is widespread and clearly injurious, and (2) it is either unlikely the class will be certified, or a certification decision is not imminent. n7 However, the United States Supreme Court has cautioned against banning communications in class actions simply to avoid the possibility of abuse. A district court must draft the least burdensome condition appropriate under the circumstances. n8

[2] Discretion of Court to Impose Conditions on Intervenors

In a class action, the court has discretion to order that notice be given in such manner as the court may direct to some or all of the members of the class of the opportunity to intervene and present claims or defenses. Thus, a court may give absentee class members the opportunity to intervene and present claims or defenses or otherwise come into the action. n1 The primary purpose of intervention is to assure that the class is adequately represented within the meaning of Rule 23(a)(4). n2 In ruling on a motion for intervention, a court usually will undertake an analysis of the adequacy of the proposed representation and may impose conditions on the intervenors to protect that adequacy of the representation. n3 Another common condition imposed on intervenors is an order by the court limiting the extent of the intervenors' right

to participate in the overall action. For example, in one case the court denied intervenors the right to participate in settlement negotiations. n4 Class members should be liberally allowed to intervene in class actions because members of the class are normally bound by the judgment. n5 For a discussion of the right of intervention, and of permissive intervention, see Ch. 14, *Multiple Party Practice*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.143, 23.144 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(C).*

(n3)Footnote 2. *Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 171 (2d Cir. 2001) .*

(n4)Footnote 3. *Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* (order restricting communications between counsel and parties exceeded authority granted in federal rules).

(n5)Footnote 4. *Wiginton v. CB Richard Ellis, Inc., 2003 U.S. Dist. LEXIS 16266, at *5 (N.D. Ill. 2003) .*

(n6)Footnote 5. *See Cobell v. Norton, 212 F.R.D. 14, 19 (D.D.C. 2002) .*

(n7)Footnote 6. *Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1203 (11th Cir. 1985) .*

(n8)Footnote 7. *Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) .*

(n9)Footnote 8. *Gulf Oil Co. v. Bernard, 452 U.S. 89, 104, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981) .*

(n10)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(B)(iii).*

(n11)Footnote 2. *Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 57 (S.D.N.Y. 1993) .*

(n12)Footnote 3. *Fed. R. Civ. P. 23(d)(1)(B)(iii)*; *see Fed. R. Civ. P. 23(d)(1)(C).*

(n13)Footnote 4. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989) .*

(n14)Footnote 5. *Fed. R. Civ. P. 24(a)*; *see Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 57 (S.D.N.Y. 1993) .*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.64

§ 14A.64 Orders Requiring Amendment of Pleadings to Eliminate Class Representationn*

The district court in a class action has authority to enter an order requiring that pleadings be amended to eliminate allegations regarding the representation of absent persons and to have the action proceed without representation of those persons. n1 In essence, this provision authorizes a court to strike class allegations from the complaint. For example, the court may order that certain allegations be stricken when class certification is denied with respect to certain claims, n2 or when class certification is denied for all claims. n3 Thus, the court may use Rule 23(d)(1)(D) to decertify a class if a court determines that the plaintiffs no longer satisfy all the requirements for maintaining a class action. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.145 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(D).*

(n3)Footnote 2. *Stubbs v. McDonald's Corp., 224 F.R.D. 668, 674, 677 (D. Kan. 2005) .*

(n4)Footnote 3. *Cohn v. Massachusetts Mutual Life Ins. Co., 189 F.R.D. 209, 219 (D. Conn. 1999) .*

(n5)Footnote 4. *Bresson v. Thomson McKinnon Sec., Inc., 118 F.R.D. 339, 342 (S.D.N.Y. 1988) .*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.65

§ 14A.65 Other Orders to Facilitate Class Action Proceduresn*

The district court in a class action has authority to make any orders appropriate to handle procedural matters similar to the others prescribed in Rule 23(d)(1). n1 The courts have liberally interpreted this provision, which is essentially a catch-all order provision, and have relied on the provision to find authority for almost any type of procedural order that facilitates the fair and efficient conduct of the action and protects the interests of the absent class members. Thus, Rule 23(d)(1)(E) may be used to require notice to members who would not ordinarily be entitled to mandatory notice under the class action rule. n2 In another example, Rule 23(d)(1)(E) has been used as authority for permitting class members to opt out of a mandatory class in a Rule 23(b)(2) injunctive relief type action. n3

The courts frequently cite this catch-all provision in conjunction with one or more of the other more specific provisions of Rule 23(d)(1)(A)-(D). In this regard, if a court order appears to be at the limits of one of these more specific grants of authority, the general power of Rule 23(d)(1)(A) provides a more substantial justification for the court's order. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.140[4] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(E).*

(n3)Footnote 2. *Evans v. Am. Credit Sys., 222 F.R.D. 388, 398 (D. Neb. 2004)* .

(n4)Footnote 3. *In re Veneman, 309 F.3d 789, 792-793 (D.C. Cir. 2002)* .

(n5)Footnote 4. *Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* (citing Rule 23(d)(5) in conjunction with Rule 23(d)(3) as authority for orders placing limitations on communications by

named plaintiffs and their counsel in class actions).

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.66

§ 14A.66 Immediate Appeal of Class Action Procedural Orders Generally Not Allowedn*

When a court enters an order under Rule 23(d), the order generally is not a final appealable order because it generally does not finally and entirely dispose of the rights of the parties in the action. n1 However, such an order is immediately appealable under the collateral-order doctrine if the order (1) conclusively determines claims or rights separable from, and collateral to, rights asserted in the action, (2) is too important to be denied review, and (3) is too independent of the cause itself to require that appellate review be deferred until the whole case is adjudicated. Appellate courts have used the collateral-order doctrine as a basis for reviewing orders restricting communications in class actions n2 and orders that allocate the cost of sending notice to class members. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsAppellate Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.146 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Cobell v. Norton, 225 F.R.D. 41, 43 (D.D.C. 2002)* ; *see also 28 U.S.C. § 1291.*

(n3)Footnote 2. *In re School Asbestos Litig., 842 F.2d 671, 677 (3d Cir. 1988)* .

(n4)Footnote 3. *Southern Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1028 (10th Cir. 1993)* .

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1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.67through 14A.79

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§§ 14A.67[Reserved]

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.80

§ 14A.80 Contents of Class Action Judgmentn*

In a class action, the judgment must correctly and completely identify the persons bound. Rule 23(c)(3) specifies how to make the description. n1 In a Rule 23(b)(1) (Type I) or Rule 23(b)(2) (Type II) class action, n2 the judgment must include and describe those whom the court finds to be members of the class, regardless of whether the judgment is favorable or unfavorable to the class. The judgment in a Rule 23(b)(3) (Type III) class action, regardless of whether it is favorable or unfavorable to the class, must include and specify or describe those members to whom the certification notice required by Rule 23(c)(2) was directed and who have not requested exclusion. n3 In other words, in a Rule 23(b)(1) or Rule 23(b)(2) action, the judgment must describe the members of the class, but need not specify the individual members; in a Rule 23(b)(3) action, the judgment must specify the individual members who have been identified and must describe those who have not been identified. n4

The purpose of these Rule 23(c)(3) requirements is to correctly and completely describe who is bound by the class action judgment. n5 If the judgment of a class action is incorrect in that it fails to correctly define the class that is to be bound by the judgment, the aggrieved party should make a motion under Rule 60(a) to correct the mistake or omission in the judgment. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.180 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Coleman v. GM Acceptance Corp., 220 F.R.D. 64, 80 (D. Tenn. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 23(b)(1), 23(b)(2).*

(n4)Footnote 3. *Fed. R. Civ. P. 23(c)(3).*

(n5)Footnote 4. *Fed. R. Civ. P. 23(c)(3).*

(n6)Footnote 5. *Coleman v. GM Acceptance Corp., 220 F.R.D. 64, 80 (D. Tenn. 2004)* .

(n7)Footnote 6. *Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 690 (11th Cir. 1987)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.81

§ 14A.81 Preclusive Effects of Class Action Judgmentn*

A final judgment in a class action that has followed the procedures of Rule 23 is generally binding in subsequent litigation on all class members, including named representatives. Thus, the principles of claim preclusion and issue preclusion apply with respect to matters contained in the judgment. n1 Thus, for example, a judgment in a class action has preclusive effect if (1) there was clearly a final judgment on the merits; (2) the required notices were properly given and comported with due process requirements; (3) the identity of the parties' standard has been met because the court determined that the class was adequately represented; and (4) there were no matters outside the scope of the matters actually litigated, or that could have been litigated in the class action. n2

The only qualification to the general rule of preclusion for class actions is that the class action procedures used to reach the judgment must have comported with certain constitutional due process requirements. Due process requires that in Rule 23(b)(3) (Type III) class actions, cases in which a plaintiff class's predominant request for relief is for money damages, absent class members must be given the best practicable notice, an opportunity to be heard, an opportunity to opt out of the action, and adequate representation by the named plaintiff. n3 Any judgment entered in the class action will not have preclusive effect as to the class members affected by any due process deficiencies. By contrast, if the requirements of Rule 23(c)(2) have been satisfied, all Rule 23(b)(3) class members who were given proper notice and did not opt out are bound by the judgment. n4

Due process concerns are minimal with regard to the preclusive effects of final judgments in Rule 23(b)(1) (Type I) or Rule 23(b)(2) (Type II) classes. Members of those classes generally do not have the absolute right to notice and to opt out and, therefore, may be bound by the judgment reached in the action even though they did not receive individual notice or an opportunity to opt out. However, there is an exception for monetary claims. A class member's individual monetary claims are not precluded in an action subsequent to a class action judgment if the member had not received notice of the prior class action. n5

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.181 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)* ; *see Bentley v. Honeywell Int'l, Inc., 223 F.R.D. 471, 483 (S.D. Ohio 2004)* (claim preclusion applies to matters actually litigated).

(n3)Footnote 2. *Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53, 58 (1st Cir. 2004)* .

(n4)Footnote 3. *Fed. R. Civ. P. 23(c)(2).*

(n5)Footnote 4. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n6)Footnote 5. *Pate v. United States, 328 F. Supp. 2d 62, 72-74 (D.D.C. 2004)* ; *see Bentley v. Honeywell Int'l, Inc., 223 F.R.D. 471, 483 (S.D. Ohio 2004)* (claim preclusion applies only to matters actually litigated or settled in prior class action).

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1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.82through 14A.89

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§§ 14A.82[Reserved]

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.90

§ 14A.90 Certified Class Action Settlement, Voluntary Dismissal, or Compromise Requires Court Approvaln*

[1] Requirement of Court Approval

[a] Review of Terms of Settlement, Dismissal, or Compromise

Once a court has ordered certification of a class action, the named representatives cease to completely control the prosecution of the action. In particular, the parties may not unilaterally or with consent of other parties settle, voluntarily dismiss, or compromise any part of the certified class action. n1 The court must approve any settlement, voluntary dismissal, or compromise of any claims, issues, or defenses of a certified class action. n2 Court approval is required despite the provisions of any other rule, including Rule 41, which governs voluntary dismissals. n3 The latest version of this rule resolves the ambiguity in prior versions: only class actions that have been formally certified strictly require court approval for a settlement, voluntary dismissal, or compromise. n4

[b] Review of Attorney's Fees

As part of its review of any settlement, voluntarily dismissal, or compromise of any class action, the court must also conduct a thorough review of the reasonableness of any attorney's fees associated with the judgment of settlement, dismissal, or compromise. n5 The court has an obligation to review the reasonableness of attorney's fees in class action settlements even in the absence of any objection to the settlement, and irrespective of the type of class action and whether the fees will be paid from a common fund or otherwise. n6 For a discussion of attorney's fee awards in class actions, see *§ 14A.50* et seq.

[2] Settlements are Favored by Court

The requirement that the court must review and approve proposed settlements and voluntary dismissals in certified class actions does not mean that they are disfavored. On the contrary, there is a strong judicial policy in favor of settlements, particularly in complex class action litigation. n1 Settlements are favored by the courts because they conserve considerable judicial resources by avoiding further litigation. The parties to a settlement also avoid the costs and risks of a potentially lengthy and complex trial. Furthermore, a settlement may represent the best method of distributing damage awards to plaintiffs, especially in the contest of a limited fund, in which piecemeal distribution might deplete the fund

before all claimants receive awards. n2

Despite the judicial favor for settlements, the federal rules provide for the strict requirement of court approval for certified class action settlements for several reasons based on the unique nature of the class action. The primary reason is to protect the interests of the entire class, including absent members. n3 A class action settlement, like an agreement resolving any other legal claim, is essentially a private contract negotiated between the parties. Rule 23(e) requires the court to intercede in that private agreement to ensure that the agreement is not the result of fraud or collusion, and that taken as a whole it is fair, adequate, and reasonable to all concerned, particularly to the unnamed and absent class members. n4

[3] Use and Certification of Settlement Class

One or more persons may file a complaint with class allegations in the pleadings and prior to certification the parties may negotiate and settle the claims of the named parties on an individual basis and voluntarily dismiss the entire action without court interference or approval. However, if they do so the settlement or settlements are individual, rather than, class settlements. The claims of class members have not been litigated and the settlement or dismissal will not bind any persons other than the named parties who agree to the settlement or dismissal. n1 Parties may want to negotiate a settlement that will bind all of the class members and may do so prior to the time the court certifies the class. However, to have the settlement bind the absent class members, the parties who have reached agreement must move to have the class certified and, simultaneously, apply to have the court review and approve the settlement agreement. A class certified in this type of pre-settled action is called a "settlement class." n2 Use of settlement classes is not explicitly authorized in Rule 23. However, the Supreme Court has recognized and approved their use. n3

Attorneys should be cautious in the use of a settlement class because the expression "settlement class" has sometimes been used incorrectly by some courts to refer to a temporary class approved by the court on a conditional basis for the limited purpose of conducting settlement negotiations. However, Rule 23 does not allow conditional certification. Even for a settlement class, the court must review all of the usual certification requirements and order a formal certification. n4 The only unique significance of a "settlement class" is that, for convenience, certification occurs simultaneously with court approval. The proper use of a settlement class occurs when the parties reach a tentative settlement that they want to make binding on the entire proposed class, and they reach a provisional settlement prior to the certification of the class. Then, the parties should move the court for simultaneous class certification and approval of the settlement. The court may then order a combined notice of the proposed certification, opt-out rights, and the proposed settlement, and combine the fairness hearing with a hearing on class certification. If the settlement is approved and the class is certified, absent class members who do not opt out are bound by the settlement agreement. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.160, 23.161 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e)*, Committee Note to 2003 Amendments.

(n3)Footnote 2. *Fed. R. Civ. P. 23(e)*; *see In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* .

(n4)Footnote 3. *Fed. R. Civ. P. 41(a)* (Rule 41, which authorizes voluntary dismissals and generally controls their procedure, is subject to provisions of Rule 23(e).

(n5)Footnote 4. *Eckert v. Equitable Life Assur. Soc'y of the United States, 227 F.R.D. 60, 62 (E.D.N.Y. 2004)* .

(n6)Footnote 5. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 299 (3d Cir. 2005)* .

(n7)Footnote 6. *Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328-29 (9th Cir. 1999)* .

(n8)Footnote 1. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116-117 (2d Cir. 2005)* .

(n9)Footnote 2. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 784 (3d Cir. 1995)* .

(n10)Footnote 3. *Denney v. Jenkens & Gilchrist, 2005 U.S. Dist. LEXIS 2507, at *32 (S.D.N.Y. 2005)* .

(n11)Footnote 4. *Holmes v. Continental Can Co., 706 F.2d 1144, 1147-1148 (11th Cir. 1983)* .

(n12)Footnote 1. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n13)Footnote 2. *See In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004)* .

(n14)Footnote 3. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n15)Footnote 4. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620-621, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (only when it meets prerequisites of numerosity, commonality, typicality, predominance of class issues, and adequacy of representation, and fairness test under Rule 23(e), may court certify proposed settlement class as class action).

(n16)Footnote 5. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 777-778 (3d Cir. 1995)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.91

§ 14A.91 Notice Requirementsn*

[1] Notice Is a Prerequisite to Settlement Approval

The court must direct that the parties send notice in a reasonable manner to all class members who are to be bound by a settlement, voluntary dismissal, or compromise. n1 The procedure for notice of a proposed settlement is not the same as for a notice of certification. While a court has discretion in some types of class actions to dispense with notice of certification, notice to class members of a proposed settlement or voluntary dismissal is mandatory for all types of classes. n2

[2] Contents and Method of Notice

The court must direct that the parties give notice in a reasonable manner to all class members. n1 Under the reasonable standard, the district court has considerable discretion in directing the form and manner of notice. However, the discretion is not unlimited. For the notice to be "reasonable" as required by Rule 23(e), the settlement notice must fairly inform the members of the class of the terms of the proposed settlement and o f the options that are available to them in connection with the proceedings; the notice must be capable of being understood by the average class member. n2 In particular, the notice of the proposed settlement or voluntary dismissal must at least provide the following information to the members of the certified class:

1. **Time and place of fairness hearing**. An important part of approval of a proposed settlement or dismissal is a hearing on the fairness of the proposed settlement or dismissal. Therefore, class members must be told when and where this hearing will be held. n3

2. **Time and manner to object to settlement**. Any class member may object to a proposed settlement or voluntary dismissal. At the fairness hearing on the proposed settlement or dismissal, the court must consider the objections made by class members. Therefore, there must be a deadline to make objections and specified methods for presenting objections to the court's attention in time for consideration at the hearing, and the notice must inform the class members of this information. n4

3. **Sufficient information about the proposed settlement or dismissal to permit opposition to object**. In order to

determine whether to accept or object to the settlement proposal, a reasonable notice must contain some detailed information about the terms and conditions of the proposed settlement or dismissal. Usually, the party providing notice will attach a copy of the proposal to the notice, but no particular form is required. n5 A reasonable notice need not include all of the details of the proposed settlement or dismissal; the only requirement is that the notice fairly apprize the class members of the terms of the settlement or dismissal. n6 The notice should also inform the members of the location where copies of the entire settlement agreement are available for inspection. n7

While "reasonable notice" is sufficient for most proposals for settlement, dismissal, or compromise, the court has discretion to set a higher standard of certification notice when necessitated by the circumstances, for example, if the class members are required to file claim forms to participate in the settlement judgment, or if the court orders a second opt-out opportunity under Rule 23(e)(3). In such cases, the court may direct individual personal notice instead of notice by publication. n8

[3] Court Has Discretion to Apportion Expense of Notice

The United States Supreme Court has stated a general rule that the named representative plaintiffs should perform all tasks and pay all costs related to the sending notice of certification, n1 and several courts have applied the Supreme Court's reasoning to notices of settlement, dismissal, or compromise under Rule 23(e). n2 However, because the representative plaintiff is not always the sole party that seeks approval of a settlement, dismissal, or compromise, most courts have recognized that the district court may order the defendants to perform tasks and pay a portion of the expense associated with providing notice of a proposed settlement, voluntary dismissal, or compromise of the claims, issues, or defenses, of a certified class. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.162 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e)(1)*; *see Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 113-114 (2d Cir. 2005)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 23(e)(1).*

(n4)Footnote 1. *Fed. R. Civ. P. 23(e)(1).*

(n5)Footnote 2. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 113-114 (2d Cir. 2005)* .

(n6)Footnote 3. *See Fed. R. Civ. P. 23(e)(5)*; *Lopez v. San Francisco Unified Sch. Dist., 2004 U.S. Dist. LEXIS 21970, at *6-*7 (N.D. Cal. 2004)* .

(n7)Footnote 4. *See Fed. R. Civ. P. 23(e)(5).*

(n8)Footnote 5. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 113-114 (2d Cir. 2005)* .

(n9)Footnote 6. *Gottlieb v. Wiles, 11 F.3d 1004, 1013 (10th Cir. 1993)* .

(n10)Footnote 7. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* .

(n11)Footnote 8. *Fed. R. Civ. P. 23(e)(1)*, Committee Note to 2003 Amendments.

(n12)Footnote 1. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 349, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n13)Footnote 2. *Fed. R. Civ. P. 23(e)(1)*, Committee Note to 2003 Amendments.

(n14)Footnote 3. *Kansas Hosp. Ass'n v. Whiteman, 167 F.R.D. 144, 146 (D. Kan. 1996)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.92

§ 14A.92 Parties Requesting Approval of Settlement Must File Statement of Any Agreements Made in Connection with Settlementn*

[1] Parties' Written Disclosure Statement Must Identify All Related Agreements

Any parties who file a motion for approval of a settlement, voluntary dismissal, or compromise of a certified class action under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. n1 These agreements, known as "side agreements," must be available to the court for its in camera review. n2

The purpose of the requirement of identifying side agreements is full disclosure to the court of all agreements that may seem separate and apart from the agreement resulting in the settlement, voluntary dismissal, or compromise, but nevertheless may have influenced the parties or their counsel in reaching that agreement. To fulfill its obligation to evaluate the fairness, reasonableness, and adequacy of the proposed settlement, the court must obtain information regarding any agreement that might have involved negotiating away possible advantages for the class in return for advantages given to other parties. n3 However, these agreements are for the use of the court and are not subject to discovery by the parties or objectors to the settlement. n4

[2] Parties Must Make Complete Disclosure

The parties should not decide among themselves whether an agreement actually influenced the settlement and, therefore, should be disclosed or identified in the written statement filed with the court. If the side agreement possibly could have influenced the terms of the settlement, it should be disclosed, even if the parties believe that it did not. n1 In other words, doubts over whether an agreement meets the criteria for disclosure should be resolved in favor of disclosure. n2 Because the parties seeking court approval of a settlement, dismissal, or compromise need only file a written statement "identifying" such agreements, n3 the parties are not required, as an initial matter, to provide the court with copies or even summaries of any of the agreements made in connection with a proposed settlement. However, the court has authority to require the parties proposing the settlement to provide the court with a summary of any agreement identified in the required statement and, if further review is necessary, a copy of the actual complete terms of the agreement. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.163 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e)(3).*

(n3)Footnote 2. *In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 204 (S.D.N.Y. 2005)* .

(n4)Footnote 3. *Fed. R. Civ. P. 23(e)(3)*, Committee Note to 2003 Amendments.

(n5)Footnote 4. *In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 204 (S.D.N.Y. 2005)* .

(n6)Footnote 1. *See In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 204 (S.D.N.Y. 2005)* .

(n7)Footnote 2. *Fed. R. Civ. P. 23(e)(3)*, Committee Note to 2003 Amendments.

(n8)Footnote 3. *Fed. R. Civ. P. 23(e)(3).*

(n9)Footnote 4. *See In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 204 (S.D.N.Y. 2005)* ; *Fed. R. Civ. P. 23(e)(2)*, Committee Note to 2003 Amendments.

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.93

§ 14A.93 Factors Considered by Court in Determining Whether to Approve Settlementn*

[1] Court Should Approve Settlement Only if Settlement Is Fair, Reasonable, and Adequate

The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only if the court finds that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. n1 The court must also determine that the terms of a settlement do not violate any applicable federal law n2 and is consistent with the public interest. n3

The court has considerable discretion whether to approve a particular settlement, so that the court need not give greater weight to any particular relevant factor and is not required to consider all factors. The standards requiring a "fair, adequate, and reasonable" disposition of a class action are somewhat general, n4 so courts have developed particular factors regarding the determination of approval. For a discussion of the primary factors a court should consider, see [2], below.

[2] Four Primary Factors for Court to Consider

[a] Settlement Is Based on Negotiation Rather Than Collusion

In assessing its fairness, adequacy, and reasonableness, the court should consider whether the settlement was the result of good faith bargaining at arms length by experienced counsel and whether there is any evidence of collusion. n1 Whether the agreement was the result of good faith bargaining rather than the result of fraud, overreaching, or collusion among the negotiating parties is one of the most significant factors that a court considers for approval. n2 Some courts have even stated that establishment of arms length bargaining merits a presumption of fairness of a proposed dismissal or settlement. n3 Indications of collusion include disparate treatment of class members and preferential treatment for the class representatives. The trial court must investigate whether the class representatives and their attorneys may be colluding with the defendants to increase their own recovery at the expense of absentee plaintiffs, and the extent of an investigation depends on the degree to which the settlement treats class members differently. n4

[b] Strength of Plaintiffs' Case Compared to Amount Offered in Settlement

Another important factor in evaluating the fairness, reasonableness, and adequacy of a settlement is the strength of the plaintiffs' case on the merits, balanced against the amount offered in the settlement. n5 In balancing these two criteria, the court must consider the probable amount the class would have obtained if the action had been prosecuted to its conclusion. The court must examine the risks of establishing liability and damages, and of maintaining the class action through trial. n6

However, the court may not adjudicate the merits of the dispute. n7 Furthermore, the court may not merely balance the amount of a proposed settlement against a speculative amount of what might be awarded in a judgment in favor of the class. The essence of a settlement is compromise, which considers not only the monetary amount but other benefits, such as avoiding the risks of trial. Therefore, a proposed settlement may be adequate even though it amounts to only a small fraction of the potential recovery in a fully litigated case. Finally, the court must balance the probable result at trial against the likely costs in time and expense of continued litigation. n8

[c] Input of Members of Class Regarding Settlement Proposal

The response of the members of a class to a proposed settlement is the third primary consideration for the district court in its determination whether to approve the settlement. Class members may either directly object or approve, or may show approval by their conduct in failing to object. n9 However, even though the court should consider class members' input, the mere fact that a large number of class members object is not determinative that the court should disapprove; rather, the input is one factor and the court should decide after weighing all the strengths and weaknesses of the case and the risks of litigation. n10 The court may also consider the opinions and observations of the parties' counsel. The more experience that class counsel possesses, the greater weight a court tends to give to counsel's opinions on fairness, adequacy, and reasonableness. n11

[d] Stage of Litigation

The further the litigation has progressed, the more likely the court will be to approve a settlement. For example, when more discovery and consultation with experts has been completed the court is more likely to give approval because it is more likely that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case. n12 Thus, after the parties become well informed of the strengths and weaknesses of their claims by discovery, investigation, and analysis, and the proceedings are in the advanced stage of preparing for trial, the more likely the court will be to approve a settlement. n13

[3] Court Must Make Findings Regarding Approval of Settlement

When approving a settlement of a class action, the court must support with formal findings of fact and conclusions of law its determination that the settlement is fair, reasonable, and adequate. n1 The findings on approval or disapproval of a proposed settlement must be specified in sufficient detail to explain to class members and the appellate court, if necessary, the factors the court considered in its determination. n2 Without precise findings, it may be impossible for a court of appeals to evaluate a district court's decision because there are so many interests and factors that the court must consider in making the decision. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.164 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e)(2).*

(n3)Footnote 2. *In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 105 (D. R.I. 1996)* .

(n4)Footnote 3. *Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990)* .

(n5)Footnote 4. *See Consol. Edison, Inc. v. Northeast Utils., 332 F. Supp. 2d 639, 651 (S.D.N.Y. 2004)* .

(n6)Footnote 1. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n7)Footnote 2. *In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 190-191 (S.D.N.Y. 2005)* .

(n8)Footnote 3. *In re Sumitomo Copper Litig., 189 F.R.D. 274, 280-281 (S.D.N.Y. 1999)* .

(n9)Footnote 4. *Holmes v. Continental Can Co., 706 F.2d 1144, 1148 (11th Cir. 1983)* .

(n10)Footnote 5. *Schneider v. Citicorp Mortg., 324 F. Supp. 2d 372, 378 (E.D.N.Y. 2004)* .

(n11)Footnote 6. *Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990)* .

(n12)Footnote 7. *See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)* ; *Murillo v. Texas A & M Univ. Sys., 921 F. Supp. 443, 445 (S.D. Tex. 1996)* .

(n13)Footnote 8. *In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

(n14)Footnote 9. *Dillard v. City of Foley, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995)* (court assumed plaintiff class overwhelmingly supported proposed consent decree because no class members registered objections).

(n15)Footnote 10. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990)* .

(n16)Footnote 11. *Dillard v. City of Foley, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995)* .

(n17)Footnote 12. *In re DJ Orthopedics, Inc. Secs. Litig., 2004 U.S. Dist. LEXIS 11457, at *5-*6 (S.D. Cal. 2004)* .

(n18)Footnote 13. *In re Sumitomo Copper Litig., 189 F.R.D. 274, 281-282 (S.D.N.Y. 1999)* .

(n19)Footnote 1. *Fed. R. Civ. P. 23(e)(2).*

(n20)Footnote 2. *Fed. R. Civ. P. 23(e)(2)*, Committee Note to 2003 Amendments.

(n21)Footnote 3. *Molski v. Gleich, 318 F.3d 937, 946 (9th Cir. 2003)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
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1-14A Moore's Manual--Federal Practice and Procedure § 14A.94

§ 14A.94 Class Members Have Right to Object to Proposed Settlementn*

[1] Court Must Receive and Respond to Objections Made by Class Members

The court must generally give preliminary approval to a settlement, n1 known as a proposed settlement. n2 All class members have the right to object to any proposed settlement, voluntary dismissal, or compromise of any of the class's claims, issues, or defenses. n3 The court frequently specifies in its notice of the proposed settlement and hearing a deadline by which class members must make objections and the manner for making objections. The class members should make objections as required in the notice; thus, a class member generally need not make a formal appearance or seek intervention at the fairness hearing to object to a proposed settlement. n4

The court must consider class members' timely objections before the court makes a determination whether a proposed settlement agreement is fair, reasonable, and adequate. Courts have consistently stated that one indicator of whether a proposed settlement is fair, reasonable, and adequate is the number and strength of the objections made. The fewer the objections, the more likely that the settlement may be approved. n5

[2] Class Members May Withdraw Objections Only on Permission of Court

A class member who has made an objection to a proposed settlement, voluntary dismissal, or compromise of the class's claims, issues, or defenses may not withdraw the objection without the court's permission. n1 The objector should obtain permission by filing a motion for withdrawal of the objection n2 prior to the deadline for making objections and, in any event, before the fairness hearing. n3 If the objector attempts to make a withdrawal without the court's permission, the withdrawal is completely without effect unless and until the court gives permission, and the court must still consider the substance of the objection during its determination whether to approve the settlement agreement.

The purpose of requiring court permission for the withdrawal of an objection is to eliminate the possibility that an objection may be used for purposes of obstruction or delay, particularly if obstruction or delay is a means of procuring special treatment for the objector. Thus, a court may permit the withdrawal of an objection to a proposed settlement, voluntary dismissal, or compromise without elaborate inquiry or any great formality in situations in which there is no possibility for misuse of the objection. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromises

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.166 (Matthew Bender 3d ed.)

(n2)Footnote 1. *In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 192 (D. Mass. 2005)* .

(n3)Footnote 2. *Fed. R. Civ. P. 23(e)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 23(e)(5).*

(n5)Footnote 4. *Devlin v. Scardelletti, 536 U.S. 1, 8, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

(n6)Footnote 5. *In re Fleet/Norstar Secs. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* .

(n7)Footnote 1. *Fed. R. Civ. P. 23(e)(5).*

(n8)Footnote 2. *Brown v. Am. Home Prods. Corp., 226 F.R.D. 498 (E.D. Pa. 2005)* .

(n9)Footnote 3. *In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 96-97 (D. Mass. 2005)* .

(n10)Footnote 4. *Fed. R. Civ. P. 23(e)(5)*, Committee Note to 2003 Amendments.

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.95

§ 14A.95 Court May Grant Final Approval to Settlement Only After Holding Hearingn*

[1] Rule Explicitly Requires Hearing

A court must hold a hearing to determine whether the binding settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. n1 The 2003 amendment to Rule 23(e) has removed any discretion the court might have previously had to approve a settlement without a hearing. Thus, the unequivocal language of Rule 23(e) now mandates the already common practice of conducting fairness hearings prior to approval of any settlement, voluntary dismissal, or compromise. n2

[2] Time of Hearing

The court must hold the formal fairness hearing for final approval after the members have received notice of the proposed settlement and of the hearing, and have had an opportunity to object to the proposed settlement. n1 The procedure for obtaining input from parties and class members other than those proposing the settlement, dismissal, or compromise also allows the court to hold multiple hearings in different locations, if necessary. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.165 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e)(2).*

(n3)Footnote 2. *In re Wireless Tel. Fed. Cost Recovery Fees Litig., 2004 U.S. Dist. LEXIS 23342, at *24 (W.D. Mo. 2004) .*

(n4)Footnote 1. *Fed. R. Civ. P. 23(e)(1)*; *see In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 96-97 (D. Mass. 2005)* .

(n5)Footnote 2. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.96

§ 14A.96 Court Has Discretion to Withhold Approval Unless Second Opt Out Is Allowedn*

[1] Court Has Discretion to Provide for Second Opt Out

At the time of certification of any class action based on common questions of law and fact under Rule 23(b)(3), the court must provide each class member with notice and the opportunity to exclude the member from the class, known as an opt out. n1 Then, at the time of its consideration of a settlement in an action previously certified as a common question of law and fact class action under Rule 23(b)(3), the court may refuse to approve a settlement unless the settlement provides each member with a new opportunity to request exclusion of those members that at the certification stage had an opportunity to request exclusion but did not do so. n2 This is known as a "second opt out" opportunity or a "back end exclusion." The decision whether to grant the absent class members a second opportunity to opt out after the terms of a proposed settlement are known is in the court's discretion, n3 and no party or class member has a right to a second opt out. n4

[2] Court May Limit or Condition Second Opt Out

The court may have concerns that a second opportunity to opt out by class members may be the subject of abuse. For example, some class members with substantial potential claims may elect to opt out in the hope of coercing settling defendants to provide them with more lucrative settlement terms than are available to the balance of the class. Other class members may elect to opt out in the hope that they might be able, in subsequent class litigation, to avoid unfavorable rulings the court made in the case before the settlement agreement was reached. The court may circumvent many of those abuses by directing that any class members electing to opt out of the class in response to their second opportunity to do so are bound by any or all rulings the court entered before the settlement agreement was proposed for approval. n1

[3] Class Members Who Opt Out Are Not Bound by and May Not Share in Settlement

Because Rule 23(e)(3) specifies that a second opt out is a new opportunity to request exclusion from the class, the effect of exercising a second opt out is the same as the effect of exercising an original opt out at the time of certification. n1 In other words, class members who take advantage of their second opportunity to opt out of the class are not bound by the settlement, and their claims against the defendants survive the entry of judgment on the settlement agreement, except to

the extent that the court ordered that class members remain bound by court rulings even if they opt out. n2 Those class members also have no right to participate in the settlement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.167 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(c)(2)(B)*; *see § 14A.33[5][f]*.

(n3)Footnote 2. *Fed. R. Civ. P. 23(e)(4)*.

(n4)Footnote 3. *See In re AMF Bowling Sec. Litig., 334 F. Supp. 2d 462, 466 (S.D.N.Y. 2004)* .

(n5)Footnote 4. *Fed. R. Civ. P. 23(e)(4)*, Committee Note to 2003 Amendments.

(n6)Footnote 1. *Fed. R. Civ. P. 23(e)(4)*, Committee Note to 2003 Amendments.

(n7)Footnote 1. *See In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 194-195 (D. Mass. 2005)* .

(n8)Footnote 2. *See* [2], *above*.

(n9)Footnote 3. *Fed. R. Civ. P. 23(e)(4)*, Committee Note to 2003 Amendments.

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.97

§ 14A.97 Settlement of Class Actions Subject to Class Action Fairness Actn*

[1] Actions That Are Subject to Class Action Fairness Act

The Class Action Fairness Act of 2005 (the Act) n1 has established several requirements for court approval of settlements for class actions covered by the Act. n2 The Act applies only to civil class actions commenced on or after the date of its enactment, n3 February 18, 2005. n4 For further discussion of the applicability of the Act, see *§ 14A.12[2]*.

[2] Court Approval of Coupon Settlement

The Act does not precisely define the term "coupon settlement." n1 However, it uses the term to apply to situations when a proposed settlement in a class action provides for a recovery of coupons to a class member. n2 Case precedent indicates that a coupon settlement is a settlement in which class action plaintiffs receive coupons instead of cash for their recovery. In other words, the class action plaintiffs each receive coupons that they can redeem for merchandise or services with the settling party. n3

In any proposed settlement under which class members are awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether the settlement is fair, reasonable, and adequate for class members. The court must make a written finding of its determination. The court also has discretion to require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the parties. n4 To assist it in the fairness determination, the court has discretion on motion of a party to receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed. n5

[3] Court Approval of Net Loss Settlement

The court has discretion to approve a proposed settlement that would obligate a class member to pay sums to class counsel that would result in a net loss to the class member. However, to grant such an approval, the court must make a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss of the settlement. n1

[4] Prohibition Against Court Approval of Settlement Providing for Payment Based on Geographic Location

A court may not approve a proposed settlement that provides for the payment of greater amounts to some class members than to others, when the difference is attributable solely to the fact some class members are located in closer geographic proximity to the court than others. n1

[5] Requirement That Defendants Must Notify Federal and State Officials of Proposed Settlement

[a] Defendants Must Give Notice Within 10 Days After Filing Proposed Settlement

Each defendant participating in a proposed settlement of a class action must serve appropriate state and federal officials with a notice of a proposed settlement not later than 10 days after a proposed settlement is filed with the court. Each defendant must serve notice on the appropriate state official for every state in which any single class member resides. n1 The appropriate federal official is usually the U.S. Attorney General or any federal and state regulators or licensing authorities that can be identified for each defendant. n2 The appropriate state official is either the state attorney general for each state in which class members might reside, as well as any state regulators or licensing authorities that can be identified for each defendant. n3 This notice requirement applies in any class action filed in federal court or removed to federal court from state court. n4

The court may not give final approval of a proposed settlement until at least 90 days have elapsed since the last date on which the last defendant completed serving notice on the appropriate federal official and the appropriate state officials. n5

[b] Required Contents of Notice

Each defendant's notice must include all the following: n6

- A copy of the complaint, any materials filed with the complaint, and any amended complaints. These materials may be omitted if they are made available through the Internet and the notice gives instruction on how to access them.
- Notice of any scheduled judicial hearing in the class action.
- Any proposed or final notice to class members informing them of any right to opt out or lack of right to opt out, and any proposed or final notice of a class settlement.
- Any proposed or final class settlement.
- Any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants.
- Any final judgment or notice of dismissal.
- If feasible, the names of class members who reside in each state, which need be provided only to the appropriate state official for each respective state.
- Any written judicial opinion relating to the class concerning their opt-out rights or related settlements or relating to any final judgment.

[c] Effects of Failure to Comply

A class member may refuse to comply with and may choose not to be bound by any settlement agreement or consent decree in a class action if the class member establishes that each defendant has not provided the required notice. n7 These rights may be exercised only by class members or any person acting on a class member's behalf. n8

If all defendants have provided the required notice to the appropriate federal official and to either the state attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant, a class member or class member's representative may not refuse to comply with or refuse to be bound by a settlement agreement or consent decree. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsClass Action Fairness ActCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.164[9] et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. Pub. L. No. 109-2, 119 Stat. 4 (2005); *see 28 U.S.C. § 1332(d).*

(n3)Footnote 2. *See 28 U.S.C. § 1712(a).*

(n4)Footnote 3. Pub. L. No. 109-2, § 9; 119 Stat. 4 (2005).

(n5)Footnote 4. *Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1233 (10th Cir. 2005) .*

(n6)Footnote 1. *See 28 U.S.C. § 1711.*

(n7)Footnote 2. *See 28 U.S.C. §§ 1712(a), 1712(b)(1).*

(n8)Footnote 3. *See In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002, 1018-1020 (N.D. Ill. 2000) .*

(n9)Footnote 4. *28 U.S.C. § 1712(e).*

(n10)Footnote 5. *28 U.S.C. § 1712(e).*

(n11)Footnote 1. *28 U.S.C. § 1713.*

(n12)Footnote 1. *28 U.S.C. § 1714.*

(n13)Footnote 1. *28 U.S.C. § 1715(b).*

(n14)Footnote 2. *28 U.S.C. § 1715(a)(1)(A).*

(n15)Footnote 3. *28 U.S.C. § 1715(a)(2).*

(n16)Footnote 4. *28 U.S.C. § 1711(2).*

(n17)Footnote 5. *28 U.S.C. § 1715(d).*

(n18)Footnote 6. *28 U.S.C. § 1715(b)(1)-(8).*

(n19)Footnote 7. *28 U.S.C. § 1715(e)(1).*

(n20)Footnote 8. *28 U.S.C. § 1715(e)(2).*

(n21)Footnote 9. *28 U.S.C. § 1715(e)(2).*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.98

§ 14A.98 Enforcement of Court Approved Settlement Agreementn*

Although Rule 23(e) requires court approval of any settlement agreement in a class action, n1 the rule does not expressly require or allow the district court to retain jurisdiction over an approved settlement agreement. As with a settlement agreement in any type of action, the district court has no inherent power to enforce settlement agreements entered into by parties litigating before them. n2 Thus, it is only if the district court explicitly retains jurisdiction over the settlement agreement, or incorporates the terms of the agreement in its dismissal order, that a breach of the agreement will constitute a violation of the order, so that the court may exercise its jurisdiction to enforce the agreement. n3 Consequently, in class actions courts often explicitly retain jurisdiction over settlement agreements and incorporate the terms of such agreements in dismissal orders. n4 A court is under no obligation, however, to reserve jurisdiction. Furthermore, a court is not bound by an agreement of the parties that the court should exercise continuing jurisdiction. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.170 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23(e).*

(n3)Footnote 2. *Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1268-1269 (9th Cir. 1996) .*

(n4)Footnote 3. *In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 229 (D.N.J. 1997) .*

(n5)Footnote 4. *See, e.g., Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 782 (S.D. Mich. 2007) .*

(n6)Footnote 5. *Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1269 (9th Cir. 1996) .*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.99

§ 14A.99 Appellate Review of Court Approved Settlement Agreementn*

[1] Standard of Review

The trial court has considerable discretion whether to grant or deny approval to a settlement of the parties in a class action, and courts of appeal give considerable deference to the district court's determinations because the district court has unique exposure to the litigants and the litigation. Consequently, a court of appeals will reverse a district court's approval of a settlement only if an appellant establishes that the district court's decision was an abuse of discretion. n1 This standard means that the appellate court may not substitute its notions of fairness, reasonableness, and adequacy for those of the district judge and the parties to the settlement agreement. n2 An appellate court may find an abuse of discretion if the district court's decision depended on a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. A finding of fact is clearly erroneous if the appellate court reviews the entire record and concludes with firm conviction that the district court made a mistake, even though there may be some evidence to support the finding. n3

[2] Persons Entitled to Appeal Approved Settlement

A named class representative has standing to appeal the approval of any class action settlement. The United States Supreme Court has held that an unnamed class member may also appeal a class action settlement, even if the unnamed member has not attempted to formally intervene in the case, provided that the unnamed class member has objected during the fairness hearing on the settlement at the trial level. The Supreme Court thus has rejected the circuit cases that have held that an unnamed class member does not have standing to appeal an order approving a settlement when the named class representatives do not want to pursue an appeal. The Supreme Court reasoned that even though there is a general rule that only parties to a lawsuit may appeal an adverse judgment even when a nonparty has an interest that is affected by the trial court's judgment, unnamed members in a class action are "parties" to the case in the sense that they are bound by a settlement. n1

Because of the nature of class actions, an unnamed plaintiff who is dissatisfied with the class settlement has four alternative avenues of relief: (1) the objector may move to intervene as of right under Rule 24(a)(2); (2) the objector may collaterally attack the settlement by filing a separate suit challenging the adequacy of the class representation; (3) if the class has been certified under Rule 23(b)(3), the individual class member may opt out; n2 and (4) the unnamed class

member may also appeal a class action settlement, provided that the unnamed class member objected to the settlement during the fairness hearing. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCompromisesCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.169 (Matthew Bender 3d ed.)

(n2)Footnote 1. *In re Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005)* .

(n3)Footnote 2. *Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)* , *cert. denied, 506 U.S. 953 (1992)* .

(n4)Footnote 3. *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 783 (3d Cir. 1995)* .

(n5)Footnote 1. *Devlin v. Scardelletti, 536 U.S. 1, 10-12, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

(n6)Footnote 2. *Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 678 (8th Cir. 1992)* .

(n7)Footnote 3. *Devlin v. Scardelletti, 536 U.S. 1, 10, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VI. SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE OF CLASS ACTION

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.100through 14A.109

[Reserved]

§§ 14A.100[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.110

§ 14A.110 Function of Derivative Actionn*

[1] Nature of Derivative Action

A "derivative action" is an action that is filed by shareholders of a corporation based on a right of action belonging to the corporation itself, but which the corporation is unable or refuses to prosecute in its own right. n1 In other words, a derivative action allows a shareholder to step into the corporation's shoes and to seek in the corporation's right relief the shareholder could not demand in his or her own right; thus, the shareholder brings suit on the cause of action "derived" from the corporation. A derivative action, for example, may be a suit to enforce a corporate cause of action against officers, directors, and third parties. In other words, the term derivative action applies to actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court. n2

Any recovery in a derivative action belongs to the corporation, not the individual shareholders who bring suit. In a derivative action, the allegations of injury to the corporation often involve direct participation by one or more persons in control of the corporation in the alleged act or omission causing the injury to the corporation. n3 Consequently, a derivative action has two important functions: first, it is the equivalent of a suit by the shareholders to compel the corporation to sue; second, it is a suit by the corporation, asserted by the shareholders on behalf of the corporation as an entity, against those liable to the corporation. n4

[2] Comparison With Direct Shareholder Action

The distinction between a derivative action and a direct shareholder action is that in a derivative action the claim for relief belongs to the corporation; in a direct action, the claim for relief belongs to the individual shareholder-claimants, independent of the rights of the corporation. Whether a claim is direct or derivative is determined by whether the injury to the individual claimant is separate and distinct from the injury to other shareholders in a similar situation as the claimant. n1 In diversity cases, state law governs the issue of whether a suit is derivative or direct. n2 Because of the nature of a derivative action, it is usually a more complicated form of action than a direct action and requires compliance with special procedural rules that govern its initiation and continuation. n3

An action is derivative only if the alleged wrong must affect all the shareholders based on their status as the collective owners of the corporation. For example, a derivative action may assert claims of fraud against the corporation by a third

party n4 or claims against corporate officers or majority shareholders for mismanagement or waste. n5 In contrast to a derivative action, a direct shareholder action involves an injury against a shareholder individually that is distinct from that of the corporation. Therefore, in a direct action the shareholder plaintiff must demonstrate either that the defendant breached a duty owed directly to the plaintiff or that the plaintiff's injury is separate and distinct from that of other shareholders. n6 For example, a direct action may be brought on a claim for the fraudulent sale of stock to an individual shareholder. n7

[3] Comparison With Class Action

A shareholder derivative action and a class action are very similar in that each is a single action brought by a representative party purporting to represent its own interests and also the interests of a group of others similarly situated. n1 The procedures for the two types of action are also similar, n2 and the provisions for derivative actions were formerly contained in Rule 23, which governs class actions. However, a derivative action differs from a class action in that a derivative action is specifically brought on behalf of a corporation as an entity for a corporate right, in which the shareholders as a class have an interest, while a class action is brought on behalf of the class itself. n3 The specific procedures for the derivative action specified in Rule 23.1 are designed to facilitate the special requirements of the derivative action. n4

In some circumstances, the facts of the alleged injuries may support bringing either a class action or a derivative action. n5 Furthermore, plaintiffs occasionally may be permitted to join both class claims and derivative claims in the same action, in the absence of any conflicts of interest, because there is no per se restriction against shareholders bringing direct and derivative actions together. n6 Even when direct and derivative actions are not combined in a single action, direct class actions and derivative suits arising from the same transaction or course of conduct may be consolidated or coordinated for purposes of joint discovery, pretrial motions, trial of common issues, or settlement. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.1.02-23.1.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23.1*; *Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* .

(n3)Footnote 2. *Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 528-529, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984)* .

(n4)Footnote 3. *Ross v. Bernhard, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n5)Footnote 4. *Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 529 n.4, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984)* .

(n6)Footnote 1. *Popp Telecom, Inc. v. Am. Sharecom, Inc., 361 F.3d 482, 492 (8th Cir. 2004)* .

(n7)Footnote 2. *Bristol Res. 1994 Acquistion Ltd. P'ship v. NI Fuel Co., 333 F.3d 608, 610 (5th Cir. 2003)* .

(n8)Footnote 3. *Warden v. McLelland, 288 F.3d 105, 112 (3d Cir. 2002)* (noting certain restrictions and defenses applicable only to derivative actions).

(n9)Footnote 4. *Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 383 (7th Cir. 1990)* , *cert. denied, 500 U.S. 952 (1991)* .

(n10)Footnote 5. *See, e.g., Popp Telecom, Inc. v. Am. Sharecom, Inc., 361 F.3d 482, 492 (8th Cir. 2004)* .

(n11)Footnote 6. *Popp Telecom, Inc. v. Am. Sharecom, Inc., 361 F.3d 482, 492 (8th Cir. 2004)* .

(n12)Footnote 7. *Simcox v. San Juan Shipyard, Inc., 754 F.2d 430, 438 (1st Cir. 1985)* .

(n13)Footnote 1. *See In re Amsted Indus. ERISA Litig. v. Amsted Indus., 263 F. Supp. 2d 1126, 1129 (N.D. Ill. 2003)* .

(n14)Footnote 2. *Powers v. Eichen, 229 F.3d 1249, 1254 (9th Cir. 2000)* .

(n15)Footnote 3. *See Official Comm. of Unsecured Creditors for the Bankruptcy Estate of Boston Reg'l Med. Ctr., Inc. v. Ricks, 328 F. Supp. 2d 130, 143-144 (D. Mass. 2004)* .

(n16)Footnote 4. *Powers v. Eichen, 229 F.3d 1249, 1254 (9th Cir. 2000)* ; *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 728 n.7 (11th Cir. 1987)* .

(n17)Footnote 5. *In re Amsted Indus. ERISA Litig. v. Amsted Indus., 263 F. Supp. 2d 1126, 1129 (N.D. Ill. 2003)* .

(n18)Footnote 6. *City P'ship Co. v. Jones Intercable, Inc., 213 F.R.D. 576, 584 (D. Colo. 2002)* (noting that action included both class action claims and derivative claims).

(n19)Footnote 7. *In re Oracle Securities Litig., 131 F.R.D. 688, 690-691 (N.D. Cal. 1990)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.111

§ 14A.111 Federal Rules Govern Procedural Requirements for Derivative Actionsn*

[1] Federal Rule Applicable Only to Procedure

[a] Derivative Action Procedure Requires Compliance with Procedural Rule

Federal Rule of Civil Procedure 23.1 specifies pleading and other procedural requirements whenever a shareholder files a derivative action in federal court. n1 Rule 23.1 creates a procedural threshold over which one or more shareholders of a corporation, or one or more members of an unincorporated association, must pass before they may litigate the merits of a derivative action. Therefore, a complaint must satisfy the procedural requirements of the rule, and a court will not automatically treat an action as a derivative action. The party asserting a claim which is based on an entity's rights must plead the claim as such. n2

[b] Substantive Right to Derivative Claim Based on State Law

Even though Federal Rule 23.1 controls procedure, n3 the rule does not provide the substantive basis for a derivative action. n4 The right under substantive law to file a derivative action is governed by the state law that controls the particular corporation or entity. Rule 23.1 itself does not create any substantive rights or impose any substantive requirements, such as whether the demand requirement has been satisfied. n5 For example, while Rule 23.1 requires the complaint to plead facts that a demand has been made on the corporation to file suit, state law controls whether the pleaded facts show a sufficient demand to maintain a derivative action. n6

Rule 23.1 was promulgated pursuant to the Rules Enabling Act, which provides that the federal rules do not abridge, enlarge, or modify any substantive right. n7 While derivative suits are often coordinated with suits based on federal substantive law, such as the federal securities laws, unless a federal right creates the existence of the corporation or entity itself, a federal question is not involved. n8 Consequently, most derivative suits in federal court are diversity actions because they are based on the existence of a corporation or other entity under the substantive law of the state of incorporation or organization of the entity. Therefore, state law controls the substance of the derivative rights of the plaintiffs to sue on behalf of the corporation. n9 Under the *Erie* doctrine, federal courts in diversity cases must apply the substantive law of the forum state. n10

[2] Federal Rule Applicable Only to Actions Based on Derivative Claim

The requirements of Rule 23.1 apply only to derivative actions by shareholders or members of corporations or unincorporated associations, n1 and whether a claim is derivative does not necessarily depend on the characterization of a party. Therefore, if a shareholder brings a personal claim and does not seek to enforce a right of the corporation, the suit is direct and Rule 23.1 does not apply. This is true even if the plaintiff has characterized such a direct action as a derivative action. n2

The rule has not specified which particular types of entities constitute "unincorporated associations" under the rule. The question is determined on a case-by-case basis. For example, partnerships have been considered unincorporated associations within the meaning of Rule 23.1. n3 It is also arguable that a limited liability company is within the purview of Rule 23.1. Because derivative actions involving unincorporated associations are so infrequent, most of the discussion in this Part of the Chapter refers to shareholders and corporations. However, counsel should remember all discussions in this Part that refer to corporations and shareholders are equally applicable to unincorporated associations and members, respectively. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsProceduresCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.1.03-23.1.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 23.1.*

(n3)Footnote 2. *Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton, 320 F.3d 849, 851 (8th Cir. 2003) .*

(n4)Footnote 3. *See* [a], *above.*

(n5)Footnote 4. *First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1289 n.2 (Fed. Cir. 2004) .*

(n6)Footnote 5. *Dreiling v. Am. Express Travel Related Servs. Co., 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004) .*

(n7)Footnote 6. *Halpert Enters. v. Harrison, 2005 U.S. Dist. LEXIS 4929, at *7-*9 (S.D.N.Y. 2005) .*

(n8)Footnote 7. *First Hartford Corporation Pension Plan & Trust v. United States, 194 F.3d 1279, 1290 n.2 (Fed. Cir. 1999)* ; *see 28 U.S.C. § 2072(b)*; *Fed. R. Civ. P. 82.*

(n9)Footnote 8. *Central Laborers' Pension Fund v. Chellgren, 2004 U.S. Dist. LEXIS 6066, at *36-*38 (E.D. Ky. 2004) .*

(n10)Footnote 9. *Zurich Capital Mkts., Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1115 (N.D. Ill. 2004) .*

(n11)Footnote 10. *Erie R.R. v. Tompkins, 304 U.S. 64, 79-80, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938) .*

(n12)Footnote 1. *Fed. R. Civ. P. 23.1.*

(n13)Footnote 2. *Simcox v. San Juan Shipyard, Inc., 754 F.2d 430, 438 (1st Cir. 1985)* (designation of suit as derivative action did not alter direct nature of claims).

(n14)Footnote 3. *Abeloff v. Barth, 119 F.R.D. 332, 333 (D. Mass. 1988)* .

(n15)Footnote 4. *See Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 120 (4th Cir. 2004)* ; *see* also *Fed. R. Civ. P. 17(b)* (partnership or other unincorporated association).

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PART IV Parties
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1-14A Moore's Manual--Federal Practice and Procedure § 14A.112

§ 14A.112 Prerequisites for Derivative Actionsn*

[1] Stock Ownership Requirement

[a] Plaintiff Must Be Shareholder Throughout Litigation

The complaint in a derivative action must allege that the plaintiff was a shareholder at the time of the transaction of which the plaintiff complains or that the plaintiff acquired the shareholder interest by operation of law. n1 This contemporaneous ownership rule is based on the equitable principle that a plaintiff may not complain of acts of corporate mismanagement if the plaintiff acquired shares from those who participated or acquiesced in the allegedly wrongful transaction. Under the "continuous ownership requirement," the plaintiff must be a shareholder during the entire period of the maintenance of the derivative suit, n2 in addition to the time of the alleged wrong, because standing to bring a derivative action is justified by the indirect benefits the named plaintiff acquires as a shareholder of the corporation. n3

A person who wants to object to a proposed settlement of a derivative action must also be a current shareholder in order to have standing to object and appeal if his or her objection is overruled. n4 Courts have held that for purposes of the derivative action rule that the term "shareholder" refers to owners of equity securities in a corporation and not owners of debt securities. It appears that this determination must be made on a case-by-case basis. n5 For example, warrant holders in a corporation may have standing to sue as shareholders if the terms of the particular warrants render their interests very similar to traditional equity securities. n6

[b] Exception for Continuing Wrong

The "continuing wrong" doctrine is an exception to the general requirement that requires contemporaneous ownership by shareholders to maintain a derivative action. Under the continuing wrong doctrine, a shareholder may initiate a derivative action concerning an occurrence or omission which occurred prior to becoming a shareholder if the occurrence or omission was part of a course of conduct that continued during the time that the plaintiff was a shareholder. n7 In deciding whether a wrong is continuing, a court must determine when the specific acts of alleged wrongdoing occurred, rather than when the effects of those acts were perceived, because every wrongful transaction is a continuing wrong to the corporation until it is remedied. Thus, the shareholder ownership requirement is met if the

"transaction" that is the subject of the complaint n8 continues to occur during the period of share ownership. n9

A shareholder who purchases shares with knowledge of an alleged wrong may not bring a derivative action even if the wrong continues after the purchase. n10 In such a situation, the plaintiff paid for the shares with knowledge of the corporation's injury and, therefore, is not entitled to recover. n11

[c] Substantive Law Generally Controls Ownership

The determination of whether a person has ownership of shares sufficient to bring a derivative suit is a matter of substantive law. Thus, in cases based on diversity jurisdiction, whether a person is a shareholder entitled to bring a derivative action is determined by substantive state law. n12 If the claims in the action are based on federal law and federal law creates the existence of the business entity, then federal law generally governs the substantive question of who is a shareholder; however, the Supreme Court has noted that if there is a gap in the federal securities laws controlling ownership, than federal courts should adopt the state law as the rule of decision, unless that would conflict with a specific federal policy. n13 On the other hand, attorneys should note that Rule 23.1's requirement that the plaintiff have continuous share ownership from the time of the injury through the maintenance of the suit is a procedural requirement and, therefore, applicable even in diversity actions when the state law has no such requirement. n14

[d] Double Derivative Suits

Because a parent corporation may own shares of a subsidiary, it has been held by most jurisdictions that a shareholder of the parent may bring a derivative suit on behalf of a wronged subsidiary; this type of suit is known as a double derivative action. n15 In a double derivative suit, the shareholder maintains the derivative action on behalf of the subsidiary through the parent corporation's derivative rights in the subsidiary. The shareholder in a double derivative suit is seeking to redress a wrong done to the subsidiary that indirectly harms both the parent corporation and the shareholder. n16 The double derivative rule does not extend to all types of ownership interests in a corporation. For example, the rule does not generally apply to owners of debt securities in the parent corporation. This determination is made on a case-by-case basis. n17

[e] Effect of Corporate Acquisition or Merger

When one corporation is merged into another corporation or acquired by another corporation, one of the corporations ceases to exist. In such a case, the former shareholders of the corporation that ceased to exist generally lose their right to pursue derivative actions of that corporation, even with respect to actions that were initiated prior to the merger. n18 At the time of the merger, the derivative rights pass to the surviving corporation, which thereafter has the right to prosecute any action that was owned by the acquired or merged corporation.

Additionally, if the shareholders receive a negotiated value for their shares, that value takes into account outstanding liabilities and contingencies, including the value of the derivative suit. Allowing the former shareholders of a merged corporation to recover in a subsequent derivative action would represent a windfall to the former shareholders. n19 There are two circumstances in which the general rule that a plaintiff loses standing as a result of an acquisition or merger does not apply: first, if the merger itself is the subject of the derivative action, for example, on a claim of fraud, n20 and second, if the merger is in reality a reorganization which does not affect the plaintiff's equity ownership in the business enterprise. n21

[2] Demand on Corporation to Enforce Corporate Right

[a] Requirement of Demand

The plaintiff in a derivative action must allege with particularity any efforts made by the plaintiff to demand action by the board of directors of the corporation or the members controlling the business n0.1 and the reasons for the failure to

obtain the demanded corporate action or the reasons for not making such a demand. n1 In other words, before maintaining a derivative action, the plaintiff must either make a demand on the corporation or controlling members or must plead and establish that making a demand would be futile. n2 Note that the plaintiff may not both make a demand and claim that a demand was futile with respect to the same cause of action. n3

Whether a demand is required or excused and what constitutes a sufficient demand are substantive issues that generally must be determined by the law of incorporation or organization of the entity. n4 The pleading requirement is controlled by federal law, which strictly requires that the plaintiff particularly specify the demand made or why demand would be futile. n5 The purpose of the demand requirement is to acknowledge that the board of directors or other management of the company, and not individual shareholders, manage the affairs of the corporation. The demand requirement permits the board to correct the alleged wrong, encourages corporate dispute resolution within the corporation itself, and allows the board to use its expertise and resources to control litigation. n6

[b] Exceptions to Demand Requirement

The primary exception to the demand requirement is that a demand is unnecessary if it would be futile. n7 The determination of whether a demand is futile depends on the facts of a particular case and the applicable substantive law, which in a diversity case is the law of the state of incorporation or organization of the entity. n8 For example, if the plaintiff makes particularized allegations of self-dealing or bias on the part of the board of directors, a demand will be considered futile. n9 A district court's determination of futility is reviewed under the abuse of discretion standard. n10

In addition to the futility exception, some jurisdictions recognize other exceptions to the demand requirement. Thus, demand may be excused if there is threat of irreparable harm to the corporation. n11 Demand may also be excused after a showing of "extraordinary conditions." n12 For example, a demand is not necessary if the board of directors specifically evidences antagonism to the derivative action. n13 In another example, a demand is excused if the board of directors is controlled by one or more people or entities that have an interest in the challenged transaction. n14 On the other hand, a general allegation that the directors approved the challenged transaction does not excuse a demand. n15

[c] Contents of Demand

The demand made by a shareholder on the corporate managers must describe the factual basis of the asserted wrongful acts, the damage caused to the corporation, identify the asserted wrongdoers, n16 and request corporate action to remedy the wrong. n17 The demand must also identify the name of the shareholder making the demand and requesting the corporate action. n18 On the other hand, the demand need not specify the shareholder's legal theory, all of the facts supporting any theory that is advanced, or the exact amount of damages caused by the asserted wrong. n19

[d] Persons Who Must Receive Demand

The plaintiff in a derivative action must allege that the demand was made on an authority comparable to a board of directors. n20 This requirement reflects that, under the applicable substantive law, plaintiffs in certain situations need not or cannot make a demand on a board of directors, such as when the demand is made to a partnership or an unincorporated association. In such circumstances, Rule 23.1 permits a plaintiff to make a valid demand on an authority comparable to a board of directors of a corporation. n21 Any person or entity of a business entity that has the full legal authority to manage the entity's affairs meets the comparable authority status. n22 Thus, the term "comparable authority" would not include a single influential director or a controlling shareholder because that individual is not vested with the full legal authority of the board to act. n23

The demand rule also requires allegations of any demand made on the shareholders of a corporation or other members of an association or partnership, when necessary. n24 Whether demand on the shareholders is necessary in a particular case is a question of substantive law. Thus, the law of the state of incorporation or organization of the entity governs the

question of whether a demand on shareholders is absolutely required. n25

[e] Timing of Demand

The shareholder derivative action originated as an equitable device. The courts consider such an action as a remedy of last resort and acknowledge that a corporation or other entity must be given every opportunity to bring suit on its own behalf. n26 Consequently, demand must be made on the board in control at the time the derivative action is filed. Even when demand is excused because of the probability of irreparable harm to the corporation, a demand must be made promptly after the commencement of the shareholder derivative action. n27 Additionally, whether a demand would be futile is determined as of the time the complaint is filed, not at the time of the transaction at issue or at any time after the filing of the complaint. n28

[f] Opportunity for Management to Respond

If a shareholder makes a demand that the corporation take action, the shareholder must give the board of directors or comparable authorities a reasonable period of time to investigate the alleged wrong and take remedial action. n29 If the plaintiff fails to give the board a reasonable amount of time to respond to the demand, and instead files suit, the plaintiff's actions are equivalent to a failure to make the demand, which may lead to dismissal of the derivative action when the court determines that a demand is required. n30 What constitutes a reasonable period for a response varies according to the complexity of the legal and factual issues raised by the demand. n31

[g] Refusal to Comply With Demand May Be Justified by Business Judgment

If the directors or comparable authorities of a business entity refuse to comply with a demand to pursue a claim on behalf of the entity, the shareholders may maintain a derivative action only when the shareholders can demonstrate that the board's refusal was not an exercise of proper business judgment. n32 The "business judgment rule" bars judicial inquiry into the actions of corporate directors that are made in good faith and in the honest exercise of business judgment. The precise content of the business judgment rule is provided by state law but, in general terms, provides that the courts refrain from second guessing business decisions made by corporate directors. n33

With respect to derivative actions, there is a presumption that a refusal of a demand represents a valid exercise of the business judgment of the board or other managing authority. Therefore, to maintain a derivative action, the plaintiff must demonstrate that the board's rejection of the demand was not the exercise of business judgment. For example, the plaintiff may demonstrate that the board acted in bad faith or fraudulently, or failed to make an informed decision as a result of gross negligence. n34 When the plaintiff makes a demand and files a derivative action, Rule 23.1 requires that the complaint state with particularity facts that create a reasonable doubt that the board's decision not to pursue the claim was protected by the business judgment rule. n35

[3] Adequacy of Representation

[a] Necessity of Adequate Representation

A plaintiff may prosecute a derivative action only if the plaintiff fairly and adequately represents the interests of similarly situated shareholders in enforcing a right of the corporation or business entity. n1 This rule is required by due process under the constitution; thus, absent shareholders may not be bound by a judgment in a derivative action unless the named plaintiff is a fair and adequate representative. n2 The representative shareholder in a derivative action must protect interests that are more comprehensive than his or her own stake in the corporation, n3 and therefore, the representative stands in a fiduciary relationship with the corporation and the other shareholders. n4

Although the adequacy requirement for a derivative action is similar to the requirement for a class action, the burden of proving the plaintiff's inadequacy in a derivative suit is on the defendant, while in a class action the plaintiff has the

burden of demonstrating that the plaintiff is an adequate representative. n5 Furthermore, unlike the class action procedure of Rule 23, the district court in a derivative action under Rule 23.1 need not make a preliminary affirmative determination that the plaintiffs will fairly and adequately represent the interest of people similarly situated. n6 The district court's determination of adequacy of representation is reviewed for an abuse of discretion. n7

[b] Determination of Adequacy of Representation

A plaintiff qualifies as a fair and adequate representative only if the plaintiff has the capacity to vigorously and conscientiously prosecute the derivative suit and does not have interests that are antagonistic to those of the other shareholders who are similarly situated. n8 In addition, the plaintiff's attorney must be qualified, experienced, and generally capable to conduct the proposed litigation. n9 These general principles are applied to the facts and circumstances of each particular case. The following are numerous factors courts have considered to determine adequacy of representation, not in any particular order of importance: n10

- Indications whether the plaintiff is the true party in interest.
- The plaintiff's degree of familiarity with the litigation.
- The degree of control exercised by attorneys over the litigation.
- The degree of support received from other shareholders.
- Any lack of personal commitment to the action by the plaintiff.
- The remedy sought.
- The relative magnitude of plaintiff's personal interest as compared with the interest in the derivative action itself.
- Any vindictiveness of the plaintiff toward the defendants.
- The motivation of the plaintiff.
- Any economic conflicts between the representative and the class.
- Any other litigation pending between the plaintiff and the defendants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsAdequate Representation RequirementCivil ProcedureClass ActionsDerivative ActionsDemand FutilityCivil ProcedureClass ActionsDerivative ActionsDemand RequirementCivil ProcedureClass ActionsDerivative ActionsDouble Derivative ActionsCivil ProcedureClass ActionsDerivative ActionsOwnership Requirement

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.1.07-23.1.09 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23.1(a), 23.1(b)(1).*

(n3)Footnote 2. *In re Sagent Tech., 278 F. Supp. 2d 1079, 1096 (N.D. Cal. 2003)* .

(n4)Footnote 3. *In re OmniVision Techs., Inc., 2004 U.S. Dist. LEXIS 22215, at *14-*16 (N.D. Cal. 2004)* .

(n5)Footnote 4. *Rosenbaum v. MacAllister, 64 F.3d 1439, 1443 n.2 (10th Cir. 1995)* .

(n6)Footnote 5. *Brooks v. Weiser, 57 F.R.D. 491, 494 (S.D.N.Y. 1972)* .

(n7)Footnote 6. *Entel v. Guilden, 223 F. Supp. 129, 132 (S.D.N.Y. 1963)* .

(n8)Footnote 7. *Kaliski v. Bacot, 320 F.3d 291, 298 (2d Cir. 2003)* .

(n9)Footnote 8. *Fed. R. Civ. P. 23.1(b)(1).*

(n10)Footnote 9. *See Brambles USA, Inc. v. Blocker, 731 F. Supp. 643, 649 (D. Del. 1990)* .

(n11)Footnote 10. *In re Bank of N.Y. Derivative Litig., 173 F. Supp. 2d 193, 198 (S.D.N.Y. 2001)* .

(n12)Footnote 11. *Noland v. Barton, 741 F.2d 315, 318 (10th Cir. 1984)* .

(n13)Footnote 12. *Official Committee of Unsecured Creditors of Cybergenics Corporation v. Chinery, 330 F.3d 548, 556 (3d Cir. 2004)* .

(n14)Footnote 13. *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* .

(n15)Footnote 14. *Kona Enterprises, Inc. v. Estate of Bishop, 179 F.3d 767, 769-770 (9th Cir. 1999)* .

(n16)Footnote 15. *See Ace & Co. v. Balfour Beatty PLC, 148 F. Supp. 2d 418, 424-425 (D. Del. 2001)* .

(n17)Footnote 16. *Silver v. Allard, 16 F. Supp. 2d 966, 967 (N.D. Ill. 1998)* .

(n18)Footnote 17. *Brooks v. Weiser, 57 F.R.D. 491, 494 (S.D.N.Y. 1972)* .

(n19)Footnote 18. *APA Excelsior III, L.P. v. Windley, 329 F. Supp. 2d 1328, 1347 (N.D. Ga. 2004)* .

(n20)Footnote 19. *Lewis v. Chiles, 719 F.2d 1044, 1047 (9th Cir. 1983)* .

(n21)Footnote 20. *Spielman v. Genzyme Corp., 251 F.3d 1, 9 (1st Cir. 2001)* .

(n22)Footnote 21. *Blasband v. Rales, 971 F.2d 1034, 1041 (3d Cir. 1992)* .

(n23)Footnote 0.1. *Fed. R. Civ. P. 23.1(b)(3)(A)*; *see Forsythe v. Sun Life Fin., Inc., 417 F. Supp. 2d 100, 109 (D. Mass. 2006)* (owners failed to either make demand required by Rule 23.1 or to adequately allege futility of such demand).

(n24)Footnote 1. *Fed. R. Civ. P. 23.1(b)(3)(B).*

(n25)Footnote 2. *In re Abbott Labs. Derivative S'Holders Litig., 325 F.3d 795, 804 (7th Cir. 2003)* ; *see* [b], *below*.

(n26)Footnote 3. *Stepak v. Addison, 20 F.3d 398, 412 (11th Cir. 1994)* .

(n27)Footnote 4. *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 92, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* .

(n28)Footnote 5. *Zurich Capital Mkts., Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1115 (N.D. Ill. 2004)* .

(n29)Footnote 6. *Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* (business judgment rule provides that directors have discretion and judgment to pursue the best interests of the corporation and that they are presumed uniquely situated to make these decisions).

(n30)Footnote 7. *Felker v. Anderson, 2005 U.S. Dist. LEXIS 4236, at *3-*5 (W.D. Mo. 2005)* .

(n31)Footnote 8. *In re Abbott Labs. Derivative S'Holders Litig., 325 F.3d 795, 804 (7th Cir. 2003)* ; *Zurich Capital Mkts., Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1115 (N.D. Ill. 2004)* .

(n32)Footnote 9. *RCM Sec. Fund, Inc. v. Stanton, 928 F.2d 1318, 1335 (2d Cir. 1991)* .

(n33)Footnote 10. *See Janas v. McCracken, 183 F.3d 970, 989 (3d Cir. 1999)* .

(n34)Footnote 11. *Warden v. McLelland, 288 F.3d 105, 111 (3d Cir. 2002)* .

(n35)Footnote 12. *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 92, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* .

(n36)Footnote 13. *Nussbacher v. Continental Ill. Natl. Bank & Trust Co., 518 F.2d 873, 878-879 (7th Cir. 1975)* , *cert. denied, 424 U.S. 928 (1976)* .

(n37)Footnote 14. *Shamrock Assocs. v. Horizon Corp., 632 F. Supp. 566, 570 (S.D.N.Y. 1986)* .

(n38)Footnote 15. *Grossman v. Johnson, 674 F.2d 115, 125-126 (1st Cir. 1982)* , *cert. denied, 459 U.S. 838 (1982)* .

(n39)Footnote 16. *Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 638-639 (8th Cir. 1987)* .

(n40)Footnote 17. *Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 138 (2d Cir. 2004)* .

(n41)Footnote 18. *Smachlo v. Birkelo, 576 F. Supp. 1439, 1444-1445 (D. Del. 1983)* .

(n42)Footnote 19. *General Motors Corp. v. General Motors Corp., 604 F. Supp. 1106, 1117 (D. Del. 1985)* , *aff'd on other grounds, 782 F.2d 1026 (3d Cir. 1985)* .

(n43)Footnote 20. *Fed. R. Civ. P. 23.1(b)(3)(A).*

(n44)Footnote 21. *See Saunders v. Hankerson, 312 F. Supp. 2d 46, 67-68 (D.D.C. 2004)* (board of trustees of unincorporated association).

(n45)Footnote 22. *Kaster v. Modification Sys., Inc., 731 F.2d 1014, 1017 (2d Cir. 1984)* .

(n46)Footnote 23. *Greenspun v. Del E. Webb Corp., 634 F.2d 1204, 1209 (9th Cir. 1980)* .

(n47)Footnote 24. *Fed. R. Civ. P. 23.1(b)(3)(A).*

(n48)Footnote 25. *Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 138 (2d Cir. 2004)* ; *Zurich Capital Mkts., Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1115 (N.D. Ill. 2004)* .

(n49)Footnote 26. *See Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* .

(n50)Footnote 27. *Warden v. McLelland, 288 F.3d 105, 111-112 (3d Cir. 2002)* .

(n51)Footnote 28. *Salsitz v. Nasser, 208 F.R.D. 589, 591-592 (E.D. Mich. 2002)* ; *see McCall v. Scott, 239 F.3d 808, 815 (6th Cir. 2001)* .

(n52)Footnote 29. *Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 139 (2d Cir. 2004)* .

(n53)Footnote 30. *Shaev v. Saper, 320 F.3d 373, 377-378 (3d Cir. 2003)* .

(n54)Footnote 31. *Silverstein v. Larson, 2005 U.S. Dist. LEXIS 2881, at *7-*8 (D. Minn. 2005)* .

(n55)Footnote 32. *See Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* .

(n56)Footnote 33. *See Hoffman v. Kramer, 362 F.3d 308, 317 (5th Cir. 2004)* .

(n57)Footnote 34. *In re Abbott Labs. Derivative S'Holders Litig., 325 F.3d 795, 808 (7th Cir. 2003)* .

(n58)Footnote 35. *See Fed. R. Civ. P. 23.1(a), 23.1(b)(3)*; *Landy v. D'Alessandro, 316 F. Supp. 2d 49, 58-59 (D. Mass. 2004)* ; *see, e.g., Halpert Enters. v. Harrison, 362 F. Supp. 2d 426, 431 (S.D.N.Y. 2005)* (plaintiff may show by pleading of particularized facts that business judgment did not exist when majority of board has financial interest in transaction or are so dominated by proponent of transaction that their business discretion is sterilized).

(n59)Footnote 1. *Fed. R. Civ. P. 23.1(a).*

(n60)Footnote 2. *See Nathan v. Rowan, 651 F.2d 1223, 1228 (6th Cir. 1981)* .

(n61)Footnote 3. *See State St. Bank & Trust Co. v. Salovaara, 326 F.3d 130, 140 (2d Cir. 2003)* .

(n62)Footnote 4. *Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992)* , *cert. denied, 508 U.S. 910 (1993)* .

(n63)Footnote 5. *Daventree Ltd. v. Republic of Azer., 349 F. Supp. 2d 736, 753 (S.D.N.Y. 2004)* .

(n64)Footnote 6. *Powers v. Eichen, 229 F.3d 1249, 1254 (9th Cir. 2000)* .

(n65)Footnote 7. *Saunders v. Hankerson, 312 F. Supp. 2d 46, 69 (D.D.C. 2004)* .

(n66)Footnote 8. *Saunders v. Hankerson, 312 F. Supp. 2d 46, 69 (D.D.C. 2004)* ; *see Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 25 (N.D. Ill. 1980)* ("similarly situated" shareholders do not include majority shareholders opposed to derivative action).

(n67)Footnote 9. *Guenther v. Pacific Telecom, Inc., 123 F.R.D. 341, 346 (D. Ore. 1987)* .

(n68)Footnote 10. *Efron v. Embassy Suites (P.R.), Inc., 47 F. Supp. 2d 200, 209 (D.P.R. 1999)* , *aff'd on other grounds, 223 F.3d 12 (1st Cir. 2000)* ; *see Larson v. Dumke, 900 F.2d 1363, 1368 (9th Cir. 1990)* , *cert. denied, 498 U.S. 1012 (1990)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.113

§ 14A.113 Pleading Requirements for Complaint in Derivative Actionn*

[1] Rule Does Not Have Substantive Requirements

Rule 23.1 imposes only pleading requirements which specify when and how facts must be alleged in the complaint in federal court, rather than substantive requirements needed for a plaintiff to prevail in a derivative suit. n1 Substantive requirements are controlled by the law of the state of the entity's incorporation or organization. n2 There is an important consequence to the procedural nature of the rule as a pleading requirement: the inquiry as to whether the requirements of the rule are satisfied does not go beyond the complaint. n3 For example, a plaintiff is generally not permitted to argue facts outside of the complaint in order to show futility of a demand. However, the court may consider documents outside of the complaint if the complaint specifically incorporates the documents by reference. n4

[2] Allegations Required in Complaint

The derivative action pleading rule requires that the plaintiff plead with particularity. Consequently, Rule 23.1 requires substantially more than the ordinary, minimal requirements of "notice pleading" under Rule 8, and "liberal pleading requirements" do not apply. The plaintiff must make particularized factual statements. n1 To satisfy Rule 23.1, the plaintiff must make specific factual allegations for each of the following items that is applicable to the circumstances of the case. n2

1. The plaintiff was a shareholder at the time of the transaction that is the subject of the plaintiff's complaint or that operation of law gave the plaintiff the status of shareholder. n3

2. The particular efforts made by the plaintiff to demand that the board of directors or comparable authority pursue the claim of the corporation and the reasons for the failure to obtain such pursuit of the claim or the reasons for not making such a demand. n4 If a complaint fails to allege the demand with particularity, the action may be dismissed. However, because Rule 23.1 imposes only a pleading requirement a court should generally grant a plaintiff's motion for leave to amend to cure the pleading defect. n5

3. The particular facts supporting the claim of futility of demand if a plaintiff shareholder claims that a demand to bring suit was not made on the board of directors because to do so would have been futile. n6 Thus, the complaint must

particularly allege facts sufficient to create a reasonable doubt that the challenged transaction was the product of a valid exercise of sound business judgment. For example, the plaintiff must state with particularity any allegations of participation, self-dealing, bias, bad faith, or corrupt motive on the part of the board. n7

4. That the suit is not a collusive act between the parties to confer federal jurisdiction. n8 This requirement is viewed as a formality based on a perceived abuse that corporations would manipulate parties in order to bring a dispute based on state law into federal court. The Supreme Court has counteracted this perceived abuse by requiring that the pleadings in derivative actions allege that the suit is not a collusive one to confer federal jurisdiction. This follows a longstanding principle that diversity jurisdiction does not exist if parties were collusively joined. n9

[3] Verification of Complaint

The plaintiff in a derivative action must verify the complaint. n1 The verification requirement was designed to discourage "strike suits," in which complaints are filed in order to coerce corporate managers to make a large settlement, rather than benefitting the corporation or entity on behalf of which suit is theoretically brought. n2 This requirement is generally considered a technicality, even though the failure to verify a complaint is a ground for dismissal. The court has discretion to grant the plaintiff leave to file an amended complaint that contains a verification. n3 The plaintiff need not have direct knowledge of the facts on which the complaint is based to verify the complaint. For example, a plaintiff shareholder may verify a complaint by relying on factual statements of the case by others. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsProceduresCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.1.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Amalgamated Bank v. Yost, 2005 U.S. Dist. LEXIS 1280, at *25-*26 (E.D. Pa. 2005)* .

(n3)Footnote 2. *Zurich Capital Mkts., Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1115 (N.D. Ill. 2004)* .

(n4)Footnote 3. *In re Symbol Techs. Sec. Litig., 762 F. Supp. 510, 515 (E.D.N.Y. 1991)* .

(n5)Footnote 4. *See In re Cendant Corp. Derivative Action Litig., 96 F. Supp. 2d 394, 397-398 (D.N.J. 2000)* ; *Stoner v. Walsh, 772 F. Supp. 790, 797-798 (S.D.N.Y. 1991)* (plaintiff incorporated demand letters into complaint by reference).

(n6)Footnote 1. *Grogan v. O'Neil, 307 F. Supp. 2d 1181, 1190 (D. Kan. 2004)* (Rule 23.1 has heightened pleading standard).

(n7)Footnote 2. *Fed. R. Civ. P. 23.1(b).*

(n8)Footnote 3. *Fed. R. Civ. P. 23.1(b)(1).*

(n9)Footnote 4. *Fed. R. Civ. P. 23.1(b)(3)(A)-(B).*

(n10)Footnote 5. *Halpert Enters. v. Harrison, 2005 U.S. Dist. LEXIS 4929, at *7-*9 (S.D.N.Y. 2005)* .

(n11)Footnote 6. *Fed. R. Civ. P. 23.1(b)(3)(B).*

(n12)Footnote 7. *In re Abbott Labs. Derivative S'Holders Litig., 325 F.3d 795, 808 (7th Cir. 2003)* .

(n13)Footnote 8. *Fed. R. Civ. P. 23.1(b)(2).*

(n14)Footnote 9. *See, e.g., Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 827-829, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969)* .

(n15)Footnote 1. *Fed. R. Civ. P. 23.1(b).*

(n16)Footnote 2. *Efron v. Embassy Suites (Puerto Rico), Inc., 47 F. Supp. 2d 200, 204 (D.P.R. 1999)* .

(n17)Footnote 3. *Halsted Video, Inc. v. Guttillo, 115 F.R.D. 177, 180 (N.D. Ill. 1987)* .

(n18)Footnote 4. *Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 370-371, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966)* (verification requirement did not bar plaintiff shareholder who lacked education and expertise of legal and business relationships that formed basis for complaint from initiating derivative suit).

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.114

§ 14A.114 Procedural Considerationsn*

[1] Diversity Jurisdiction

[a] Amount in Controversy

Unless federal law controls the existence of the entity that holds the derivative claim, a derivative action in federal court must be based on diversity jurisdiction. n1 To obtain federal court jurisdiction based on diversity of the parties, the plaintiff must establish that the claims in the derivative action complaint satisfy the $75,000 amount in controversy requirement applicable in diversity actions. n2 To determine whether the suit meets the amount in controversy requirement, the court calculates the amount of the entire claim alleged due to injury to the corporation itself, rather than merely its individual shareholders. Because the shareholders in a derivative suit may pursue a claim only on behalf of the corporation, the jurisdictional amount is not limited to each individual shareholder's claim or interest in the action. However, if an action does not qualify under the rule as derivative, the individual amounts must exceed $75,000. n3

[b] Diversity of Citizenship

In addition to a claim for a minimum amount, n4 diversity jurisdiction for a derivative suit, as well as other suits, requires complete diversity between all claiming parties (plaintiffs) and all parties defending the claims (defendants). n5 Thus, diversity jurisdiction exists only when no plaintiff is a citizen of the same state as any defendant. In diversity actions, a corporate party or other entity is generally deemed to be a "citizen" of any state in which it has been incorporated or organized and of the state where its principal place of business is located. n6 In a derivative suit, the issue of diversity of citizenship may become more complex than in the usual situation because of the alignment of the corporation or association on the plaintiff side or the defense side. n7 For example, if the corporation is aligned as a plaintiff and citizenship of the corporation is the same as one or more defendant directors, then the alignment of the corporation as a plaintiff would destroy diversity jurisdiction. n8

The corporation may be named, with justification, as either a plaintiff or defendant. The corporation may be named as a defendant in order to ensure its presence as a party to the suit. Also, the corporation may be considered a defendant when it is opposed to the maintenance of the derivative action by the plaintiffs. On the other hand, because a derivative

suit is prosecuted on behalf of the corporation and any recovery will accrue to it, the corporation may be deemed a plaintiff. Courts are not bound either by formalistic styling or by the alignment specified in the pleadings and should attempt to determine, to the extent practicable, the actual interests of the parties. Only after the parties have been realigned to match their actual interests can a decision be made as to whether complete diversity exists. The Supreme Court has held that when adverse to the plaintiff's derivative suit, the corporation should be aligned as a party defendant. A corporation is deemed adverse to a derivative suit when, regardless of the reason, the corporation's management opposes the maintenance of the action. n9

[2] Venue

A special venue statute applies to shareholder derivative actions, providing that any civil action by a shareholder on behalf of a corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants. n1 The special venue statute was designed to supplement, rather than displace, the general venue statute in actions involving derivative claims. Consequently, the plaintiff in a derivative action may alternatively obtain venue under the general federal venue statute. n2 For example, venue would be proper in the district where the plaintiff resides and where plaintiffs and defendants transacted the business that was the subject matter of the suit. n3 If the corporation is deemed aligned as a defendant, venue is proper where the corporate defendant resides, which is in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. n4

[3] Service of Process

When shareholders or members file a derivative suit on behalf of a corporation or other business entity, the plaintiff may serve process on the corporation in any district where it is organized or licensed to do business or is doing business. n1 In essence, Section 1695 authorizes service of process on the beneficiary corporation outside of the district where the shareholders have brought the derivative action. n2 Although the language of section 1695 is broad enough to apply to all derivative suits, there is some authority for the proposition that it is only available if the plaintiff has chosen proper venue. n3 Otherwise, the court may require that service of process be made at a specific time and place. n4

[4] Attorney's Representation of Corporation

In a derivative action against corporate officers or association management, an attorney may in certain circumstances represent both the corporation and its officers provided that the representation does not create a conflict of interest. n1 Thus, an attorney for a corporation may defend a derivative suit that presents a routine legal controversy regarding the management of the corporation without creating a conflict of interest. n2 However, if the derivative action involves serious charges of corporate wrongdoing against management, the corporation and its directors must retain separate counsel. For example, actions that involve allegations of criminal wrongdoing, fraud, or a breach of the duty of loyalty typically require independent counsel. n3

[5] Privilege and Work Product

A shareholder derivative action creates unique issues with respect to discovery, especially matters of attorney-client privilege and the work product doctrine, because of the competing and overlapping interests among the parties. Thus, as a shareholder the plaintiff may be entitled to access to corporate communications and may request communications between the corporation's management and its attorney. n1 However, unrestricted access to corporate communications conflicts with the goal of the attorney-client privilege to promote open communication between the corporate client and the attorney and the interest in protecting work product necessary to further litigation. Courts have developed a balancing test between these competing interests. Under the test, the shareholder plaintiff is entitled to obtain privileged or work product materials only on a showing of good cause. n2

The following are examples of the factors that the court may use to determine good cause: the number of plaintiff shareholders and the percentage of stock they represent; the nature of the shareholders' claims and whether they are

clearly bona fide; the necessity of the shareholders having the information, and its availability from other sources; whether the claims are for a wrong that is criminal, illegal, or of doubtful legality; whether the existence of the communication is speculative; whether the communications relate to past or to prospective actions; whether the communications contain advice concerning the litigation itself; whether the shareholders are merely fishing; and the risk of revealing trade secrets or other confidential information or intellectual property. None of the factors is determinative. n3

[6] Right to Jury Trial

When legal and equitable claims are joined in the same action, either party has a right to a jury trial on the legal claims. Therefore, the right to a jury trial in a derivative action is determined as if the corporation itself had brought suit. n1 Because shareholders may obtain both legal and equitable remedies in a derivative action, the *Seventh Amendment* preserves to parties the same right to a jury trial that historically belonged to corporations for legal claims but not for purely equitable claims. n2

[7] Costs and Attorney's Fees

[a] Prevailing Party in Derivative Action Entitled to Costs and Attorney's Fees

Courts have developed the rule that because of the unique role of derivative suits in corporate management, the prevailing party in a derivative action may recover costs and attorney's fees. Thus, either the prevailing plaintiff shareholder or a prevailing corporation may recover its expenses and fees. n1 This rule is in contrast to the general American rule that each party bears its own costs and fees. n2 A prevailing plaintiff is entitled to fees because a meritorious derivative action benefits not only the plaintiff shareholder but also the corporation and the other shareholders. n3 The prevailing corporation may recover costs and fees because the corporation should not have to bear the burden of its own costs when it prevails. n4 This rule also assists in deterring "strike suits," in which complaints are filed by disgruntled shareholders in order to coerce corporate managers to make a large settlement, rather than to benefit the corporation. n5

[b] Determination of Amount of Attorney's Fees

A party may request attorney's fees by pleading or by motion under Rule 54. n6 The party requesting attorney's fees must generally present evidence establishing the legal services time expended on the litigation and the rates claimed. Thus, the plaintiff must show the attorney time and expenses spent on claims that represent the degree of success achieved by the prevailing party's attorney on benefits afforded to the corporation. n7 The opposition party may then make objections.

In making a determination whether to award fees, the court may conduct a hearing and take evidence regarding the legal services rendered. n8 In determining the amount of the fee, the court may consider the following factors: the amount recovered for the corporation; the time the attorneys reasonably spent on the case; the compensation rate of comparably skilled and experienced attorneys; the complexity of issues involved and the skill required for the prosecution of the case; any complexities in uncovering relevant facts; the skill and competency of opposing counsel; n9 any nonmonetary benefits derived from the action; and any contingent fee arrangements between the attorney and the party. n10 Any cost or fee award is an appealable final decision. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsProceduresCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* § 23.1.12 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Central Laborers' Pension Fund v. Chellgren, 2004 U.S. Dist. LEXIS 6066, at *36-*38 (E.D. Ky. 2004)* .

(n3)Footnote 2. *See 28 U.S.C. § 1332*; *see also Geer v. Cox, 216 F.R.D. 677, 678-679 (D. Kan. 2003)* .

(n4)Footnote 3. *Potter v. Janus Inv. Fund, 2004 U.S. Dist. LEXIS 9181, at *9-*10 (S.D. Ill 2004)* .

(n5)Footnote 4. *See* [a], *above*.

(n6)Footnote 5. *See* 28 U.S.C. § 28 U.S.C. § 1332(c)(1).

(n7)Footnote 6. *28 U.S.C. § 1332(c)*; *see Gabriel v. Preble, 396 F.3d 10, 14 (1st Cir. 2005)* .

(n8)Footnote 7. *Gabriel v. Preble, 396 F.3d 10, 14 (1st Cir. 2005)* .

(n9)Footnote 8. *See Trabucco v. Carlile, 57 F. Supp. 2d 1074, 1076 (D. Ore. 1999)* .

(n10)Footnote 9. *Gabriel v. Preble, 396 F.3d 10, 14-15 (1st Cir. 2005)* (corporation should be aligned as a defendant if corporate management is antagonistic to plaintiff shareholder).

(n11)Footnote 1. *28 U.S.C. § 1401*; *see Van Gelder v Taylor, 621 F. Supp. 613, 621 (N.D. Ill. 1985)* .

(n12)Footnote 2. *Salovaara v. Jackson National Life Ins. Co., 66 F. Supp. 2d 593, 604 (D.N.J. 1999)* (citing **Moore's Federal Practice**).

(n13)Footnote 3. *See 28 U.S.C. § 1391*; *Rubinstein v. Skyteller, Inc., 48 F. Supp. 2d 315, 324-325 (S.D.N.Y. 1999)* .

(n14)Footnote 4. *28 U.S.C. § 1391(c)*.

(n15)Footnote 1. *28 U.S.C. § 1695*.

(n16)Footnote 2. *Messinger v. United Canso Oil & Gas Ltd., 1979 U.S. Dist. Lexis 13772, at *13-*14 (D. Conn. 1979)* .

(n17)Footnote 3. *Norte & Co. v. Huffines, 222 F. Supp. 90, 91-92 (S.D.N.Y. 1962)* (citing **Moore's Federal Practice**); *see 28 U.S.C. § 1401*.

(n18)Footnote 4. *Trabucco v. Carlile, 57 F. Supp. 2d 1074, 1077 (D. Ore. 1999)* .

(n19)Footnote 1. *Heim v. Signcraft Screenprint, Inc., 2001 U.S. Dist. LEXIS 25890, at *6 (N.D. Ill. 2001)* .

(n20)Footnote 2. *See Musheno v. Gensemer, 897 F. Supp. 833, 836-837 (M.D. Pa. 1995)* .

(n21)Footnote 3. *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1317 (3d Cir. 1993)* .

(n22)Footnote 1. *See Ferko v. NASCAR, 219 F.R.D. 403, 406-407 (E.D. Tex. 2003)* .

(n23)Footnote 2. *Henry v. Champlain Enters., 212 F.R.D. 73, 83 (N.D.N.Y. 2003)* .

(n24)Footnote 3. *Henry v. Champlain Enters., 212 F.R.D. 73, 83-84 (N.D.N.Y. 2003)* .

(n25)Footnote 1. *Ross v. Bernhard, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n26)Footnote 2. *See Green v. Fund Asset Mgmt., L.P., 245 F.3d 214, 227-228* (plaintiff in derivative action would have jury trial right on behalf of corporation in suit seeking damages for common law fraud or deceit).

(n27)Footnote 1. *Tipton v. Mill Creek Gravel, Inc., 373 F.3d 913, 922-923 (8th Cir. 2004)* .

(n28)Footnote 2. *Zucker v. Westinghouse Elec., 374 F.3d 221, 226-227 (3d Cir. 2004)* .

(n29)Footnote 3. *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396-397, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)* .

(n30)Footnote 4. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n31)Footnote 5. *City of Philadelphia v. Fleming Cos., 264 F.3d 1245, 1258 (10th Cir. 2004)* .

(n32)Footnote 6. *Tipton v. Mill Creek Gravel, Inc., 373 F.3d 913, 922-923 (8th Cir. 2004)* (plaintiff was not required to plead attorney's fees as special damages in complaint but could raise issue of attorney's fees by motion); *see Fed. R. Civ. P. 54(d)(2).*

(n33)Footnote 7. *Tipton v. Mill Creek Gravel, Inc., 373 F.3d 913, 922-923 (8th Cir. 2004)* .

(n34)Footnote 8. *Granada Invest., Inc. v. DWG Corp., 962 F.2d 1203, 1208 (6th Cir. 1992)* .

(n35)Footnote 9. *Wallace ex rel. Northeast Utils. v. Fox, 7 F. Supp. 2d 132, 141-142 (D. Conn. 1998)* .

(n36)Footnote 10. *Angoff v. Goldfine, 270 F.2d 185, 189 (1st Cir. 1959)* .

(n37)Footnote 11. *Swanson v. American Consumer Indus., Inc., 517 F.2d 555, 559-560 (7th Cir. 1975)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure § 14A.115

§ 14A.115 Compromise and Voluntary Dismissal of Derivative Actionn*

[1] Substantive Requirements

[a] Court Approval Required

A party or parties may not voluntarily dismiss or compromise a derivative action without the approval of the court. n1 For purposes of Rule 23.1, the terms "settlement" or "to settle" have an identical meaning to the terms "compromise" or "to compromise." n2 Court approval is also required for any voluntary dismissal by a party. n3 While settlement of derivative actions is generally favored because such actions are typically difficult and costly to litigate, n4 the court approval requirement means that the court must always weigh the interests of any nonparty shareholders in evaluating whether to approve a dismissal or settlement. Furthermore, if a court determines that a settlement proposal is not in the corporation's best interests, the court may reject the settlement even if vigorously proposed by all parties. n5 The proponents of a settlement have the burden of proving that the settlement protects absent shareholders and is in the best interests of the corporation. n6

[b] Factors Considered Before Court Approval

In making the determination of whether to approve a settlement, the district court may not simply substitute its judgment for that of the parties but has the obligation to use its discretion to ascertain whether the settlement is based on fairness, reasonableness, and adequacy. The court must also ensure that the settlement has not been reached through fraud or collusion. n7 In order to evaluate the fairness, adequacy, and reasonableness of the proposed settlement, the court should balance the likelihood of success in the derivative suit against the amount offered in settlement. Considering the settlement in the light most beneficial to the corporation, the court should analyze the potential benefit available to the corporation and weigh that potential benefit against the risks involved in establishing liability and proving damages and against the costs of prolonged litigation. n8 In particular, the court should consider the following factors, which were initially applied to class action settlement agreements and later to derivative actions: n9

- The complexity, expense, and likely duration of the litigation.
- The reaction of the other shareholders or members to the settlement.

- The stage of the proceedings and the amount of discovery completed.
- The risks of establishing liability.
- The risks of establishing damages.
- The risks of maintaining the class action through the trial.
- The ability of the defendants to withstand a greater judgment.
- The range of reasonableness of the settlement amount in light of the best possible recovery.
- The range of reasonableness of the settlement amount in light of all the associated risks of litigation.

[2] Procedural Requirements

[a] Notice to Shareholders Required

As part of its approval required for any voluntary dismissal or settlement of a derivative action, n1 the court must direct the manner in which notice will be given of the proposed dismissal or settlement to all shareholders. n2 This rule has been held to require notice whenever a settlement or dismissal is approved n3 but to leave the manner of notice to the discretion of the court. n4 It has also been held that if notice is not given in the manner specified by the court, a settlement or voluntary dismissal will not have claim preclusive effect. n5

[b] Manner of Giving Notice

The notice of settlement or voluntary dismissal must contain sufficient information to provide the shareholders with the opportunity to make an informed choice of whether to intervene or object to challenge the proposed settlement or dismissal of the litigation. n6 To accomplish this purpose, the court has discretion to determine the method and content of a notice of proposed dismissal or compromise of a derivative action. n7 Notice is sufficient if it is reasonable and the best notice practicable under the circumstances. Therefore, actual receipt is not required by all shareholders, and notice by publication may be sufficient in some circumstances when combined with notice by mail to all current shareholders. n8

[c] Opportunity of Shareholders to Contest Settlement

Even though not expressly stated in Rule 23.1, courts have universally held that the notice requirement means that shareholders must be given the opportunity to contest the proposed settlement. n9 However, there is no requirement that the court hold a hearing on the settlement. The courts have developed the requirement that the shareholders be given "meaningful participation" at a settlement hearing on a proposed compromise. Meaningful participation usually includes the opportunity for discover y and cross-examination on issues pertaining to the settlement n10 but does not include the opportunity to examine the merits of the case. n11

[3] Appeal of Settlement

The named parties in a derivative suit may appeal a trial court denial or grant of approval of a proposed settlement, n1 and due process requires that the trial court provide findings regarding its determination in order to facilitate this appellate review. n2

Some circuits require that a nonparty must formally become a party through intervention before the person has standing

to appeal the approval of a settlement. n3 Such courts reason that because a shareholder derivative suit is brought in the corporation's name to rectify an injury suffered by the corporation, individual investors are not injured parties. n4 On the other hand, some circuits have held that any shareholder who has objected in response to a notice of proposed settlement may appeal an approved settlement. n5 These courts allow appeal by a nonparty, unlike the rule with regard to Rule 23 class actions, based on distinctions between Rule 23 and Rule 23.1. The courts reason that Rule 23.1 does not offer the same protective mechanisms that are given by Rule 23. Thus Rule 23.1 does not require a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members, as required under Rule 23. Additionally, there is no opt-out provision in shareholder derivative suits; thus, all shareholders are bound by the outcome regardless of their objections. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsProceduresCivil ProcedureClass ActionsDerivative ActionsCompromisesCivil ProcedureClass ActionsDerivative ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 5 *Moore's Federal Practice,* §§ 23.1.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23.1(c).*

(n3)Footnote 2. *In re Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 332 (D.N.J. 2002)* .

(n4)Footnote 3. *Burks v. Lasker, 441 U.S. 471, 485, n.16, 99 S. Ct. 1831, 1841 n.16, 60 L. Ed. 2d 404 (1979)* .

(n5)Footnote 4. *In re Xcel Energy, Inc., 364 F. Supp. 2d 980, 1003 (D. Minn. 2006)* .

(n6)Footnote 5. *In re Pittsburgh & L. E. R.R. Co. Sec. & Antitrust Litig., 543 F.2d 1058, 1070 (3d Cir. 1976)* ; *see Daily Income Fund v. Fox, 464 U.S. 523, 532 n.7, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984)* (purpose of court approval requirement is to prevent shareholders from suing in place of corporation in circumstances where action would disserve legitimate interests of either company or its shareholders).

(n7)Footnote 6. *Maher v. Zapata Corp., 714 F.2d 436, 454 (5th Cir. 1983)* .

(n8)Footnote 7. *Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49, 54 (5th Cir. 1980)* , *cert. denied, 450 U.S. 1029 (1981)* (if court finds there is evidence of fraud or collusion between parties to settlement, court may reject settlement despite its apparent fairness).

(n9)Footnote 8. *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1311-1314 (3d Cir. 1993)* .

(n10)Footnote 9. *In re Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 332 (D.N.J. 2002)* .

(N11)Footnote 1. *See* [1], *above*

(n12)Footnote 2. *Fed. R. Civ. P. 23.1(c).*

(n13)Footnote 3. *Daily Income Fund v. Fox, 464 U.S. 523, 532 n.7, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984)* ; *Saylor v. Bastedo, 623 F.2d 230, 238, 239-240 (2d Cir. 1980)* .

(n14)Footnote 4. *Fed. R. Civ. P. 23.1(c).*

(n15)Footnote 5. *Maher v. Zapata Corp., 714 F.2d 436, 450-451 (5th Cir. 1983)* .

(n16)Footnote 6. *Felzen v. Andreas, 134 F.3d 873, (7th Cir. 1998)* (notice provides opportunity for other shareholders to contest faithfulness or honesty of self appointed plaintiffs).

(n17)Footnote 7. *Fed. R. Civ. P. 23.1(c).*

(n18)Footnote 8. *In re Xcel Energy, Inc., 364 F. Supp. 2d 980, 996 (D. Minn. 2006)* .

(n19)Footnote 9. *Kaplan v. Rand, 192 F.3d 60, 67 (2d Cir. 1999)* .

(n20)Footnote 10. *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314-1315 (3d Cir. 1993)* .

(n21)Footnote 11. *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987)* .

(n22)Footnote 1. *Carson v. American Brands, Inc., 450 U.S. 79, 88-90, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981))* (order refusing entry of settlement was appealable prior to final judgment because parties otherwise would be denied right to compromise their dispute).

(n23)Footnote 2. *In re Pacific Enterps. Sec. Litig., 47 F.3d 373, 377 (9th Cir. 1995)* .

(n24)Footnote 3. *Shults v. Champion Int'l Corp., 35 F.3d 1056, 1060-1061 (6th Cir. 1994)* (nonintervening shareholder had standing to appeal only if shareholder attempted to intervene).

(n25)Footnote 4. *Felzen v. Andreas, 134 F.3d 873, 875-876 (7th Cir. 1998)* .

(n26)Footnote 5. *Rosenbaum v. MacAllister, 64 F.3d 1439, 1442-1443 (10th Cir. 1995)* .

(n27)Footnote 6. *Powers v. Eichen, 229 F.3d 1249, 1254-1255 (9th Cir. 2000)* .

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VII. DERIVATIVE ACTIONS

1-14A Moore's Manual--Federal Practice and Procedure §§ 14A.116through 14A.129

[Reserved]

§§ 14A.116[Reserved]

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VIII. CLASS ACTION INVOLVING UNINCORPORATED ASSOCIATION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.130

§ 14A.130 Unincorporated Entities and Its Members as Party to Suitn*

The members of an unincorporated association may institute and maintain an action in federal court as a class by naming certain members as representative parties, provided that it appears that the representative parties will fairly and adequately protect the interests of both the association and its members. n1 This rule also applies to unincorporated association defendants. Thus, a plaintiff may institute and maintain an action against the members of an unincorporated association as a class by naming certain members as representative parties, provided that the representative parties will fairly and adequately protect the interests of the association and its members. n2 It should also be noted that the general class action rule itself, Rule 23, provides for the certification of defendant classes, including classes comprised of the members of an unincorporated association or other group. n3 For example, if the purpose of an action is to reach the assets of the members of the association by obtaining judgment against the assets of the members of an existing or dissolved association, Rule 23's provision for a defendant class may be utilized. n4

An analysis of the class action rules and the joinder rules reveals that suits by or against unincorporated associations may be maintained using one of several possible procedural methods, provided that the requirements of the particular rule are satisfied: n5 (1) by bringing a class suit under either Rule 23 or Rule 23.2, with named representatives of the association as parties; (2) by an action in which the association itself is named as a formal party based on its existence as a jural entity having the capacity to institute or defend the suit, n6 or (3) by joining all of the members of the association in the suit. n7

The three procedures may have varying consequences in terms of service of process, venue, subject matter jurisdiction, and the enforceability of the judgment. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsUnincorporated AssociationsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23.2*; *see, e.g., Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 865 (5th Cir. 2003)* .

(n3)Footnote 2. *Fed. R. Civ. P. 23.2*; *see e.g., Indiana Gas Co. v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 23(b)(1)(B).*

(n5)Footnote 4. *In re Alexander Grant & Co. Litig., 110 F.R.D. 528, 538 (S.D. Fla. 1986)* (claims certified against defendant class of past and present partners of accounting firm under Rule 23(b)(1)(B)).

(n6)Footnote 5. *Indiana Gas Company, Inc. v. Home Ins. Co., 141 F.3d 314, 317-319 (7th Cir. 1999)* ; *see Benn v. Seventh-Day Adventist Church, 304 F. Supp. 2d 716, 723-724 (D. Md. 2004)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 17.*

(n8)Footnote 7. *See Fed. R. Civ. P. 19.*

(n9)Footnote 8. *See § 14A.135.*

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.131

§ 14A.131 Status of Entity as Unincorporated Associationn*

Case precedent establishes that virtually any type of ongoing association qualifies as an "unincorporated association" within the meaning of Rule 23.2, provided that it has not been formed merely for the purpose of filing suit or defending against suit related to a particular occurrence. Thus, the rule is not available to associations formed after the events that created the cause of action occurred. To allow a class action suit in such circumstances would allow pervasive evasion of the diversity jurisdiction requirement because a group of litigants who otherwise would not be able to avail themselves of a federal forum could easily form an unincorporated association merely to create diversity jurisdiction through designated representatives. n1 Although a formal association such as a limited liability company or a limited partnership qualifies under the rule, n2 even informal associations, such as insurance associations, qualify under the rule. n3

At common law, an unincorporated association was not recognized as a legal entity, was not subject to suit in its own name, but only in the name of its members, had no existence separate from that of its individual members, and one member's personal liability could not be enforced against any other members unless they also expressly or impliedly assented to or authorized the event on which liability was predicated. Since that time, many states and the federal government have passed statutes that expressly or impliedly authorize suits by and against unincorporated associations. n4 An action by or against representatives of the membership of an unincorporated association has now been allowed under Rule 23.2 to give "entity treatment" to any unincorporated association when for formal reasons it may not sue or be sued as a jural person under Rule 17(b). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsUnincorporated AssociationsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Sembach v. McMahon College, Inc., 86 F.R.D. 188, 192 (S.D. Tex. 1980)* .

(n3)Footnote 2. *See Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 121 (4th Cir. 2004)* .

(n4)Footnote 3. *See Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 865 (5th Cir. 2003)* .

(n5)Footnote 4. *Tittle v. Enron Corp., 284 F. Supp. 2d 511, 614 (S.D. Tex. 2003)* .

(n6)Footnote 5. *Benn v. Seventh-Day Adventist Church, 304 F. Supp. 2d 716, 723-724 (D. Md. 2004)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.132

§ 14A.132 Status of Member of Unincorporated Association Determined by Ordinary Meaningn*

The courts use the common meaning of the term "member" to determine whether a particular person is a member of an unincorporated association within the meaning of Rule 23.2. For example, both the general and the limited partners of a limited partnership are members of an unincorporated association. n1 A labor organization is an unincorporated association under the rule, and persons who pay dues to the union are consequently deemed members of an unincorporated association within Rule 23.2. n2 Furthermore, a "member" could be one insurance company of an unincorporated association of insurance companies that insured a particular type of risk. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsUnincorporated AssociationsGeneral OverviewCivil ProcedureClass ActionsUnincorporated AssociationsAdequate Representation Requirement

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Indiana Gas Company, Inc. v. Home Ins. Co., 141 F.3d 314, 317-319 (7th Cir. 1999)* .

(n3)Footnote 2. *S. Ill. Carpenters Welfare Fund v. Carpenters Welfare Fund, 326 F.3d 919, 922 (7th Cir. 2003)* .

(n4)Footnote 3. *Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 865 (5th Cir. 2003)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.133

§ 14A.133 Requirements for Member as Representative of Classn*

[1] At Least One Member Must Be Named as Class Representative

An unincorporated association may not maintain or defend a class action under Rule 23.2 on behalf of its members unless members of the association are named as parties representative of the association. n1 Therefore, to use the Rule 23.2 procedure, the association itself may not function as a named representative. Another prohibition is that members of the association may not maintain a class action under Rule 23.2 if the class action is joined with a direct action in the name of the unincorporated association. n2 Courts have imposed this prohibition because a class action under Rule 23.2 may be analogized to a derivative action under Rule 23.1, which requires that the action be brought on behalf of a corporation rather than by a corporation. n3

[2] Named Members Must Adequately Represent Other Members and Association

Named representatives may not maintain a class action or defend as a class under Rule 23.2 unless the class representatives fairly and adequately protect the interests of both the association and its members. n1 This requirement of adequacy is similar to the provision in Rule 23(a)(4) that mandates that named representatives fairly and adequately protect the interests of the class. Unlike Rule 23, however, Rule 23.2 requires that the named parties fairly and adequately represent both the individual members and the entity of the association itself. The concern of Rule 23.2 with both the association and its members reflects the purpose of the rule to treat associations as distinct entities from their members. n2

The standards for evaluating fair and adequate representation under Rule 23.2 are analogous to, but not redundant of, those used for the parallel inquiry under Rule 23. n3 Therefore, to fairly and adequately represent the interests of the association and its members, the named representatives must have interests in common with the other class members and must vigorously prosecute the interests of the class and the association through qualified counsel. n4 The court may deny certification under Rule 23.2 if the named representatives completely abdicate the conduct of the case to their attorneys. n5 Furthermore, although courts generally hold that Rule 23.2 does not incorporate the requirements of Rule 23, n6 the factors in the typicality and commonality analysis of Rule 23(a) may be considered when determining whether the adequacy of representation standard under Rule 23.2 has been met. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsUnincorporated AssociationsGeneral OverviewCivil ProcedureClass ActionsUnincorporated AssociationsAdequate Representation Requirement

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.07 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23.2.*

(n3)Footnote 2. *Murray v. Scott, 176 F. Supp. 2d 1249, 1254 (D. Ala. 2001)* .

(n4)Footnote 3. *Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216, 221 (4th Cir. 1975)* .

(n5)Footnote 1. *Fed. R. Civ. P. 23.2.*

(n6)Footnote 2. *Gravenstein v. Campion, 96 F.R.D. 137, 139 (D. Alas. 1982)* (citing **Moore's Federal Practice**).

(n7)Footnote 3. *Gravenstein v. Campion, 96 F.R.D. 137, 140 (D. Alas. 1982)* .

(n8)Footnote 4. *Murray v. Sevier, 156 F.R.D. 235, 257 (D. Kan. 1994)* ; *Resolution Trust Corp. v. Deloitte & Touche, 822 F. Supp. 1512, 1515 (D. Colo. 1993)* .

(n9)Footnote 5. *Murray v. Sevier, 156 F.R.D. 235, 257 (D. Kan. 1994)* .

(n10)Footnote 6. *Management TV Systems, Inc. v. National Football League, 52 F.R.D. 162, 163-164 (E.D. Pa. 1971)* .

(n11)Footnote 7. *See Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.134

§ 14A.134 Availability of Rule When Association Has Jural Capacity Under State Lawn*

Rule 17(b) requires that the jural capacity of an unincorporated association in a diversity case be determined under the law of the forum state. n1 However, there is a conflict among authorities as to whether, in a diversity jurisdiction case, Rule 23.2 may be actuated as an alternative procedure if an unincorporated association is granted juridical capacity under the law of the forum state. The Committee Note for Rule 23.2 states that even though an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it may not sue or be sued as a juridical person under Rule 17(b). n2 Some courts have concluded from such language that Rule 23.2 may be used only if an unincorporated association lacks jural capacity under the law of the forum state and, thus, is barred from suing or being sued under Rule 17(b). n3

On the other hand, some courts take a more permissive view of Rule 23.2 and hold that a class suit may be maintained even if the law of the forum state grants jural capacity to the association. It appears that the more permissive view of the availability of Rule 23.2 is supported by the plain language of the Rule, which does not impose any restrictions on its use other than that the named representatives fairly and adequately protect the interests of the association and its members. n4 Thus, those courts following the permissive view have concluded that the drafters of the rule found it necessary to grant advantageous procedures in states that did not recognize the juridical capacity of associations and made those procedures available in all district courts. n5

However, even courts that adopt the permissive view of Rule 23.2 have held that suits by or against members of an association may not be maintained in diversity cases if state law restricts association actions to entity suits. n6 To hold otherwise would conflict with Rule 17(b), which provides that in diversity cases juridical capacity is determined pursuant to state law. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsUnincorporated AssociationsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 17(b).*

(n3)Footnote 2. *See Fed. R. App. P. 17(b)*, Committee Note to 1966.

(n4)Footnote 3. *Benn v. Seventh-Day Adventist Church, 304 F. Supp. 2d 716, 723-724 (D. Md. 2004)* .

(n5)Footnote 4. *Kerney v. Fort Griffin Fandangle Assn., Inc., 624 F.2d 717, 720 (5th Cir. 1980)* (purpose of Rule 23.2 was clearly to enlarge, not contract, authorization for class actions against unincorporated associations).

(n6)Footnote 5. *Murray v. Sevier, 156 F.R.D. 235, 255 (D. Kan. 1994)* .

(n7)Footnote 6. *Lumbermen's Underwriting Alliance v. Mobil Oil Corp., 612 F. Supp. 1166, 1172 (D. Idaho 1985)* .

(n8)Footnote 7. *Lumbermen's Underwriting Alliance v. Mobil Oil Corp., 612 F. Supp. 1166, 1169-1170 (D. Idaho 1985)* .

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1-14A Moore's Manual--Federal Practice and Procedure § 14A.135

§ 14A.135 Procedural Considerations Regarding Unincorporated Association Class Suitsn*

[1] Citizenship of Parties for Diversity Purposes

When an unincorporated association sues or is sued as an entity in its own name, the citizenship of each of the association's members is relevant for purposes of diversity jurisdiction. n1 Therefore, because the diversity statute requires complete diversity between all defendants and all plaintiffs, diversity will normally not exist in an action involving a large multistate association or, in the alternative, all of its members. n2 However, as with class actions under Rule 23, only the citizenship of the named parties is considered in determining whether a class action under Rule 23.2 satisfies the diversity jurisdiction statute. n3 Naming only diverse parties as representatives of a class that includes nondiverse members is a generally an accepted method for creating diversity jurisdiction. n4 However, there is contrary authority which holds that the Supreme Court's cases treating unincorporated associations as citizens of every state of which any member is a citizen may not be avoided by suing one partner or member as a "representative" of the rest. n5

[2] Personal Jurisdiction

Rule 23.2 allows an action to proceed if the court has personal jurisdiction over the named representatives, whether or not it has personal jurisdiction over the other members. n1 Furthermore, provided that the court has personal jurisdiction over the named class representatives, the court's jurisdiction also extends to the association itself. n2 By contrast, in a suit in which all members of an association are joined, each member must be served with process in order to be brought within the personal jurisdiction of the court, and if the unincorporated association is sued as an entity in its own name, service must be made on an appropriate officer or agent of the association. n3

[3] Venue

Under the general venue statute, the plaintiff has the option to institute an action in a district in which all of the defendants reside. n1 If the plaintiff institutes an action by joining all of the individual members of an association as defendants, then the residence of each member must be considered in the venue determination, and if an association is large, it may be difficult to find a single district in which all of the defendants reside. n2 By contrast, if a suit is brought against the association in its common name, the association's residence is used for determining venue. An unincorporated association is treated as a corporation for venue purposes and, therefore, is a resident of any district in

which it is subject to personal jurisdiction. n3

On the other hand, if the suit is brought as a class action, only the residences of the named representatives are relevant to determine whether a particular venue is proper. n4 Furthermore, plaintiffs using Rule 23.2 may choose their particular class representatives to sue in order to expand the number of districts in which venue is appropriate. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsUnincorporated AssociationsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Carden v. Arkoma Assoc., 494 U.S. 185, 195-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* .

(n3)Footnote 2. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 930-933 (2d Cir. 1998)* .

(n4)Footnote 3. *Holman v. Cook, 879 F. Supp. 113, 114 (D.D.C. 1995)* .

(n5)Footnote 4. *Shlomchik v. Richmond 103 Equities Co., 662 F. Supp. 365, 370 (S.D.N.Y. 1986)* .

(n6)Footnote 5. *Indiana Gas Company, Inc. v. Home Ins. Co., 141 F.3d 314, 317-319 (7th Cir. 1999)* (citizenship of underwriting syndicates' "names" could not be ignored, for purposes of establishing diversity jurisdiction).

(n7)Footnote 1. *Curley v. Brignoli, Curley & Roberts Assoc., 915 F.2d 81, 87 (2d Cir. 1990)* , *cert. denied, 499 U.S. 955 (1991)* .

(n8)Footnote 2. *Fowler v. Brignoli, 765 F. Supp. 1202, 1204 (S.D.N.Y. 1991)* .

(n9)Footnote 3. *See Murray v. Scott, 176 F. Supp. 2d 1249, 1256 (M.D. Ala. 2004)* ; Local 15 of *Independent Workers of Noble County, Inc. v. International Broth. of Elec. Workers, 273 F. Supp. 313, 315 (N.D. Ind. 1967)* .

(n10)Footnote 1. *28 U.S.C. § 1391.*

(n11)Footnote 2. *See Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1107 (C.D. Cal. 2001)* .

(n12)Footnote 3. *28 U.S.C. § 1391(c)*; *see Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 562, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967)* .

(n13)Footnote 4. *Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1107 (C.D. Cal. 2001)* (venue for entire class is proper if venue for named representatives is proper).

(n14)Footnote 5. *Curley v. Brignoli, Curley & Roberts Assoc., 915 F.2d 81, 87 (2d Cir. 1990)* , *cert. denied, 499 U.S. 955 (1991)* (unincorporated class action device provides litigants with important procedural advantages, including larger number of districts in which venue is proper).

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PART IV Parties
CHAPTER 14A CLASS ACTIONS; DERIVATIVE ACTIONS
PART VIII. CLASS ACTION INVOLVING UNINCORPORATED ASSOCIATION

1-14A Moore's Manual--Federal Practice and Procedure § 14A.136

§ 14A.136 Application of General Class Action Principles to Unincorporated Association Class Actionsn*

Rule 23.2 expressly incorporates two provisions of the general class action rule: n1 Rule 23(d), which controls court orders dealing with all procedural matters in the conduct of class actions, n2 and Rule 23(e), which controls court approval and disposition of the class action by dismissal or compromise. n3 The authorities are split as to whether all of the other Rule 23 requirements apply to Rule 23.2 actions. The majority of courts hold that Rule 23.2 does not incorporate other Rule 23 requirements and limitations, n4 because the express inclusion of 23(d) and 23(e) implies that other subsections or Rule 23 were intentionally not incorporated. n5

However, other courts hold that all of the provisions of Rule 23 apply because Rule 23.2 merely supplements Rule 23 and Rule 17 by allowing unincorporated associations the same legal status as a person or corporation. Consequently, Rule 23 remains unaffected by Rule 23.2, and an unincorprated association, or those representing the association's membership, must comply with all of Rule 23 provisions when bringing a class action suit, such as the numerosity, commonality, typicality, and representative requirements of Rule 23(a), in addition to the requirements specified in Rule 23.2. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsUnincorporated AssociationsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 5 *Moore's Federal Practice,* § 23.2.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 23.2.*

(n3)Footnote 2. *Fed. R. Civ. P. 23(d).*

(n4)Footnote 3. *Fed. R. Civ. P. 23(e).*

(n5)Footnote 4. *Resolution Trust Corp. v. Deloitte & Touche, 822 F. Supp. 1512, 1515 (D. Colo. 1993)* .

(n6)Footnote 5. *Management Television Systems, Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971)* .

(n7)Footnote 6. *See Stolz v. United Brotherhood of Carpenters & Joiners, 620 F. Supp. 396, 403 (D. Nev. 1985)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.01

§ 15.01 Principles Governing Discovery and Disclosures in Federal Court

[1] Purpose of Discovery and Disclosure Is to Specify and Limit Issues for Trial n*

"Discovery" in federal litigation is the process parties use to gather information from an opposing claimant or defending party before trial for the purpose of narrowing and defining the disputed legal and factual issues. n1 Through the process of discovery, each party learns the evidentiary basis of the opposing party's case by exchanging information with the opposing party. n2 Discovery is characterized by a search for information, and this search is governed by the process specified by the local rules of the particular court and *Rules 26-37 of the Federal Rules of Civil Procedure*. Discovery should be distinguished from a party's investigation of its own case, which is not governed by the federal rules. Thus, a party may continue its investigation even after the formal discovery deadline set by the court. Parties engage in discovery to obtain unknown information or to supplement or corroborate information that is already known by the party. n3

Another significant purpose of discovery is to remove surprise from trial preparation so that the parties may obtain the evidence necessary to evaluate and resolve their dispute. n4 Because discovery facilitates this evaluation on both sides of a case, it is a powerful tool to promote fair settlements. n5 The discovery process supplements the function of the simplified pleading practice in federal litigation, which merely notifies the opposing parties of the general nature of a party's claim or defense and does not set forth the underlying facts in detail. n6 Thus, discovery is the device for ascertaining before trial what facts are really in dispute by allowing the parties to obtain the fullest possible knowledge of the facts and issues, while providing privileges and exceptions based on public policy to protect the parties from having to divulge sensitive material, even if the material would otherwise be relevant to the claim in dispute. n7

[2] Parties to Civil Actions Entitled to Discovery from Opposition n*

[a] Types of Action Subject to Discovery Rules

A party is entitled as a matter of right to the discovery provided in *Rules 26-37 of the Federal Rules of Civil Procedure* in any pending "civil" action covered generally by the Federal Rules of Civil Procedure, which includes all civil actions except for those specified in Rule 81. If an action is not a civil action, or is specified in Rule 81, the parties are not subject to the broad discovery provisions of Rules 26-37 as a matter of right, but are entitled to the discovery governing

that type of action. n1 For example, in habeas corpus proceedings, the petitioner is not entitled to broad discovery as a matter of right because Rule 6(a) of the rules governing habeas corpus cases provides that a party is entitled to discovery in a habeas petition only by express permission of the court after the party states sufficient reasons for requesting discovery. n2 As another example, the right to discovery in bankruptcy cases is determined by the Bankruptcy Rules, which for adversary proceedings are analogous to but separate from Civil Procedure Rules 26 through 37. n3

[b] Status of Party Entitled to Discovery

The civil discovery rules are applicable in the specified types of civil actions n4 at the request of any party to the action, whether the party is an individual or a corporation, n5 and whether a claiming party or a defending party. n6 The discovery rules apply to actions by or against the United States as a party, n7 and may also be used to obtain discovery from the United States in civil actions in circumstances specified in the federal rules even if the United States is not a party to the action. n8

[c] Parties Before International Tribunals

Generally, the discovery provisions of Rules 26-37 do not apply to proceedings in tribunals in foreign countries or in international tribunals to obtain discovery from United States federal courts for use in those tribunals. n9 However, the United States Code contains a provision for limited discovery in United States federal courts by a party or a complainant in a foreign or international tribunal. Under the special provision, the United States district court where a person resides or is found has the discretion to order that person to give his or her testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. n10 The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal, or on the application of any interested person. n11 The United States Supreme Court has construed Section 1782 in a liberal manner requiring district courts to implement Section 1782 in a manner that furthers its purposes of cooperation in multinational litigation. n12

[3] Provisions Controlling Federal Discovery n*

Discovery in a federal district court is governed primarily by the *Federal Rules of Civil Procedure 26 through 37*. n1 State statutes and rules relating to discovery procedures are not applicable in federal court, even if the substantive legal issues in the federal court are controlled by state law on the basis of diversity jurisdiction. n2 Furthermore, a federal district court may not consider state discovery law in determining how to interpret and apply a federal discovery rule. n3 However, if a discovery issue is not covered by a federal rule, a federal court may consider a state-law rule governing the issue. n4

As another source of rules governing the process of discovery, the parties themselves may make an agreement or may stipulate to discovery rules that control discovery, subject to court approval based on the court's inherent power to control the litigation. n5. Thus, the parties to a contract may agree to limit or provide discovery in a particular way in the event any future litigation arises regarding the contract, provided that they are on an equal in bargaining power. n6 After a suit has been filed, the parties may mutually stipulate to use procedures for discovery that vary from Rules 26 through 37. n7

[4] Appeal of Court Order Related to Discovery n*

[a] Most Discovery Orders are Not Appealable

[i] Discovery Order Typically is Not Final Order

In general, appeals are not permitted from an order of the district court which either grants or denies discovery because

such an order by itself is not a "final" order as required by statute for appellate review. n1 For example, courts have held that the following types of orders are not appealable: (1) granting or denying a protective order precluding discovery; n2 (2) granting or denying a motion for an order to take or cease taking a deposition; n3 (3) directing a party or witness to produce documents; n4 and (4) requiring a party to submit to a physical examination. n5 However, a party does have the option to disobey the order and have sanctions imposed against the disobeying party. n6 A sanction order is final and immediately appealable, and on appeal, the party may then assert any legal errors in the underlying discovery order. n7

Some circuits have held that the principle is not the same for a nonparty, and take the position that a discovery order directed at a disinterested third party must be treated as an immediately appealable final order for two reasons. First, the nonparty may have no appellate remedy at the end of the litigation, so the nonparty should be entitled to an immediate appeal. n8 Second, a third party presumably lacks a sufficient stake in the proceeding to risk contempt or sanctions by refusing compliance with a discovery order and should be allowed an immediate appeal. n9

[ii] Discovery Order Not Appealable as Injunction

A discovery order does not constitute an injunction that is appealable under Section 1292. n10 The Supreme Court has stated that a discovery order is not appealable as an injunction because it does not provide some or all of the substantive relief sought by the complaint, as required by Section 1292(a)(1), in more than preliminary fashion. n11 Similarly, an order staying the proceedings is not an injunction for purposes of appealability because it merely has the effect of conditioning a party's right to proceed with compliance with a discovery order. n12 It should be noted that a discovery order is not appealable as an injunction whether the order is directed at a party or at non-parties. n13

[iii] Collateral Order Doctrine Generally Not Applicable

Courts as a general rule do not apply the "collateral order doctrine" to discovery orders n14 because the doctrine provides that a non-final order may be appealed only if the following three requirements are met: (1) the order determines a claim of right separable from and collateral to the rights asserted in the main action; (2) the order is too important to be denied review; and (3) review cannot be deferred until final disposition of the main action because certain rights may be lost in the interim. n15 Considering these three factors, the Supreme Court has held that the collateral order doctrine does not extend to disclosure orders adverse to the attorney client privilege because such orders are not unreviewable under part (3) of the test. The court noted that effective review of adverse attorney client privilege orders can be had without resort to the doctrine by direct appeal, in that appellate courts can remedy the improper disclosure of privileged material by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence. The Supreme Court also stated that the collateral order doctrine is not an individualized jurisdictional inquiry into the circumstances of a particular order, but is an analysis that should be applied only with respect to a class or type of order. n16 On the other hand, it has been held that orders which require a party's attorneys to testify can be appealed under the doctrine, because of the lack of an available and meaningful appeal to remedy a wrongful order. n17

[iv] Extraordinary Writs

Extraordinary writs such as mandamus and prohibition are drastic remedies that may be invoked only in extraordinary situations. Because these writs are disfavored and strictly limited, the writs may not generally be used to provide appellate review of discovery orders. n17.1 Consequently, to prevent piecemeal appellate litigation, the United States Supreme Court has narrowly delineated the scope of the use of extraordinary writs in discovery order controversies and has stated that the writs should not be used in anything less than extraordinary situations, determined by the facts of the each case. n18 Thus, the appellate courts have usually limited the issuance of the writ of mandamus regarding such orders to three situations: n19 (1) when the district court has clearly abused its discretion; (2) when the district court has usurped its power; and (3) when mandamus is necessary to resolve an important novel issue.

[b] Exceptions Which Provide for Immediate Appeal of Discovery Order

[i] Summary of Grounds for Immediate Appealability of Discovery Orders

Although discovery orders are generally not appealable, n20 there are exceptional circumstances in which such an order may be immediately appealable. n21 Thus, a discovery order is subject to immediate appellate review if it is a statutory "final decision," n22 if it comes within the statutory definition of an appealable interlocutory order, n23 or if the circumstances are proper for the issuance of an extraordinary writ. n24 Based on these grounds, discovery orders have been held to be appealable in several types of situations, as discussed in [ii] through [v]. *below*.

[ii] Final Orders That Impose Sanctions

The court may impose various sanctions on a party for the party's failure to comply with any type of discovery order made by the court. If a discovery order disposes of a case, such as an order dismissing an action or entering a default judgment, the order is appealable. n25 On the other hand, if a sanction order does not completely dispose of a case, it is generally not appealable. Thus, orders that are clearly interlocutory are not appealable, such as an order that a particular matter be taken as established, n26 an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence, n27 an order striking pleadings, n28 or an order staying proceedings. n29 An order that is conditional because it depends on the occurrence of events or acts of the parties is not final and is unappealable. n30 A refusal to impose sanctions under Rule 37 has also been held interlocutory and unappealable. n31

[iii] Interlocutory Orders That Involve Controlling Questions of Law

When a district court states in writing that an order involves a controlling question of law, n32 n33-34 that there is substantial difference of opinion on the question, and that an immediate appeal from the order may materially advance the ultimate conclusion of the action, the court of appeals has discretionary jurisdiction over the order even if it is interlocutory. n35 Discovery orders are not usually appealable under this rule n36 because either the issues involved do not present a controlling question of law n37 or resolution of the question would not advance the conclusion of the action. n38 However, if a particular discovery order satisfies the strict statutory requirements, the court may certify a discovery issue for appeal. n39

[iv] Proceedings Requesting Only Discovery or Perpetuation of Testimony

When the only relief that a party seeks in a particular proceeding is discovery, the court's decision in the proceeding is final for purposes of appeal, provided that the court disposes of every issue before it. n40 For example, even though proceedings under Rule 27(a) to perpetuate testimony may be considered ancillary or auxiliary, it has been held that an order authorizing the taking of depositions under Rule 27(a) n41 is final and appealable. n42 Similarly, an order denying the right to perpetuate testimony is appealable because of the possibility that the eventuality that made perpetuation of the testimony desirable might occur; postponement of the appeal until disposition of the action could potentially preclude all relief. n43 An order is also appealable when it concerns perpetuation of testimony pending appeal of an action, n44 or when the district court's jurisdiction is invoked in aid of litigation in another court system, whether the other court system is within n45 or outside of the United States. n46

[v] Order of Contempt

If an order of contempt against any party for refusal to comply with a discovery order is criminal in character, it is a final order and immediately appealable. n47 On the other hand, an order of civil contempt is not immediately appealable because it is not a final order. n48 The characterization of a contempt order as either criminal or civil depends on the nature of the penalty imposed. A criminal contempt order is punitive in nature because criminal contempt results in imposition of a sentence for a definite time or a definite imposition of a fine without the possibility of modification. On the other hand, civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. n49 The label a court puts on its contempt order does not necessarily

make the order criminal or civil. n50 Furthermore, the mere imposition of a fine does not change a civil contempt to a criminal one. n51

[c] Standard of Review of Discovery Order

Any discovery order is reviewable on appeal or cross-appeal from the final judgment, and is subject to reversal when it has affected the correctness of the final judgment. n52 However, review after judgment often comes too late: if discovery is denied and the party goes to trial without the information sought, the party on appeal may have difficulty establishing that the discovery sought would have made a difference in the outcome. n53 On the other hand, if discovery is allowed and the information comes in at trial, a reversal on appeal of only the order itself may not erase the damage done by the information obtained through the order; n54 consequently, the court may have to order a new trial. n55

An appellate court's standard of review of discovery orders is very narrow; the appellate court will only reverse on a showing of gross abuse of discretion that results in fundamental unfairness in the case. n56 Thus, appellate courts defer the management of discovery to the sound discretion of the trial court. n57 However, if a district court clearly considers erroneous standards or principles in making its order, or the denial of discovery may have been responsible for the failure of a party to prove its case, n58 the discovery order will be reversed by the appellate court. n59

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. O2 *Micro Int'l, Ltd. v. Monolithic Power Sys., 467 F.3d 1355, 1365 (Fed. Cir. 2006)* .

(n3)Footnote 2. *See NicSand, Inc. v. 3M Co., 507 F.3d 442, 462-463 (6th Cir. 2007)* .

(n4)Footnote 3. *Williams v. McClain, 708 F. Supp. 1086, 1090 (W.D. Mo. 1989)* .

(n5)Footnote 4. *Erskine v. Consolidated Rail Corp., 814 F.2d 266, 272 (6th Cir. 1987)* .

(n6)Footnote 5. *City & County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 221 (N.D. Cal. 2003)* .

(n7)Footnote 6. *Rottlund Co. v. Pinnacle Corp., 222 F.R.D. 362, 374-375 (D. Minn. 2004)* .

(n8)Footnote 7. *Baldrige v. Shapiro, 455 U.S. 345, 360, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982)* .

(n9)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.03* (Matthew Bender 3d ed.).

(n10)Footnote 1. *Green v. Artuz, 990 F. Supp. 267, 271 (S.D.N.Y. 1998)* ; *see Fed. R. Civ. P. 81(a)* (Rule 81 limits application of discovery rules in certain actions, such as admiralty actions, and specifies that in other actions the broad rules do not apply at all).

(n11)Footnote 2. *28 U.S.C. App., § 2254* Cases, R. 6(a).

(n12)Footnote 3. *Fed. R. Bankr. P. 7026-7037*; *see Collier's Bankruptcy Practice Guide*, Ch. 110, *Discovery* (Matthew Bender).

(n13)Footnote 4. *See* [a] *above*.

(n14)Footnote 5. *See Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 654 (D. Kan. 2004)* .

(n15)Footnote 6. *See* O2 *Micro Int'l, Ltd. v. Monolithic Power Sys., 467 F.3d 1355, 1365 (Fed. Cir. 2006)* .

(n16)Footnote 7. *United States v. Procter & Gamble Co., 356 U.S. 677, 681, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)* .

(n17)Footnote 8. *Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir. 1994)* .

(n18)Footnote 9. *Matter of Jenoptik AG, 109 F.3d 721, 723 (Fed. Cir. 1997)* .

(n19)Footnote 10. *See 28 U.S.C. § 1782*; *see also Metallgesellschaft AG v. Hodapp, 121 F.3d 77, 79 (2d Cir. 1997)* (discretion of U.S. District Court to order discovery).

(n20)Footnote 11. *Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995)* .

(n21)Footnote 12. *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 371-379 (2004)* (holding that foreign "tribunal" for purposes of Section 1782 need not be "court," but may be any formally recognized body that acts in judicial or quasi-judicial manner as adjudicatory decision maker).

(n22)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, § 26.04* (Matthew Bender 3d ed.).

(n23)Footnote 1. *Rottlund Co. v. Pinnacle Corp., 222 F.R.D. 362, 374 (D. Minn. 2004)* ; *see Fed. R. Civ. P. 26 et seq.*

(n24)Footnote 2. *Bearint v. Dorell Juvenile, 389 F.3d 1339, 1353 (11th Cir. 2004)* .

(n25)Footnote 3. *Sharon Steel Corp. v. Travelers Indem. Co., 26 F.R.D. 113, 116 (N.D. Ohio 1960)* .

(n26)Footnote 4. *Benally v. United States, 216 F.R.D. 478, 480 (D. Ariz 2003)* .

(n27)Footnote 5. *See In re Merck & Co. Sec., Derivative & ERISA Litig., 493 F.3d 393, 398 (3rd Cir. 2007)* .

(n28)Footnote 6. *Elliott-McGowan Productions v. Republic Productions, Inc., 145 F. Supp. 48, 50 (S.D.N.Y. 1956)* .

(n29)Footnote 7. *Morrison v. Stephenson, 2008 U.S. Dist. LEXIS 6512, at *13-*15 (S.D. Ohio 2008)* .

(n30)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.07* (Matthew Bender 3d ed.).

(n31)Footnote 1. *Cunningham v. Hamilton County, 527 U.S. 198, 208-210, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* ; *see 28 U.S.C. § 1291.*

(n32)Footnote 2. *Osband v. Woodford, 290 F.3d 1036, 1038-1039 (9th Cir. 2002)* .

(n33)Footnote 3. *Merino v. Hocke, 289 F.2d 636, 638-639 (9th Cir. 1961)* .

(n34)Footnote 4. *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Litig., 857 F.2d 1238, 1239-1240 (9th Cir. 1988)* .

(n35)Footnote 5. *Donnelly v. Parker, 486 F.2d 402, 408 (D.C. Cir. 1973)* .

(n36)Footnote 6. *See* [b][ii], *below.*

(n37)Footnote 7. *In re Minister Papandreou, 139 F.3d 247, 250-251 (D.C. Cir. 1998)* .

(n38)Footnote 8. *Burden-Meeks v. Welch, 319 F.3d 897, 901 (7th Cir. 2003)* .

(n39)Footnote 9. *In re Sealed Case (Medical Records), 381 F.3d 1205, 1210 (D.C. Cir. 2004)* .

(n40)Footnote 10. *United States v. Pappas, 94 F.3d 795, 798 (2nd Cir. 1996)* .

(n41)Footnote 11. *Poyner v. Murray, 508 U.S. 931, 932, 113 S. Ct. 2397, 124 L. Ed. 2d 299 (1993)* .

(n42)Footnote 12. *United States v. Richardson, 204 F.2d 552, 556 (5th Cir. 1953)* .

(n43)Footnote 13. *Bennett v. City of Boston, 54 F.3d 18, 20-21 (1st Cir. 1995)* .

(n44)Footnote 14. *In re Minister Papandreou, 139 F.3d 247, 250-251 (D.C. Cir. 1998)* .

(n45)Footnote 15. *Will v. Hallock, 546 U.S. 345, 349-350, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)* .

(n46)Footnote 16. *Mohawk Indus. v. Carpenter, 130 S. Ct. 599, 175 L. Ed. 2d 458, 465-467 (2009)* .

(n47)Footnote 17. *See Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989)* .

(n48)Footnote 17.1. *Earley v. Braxton (In re Braxton), 258 F.3d 250, 261 (4th Cir. 2001)* .

(n49)Footnote 18. *Will v. United States, 389 U.S. 90, 108, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)* ; *see United States ex rel. Chandler v. Cook County, 277 F.3d 969, 981 (7th Cir. 2002)* (mandamus review would be appropriate if particular discovery order would result in violation of federal law or would seriously impair legal right of person subject to order).

(n50)Footnote 19. *Schlagenhauf v. Holder, 379 U.S. 104, 110-112, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

(n51)Footnote 20. *See* [a], *above*.

(n52)Footnote 21. For a complete discussion of appellate jurisdiction, see Chapter 27, *General Principles of Appeal*.

(n53)Footnote 22. *See 28 U.S.C. § 1291*.

(n54)Footnote 23. *See 28 U.S.C. § 1292*.

(n55)Footnote 24. *See 28 U.S.C. § 1651*.

(n56)Footnote 25. *United States v. Procter & Gamble Co., 356 U.S. 677, 680-681, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)* .

(n57)Footnote 26. *See Fed. R. Civ. P. 37(b)(2)(A)(i)*.

(n58)Footnote 27. *See Fed. R. Civ. P. 37(b)(2)(A)(ii)*.

(n59)Footnote 28. *See Fed. R. Civ. P. 37(b)(2)(A)(iii)*.

(n60)Footnote 29. *See Fed. R. Civ. P. 37(b)(2)(A)(iv)*; *see also Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974)* .

(n61)Footnote 30. *Bache & Co., Inc. v. Taylor, 458 F.2d 395, 395-396 (5th Cir. 1972)* .

(n62)Footnote 31. *Alexander v. Pacific Maritime Ass'n, 332 F.2d 266, 267 (9th Cir. 1964)* .

(n63)Footnote 32. *Harrisonville Tel. Co. v. Ill. Commerce Comm'n, 472 F. Supp. 2d 1071, 1080-1081 (S.D. Ill. 2006)* (difficulty in finding discovery order that will present controlling question of law).

(n64)Footnote 33-34. [Reserved]

(n65)Footnote 35. *28 U.S.C. § 1292(b).*

(n66)Footnote 36. *See e.g., Joseph v. Lindsey, 212 B.R. 373, 374-375 (10th Cir. 1997)* .

(n67)Footnote 37. *United States v. Salter, 421 F.2d 1393, 1394 (1st Cir. 1970)* ; *Harrisonville Tel. Co. v. Ill. Commerce Comm'n, 472 F. Supp. 2d 1071, 1080-1081 (S.D. Ill. 2006)* .

(n68)Footnote 38. *Kockums Indus. Ltd. v. Salem Equip., Inc., 561 F. Supp. 168, 174 (D. Ore. 1983)* (attorney-client privilege denied).

(n69)Footnote 39. *See, e.g., Watson v. Lowcountry Red Cross, 974 F.2d 482, 484-485 (4th Cir. 1992)* (question was properly certified when it concerned discovery of information about anonymous blood donor, raising important undecided constitutional issues).

(n70)Footnote 40. *See, e.g., Cobbledick v. United States, 309 U.S. 323, 329, 60 S. Ct. 540, 84 L. Ed. 783 (1940)* (after court has ordered witness to testify under subpoena before administrative agency, there is nothing remaining for court to accomplish, and therefore proceeding before district court is not ancillary to judicial proceeding, but complete in itself).

(n71)Footnote 41. *Fed. R. Civ. P. 27(a).*

(n72)Footnote 42. *See Martin v. Reynolds Metal Corp., 297 F.2d 49, 54-55 (9th Cir. 1961)* .

(n73)Footnote 43. *Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 870 (9th Cir. 1976)* (motion denied under *Fed. R. Civ. P. 27(b)*).

(n74)Footnote 44. *Ash v. Cort, 512 F.2d 909, 911-912 (3d Cir. 1975)* (order denying motion to perpetuate testimony, citing **Moore's Federal Practice**).

(n75)Footnote 45. *Gibson v. United States, 403 F.2d 166, 167 (D.C. Cir. 1968)* .

(n76)Footnote 46. *In re Application of Aldunate, 3 F.3d 54, 57 (2d Cir. 1993)* .

(n77)Footnote 47. *Union Tool Co. v. Wilson, 259 U.S. 107, 110-111, 42 S. Ct. 427, 66 L. Ed. 848 (1922)* .

(n78)Footnote 48. *Law v. National Collegiate Athletic Association, 134 F.3d 1438, 1440-1441 (10th Cir. 1998)* .

(n79)Footnote 49. *Cunningham v. Hamilton County, 527 U.S. 198, 207-208, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* .

(n80)Footnote 50. *Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968)* .

(n81)Footnote 51. *International Bus. Mach. Corp. v. United States, 493 F.2d 112, 115-116 (2d Cir. 1973)* (order was coercive and contingent in nature and was therefore civil).

(n82)Footnote 52. *Ahlberg v. Chrysler Corp., 481 F.3d 630, 637-638 (8th Cir. 2007)* .

(n83)Footnote 53. *See Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197 (11th Cir. 1991)* (no abuse of discretion when overly-broad deposition subpoena was quashed).

(n84)Footnote 54. *See Brooms v. Regal Tube Co., 881 F.2d 412, 422 (7th Cir. 1989)* (no prejudice demonstrated from admission of investigator's findings in sexual discrimination claim).

(n85)Footnote 55. *See Evans v. City of Chicago, 513 F.3d 735, 745-746 (7th Cir. 2008)* .

(n86)Footnote 56. *Ahlberg v. Chrysler Corp., 481 F.3d 630, 637-638 (8th Cir. 2007)* .

(n87)Footnote 57. *Matter of Missouri Department of Natural Resources, 105 F.3d 434, 435-436 (8th Cir. 1997)* .

(n88)Footnote 58. *Shaklee Corp. v. Gunnell, 748 F.2d 548, 550 (10th Cir. 1984)* .

(n89)Footnote 59. *See Linder v. Department of Defense, 133 F.3d 17, 24 (D.C. Cir. 1998)* .

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Moore's Manual--Federal Practice and Procedure

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.02

§ 15.02 Required Automatic Disclosures

[1] Initial Disclosures Required n*

[a] Duty to Make Initial Disclosures

Each party has a duty to make initial disclosures of information that it has related to all claims in the case. n1 The duty to make these is automatic in that it does not arise from a discovery request from another party or from the court. n2 A party is not excused from making its disclosures because it has not fully investigated the case, as it must make the disclosures based on the information then reasonably available to it. Furthermore, a party may not withhold initial disclosures because it challenges the sufficiency of another party's disclosures, nor because another party has not made its required disclosures. n3

[b] Subject Matter of Required Initial Disclosures

[i] Disclosures Are Generally Required Except By Court Direction or Parties' Stipulation

Unless the court directs or the parties stipulate otherwise, and except in certain specified categories of proceedings, n4 all parties must make the following disclosures within 14 days after the discovery planning conference: n5

1. The names, addresses, and telephone numbers of individuals likely to have discoverable information, and the subject of that information. n6

2. A copy or a description of all documents, electronically stored information, and tangible things in the possession, custody, or control of the disclosing party that the party may use to support its claims or defenses. n7

3. Computations regarding damages for which the disclosing party makes a claim, and documents or other evidence that form the basis of the computations. n8

4. Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action. n9

A disclosing party must make its initial disclosures based on the information then reasonably available to it. n10 However, for its initial disclosures, a party need not conduct a thorough or exhaustive investigation of the case. Parties are required only to disclose matters that they know of, or should know of through reasonable investigation, at the time they make the disclosures. n11 The party must then supplement an initial disclosure if the party obtains additional information related to that initial disclosure. n12

The initial disclosure requirements are nationally uniform requirements in federal courts, and parties must ordinarily make the disclosures except in the types of proceedings that are specifically exempted from the initial disclosure requirements by the rules. n13 Consequently, a trial court does not have the option to disregard the initial disclosure requirements by adopting local rules or formal or informal standing orders. n14 However, the trial court does have the option to enter case-specific orders eliminating disclosure, or limiting or expanding the scope of disclosure required. n15

[ii] Disclosures Regarding Individuals with Information

As part of its initial disclosures, each party must provide the name and if known the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless used solely for impeachment. The party must also identify the subjects of such information. n16 The ultimate result of these disclosures is to provide information about potential witnesses and the subject matter of their knowledge. The purpose of the requirement is to assist the other parties in deciding whom they wish to depose without the necessity of first serving multiple boilerplate interrogatories seeking this information. n17

The party must disclose each known individual's own addresses and telephone numbers. n18 It is not sufficient when an individual is an employee to merely provide the employer's general address and telephone number. n19 Furthermore, the possibility that opposing counsel could use the information to improperly contact a party's employees outside the party's presence does not justify noncompliance with the rule; n20 such objections must be raised at the discovery planning conference. n21 With respect to the subject matter of the information about which the witness will testify, the party need only make a brief disclosure of the general topics of each witness's knowledge, rather than details of particular topics. Thus, it is not necessary to provide a detailed narrative of all of the facts known to each witness the party anticipates calling. n22

[iii] Copy or Description of All Items Used to Support Claims or Defenses

In its initial disclosure, each party must provide other parties with a copy of, or description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses. n23 This disclosure must describe and categorize the nature and location of the documents and records in a manner sufficient to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined initially and (2) to frame their document requests in a manner likely to avoid disputes resulting from the wording of the requests. n24

A party need not provide this copy or description for items that the attorney intends to use solely for impeachment purposes. n25 However, if a party relies on this exception, the court will not permit the party to use the documents at trial for any purpose other than impeachment. n26

It is important to note that the disclosing party does not have to produce actual documents or items requested. It may comply fully with its initial disclosure obligation by providing a description by category and location of all documents, electronically stored information, and tangible things it expects to use during the proceeding. n27 Furthermore, this provision is designed to facilitate early disclosure of discoverable information and does not require that all documents and items relevant to the issues in a law suit will be among the initial disclosures; consequently, the failure to make

timely disclosures does not necessarily preclude a party's witnesses from relying on documents not included in the initial disclosures. n28 However, the best practice is to produce a description or copy of all items that the attorney anticipates he or she will use regarding any party's allegations, claims, or defenses or rebuttal to any allegations, claims, or defenses. n29

[iv] Computations Regarding Damages Claims

Each party in its initial disclosures must include a computation of any category of damages claimed by the disclosing party. The party must also make available for inspection and copying the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered. However, the party need not make available material that is privileged or protected from disclosure. n30 Documents or other evidentiary materials that are not required for damage computation need not be included in this disclosure, even if otherwise relevant to the case. n31

This provision is the functional equivalent of a standing request for production of documents under Rule 34. n32 Courts have stressed that there are two parts to this initial disclosure requirement. First, the party must disclose the method it used to calculate its claims for damages or other monetary relief; second the party must make available the documents supporting the calculations for inspection and copying, as if a request for such material had been made under Rule 34. n33 The disclosures must be sufficiently specific that opposing parties have some basis to calculate the damages claimed against them. Consequently, the party making the damage claim has the obligation in its initial disclosures to disclose to the other parties the best information available to the disclosing party related to the damages claim at the time of the disclosure, however limited and subject to change the information may be at that time. n34 Furthermore, if documents on which a party's claim of injury or damages is based are in the possession of a third person over whom the disclosing party has control, the disclosing party must make the third-person documents available to the other parties for their inspection and copying in connection with its initial disclosures. n35

[v] Insurance Agreements

As the last item a party must make in initial disclosures, the party must make available to the other parties for inspection and copying under Rule 34 any insurance agreement under which any insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. n36 The purpose of this disclosure is to enable the opposition to realistically appraise the case by determining whether an insurer will be able to satisfy an expected judgment or settlement agreement, n37 based on knowledge of the size of the fund that is available for the satisfaction of any judgment obtained, rather than speculation. n38 Counsel should note that the discovery of insurance information pursuant to this provision does not render insurance information admissible in evidence. n39

In some circumstances, a party may properly refuse and object to production of insurance documents. When the party under the obligation to disclose has or is providing all of the information necessary to satisfy the purpose of the insurance coverage disclosure provision, the party has complied with the initial disclosure requirements. n40 In such circumstances, the initial insurance disclosures must be made unless the party objects during conference that initial disclosures are not appropriate in circumstances of the action, and states the objection in the Rule 26(f) proposed discovery plan. n41

[vi] Types of Proceedings Exempted From Initial Disclosure Requirements

The following categories of proceedings are exempt from the initial disclosure requirements specified in [ii] through [v], *above*: n42

1. An action for review on an administrative record;

2. A forfeiture action in rem arising from a federal statute;

3. A petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

4. An action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

5. An action to enforce or quash an administrative summons or subpoena;

6. An action by the United States to recover benefit payments;

7. An action by the United States to collect on a student loan guaranteed by the United States;

8. A proceeding ancillary to a proceeding in another court; and

9. An action to enforce an arbitration award.

These descriptions of the exempted proceedings are generic and should be interpreted with flexibility. However, the enumeration of the exempt proceedings is exclusive, which means that only those proceedings actually listed are exempt from the initial disclosure requirements. n43 Thus, although the first exclusion, for an action for review on an administrative record, exempts a proceeding that is determined to be an "appeal" based solely on the administrative record, it does not exempt any proceeding that commonly permits admission of new evidence to supplement the administrative record, because such a proceeding does not constitute an "appeal." Furthermore, it should be noted that district courts are prohibited from adopting local rules or issuing standing orders that alter the enumerated list of exempted proceedings. n44

[c] Timing of Initial Disclosures

Unless the court directs or the parties stipulate otherwise, the initial disclosures must be made at or within 14 days of the discovery conference specified in Rule 26(f). n45 The timing of the Rule 26(f) conference is generally left to the agreement of the parties, provided that it must be held at least 21 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). n46 If a defendant asserts that the plaintiff has not properly pleaded the complaint, and makes a motion that the complaint should be dismissed, the defendant may obtain a stay of the requirement of the initial disclosures pending resolution of the motion to dismiss, provided that the defendant makes a strong showing that the plaintiff's claim is without merit. n47

Any party joined after the Rule 26(f) conference has 30 days after being served or joined within which to make its initial disclosures. However, the parties may stipulate to a different time period for any subsequently joined party to make its initial disclosures, or the court may order a different time for such disclosures in the particular case. n48

[2] Required Disclosures of Expert Witnesses

[a] Duty to Make Expert Witness Disclosures

Each party must disclose the identity of any person whom the party may use at trial to present expert testimony n1 and information about the opinions that the expert will express in testimony and the factual basis of those opinions. n2 The purpose of this rule is to give parties a reasonable opportunity to prepare an effective cross-examination of the opposing party's expert witnesses and, if necessary, arrange for testimony from other experts. n3 The parties have the duty to supplement these disclosures when required under Rule 26(e). n4

[b] Subject Matter of Expert Witness Disclosures

[i] Identity of Expert Witnesses

Each party must disclose the identity of any person whom the party may use at trial to present evidence under *Rules 702*, *703*, or *705 of the Federal Rules of Evidence*, which pertain to expert witnesses. n5 This rule requires disclosure of any person who may testify as an expert witness under the specified Evidence Rules only, and therefore does not require a party to disclose the name of any lay witness who may be used at trial to present evidence under Rule 701 (opinion testimony by lay witnesses), even though the lay witness will be testifying regarding the witness's opinions. n6

[ii] Written Report Required by Retained or Employed Expert

If any witness is retained or specially employed to provide expert testimony in the case, or if any witness has duties as an employee of a party which regularly involve giving expert testimony, that witness must make a report unless otherwise stipulated or ordered by the court. n7 For purposes of the rule, "witnesses who are retained or specially employed to provide expert testimony" include any witness: who will receive some type of consideration, whether or not monetary consideration, and who will testify pursuant to *Rule 702 of the Federal Rules of Evidence*. n8 On the other hand, if an expert witness is not so retained or employed, the expert need only summarize the opinions of the expert, rather than make a full report. n9

Each required report must be prepared and signed by the expert, and must accompany the identification of the witness. n10 The report must contain all of the following items:

(1) A complete statement of all opinions the witness will express and the basis and reasons for them. n11 The report need not replicate every word that the expert might testify to. Rather, it must convey the substance of the expert's opinion so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary. n12

(2) The facts or data considered by the witness in forming the opinions. n13 The disclosure of "facts or data" means that it is limited disclosure to material of a factual nature; it excludes theories or mental impressions of counsel. On the other hand, "facts or data" requires disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure requirement extends to all facts or data "considered" by the expert, whether or not actually relied on by the expert. n14

(3) Any exhibits that will be used to summarize or support the opinions. n15

(4) The witness's qualifications, including a list of all publications authored in the previous 10 years. n16

(5) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition. n17

(6) A statement of the compensation to be paid for the study and testimony in the case. n18

[iii] Disclosure Required by Expert Not Required to Provide Report

If an expert witness is neither retained or specially employed to provide expert testimony in the case, nor has duties as an employee of a party that regularly involve giving expert testimony, and is therefore not required to file a written report, n19 the party must nevertheless provide a disclosure for the expert, which contains both of the following:

(1) The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. n20

(2) A summary of the facts and opinions to which the witness is expected to testify. n21

These two disclosures are considerably less extensive than the full report required by Rule 26(a)(2)(B). Courts should not require extensive detail for these disclosures, noting that these witnesses have not been specially retained and may not be as responsive to counsel as those who have. Examples of these types of witness include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. n22

[c] Timing of Expert Witness Disclosures

A party must generally make its required expert witness disclosures either at the time ordered by the court or at the time stipulated to by the parties. n23 In the absence of such an order or stipulation, the disclosures must be made at least 90 days before the trial date or the date the case is to be ready for trial. n24 However, if the expert evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), the disclosures must be made within 30 days after such other party's disclosure. n25

[d] Exclusion of Expert's Testimony for Failure to Disclose

If a party fails to comply with the disclosure requirements of Rule 26(a)(2)(C), the court may sanction the failure by ordering the exclusion of the proposed expert's testimony, unless the failure was substantially justified or harmless. n26 When a party has failed to comply with a discovery requirement, the district court has discretion n27 to exclude or strike expert testimony from the record after considering the importance of excluded testimony, an explanation of a party for its failure to comply, potential prejudice that would arise from allowing the testimony, and the availability of a continuance to cure such prejudice. n28 In the same way, a party that fails to supplement the expert disclosures as required by Rule 26(e)(2) n29 is also subject to the exclusion of its expert's testimony. n30

[3] Additional Required Pretrial Disclosures Concerning Evidence to Be Used at Trial

[a] Duty to Make Additional Pretrial Disclosures

At a specified time before trial, each party must make automatic disclosures about evidence that will be presented at trial, n1 in addition to the automatic initial disclosures, n2 and automatic disclosures regarding expert witnesses. n3 These required disclosures, referred to as the "pretrial disclosures," must be made to other parties and also be promptly filed with the court. n4 As is the case with non-expert witness disclosures under Rule 26(a)(1)(A) and (B), the pretrial disclosure, applies only to evidence that will be presented other than solely for impeachment purposes. n5 In other words, there is no duty to disclose evidence that the party intends to use solely to impeach the other party's evidence. n6

[b] Subject Matter of Pretrial Disclosures

The parties must make the following three types of "pretrial disclosures" within the specified time before trial:

1. The name and, if not previously disclosed, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises. n7 It is important for a party to identify all prospective witnesses because Rule 37(c)(1) provides that only persons so listed may be used to present substantive evidence at trial, unless there was substantive justification for the omission or unless the failure to disclose was harmless. n8 "Substantial justification" means justification to a degree that would satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. n9 An example of a "substantial justification" for failure to disclose would be a trial development that could not have reasonably been anticipated. When a party does list a witness in its pretrial disclosure, the party is not necessarily obligated to secure that witness's attendance at trial, but the party is precluded from objecting if the person is called to testify by another party who did not list the person as a witness. n10

2. All witnesses whose testimony the party expects to present by deposition. The party must provide, if the deposition is not taken stenographically, a transcript of the pertinent portions of the deposition testimony. n11 The rule regarding nonstenographic depositions is intended to allow the opposing party time to verify a transcript made from an audio or video tape. n12 Under this provision, the court may by order or local rule require the parties to designate the particular portions of stenographic depositions to be used at trial. n13 When a deposition is recorded by videotape the opposition will be entitled to recover the costs of both videotaping and transcribing the deposition. n14

3. An identification of each document or other exhibit, including summaries of other evidence, separately identifying those that the party expects to offer and those that the party may offer if the need arises. n15 Although this rule requires each exhibit to be listed separately, voluminous items of a similar or standardized character may be described by purposeful categories. For example a consecutive series of invoice vouchers might be shown collectively as a single exhibit with their starting and ending dates. Under Rule 37(c)(1), a party may use an unlisted exhibit only if there was substantial justification for the omission, n16 such as a trial development that could not have been reasonably anticipated, or if the failure to disclose was harmless. n17

[c] Timing of Pretrial Disclosures

Unless the court specifies a different time, the pretrial disclosures under Rule 26(a)(3) must be made at least 30 days before trial and promptly filed with the court. Unless the court specifies a different time, the other parties have 14 days following the pretrial disclosures to file a list disclosing their objections to the use of a disclosed deposition witness under Rule 26(a)(3)(A)(ii) and any objections, and the reasons for the objections, to the admissibility of any materials disclosed under Rule 26(a)(3)(A)(iii). n18 A party who fails to list an objection to the admissibility of deposition testimony or an exhibit waives any objection to that evidence, except an objection under *Rules 402* and *403 of the Federal Rules of Evidence*. The purpose of this rule is to dispense with the need to provide foundation testimony for most documentary evidence. n19 However, listing an objection does not constitute an objection itself or obligate the court to rule on the objection; it merely preserves the party's right to object at trial. The court does have the option to deem the listing as a motion in limine and rule on the listed objection in advance of trial. n20

In addition to orders of court, compliance with the timing requirements of Rule 26(a)(3) may also be affected by a provision of the local rules of the particular district, and counsel should be familiar with such rules. For example, some local rules provide that a party need not file its list identifying trial witnesses until the calling party files a pretrial statement. n21

[4] Format and Filing of Automatic Disclosures

Unless the court orders otherwise, the disclosures under Rule 26 must be made in writing, signed, and served on all other parties. n1 Additionally, "pretrial disclosures' ' under Rule 26(a)(3) must be promptly filed with the court. n2 On the other hand, the mandatory initial disclosures required by Rule 26(a)(1) and the expert witness disclosures required by Rule 26(a)(2) need not be filed with the court n3 until they are used in the proceeding or the court orders filing. n4

Initial disclosures made on behalf of a represented party must be signed by at least one attorney of record in the attorney's individual name, with the attorney's address stated. Initial disclosures made by an unrepresented party must be signed by the party, with the party's address stated. The signature of the attorney or the party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it was made. n5

[5] Failure to Provide Required Automatic Disclosures

[a] Court Has Discretion to Impose Various Sanctions

The rule governing discovery violation sanctions explicitly provides that a party is subject to sanctions if the party fails to make an automatic, mandatory disclosure as required under Rule 26(a) or as ordered by the court. n1 Specifically, if a party without substantial justification fails to disclose information as required by Rule 26(a), and the failure is not harmless, the party may be precluded from using that witness or information at trial, at a hearing, or on a motion. n2 In addition to or in lieu of this sanction, the court on motion and after affording an opportunity to be heard, may impose other appropriate sanctions, such as requiring payment of reasonable expenses, including attorney's fees, caused by the violation of Rule 26(a), informing the jury of the failure to make the required supplementation, and may impose any of the actions authorized under Rule 37(b)(2)(A)(i)-(vi). n3

[b] Exception for Supplementation of Electronically Stored Information

There is an exception to the imposition of sanctions for cases involving disclosure of electronically stored information, n4 which includes but is not limited to, items such as data files, program files, and e-mail messages and files. n5 A court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n6 This provision applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may require a party to intervene to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. n7 A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(e) means that a party is not permitted to exploit the routine operation of an information system to avoid discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. n8

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice*, *§ 26.22* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(a)(1)*; *see* [b], *below* (subject matter of initial disclosures).

(n3)Footnote 2. *United States v. Dunn, 2007 U.S. Dist. LEXIS 27089, at *9 (N.D. Ill. 2007)* .

(n4)Footnote 3. *Fed. R. Civ. P. 26(a)(1)(E)*.

(n5)Footnote 4. *See* [vi], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 26(a)(1)(A)*.

(n7)Footnote 6. *See* [iii], *below*.

(n8)Footnote 7. *See* [iii], *below*.

(n9)Footnote 8. *See* [iv], *below*.

(n10)Footnote 9. *See* [v], *below*.

(n11)Footnote 10. *Fed. R. Civ. P. 26(a)(1)(E)*.

(n12)Footnote 11. *Charles F. McAfee, FAIA, NOMA, P.A. v. U.S.D. 259, 2006 U.S. Dist. LEXIS 47695, at *5-*6 (D. Kan. 2006)* .

(n13)Footnote 12. *Fed. R. Civ. P. 26(e)(1)(A)*.

(n14)Footnote 13. *See* [vi], *below*.

(n15)Footnote 14. *Toth v. Grand Trunk R.R., 306 F.3d 335, 344 n.3 (6th Cir. 2002)* .

(n16)Footnote 15. *Jordan v. City of Cleveland, 464 F.3d 584, 600-601 (6th Cir. 2006)* ; *see Fed. R. Civ. P. 26(a)(1)(A).*

(n17)Footnote 16. *Fed. R. Civ. P. 26(a)(1)(A)(i).*

(n18)Footnote 17. *Chalick v. Cooper Hosp./Univ. Med. Ctr., 192 F.R.D. 145, 150 (D.N.J. 2000)* .

(n19)Footnote 18. *Biggars v. Romans, 2006 U.S. Dist. LEXIS 30015, at *2-*5 (S.D.N.Y. 2006)* .

(n20)Footnote 19. *Hernandez-Torres v. Intercontinental Trading, 158 F.3d 43, 49-50 (1st Cir. 1998)* .

(n21)Footnote 20. *Dixon v. Certainteed Corp., 164 F.R.D. 685, 689 (D. Kan. 1996)* .

(n22)Footnote 21. *Fed. R. Civ. P. 26(a)(1)(C).*

(n23)Footnote 22. *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 223 F.R.D. 330, 332-333 (E.D. Pa. 2006)* .

(n24)Footnote 23. *Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n25)Footnote 24. *See Lomascolo v. Otto Oldsmobile-Cadillac, Inc., 253 F. Supp. 2d 354, 360-361 (N.D.N.Y. 2003)* .

(n26)Footnote 25. *Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n27)Footnote 26. *Lomascolo v. Otto Oldsmobile-Cadillac, Inc., 253 F. Supp. 2d 354, 360-361 (N.D.N.Y. 2003)* .

(n28)Footnote 27. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 2000 Amendments; *see Watson v. United States, 485 F.3d 1100, 1108 (10th Cir. 2007)* (disclosure required of actual item or its location).

(n29)Footnote 28. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 2000 Amendments.

(n30)Footnote 29. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 2000 Amendments.

(n31)Footnote 30. *Fed. R. Civ. P. 26(a)(1)(A)(iii)*; *see Fed. R. Civ. P. 34(a).*

(n32)Footnote 31. *Asia Strategic Investment Alliances, Ltd. v. General Electric Capital Services, Inc., 173 F.R.D. 305, 308 (D. Kan. 1997)* .

(n33)Footnote 32. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 1993 Amendments.

(n34)Footnote 33. *Design Strategy, Inc. v. Davis, 469 F.3d 284, 295 (2d Cir. 2006)* (this disclosure requires explanation in form of "computation" supported by disclosed documents).

(n35)Footnote 34. *See Stairmaster Sports/Med. Prods, Inc. v. Groupe Procycle, Inc., 25 F. Supp. 2d 270 (D. Del. 1998)* .

(n36)Footnote 35. *Arthur v. Atkinson Freight Lines Corp., 164 F.R.D. 19, 20 (S.D.N.Y. 1995)* .

(n37)Footnote 36. *Fed. R. Civ. P. 26(a)(1)(A)(iv)*; *see Fed. R. Civ. P. 34(a).*

(n38)Footnote 37. *In re Delmarine, Inc., 535 F. Supp. 2d 318, 322 (E.D.N.Y. 2008)* ; *Suffolk Fed. Credit Union v.*

CUMIS Ins. Soc'y, Inc., 270 F.R.D. 141, 143 (E.D.N.Y. 2010) .

(n39)Footnote 38. *Fed. R. Civ. P. 26(b)(2)*, Committee Note to 1970 Amendments.

(n40)Footnote 39. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 1993 Amendments.

(n41)Footnote 40. *Wegner by Wegner v. Cliff Viessman, Inc., 153 F.R.D. 154, 160-161 (N.D. Iowa 1994)* .

(n42)Footnote 41. *Fed. R. Civ. P. 26(a)(1)(C)*.

(n43)Footnote 42. *Fed. R. Civ. P. 26(a)(1)(B)(i)-(ix)*.

(n44)Footnote 43. *Al Odah v. United States, 329 F. Supp. 2d 106, 109 (D.D.C. 2004)* .

(n45)Footnote 44. *Fed. R. Civ. P. 26(a)(1)*, Committee Note to 2000 Amendments.

(n46)Footnote 45. *Fed. R. Civ. P. 26(a)(1)(C)*.

(n47)Footnote 46. *Fed. R. Civ. P. 26(f)(1)*.

(n48)Footnote 47. *Medhekar v. United States District Court, 99 F.3d 325, 328 (9th Cir. 1996)* ; *Catholic Order v. U.S. Bancorp Piper Jaffray, Inc., 337 F. Supp. 2d 1148, 1152 (N.D. Iowa 2004)* .

(n49)Footnote 48. *Fed. R. Civ. P. 26(a)(1)(D)*.

(n50)Footnote 1. *Fed. R. Civ. P. 26(a)(2)(A)*; *see § 15.02[2][b][i], below*.

(n51)Footnote 2. *Fed. R. Civ. P. 26(a)(2)(B), (C)*; *see § 15.02[2][b][ii], [iii], below*.

(n52)Footnote 3. *See Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 762 (7th Cir. 2010)* ; *Brandon v. Maywood, 179 F. Supp. 2d 847, 860 (N.D. Ill. 2001)* .

(n53)Footnote 4. *Fed. R. Civ. P. 26(a)(2)(E)*; *see Fed. R. Civ. P. 26(e)*, discussed in *§ 15.06[1][b]*.

(n54)Footnote 5. *Fed. R. Civ. P. 26(a)(1)(C)*; *see Fed. R. Evid. 702, 703, 705*.

(n55)Footnote 6. *Wilburn v. Maritrans GP Inc., 139 F.3d 350, 353-354 (3rd Cir. 1998)* .

(n56)Footnote 7. *Fed. R. Civ. P. 26(a)(2)(B)*; *see Meyers v. AMTRAK, 619 F.3d 729, 734 (7th Cir. 2010)* (consequence of non-compliance with Rule 26(a)(2)(B) is exclusion of expert's testimony unless failure was substantially justified).

(n57)Footnote 8. *Innogenetics, N.V. v. Abbott Labs., 512 F.3d 1363, 1375 (Fed. Cir. 2008)* ; *Smith v. State Farm Fire & Casualty Co., 164 F.R.D. 49, 56 (S.D.W. Va. 1995)* .

(n58)Footnote 9. *See Fed. R. Civ. P. 26(a)(2)(C)*; *Watson v. United States, 485 F.3d 1100, 1107 (10th Cir. 2007)* ; *see also § 15.02[2][b][iii], below*.

(n59)Footnote 10. *Fed. R. Civ. P. 26(a)(2)(B)*; *see § 15.02[2][b][i], above*.

(n60)Footnote 11. *Fed. R. Civ. P. 26(a)(2)(B)(i)*.

(n61)Footnote 12. *Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 762 (7th Cir. 2010)* .

(n62)Footnote 13. *Fed. R. Civ. P. 26(a)(2)(B)(ii)*.

(n63)Footnote 14. *Fed. R. Civ. P. 26(a)(2)(B)(ii)*, Committee Note to 2010 Amendments.

(n64)Footnote 15. *Fed. R. Civ. P. 26(a)(2)(B)(iii)*.

(n65)Footnote 16. *Fed. R. Civ. P. 26(a)(2)(B)(iv)*.

(n66)Footnote 17. *Fed. R. Civ. P. 26(a)(2)(B)(v)*.

(n67)Footnote 18. *Fed. R. Civ. P. 26(a)(2)(B)(vi)*.

(n68)Footnote 19. *Fed. R. Civ. P. 26(a)(2)(B)*; *see § 15.02[2][b][ii]*, *above*.

(n69)Footnote 20. *Fed. R. Civ. P. 26(a)(2)(C)(i)*.

(n70)Footnote 21. *Fed. R. Civ. P. 26(a)(2)(C)(ii)*.

(n71)Footnote 22. *Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note to 2010 Amendments.

(n72)Footnote 23. *Fed. R. Civ. P. 26(a)(2)(C)*.

(n73)Footnote 24. *Fed. R. Civ. P. 26(a)(2)(D)(i)*.

(n74)Footnote 25. *Fed. R. Civ. P. 26(a)(2)(D)(ii)*.

(n75)Footnote 26. *Fed. R. Civ. P. 37(c)(1)*.

(n76)Footnote 27. *Design Strategy, Inc. v. Davis, 469 F.3d 284, 297 (2d Cir. 2006)* (imposition of exclusion or other sanction is discretionary).

(n77)Footnote 28. *Trilogy Communications, Inc. v. Times Fiber Communications, Inc., 109 F.3d 739, 744 (Fed. Cir. 1997)* .

(n78)Footnote 29. *See Fed. R. Civ. P. 26(e)(2)*.

(n79)Footnote 30. *Fed. R. Civ. P. 37(c)(1)*; *Corwin v. Walt Disney World Co., 475 F.3d 1239, 1252 (11th Cir. 2007)* .

(n80)Footnote 1. *Fed. R. Civ. P. 26(a)(3)(A)*.

(n81)Footnote 2. *See* [2], *above*.

(n82)Footnote 3. *See* [3], *above*.

(n83)Footnote 4. *Fed. R. Civ. P. 26(a)(3)(A)*.

(n84)Footnote 5. *Fed. R. Civ. P. 26(a)(3)*; *see* [c], *below* (required timing on pretrial disclosures).

(n85)Footnote 6. *DeBiasio v. Illinois Cent. R.R., 52 F.3d 678, 686 (7th Cir. 1995)* .

(n86)Footnote 7. *Fed. R. Civ. P. 26(a)(3)(A)(i)*.

(n87)Footnote 8. *See Fed. R. Civ. P. 37(c)(1)*; *Fed. R. Civ. P. 26(a)(3)*, Committee Note to 1993 Amendments.

(n88)Footnote 9. *Chapple v. Alabama, 174 F.R.D. 698, 701 (M.D. Ala. 1997)* ; *see Roe v. Nevada, 621 F. Supp. 2d 1039, 1060 (D. Nev. 2007)* .

(n89)Footnote 10. *Fed. R. Civ. P. 26(a)(3)(A)*, Committee Note to 1993 Amendments.

(n90)Footnote 11. *Fed. R. Civ. P. 26(a)(3)(A)(ii)*.

(n91)Footnote 12. *See Little v. Mitsubishi Motors N. Am., Inc., 514 F.3d 699, 702 (7th Cir. 2008)* .

(n92)Footnote 13. *Fed. R. Civ. P. 26(a)(3)*, Committee Note to 1993 Amendments.

(n93)Footnote 14. *Little v. Mitsubishi Motors N. Am., Inc., 514 F.3d 699, 702 (7th Cir. 2008)* .

(n94)Footnote 15. *Fed. R. Civ. P. 26(a)(3)(A)(iii)*.

(n95)Footnote 16. *See Fed. R. Civ. P. 37(c)(1)*.

(n96)Footnote 17. *Fed. R. Civ. P. 26(a)(3)*, Committee Note to 1993 Amendments.

(n97)Footnote 18. *Fed. R. Civ. P. 26(a)(3)(B)*; *see Trafton v. Sunbury Primary Care, P.A., 689 F. Supp. 2d 198, 205 (D. Me. 2010)* (time limit also applies to obligation to supplement).

(n98)Footnote 19. *Fed. R. Civ. P. 26(a)(3)*, Committee Note to 1993 Amendments.

(n99)Footnote 20. *Fed. R. Civ. P. 26(a)(3)*; *see Fed. R. Evid. 402*, *403*.

(n100)Footnote 21. *D'Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43, 53 (D.D.C. 2008)* .

(n101)Footnote 1. *Fed. R. Civ. P. 26(a)(4)*.

(n102)Footnote 2. *Fed. R. Civ. P. 26(a)(3)(A)*.

(n103)Footnote 3. *See Fed. R. Civ. P. 26(a)(1)(A)*, *26(a)(2)(A)*.

(n104)Footnote 4. *Fed. R. Civ. P. 5(d)(1)*.

(n105)Footnote 5. *Fed. R. Civ. P. 26(g)(1)(A)*; *see also Fed. R. Civ. P. 26(e)(1)(A)* (duty to supplement disclosures).

(n106)Footnote 1. *Fed. R. Civ. P. 37(c)(1)*; *see Fed. R. Civ. P. 26(a)(1)*.

(n107)Footnote 2. *Fed. R. Civ. P. 37(c)(1)*.

(n108)Footnote 3. *Fed. R. Civ. P. 37(c)(1)(A)-(C)*.

(n109)Footnote 4. *Fed. R. Civ. P. 37(e)*.

(n110)Footnote 5. *See Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n111)Footnote 6. *Fed. R. Civ. P. 37(e)*.

(n112)Footnote 7. *Fed. R. Civ. P. 37(e)*, Committee Note to 2006 Amendments; *see Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 432 n.31 (S.D.N.Y. 2009)* (among factors that bear on party's good faith in routine operation of information system are any steps party took to comply with agreement requiring preservation of specific electronically stored information).

(n113)Footnote 8. *Fed. R. Civ. P. 37(e)*, Committee Note to 2006 Amendments.

Moore's Manual--Federal Practice and Procedure

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.03

§ 15.03 Scope and Limits of Discovery

[1] Information Requested Must Be Relevant n*

[a] Liberal Standard of Relevance

The parties to an action may generally obtain discovery of any information that is relevant to the claim or defense of any party. n1 Whether an item is relevant for discovery purposes depends on the subject matter of the action. Relevance for discovery purposes is broadly and liberally construed n2 in order to further the purposes of discovery, which are to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement. n3 Therefore, courts will resolve any doubt about relevancy in favor of permitting discovery. n4 Thus, trial courts exercise considerable discretion in handling discovery matters, and a district court's decision to permit or deny discovery is reviewable only for an abuse of discretion. Although it is rare for an appellate court to overturn a district court's decision to allow discovery, the appellate court will reverse when the requested material is not relevant to the issues or parties in the case. n5

[b] Information Need Not Be Admissible in Evidence

An important principle of civil discovery under the federal rules is that relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n6 Furthermore, because of the broad scope of discovery under the Federal Rules of Civil Procedure, the scope of examination permitted under Rule 26(b) is broader than that permitted at trial. n7 The rule permitting discovery of information inadmissible at trial has been broadly construed to include almost any matter that will assist the examining party to discover admissible evidence. n8 For example, inadmissible hearsay evidence is discoverable if it will likely lead to discovery of admissible evidence. n9 On the other hand, if there is no reasonable likelihood that allowing discovery of documents or other information will lead to discovery of evidence relevant to the underlying action, it is not discoverable. n10

[c] Pleadings Are Guide to Relevance But Are Not Determinative

Under the federal rules of "notice pleading," pleadings are extremely skeletal factual statements which control the boundaries of the claims and defenses in a case. Discovery is also important in determining the claims and defenses that

will be tried, as well as in discovering factual evidence concerning those claims and defenses. Therefore, the pleadings may be used as a guide to determine whether particular requested items are relevant to a claim or defense of any party, but are not determinative because of their general nature and because discovery may occur before full development and narrowing of the claims and defenses by the court and party has occurred. n11 When, for example, particular issues have been narrowed in a case, discovery not relevant to those issues may be refused. n12 Similarly, once a claim or defense of any party has been disposed of, a party may not discover information concerning the matter, n13 and a court may deny discovery of matters that are relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case. n14

[d] Any Party to Action May Obtain Information Relevant to Claim or Defense of Any Party

Any party may obtain discovery regarding any matter that is not privileged that is relevant to the claim or defense of any party. n15 This means that discovery requests do not have to relate to the requesting party's claim, but may relate to that party's defense, or to the claim or defense of another party. n16 Furthermore a party may obtain discovery relating to a claim even if that party is not directly involved in that particular claim, provided that the requested items are otherwise discoverable. n17 For example, a third-party defendant may seek discovery from the plaintiff even though the plaintiff has not asserted a claim against the third-party defendant. n18

Any party is also entitled to obtain discovery on foundational matters; for example, a challenge to a court's subject matter jurisdiction is considered a defense for which discovery may be obtained. n19 Similarly, discovery may be used to obtain information relating to the court's exercise of personal jurisdiction over the defendant, n20 or facts relating to venue. n21

[e] Party Opposing Discovery Has Burden to Show Lack of Relevance

Due to the liberal standard of relevance, the party resisting discovery generally has the burden of showing that the requested information is not relevant. n22 However, this burden may shift depending on the nature of the action or from whom the information is requested. n23 Furthermore, a person's status as a nonparty may be considered in weighing the burdens imposed by discovery. When a nonparty resists discovery, the standard of relevance is not as liberal as for parties. n24

[f] Good Cause to Discover Any Matter Relevant to Subject Matter of Action

On a showing of good cause, the court may order discovery of any matter relevant to the subject matter involved in the action, rather than merely relevant to a particular claim or defense. n25 Thus, when there is an objection to a discovery request on the ground that it goes beyond material relevant to the parties' claims and defenses, the court must (1) determine whether the request does exceed the bounds of the claims and defenses and, if so, (2) ascertain whether there is good cause to permit the discovery, provided that the material sought is relevant to the subject matter involved in the action. Under this test, "good cause" means that the information requested is necessar y for the achievement of justice and a fair trial. n26 However, the moving party's burden of obtaining discovery beyond that directly pertinent to a particular claim or defense in the suit appears not be a heavy burden, because the good cause standard warranting broader discovery is meant to be flexible. n27

[2] Discovery to Determine Existence of Documents and Other Tangible Things

A party may use discovery to determine from other parties the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things. n1 Thus, a party may discover the existence and location of books, documents, or other tangible things, even though the party is not entitled to discover the contents of the documents. n2 This provision permits discovery regarding books, documents, or other tangible things that would otherwise be inadmissible at trial. n3 For example, a party may discover whether certain documents exist that were

prepared in anticipation of litigation or for trial, even though production is barred from discovery by the work product rule. n4 This provision parallels the requirement that each party, as part of their initial disclosure, must provide a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things in the possession, custody, or control of the party that the party may use to support its claims or defenses, unless the use would be solely for impeachment. n5

[3] Discovery to Determine Identity and Location of Persons With Knowledge

A party may obtain discovery from another party of the identity and location of persons having knowledge of any discoverable matter. n1 This provision parallels the automatic disclosure requirement which mandates voluntary disclosure of the identity and location of persons likely to have discoverable information that the disclosing party may use to support its claims or defenses. n2 With respect to claims of privilege, the focus is on whether the items that are discoverable are privileged, and not whether the person who has knowledge has a privileged relationship with an attorney or party. Such a privileged relationship with a person with knowledge may not serve as the basis to withhold the identity of the person with knowledge. n3

The usual discovery limitations apply to this type of discovery, n4 and a party need not provide the identity and location of persons if the discovery request is cumulative or duplicative or obtainable from some other source, the requesting party has had other opportunity to obtain the information sought, or if answering the request would be unduly burdensome or expensive. n5 Similarly, a party need not provide information about a person with discoverable information if the party or attorney does not know the name, address, or phone number of the person with such knowledge. n6

[4] Limitation of Discovery Related to Experts n*

[a] Expert Expected to Testify at Trial

Any party may depose any expert witness who is expected to testify at trial. However, if a report is required from the expert witness under the discovery rules, n1 the deposition may not be conducted until after the report is provided. n2 When a party discloses documents or information to a testifying expert in connection with his or her testimony, those documents or information are discoverable by the opposing party, whether or not the expert relies on the documents or information in preparing the report; thus, the attorney-client privilege and any work product protection are waived by disclosure of confidential communications to expert witnesses. n3

[b] Trial Preparation Protection for Drafts of Expert Reports or Disclosures

A 2010 amendment to the Rules adds a provision specifically stating that n4 the trial preparation protection of Rules 26(b)(3)(A) and (B) n5 also protect drafts of any expert report required under Rule 26(a)(2)(B) n6 and any expert disclosure required under Rule 26(a)(2)(C). n7

This protection applies regardless of the form in which the draft is recorded, such as in hard copy or electronic digital storage on a disk or tape. n8 It also applies whether the draft is of an original or a supplemental submission. n9

[c] Protection of Communications Between Expert and Attorney

A 2010 amendment to the Rules adds a provision specifically stating that n10 the trial preparation protection of Rules 26(b)(3)(A) and (B) n11 also protect communications between any party's attorney and any witness required to provide an expert report required under Rule 26(a)(2)(B), n12 This protection applies regardless of the form in which the communication is made, n13 whether oral, written, electronic, or other form. This rule provision has been promulgated to protect counsel's work product and ensure that attorneys can interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness

required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. Also, the rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine. n14

However, there are three specific exceptions to this communication protection; the following three communications are not protected:

1. Any communication which relates to compensation for the expert's study or testimony. n15 The purpose of this exception is to permit full inquiry into potential sources of bias. Consequently, any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, are not protected, and neither are communications about compensation for work done by a person or organization associated with the expert. n16

2. Any communication which identifies facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed. n17 This exception applies only to communications identifying the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected. n18

3. Any communication which identifies any assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. n19 For example, the party's attorney may require the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. n20

Under the amended rule, discovery regarding attorney and expert communications on subjects not included in these three exceptions in Rule 26(b)(4)(C) is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii), which requires that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. n21

[d] Non-Testifying Expert Employed Only for Trial Preparation

A party may not generally use either interrogatories or depositions to discover facts known or opinions held by an expert that is not expected to be called as a witness but been specially retained by a party in anticipation of litigation or preparation for trial. n22 An expert is considered hired in anticipation of litigation if there is more than a remote possibility of litigation, even if a lawsuit has not actually been filed at the time of the hiring. n23 Discovery may be made regarding such an expert only under the following two circumstances:

1. As provided in Rule 35(b), n24 regarding reports on the physical and mental examinations of persons. n25

2. If the party requesting discovery shows exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. n26 The party seeking discovery has a heavy burden of proving that the required exceptional circumstances exist. n27

The purpose of these restrictive provisions is to prevent a party from replacing the work of its own experts with that of its opponent, n28 and the provision is not applicable when the opposition party has allowed discovery of its expert without objection. n29 To trigger the restrictions, the party claiming "privilege" pursuant to Rule 26(b)(4)(B) has the burden to establish that the materials were prepared by a non-testimonial expert retained in anticipation of trial, and when that burden is met, the party requesting discovery has the burden to prove waiver of the privilege. n30

[e] Payment of Discovery Related Fees of Expert

Unless manifest injustice would result, the court will require the party seeking discovery to pay the expert a reasonable fee for the time spent in responding to any discovery demands. n31 The purpose of this provision is to calibrate the fee so that the parties will not be hampered in efforts to hire quality experts, while opposing parties will not be burdened by unfairly high fees preventing feasible discovery and resulting in windfalls to the expert. n32 "Reasonable fees" do not include those expenses that could have been avoided by the party that is responding to the expert discovery request. n33 In determining the reasonableness of a requested fee, the court should consider: the expert's area of expertise; the education and training required to provide the expertise that is sought; the prevailing rates for other comparably respected experts; the nature, quality and complexity of the information provided by the expert; the cost of living in the applicable geographic area; and any other factor that may assist the court in achieving the proper balance of interests implicated by Rule 26. n34

In situations in which a party is permitted to discover facts known or opinions held by a non-testifying expert employed only for trial preparation, n35 the court may require the party seeking discovery to pay the other party a fair portion of the cost of obtaining such discovery. n36

[5] Court May Alter Limitations on Discovery n*

[a] Limitations on Depositions, Interrogatories, or Requests for Admission

The Federal Rules give specific authority to the court to alter the limits specified in the Federal Rules on the number of depositions, on the length of time of oral depositions under Rule 30, and the number of interrogatories. The court also has broad authority by order or local rule to limit the number of requests for admission under Rule 36. n1 The purpose for providing the court with this broad authority is to enable the court to prevent the need for unnecessary and costly discovery, and accomplish the other goals of discovery to narrow the issues and streamline the presentation of evidence at trial. n2

[b] Limitations on Discovery of Electronically Stored Information

A responding party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. However, if the requesting party moves to compel discovery or for a protective order to obtain that information, the responding party must show that the information is not reasonably accessible because of undue burden or cost. n3 If that showing is made, the court may still order discovery from such sources if the requesting party shows good cause, considering the factors allowing limitation on discovery under Rule 26(b)(2)(C), n4 as stated in [c], *below*. The court may specify conditions for the discovery of such electronically stored information. n5

Before a motion to compel or protective order is made, the parties must confer to determine whether they can agree on the parameters of the discovery of electronically stored information, n6 which includes, but is not limited to, items such as data files, program files, backup and archival tapes, cache files, temporary files, system history files, voice mail messages and files, backup voice mail files, e-mail messages and files, backup e-mail files, deleted e-mails, and web site information. n7 If the parties cannot resolve the scope of electronically stored discovery, and the court must decide, the responding party must show that the identified sources of such information are not reasonably accessible because of undue burden or cost, based on the circumstances of the case, and the particular information systems involved. n8

[c] Court Required to Limit Unnecessary Discovery

There are four circumstances in which the court must limit the frequency or extent of use of the discovery methods otherwise permitted under the Federal Rules of Civil Procedure. In these circumstances, the court after reasonable notice must act to limit discovery on its own initiative and order, or pursuant to a motion for a protective order: n9

1. If the discovery sought is unreasonably cumulative or duplicative, n10 considering the nature of the request. A court generally will not limit discovery simply because it may be slightly cumulative and duplicative. n11

2. If the discovery sought is available from another source that is more convenient, less burdensome, or less expensive. n12 For example, the court may limit discovery if the information is equally accessible to each party from a public source. n13 This analysis requires a determination as to whether the information should be discovered through the requesting party's chosen discovery source and discovery method. n14

3. If the party seeking discovery has already had ample opportunity to discover the information sought. n15 For example, the court may deny discovery of information from a third-party individual when the requesting party had prior opportunity to discover testimony from witnesses that were available to the requesting party. n16

4. If the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues. n17 This provision operates as a "proportionality test" n18 or "balancing test" which is designed to protect parties from unduly burdensome or expensive discovery requests. n19 Although the court may limit discovery on its own initiative, n20 the responding party may establish undue burden or expense by providing detailed affidavits or other evidence that illustrates the extent of the burden or expense. n21

[6] Party Not Permitted to Discover Privileged Information n*

[a] Party Ordinarily Precluded from Discovery of Privileged Information

Parties may not generally obtain discovery of privileged information. n1 The term "privilege," as used in the discovery rules, refers to the same matter as evidentiary privilege, n2 and the scope of privilege at the discovery stage of an action is the same as at the trial. n3 A "civil discovery privilege" is an exception to the ordinary rules of discovery to protect confidentiality based on a special relationship, such as an attorney-client communication. n4 For a discussion of the particular types of privilege, *see* [c] through [g], *below*.

There are two situations in which a party may make a claim of privilege or protection of trial-preparation materials. First, when a party wants to withhold information otherwise discoverable by claiming that it is privileged or subject to protection as trial-preparation material, the party must make the claim expressly and must describe the privileged or protected items in a manner that will reveal the nature of the privilege. n5 Second a party may claim privilege or trial-preparation protection in items already produced to another party by expressly notifying the other party of the claim and the basis of the claim. The receiving party must protect and return the documents, or have the court resolve the privilege or trial-preparation protection claim. n6

Because it is an exception to the ordinary rules, the doctrine of privilege is narrowly construed, in contrast to the doctrine of relevance, which is broadly construed. n7 Therefore, the burden of establishing that a privilege exists is on the party claiming the privilege. n8 The burden of establishing any exception to the claimed privilege then shifts to the party claiming the exception. n9 A party must support its assertion of privilege, and a blanket refusal to participate in discovery on the basis of a claimed privilege is not acceptable. n10 Rather, a party must make a claim of privilege at specific questions or documents, so that the trial court has a basis to rule on the privilege claim. n11

[b] State or Federal Law May Control Privileges

For any claim or defense governed by state law, any objections based on privilege related to that state law claim or defense are also governed by state law. n12 Thus, for diversity cases in federal court in which only state claims and defenses have been raised, all assertions of privilege are governed by state law. n13 If an action contains both federal

question claims and state-law diversity claims, any asserted privileges relating to evidence relevant to both the state and federal claims are governed by federal common law. Similarly, in cases in which jurisdiction is based both on the federal common law and on diversity of citizenship state-law claims, federal common law controls any claims of privilege with respect to evidence relevant to both sets of claims. n14

[c] Attorney-Client Privilege

The federal common law recognizes an attorney-client privilege, which protects from discovery any communication from a client to an attorney for the purpose of obtaining legal advice, provided that the communication was intended to be confidential. n15 The purpose of the attorney-client privilege is to promote complete and open communication between attorneys and their clients by assuring clients that their disclosures will be held in confidence, n16 which in turn facilitates the proper functioning of the adversary system. n17 Under the doctrine, no distinction is drawn between communications made by the client to the attorney and those made by the attorney to the client, provided that the communications are for the purpose of securing legal advice. n18 Also, corporate in-house counsel are treated in the same manner as counsel retained from the outside. n19 The attorney-client privilege extends to consultations between attorneys and their prospective clients, even if the attorney decides not to take the case, or the client decides not to retain the attorney. n20

Another important aspect of the doctrine is that only the communication itself is privileged; the underlying facts, as well as the factual circumstances surrounding the attorney-client relationship, are discoverable. n21 Thus, the privilege does not extend to the fact of consultation, or to the identity of the client or the attorney. n22

The United States Supreme Court has held that the attorney-client privilege survives the client's death, based on the purposes of the privilege. The court noted that there are weighty reasons that favor the posthumous application of the attorney-client privilege. Knowing that communications will remain confidential even after death encourages the client to communicate fully and openly with counsel. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures of these matters to his or her attorney at all. n23

The burden of establishing the attorney-client privilege is on the party asserting it. n24 Furthermore, when a privilege is claimed and the opponent alleges that it has been lost through disclosure, the burden of proof is on the claimant to show nondisclosure whenever that is material to the disposition of the claim. n25

[d] Other Privileges Arising from Professional Consultations

The federal courts recognize a psychotherapist-patient privilege. This privilege protects from compelled disclosure confidential communications between a licensed psychiatrist or psychologist and a patient made in the course of diagnosis or treatment. It also extends to confidential communications with licensed social workers in the course of psychotherapy. n26

Federal common law also recognizes a privilege between ordained clergy and their penitents, which protects confidential communications from discovery. n27 The privilege is restricted to confidential communications, including confessions, of a person seeking spiritual rehabilitation or guidance. Like the attorney-client and the psychotherapist-patient privileges, the clergy-penitent privilege is rooted in the imperative need for confidence and trust to preserve the relationship. n28 In federal cases in which a claim or defense is governed by state law, any claims of privilege pertaining to the state claim or defense are also governed by state law, and some states recognize a broader clergy-penitent privilege than that recognized under federal common law. n29

In contrast to the specific federal privilege for communications between psychotherapist and patient, federal courts do not recognize a general federal privilege between a physician and patient. n30 There is also no general accountant-client privilege recognized under federal statute or federal common law. n31 Furthermore, there is no federal banker-client

privilege recognized under federal statute or federal common law, n32 nor does federal common law recognize a stockbroker-client privilege. n33 However, in federal cases in which a claim or defense is governed by state law, an asserted privilege pertaining to the state claim or defense are also governed by state law. Therefore, a state-law privilege may be recognized with respect to these professional relationships, provided that the substantive claim involved is not based on federal law. n34

[e] Privilege for Marital Communications

Federal courts recognize a privilege for confidential marital communications. n35 The marital communications privilege prohibits one spouse from testifying about communications with the other spouse made in confidence during their marriage. The marital communications privilege applies in both civil and criminal cases, is held by the non-testifying spouse, and survives the termination of the marital relationship, but may be waived by disclosure by the person claiming the privilege. In the context of discovery, the marital communications privilege may be asserted against the production of information when four prerequisites have been met: (1) there must have been a communication, (2) there must have been a valid marriage at the time of the communication, (3) the communication must have been made in confidence, and (4) the privilege must not have been waived. n36

[f] Constitutional Privilege Against Self-Incrimination

The *Fifth Amendment to the United States Constitution* provides that no person may be compelled in any criminal case to be a witness against himself or herself. n37 The privilege against self-incrimination may also be applicable in a civil context, because courts may not compel a civil deponent to testify over a valid assertion of the *Fifth Amendment* privilege absent a grant of immunity. n38 To assert the privilege against self-incrimination in a civil context, the person need only demonstrate a continuing possibility of criminal prosecution, even if the possibility is remote. n39 On the other hand, the privilege is not available, unless the witness provides some credible reason why a discovery response would pose a real danger of incrimination. n40 Furthermore, any claim of privilege against self-incrimination must be directed to specific questions or documents. Thus, a deponent must appear for deposition, but may object to particular questions. n41 Only natural individuals may claim the *Fifth Amendment* privilege against self-incrimination. Thus, the privilege may not be claimed by a corporation, unincorporated association, partnership, labor union, or other joint entity. n42

[g] Government Privileges

In the same manner as for other privileges, federal courts may prevent or restrict discovery when government privileges, such as the deliberative process privilege or state secrets privilege, are implicated by discovery requests. n43 The rule regarding discovery related to government privileges is a result of the axiom that general discovery rules apply to the United States as a party in the same manner that they apply to all other parties. n44 Therefore, the government must claim privileges in the same manner as any other party, has the burden of establishing the existence of the privilege, and must assert the privilege in the same way procedurally as would any other party. n45 However, because of the nature of government secrets, the Supreme Court has endorsed the practice of holding in camera proceedings for determining whether the government may withhold documents from discovery based on a claimed government privilege. n46

There are several privileges unique to the United States government that don't exist for other parties. These include:

1. State secrets. n47 The state secrets privilege is designed to protect against impairment of the nation's defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign governments. The state secrets privilege may be claimed solely for the benefit of the government; it may neither be claimed nor waived by a private party. n48

2. A qualified privilege for official information or records. The court determines whether this privilege exists based on a

balancing of the party's need for the information against the government's interest in secrecy. In applying the balancing test, courts must examine the importance of the documents to the party's claim or defense, as well as any alternative sources for the information sought. n49

3. A qualified privilege for deliberative processes. n50 The deliberative process privilege protects communications that are part of the decision making process of a government agency. communications made as a part of an agency determination are protected from disclosure. n51

4. A qualified executive privilege, in which the president may protect official communications. n52

5. Federal statutory privileges, such as the statute prohibiting disclosure of federal tax return information; n53 and the statute providing that census reports are immune from legal process. n54

6. Other privileges, including an informer's privilege, a law enforcement evidentiary privilege, and a confidential report privilege. n55

[h] Waived Privilege Ordinarily Subjects Material to Discovery

If a party has waived a privilege, the party is not entitled to withhold it from discovery. n56 Most privileges n57 are waived either by disclosure of the confidential communication that is the basis of the privilege, n58 or by putting the subject matter of the privileged communication in issue on a claim or defense. n59

However, because of the complexity and volume of discovery in modern litigation, and discovery demands related to electronic information, an ever increasing number of federal courts have held that not every disclosure of information is a waiver of privilege. Most courts now apply a reasonableness test regarding waiver of a disclosure if the disclosure was inadvertent. n60 Under this test, the court may rule that a waiver of a privilege has not occurred by an inadvertent disclosure after considering: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness. n61

Additionally, Congress has enacted *Federal Rule of Evidence 502* n62 which limits the waiver consequences of certain disclosures of information protected by the attorney-client privilege. Specifically, Evidence Rule 502 establishes standards to determine whether a waiver of material protected by the attorney-client privilege occurs in two situations, when the waiver has been made in a federal context. n63

First, if a person does waive attorney-client privileged material by disclosure, that waiver generally does not apply to undisclosed material, even if the undisclosed material concerns the same subject matter. n64 Second, the rule provides that protection for attorney-client material contained in an inadvertent disclosure is not waived, provided that the disclosing party had reasonably attempted to prevent the disclosure, and reasonably attempted to correct the mistaken disclosure. n65 In its determination whether the party has taken reasonable steps under Rule 502 to prevent disclosure or correct the disclosure, courts have looked to inadvertent disclosure tests from their own jurisdictions. n66

For a complete discussion of waiver by disclosure under Rule 502, see [8], *below*.

[7] Party Not Allowed to Discover Work Product n*

[a] Scope of Work Product Doctrine

The federal work product doctrine protects trial preparation materials made by one party from discovery by other parties. n1 The doctrine provides that a party may not obtain discovery of documents or other tangible things prepared

in anticipation of litigation or trial by or for another party or that other party's representative, unless: (1) they are otherwise discoverable under Rule 26(b)(1); n2 and (2) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. n3 If the court orders the discovery of work product materials after the party has made this required showing, the court must nevertheless protect to the extent possible against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation (known as "core work product"). n4 A federal court applies only federal law to work product claims, even in diversity cases, n5 whereas other types of privileges are governed by state law in diversity cases. n6

There is no precise definition of what constitutes a "document or other tangible thing" within the meaning of the work product doctrine, other than that the item was prepared in anticipation of the litigation between the parties to the current litigation. n7 Thus, documents protected under the doctrine include documents, records, reports, exhibits, and similar items, n8 such as letters n9 and surveillance tapes. n10 If a claim of work product applies to only a portion of a document or other matter containing the information that is the subject matter of the discovery request, the court may order redaction of the work product portions. n11 In this way, the opposition party receives only those portions of the item that are not protected by work product. n12

The work product privilege regarding a party's attorney protects both opinion and factual work product from discovery. n13 For example, an attorney's selection and compilation of a group of documents out of thousands gathered for litigation may fall within the purview of work product protection if it reveals the attorney's thought processes. n14 However, work product protection for the organization or selection of documents depends on the existence of a real, rather than speculative, concern that counsel's thought processes might be revealed. n15

The primary purpose of the work product doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from unfairly taking advantage of an adversary's preparation. n16 Another purpose of the work product doctrine is to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent. n17 Thus, Rule 26(b)(3) attempts to strike a balance between the necessity of protecting an attorney's preparation under the adversary system, and the policy of full and open discovery underlying the Federal Rules of Civil Procedure. n18

[b] Disclosure of Prior Statement Despite Doctrine

Regardless of the work product doctrine, a party may obtain a statement previously made by that party concerning the action or its subject matter without showing a substantial need or undue hardship. A nonparty is likewise entitled to obtain a statement previously made by that witness concerning the action or its subject matter without the required showing. n19 For purposes of Rule 26(b)(3), a "statement previously made" is either: (1) a written statement signed or otherwise adopted or approved by the person making it; n20 or (2) a stenographic, mechanical, electrical, or other recording, or a transcript of such a recording, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. n21 Thus, for example, handwritten notes of a conversation between a prospective plaintiff and the defendant's agent, taken during the defendant's investigation of the claim, do not constitute a "statement previously made" for purposes of Rule 23(b)(3), because they have not been signed or approved by the maker, nor are they are verbatim. n22

[c] Comparison of Work Product Protection With Attorney-Client Privilege

Unlike the attorney-client privilege, n23 the work product doctrine is governed, even in diversity cases, by the uniform federal standard embodied in Rule 26(b)(3). n24 The work product doctrine is separate from and broader than the attorney-client privilege, and the law regarding third-party waiver of work product protection is completely different. While the attorney-client privilege exists to encourage the client to communicate with his lawyer, the work product protection exists to encourage an attorney to prepare effectively for litigation. n25 Thus, unlike the attorney-client

privilege, the mere showing of a voluntary disclosure to a third person (which will generally suffice to show waiver of the attorney-client privilege) will not suffice in itself to prove waiver of the work product privilege. n26

[d] Items Must be Prepared in Anticipation of Litigation or for Trial

The work product doctrine applies only to documents or tangible items prepared in anticipation of litigation or for trial. n27 However, litigation need not have actually commenced for the doctrine to apply. Courts have held that the anticipation of litigation must be reasonable based on the perception of the party that some past or future act or condition related to the party may precipitate litigation with another. n28 However, "anticipation of litigation" does not necessarily mean that any specific litigation assertions or claims have been made. n29 Other courts require that at the time the document is created, the party or its representative must have in mind a specific claim supported by concrete facts which would likely lead to litigation. n30

Because work product protection extends only to documents prepared in anticipation of litigation or trial, that protection does not extend to documents prepared in the regular course of a party's business. n31 The crucial factor in determining whether a document was prepared in the regular course of business or in anticipation of litigation is the party's purpose in preparing the document, or causing its preparation. n32 If there was an ordinary business purpose behind the document's preparation, it is unprotected, even if litigation was imminent. n33

[e] Protection Continues After Litigation Ends

Just as litigation need not have been commenced for work product protection to apply, a document or tangible item does not necessarily lose its protection when the litigation ends. n34 Most courts hold that a document remains protected by the work product doctrine in subsequent litigation, reasoning that the doctrine is designed to protect the attorney as much as the client, so that its application should not depend solely on how closely related the subsequent litigation is to the parties or issues involved in the prior case. n35

However, other courts will not extend the doctrine to subsequent litigation unless there is a close relationship between the parties or issues in the subsequent litigation. n36 The Supreme Court in dicta has stated that the literal language of a Freedom of Information Provision similar to Rule 26(b)(3) protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. n37

[f] Documents Must be Prepared by or for Party or Representative

The work product doctrine provides protection only for documents or things prepared by or for a party or the party's representative. n38 The Supreme Court has acknowledged that this element of Rule 26 reflects the extremely practical nature of the work product doctrine, including the fact that parties and attorneys commonly rely on investigators and experts in preparing for trial. n39 Therefore, reports prepared by agents of the party or the party's attorney may be protected by the work product doctrine, provided they are prepared in anticipation of litigation. n40

For work product purposes, the term "representative" may include inside employees of the party or attorney, or outside contractors hired only for a particular project. n41 However, a party may not attempt to shield information from discovery by hiring as a litigation "consultant" a person who might otherwise be a witness in the case. n42 Additionally, if the document is prepared for a nonparty to the litigation, work product protection does not apply if the nonparty is not a representative of a party, even if the nonparty is a party to closely related litigation. n43

[g] Doctrine Not Applicable on Certain Facts

The purpose of the work product doctrine is to protect against disclosing an attorney's strategies and legal theories regarding litigation. Consequently, the work product doctrine provides that facts related to those matters need not be disclosed. If a document is covered by work product protection, a party generally need not disclose its factual contents

regarding any matters. n44 However, the opposition may obtain discovery of facts from work product provided the opposition establishes substantial need and inability to obtain the facts elsewhere. n45 Similarly, facts are not protected from disclosure merely by virtue of having been gathered by an attorney. n46

[h] Work Product Protection May be Claimed by Client or Attorney

Work product protection may be claimed either by the client or the attorney. n47 Because the work product doctrine protects only materials that were prepared in anticipation of litigation, at the time a client seeks protection of the material, the client also must be a "party." n48 The person claiming work product may be either an individual or an organization, including the government. n49

[i] Burdens Under Work Product Doctrine

[i] Party Asserting Work Product Protection

The party asserting work product protection has the burden of establishing that the doctrine applies. In order to satisfy this burden, the party must show that the materials are: n50 (1) documents and tangible things; n51 (2) prepared in anticipation of litigation or for trial; n52 and (3) prepared by or for the party or by or for that party's representative. n53 A party may not rely on a conclusory assertion of the work product doctrine to object to discovery requests, because that party has a heavy burden to establish the applicability of the doctrine. n54 Furthermore, a party may not utilize a blanket assertion of the work product doctrine to object to multiple discovery requests, because the party asserting the doctrine must generally establish applicability for each request that calls for production of work product. n55 Rather, the party asserting the rule must establish that each objectionable request calls for production of work product. If a party believes that an entire request for production would be prohibited by the work product doctrine, the party should seek a pre-discovery protective order from the district court. n56

[ii] Party Seeking Disclosure

Once a party claiming protection under the work product doctrine establishes that the doctrine applies, n57 the party seeking discovery has the burden to establish that (1) the items are otherwise discoverable, n58 (2) the party has substantial need of the materials in preparation of the party's case, and (3) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. n59

Even when the proponent of discovery has established these three elements, the court still must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, which are know as "core work product." n60 Accordingly, the substantial need and undue hardship test applies only to ordinary or fact work product, i.e., documents prepared in anticipation of litigation or for trial, which do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. n61

In making a determination of whether the requesting party has met the substantial need/undue burden test, the court will consider if any alternative means of acquiring the information are less intrusive to the attorney's work, and whether the information can be obtained in other ways. n62 A party may meet its burden to show a substantial need for material otherwise protected by the work product doctrine by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case. n63 A party may show undue hardship by showing impossibility, for example, when the only available witness can no longer recall the statements reflected in the documents. n64

[j] Waiver of Work Product Protection

A party may waive protection of the work product doctrine, n65 by, for example, failing to assert it in a timely manner.

n66 With respect to waiver by disclosure, however, the different policies behind the work product doctrine and the attorney-client privilege lead to different rules of waiver. Unlike the attorney-client privilege, which is designed to protect the client's confidences, the work product doctrine is designed to protect the adversary process. n67 Therefore, not every disclosure of work product waives the doctrine. n68 For example, a party does not waive work product protection by providing documents to those assisting in trial preparation. n69

In general, a party does make a waiver of work product protection for by disclosing the document to a third party, when the disclosure is intentional and, at the time of disclosure, there was a substantial likelihood that the material could be disclosed to an adversary. n70 However, if the disclosure to the third party is inadvertent, the court will consider (1) whether the party seeking discovery of the documents was misled by the disclosure, or relied on the disclosure to its detriment, (2) the reasonableness of the precautions the party claiming the privilege took to prevent accidental disclosure, (3) the amount of time it took the disclosing party to notice its error, and (4) the overriding interest of fairness and justice. n71

If information subject to a claim of protection as work product is actually produced in discovery, the protection is not necessarily lost or waived. Under Rule 26(b)(5)(B), the party claiming work product protection may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and may not use or disclose the information until the claim is resolved. If the claim of trial-preparation material is contested, the party that received the information may present the matter to the court for determination. n72

When a party asserts a work product claim as to material that has already been produced, the court will apply the usual principles developed for determining whether waiver resulted from an inadvertent disclosure, as discussed in the previous paragraph. In other words, Rule 26(b)(5)(B) does not control the determination of whether the work product doctrine has been waived for particular disclosed material. Rather, once a court has determined there is no waiver for inadvertently disclosed privileged material, the rule specifies a detailed procedure for parties to retrieve that material without allowing its use. n73

A new Federal Rule of Evidence enacted by Congress n74 also limits the waiver consequences of certain disclosures of information protected by the work product doctrine. n75 In particular, Evidence Rule 502 establishes standards to determine whether a waiver of protected material occurs in two situations when the waiver has been made in a federal context. n76 First, if a disclosure and waiver is made of particular material, that waiver generally does not apply to undisclosed material, even if the undisclosed material concerns the same subject matter. n77 Second, the rule provides that protection for material contained in an inadvertent disclosure is not waived, provided that the disclosing party had reasonably attempted to prevent the disclosure, and attempted to correct the mistake. n78 Courts may refer to prior case law in their own jurisdictions to determine what are "reasonable steps." Thus, Rule 502 is actually a set of non-determinative guidelines that vary from case to case. n79

For a complete discussion of waiver by disclosure under Rule 502, see [8], *below*.

A party may not use the work product doctrine as both a sword and a shield. n80 This means that a party impliedly waives work product protection if it places the substance of the documents for which the protection is claimed at issue, or uses the substance of the documents in testimony. n81

[8] Limitations on Waiver by Disclosure of Attorney-Client Privilege and Work Product Protection n*

[a] Scope of Limitations on Waiver

To ensure the predictability of the effects of waiver of attorney-client privilege and work product protection by disclosure, n1 and to protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent

mistake, n2 Congress has enacted *Federal Rule of Evidence 502*. n3 Rule 502 controls the waiver effect for disclosures of materials subject to either to the attorney-client privilege n4 or the doctrine of protected work product. n5 Essentially, Rule 502 has two provisions that apply related to disclosures made in a federal proceeding or to a federal office or agency. n6 First, if a person does waive by disclosure, that waiver generally does not apply to undisclosed material, even if the undisclosed material concerns the same subject matter. n7 Second, the rule provides that protection for material contained in an inadvertent disclosure is not waived, provided that the disclosing party had reasonably attempted to prevent the disclosure, and attempted to correct the mistake. n8

[b] Purpose of Limitations on Waiver

Congress enacted *Federal Rule of Evidence 502* n9 for several purposes: n10 (1) to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by either the attorney-client privilege or the work product doctrine; (2) to resolve court disputes about the effect of inadvertent disclosures and subject matter waiver; and (3) to control exorbitant litigation costs that have been recently brought about by the necessity for litigants to protect against waiver resulting from any disclosure, however innocent or minimal, especially in cases involving electronic discovery. n11

[c] Proceedings Which May Create Limitations on Waiver

The limitations on waiver under Rule 502 are generally created when a disclosure of attorney-client or work product is made in a federal proceeding or to a federal office or agency. n12

Additionally, a limitation on waiver may be created in a state court. Thus, if a disclosure is made in a state proceeding, and is not the subject of a state court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if *either* the disclosure would not be a waiver under Rule 502 if it had been made in a federal proceeding, n13 or the disclosure is not a waiver according to the law of the state where the disclosure occurred. n14 Thus, whether a waiver occurs in a state court proceeding depends on an application of that law, state or federal, that is most protective of privilege and work product. n15

[d] Subsequent Federal and State Proceedings Are Subject to Waiver Limitations

To ensure the predictability of waiver by disclosure, the rule regulates the waiver consequences of disclosure of protected information at both the federal and state levels. n16 Therefore, notwithstanding the other Federal Rules of Evidence, n17 the waiver effect of disclosure of protected material is governed by Rule 502 in both federal and state courts. n18 Furthermore, the waiver effect of Rule 502 also controls even in diversity cases, n19 where state law ordinarily applies the rule of decision. n20 The costs of discovery can be equally high for state and federal claims, and the purpose of the rule is to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Consequently, this federal rule applies to state law claims brought in federal court, even in diversity cases. n21

Because Rule 502 limitations apply in all federal court proceedings, the limitations also apply in court-annexed and court-ordered arbitrations, n22 without regard to any possible contrary provisions of Rules 101 and 1101. n23

[e] Protected Material Subject to Waiver Limitations

The provisions of Rule 502 apply only to disclosure of a communication or information covered by either the attorney-client privilege or work product protection. n24 For purposes of the rule, "attorney-client privilege" means the protection that applicable substantive law provides for confidential attorney-client communications; n25 and "work product protection" means the protection that applicable substantive law provides for tangible and intangible material prepared in anticipation of litigation or for trial. n26

Rule 502 does not cover waiver of other types of privilege. Furthermore, the rule only covers waivers by disclosure, and not other methods of waiver, n27 such as when a party relies on attorney advice in either a claim or defense. n28

Rule 502 only applies to waiver of the attorney-client privilege and work product protection. Rule 502 does not in any way affect the federal or state law concerning whether a particular communication or information qualifies as protected material under the attorney-client privilege or work product immunity as an initial matter; n29 that determination is made according to the applicable substantive law. n30 Furthermore, while it does establish some exceptions to waiver, the rule does not modify or add to the applicable federal or state waiver doctrine generally. n31

[f] Disclosure of Protected Matter Does Not Generally Waive Similar Undisclosed Matter

If a disclosure is made in a federal proceeding or to a federal office or agency, and that disclosure waives the attorney-client privilege or work product protection, such waiver generally does not also extend to an undisclosed communication or information in a subsequent federal or state proceeding. n32 However, such undisclosed matters are waived if *all three* of the following factors apply:

1. The original disclosure must have been intentional. n33 Inadvertent disclosures do not waive similar, undisclosed information. n34

2. The disclosed and undisclosed communications or information must concern the same subject matter. n35 Thus, "subject matter waiver" applies only when both the disclosed and undisclosed material cover identical topics. n36

3. Both the disclosed and undisclosed matters ought in fairness to be considered together. n37 The effect of this provision is that subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading, and unfair manner. Thus, if a party makes a selective, misleading disclosure that is unfair to the adversary, the disclosing party waives protection of undisclosed information on the same topic, and opens itself to a more complete and accurate presentation of the material. n38

[g] Waiver of Inadvertent Disclosures

[i] Disclosures Generally Waived

A voluntary disclosure of protected matters is generally deemed waived in federal court. n39 Many courts hold that there is a waiver even if the disclosure was inadvertent. n40 However, when made in a federal proceeding or to a federal office or agency, a disclosure is *deemed not* waived in any federal or state proceeding provided that *all three* of the factors listed in [ii], below, apply. n41

[ii] Three Factors Required for Nonwaiver of Inadvertent Disclosure

1. The first prerequisite for nonwaiver is that the disclosure is inadvertent. n42 An inadvertent disclosure is one that is not intentional and that is not due to gross negligence. n43 Thus, an inadvertent disclosure unintentionally occurs, for example, when a third party transfers documents or information between two parties without the knowledge of either party. n44 An inadvertent disclosure also occurs when the party makes the disclosure by mistake. n45 Whether a disclosure is inadvertent depends on the facts of each case. n46 Thus, the court should consider factors such as the total number of documents reviewed, the procedures used to review the documents before they were produced, and the actions of the producing party after discovering that the documents had been produced. n47

2. The second prerequisite to nonwaiver is that the holder of the privilege or protection took reasonable

steps to prevent disclosure of the matters not waived. n48 Whether steps are reasonable depends on the circumstances of each case, and include factors such as the nature of precautions taken, any delay in correcting the error, the extent and numbers of disclosures, the scope of discovery, and fairness to the party requesting discovery. n49

3. The third prerequisite to nonwaiver is that the disclosing party promptly took reasonable steps to rectify the error after the disclosure, n50 including complying with any applicable requirements of Procedure Rule 26(b)(5)(B), which mandates notification of the opposition of the claim of protection and the basis for the claim, and preservation of the disclosed information until the claim is resolved. n51 *How* the disclosing party *discovers and rectifies* the disclosure is more important than *when* after the inadvertent disclosure the discovery occurs. n52

Once the producing party has shown minimal compliance with the three factors in Rule 502(b) listed above, but reasonableness is in dispute, the court should proceed to an analysis of the traditional five factors considered relevant on the issue of inadvertent disclosure of privileged material. n53 These five factors are: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its disclosure errors. n54

[h] Limitations on Waiver of Disclosures Made in State Court Proceeding

If a disclosure is made in a state proceeding and is not the subject of a state court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if *either* of the following is true:

(1) The disclosure would not be a waiver under Rule 502 if it had been made in a federal proceeding; n55 or

(2) The disclosure is not a waiver under the law of the state where the disclosure occurred. n56

Thus, whether a waiver occurs in a state court proceeding depends on an application of that law, state or federal, that is most protective of privilege and work product. Such a rule controls cases when (a) a disclosure of a protected communication or information is made in a state proceeding, (b) the communication or information is offered in a subsequent federal proceeding on the ground that there was a waiver by disclosure, and (c) the state and federal laws are in conflict on the question of waiver. n57

[i] Controlling Effect of Court Order on Waiver

Both federal and state courts may on motion, or on their own initiative, order that a disclosure of documents does or does not have the effect of waiver of attorney-client or work product protection. n58 Such an order is typically used in conjunction with a confidentiality order. n59 The effect of such orders are as follows:

1. A federal court may order that a privilege or protection is not waived by disclosure connected with the litigation pending before the court. The court may make this order after it has made a determination under the requirements of Evidence Rule 502(a) n60 or 502(b) n61 that the disclosure in question has not resulted in a waiver of privilege or protection for the particular items specified in the order. n62 Such an order has the effect that the disclosure is also not a waiver in any other subsequent federal or state proceeding. n63 This provision was enacted because tailored confidentiality orders are becoming increasingly necessary to limit the costs of privilege review and retention, especially in cases involving electronic discovery; however, such orders may not be effective unless the order provides for protection

outside the particular litigation in which the order is entered. n64

2. A state court may enter an order concerning waiver of protected material, and if it makes such an order, the court in federal proceedings may give effect to that order. n65 Whether the federal court must give effect to the state court order depends on both statutory law and on the principles of federalism and comity n66 under the full faith and credit statute. n67

[j] Controlling Effect of Party Agreement on Waiver

If parties have made an agreement on the effect of disclosure in a federal proceeding, that agreement is binding only on the parties to the agreement, unless a court incorporates the agreement into a court order. n68 Therefore, if parties want protection against non-parties from a finding of waiver by disclosure, they must request the court to include the agreement in an order of the court. n69 The court may on its own initiative include such an agreement in its order. n70

[9] Procedure for Asserting Claim for Protection of Material as Privileged or Work Product

[a] Withholding Otherwise Discoverable Material

A party is entitled to withhold from discovery materials that would otherwise be discoverable if the materials are privileged or constitute work product. n1 To withhold materials under a claim of privilege or work product, the party must make the claim expressly, n2 and describe the nature of the information not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the claim. n3 The court will overlook slight imperfections in a party's efforts to comply with this rule to protect privileges or work product materials, provided that the imperfections do not prejudice the opposition. n4 However, a conclusory or blanket assertion of privilege is insufficient to make a claim. Rather, the party must include a description and grounds for the privilege or work product claimed for each document withheld. n5 The party asserting the privilege must supply enough information to enable the court to determine whether the asserted privilege is applicable. n6

Courts almost universally require a party claiming privilege or work product to produce what is referred to as a "privilege log," which is a detailed list describing all of the items that come under the privilege or work product claim. n7 The privilege log must contain sufficient detail to permit the court to determine whether each document or communication is potentially protected from disclosure. n8 For each document or communication, the log should contain: n9 (1) a brief description or summary of the contents of the document or communication; (2) the date the document was prepared; (3) the names of the persons who prepared the document; (4) the person to whom the document was directed, or for whom it was prepared; (5) the purpose for preparing the document or communication; (6) the privilege or privileges asserted for the document or communication; and (7) how the document or communication satisfies the asserted privilege or privileges.

[b] Claiming Privilege or Work Product for Documents Already Produced

If a party has made an inadvertent disclosure of privileged or work product material, the court may nevertheless find that the protection for the material has not been waived, as discussed in [6][h], [7][j], and [8], above. If the court has found no waiver for privileged or protected material that was inadvertently disclosed, Rule 26 specifies a detailed procedure for a party to obtain the return of that material, to maintain its protection, and to prevent its use by the opposition. n10 First, the party making the claim for privilege or work product must notify any party that received the information of the claim and the basis for it. The producing party must also preserve the information until the claim is resolved. n11 The notice of a claim should be in writing unless the circumstances preclude it, such as the assertion of the claim during a deposition. n12

After being notified of a claim of privilege or work product, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is

resolved. Alternatively, a receiving party may promptly present the information to the court under seal for a resolution of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. n13 The receiving party may move the court to determine the issues of whether the information is privileged or protected as work product, and whether the privilege or protection has been waived. n14 If it makes such a motion it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. n15

Attorneys should also note that the parties are required as part of their pretrial conference obligations to discuss any issues relating to assertions of privilege or protection as trial-preparation materials, n16 including whether the parties can further discovery by agreeing on procedures for asserting claims of privilege or protection after production n17 and whether to ask the court to enter an order that includes any such agreement reached by the parties. n18

[10] Discovery Implications of Freedom of Information Act n*

The Freedom of Information Act n1 is a mechanism for obtaining government documents that is entirely independent and separate from the civil litigation discovery process. Furthermore, the Act does not create any duties or privileges in addition to the ones provided by the usual civil discovery rules, n2 and the disclosure provisions of the Act were not intended to displace general civil rules of discovery. n3 However, the Act may serve as an independent source of information for use in litigation. With several exceptions, the Act provides that unless published, federal agencies must disclose and make available for public inspection and copying final opinions, including concurring and dissenting opinions and orders made in the adjudication of cases, n4 statements of policy and interpretations adopted by the agency but not published in the Federal Register, n5 administrative staff manuals and instructions to staff that affect a member of the public, n6 and copies of all records, regardless of form or format, which have been released to any person and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records. n7

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 26.41-26.46* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n3)Footnote 2. *Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979)* .

(n4)Footnote 3. *Coker v. Duke & Company, Inc., 177 F.R.D. 682, 685 (M.D. Ala. 1998)* .

(n5)Footnote 4. *Jewish War Veterans of the United States of Am., Inc. v. Gates, 506 F. Supp. 2d 30, 42 (D.D.C. 2007)* .

(n6)Footnote 5. *See, e.g., Epstein v. MCA, Inc., 54 F.3d 1422, 1423 (9th Cir. 1995)* (district court abused its discretion in allowing discovery of documents that would have no bearing on merits of case).

(n7)Footnote 6. *Fed. R. Civ. P. 26(b)(1).*

(n8)Footnote 7. *Lewis v. ACB Business Services, Inc., 135 F.3d 389, 403 (6th Cir. 1998)* .

(n9)Footnote 8. *See, e.g., Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499, 500-501 (6th Cir. 1970)* (citing **Moore's Federal Practice**).

(n10)Footnote 9. *Coleman v. American Red Cross, 23 F.3d 1091, 1097 (6th Cir. 1994)* (citing **Moore's Federal Practice**).

(n11)Footnote 10. *Food Lion, Inc. v. United Food and Commercial Workers International Union, 103 F.3d 1007, 1013 (D.C. Cir. 1997)* ; *see Abels v. JBC Legal Group, P.C., 233 F.R.D. 645, 647 (N.D. Cal. 2006)* (attenuated and vague hearsay not discoverable because it did not appear reasonably calculated to lead to the discovery of admissible evidence).

(n12)Footnote 11. *See Fed. R. Civ. P. 26(b)(1)*; *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., 2007 U.S. Dist. LEXIS 66767, at *21 (N.D.N.Y. Sept. 7, 2007)* ; *ICE Corp. v. Hamilton Sundstrand Corp., 2007 U.S. Dist. LEXIS 38180, at *13 (D. Kan. May 24, 2007)* .

(n13)Footnote 12. *Epstein v. MCA, Inc., 54 F.3d 1422, 1424 (9th Cir. 1995)* .

(n14)Footnote 13. *Jones v. Derosa, 238 F.R.D. 157, 163-164 (D.N.J. 2006)* .

(n15)Footnote 14. *Lewis v. ACB Business Services, Inc., 135 F.3d 389, 402 (6th Cir. 1998)* .

(n16)Footnote 15. *Fed. R. Civ. P. 26(b)(1).*

(n17)Footnote 16. *Kerr v. United States Dist. Court, 511 F.2d. 192, 197 (9th Cir. 1975)* , *aff'd on other grounds, 426 U.S. 394 (1976)* .

(n18)Footnote 17. *Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 69051, at *16-*19 (D. Kan. 2006)* .

(n19)Footnote 18. *Fruit Growers Co-op. v. California Pie & Baking Co., 3 F.R.D. 206, 208 (E.D.N.Y. 1942)* .

(n20)Footnote 19. *See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010 (2d Cir. 1986)* .

(n21)Footnote 20. *Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1034 (10th Cir. 1975)* .

(n22)Footnote 21. *Procacci v. Sigler, 61 F.R.D. 5, 7 (D.D.C. 1973)* .

(n23)Footnote 22. *In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1196-1197 (10th Cir. 2009)* (citing **Moore's Federal Practice**).

(n24)Footnote 23. *Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980)* (because of limited privilege attaching to confidentiality of journalistic sources in defamation action, plaintiff seeking identity of sources was required to establish relevance of requested information).

(n25)Footnote 24. *Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993)* .

(n26)Footnote 25. *Fed. R. Civ. P. 26(b)(1)*; *see In re Sealed Case (Medical Records), 381 F.3d 1205, 1215 n.11 (D.C. Cir. 2006)* .

(n27)Footnote 26. *Klein v. AIG Trading Group, Inc., 228 F.R.D. 418, 422-424 (D. Conn. 2006)* .

(n28)Footnote 27. *Fed. R. Civ. P. 26(b)(1)*, Committee Note to 2000 Amendments.

(n29)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n30)Footnote 2. *Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396, 398 (D.S.C. 1965)* .

(n31)Footnote 3. *Fed. R. Civ. P. 26(b)(1)*; *see Cotter v. Prudential Fin., 238 F.R.D. 567, 571 (N.D.W. Va. 2006)* , *vac. as to attorney's fees, 2007 U.S. Dist. LEXIS 62893 (N.D.W. Va. Jan. 5, 2007)* .

(n32)Footnote 4. *See Fed. R. Civ. P. 26(b)(3).*

(n33)Footnote 5. *See Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n34)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n35)Footnote 2. *See Fed. R. Civ. P. 26(a)(1)(A)(i).*

(n36)Footnote 3. *Corporate Express Office Prods. v. Gamache (In re Wagar), 2006 U.S. Dist. LEXIS 90345, at *48-*49 (N.D.N.Y. 2006)* .

(n37)Footnote 4. *Apsley v. Boeing Co., 2007 U.S. Dist. LEXIS 5144, at *11-*14 (D. Kan. 2007)* .

(n38)Footnote 5. *Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).*

(n39)Footnote 6. *Vandervest v. Wisconsin Central, Ltd., 172 F.R.D. 401, 402 (E.D. Wis. 1997)* .

(n40)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.80* (Matthew Bender 3d ed.).

(n41)Footnote 1. *See § 15.02[2][b][ii].*

(n42)Footnote 2. *Fed. R. Civ. P. 26(b)(4)(A).*

(n43)Footnote 3. *In re Pioneer Hi-Bred Intl., Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* .

(n44)Footnote 4. *Fed. R. Civ. P. 26(b)(4)(B).*

(n45)Footnote 5. *See § 15.03[7], below.*

(n46)Footnote 6. *See § 15.02[2][b][ii].*

(n47)Footnote 7. *See § 15.02[2][b][iii].*

(n48)Footnote 8. *Fed. R. Civ. P. 26(b)(4)(B).*

(n49)Footnote 9. *Fed. R. Civ. P. 26(b)(4)(B)*, Committee Note to 2010 Amendments.

(n50)Footnote 10. *Fed. R. Civ. P. 26(b)(4)(C).*

(n51)Footnote 11. *See § 15.03[7], below.*

(n52)Footnote 12. *See § 15.02[2][b][ii].*

(n53)Footnote 13. *Fed. R. Civ. P. 26(b)(4)(C).*

(n54)Footnote 14. *Fed. R. Civ. P. 26(b)(4)(C)*, Committee Note to 2010 Amendments.

(n55)Footnote 15. *Fed. R. Civ. P. 26(b)(4)(C)(i).*

(n56)Footnote 16. *Fed. R. Civ. P. 26(b)(4)(C)(i)*, Committee Note to 2010 Amendments.

(n57)Footnote 17. *Fed. R. Civ. P. 26(b)(4)(C)(ii).*

(n58)Footnote 18. *Fed. R. Civ. P. 26(b)(4)(C)(ii)*, Committee Note to 2010 Amendments.

(n59)Footnote 19. *Fed. R. Civ. P. 26(b)(4)(C)(iii).*

(n60)Footnote 20. *Fed. R. Civ. P. 26(b)(4)(C)(iii)*, Committee Note to 2010 Amendments.

(n61)Footnote 21. *Fed. R. Civ. P. 26(b)(4)(C)(iii)*, Committee Note to 2010 Amendments; *see Fed. R. Civ. P. 26(b)(3)(A)(ii), see § 15.03[7][a], below.*

(n62)Footnote 22. *Fed. R. Civ. P. 26(b)(4)(D).*

(n63)Footnote 23. *Spearman Indus., Inc. v. St. Paul Fire &Marine Ins. Co., 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001)* .

(n64)Footnote 24. *See Fed. R. Civ. P. 35(b).*

(n65)Footnote 25. *Fed. R. Civ. P. 26(b)(4)(D)(i).*

(n66)Footnote 26. *Fed. R. Civ. P. 26(b)(4)(D)(ii).*

(n67)Footnote 27. *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 208-209 (N.D. Ind. 1993)* (citing **Moore's Federal Practice**).

(n68)Footnote 28. *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 207 (N.D. Ind. 1993)* .

(n69)Footnote 29. *Agron v. Trustees of Columbia Univ., 176 F.R.D. 445, 449 (S.D.N.Y. 1997)* .

(n70)Footnote 30. *Western Resources, Inc. v. Union Pacific Railroad Co., 2002 U.S. Dist. LEXIS 1911 (D. Kan. 2002)* .

(n71)Footnote 31. *Fed. R. Civ. P. 26(b)(4)(E)(i).*

(n72)Footnote 32. *Mathis v. NYNEX, 165 F.R.D. 23, 24 (E.D.N.Y. 1996)* .

(n73)Footnote 33. *M. T. McBrian, Inc. v. Liebert Corporation, 173 F.R.D. 491, 493 (N.D. Ill. 1997)* .

(n74)Footnote 34. *Goldwater v. Postmaster Gen. of the United States, 136 F.R.D. 337, 340 (D. Conn. 1991)* .

(n75)Footnote 35. *Fed. R. Civ. P. 26(b)(4)(D)(i).*

(n76)Footnote 36. *Fed. R. Civ. P. 26(b)(4)(E)(ii).*

(n77)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.60* (Matthew Bender 3d ed.).

(n78)Footnote 1. *Fed. R. Civ. P. 26(b)(2)(A).*

(n79)Footnote 2. *Static Control Components, Inc. v. Lexmark Int'l, 2007 U.S. Dist. LEXIS 39788, at *21-*23 (E.D. Ky. 2007)* .

(n80)Footnote 3. *Fed. R. Civ. P. 26(b)(2)(B).*

(n81)Footnote 4. *Baker v. Gerould, 2008 U.S. Dist. LEXIS 28628, at *5 (W.D.N.Y. 2008)* ; *see Fed. R. Civ. P. 26(b)(2)(C).*

(n82)Footnote 5. *Fed. R. Civ. P. 26(b)(2)(B).*

(n83)Footnote 6. *See Fed. R. Civ. P. 26(b)(2)(B)*, Committee Note to 2006 Amendments.

(n84)Footnote 7. *See Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n85)Footnote 8. *See Petcou v. C.H. Robinson Worldwide, Inc., 2008 U.S. Dist. LEXIS 13723, at *3-*5 (N.D. Ga. 2008)* (responding party has burden of showing that requested electronically stored information is not reasonably accessible because of undue burden or cost.); *Fed. R. Civ. P. 26(b)(2)(B)*, Committee Note to 2006 Amendments.

(n86)Footnote 9. *Fed. R. Civ. P. 26(b)(2)(C).*

(n87)Footnote 10. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n88)Footnote 11. *Aramburu v. Boeing Co., 885 F. Supp. 1434, 1444 (D. Kan. 1995)* .

(n89)Footnote 12. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n90)Footnote 13. *FTC v. Think All Publ, 2008 U.S. Dist. LEXIS 18623, at *5-*6 (E.D. Tex. 2008)* .

(n91)Footnote 14. *Hall v. Sullivan, 231 F.R.D. 468, 475 (D. Md. 2005)* .

(n92)Footnote 15. *Fed. R. Civ. P. 26(b)(2)(C)(ii).*

(n93)Footnote 16. *Seales v. Macomb County, 226 F.R.D. 572, 578 (E.D. Mich. 2005)* .

(n94)Footnote 17. *Fed. R. Civ. P. 26(b)(2)(C)(iii).*

(n95)Footnote 18. *Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc., 240 F.R.D. 401, 412 (N.D. Ill. 2007)* .

(n96)Footnote 19. *Surles v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007)* .

(n97)Footnote 20. *Fed. R. Civ. P. 26(b)(2)(C).*

(n98)Footnote 21. *In re Urethane Antitrust Litig., 237 F.R.D. 454, 454 (D. Kan. 2006)* .

(n99)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 26.47-26.52* (Matthew Bender 3d ed.).

(n100)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n101)Footnote 2. *United States v. Reynolds, 345 U.S. 1, 6, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* .

(n102)Footnote 3. *Lincoln Am. Corp. v. Bryden, 375 F. Supp. 109, 111 (D. Kan. 1973)* (citing **Moore's Federal Practice**).

(n103)Footnote 4. *Flathead Joint Bd. of Control v. United States DOI, 309 F. Supp. 2d 1217, 1224 (D. Mont. 2004)* .

(n104)Footnote 5. *Fed. R. Civ. P. 26(b)(5)(A)*; *see* [8][a], *below*.

(n105)Footnote 6. *Fed. R. Civ. P. 26(b)(5)(B)*; *see* [8][b], *below*.

(n106)Footnote 7. *See Matter of Subpoena Served Upon the Comptroller of the Currency, 967 F.2d. 630, 634 (D.C. Cir. 1992)* .

(n107)Footnote 8. *Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)* .

(n108)Footnote 9. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31 (N.D. Ill. 1980)* (good cause exception to attorney-client privilege).

(n109)Footnote 10. *Byers v. Burleson, 100 F.R.D. 436, 439 (D.D.C. 1983)* (plaintiff's refusal to attend deposition unsupported, citing **Moore's Federal Practice**).

(n110)Footnote 11. *North River Ins. Co. v. Stefanou, 831 F.2d 484, 486-487 (4th Cir. 1987)* .

(n111)Footnote 12. *Fed. R. Evid. 501.*

(n112)Footnote 13. *Fed. R. Evid. 501*; *see Frontier Refining Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 699 (10th Cir. 1998)* .

(n113)Footnote 14. *See Doe v. Special Investigations Agency, Inc., 779 F. Supp. 21, 23-24 (E.D. Pa. 1991)* ; *see also* 3 *Weinstein's Federal Evidence,* Ch. 501, *General Rule* (Matthew Bender 2d ed.).

(n114)Footnote 15. *United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3d Cir. 1990)* .

(n115)Footnote 16. *Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 236 (D. Md. 2005)* .

(n116)Footnote 17. *Trammel v. United States, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* .

(n117)Footnote 18. *Kelly v. Ford Motor Company, 110 F.3d 954, 965-966 (3d Cir. 1998)* .

(n118)Footnote 19. *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

(n119)Footnote 20. *Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 225-226 (D.D.C. 1995)* .

(n120)Footnote 21. *Upjohn Co. v. United States, 449 U.S. 383, 395-396, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

(n121)Footnote 22. *See Howell v. Jones, 516 F.2d 53, 58 (5th Cir. 1975)* .

(n122)Footnote 23. *Swidler & Berlin v. United States, 524 U.S. 399, 407-408, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)* .

(n123)Footnote 24. *Smith v. Conway Org., Inc., 154 F.R.D. 73, 77 (S.D.N.Y. 1994)* .

(n124)Footnote 25. *United States v. Massachusetts Institute of Technology, 129 F.3d 681, 686 (1st Cir. 1997)* .

(n125)Footnote 26. *Jaffee v. Redmond, 518 U.S. 1, 15-18, 116 S. Ct. 1923, 1931, 135 L. Ed. 2d 337 (1996)* .

(n126)Footnote 27. *United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981)* .

(n127)Footnote 28. *See United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971)* .

(n128)Footnote 29. *Cimijotti v. Paulsen, 219 F. Supp. 621, 624 (N.D. Iowa 1963)* ; *see Fed. R. Evid. 501.*

(n129)Footnote 30. *Patterson v. Caterpillar, Inc., 70 F.3d 503, 506-507 (7th Cir. 1995)* .

(n130)Footnote 31. *In re Valley Forge Plaza Assocs., 109 B.R. 669, 675 (E.D. Pa. 1990)* .

(n131)Footnote 32. *Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21, 22 (S.D.N.Y. 1971)* .

(n132)Footnote 33. *King v. E.F. Hutton & Co., 117 F.R.D. 2, 7 (D.D.C. 1987)* .

(n133)Footnote 34. *See United States v. Moore, 970 F.2d 48, 49-50 (5th Cir. 1992)* (state law physician-patient privilege).

(n134)Footnote 35. *Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* .

(n135)Footnote 36. *Securities and Exchange Commission v. Lavin, 111 F.3d 921, 925-927 (D.C. Cir. 1997)* .

(n136)Footnote 37. *U.S. Const. Amend. V.*

(n137)Footnote 38. *Pillsbury Co. v. Conboy, 459 U.S. 248, 256-257, 103 S. Ct. 608, 74 L. Ed. 2d 430 (1983)* .

(n138)Footnote 39. *Andover Data Servs. v. Statistical Tabulating, 876 F.2d 1080, 1082 (2d Cir. 1989)* .

(n139)Footnote 40. *Bear Sterns & Co. v. Wyler, 182 F. Supp. 2d 679, 684 (N.D. Ill. 2002)* .

(n140)Footnote 41. *See Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co., 518 F.2d 671, 674 (2d Cir. 1975)* .

(n141)Footnote 42. *See Braswell v. United States, 487 U.S. 99, 105-110, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988)* .

(n142)Footnote 43. *Leyh v. Modicon, Inc., 881 F. Supp. 420, 424-425 (S.D. Ind. 1995)* .

(n143)Footnote 44. *United States v. Procter & Gamble Co., 356 U.S. 677, 681, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)* .

(n144)Footnote 45. *Bank Line, Ltd. v. United States, 163 F.2d 133, 138 (2d Cir. 1947)* (government has burden of establishing privilege).

(n145)Footnote 46. *United States v. Smith, 123 F.3d 140, 151 (3rd Cir. 1997)* .

(n146)Footnote 47. *Leyh v. Modicon, Inc., 881 F. Supp. 420, 424-425 (S.D. Ind. 1995)* .

(n147)Footnote 48. *Kinoy v. Mitchell, 67 F.R.D. 1, 8 (S.D.N.Y. 1975)* .

(n148)Footnote 49. *See United States v. Leggett & Platt, Inc., 542 F.2d 655, 659 (6th Cir. 1976)* .

(n149)Footnote 50. *Leyh v. Modicon, Inc., 881 F. Supp. 420, 424-425 (S.D. Ind. 1995)* .

(n150)Footnote 51. *United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993)* .

(n151)Footnote 52. *Dellums v. Powell, 561 F.2d 242, 248 (D.C. Cir. 1977)* .

(n152)Footnote 53. *See 26 U.S.C. § 6103.*

(n153)Footnote 54. *See 13 U.S.C. § 9(a)*; *see also Baldrige v. Shapiro, 455 U.S. 345, 361, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982)* .

(n154)Footnote 55. *See Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977)* ; *see also* 6 *Moore's Federal Practice, § 26.52* (Matthew Bender 3d ed.).

(n155)Footnote 56. *See Fed. R. Civ. P. 26(b)(1)* (party may only discover nonprivileged matter relevant to claim or defense); *In re Seagate Tech., LLC, 497 F.3d 1360, 1375-1376 (Fed. Cir. 2007)* .

(n156)Footnote 57. *See* [c]-[g], *above*.

(n157)Footnote 58. *Maday v. Pub. Libraries, 480 F.3d 815, 821 (6th Cir. 2007)* (waiver of attorney-client privilege).

(n158)Footnote 59. *Sims v. Blot, 534 F.3d 117, 125 (2d Cir. 2008)* (waiver of psychotherapist-patient privilege).

(n159)Footnote 60. *See, e.g., Judson Atkinson Candies, Inc. v. Latini Hohberger Dhimantec, 529 F.3d 371, 387-389 (7th Cir. Ill. 2008)* ; *Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 767 (D. Md. 2008)* .

(n160)Footnote 61. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 388-389 (7th Cir. 2008)* .

(n161)Footnote 62. *See Fed. R. Evid. 502*.

(n162)Footnote 63. *Fed. R. Evid. 502(a), (b)*.

(n163)Footnote 64. *Fed. R. Evid. 502(a)*.

(n164)Footnote 65. *Fed. R. Evid. 502(b)*.

(n165)Footnote 66. *Grain v. Trinity Health, 2009 U.S. Dist. LEXIS 54299, at *14-*15 (E.D. Mich. June 26, 2009)* ; *Clarke v. J.P. Morgan Chase & Co., 2009 U.S. Dist. LEXIS 30719, at *13-*14 (S.D.N.Y. Apr. 10, 2009)* .

(n166)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.70* (Matthew Bender 3d ed.).

(n167)Footnote 1. See *Fed. R. Civ. P. 23(b)(3)*.

(n168)Footnote 2. *Fed. R. Civ. P. 26(b)(3)(A)(i)*.

(n169)Footnote 3. *Fed. R. Civ. P. 26(b)(3)(A)(ii)*.

(n170)Footnote 4. *Fed. R. Civ. P. 26(b)(3)(B)*; *see Kelly v. Ford Motor Company, 110 F.3d 954, 965-966 (3d Cir. 1997)* ; [i][ii], *below*.

(n171)Footnote 5. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 816 (8th Cir. 2002)* .

(n172)Footnote 6. *Frontier Refining, Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 702 (10th Cir. 1998)* .

(n173)Footnote 7. *Fed. R. Civ. P. 26(b)(3)(A)*; *see ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1297 (Fed. Cir. 2009)* (results of scientific tests could qualify as work product, but only if prepared for current litigation).

(n174)Footnote 8. *In re Perrigo Company, 128 F.3d 430, 437 (6th Cir. 1997)* .

(n175)Footnote 9. *Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp., 154 F.R.D. 218, 219 (N.D. Iowa 1994)* .

(n176)Footnote 10. *Ford v. CSX Transp., Inc., 162 F.R.D. 108, 111-112 (E.D.N.C. 1995)* .

(n177)Footnote 11. *In re Qwest Communs. Int'l, 450 F.3d 1179, 1182 (10th Cir. 2006)* ; United States v. Under Seal (In re Grand Jury Proceedings #5), *401 F.3d 247, 252 (4th Cir. 2005)* .

(n178)Footnote 12. *Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1146 (9th Cir. 2008)* (noting party requesting redaction must explain application of work product doctrine).

(n179)Footnote 13. *Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008)* (if document is covered by work product privilege, party need not disclose its factual contents).

(n180)Footnote 14. *United States v. Thompson, 562 F.3d 387, 393 (D.C. Cir. 2009)* (attorney's work reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal theories, and other tangible and intangible ways qualifies as work product; generally citing **Moore's Federal Practice**).

(n181)Footnote 15. *Hendrick v. Avis Rent A Car Sys., 916 F. Supp. 256, 259 (W.D.N.Y. 1996)* .

(n182)Footnote 16. *Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821, 826 (D. Vt. 1997)* .

(n183)Footnote 17. *In re Perrigo Company, 128 F.3d 430, 437 (6th Cir. 1997)* .

(n184)Footnote 18. *See Reg'l Airport Auth. v. LFG, LLC, 460 F.3d 697, 715-716 (6th Cir. 2006)* .

(n185)Footnote 19. *Fed. R. Civ. P. 26(b)(3)(C).*

(n186)Footnote 20. *Fed. R. Civ. P. 26(b)(3)(C)(i).*

(n187)Footnote 21. *Fed. R. Civ. P. 26(b)(3)(C)(ii).*

(n188)Footnote 22. *Hayden v. Acadian Gas Pipeline Sys., 173 F.R.D. 429, 430 (E.D. La. 1997)* .

(n189)Footnote 23. *In re Powerhouse Licensing, LLC, 441 F.3d 467, 472 (6th Cir. 2006)* (in diversity cases, court applies federal law to resolve work product claims and state law to resolve attorney client claims).

(n190)Footnote 24. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 816 (8th Cir. 2002)* ; *Frontier Refining, Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 702 (10th Cir. 1998)* .

(n191)Footnote 25. *Tennessee Laborers Health & Welfare Fund v. Columbia/HCA Healthcare, 293 F.3d 289, 294 (6th Cir. 2002)* (work product doctrine is distinct from and broader than attorney client privilege).

(n192)Footnote 26. *Federal Election Commission v. Christian Coalition, 178 F.R.D. 61, 74 (E.D. Va. 1998)* , *aff'd on other grounds, 178 F.R.D. 456 (E.D. Va. 1998)* .

(n193)Footnote 27. *Fed. R. Civ. P. 26(b)(3)(A).*

(n194)Footnote 28. *United States v. Roxworthy, 457 F.3d 590, 600 (6th Cir. 2006)* ; *see La. Mun. Police Emples. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 308 (D.N.J. 2008)* (anticipation of litigation was driving force behind legal work that was undertaken pre transaction).

(n195)Footnote 29. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002)* .

(n196)Footnote 30. *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Co., 5 F.3d 1508, 1515 (D.C. Cir. 1993)* .

(n197)Footnote 31. *Me. v. United States DOI, 298 F.3d 60, 70 (1st Cir. 2002)* (work product does not protect from disclosure documents that are prepared in ordinary course of business, even if documents ultimately could aid in preparation of litigation).

(n198)Footnote 32. *See North Shore Gas Co. v. Elgin, Joliet & Eastern Ry. Co., 164 F.R.D. 59, 61 (N.D. Ill. 1995)*

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(n199)Footnote 33. *United States v. Adlman, 134 F.3d 1194, 1202 (2nd Cir. 1998)* .

(n200)Footnote 34. *Honda Lease Trust v. Middlesex Mut. Assur. Co., 2007 U.S. Dist. LEXIS 72653, at *14 (D. Conn. Sept. 28, 2007)* (quoting **Moore's Federal Practice**).

(n201)Footnote 35. *Frontier Refining Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 703 (10th Cir. 1998)* ; Duplan Corp. v. Moulinage et *Retorderie de Chavanoz, 487 F.2d 480, 483-484 (4th Cir. 1973)* .

(n202)Footnote 36. *Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973)* .

(n203)Footnote 37. *FTC v. Grolier, Inc., 462 U.S. 19, 25, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983)* .

(n204)Footnote 38. *Fed. R. Civ. P. 26(b)(3)(A).*

(n205)Footnote 39. *United States v. Nobles, 422 U.S. 225, 238-239, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)* .

(n206)Footnote 40. *See, e.g., Sprague v. Director, Office of Workers' Compensation Programs, 688 F.2d 862, 869-870 (1st Cir. 1982)* (opinion letter prepared by expert for attorney as part of attorney's preparation for imminent lawsuit was protected).

(n207)Footnote 41. *United States v. Adlman, 134 F.3d 1194, 1203-1204 (2nd Cir. 1998)* .

(n208)Footnote 42. *State of New York v. Solvent Chem. Co., Inc., 166 F.R.D. 284, 291-292 (W.D.N.Y. 1996)* .

(n209)Footnote 43. *See In re California Public Util. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989)* .

(n210)Footnote 44. *Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008)* .

(n211)Footnote 45. *Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* ; *see Fed. R. Civ. P. 26(b)(3)(A)(ii).*

(n212)Footnote 46. *Audiotext Communications Network v. U.S. Telecom, Inc., 164 F.R.D. 250, 254 (D. Kan. 1996)* .

(n213)Footnote 47. *In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994)* (work product may be claimed by attorney or client); *U.S. Info. Sys. v. IBEW Local Union No. 3, 2002 U.S. Dist. LEXIS 19363, at *3 (S.D.N.Y. 2002)* .

(n214)Footnote 48. *Lasalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc., 209 F.R.D. 112, 117 (D. Md. 2002)* (person claiming protection under work product doctrine must be party or representative of party).

(n215)Footnote 49. *See United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996)* (citing **Moore's Federal Practice**).

(n216)Footnote 50. *Onwuka v. Federal Express Corp., 178 F.R.D. 508, 512 (D. Minn. 1997)* ; *see Fed. R. Civ. P. 26(b)(3)*; *see also Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* .

(n217)Footnote 51. *See* [a], *above*.

(n218)Footnote 52. *See* [d], *above*.

(n219)Footnote 53. *See* [f], *above*.

(n220)Footnote 54. *In re Grand Jury Subpoena, 510 F.3d 180, 184 (2d Cir. 2007)* ; *see United States v. Roxworthy, 457 F.3d 590, 597 (6th Cir. 2006)* (party must present factual basis for its claims of work product protection).

(n221)Footnote 55. *Cunningham v. SmithKline Beecham, 255 F.R.D. 474, 480-481 (N.D. Ind. 2009)* .

(n222)Footnote 56. *See Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* .

(n223)Footnote 57. *See Fed. R. Civ. P. 26(b)(3)(A)*; [i], *above*.

(n224)Footnote 58. *Fed. R. Civ. P. 26(b)(3)(A)(i)*.

(n225)Footnote 59. *Fed. R. Civ. P. 26(b)(3)(A)(ii)*; *see, e.g., Hendrick v. Avis Rent A Car Sys., 916 F. Supp. 256, 261 (W.D.N.Y. 1996)* (discovery of defendant's product testing results refused in automobile products liability action because plaintiff did not demonstrate impracticality or expense of conducting plaintiff's own testing).

(n226)Footnote 60. *Fed. R. Civ. P. 26(b)(3)(B)*; *see Kelly v. Ford Motor Company, 110 F.3d 954, 965-966 (3d Cir. 1997)* (core work product of attorney or other representative of party concerning litigation is generally afforded near absolute protection from discovery).

(n227)Footnote 61. *See Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 512 (D.N.H. 1996)* (substantial need and hardship tests for ordinary rather than opinion work product).

(n228)Footnote 62. *Toledo Edison Co. v. G A Techs., Inc., Torrey Pines Tech. Div., 847 F.2d 335, 340 (6th Cir. 1988)* .

(n229)Footnote 63. *See Hendrick v. Avis Rent A Car Sys., 916 F. Supp. 256, 261 (W.D.N.Y. 1996)* .

(n230)Footnote 64. *See In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982)* (faulty memory of witness must be substantiated to show undue hardship).

(n231)Footnote 65. *United States v. Nobles, 422 U.S. 225, 239-240, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)* .

(n232)Footnote 66. *United States v. White, 970 F.2d 328, 334-335 (7th Cir. 1992)* .

(n233)Footnote 67. *In re Seagate Tech., LLC, 497 F.3d 1360, 1375 (Fed. Cir. 2007)* (because work product protection is designed to protect adversary trial process itself, it is applied with even greater force than attorney client privilege).

(n234)Footnote 68. *In re Grand Jury Proceedings, 43 F.3d 966, 970 (5th Cir. 1994)* .

(n235)Footnote 69. *Federal Election Commission v. Christian Coalition, 178 F.R.D. 61, 74 (E.D. Va. 1998)* , *aff'd on other grounds, 178 F.R.D. 456 (E.D. Va 1998)* .

(n236)Footnote 70. *In re Qwest Communs. Int'l, 450 F.3d 1179, 1186 (10th Cir. 2006)* .

(n237)Footnote 71. *Scanlon v. Bricklayers & Allied Craftworkers, Local No. 3, 242 F.R.D. 238, 247 (W.D.N.Y. 2007)* .

(n238)Footnote 72. *Fed. R. Civ. P. 26(b)(5)(B)*.

(n239)Footnote 73. *In re Fannie Mae Secs. Litig., 552 F.3d 814, 824 (D.C. Cir. 2009)* ; *see* [9][b], *below*.

(n240)Footnote 74. *See Fed. R. Evid. 502*.

(n241)Footnote 75. *Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1037 (N.D. Ill. 2009)* (Rule 502 creates new framework for managing disclosure issues in cost effective manner in age of large electronic document productions).

(n242)Footnote 76. *Fed. R. Evid. 502(a), (b).*

(n243)Footnote 77. *Fed. R. Evid. 502(a).*

(n244)Footnote 78. *Fed. R. Evid. 502(b).*

(n245)Footnote 79. *Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038-1039 (N.D. Ill. 2009)* .

(n246)Footnote 80. *Frontier Refining, Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 703 (10th Cir. 1998)* (citing **Moore's Federal Practice**).

(n247)Footnote 81. *See Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 419-420 (D. Del. 1992)* (citing **Moore's Federal Practice**).

(n248)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.90* (Matthew Bender 3d ed.).

(n249)Footnote 1. *See Fed. R. Evid. 502(g)*; see [b], *below*.

(n250)Footnote 2. *Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009)* .

(n251)Footnote 3. *See Fed. R. Evid. 502.*

(n252)Footnote 4. *See, e.g., Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379, 384 (D. Ariz. 2010)* .

(n253)Footnote 5. *See, e.g., Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1036-1037 (N.D. Ill. 2009)* .

(n254)Footnote 6. *Fed. R. Evid. 502(a), (b).*

(n255)Footnote 7. *Fed. R. Evid. 502(a).*

(n256)Footnote 8. *Fed. R. Evid. 502(b)*; *see* [g], *below*.

(n257)Footnote 9. *See* Fed. R. Civ. P. 502.

(n258)Footnote 10. *Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226 (E.D. Pa. 2008)* (Rule 502 sets well defined standards consistent with existing mainstream legal principles on topic of waiver by disclosure); *see Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 502 (Fed. Cl. 2009)* (one of primary purposes of Rule 502 is to set uniform standards regarding inadvertent disclosure and subject matter waiver without altering substantive federal law on whether communication or information is protected).

(n259)Footnote 11. *See Fed. R. Evid. 502*, Original Committee Notes.

(n260)Footnote 12. *See Fed. R. Evid. 502(a), (b).*

(n261)Footnote 13. *Fed. R. Evid. 502(c)(1).*

(n262)Footnote 14. *Fed. R. Evid. 502(c)(2).*

(n263)Footnote 15. *See Fed. R. Evid. 502(c)*, Original Committee Notes.

(n264)Footnote 16. *See Fed. R. Evid. 502*, Original Committee Notes.

(n265)Footnote 17. *See Fed. R. Evid. 101*, *1101(a)*, *(b)*.

(n266)Footnote 18. *Fed. R. Evid. 502(f)*; *see Fed. R. Evid. 502(a)*, *502(b)*.

(n267)Footnote 19. *Fed. R. Evid. 502(f)*.

(n268)Footnote 20. *See Fed. R. Evid. 501*.

(n269)Footnote 21. *See Fed. R. Evid. 502(f)*, Original Committee Notes.

(n270)Footnote 22. *Fed. R. Evid. 502(f)*.

(n271)Footnote 23. *See Fed. R. Evid. 101*, *1101(a)*, *(b)*.

(n272)Footnote 24. *Fed. R. Evid. 502*.

(n273)Footnote 25. *Fed. R. Evid. 502(g)(1)*; *see DJ Coleman, Inc. v. Nufarm Ams., Inc., 2010 U.S. Dist. LEXIS 27552, at *3 (D.N.D. Feb. 25, 2010)* (in diversity actions, state law determines existence and scope of attorney-client privilege); *Kumar v. Hilton Hotels Corp., 2009 U.S. Dist. LEXIS 53387, at *2 (W.D. Tenn. June 16, 2009)* (whether attorney client relationship exists depends on elements of substantive law of forum).

(n274)Footnote 26. *Fed. R. Evid. 502(g)(2)*; *see In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003)* .

(n275)Footnote 27. *See Fed. R. Evid. 502*, Original Committee Notes.

(n276)Footnote 28. *Pritchard v. County of Erie, (In re County of Erie), 546 F.3d 222, 228 (2d Cir. 2008)* .

(n277)Footnote 29. *See Fed. R. Evid. 502*, Original Committee Notes; *Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379, 384 (D. Ariz. 2010)* (Rule 502 does supplant applicable waiver doctrine generally).

(n278)Footnote 30. *See Fed. R. Evid. 502(g)(1)*; *see also DJ Coleman, Inc. v. Nufarm Ams., Inc., 2010 U.S. Dist. LEXIS 27552, at *3 (D.N.D. Feb. 25, 2010)* (in diversity actions, state law determines existence and scope of attorney-client privilege); *Kumar v. Hilton Hotels Corp., 2009 U.S. Dist. LEXIS 53387, at *2 (W.D. Tenn. June 16, 2009)* (whether attorney client relationship exists depends on elements of substantive law of forum).

(n279)Footnote 31. *See Fed. R. Evid. 502*, Original Committee Notes.

(n280)Footnote 32. *Fed. R. Evid. 502(a)*.

(n281)Footnote 33. *Fed. R. Evid. 502(a)(1)*.

(n282)Footnote 34. *See Fed. R. Evid. 502(a)*, Original Committee Notes; *Square D Co. v. E.I. Elecs., Inc., 264 F.R.D. 385, 394 (N.D. Ill. 2009)* ; *see also* [g], *below*.

(n283)Footnote 35. *Fed. R. Evid. 502(a)(2)*; *see Trs. of the Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc., 266 F.R.D. 1, 11 (D.D.C. 2010)* .

(n284)Footnote 36. *Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349-1350 (Fed. Cir. 2005)* .

(n285)Footnote 37. *Fed. R. Evid. 502(a)(3).*

(n286)Footnote 38. *See Fed. R. Evid. 502(a)*, Original Committee Notes; *see also Fed. R. Evid. 106.*

(n287)Footnote 39. *See Maday v. Pub. Libraries, 480 F.3d 815, 821 (6th Cir. 2007)* ; *Fed. R. Evid. 502(b)*, Original Committee Notes (Rule 502 does not replace applicable waiver doctrine generally).

(n288)Footnote 40. *See Fed. R. Evid. 502(b)*, Original Committee Notes.

(n289)Footnote 41. *Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038-1039 (N.D. Ill. 2009)* ; *Heriot v. Byrne, 257 F.R.D. 645, 654 (N.D. Ill. 2009)* .

(n290)Footnote 42. *Fed. R. Evid. 502(b)(1).*

(n291)Footnote 43. *Bensel v. Air Line Pilot Ass'n, 248 F.R.D. 177, 179-180 (D.N.J. 2008)* .

(n292)Footnote 44. *See G. v. Hawaii, 2009 U.S. Dist. LEXIS 48214, at *4 (D. Haw. June 9, 2009)* .

(n293)Footnote 45. *Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009)* .

(n294)Footnote 46. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 388 (7th Cir. 2008)* .

(n295)Footnote 47. *Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009)* ; *Heriot v. Byrne, 257 F.R.D. 645, 658-659 (N.D. Ill. 2009)* .

(n296)Footnote 48. *Fed. R. Evid. 502(b)(2).*

(n297)Footnote 49. *See Fed. R. Evid. 502(b)*, Original Committee Notes; *see also Heriot v. Byrne, 257 F.R.D. 645, 659 (N.D. Ill. 2009)* ; *Bus. Integration Servs. v. AT&T Corp., 251 F.R.D. 121, 129 (S.D.N.Y. 2008)* .

(n298)Footnote 50. *Fed. R. Evid. 502(b)(3).*

(n299)Footnote 51. *See Fed. R. Civ. P. 26(b)(5)(B)*; *see Fed. R. Evid. 502(b)*, Original Committee Notes (producing party is required to follow up on any obvious indications that protected communication or information has been produced inadvertently).

(n300)Footnote 52. *See Heriot v. Byrne, 257 F.R.D. 645, 662 (N.D. Ill. 2009)* .

(n301)Footnote 53. *Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226 (E.D. Pa. 2008)* .

(n302)Footnote 54. *Alpert v. Riley, 267 F.R.D. 202, 209 (S.D. Tex. 2010)* .

(n303)Footnote 55. *Fed. R. Evid. 502(c)(1).*

(n304)Footnote 56. *Fed. R. Evid. 502(c)(2).*

(n305)Footnote 57. *See Fed. R. Evid. 502(c)*, Original Committee Notes.

(n306)Footnote 58. *Fed. R. Evid. 502(c),(d)*; *see* Capitol Records, Inc, v. MP3tunes, *LLC, 261 F.R.D. 44, 50-52 (S.D.N.Y. 2009)* .

(n307)Footnote 59. *See In re Qwest Communs. Int'l, 450 F.3d 1179, 1182 (10th Cir. 2006)* .

(n308)Footnote 60. *See* [f], *above*.

(n309)Footnote 61. *See* [g], *above*.

(n310)Footnote 62. *See* Capitol Records, Inc, v. MP3tunes, *LLC, 261 F.R.D. 44, 51 n.6 (S.D.N.Y. 2009)* ; *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., 2009 U.S. Dist. LEXIS 15901, at *10-*22 (N.D. Tex. Feb. 23, 2009)* .

(n311)Footnote 63. *Fed. R. Evid. 502(d)*.

(n312)Footnote 64. *See Fed. R. Evid. 502(d)*, Original Committee Notes.

(n313)Footnote 65. *See Fed. R. Evid. 502(c)*; *Fed. R. Evid. 502(d)*, Original Committee Notes.

(n314)Footnote 66. *Fed. R. Evid. 502(d)*, Original Committee Notes.

(n315)Footnote 67. *See 28 U.S.C. § 1738*.

(n316)Footnote 68. *Fed. R. Evid. 502(e)*.

(n317)Footnote 69. *Fed. R. Evid. 502(e)*, Original Committee Notes.

(n318)Footnote 70. *See Fed. R. Evid. 502(d)*; *see also* Capitol Records, Inc, v. MP3tunes, *LLC, 261 F.R.D. 44, 51 n.6 (S.D.N.Y. 2009)* .

(n319)Footnote 1. *Fed. R. Civ. P. 26(b)(5)(A)*; *see Fed. R. Civ. P. 26(b)(3)(A)*; *see also* [7], *above*.

(n320)Footnote 2. *Fed. R. Civ. P. 26(b)(5)(A)(i)*.

(n321)Footnote 3. *Fed. R. Civ. P. 26(b)(5)(A)(i)*; *see Alleyne v. N.Y. State Educ. Dep't, 248 F.R.D. 383, 386 (N.D.N.Y 2008)* (part must state basis for its claim to withhold, and describe non-disclosed documents, communications, or things in manner that will allow its adversaries to assess claim).

(n322)Footnote 4. *First Sav. Bank v. First Bank Sys., 902 F. Supp. 1356, 1361-1365 (D. Kan. 1995)* .

(n323)Footnote 5. *Am. Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of the United States, 406 F.3d 867, 870 (7th Cir. 2005)* .

(n324)Footnote 6. *Caplan v. Fellheimer Eichen Braverman & Kaskey, 162 F.R.D. 490, 492 (E.D. Pa. 1995)* .

(n325)Footnote 7. *Banks v. Office of the Senate Sergeant-At-Arms & Doorkeeper of the United States Senate, 471 F.3d 1341, 1343 (D.C. Cir. 2006)* .

(n326)Footnote 8. *United States v. Construction Prod. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996)* .

(n327)Footnote 9. *Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996)* ; *see Lightfoot v. Rosskopf, 374 F. Supp. 2d 69, 72 (D.D.C. 2005)* (court should tailor information required in privilege log to circumstances of each case).

(n328)Footnote 10. *In re Fannie Mae Secs. Litig., 552 F.3d 814, 824 (D.C. Cir. 2009)* .

(n329)Footnote 11. *Fed. R. Civ. P. 26(b)(5)(B)*.

(n330)Footnote 12. *Fed. R. Civ. P. 26(b)(5)(B)*, Committee Note to 2006 Amendments.

(n331)Footnote 13. *Fed. R. Civ. P. 26(b)(5)(B).*

(n332)Footnote 14. *See, e.g., Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076 (C.D. Cal. 2009)* (plaintiff filed motion for order declaring 28 documents produced by defendants to be not privileged).

(n333)Footnote 15. *Fed. R. Civ. P. 26(b)(5)*, Committee Note to 2006 Amendments.

(n334)Footnote 16. *See Fed. R. Civ. P. 26(f).*

(n335)Footnote 17. *Alleyne v. N.Y. State Educ. Dep't, 248 F.R.D. 383, 386 (N.D.N.Y 2008)* .

(n336)Footnote 18. *Fed. R. Civ. P. 26(b)(5)*, Committee Note to 2006 Amendments; *Fed. R. Civ. P. 26(f)*, Committee Note to 2006 Amendments.

(n337)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.52[6]* (Matthew Bender 3d ed.).

(n338)Footnote 1. *See 5 U.S.C. § 552.*

(n339)Footnote 2. *John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989)* .

(n340)Footnote 3. *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978)* .

(n341)Footnote 4. *5 U.S.C. § 552(a)(2)(A).*

(n342)Footnote 5. *5 U.S.C. § 552(a)(2)(B).*

(n343)Footnote 6. *5 U.S.C. § 552(a)(2)(C).*

(n344)Footnote 7. *5 U.S.C. § 552(a)(2)(D), (E).*

Moore's Manual--Federal Practice and Procedure

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.04

§ 15.04 Protective Order of Court to Prevent Discovery Abuse

[1] Purpose and Effect of Discovery Protective Order n*

[a] Court's Discretion to Limit Discovery to Prevent Abuse

The scope of discovery under the Federal Rules of Civil Procedure is extremely broad, in that parties may generally discover any material that is relevant to the subject matter involved in the action provided that it is not privileged. n1 However, to prevent a party from abusing even this liberal scope of discovery rules, n2 the federal rules gives the district court the power to issue an order to protect the opposition from annoyance, embarrassment, oppression, or undue burden or expense, if there is good cause for the order. n3 The purpose of the protective order as a whole is to facilitate liberal discovery between opposition parties without compromising the integrity of proprietary information. n4 Thus, Rule 26(c) authorizes the court to limit discovery even when the information sought is relevant when the conditions of the rule are met. n5

The district court has broad discretion to decide whether a protective order is appropriate in the circumstances, and what degree of protection is required in those circumstances when an order is appropriate. n6 However, the federal courts have adopted a balancing of interests test to guide decisions concerning protective orders. n7 Under the balancing standard, the district judge must compare the hardship to the party against whom discovery is sought against the probative value of the information to the other party. n8

[b] Availability of Protective Orders

Rule 26(c) applies to all types of discovery, including depositions and written discovery, such as interrogatories, requests for production of documents, requests for admissions, and depositions. n9 Furthermore, in a protective order the court may order the type of discovery that is to be used to obtain particular information. n10

A party responding to a discovery request may not seek a protective order asserting the rights of third parties to protect the third party's privileged or confidential information. n11 The affected third party must intervene directly to seek a protective order to protect that information. n12 A protective order may bind parties to the action and nonparty witnesses called in the action. n13 Likewise, a protective order made in private litigation is enforceable against third

parties, including the government, absent a showing that the order was improper or that there is a compelling need or extraordinary circumstance for the material subject to the order. n14

[2] Procedure for Application for Protective Order n*

[a] Filing of Motion

A party or other person from whom discovery is sought must apply for a protective order by filing a motion in the district court, either the court in which the action is pending or in the case of a deposition, where the deposition is to occur. n1 Thus, Rule 26(c) contemplates that two district courts have the power to act on a motion for a protective order concerning a deposition. The court in the district where the deposition will be taken has the power to grant or deny the protective order and also has the discretion to defer to the judge handling the case on the merits. n2

The party seeking a protective order must make a request for a specific order and must articulate facts in support of the request. n3 The facts must show that a clearly defined and significant injury will result from the discovery sought. n4 It is not sufficient for a party to make conclusory or speculative statements about the need for a protective order. n5 The party should demonstrate injury through allegations of facts made by affidavits of knowledgeable persons. n6

Some courts have held that, as an alternative to filing a motion for a protective order, a deponent may decline to answer on a proper ground such as privilege, and then wait for the party taking the deposition to file a motion to compel; the deponent may then defend the motion to compel. In either scenario, the party resisting discovery has the burden to support its position. n7

[b] Timing of Motion

Rule 26(c) does not specify the time period within which a protective order must be made. However, at the least it must be made prior to the date set for producing the discovery. n8 In the case of a deposition, a party must file a motion for a Rule 26(c) protective order prior to the time the deposition is set to begin. n9 In making a determination of timeliness, a court should consider all of the circumstances facing the parties. A failure to request a protective order prior to the time set for producing the discovery may be excused for good cause. n10

Once a deposition has started, protection against annoyance, embarrassment, or oppression must be sought under Rule 30(d), n11 which allows a party or a deponent to seek protection at any time during a deposition on a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or a party. n12 The court may order that the deposition be terminated or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). n13

[c] Certification That Parties Have Attempted to Resolve Dispute

A party that makes a motion for a protective order must also file a certification that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. n14 The court may deny a motion for a protective order solely for failure to comply with this requirement. n15 Rule 26(c) does not specify requirements for the conference. Therefore, the required conference may be held by telephone or in person. If the person seeking the protective order is unable to convince the opposing parties to discuss the matter, the party should describe for the court in the certificate the efforts made to confer. n16

[3] Grounds for Protective Order n*

[a] Good Cause

The court may issue a protective order only after the moving party has made a showing that good cause exists for the

protection of the material. n1 The party moving for the protective order has the burden of demonstrating good cause. n2 Good cause is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. n3

In deciding whether good cause exists to issue a protective order, the district court must balance the interests involved, i.e., the harm to the party seeking the order against the importance of disclosure to public. The court must consider the facts and circumstances of each case in making the good cause determination. Some factors for the court to consider in balancing the interests are privacy interests, whether the information is important to public health and safety, whether the party benefitting from the confidentiality of protective order is a public official, n4 the danger of abuse if a protective order is granted, the good faith of the various parties' positions, the adequacy of the protective measures provided by a protective order, and the availability of other means of proof. n5 On the other hand, good cause is not established merely by showing that discovery may involve some inconvenience or expense. n6

[b] Stipulation by Parties

Although Rule 26(c) does not specifically provide for stipulated protective orders, litigants commonly agree to discovery orders, typically agreements to seal documents produced during discovery, and courts will enter a stipulated protective order to enforce the agreement. Such orders usually restrict access to particular discovery materials to parties and counsel, and limited their use solely for the litigation. The purpose of the protective order is to allow the parties to make full disclosure to the opposition without fear of publication of confidential or sensitive information. n7 The orders may also avoid the expense and delay of discovery disputes over each item of allegedly confidential information, and thus promote the ultimate goals of the Federal Rules of Civil Procedure to secure the just, speedy, and inexpensive determination of every action. n8

Stipulated protective orders are subject to the "good cause" standard, which in this case means that even if the parties agree that a protective order should be entered, the court must still approve the order. The parties still must show that good cause exists for the issuance of that order; if good cause is not shown, the protective order should not be issued. Furthermore, in deciding whether to issue a stipulated protective order, the district court must independently determine if good cause exists, because the parties are in a non-adversarial position on the issue. n9 However, some courts take a less strict view of the "good cause" requirement for stipulated protective orders in complex litigation. Under this more liberal standard the party seeking a protective order need not make a document-by-document showing. Instead, the court may enter a broad "umbrella" protective order on a threshold showing of good cause. n10

[4] Types of Protective Orders n*

[a] Any Order Required to Protect Movant

Rule 26(c) explicitly provides that the district court may issue any discovery order required to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. n1 The rule then lists eight examples of particular types of protective orders, all of which limit or preclude discovery or regulate the disclosure of information obtained in discovery. n2 These specific examples are discussed in [b], *below*.

A district court is not limited to the examples listed in Rule 26(c)(1). Rather, a court has discretion for good cause to issue any order to protect a party from discovery excesses of an offending discovery request. The "good cause" standard of Rule 26(c) is highly flexible, and has been designed to accommodate all relevant considerations as they arise during discovery. n3 The district courts should use their discretion to restrict discovery in a tailored fashion to fit the facts and circumstances of each case. n4 An example of this other type of protective order is an order barring ex parte communications by the parties. n5

In conjunction with its order on the motion for protective order, the court may award expenses and attorney's fees to

either the moving or the nonmoving party on the motion, depending on whether the motion was granted or denied, as specified in Rule 37(a)(5). n6

[b] Examples of Particular Restrictive Protective Orders

The following are examples of eight types of orders which Rule 26(c)(1) specifies the court may make to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense: n7

1. Forbidding a particular disclosure or discovery. n8 Courts rarely issue an order that discovery not be taken at all. n9 However, courts commonly issue orders that a particular type of discovery is prohibited. For example, the court may use a protective order to prohibit taking discovery from certain employees at a company, n10 or an order to prevent a party from taking the deposition of a particular person. n11

2. Specifying terms, including time and place, for the disclosure or discovery. n12 Courts commonly restrict the number of hours or days that a deposition may last. n13 Courts also typically issue protective orders that vary the sequence and timing of discovery. n14

3. Prescribing a discovery method other than the one selected by the party seeking discovery. n15 This provision of Rule 26(c) is most commonly used to order a deposition by written questions pursuant to Rule 31 rather than by verbal questioning. However, courts have cautioned that oral depositions should not routinely be replaced by depositions on written questions because written questioning does not permit investigative follow-up questions, does not allow the observation of the demeanor of the witness, nor the evaluation of credibility. n16

4. Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters. n17 Courts often enter this type of order to limit the scope of discovery to only those issues that are left to be decided in case. n18

5. Designating the persons who may be present while the discovery is conducted. n19 For example, a court may order the sequestering of fact witnesses prior to their depositions and barring fact witnesses from attending depositions of other witnesses, provided that the party supports its motion for protective order with affidavits or other evidence that provides support that sequestration is necessary. n20

6. Requiring that a deposition be sealed and opened only on court order. n21 Although this provision specifies only depositions, the courts have often ordered other discovery materials under seal. n22 Rule 26(c)(1)(F) is frequently used to protect confidential or sensitive business information. n23

7. Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way. n24 To demonstrate "good cause" under this provision, the party seeking the protective order must show that the information sought is a trade secret or other confidential information and that the harm caused by its disclosure outweighs the need of the party seeking disclosure. n25 Courts may also use Rule 26(c)(1)(G) to protect from disclosure material that would harm the disclosing party by placing it at a commercial disadvantage. n26

8. Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. n27 The purpose of Rule 26(c)(1)(H) is to protect the parties from fraud, and to prevent one party from acquiring an unfair advantage over the other. n28 This purpose can often be realized by a simultaneous exchange of sensitive information, so that neither party is privy to the other party's information first. n29

[c] Partial or Complete Denial of Protective Order

If a court partially or completely denies a protective order, the court may, on just terms, order that any party or person

provide or permit discovery. n30 The court typically makes a partial denial of a protective order, and grants what is referred to as a "partial protective order," when a party is entitled to protection only with respect to particular issues, claims, or defenses, or when only some items of discovery are subject to protection. In cases when a court denies a motion for a protective order, or grants a partial protective order, the court will make an order compelling discovery to make clear precisely those items that must be produced or that are subject to discovery after the order. n31

[d] Court Order Specifying Waiver Effect of Disclosure

Although it is not technically a protective order, under Evidence Rule 502, a court may enter an order specifying that the attorney-client privilege or the work product doctrine is not waived by disclosure connected with the litigation pending before the court. When the court makes such an order, the disclosure that is subject of the order is also not a waiver in any other federal or state proceeding. n32 Such an order is typically used in conjunction with a confidentiality order, n33 and the court may incorporate into a confidentiality order any agreement of the parties with respect to the waiver effect of disclosure in a federal proceeding. n34

This provision was enacted because tailored confidentiality orders are becoming increasingly necessary to limit the costs of discovery privilege review and retention, especially in cases involving electronic discovery. Such an order would not be as effective if the order could not provide for protection outside the particular litigation in which the order is entered. n35

For a further discussion of limitations on waiver in cases of disclosures of protected material, see *§ 15.03[8]*.

[5] Modification of Protective Order n*

A court that has entered a protective order retains the power to modify it as long as the order remains in effect, n1 even if the underlying action or claim has been dismissed. n2 However, once an underlying action has ended, the court lacks power to impose any new, affirmative requirements on the parties relating to discovery. n3

The determination whether to modify a protective order is left to the sound discretion of the district court, like the original entry of the order. n4 In deciding whether to modify a protective order, courts may consider whether the person seeking the modification is a party seeking to modify the order for purely private reasons, a nonparty seeking to modify the order to gain access to matters of "public interest," a nonparty seeking access to discovery materials for use in collateral litigation to avoid duplicative discovery efforts, or a nonparty governmental entity seeking to gain access to information for purposes of a criminal investigation. When a party seeks modification, the court must balance the following factors: any good cause established for the modification; the nature of the protective order; the foreseeability of the requested modification; and whether any parties have relied on the protective order. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.101* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(b)(1)*; *see Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979)* ; *see also § 15.03[1]*.

(n3)Footnote 2. *Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)* (because of liberality of pretrial discovery, court must have authority to issue protective orders).

(n4)Footnote 3. *See Fed. R. Civ. P. 26(c)(1)*.

(n5)Footnote 4. *See UFCW Local 1776 & Participating Employers Health & Welfare Fund, 242 F.R.D. 29, 30-31 (E.D.N.Y. 2007)* .

(n6)Footnote 5. *Tisby v. Buffalo Gen. Hosp., 157 F.R.D. 157, 170 (W.D.N.Y. 1994)* .

(n7)Footnote 6. *United States v. $9,041,598.68, 976 F. Supp. 654, 656 (S.D. Tex. 1997)* (broad discretion conferred on trial court by Rule 26(c) is necessary because unique character of discovery process requires that trial court have substantial latitude to fashion protective orders).

(n8)Footnote 7. *Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985)* .

(n9)Footnote 8. *Brown v. City of Oneonta, 160 F.R.D. 18, 21 (N.D.N.Y. 1995)* ; *see In re Eli Lilly & Co., Prozac Prod. Liab. Litig., 142 F.R.D. 454, 460 (S.D. Ind. 1992)* (courts also apply balancing of interests standard in determining whether "good cause" exists for issuance of protective order).

(n10)Footnote 9. *Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991)* .

(n11)Footnote 10. *Fed. R. Civ. P. 26(c)(1)(C).*

(n12)Footnote 11. *Bush Development Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1364 (E.D. Va. 1986)* .

(n13)Footnote 12. *Blum v. Schlegel, 150 F.R.D. 38, 41-42 (W.D.N.Y. 1993)* (nonparty permitted to intervene to protect confidential information sought from party in interrogatories and document requests, citing **Moore's Federal Practice**).

(n14)Footnote 13. *Truswal Systems Corp. v. Hydro-Air Engineering, Inc., 813 F.2d 1207, 1210 (Fed. Cir. 1987)* (standards of Rule 26(c) apply to both parties and nonparties equally).

(n15)Footnote 14. *See* In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, *945 F.2d 1221, 1224 (2nd Cir. 1991)* .

(n16)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, §§ 26.102, 26.103* (Matthew Bender 3d ed.).

(n17)Footnote 1. *Fed. R. Civ. P. 26(c)(1).*

(n18)Footnote 2. *Matter of Orthopedic Bone Screw Prod. Liab. Litig., 79 F.3d 46, 48 (7th Cir. 1996)* .

(n19)Footnote 3. *Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412 (M.D.N.C. 1991)* (seeking protective order to deny discovery of particular confidential material).

(n20)Footnote 4. *Federal Election Comm'n v. GOPAC, Inc., 897 F. Supp. 615, 617 (D.D.C. 1995)* .

(n21)Footnote 5. *See Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)* .

(n22)Footnote 6. *Johnson v. Jung, 242 F.R.D. 481, 483 (N.D. Ill. 2007)* .

(n23)Footnote 7. Neuberger Herman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, *230 F.R.D. 398, 421-422 (D. Md. 2005)* (citing **Moore's Federal Practice**).

(n24)Footnote 8. *In re Coordinated Pretrial Proceedings, Etc., 669 F.2d 620, 622 (10th Cir. 1982)* (motion timely when made four days prior to date set for production).

(n25)Footnote 9. *See BCI Communications Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 159 (N.D. Ala. 1986)* , *aff'd without opinion, 995 F.2d 236 (1993)* .

(n26)Footnote 10. *Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 414 (M.D.N.C. 1991)* .

(n27)Footnote 11. *Hearst/ABC-Viacom v. Goodway Mktg., 145 F.R.D. 59, 61 (E.D. Pa. 1992)* (ruling on protective order under *Fed. R. Civ. P. 30(d)*).

(n28)Footnote 12. *Fed. R. Civ. P. 30(d)(3)(A)*; *Sica v. Connecticut, 331 F. Supp. 2d 82, 87-88 (D. Conn. 2004)* .

(n29)Footnote 13. *Fed. R. Civ. P. 30(d)(3)(B)*.

(n30)Footnote 14. *Fed. R. Civ. P. 26(c)(1)*.

(n31)Footnote 15. *See Oleson v. Kmart Corporation, 175 F.R.D. 568, 569 (D. Kan. 1997)* .

(n32)Footnote 16. *Fed. R. Civ. P. 26(c)*, Committee Note to 1993 Amendments.

(n33)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.104* (Matthew Bender 3d ed.).

(n34)Footnote 1. *Fed. R. Civ. P. 26(c)(1)*; *see Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789 (1st Cir. 1988)* .

(n35)Footnote 2. *In re Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987)* .

(n36)Footnote 3. *Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005)* ; *Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)* .

(n37)Footnote 4. *Wiggins v. Burge, 173 F.R.D. 226, 228-229 (N.D. Ill. 1997)* .

(n38)Footnote 5. *Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 415 (M.D.N.C. 1991)* .

(n39)Footnote 6. *Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 556 F. Supp. 316, 318 (W.D. Mich. 1983)* .

(n40)Footnote 7. *Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1176-1177 (9th Cir. 2006)* .

(n41)Footnote 8. *See In re Alexander Grant & Co. Litig., 820 F.2d 352, 356-357 (11th Cir. 1987)* (court refused to modify stipulated protective order to grant nonparties access to discovery materials).

(n42)Footnote 9. *Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994)* (good cause did not exist for issuance of parties' stipulated confidentiality order).

(n43)Footnote 10. *See Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 945-946 (7th Cir. 1999)* .

(n44)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.105* (Matthew Bender 3d ed.).

(n45)Footnote 1. *Fed. R. Civ. P. 26(c)(1)*.

(n46)Footnote 2. *Fed. R. Civ. P. 26(c)(1)(A)-(H)*.

(n47)Footnote 3. *Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2008)* .

(n48)Footnote 4. *Regan-Touhy v. Walgreen Co., 526 F.3d 641, 648-649 (10th Cir. 2008)* .

(n49)Footnote 5. *M&M Med. Supplies v. Pleasant Valley Hosp., 981 F.2d 160, 163 (4th Cir. 1992)* .

(n50)Footnote 6. *Fed. R. Civ. P. 26(c)(3)*.

(n51)Footnote 7. *Fed. R. Civ. P. 26(c)(1).*

(n52)Footnote 8. *Fed. R. Civ. P. 26(c)(1)(A).*

(n53)Footnote 9. *Regan-Touhy v. Walgreen Co., 526 F.3d 641, 648 (10th Cir. 2008)* (courts must be cautious about ordering entire contents of files disclosed willy-nilly).

(n54)Footnote 10. *Kidd v. Taos Ski Valley, Inc., 88 F.3d 848, 853-854 (10th Cir. 1996) .*

(n55)Footnote 11. *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation, 175 F.R.D. 347, 348 (N.D. Ga. 1997) .*

(n56)Footnote 12. *Fed. R. Civ. P. 26(c)(1)(B).*

(n57)Footnote 13. *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 356 (D.N.J. 1990) .*

(n58)Footnote 14. *Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 505 (E.D. Cal. 1995) .*

(n59)Footnote 15. *Fed. R. Civ. P. 26(c)(1)(C).*

(n60)Footnote 16. *Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 549 (S.D.N.Y. 1989) .*

(n61)Footnote 17. *Fed. R. Civ. P. 26(c)(1)(D).*

(n62)Footnote 18. *See Johnson v. Mortham, 164 F.R.D. 571, 572 (N.D. Fla. 1996) .*

(n63)Footnote 19. *Fed. R. Civ. P. 26(c)(1)(E).*

(n64)Footnote 20. *In re Terra International, Inc., 134 F.3d 302, 306 (5th Cir. 1998) .*

(n65)Footnote 21. *Fed. R. Civ. P. 26(c)(1)(F).*

(n66)Footnote 22. *See Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc., 62 F.3d 1217, 1218 (9th Cir. 1995) .*

(n67)Footnote 23. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130-1131 (9th Cir. 2003) .*

(n68)Footnote 24. *Fed. R. Civ. P. 26(c)(1)(G).*

(n69)Footnote 25. *Diamond Ventures, LLC v. Barreto, 452 F.3d 892, 898 (D.C. Cir. 2007) .*

(n70)Footnote 26. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 129 F.R.D. 483, 484 (D.N.J. 1990) .*

(n71)Footnote 27. *Fed. R. Civ. P. 26(c)(1)(H).*

(n72)Footnote 28. *See, e.g., Member Servs. v. Sec. Mut. Life Ins., 2007 U.S. Dist. LEXIS 17498, at *7-*8 (N.D.N.Y. Mar. 12, 2007) .*

(n73)Footnote 29. *Friction Div. Prod. v. E.I. DuPont de Nemours, 658 F. Supp. 998, 1003 (D. Del. 1987) , aff'd without opinion, 883 F.2d 1027 (1989) .*

(n74)Footnote 30. *Fed. R. Civ. P. 26(c)(2).*

(n75)Footnote 31. *Sunshine Jr. Stores, Inc. v. Sunshine-Jr. Stores, Inc., 456 F.3d 1291, 1306-1307 (11th Cir.*

2006) .

(n76)Footnote 32. *See Fed. R. Evid. 502(d).*

(n77)Footnote 33. *See In re Qwest Communs. Int'l, 450 F.3d 1179, 1182 (10th Cir. 2006)* .

(n78)Footnote 34. *See Fed. R. Evid. 502(d).*

(n79)Footnote 35. *See Fed. R. Evid. 502(d)*, Original Committee Notes.

(n80)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.106* (Matthew Bender 3d ed.).

(n81)Footnote 1. *See In re Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2nd Cir. 1987)* .

(n82)Footnote 2. *Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 781 (1st Cir. 1988)* .

(n83)Footnote 3. *United Nuclear Corp, v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990)* .

(n84)Footnote 4. *Abraham v. Intermountain Health Care, Inc., 461 F.3d 1249, 1269 (10th Cir. 2006)* .

(n85)Footnote 5. *Bayer AG and Miles, Inc. v. Barr Lab., Inc., 162 F.R.D. 456, 459 (S.D.N.Y. 1995)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.05

§ 15.05 Timing and Sequence of Discovery

[1] Timing in Absence of Exercise of Discretion by Court n*

The Court has discretion over the exercise of discovery, and in its discretion may determine the timing of discovery. n1 Absent a controlling court order, discovery may not ordinarily take place until the parties confer as required by Rule 26(f). n2 Discovery may be conducted earlier, however, if any of the following are true: n3

1. The case is one of those proceedings exempted from initial disclosure under Rule 26(a)(1)(E); n4

2. A specific Federal Rule of Civil Procedure authorizes early discovery; n5

3. The court has issued an order authorizing the discovery; n6 or

4. The parties have agreed or stipulated to earlier discovery.

The Rule 26(f) discovery planning conference must take place as soon as practicable, and in any event at least 21 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). n7 The court may ensure that discovery is not unduly delayed either by entering a special order or by setting the date for a scheduling conference. n8

[2] Each Party May Determine Sequence Unless Otherwise Ordered by Court n*

Each party may conduct discovery in any sequence, unless the court orders otherwise. n1 The court may issue an order prescribing the sequence of discovery on motion, in the interests of justice, and for the convenience of parties and witnesses. n2 Rule 26(a) specifies a schedule requiring mandatory automatic disclosure of specified information absent court order or stipulation. n3 If a party attempts to serve discovery demands seeking the information covered by automatic disclosures prior to the time that the disclosures are due, the court may strike the discovery demands as untimely. n4

Both parties may conduct discovery at the same time. Initiation of discovery by one party does not require any other

party to delay its own discovery. n5 Consequently, a party may not unilaterally demand that they have priority in document production and need not produce documents to the other party until their own request is completed merely because they have served a discovery request on the other party first. n6 To establish any priority in discovery production, the party must file a motion for protective order. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.121* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Telecomm Technical Services, Inc. v. Siemens Rolm Communications, Inc., 172 F.R.D. 532, 541 (N.D. Ga. 1997)* (nothing in Rule 26(d) withdraws discretion of court to order that discovery not begin, for example, until 30 days after the defendant's answer).

(n3)Footnote 2. *Fed. R. Civ. P. 26(d)(1)*; *Thrower v. Barney, 849 F. Supp. 1445, 1446 (N.D. Ala. 1994)* , *aff'd without opinion, 43 F.3d 680 (11th Cir. 1994)* .

(n4)Footnote 3. *Fed. R. Civ. P. 26(d)(1)*.

(n5)Footnote 4. *See § 15.02[1][b][vi]*.

(n6)Footnote 5. *See, e.g., Fed. R. Civ. P. 30(a)(2)(C)* (deposition of person about to leave country may be noticed before Rule 26(f) conference).

(n7)Footnote 6. *See Telecomm Technical Servs., Inc. v. Siemens Rolm Commun., Inc., 172 F.R.D. 532, 541 (N.D. Ga. 1997)* .

(n8)Footnote 7. *Fed. R. Civ. P. 26(f)(1)*; *see Fed. R. Civ. P. 16(b)*.

(n9)Footnote 8. *See Fed. R. Civ. P. 26(f)*, Committee Note to 1993 Amendments.

(n10)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.122* (Matthew Bender 3d ed.).

(n11)Footnote 1. *Fed. R. Civ. P. 26(d)(2)(A)*.

(n12)Footnote 2. *Fed. R. Civ. P. 26(d)(2)*; *see Cruden v. Bank of New York, 957 F.2d 961, 972 (2d Cir. 1992)* (order regarding sequence of discovery is at discretion of trial judge).

(n13)Footnote 3. *See Fed. R. Civ. P. 26(a)(1)-(3)*.

(n14)Footnote 4. *Fed. R. Civ. P. 26(a)*, Committee Note to 1993 Amendments.

(n15)Footnote 5. *Fed. R. Civ. P. 26(d)(2)(B)*.

(n16)Footnote 6. *Fed. R. Civ. P. 26(d)(2)(A)*.

(n17)Footnote 7. *See Fed. R. Civ. P. 26(c)(1)(B)* (protective order may require that discovery be had only on specified terms and conditions, including designation of time).

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.06

§ 15.06 Supplementation of Disclosures and Responses

[1] Obligation to Supplement Automatic Disclosures and Discovery Responses n*

[a] Supplementation Required For Disclosure and Written Responses

A party must supplement or correct automatic disclosures and written discovery responses the party has made whenever the party learns that the disclosures or responses are incomplete or incorrect. This supplementation duty extends to two types of discovery: n1 (1) the mandatory initial disclosures that a party is required to make prior to trial, and (2) the written responses a party makes in response to the opposition party's interrogatories, requests for production, and requests for admission. A party must also supplement or correct such disclosures or responses to include information that is acquired by the party after the disclosure or response when the court orders such supplementation or corrections. n2 The duty to supplement and correct applies both to attorneys as well as parties who discover corrective information. n3

Rule 26(e)(1)(A) imposes a duty on a party to supplement its mandatory automatic disclosures at appropriate intervals, when a party learns that the information in a mandatory disclosure is in some material respect incomplete or incorrect and if additional or correct information has not otherwise been made known to other parties during the discovery process or in writing. n4 Rule 26(e)(1)(A) also imposes a duty on a party to seasonably amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. n5

[b] Additional Supplementation Required for Expert Witness Disclosures

A party's duty to supplement and correct generally does not extend to disclosures made as part of deposition testimony. n6 However, with respect to experts for whom a disclosure report is required, n7 the duty extends both to information contained in the expert's report and to information provided through the expert's deposition. n8 The continuing duty to disclose typically arises in the context of the expert's report. Thus, a party is under a continuing duty to supplement the expert's report if there are any additions or changes to what has been previously disclosed. For example, if the expert states in the initial report that he or she will provide more complete or additional opinions, the party must amend the

statement of opinions in the report. n9 Additionally, the continuing duty applies to the expert's deposition testimony. n10 An expert may change his or her opinions in preparation for trial and even during trial, n11 and to protect the opposition party's trial preparations, these changes must be Disclosed. n12

Any supplementation or other changes required with regard to the expert witness information must be disclosed by the time the party's pretrial disclosures are due under Rule 26(a)(3); n13 that is, at least 30 days before trial, unless otherwise directed by the court. n14 The pretrial disclosures required by Rule 26(a)(3) are commonly directed by the court, because they are contained in the court's pretrial order. Consequently, any supplementation of expert witness information then available should take place on or before the date of the pretrial order.

[2] Effect of Failure to Supplement n*

[a] Sanctions Available for Failure to Supplement As Required

[i] Court Has Discretion to Impose Various Sanctions

The rule governing discovery violation sanctions explicitly provides that a party is subject to sanctions if: n1 the party fails to supplement its automatic mandatory disclosures or discovery responses as required under Rule 26(e)(1)(A) or as ordered by the court under Rule 26(e)(1)(B), n2 or fails to amend a prior disclosure regarding an expert's report or information given during the expert's deposition as required under Rule 26(e)(2). n3 Specifically, if a party without substantial justification fails to supplement or to amend a prior response to discovery as required by Rule 26(e), and the failure is not harmless, the party may be precluded from using that witness or information at trial, at a hearing, or on a motion. n4 In addition to or in lieu of this sanction, the court on motion and after affording an opportunity to be heard, may impose other appropriate sanctions, such as requiring payment of reasonable expenses, including attorney's fees, caused by the violation of Rule 26(e), informing the jury of the failure to make the required supplementation, and may impose any of the actions authorized under Rule 37(b)(2)(A)(i)-(vi). n5

[ii] Exception for Supplementation of Electronically Stored Information

There is an exception to the imposition of sanctions for cases involving supplementation of electronically stored information, n6 which includes but is not limited to items such as data files, program files, and e-mail messages and files. n7 A court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n8 This provision applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may require a party to intervene to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(e) means that a party is not permitted to exploit the routine operation of an information system to avoid discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. n9

[b] Court's Determination of Appropriate Sanction

When a court determines that there has been a violation by failure to supplement, the court has discretion to decline to impose sanctions if the failure was substantially justified or was harmless. n10 In determining whether a Rule 26(e) violation was justified or harmless, the court should consider the following factors, n11 which it should also consider in the determination of the nature and the monetary amount of any sanction to be imposed: n12

1. The importance of the testimony or evidence that may be subject to exclusion.

2. The prejudice to the opposing party arising from allowance of the testimony or evidence subject to exclusion.

3. The ability of the party to cure the prejudice.

4. The extent to which introducing such testimony would disrupt the trial.

5. The explanation, if any, for the party's failure to comply with the duty to supplement, including any bad faith or willfulness.

The rules do not require that a discovery order be violated before sanctions are imposed. n13 Therefore, a party need not make a motion to compel compliance with a discovery request for the court to impose sanctions under Rule 26(e). n14 A district court may sanction individual attorneys for violations of Rule 26(e), if the attorney is actually aware that the client's discovery responses were incorrect. On the other hand, a district court should not sanction an attorney who was unaware of his or her client's violation of the rule. n15

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.131* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(e)(1)(A).*

(n3)Footnote 2. *Fed. R. Civ. P. 26(e)(1)(B).*

(n4)Footnote 3. *See Fed. R. Civ. P. 26(e)*, Committee Note to 1993 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 26(e)(1)(A)*; *see Dotson v. Bravo, 321 F.3d 663, 667 (7th Cir. 2003)* (duty applies whether through mistake in initial disclosure or through change in circumstance).

(n6)Footnote 5. *Fed. R. Civ. P. 26(e)(1)(A).*

(n7)Footnote 6. *See Fed. R. Civ. P. 26(e)(1)*; [a], *above*.

(n8)Footnote 7. *See Fed. R. Civ. P. 26(a)(2)(B).*

(n9)Footnote 8. *Fed. R. Civ. P. 26(e)(2)*; *see Reed v. Smith & Nephew, Inc., 527 F. Supp. 2d 1336, 1349 (W.D. Okla. 2007)* .

(n10)Footnote 9. *Jacobsen v. Deseret Book Co., 287 F.3d 936, 951-952 (10th Cir. 2002)* .

(n11)Footnote 10. *Fed. R. Civ. P. 26(e)(2).*

(n12)Footnote 11. *See Newell Puerto Rico, Ltd. v. Rubbermaid Inc., 20 F.3d 15, 21, 22 (1st Cir. 1994)* .

(n13)Footnote 12. *Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 2003)* .

(n14)Footnote 13. *Fed. R. Civ. P. 26(e)(2).*

(n15)Footnote 14. *Fed. R. Civ. P. 26(a)(3).*

(n16)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.132* (Matthew Bender 3d ed.).

(n17)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n18)Footnote 2. *See Fed. R. Civ. P. 26(e)(1).*

(n19)Footnote 3. *See Fed. R. Civ. P. 26(e)(2).*

(n20)Footnote 4. *Fed. R. Civ. P. 37(c)(1).*

(n21)Footnote 5. *Fed. R. Civ. P. 37(c)(1)(A)-(C).*

(n22)Footnote 6. *Fed. R. Civ. P. 37(e).*

(n23)Footnote 7. *See Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n24)Footnote 8. *Fed. R. Civ. P. 37(e).*

(n25)Footnote 9. *Fed. R. Civ. P. 37(e)*, Committee Note to 2006 Amendments.

(n26)Footnote 10. *Fed. R. Civ. P. 37(c)(1).*

(n27)Footnote 11. *Reed v. Smith & Nephew, Inc., 527 F. Supp. 2d 1336, 1350 (W.D. Okla. 2007)* .

(n28)Footnote 12. *See Bradley v. United States, 866 F.2d 120, 126-127 (5th Cir. 1989)* .

(n29)Footnote 13. *Toth v. Grand Trunk R.R., 306 F.3d 335, 344 (6th Cir. 2002)* ; *see Fed. R. Civ. P. 37(c)(1).*

(n30)Footnote 14. *Alldread v. City of Grenada, 988 F.2d 1425, 1436 (5th Cir. 1993)* .

(n31)Footnote 15. *Reed v. Iowa Marine and Repair Corp., 16 F.3d 82, 85 (5th Cir. 1994)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.07

§ 15.07 Discovery Planning Conferencen*

[1] Discovery Conference

[a] Function of Required Discovery Conference

All parties, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), n1 must confer to discuss the nature and the basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, to make or arrange for the automatic initial disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan. Attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging for the conference, attempting in good faith to agree on the proposed discovery plan, and submitting to the court within 14 days after the conference a written report outlining the plan. n2 The Rule 26(f) conference is no longer required in those categories of proceedings that are exempted by Rule 26(a)(1)(B) from the mandatory initial disclosure requirements of Rule 26(a)(1)(A). n3

The primary purpose of the discovery conference is to refine and clarify disputes by requiring the parties to make basic disclosures and to set a schedule for future discovery. n4 The conference requirement contemplates that no discovery will take place until the parties have conferred. Although discovery may not be conducted prior to the conference, parties may file motions to dismiss or for summary judgment. n5 Under the rule, the parties no longer need to meet in person on a face-to-face basis, although the court may order that the parties or attorneys attend the conference in person. n6

Parties are required to make the initial disclosures required by Rule 26(a)(1) within 14 days of the discovery planning conference. n7 The parties should use the Rule 26(f) conference to exchange, discuss, and clarify their respective automatic disclosures. Parties should also consider whether a stipulation extending the 14-day period would be appropriate, for example, when a defendant would have less than 60 days after being served in which to make its initial disclosures. n8

If necessary to comply with an expedited schedule for Rule 16(b) conferences, a court may by local rule require: (1) that the discovery conference between the parties occur fewer than 21 days before the scheduling conference is held or a

scheduling order is due under Rule 16(b), n9 and (2) that the written report outlining the discovery plan be filed fewer than 14 days after the discovery conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference. n10

[b] Discretion of Court to Alter Discovery Conference Requirements

The district court has discretion to enter an order that modifies the conference requirements, or dispenses entirely with the requirement that the parties hold a discovery conference. n11 Such an order may be appropriate in cases that are exempted from the scheduling order requirement under Rule 16(b), n12 such as cases in which there will be no discovery, in which discovery is rarely required, or when a conference of the parties would be impracticable. n13

Rule 26(f) does not require that the discovery conference be held with direct participation by the court. n14 Nevertheless, district courts continue to exercise supervisory authority over discovery. In its scheduling order, for example, the court will set a time for the completion of discovery. n15 Furthermore, the court may issue other orders affecting the scope, timing, and extent of discovery and disclosures. n16 The court also retains control through the power to impose sanctions for discovery abuse. n17 For example, if a party is not ready for trial and requests a continuance, the court will deny the motion for continuance if the party fails to comply with the conference requirements of Rule 26(f). n18

[2] Discovery Plan

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible to proceed in good faith, to agree on the proposed discovery plan, and to submit to the court within 14 days after the discovery conference a written report outlining the plan. n1 The discovery plan must state the parties' views and proposals concerning the following matters:

1. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; n2

2. The subjects on which discovery may be needed, when discovery should be completed, n3 and whether discovery should be conducted in phases or be limited to or focused on particular issues; n4

3. Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; n5

4. Any issues about claims of privilege or of protection as trial-preparation materials, and if the parties agree on a procedure to assert these claims after production, whether to ask the court to include their agreement in an order; n6

5. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; n7 and

6. Any other orders that the court should issue under Rule 26(c) (regarding limitations on discovery) or under Rule 16(b) (contents of scheduling order) and 16(c) (pretrial conference matters). n8

The parties must confer in good faith to reach agreement on the matters required to be included in the discovery plan. n9 However, if they cannot in good faith reach agreement on particular claims or defenses, the discovery plan should include each party's competing proposals, as well as a statement of the issues on which they were able to reach agreement. Any party that fails to cooperate in good faith respecting the scheduling and holding of the discovery conference and the generation of a joint discovery plan may be sanctioned under Rule 37(f). n10

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 26.141* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(f)(1)*; *see Fed. R. Civ. P. 16(b)*; *see also Carney v. K-Mart Corporation, 176 F.R.D. 227, 228-229 (S.D. W. Va. 1997)* .

(n3)Footnote 2. *Fed. R. Civ. P. 26(f)(2)*.

(n4)Footnote 3. *Fed. R. Civ. P. 26(f)(2)*.

(n5)Footnote 4. *Cablevision of Boston, Inc. v. Public Improvement Comm'n, 38 F. Supp. 2d 46, 62 (D. Mass. 1999)* .

(n6)Footnote 5. *Thrower v. Barney, 849 F. Supp. 1445, 1446 (N.D. Ala. 1994)* , *aff'd without opinion, 43 F.3d 680 (11th Cir. 1994)* .

(n7)Footnote 6. *Fed. R. Civ. P. 26(f)(2)*.

(n8)Footnote 7. *Fed. R. Civ. P. 26(f)*, Committee Note to 1993 Amendments.

(n9)Footnote 8. *Fed. R. Civ. P. 26(f)*, Committee Note to 1993 Amendments.

(n10)Footnote 9. *Fed. R. Civ. P. 26(f)(4)(A)*.

(n11)Footnote 10. *Fed. R. Civ. P. 26(f)(4)(B)*.

(n12)Footnote 11. *Fed. R. Civ. P. 26(f)(1)*.

(n13)Footnote 12. *See Fed. R. Civ. P. 26(f)*; *Fed. R. Civ. P. 16(b)*.

(n14)Footnote 13. *Fed. R. Civ. P. 26(f)*, Committee Note to 1993 Amendments.

(n15)Footnote 14. *See Fed. R. Civ. P. 26(f)*, Committee Note to 1993 Amendments.

(n16)Footnote 15. See *Fed. R. Civ. P. 16(b)(3)(A)*.

(n17)Footnote 16. *See Fed. R. Civ. P. 16(b)(3)(B)(ii)*.

(n18)Footnote 17. See *Fed. R. Civ. P. 26(g)(3)*, *37(c)(1)*, *37(f)*.

(n19)Footnote 18. *Cook v. City of Pomona, 884 F. Supp. 1457, 1460 (C.D. Cal. 1995)* .

(n20)Footnote 1. *Fed. R. Civ. P. 26(f)(2)*; *see Beecham v. Socialist People's Libyan Arab Jamahiriya, 424 F.3d 1109, 1111 (D.C. Cir. 2005)* (burden of conferring and formulating discovery plan falls on attorneys for opposing sides).

(n21)Footnote 2. *Fed. R. Civ. P. 26(f)(3)(A)*.

(n22)Footnote 3. *See Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, 479 F.3d 1330, 1333 (Fed. Cir. 2007)* .

(n23)Footnote 4. *Fed. R. Civ. P. 26(f)(3)(B)*.

(n24)Footnote 5. *Fed. R. Civ. P. 26(f)(3)(C)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* (this information includes, for example, data files, program files, backup and archival tapes, cache files, temporary files, voice mail files, and e-mail messages and files).

(n25)Footnote 6. *Fed. R. Civ. P. 26(f)(3)(D)*.

(n26)Footnote 7. *Fed. R. Civ. P. 26(f)(3)(E)*.

(n27)Footnote 8. *Fed. R. Civ. P. 26(f)(3)(F)*.

(n28)Footnote 9. *Fed. R. Civ. P. 26(f)(2)*.

(n29)Footnote 10. *Fed. R. Civ. P. 26(f)(2)*, Committee Note to 1993 Amendments; *see Fed. R. Civ. P. 37(f)*.

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
I. PRINCIPLES AND PROCEDURES GOVERNING ALL DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.08

§ 15.08 Discovery Signature Requirementsn*

[1] Required Signature Constitutes Certification

Every mandatory, automatic initial disclosure n1 and pretrial disclosure n2 and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name (or by the party personally, if unrepresented) and must state the signer's address, e-mail address, and telephone number. n3 A signature constitutes a certification of the following:

1. By signing an automatic disclosure, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, that the disclosure is complete and correct as of the time it is made. n4

2. By signing a discovery request, response, or objection, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, that the item is: n5

a. consistent with the Federal Rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; n6

b. not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; n7 and

c. neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. n8

The certification requirement serves the purpose of deterring discovery abuse by requiring persons certifying disclosures, requests, responses, and objections to consider carefully the veracity and accuracy of the papers before signing them. n9

[2] Effect of Failure to Sign

If an attorney or party fails to sign a disclosure, request, response, or objection, other parties have no duty to act on the unsigned item until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention. n1 A court that strikes a request, response, or objection because of a failure to sign may still subject the party or his or her attorney to sanctions if the request, response or disclosure violates discovery rules. Such sanctions, however, must be imposed under authority other than rule 26(g) (such as, Rule 16(f) or Rule 37, or *28 U.S.C. § 1927*), because sanctions may not be applied under Rule 26(g) unless the request, response, or objection is signed. n2

[3] Effect of Improper Certification

If a certification violates Rule 26 without substantial justification, the court on a filed motion or its own initiative must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. n1 The sanction provision is mandatory, in that it provides that the court must impose a sanction when there is a certification violation without substantial justification. For example, if discovery responses are for the improper purposes of causing unnecessary delay, increasing the other party's expenses, and preventing the other party from receiving discovery material, sanctions are required. n2 However, the court has discretion regarding the type of sanction to impose. n3

The imposition of sanctions does not require subjective bad faith by the signer. The imposition of sanctions under Rule 26(g) is proper when the signing of a discovery response is incomplete, evasive or objectively unreasonable under the circumstances. The "reasonable inquiry" standard is an objective standard. The most obvious situation where sanctions are appropriate occurs where a party or its attorney submits a false discovery document. n4 Similarly, the court is required to impose a sanction on the party and/or the party's attorney when the certification itself is false. n5

Even though subjective bad faith is not required for the imposition of sanctions, the converse is not true; therefore, if the certification process is completed in bad faith, the court may impose sanctions. n6 Thus, if a discovery request or response is made for the improper purpose of causing unnecessary delay or needlessly increasing the cost of litigation, the court may impose sanctions. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 26.151*-26.154 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 26(a)(1).*

(n3)Footnote 2. *See Fed. R. Civ. P. 26(a)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n6)Footnote 5. *Fed. R. Civ. P. 26(g)(1)(A).*

(n7)Footnote 6. *Fed. R. Civ. P. 26(g)(1)(A)(i).*

(n8)Footnote 7. *Fed. R. Civ. P. 26(g)(1)(A)(ii).*

(n9)Footnote 8. *Fed. R. Civ. P. 26(g)(1)(A)(iii).*

(n10)Footnote 9. *See Fed. R. Civ. P. 26(g)*, Committee Note to 1993 Amendments.

(n11)Footnote 1. *Fed. R. Civ. P. 26(g)(2).*

(n12)Footnote 2. *See Wade v. Soo Line R.R. Corp., 500 F.3d 559, 565 (7th Cir. 2007)* .

(n13)Footnote 1. *Fed. R. Civ. P. 26(g)(3).*

(n14)Footnote 2. *Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1372 (11th Cir. 1997)* .

(n15)Footnote 3. *Chambers v. NASCO, Inc., 501 U.S. 32, 51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n16)Footnote 4. *Books Are Fun, Ltd. v. Rosebrough, 239 F.R.D. 532, 550-551 (D. Iowa 2007)* .

(n17)Footnote 5. *Wade v. Soo Line R.R. Corp., 500 F.3d 559, 565 (7th Cir. 2007)* .

(n18)Footnote 6. *Resolution Trust Corp. v. Dabney, 73 F.3d 262, 268 (10th Cir. 1995)* .

(n19)Footnote 7. *Fed. R. Civ. P. 26(g)(1)(A)(ii).*

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2-15 Moore's Manual--Federal Practice and Procedure § 15.09

§ 15.09 Stipulations Regarding Discoveryn*

[1] Parties May Alter Discovery Procedures By Stipulation

[a] Agreement of Parties to Control Particular Aspect of Discovery

Ordinarily, parties must conduct discovery in compliance with *Rules 26 through 37 of the Federal Rules of Civil Procedure* and the local rules of the court. n1 However, unless the court directs otherwise, the parties may agree by stipulation to dispense with particular discovery requirements imposed by the federal rules, and may modify the discovery procedures that will apply to their particular claims and defenses. n2 In particular, the parties may stipulate that:

1. A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified, and that such deposition may be used in the same way as any other deposition. n3

2. Any procedures other than depositions that govern or limit discovery be modified; however, a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial. n4

Rule 29 applies only to stipulations relating to general discovery, not to stipulations concerning mandatory automatic disclosures, which are governed by Rule 26(a). n5

[b] Court Has Ultimate Control over Discovery

Although the parties may ordinarily control discovery by stipulation, n6 the court has ultimate power to order that discovery be accomplished in a manner other than stipulated. n7 This authority is based on the court's inherent authority to control discovery in the interests of justice. n8 Because the purpose of the discovery rules is to promote the open exchange of information, a court may refuse to approve stipulations that constrict discovery. On the other hand, a district court is more likely to approve a stipulation that expands discovery, even if there would not have been a basis under the Federal Rules for requiring the discovery. n9

With respect to any stipulation extending the time for any form of discovery, that stipulation must have *prior* court approval if it would conflict with the time set by the court for completing discovery, for hearing a motion, or for trial. n10 Additionally, by order or local rule, the court may direct that its approval be obtained prior to the time that specific types of stipulation take effect. n11

[2] Examples of Valid Stipulations

The following are examples of the types of enforceable stipulations that parties have made:

1. A stipulation to commence early discovery, that is, prior to the discovery planning conference required by Rule 26(f), n1 or to alter the deadlines for discovery. n2

2. A stipulation to the entry of a protective order to protect a party or other person against annoyance, embarrassment, oppression, or undue burden or expense. n3

3. Stipulations relating to depositions, such as stipulations (1) regarding the number of depositions, n4 (2) allowing the party to take a deposition before a person other than an officer named under Rule 28, n5 or (3) allowing the parties to take depositions by telephone or other remote electronic means. n6

4. A stipulation permitting service of more than 25 interrogatories. n7

5. A stipulation to have service of a request for production and inspection take place before the discovery planning conference required by Rule 26(f). n8 Additionally, parties may stipulate that a written response to a request for production be served within a longer or shorter period than the 30 days normally required, provided that any extension does not interfere with a court-specified discovery cut-off date or scheduled hearing or trial. n9

6. Stipulations relating to requests for admissions, n10 including a stipulation that a written answer or objection to a request for admission must be served within a time other than the usual 30 days. n11

7. Stipulations related to subpoenas under Rule 45, when the subpoena is used related to discovery purposes. n12

[3] Effect of a Stipulation

The court will give full effect to unambiguous terms expressed in a stipulation. n1 When parties stipulate in writing how discovery will be conducted, they waive their rights under otherwise applicable federal rules. n2 However, the court will not give effect to a discovery stipulation that does not show binding intent. For example the court will not give effect to the parties' stipulation to a particular practice or procedure unless the stipulation makes clear it is applicable to the case at hand. n3

A stipulation controls discovery of the parties only to the terms actually agreed on. However, the court may consider circumstances surrounding a stipulation, so that rigid enforcement does not lead to injustice. n4 For example, a stipulation that a party will pay the reasonable costs of reproducing documents does not contemplate payment of attorney's fees, because attorney's fees are extraordinary costs of complying with the production of documents. n5

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 29.02*-29.07 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Boardman v. National Medical Enterprises, 106 F.3d 840, 842-843 (8th Cir. 1997)* .

(n3)Footnote 2. *Fed. R. Civ. P. 29.*

(n4)Footnote 3. *Fed. R. Civ. P. 29(a).*

(n5)Footnote 4. *Fed. R. Civ. P. 29(b)*; *see* [b], *below.*

(n6)Footnote 5. *See Fed. R. Civ. P. 26(a)*, discussed in *§ 15.02.*

(n7)Footnote 6. *See* [a], *above.*

(n8)Footnote 7. *Fed. R. Civ. P. 29.*

(n9)Footnote 8. *See Cowen v. Bank United of Texas, 70 F.3d 937, 944 (7th Cir. 1995)* ; *Feldman v. Flood, 176 F.R.D. 651, 653 (M.D. Fla. 1997)* ; *see also* Federal Judicial Center, Manual for Complex Litigation § 11.422 (4th ed. 2004).

(n10)Footnote 9. *See, e.g., In re Application of Sinclair Oil Corp., 881 F. Supp. 535, 539 (D. Wyo. 1995)* .

(n11)Footnote 10. *Fed. R. Civ. P. 29(b).*

(n12)Footnote 11. *See Fed. R. Civ. P. 29*, Committee Note to 1993 Amendments.

(n13)Footnote 1. *Fed. R. Civ. P. 26(d)(1)*; *see Fed. R. Civ. P. 26(f).*

(n14)Footnote 2. *Greenawalt v. Sun City W. Fire Dist., 2006 U.S. Dist. LEXIS 40447, at *10-*11 (D. Ariz. 2006)* .

(n15)Footnote 3. *See Fed. R. Civ. P. 26(c).*

(n16)Footnote 4. *See Fed. R. Civ. P. 30(a)(2)(A)* (oral depositions); *Fed. R. Civ. P. 31(a)(2)(A)* (depositions on written questions).

(n17)Footnote 5. *See Fed. R. Civ. P. 30(b)(5)(a).*

(n18)Footnote 6. *See Fed. R. Civ. P. 28(a), 30(b)(4).*

(n19)Footnote 7. *See Fed. R. Civ. P. 29, 33(a)*, Committee Note to 1993 Amendments.

(n20)Footnote 8. *See Fed. R. Civ. P. 26(d)(1).*

(n21)Footnote 9. *Fed. R. Civ. P. 29(b), 34(b)(2)(A).*

(n22)Footnote 10. *See Fed. R. Civ. P. 26(d)(1).*

(n23)Footnote 11. *Fed. R. Civ. P. 29(b), 36(a)(3).*

(n24)Footnote 12. *See Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 589-590 (M.D.N.C. 1994)* .

(n25)Footnote 1. *Berkley v. Clark Equip. Co., 26 F.R.D. 153, 154 (E.D.N.Y. 1960)* .

(n26)Footnote 2. *See OMG Fid., Inc. v. Sirius Techs., Inc., 239 F.R.D. 300, 306 (N.D.N.Y. 2006)* (when parties otherwise agree by stipulation entered into under Rule 29, discovery periods prescribed under Federal Rules of Civil Procedure do not control).

(n27)Footnote 3. *Melton v. McCormick, 94 F.R.D. 344, 346 (W.D.N.Y. 1982)* (party's agreement to pay deposition expenses in one action has no effect on different action).

(n28)Footnote 4. *Rice v. Glad Hands, Inc., 750 F.2d 434, 438 (5th Cir. 1985)* .

(n29)Footnote 5. *Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 590-591 (M.D.N.C. 1994)* .

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2-15 Moore's Manual--Federal Practice and Procedure §§ 15.10-15.19

[Reserved]

§§ 15.10-15.19[Reserved]

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.20

§ 15.20 Perpetuation of Testimony By Deposition

[1] Purpose of Perpetuation Procedures n*

[a] Methods for Perpetuation of Testimony Other than Trial Testimony

There are three methods for perpetuation of testimony outside of the trial of an action. These are (1) the taking of depositions before the action, n1 (2) the taking of depositions pending appeal, n2 and (3) the initiation of a separate action to perpetuate testimony: n3

1. Rule 27(a) provides a method for perpetuating testimony before the filing of a suit when there is an expectation of future litigation and a risk that the testimony could cease to exist if not preserved. n4 Rule 27(a) is intended to apply to situations in which testimony might be lost to a prospective litigant unless taken immediately, without having to wait for a lawsuit or other legal proceeding to commence. n5 Any person who desires to perpetuate testimony must file a verified petition in the United States District Court for the district where any expected adverse party resides. n6 A district court will order discovery if satisfied that the perpetuation of testimony may prevent a failure or delay of justice. n7 A Rule 27(a) petition is not a separate action and does not require a current independent basis of federal jurisdiction; n8 rather, it is an ancillary proceeding. n9 However, the petitioner must be able to show that subject matter jurisdiction will exist in federal court over the contemplated action for which the testimony is being perpetuated. n10

2. Rule 27(b) provides a procedure to use when perpetuating testimony may prevent a failure or delay of justice, when an appeal has been taken or will be taken, to avoid loss of testimony while the appeal is pending. n11 Unlike depositions in pending actions, a deposition pending appeal maybe taken only by leave of the court n12 and only to perpetuate testimony for use in the event of further proceedings in that court. n13 A party who wants to perpetuate testimony under Rule 27(b) must move for leave to take the deposition in the district court that rendered the judgment. n14

3. Rule 27(c) provides that the courts retain their inherent power to entertain an independent action to perpetuate testimony. n15 Rule 27 does not specify the procedures or requirements for filing such an action; however, Rule 27(c) was intended to preserve the right to use a separate action to perpetuate testimony under former *Section 644 of Title 28 of the United States Code*. Thus, the courts tend to follow the procedures and requirements established under that statute

in a Rule 27(c) action to perpetuate testimony. n16

[b] Special Perpetuation Procedures Not Substitute for Standard Discovery

Rule 27 procedures are applicable only to preserve testimony from the imminent possibility of extinction; they are not a substitute for standard methods of discovery. n17 Thus, the scope of inquiry allowed under Rule 27 is narrower than that available under the general discovery provisions of Rule 26. n18 While Rule 26 permits discovery of any matter relevant to the subject matter involved in the pending action, n19 Rule 27 may not be used to investigate for possible claims, n20 or to inquire into facts related to an injury, unless a witness's testimony is in imminent danger of being lost. n21 However, Rule 27 may be used if the purpose is both to perpetuate testimony and discovery, n22 provided that the petition to perpetuate testimony sets forth in detail the substance of the testimony to be preserved. n23

[2] Depositions Before Action

[a] Petition is Required to Take Deposition Before Action

A person who wants to perpetuate testimony concerning any matter cognizable in a United States court must file a verified petition requesting an order authorizing the petitioner to depose the named persons in the district court for the district where any expected adverse party resides. n1 The term "United States court" refers to the Supreme Court of the United States, courts of appeals, district courts, bankruptcy courts, and the Court of International Trade. n2 Rule 27(a) must be invoked prior to the filing of a complaint, because after the contemplated action is filed, the general rules of discovery apply. n3 A prospective defending party may bring a Rule 27(a) petition, provided he or she alleges facts showing that there is a real likelihood that the expected adversary will bring an action. n4

Rule 27 does not define the phrase "cognizable in a United States court," but it has been generally acknowledged that there must be some potential basis for federal jurisdiction; in other words, the petitioner must show that the federal court of the contemplated action requiring the testimony to be perpetuated will have federal subject matter jurisdiction. n5 Therefore, for example, Rule 27(a) is not available to perpetuate testimony in a contemplated personal injury action which could present neither federal question jurisdiction nor diversity jurisdiction. n6

[b] Notice and Service of Petition

After filing the petition, and at least 21 days before the date of the hearing, the petitioner must serve a copy of the petition on each person named in the petition as an expected adverse party and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. n7 If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies. n8

[c] Contents of Petition

A petition to perpetuate testimony under Rule 27(a) must be titled in the name of the petitioner and must show each of the following: n9

1. That the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought. n10 The petitioner must show a present inability to bring the action in any court, state or federal, anywhere in the United States. n11

2. The subject matter of the expected action and the petitioner's interest. n12

3. The facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it. n13

4. The names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known. n14

5. The name, address, and expected substance of the testimony of each deponent. n15

6. A statement that the petitioner asks for an order authorizing the petitioner to take the depositions of the persons named in the petition. n16

7. A verification. n17

General or conclusory allegations are insufficient in the petition. The petitioner must specifically state facts which establish all of the elements listed above. For example, the petitioner must state facts that the testimony will preserve. n18

[d] Court's Order to Perpetuate Testimony and Evidence

If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order granting the petition. The court's order perpetuating testimony must: (1) designate or describe the persons whose depositions may be taken, (2) specify the subject matter of the examinations, and state whether the depositions will be taken orally or by written interrogatories. n19 The court also may order discovery of the type permitted in Rule 34, which provides for the production of documents and things and for entry on land for inspection and other purposes, n20 and may order discovery under Rule 35, which provides for the physical and mental examination of persons. n21 The overall purpose of Rule 27 is to perpetuate and preserve evidence for use in a prospective action, and to the extent that a use of Rules 34 and 35 will yield such evidence, the petitioner may use these rules, whether or not they are used in conjunction with the taking of a deposition. n22

Orders directing depositions to perpetuate testimony in advance of litigation are subject to immediate appellate review, under an abuse of discretion standard. n23

[e] Examination Perpetuating Testimony

After the court has issued an order to perpetuate testimony under Rule 27(a), n24 the depositions must proceed in the manner of other depositions as specified in the federal rules. A reference in these rules to the court where an action is pending means, for purposes of Rule 27, the court where the petition for the deposition was filed. n25 Rule 27(a)(3) does not specify the scope of the evidence permitted to be perpetuated under Rule 27. The case precedent indicates that the petitioners may perpetuate that testimony or evidence that would be discoverable under Rule 26, provided that the petitioner shows that the testimony or evidence requested is material and competent. n26

[f] Use of Deposition Perpetuating Testimony

Once testimony or evidence is perpetuated under Rule 27(a), the petitioner may use the deposition under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under the Federal Rules or, although not taken under the Federal Rules, would be admissible in evidence in the courts of the state where it was taken. n27

[3] Depositions Pending Appeal

[a] Purpose of Deposition to Perpetuate Testimony Pending Appeal of Judgment

After a court has rendered a judgment, and an appeal has been taken or may still be taken from that judgment, the rendering court may permit a party to depose witnesses to perpetuate the witnesses' testimony for use in the event of further proceedings in the rendering court. n1 The purpose of perpetuating testimony in the district court pending appeal of a judgment is to prevent injustice from the possible loss of testimony in any future proceedings in the district court after the appeal. n2 Rule 27(b) is intended for use only after entry of a final judgment. Rule 27(b) is not available in a pending suit merely because an interlocutory ruling is on appeal. n3

[b] Motion Required to Take Deposition to Perpetuate Testimony Pending Appeal

The party who wants to perpetuate testimony pending an appeal may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. n4

A motion to perpetuate testimony pending appeal must state each of the following:

1. The names and addresses of each deponent. n5

2. The substance of the testimony the moving party expects to elicit from each deponent. n6

3. The reasons for perpetuating the testimony, n7 including the risk that the testimony will be lost. n8

[c] Order of Court to Perpetuate Testimony and Evidence

If the court finds that perpetuating the testimony pending appeal may prevent a failure or delay of justice, the court may order the depositions to be taken, and the depositions may then be taken and used as any other deposition taken in a pending district-court action. n9 The court also may order discovery of the type permitted in Rule 34, which provides for the production of documents and things and for entry on land for inspection and other purposes, n10 and may order discovery under Rule 35, which provides for the physical and mental examination of persons. n11 Subpoenas under Rule 45 may also be used at this stage for discovery purposes. n12

The ruling of a district court on a request to perpetuate testimony by a district court under Rule 27(b) is a final order, and the appropriate court of appeals has jurisdiction to review it. n13 The order is appealable whether it grants or denies a Rule 27(b) request, n14 and the standard of review is abuse of discretion. n15

[d] Scope of Perpetuation Pending Appeal

The purpose of a deposition and further discovery pending appeal is to perpetuate testimony for use in the event of future district court proceedings. n16 Consequently, a party will not be permitted to use Rule 27(b) to obtain discovery to support an argument raised for the first time after judgment. Nor will a party be permitted to obtain discovery after judgment of matters that could have been obtained during discovery in the main action, n17 because in such circumstances, the movant is not actually attempting to avoid a failure or delay of justice, but is trying to relitigate the issues. n18 Similarly Rule 27(b) may not be used by a party to reopen a case after judgment by introducing a new theory or to correct tactical choices made the first time. n19

[4] Independent Action to Perpetuate Testimony

Rule 27(c) provides that the provisions of Rule 27(a) and 27(b) do not preclude exercise of the district court's power to entertain a separate action for the sole purpose of perpetuating testimony. n1 Because Rule 27(c) contemplates a true action rather than the ancillary proceeding before litigation created by Rule 27(a) or the perpetuation on appeal of an action, n2 a Rule 27(c) action must be brought in a manner that satisfies the venue requirements for an original action. Furthermore, the plaintiff must give service of process in the same manner as in the expected action in which the perpetuated testimony will be used. n3

The complaint in a Rule 27(c) action must allege facts similar to those required for a Rule 27(a) petition. Thus, the plaintiff is entitled to discovery under Rule 27(c) if he or she establishes all of the following: n4

1. That the records or testimony sought are competent and material to the matter in controversy;

2. That the information sought cannot be obtained in ordinary discovery because the plaintiff is not yet in a position to initiate such an action; and

3. That the testimony or records may be lost if the plaintiff cannot obtain them at the present time.

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 27.02*-27.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 27(a).*

(n3)Footnote 2. *See Fed. R. Civ. P. 27(b).*

(n4)Footnote 3. *See Fed. R. Civ. P. 27(c).*

(n5)Footnote 4. *Fed. R. Civ. P. 27(a)(1)*; *see* [2], *below.*

(n6)Footnote 5. *Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1373 (D.C. Cir. 1995)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 27(a)(1).*

(n8)Footnote 7. *See Fed. R. Civ. P. 27(a)(1).*

(n9)Footnote 8. *General Motors Corp. v. Gunn, 752 F. Supp. 729, 732 (N.D. Miss. 1990)* .

(n10)Footnote 9. *Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981)* .

(n11)Footnote 10. *Dresser Industries, Inc. v. U.S., 596 F.2d 1231 (5th Cir. 1979)* ; *In re Nabors Loffland Drilling Co., 142 F.R.D. 295, 296 (W.D. La. 1992)* .

(n12)Footnote 11. *Fed. R. Civ. P. 27(b)(1)*; *see* [3], *below.*

(n13)Footnote 12. *In re City of El Paso, 887 F.2d 1103, 1105 (D.C. Cir. 1989)* .

(n14)Footnote 13. *In re City of El Paso, 887 F.2d 1103, 1105 (D.C. Cir. 1989)* .

(n15)Footnote 14. *Fed. R. Civ. P. 27(b)(2).*

(n16)Footnote 15. *See Fed. R. Civ. P. 27(c)*; [4], *below.*

(n17)Footnote 16. *Nevada v. O'Leary, 63 F.3d 932, 937 (9th Cir. 1995)* .

(n18)Footnote 17. *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 485 (4th Cir. 1999)* .

(n19)Footnote 18. *In re Petition of Ford, 170 F.R.D. 504, 507 (M.D. Ala. 1997)* .

(n20)Footnote 19. *Fed. R. Civ. P. 26(b)(1).*

(n21)Footnote 20. *Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995)* .

(n22)Footnote 21. *In re Petition of Ford, 170 F.R.D. 504, 506-507 (M.D. Ala. 1997)* .

(n23)Footnote 22. *See In re Gary Constr., Inc., 96 F.R.D. 432, 433 (D. Colo. 1983)* .

(n24)Footnote 23. *Application of Sitter, 167 F.R.D. 80, 82 (D. Minn. 1996)* .

(n25)Footnote 1. *Fed. R. Civ. P. 27(a)(1)*.

(n26)Footnote 2. *28 U.S.C. § 451*.

(n27)Footnote 3. *Shore v. Acands, Inc., 644 F.2d 386, 388 (5th Cir. 1981)* .

(n28)Footnote 4. *See Martin v. Reynolds Metal Corp., 297 F.2d 49, 55 (9th Cir. 1961)* .

(n29)Footnote 5. *Dresser Industries, Inc. v. U.S., 596 F.2d 1231 (5th Cir. 1979)* .

(n30)Footnote 6. *In re Nabors Loffland Drilling Co., 142 F.R.D. 295, 296 (W.D. La. 1992)* .

(n31)Footnote 7. *Fed. R. Civ. P. 27(a)(2)*; *see Fed. R. Civ. P. 4*; *see also In re Deiulemar di Navigazione S.p.A., 153 F.R.D. 592, 593 (E.D. La. 1994)* (it appears that time limit may not be altered by court; construing former time limits).

(n32)Footnote 8. *Fed. R. Civ. P. 27(a)(2)*; *see Fed. R. Civ. P. 17(c)*.

(n33)Footnote 9. *See* Deiulemar Compagnia di *Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484 (4th Cir. 1999)* .

(n34)Footnote 10. *Fed. R. Civ. P. 27(a)(1)(A)*.

(n35)Footnote 11. *Shore v. Acands, Inc., 644 F.2d 386, 388 (5th Cir. 1981)* (citing **Moore's Federal Practice**).

(n36)Footnote 12. *Fed. R. Civ. P. 27(a)(1)(B)*.

(n37)Footnote 13. *Fed. R. Civ. P. 27(a)(1)(C)*; *see Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995)* (particularized showing that testimony will be lost if not preserved).

(n38)Footnote 14. *Fed. R. Civ. P. 27(a)(1)(D)*.

(n39)Footnote 15. *Fed. R. Civ. P. 27(a)(1)(E)*; *see In re Checkosky, 142 F.R.D. 4, 7 (D.D.C. 1992)* , *remanded on other grounds, Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994)* (testimony must be known to petitioner)

(n40)Footnote 16. *Fed. R. Civ. P. 27(a)(1)*.

(n41)Footnote 17. *Fed. R. Civ. P. 27(a)(1)*.

(n42)Footnote 18. *In re Yamaha Motor Corp., 251 F.R.D. 97, 99-100 (N.D.N.Y. 2008)* .

(n43)Footnote 19. *Fed. R. Civ. P. 27(a)(3)*.

(n44)Footnote 20. *Fed. R. Civ. P. 27(a)(3)*; *see Fed. R. Civ. P. 34(a)*.

(n45)Footnote 21. *Fed. R. Civ. P. 27(a)(3)*; *see Fed. R. Civ. P. 35(a)*.

(n46)Footnote 22. *In re Thomas, 155 F.R.D. 124, 126 (D. Md. 1994)* (authorizing use of non-deposition discovery for perpetuation, citing **Moore's Federal Practice**).

(n47)Footnote 23. Deiulemar Compagnia di *Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 479 (4th Cir. 1999)* .

(n48)Footnote 24. *See* [d], *above*.

(n49)Footnote 25. *Fed. R. Civ. P. 27(a)(3)*.

(n50)Footnote 26. *Nissei Sangyo America, Ltd. v. United States, 31 F.3d 435, 440 (7th Cir. 1994)* .

(n51)Footnote 27. *Fed. R. Civ. P. 27(a)(4)*; *see Fed. R. Civ. P. 32(a)* (using depositions in court proceedings); *see also Kimberly-Clark Corp. v. Cont'l Cas. Co., 2006 U.S. Dist. LEXIS 60357, at *21-*29 (N.D. Tex. 2006)* (use of pre-suit deposition not allowed at trial under either federal or Texas law).

(n52)Footnote 1. *Fed. R. Civ. P. 27(b)(1)*.

(n53)Footnote 2. *Central Bank of Tampa v. Transamerica Ins. Group, 128 F.R.D. 285, 286 (M.D. Fla. 1989)* , *aff'd without opinion, 959 F.2d 971 (11th Cir. 1992)* (when passage of time or unavailability of witnesses would cause injustice, court may allow the perpetuation of testimony pending appeal, citing **Moore's Federal Practice**).

(n54)Footnote 3. *Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981)* .

(n55)Footnote 4. *Fed. R. Civ. P. 27(b)(1)*.

(n56)Footnote 5. *Fed. R. Civ. P. 27(b)(1)(A)*.

(n57)Footnote 6. *Fed. R. Civ. P. 27(b)(1)(A)*; *see In re City of El Paso, 887 F.2d 1103, 1105 (D.C. Cir. 1989)* .

(n58)Footnote 7. *Fed. R. Civ. P. 27(b)(1)(B)*.

(n59)Footnote 8. *Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 976 (11th Cir. 1985)* ; *see In re Ramirez, 241 F.R.D. 595, 597 (W.D. Tex. 2006)* (petitioner failed to adequately set forth factual basis showing that testimony sought would be lost if not preserved).

(n60)Footnote 9. *Fed. R. Civ. P. 27(b)(3)*.

(n61)Footnote 10. *Fed. R. Civ. P. 27(b)(3)*; *see Fed. R. Civ. P. 34(a)*.

(n62)Footnote 11. *Fed. R. Civ. P. 27(b)(3)*; *see Fed. R. Civ. P. 35(a)*.

(n63)Footnote 12. *Okros v. Angelo Iafrate Constr. Co., 502 F. Supp. 2d 648, 651, 654 (E.D. Mich. 2007)* .

(n64)Footnote 13. *Shore v. Acands, Inc., 644 F.2d 386, 387-388 (5th Cir. 1981)* .

(n65)Footnote 14. *Campbell v. Blodgett, 982 F.2d 1356, 1357-1358 (9th Cir. 1993)* .

(n66)Footnote 15. *Shore v. Acands, Inc., 644 F.2d 386, 388 (5th Cir. 1981)* .

(n67)Footnote 16. *Fed. R. Civ. P. 27(b)*.

(n68)Footnote 17. *See* 19th *St. Baptist Church v. St. Peters Episcopal Church, 190 F.R.D. 345, 348 (E.D. Pa. 2000)* .

(n69)Footnote 18. *See Schreier v. Weight Watchers Northeast Region, Inc., 872 F. Supp. 1, 5 (E.D.N.Y. 1994)* , *aff'd without opinion, 57 F.3d 1064 (2d Cir. 1995)* .

(n70)Footnote 19. *Central Bank of Tampa v. Transamerica Ins. Group, 128 F.R.D. 285, 286 (M.D. Fla. 1989)* .

(n71)Footnote 1. *Fed. R. Civ. P. 27(c)*.

(n72)Footnote 2. *General Motors Corp. v. Gunn, 752 F. Supp. 729, 732 (N.D. Miss. 1990)* (Rule 27(c) independent action is in substance former bill in equity to perpetuate testimony material in determination of matter in controversy in expected action).

(n73)Footnote 3. *Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981)* (citing **Moore's Federal Practice**).

(n74)Footnote 4. *Nissei Sangyo Am., Ltd. v. United States, 31 F.3d 435, 440 (7th Cir. 1994)* ; *see Fed. R. Civ. P. 27(a)*.

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.21

§ 15.21 Depositions On Oral Examination

[1] Utility of Oral Depositions n*

[a] Nature and Purpose of Depositions

A deposition is a record of testimony taken outside the courtroom that has been certified in conformity with the Federal Rules of Civil Procedure so that a court may regard it as equivalent to testimony delivered inside the courtroom under oath. n1 The purpose of a deposition is to determine information that a person might testify to at trial, such as what the witness observed or heard through a question and answer conversation between the deposing lawyer and the witness. n2 Unlike interrogatories or requests for admissions, which may not be addressed to nonparties, depositions of nonparties are permitted as of right. n3 Nonparties may also be required to produce documents through a deposition by service of a subpoena duces tecum pursuant to Rule 45. n4

Depositions are used most often for gathering information through discovery beyond that which can be obtained in the automatic disclosures. n5 The primary use of depositions at trial is in cross-examining witnesses and attempting to impeach their trial testimony to the extent it differs from testimony previously given at a deposition. Depositions are also used for a wide variety of other litigation purposes including preservation of information and establishment of facts crucial to settlement or rulings on pretrial motions. n6

[b] Persons Subject to Depositions

The testimony of any person may be taken by deposition. n7 The deposition Rule draws no distinction between the taking of the deposition of a party or of a nonparty witness. By contrast, interrogatories may be addressed only to a party. n8

Public officials, the United States government, and states and their subdivisions all are subject to deposition when warranted by the circumstances of the case. n9

The party to be deposed may be a natural person or any entity. When the deponent is a corporation, the person designated to be deposed on behalf of the corporation must be an officer, director, or managing agent of the corporate

deponent. n10 If the individual designated in a notice of deposition is not an officer, director, or managing agent, the deposition must proceed as for an ordinary nonparty witness, and the deponent may not speak on behalf of the corporation. n11 If not deposed as a representative of the corporate party, a witness must be subpoenaed. Courts utilize a three-prong test for determining whether a person is a managing agent of a corporation: the individual must (1) possess general powers to exercise judgment and discretion in corporate matters; (2) be a person who can be relied on to give testimony, at the employer's request, in response to the demand of the examining party; and (3) be a person who can be expected to identify with the interests of the corporation. n12

The provision of Rule 30(a) that "any person" may be deposed may include even the attorney for a party; however, because questions to an attorney may give rise to objections based on work product doctrine and the attorney-client privilege, a request to depose opposing counsel is not allowed except in extraordinary circumstances. n13

[c] Persons Who May Preside Over Depositions

Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. n14 The officer must be authorized to administer oaths and take testimony. n15 Typically, a court reporter is the officer who conducts the deposition. n16 However, in rare instances, the court may order that a deposition take place in the presence of a discovery master, for example, if there have been discovery disputes. n17

[d] Timing of Depositions

Rule 30 provides that a party must obtain leave of court if, without the written stipulation of the parties, a party seeks to take a deposition before the time specified in Rule 26(d) or unless the party certifies in the notice with supporting facts that the deponent is expected to leave the United States and be unavailable for examination in this country after that time. n18 Rule 26(d) provides that, except in categories of proceedings exempted from initial disclosure under Rule 26, or when authorized by the Federal Rules of Civil Procedure or by court order or agreement of the parties, a party may not seek discovery from any source before the parties have met at a discovery conference as required by Rule 26(f). n19 The practical effect of the rules when read together is that parties must wait for the taking of any depositions until after a discovery plan has been agreed to by the parties, n20 absent leave of court or stipulation of the parties. n21

[e] When Deposition Requires Leave of Court

Ordinarily, a party does not need permission from the court to initiate and take a deposition. However, there are several situations in which leave of court is required, based on the principles stated in Rule 26(b)(2), n22 as follows:

1. If the proposed deposition would result in more than 10 depositions being taken by the plaintiffs, or by the defendants, or by third-party defendants. This limit of 10 depositions applies to each adverse "side" or "position" in litigation, and not to each party. Furthermore, both oral depositions and depositions on written questions under Rule 31 are included in determining the total number of depositions taken. Leave of court is not required to take more than 10 depositions if the parties stipulate to additional depositions. n23 A deposition of an entity or a governmental agency is counted as a single deposition for purposes of this limit, even if more than one person is designated to testify. n24

2. If the person has already been deposed in the case unless the parties stipulate to the second deposition. n25 Courts generally disfavor second depositions, and absent a showing of need or good reason, a court generally will not require a deponent to appear for a second deposition. However, second depositions may be justified in view of a subsequent disclosure or discovery occurring after the first deposition. n26

3. A party must obtain leave of court to take a deposition before the parties have met to plan discovery as required by Rules 26(d) and (f). n27 There are two exceptions to this requirement. First, the parties may stipulate to the taking of the deposition without leave of court. n28 Second, a deposition may be taken before the discovery planning meeting if the

deposition notice contains a certification that the person to be examined is expected to leave the United States and be unavailable for examination in the United States unless deposed before the discovery conference. n29

4. A party must petition the district court to take a deposition to perpetuate testimony before the formal commencement of a civil action, n30 and must make a motion in the district court to take a deposition to perpetuate testimony pending appeal from a district court judgment. n31

5. When the person to be deposed is confined in prison. There is no provision for allowing the parties to stipulate to the deposition of an inmate without leave of court. n32

As noted above, when a party requests leave of court to take a deposition the court must generally grant permission to the extent that the deposition would be consistent with the principles stated in Rule 26(b)(2), n33 which gives the court discretion to limit the number and length of depositions, n34 and requires the court to limit depositions to the extent that (1) the deposition is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the person taking the deposition has had ample opportunity already to obtain the information sought; or (3) the burden or expense of taking the deposition outweighs its likely benefit. n35

[2] Procedural Requirements for Oral Depositions n*

[a] Notice of Deposition Examination

A party that wants to depose a person by oral examination must give reasonable written notice to every other party to the action. n1

The notice must contain a statement of all of the following:

1. The time when the deposition will be taken. n2 A proper designation of the deposition time requires the deposing party to specify both the date and the hour at which the examination is to begin. Ordinarily, designation of any time during normal business hours is appropriate for a deposition. Therefore, it has been held improper to schedule a deposition for a Sunday. n3 However, there is no prohibition on counsel, the parties, and the deponent holding the deposition at their convenience, even if this results in a deposition at unusual hours. n4

2. The location of the deposition. n5 The party noticing the deposition usually has the right to choose the location. n6 If the party deposed is a plaintiff or the plaintiff's agent, the deposition is generally appropriate at the litigation forum. n7 The deposition of a defending party typically may be taken at its place of business. n8 However, the court has discretion to authorize that the deposition be taken in another location. n9 Unless the witness agrees otherwise, the deposition of a nonparty witness must take place within 100 miles of that witness's residence or place of employment. n10

3. The name and address of each person to be examined, if known. If the name of the deponent is not known, the notice must contain a general description sufficient to identify the person or the particular class or group to which the person belongs. n11 If the deponent is an organization or governmental agency and the party noticing the deposition is unsure of the name and address of the person with knowledge of the information sought, the notice may name the organization or governmental agency and describe with reasonable particularity the matters on which examination is requested. Then, the organization or agency must designate a person to testify on its behalf. n12

4. If a subpoena duces tecum will be served on the person to be deposed, a designation of the materials to be produced. The party may do this by specifically identifying the materials in the notice or by attaching a copy of the subpoena. The notice to a party deponent may be accompanied by a request complying with Rule 34 to produce documents and tangible things at the deposition. n13

5. The method by which the testimony will be recorded. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. n14 With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. n15 The parties may stipulate, or the court may on motion order that a deposition be taken by telephone or other remote means. For the purpose of the federal rules, the deposition "takes place" where the deponent answers the questions. n16

[b] Compelling Attendance of Witness

If a witness is a party or party representative, the opposition need not subpoena the witness for deposition. Reasonable and proper deposition notice is sufficient to compel the party witness's attendance, n17 with sanctions available should the party fail to appear. n18 A party is responsible for ensuring that its representative attend the deposition. n19 However, a subpoena is necessary to compel someone who is not a party to appear for the taking of a deposition, n20 and subpoenas issued in connection with a deposition are governed by Rule 45. n21 There are two types of subpoenas under Rule 45 that may be used in connection with a deposition: (1) a subpoena ad testificandum, which compels the attendance of a witness to testify; n22 and (2) a subpoena duces tecum, which also requires the production of documents or things. n23

[c] Production of Documents in Connection with Deposition

The deposing party may require the deposition witness to bring documents and other materials to the deposition. This may be accomplished in one of two ways. If the deponent is not a party, the deposing party must serve a subpoena duces tecum on the deponent. n24 If the deponent is a party, the notice may be accompanied or preceded by a request made pursuant to Rule 34 for the production of documents and tangible things at the taking of the deposition. n25

A party may not use a document request in connection with a deposition in order to circumvent court-imposed discovery deadlines. For example, if the deadline for serving documentary discovery requests has passed, a party may not avoid the expiration of the deadline by serving an extensive document request in connection with a notice of deposition. n26

[d] Methods of Recording Testimony

[i] Permissible Methods

Unless the court orders otherwise, deposition testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. n27 With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. n28 Also, any party may arrange to transcribe a deposition. n29 The parties may stipulate, or the court may on motion order that a deposition be taken by telephone or other remote means. For the purpose of the federal rules, the deposition "takes place" where the deponent answers the questions. n30

When a deposition is recorded other than stenographically, the person recording the deposition may not distort the appearance or demeanor of the deponent or attorneys through audio or visual recording techniques. n31 The rules do not require that a deposition be taken all in one method of recording and a deposing party may change techniques for a subsequent portion of a continued deposition. n32

Any party may arrange to transcribe a deposition. n33 Although Rule 30 does not generally require that a transcription be made, a transcript is required when the deposition will be used for the following purposes:

1. For pretrial disclosures under Rule 26(a)(3)(A)(2); n34

2. Under Rule 32(c) if the deposition is later to be offered as evidence at trial; n35 or

3. If the deposition is offered on a dispositive motion for summary judgment under Rule 56. n36

[ii] Court May Order Method of Recording

The court has the authority to designate the means by which a deposition will be recorded. n37 The court will typically use this discretion only when a party objects to the deposing party's choice of recording method. n38 However, the court may require, for example, a simultaneous stenographic recording of the deposition, if there is a legitimate concern about accuracy or distortion. n39

[iii] Deposition Taken by Remote Means

The parties may make a written stipulation or the court may order that a deposition be taken by telephone or other remote electronic means. A deposition taken by remote means is deemed taken in the district and at the place where the deponent answers the questions. n40 When the authorized officer administers the oath, the officer must be present with the witness at a telephonic deposition, rather than in the presence of the persons conducting the examination. n41

It is not necessary for a party to show extraordinary circumstances before the court will order a deposition by telephone, because there is no requirement in Rule 30(b)(4) of a showing of necessity, financial inability, or other hardship. Rather, the purpose of Rule 30(b)(4) is to reduce the cost of federal litigation by providing alternatives to traditional stenographic depositions. Therefore, leave to take a telephonic deposition should be liberally granted. Consequently, the burden is on the party opposing the deposition to establish why it should not be conducted by telephone, n42 once the party requesting to depose a witness by telephone presents a legitimate reason for its request. n43 The court must determine whether the use of telephonic means would reasonably ensure accuracy and trustworthiness and whether the opposing party would be prejudiced. n44

[3] Conduct of Deposition Examination

[a] Presiding Officer's Responsibilities

Before the deposition itself may begin, the presiding officer must satisfy the qualification and disqualification requirements of Rule 28. n1 The officer must make a statement on the record that includes the following: n2 (1) the officer's name and business address; (2) the date, time, and place of the deposition; (3) the name of the deponent; (4) the administration of the oath or affirmation to the deponent; and (5) an identification of all persons present. If the deposition is recorded other than stenographically, the officer must repeat the first three items at the beginning of each unit of recorded tape or other recording medium. n3

The Federal Rules do not contain any requirements regarding the form or content of the oath. n4 In general, any statement made by the deponent that demonstrates the deponent is impressed with the duty to tell the truth and is subject to the penalty of perjury for failure to do so is sufficient. n5 A solemn affirmation may be substituted in place of the oath. n6

The officer presiding over the deposition has the responsibility to record the testimony. This may be done by the officer personally, or by someone acting under his or her direction and in the officer's presence. The testimony must be taken stenographically or recorded by any other method authorized by Rule 30(b)(3)(A). All objections made at the deposition must be noted by the officer in the record. n7 At the end of the deposition, the officer must state on the record that the deposition is complete. The officer also must state any stipulations made by counsel concerning the custody of the

transcript or recording and the exhibits, or concerning other pertinent matters. n8

[b] Time Limitations on Deposition

Unless otherwise ordered by the court or stipulated by the parties, a deposition is limited in duration to one day of seven hours. n9 The court may specify a longer or shorter limitation based on the factors stated in Rule 26(b)(2) n10 if a different time period is needed for a fair examination of a particular deponent, or if the deponent or another person, or other circumstance, impedes or delays the examination. n11 This provision, in effect, imposes a presumptive durational limitation of one day of seven hours for any deposition, and its purpose is to prevent undue costs and delays. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement, and absent agreement, by court order. n12

[c] Oral Examination of Witnesses

[i] Rules of Evidence Generally Apply Except for Objections

Examination and cross-examination of witnesses at a deposition generally is held in the same manner as permitted at trial under the Federal Rules of Evidence, with two important exceptions. Under *Rule 30(c)*, Federal Rules of Evidence *103* and *615* do not apply at a deposition. n13 Rule 103 governs objections and court rulings on the evidence. n14 Rule 615 governs sequestration of witnesses, generally allowing for automatic exclusion of trial witnesses, other than the parties or their designated agents, so that they cannot hear the testimony of other witnesses. n15 Although mandatory sequestration no longer applies at depositions, both party and nonparty witnesses may be excluded from a deposition for good cause under Rule 26(c). n16

Based on the incorporation of most of the Federal Rules of Evidence by Rule 30(c), the courts have applied *Federal Rules of Evidence Rule 612* to permit an adverse party access to materials used by a deponent to refresh the witness's memory during or prior to the deposition. n17 Thus, while testifying, or in the discretion of court before the witness testifies, if a witness uses a writing to refresh his or her memory, the adverse party is entitled to have the writing produced, to inspect it, to cross-examine the witness about it, and to introduce into evidence those portions of the writing that relate to the testimony of the witness. n18

Examination and cross-examination of a deponent generally proceed as permitted at trial. n19 Based on this rule, several courts have held that a deponent and the deponent's attorney have no right to confer during a deposition, except for the purpose of determining whether a privilege should be asserted. n20 Instead of asking the deponent questions at a deposition, a party has the option to serve on the opponent written questions for the opposition to propound to the witness, who must deliver them to the officer. The deposition officer must present such questions to the witness verbatim during the deposition. n21

[ii] Raising Objection During Deposition Examination

During a deposition, the attorney must state objections concisely and in a non-argumentative and non-suggestive manner. An objection at the time of the examination, whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition, must be noted on the record. The examination still proceeds but the testimony is taken subject to any objection. Once an objection has been stated, the deponent must answer the question, unless there is a proper reason for instructing the witness not to answer. Counsel may instruct a deponent not to answer only in the following three situations: n22

1. When necessary to preserve a privilege;

2. To enforce a limitation on evidence directed by the court; or

3. To suspend a deposition in order to present a motion under Rule 30(d)(3) to terminate or limit the deposition.

Objections at depositions generally should be limited to those that would be waived under Rule 32(d)(3) if not made at the deposition. n23 Rule 32(d)(3) provides, in relevant part, that errors and irregularities in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and other matters that may have been correct at that time are waived if not objected to at the deposition. n24 All other objections, such as those grounded on competence, relevance, or materiality, are preserved for trial unless the grounds could have been corrected at the deposition. n25

If deposing counsel engages in irrelevant or repetitious questioning, the appropriate course for opposing counsel is to enter an objection. The witness may then answer the question. If the answer is offered at trial, opposing counsel may then renew the objection and obtain a ruling from the trial court. If deposing counsel persists in irrelevant or repetitious questioning after objection, opposing counsel may seek a protective order or sanctions from the court. However, counsel does not have the right to unilaterally instruct the witness not to answer. n26

[d] Examination on Written Questions

Instead of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, who must deliver the questions to the officer who will preside over the deposition. The officer must ask the deponent the questions and record the answers verbatim. n27 This procedure, like participating by telephone or other remote electronic means pursuant to Rule 30(b)(4), enables a party with a relatively small interest in the action or with little interest in a particular deponent to protect its interests at minimum expense. n28

[e] Conduct of Attorneys at Deposition

As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition, which is essentially an extension of a legal proceeding in court. A deposition is intended to permit discovery of information in the possession of the deponent or to perpetuate the testimony of the deponent; the witness is placed under oath and a court reporter is present. Specifically, attorneys may not make implied or express accusations of wrongdoing against witnesses and attorneys or attempt to interrogate opposing counsel during the course of a deposition. In addition, because a judge is not present to rule on legal disputes, attorneys should not engage in argument about legal issues. n29

Additionally, attorneys should not engage in private conferences with the deponent during the deposition, interrupt the deposition testimony to make statements on the record, n30 or coach a witness through suggestive objections. n31 If an attorney engages in improper conduct, the proper course of action is to enter an objection on the record, and if necessary because improper conduct does not cease, suspend the deposition to request a protective order from the court. n32

[f] Sanctions for Improper Objections of Attorney

If, as a result of improper objections or instructions not to answer, a party is required to move for an order compelling disclosure, the moving party may be entitled to expenses and sanctions under Rules 30(d)(2) or 37(a)(5)(A). n33 The district court should consider a five-factor test for determining whether to impose sanctions under Rule 37 for improperly instructing a witness not to answer. These factors include: (1) the importance of the requested information to the issues in litigation that is, whether material to a claim or defense; (2) the number of times the attorney instructed the witness not to answer; (3) whether the question that prompted the instruction was proper and unobjectionable; (4) whether the instruction not to answer appears to have been made in a sincere, though misguided, effort to preserve a colorably valid objection, or, instead, for purposes of disrupting the deposition; and (5) whether the attorney instructing the deponent not to answer had advance notice of the likelihood that the deposing attorney would initiate questions in an area considered objectionable and could have sought a protective order in advance. n34

An attorney who improperly instructs a witness not to answer may also be sanctioned under *28 U.S.C. § 1927*, n35 which authorizes costs, expenses, and attorney's fees incurred as a result of an attorney's unreasonable and vexatious conduct, or under the court's inherent power to impose sanctions to regulate its docket, promote judicial efficiency, and deter frivolous filings. n36

[4] Procedures After Deposition Examination n*

[a] Review and Changes by Deponent

Before the deposition is completed, the deponent or a party may request to review the transcript or recording. n1 If so requested, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available: (1) to review the transcript or recording; n2 and (2) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. n3

The officer who conducted the deposition must indicate in his or her certificate n4 whether a review was requested. If so, the officer must attach to the certificate any changes the deponent makes during the 30-day period. n5 Without such a certificate, the court will not accept any attempt by the witness to modify the deposition testimony. n6 Thus, if the deponent wishes to make changes in form or substance, the changes must be made in a timely, signed statement that recites the changes and the reasons given by the deponent for making them. n7 This statement is known as an "errata sheet," which is effective to make changes only if the deponent strictly follows the Rule 30(e) procedures. n8

Generally, a court does not have a duty to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes. n9 However, if the changes will alter the substance of the deposition testimony in such a way that the veracity of the changes come in question to the extent that they constitute a sham, the court may disregard the changes. Factors to be considered in determining whether a deposition change amounts to a sham include whether the deponent was cross-examined during his or her earlier testimony, whether the deponent had access to the pertinent evidence at the time of his or her earlier testimony or whether the change was based on newly discovered evidence, and whether the earlier testimony reflects confusion that the deponent attempts to explain. n10

[b] Officer's Certification and Transcript Responsibilities

[i] Certification, Delivery, and Storage of Deposition

The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the original deposition in an envelope or package bearing the title of the action and marked "Deposition of _____ [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. n11

The federal rules generally provide that discovery materials, including depositions and deposition copies, ordinarily must not be filed until used in the proceeding or unless directed by the court. n12 If a party does file the deposition, the party must give prompt notice of its filing to all other parties. n13

[ii] Documents and Tangible Things Related to Deposition

If requested by a party, documents and tangible things produced for inspection during a deposition must be marked for identification and attached to the deposition as originals. n14 Any party may inspect and copy the originals. But if the person who produced them wants to keep the originals, the person may either: (1) offer copies to be marked, attached to the deposition, and then used as originals, after giving all parties a fair opportunity to verify the copies by comparing

them with the originals; n15 or (2) give all parties a fair opportunity to inspect and copy the originals after they are marked, in which event the originals may be used as if attached to the deposition. n16 Any party may move for an order that the originals be attached to the deposition pending final disposition of the case. n17

[iii] Copies of the Transcript or Recording of Deposition

Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. The officer must furnish a copy of the transcript or recording to any party or the deponent if the party or deponent pays reasonable charges for the transcript or recording. n18 This means that each party and the deponent must pay for its own copy. No party is required to provide a free copy to another party. n19

[5] Avoidance of Deposition Examination n*

[a] Motion to Quash Deposition

If a person is not required to give deposition testimony because the testimony is not discoverable, or because deposition procedures have been violated, the person or party may prevent the depositing by filing a motion to quash the deposition n1 or a motion to quash a deposition subpoena. n2 The court has the power to grant a motion to quash a deposition through its general power to limit improper discovery. n3

Therefore, the court may quash a notice of deposition if it finds that the discovery sought is unreasonably cumulative or duplicative; is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the party seeking discovery has had ample opportunity by other discovery methods to obtain the information sought. n4 The court may also quash a notice of deposition when good cause is shown that the proposed deponent must be protected from annoyance, embarrassment, oppression, or undue burden or expense. n5

[b] Motion to Terminate or Limit Depositions

During the process of discovery, Rule 26(c) provides general authority for the issuance of orders protecting a party or person from annoyance, embarrassment, oppression or undue burden or expense. n6 However, once a deposition has already commenced, protection against abuse is provided under the more specific provisions of Rule 30(d)(3). At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. n7

If the court finds in favor of the moving party, the court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). n8 If terminated, the deposition may be resumed only by order of the court where the action is pending. n9 Additionally, the court may award expenses, as specified in Rule 37(a)(5), which provides for an award either against the party whose conduct necessitated the motion if it is granted, n10 or if the motion is denied, against the moving party. n11

Whether to grant an order terminating a deposition is a matter within the discretion of the court. However, courts use the power to terminate or limit deposition examinations sparingly. n12 To obtain a protective order under Rule 30(d), the moving party has the burden of proving that the examination was being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or a party. An objecting party who fails to meet this burden may be subjected to costs and reasonable expenses if the court finds that the motion has no substantial basis. n13

[6] Costs of Deposition n*

[a] Each Party Initially Must Pay Its Own Expenses

Generally, each party must initially pay its own costs and expenses incurred related to notices of deposition and deposition examinations for deposing the opposition party witnesses. n1 However, the district court, as part of its inherent equitable power to control discovery, may order that the parties divide the costs evenly, n2 or that one party must pay the deposition costs of another party. n3

Also as part of that inherent equitable power to control discovery, a district court may, under some circumstances, order an opposing party to pay for deposition expenses of an indigent litigant as a condition precedent to allowing that party to take the deposition. n4 However, there is no requirement that the United States provide free copies of deposition transcripts to indigent civil litigants under the in forma pauperis statute. n5

[b] Award of Costs to Prevailing Party

The court may award deposition expenses, including the costs of deposition transcripts, to the prevailing party provided that the court determines at the end of litigation that the transcripts were reasonably necessary for use in the case. n6 Whether a deposition is "reasonably necessary" is within the trial court's discretion. n7 The determination of reasonable necessity is based on a consideration of the facts known at the time of the deposition. n8 An appellate court will not reverse a deposition costs award unless there has been a clear abuse of discretion by the district court. n9

Courts may not tax the costs of transcripts of depositions provided for the convenience of the requesting party or attorney. n10 Similarly, the court should not routinely award the extra cost of "expedited" transcriptions, so that litigation costs are not unnecessarily increased; however, in some circumstances, the district court may award the cost of expedited transcripts when they are necessary because of the length and complexity of the case. n11 Courts usually require that the prevailing party itemize their expenses, including the names of the deponents and a description of the services in the invoices submitted. This enables the district court to determine whether the expenses were necessarily obtained for use in the case. n12

[7] Sanctions Related to Deposition n*

[a] Sanctions for Noticing Party's Failure to Attend Deposition

If a party is expecting a deposition to be taken that has been noticed by another party and attends that deposition in person or by an attorney, the attending party may recover reasonable expenses for attending, including attorney's fees, if the noticing party fails to attend and proceed with the deposition. n1 Under this provision, the noticing party may be sanctioned for either a failure to attend or a failure to proceed, as both actions are required to avoid sanctions. n2

Similarly, if a party who fails to appear as a witness when the party has been noticed for a deposition and properly served with the notice, the party is subject to sanctions under Rule 37(d). n3 Some courts have held that when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), if the corporation produces an uninformed or unprepared witness, that circumstance is equivalent to a "failure to appear," which is sanctionable under Rule 37(d). n4

[b] Sanctions for Noticing Party's Failure to Serve Subpoena on Nonparty Deponent

If a party is expecting a deposition to be taken that has been noticed by another party, and attends that deposition in person or by an attorney, the attending party may recover reasonable expenses for attending, including attorney's fees, if the noticing party fails to serve a subpoena on a nonparty deponent, and the nonparty deponent consequently does not attend. n5 One court has held that the court may impose sanctions if a nonparty witness appears for a deposition, but the witness has not been subpoenaed and refuses to be sworn or to testify. n6

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 30.02*-30.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F. Supp. 589, 606 (E.D. Pa. 1992)* , *aff'd without op., 989 F.2d 490 (3d Cir. 1993)* ; *Hudson v. Spellman High Voltage, 178 F.R.D. 29, 32 (E.D.N.Y. 1998)* .

(n3)Footnote 2. *See Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 30(a)(1).*

(n5)Footnote 4. *See Fed. R. Civ. P. 45(a)(1)(A)(iii).*

(n6)Footnote 5. *Martin v. CSX Transp., Inc., 215 F.R.D. 554, 557 (S.D. Ind. 2003)* .

(n7)Footnote 6. *See Hall v. Clifton Precision, 150 F.R.D. 525, 526 (E.D. Pa. 1993)* .

(n8)Footnote 7. *Fed. R. Civ. P. 30(a)(1).*

(n9)Footnote 8. *See Fed. R. Civ. P. 33(a).*

(n10)Footnote 9. *See Fay v. United States, 22 F.R.D. 28, 32 (E.D.N.Y. 1958)* (in tort action against United States, United States as Entity required to produce designated representative for deposition); *Conneway v. City of New York, 32 F. Supp. 54, 55 (E.D.N.Y. 1940)* (city employees with knowledge of facts must be produced for deposition in personal injury action).

(n11)Footnote 10. *Fed. R. Civ. P. 30(b)(6)*; *see also In re Honda Am. Motor Co., Inc., 168 F.R.D. 535, 540 (D. Md. 1996)* .

(n12)Footnote 11. *Sugarhill Records, Ltd. v. Motown Record Corp., 105 F.R.D. 166, 169 (S.D.N.Y. 1985)* .

(n13)Footnote 12. *In re Honda Am. Motor Co., Inc., 168 F.R.D. 535, 540 (D. Md. 1996)* .

(n14)Footnote 13. *See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)* .

(n15)Footnote 14. *Fed. R. Civ. P. 30(b)(5)(A)*; *see Fed. R. Civ. P. 28*; *see also § 15.23.*

(n16)Footnote 15. *See Fed. R. Civ. P. 28(a).*

(n17)Footnote 16. *Travelers Indemnity Company of Illinois v. Hash Management, Inc., 173 F.R.D. 150, 155-156 (M.D.N.C. 1997)* .

(n18)Footnote 17. *See, e.g., Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 181 (S.D. Iowa 1993)* .

(n19)Footnote 18. *Fed. R. Civ. P. 30(a)(2)(A)(iii).*

(n20)Footnote 19. *Garza v. Scott & White Mem. Hosp., 234 F.R.D. 617, 623 (W.D. Tex. 2005)* .

(n21)Footnote 20. *See Fed. R. Civ. P. 26(f)(3).*

(n22)Footnote 21. *Garza v. Scott & White Mem. Hosp., 234 F.R.D. 617, 623 (W.D. Tex. 2005)* (federal rules tie opening of discovery to timing of Rule 26(f) conference).

(n23)Footnote 22. *See Fed. R. Civ. P. 30(a)(2)*.

(n24)Footnote 23. *Fed. R. Civ. P. 30(a)(2)(A)(i)*.

(n25)Footnote 24. *See Fed. R. Civ. P. 30(a)*, Committee Note to 1993 Amendments.

(n26)Footnote 25. *Fed. R. Civ. P. 30(a)(2)(A)(ii)*.

(n27)Footnote 26. *Dixon v. Certainteed Corp., 164 F.R.D. 685, 690 (D. Kan. 1996)* .

(n28)Footnote 27. *Fed. R. Civ. P. 30(a)(2)(A)(iii)*.

(n29)Footnote 28. *Fed. R. Civ. P. 30(a)(2)(A)*.

(n30)Footnote 29. *Fed. R. Civ. P. 30(a)(2)(A)(iii)*.

(n31)Footnote 30. *Fed. R. Civ. P. 28(a)*; *see § 15.20[2]*.

(n32)Footnote 31. *Fed. R. Civ. P. 28(b)*; see *§ 15.20[3]*.

(n33)Footnote 32. *Fed. R. Civ. P. 30(a)(2)(B)*.

(n34)Footnote 33. *Fed. R. Civ. P. 30(a)(2)*.

(n35)Footnote 34. *Fed. R. Civ. P. 26(b)(2)(A)*.

(n36)Footnote 35. *Fed. R. Civ. P. 26(b)(2)(C)*.

(n37)Footnote *. For a more complete discussion, *see* 7 *Moore's Federal Practice, §§ 30.20*-30.25 (Matthew Bender 3d ed.).

(n38)Footnote 1. *Fed. R. Civ. P. 30(b)(1)*.

(n39)Footnote 2. *Fed. R. Civ. P. 30(b)(1)*.

(n40)Footnote 3. *Shenker v. United States, 25 F.R.D. 96, 98 (E.D.N.Y. 1960)* .

(n41)Footnote 4. *See KeyBank National Assoc. v, Mann, 220 B.R. 351, 356 (N.D. Ohio 1998)* .

(n42)Footnote 5. *Fed. R. Civ. P. 30(b)(1)*.

(n43)Footnote 6. *See Riley v. Murdock, 156 F.R.D. 130, 132 (E.D.N.C. 1994)* .

(n44)Footnote 7. *See Detweiler Bros., Inc. v. John Graham & Co., 412 F. Supp. 416, 422 (E.D. Wash. 1976)* .

(n45)Footnote 8. *See Zuckert v. Berkliff Corp., 96 F.R.D. 161, 162 (N.D. Ill. 1982)* .

(n46)Footnote 9. *See M & C Corp. v. Erwin Behr GmbH & Co., KG, 165 F.R.D. 65, 67 (E.D. Mich. 1996)* .

(n47)Footnote 10. *See Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 623 (D. Mass. 1988)* .

(n48)Footnote 11. *Fed. R. Civ. P. 30(b)(1)*.

(n49)Footnote 12. *See Fed. R. Civ. P. 30(b)(6)*.

(n50)Footnote 13. *Fed. R. Civ. P. 30(b)(2).*

(n51)Footnote 14. *Fed. R. Civ. P. 30(b)(3)(A).*

(n52)Footnote 15. *Fed. R. Civ. P. 30(b)(3)(B).*

(n53)Footnote 16. *Fed. R. Civ. P. 30(b)(4).*

(n54)Footnote 17. *Fed. R. Civ. P. 30(b)(1).*

(n55)Footnote 18. *See Fed. R. Civ. P. 37(d).*

(n56)Footnote 19. *Martin Eng'g Co. v. Vibrators, Inc., 20 Fed. R. Serv. 2d 486, 487 (E.D. Ark. 1975)* (corporation liable if former employee subject to its control fails to attend deposition).

(n57)Footnote 20. *United States v. Santiago-Lugo, 904 F. Supp. 43, 47 (D.P.R. 1995) .*

(n58)Footnote 21. *See Fed. R. Civ. P. 30(a)(1), 45.*

(n59)Footnote 22. *See Fed. R. Civ. P. 45(a)(1)(B).*

(n60)Footnote 23. *See Fed. R. Civ. P. 45(a)(1)(C),(D); see also* [c], *below.*

(n61)Footnote 24. *See Fed. R. Civ. P. 45(a)(1)(C),(D).*

(n62)Footnote 25. *Fed. R. Civ. P. 30(b)(2).*

(n63)Footnote 26. *See Carter v. United States, 164 F.R.D. 131, 133 (D. Mass. 1995) .*

(n64)Footnote 27. *Fed. R. Civ. P. 30(b)(3)(A).*

(n65)Footnote 28. *Fed. R. Civ. P. 30(b)(3)(B).*

(n66)Footnote 29. *Fed. R. Civ. P. 30(b)(3)(A).*

(n67)Footnote 30. *Fed. R. Civ. P. 30(b)(4).*

(n68)Footnote 31. *Fed. R. Civ. P. 30(b)(5)(B).*

(n69)Footnote 32. *Riley v. Murdock, 156 F.R.D. 130, 131 (E.D.N.C. 1994) .*

(n70)Footnote 33. *Fed. R. Civ. P. 30(b)(3)(A).*

(n71)Footnote 34. *See Fed. R. Civ. P. 26(a)(3)(A)(2).*

(n72)Footnote 35. *Fed. R. Civ. P. 32(c).*

(n73)Footnote 36. *See Fed. R. Civ. P. 56(e)(1).*

(n74)Footnote 37. *Fed. R. Civ. P. 30(b)(3)(A).*

(n75)Footnote 38. *See, e.g., Riley v. Murdock, 156 F.R.D. 130, 131 (E.D.N.C. 1994) .*

(n76)Footnote 39. *See, e.g., Gillen v. Nissan Motor Corp., 156 F.R.D. 120, 122 (E.D. Pa. 1994) .*

(n77)Footnote 40. *Fed. R. Civ. P. 30(b)(4).*

(n78)Footnote 41. *See Hudson v. Spellman High Voltage, 178 F.R.D. 29, 32 (E.D.N.Y. 1998)* .

(n79)Footnote 42. *See Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446-447 (W.D. Mich. 1993)* .

(n80)Footnote 43. *Jahr v. IU Int'l Corp., 109 F.R.D. 429, 432 (M.D.N.C. 1986)* .

(n81)Footnote 44. *See Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446-447 (W.D. Mich. 1993)* .

(n82)Footnote 1. *See Fed. R. Civ. P. 28(a), 28(c).*

(n83)Footnote 2. *Fed. R. Civ. P. 30(b)(5)(A)(i)-(v).*

(n84)Footnote 3. *Fed. R. Civ. P. 30(b)(5)(B); see Fed. R. Civ. P. 30(b)(5)(A)(i)-(v).*

(n85)Footnote 4. *See Fed. R. Civ. P. 30(b)(5)(A)(iv), 30(c)(1).*

(n86)Footnote 5. *Gordon v. Idaho, 778 F.2d 1397, 1399-1400 (9th Cir. 1985)* .

(n87)Footnote 6. *See Fed. R. Civ. P. 43(d).*

(n88)Footnote 7. *Fed. R. Civ. P. 30(c)(1).*

(n89)Footnote 8. *Fed. R. Civ. P. 30(b)(5)(C).*

(n90)Footnote 9. *Fed. R. Civ. P. 30(d)(1).*

(n91)Footnote 10. *See Fed. R. Civ. P. 26(b)(2).*

(n92)Footnote 11. *Fed. R. Civ. P. 30(d)(1).*

(n93)Footnote 12. *Sabre v. First Dominion Capital, L.L.C., 2001 U.S. Dist. LEXIS 20637, at *2-*4 (S.D.N.Y. 2001)* ; *see Fed. R. Civ. P. 30(d)(2)*, Committee Note to 2000 Amendments.

(n94)Footnote 13. *Fed. R. Civ. P. 30(c)(1).*

(n95)Footnote 14. *Fed. R. Evid. 103.*

(n96)Footnote 15. *Fed. R. Evid. 615.*

(n97)Footnote 16. *Fed. R. Civ. P. 26(c)(1)(E).*

(n98)Footnote 17. *See Sauer v. Burlington Northern R.R. Co., 169 F.R.D. 120, 123 (D. Minn. 1996)* .

(n99)Footnote 18. *Fed. R. Evid. 612.*

(n100)Footnote 19. *Fed. R. Civ. P. 30(c)(1).*

(n101)Footnote 20. *See Hall v. Clifton Precision, 150 F.R.D. 525, 528-529 (E.D. Pa. 1993)* .

(n102)Footnote 21. *Fed. R. Civ. P. 30(c)(3); see* [d], *below.*

(n103)Footnote 22. *Fed. R. Civ. P. 30(c)(2).*

(n104)Footnote 23. *Fed. R. Civ. P. 32(d)(3)(B)(ii).*

(n105)Footnote 24. *Fed. R. Civ. P. 32(d)(3)(B)(i).*

(n106)Footnote 25. *Fed. R. Civ. P. 32(d)(3)(A).*

(n107)Footnote 26. *See Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995)* (court instructed counsel on proper conduct at deposition).

(n108)Footnote 27. *Fed. R. Civ. P. 30(c)(3).*

(n109)Footnote 28. *See Hudson v. Spellman High Voltage, 178 F.R.D. 29, 32 (E.D.N.Y. 1998)* .

(n110)Footnote 29. *Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995)* .

(n111)Footnote 30. *See Hall v. Clifton Precision, 150 F.R.D. 525, 528-531 (E.D. Pa. 1993)* .

(n112)Footnote 31. *Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 561 (N.D. Okla. 1995)* .

(n113)Footnote 32. *Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 100 (S.D. Ohio 1995)* ; *see Fed. R. Civ. P. 30(c)(2), 30(d)(3).*

(n114)Footnote 33. *See Fed. R. Civ. P. 30(d)(2), 37(a)(5)(A).*

(n115)Footnote 34. *Boyd v. University of Md. Med. Sys., 173 F.R.D. 143, 147 (D. Md. 1997)* .

(n116)Footnote 35. *Resolution Trust Corp. v. Dabney, 73 F.3d 262, 265-267 (10th Cir. 1995)* ; *see 28 U.S.C. § 1927.*

(n117)Footnote 36. *See Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239 (11th Cir. 2007)* .

(n118)Footnote *. For a more complete discussion, *see* 7 *Moore's Federal Practice, §§ 30.60*-30.64 (Matthew Bender 3d ed.).

(n119)Footnote 1. *Fed. R. Civ. P. 30(e)(1).*

(n120)Footnote 2. *Fed. R. Civ. P. 30(e)(1)(A).*

(n121)Footnote 3. *Fed. R. Civ. P. 30(e)(1)(B).*

(n122)Footnote 4. *See Fed. R. Civ. P. 30(f)(1)*; [b], *below.*

(n123)Footnote 5. *Fed. R. Civ. P. 30(e)(2).*

(n124)Footnote 6. *Rios v. Bigler, 67 F.3d 1543, 1551-1552 (10th Cir. 1995)* (certificate is absolute prerequisite to amending or correcting deposition).

(n125)Footnote 7. *See Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 804 (N.D. Ind. 1996)* ; *Fed. R. Civ. P. 30(e)(1)(B).*

(n126)Footnote 8. *Agrizap, Inc. v. Woodstream Corp., 232 F.R.D. 491, 494 (E.D. Pa. 2006)* (deponent was barred from changing his deposition because there was no request to review transcript before completion of deposition; also, deponent failed to submit changes within 30-day time limit).

(n127)Footnote 9. *See Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 804 (N.D. Ind. 1996)* .

(n128)Footnote 10. *Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1281-1282 (10th Cir. 2003)* .

(n129)Footnote 11. *Fed. R. Civ. P. 30(f)(1)*.

(n130)Footnote 12. *Fed. R. Civ. P. 5(d)(1)*.

(n131)Footnote 13. *Fed. R. Civ. P. 30(f)(4)*.

(n132)Footnote 14. *Fed. R. Civ. P. 30(f)(2)(A)*.

(n133)Footnote 15. *Fed. R. Civ. P. 30(f)(2)(A)(i)*.

(n134)Footnote 16. *Fed. R. Civ. P. 30(f)(2)(A)(ii)*.

(n135)Footnote 17. *Fed. R. Civ. P. 30(f)(2)(B)*.

(n136)Footnote 18. *Fed. R. Civ. P. 30(f)(3)*.

(n137)Footnote 19. *Brown v. Castillo, 2007 U.S. Dist. LEXIS 72621, at *5 (E.D. Cal. 2006)* .

(n138)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 30.50*-30.51 (Matthew Bender 3d ed.).

(n139)Footnote 1. *Rahn v. Hawkins, 464 F.3d 813, 822 (8th Cir. 2006)* .

(n140)Footnote 2. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 468-469 (6th Cir. 2006)* (power to quash subpoena to depose nonparty witness resides with issuing court).

(n141)Footnote 3. *See Fed. R. Civ. P. 26(b)(2)(C)*, *26(c)(1)(A)*.

(n142)Footnote 4. *Fed. R. Civ. P. 26(b)(2)(C)*; *see Insituform Techs., Inc. v. Cat Contracting, Inc., 914 F. Supp. 286, 286* (287 (N.D. Ill. 1996) (court quashed notice of deposition of nonparty witness because plaintiffs could have obtained information sought directly from defendants).

(n143)Footnote 5. *Fed. R. Civ. P. 26(c)(1)(A)*; *see Burket v. Hyman Lippitt, P.C., 2008 U.S. Dist. LEXIS 20703, at *9-*13 (E.D. Mich. 2008)* .

(n144)Footnote 6. *See Fed. R. Civ. P. 26(c)(1)(A)*; *see also* [a], *above* (motion to quash).

(n145)Footnote 7. *Fed. R. Civ. P. 30(d)(3)(A)*.

(n146)Footnote 8. *Fed. R. Civ. P. 30(d)(3)(B)*; *see Fed. R. Civ. P. 26(c)(1)(A)-(H)*.

(n147)Footnote 9. *Fed. R. Civ. P. 30(d)(3)(B)*.

(n148)Footnote 10. *Fed. R. Civ. P. 37(a)(5)(A)*.

(n149)Footnote 11. *Fed. R. Civ. P. 37(a)(5)(A)*.

(n150)Footnote 12. *In re Omeprazole Patent Litig., 2005 U.S. Dist. LEXIS 6112, at *10-*12 (S.D.N.Y. 2005)* (citing **Moore's Federal Practice**).

(n151)Footnote 13. *See Hearst/ABC-Viacom Entertainment Servs. v. Goodway Mktg., Inc., 145 F.R.D. 59, 62*

(E.D. Pa. 1992) (citing **Moore's Federal Practice**).

(n152)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 30.70*-30.71 (Matthew Bender 3d ed.).

(n153)Footnote 1. *Turning Point Found. v. Destefano, 2007 U.S. Dist. LEXIS 90084, at *4 (D. Conn. 2007)* ; *see Fed. R. Civ. P. 30(b)(3)(A)* (deposition testimony may be recorded by sound, sound-and-visual, or stenographic means, and party taking deposition must bear cost of recording).

(n154)Footnote 2. *Dilley v. Acad. Credit, LLC, 2008 U.S. Dist. LEXIS 14507* . at *4 (D. Utah 2008).

(n155)Footnote 3. *Byrne v. Liquid Asphalt Sys., 250 F. Supp. 2d 84, 91 n.2 (E.D.N.Y. 2003)* .

(n156)Footnote 4. *See Tabron v. Grace, 6 F.3d 147, 159 (3d Cir. 1993)* .

(n157)Footnote 5. *See Lewis v. Precision Optics, Inc., 612 F.2d 1074, 1075 (8th Cir. 1980)* .

(n158)Footnote 6. *Wirtz v. Kansas Farm Bureau Servs., Inc., 355 F. Supp. 2d 1190, 1208 (D. Kan. 2005)* .

(n159)Footnote 7. *Jensen v. Lawler, 338 F. Supp. 2d 739, 746 (S.D. Tex. 2004)* .

(n160)Footnote 8. *Sepulveda v. Matos, 306 F. Supp. 2d 100, 107 (D.P.R. 2004)* .

(n161)Footnote 9. *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1225 (11th Cir. 2002)* .

(n162)Footnote 10. *See Barber v. Ruth, 7 F.3d 636, 645 (7th Cir. 1993)* .

(n163)Footnote 11. *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1225 (11th Cir. 2002)* .

(n164)Footnote 12. *Summit Technology, Inc. v. Nidek, Inc., Ltd., 435 F.3d 1371, 1380 (Fed. Cir. 2006)* (convenience expense items may be excluded as not recoverable).

(n165)Footnote *. For a more complete discussion, *see* 7 *Moore's Federal Practice, §§ 30.72*-30.73 (Matthew Bender 3d ed.).

(n166)Footnote 1. *Fed. R. Civ. P. 30(g)(1)*; *Frazier v. Layne Christensen Co., 486 F. Supp. 2d 831, 846-847 (W.D. Wis. 2006)* .

(n167)Footnote 2. *Barrett v. Brian Bemis Auto World, 230 F.R.D. 535, 537 (N.D. Ill. 2005)* (unprepared attorney could be sanctioned for failure to proceed, even though attorney attended).

(n168)Footnote 3. *See, e.g., In re Selected Somersworth Bank Cases, 148 F.R.D. 1, 4 (D. Me. 1993)* .

(n169)Footnote 4. *In re Vitamins Antitrust Litig., 216 F.R.D. 168, 174 (D.D.C. 2003)* .

(n170)Footnote 5. *Fed. R. Civ. P. 30(g)(2).*

(n171)Footnote 6. *Greenwood v. Dittmer, 776 F.2d 785, 790* (791 (8th Cir. 1985).

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.22

§ 15.22 Deposition on Written Questions

[1] Nature and Purpose n*

[a] Alternative to Oral Depositions

After an action has commenced, a party may take a deposition on written questions from any person that has discoverable information. n1 Depositions on written questions provide an affordable, alternative means of discovery for parties who need to conduct discovery based on deposition questions, but who do not want to or cannot incur the high cost of a full oral deposition. n2 The fundamental difference between oral and written question depositions is that rather than questioning the opponent in person orally, the attorney sends to the presiding officer a list of questions to be asked at the deposition, who asks the questions of the deponent. n3 Depositions on written questions also have the advantage of obtaining the testimony of nonparty witnesses, who are not subject to discovery by way of interrogatories and who may reside far from the forum. n4 They may also be used effectively before oral depositions, by stipulation or court order, to determine if a subsequent oral deposition is necessary. n5 Depositions on written questions are also an efficient method for obtaining discrete information from large numbers of persons, such as members of a class. n6

Even though depositions on written questions offer some advantages, they are used far less frequently than oral depositions, because there are some important limitations inherent in posing questions in written form, including the following: (1) the written question format does not permit probing follow-up questions; (2) because the attorney conducting the examination does not pose the questions in person, counsel cannot observe the demeanor of a witness who is being deposed; (3) because written questions are often provided in advance to the witness, counsel for the witness may assist the witness in providing answers so carefully tailored that they are not informative. n7

[b] Distinguished from Written Interrogatories

Depositions on written questions are often compared to interrogatories, which also involve the submission of written questions to the person from whom discovery is sought. n8 Even though interrogatories may generally be broader in scope, depositions on written questions can be potentially more useful than written interrogatories for several reasons:

1. A party may depose any person on written questions, n9 while party may propound written interrogatories only on

other parties. n10

2. Without leave of court or written stipulation, written interrogatories are usually limited to 25 questions, including subparts. n11 The Federal Rules impose no analogous numerical limitation on the inquiries propounded at a deposition on written questions. n12 Note, however, that deposition questions may not be oppressive, and that courts may limit the length of depositions by order or local rule. n13

3. While the person who answers interrogatories must be identified, n14 anonymous depositions (depositions in which the identity of the deponent is to be kept confidential) may be conducted by depositions on written questions, when the court determines that the witness's identity must be kept confidential. n15

4. A party answering interrogatories does not have to appear before an officer, n16 as does a deponent who gives a deposition on written questions, n17 but both must provide answers under oath. n18

[2] Availability of Deposition on Written Question n*

In most cases, depositions on written questions may be taken at the time specified in Rule 26(d) without leave of court. n1 Thus, unless otherwise authorized by agreement of the parties, another federal rule, or a court order, the parties may conduct discovery after the discovery planning conference required by Rule 26(f). n2 In the following circumstances, however, Rule 31 requires leave of court to be granted in accordance with Rule 26(b)(2)(C): n3

1. If the proposed deposition would result in more than 10 depositions being taken by the plaintiffs, or by the defendants, or by third-party defendants. This limit of 10 depositions applies to each adverse "side" or "position" in litigation, and not to each party. Furthermore, both oral depositions and depositions on written questions under Rule 31 are included in determining the total number of depositions taken. Leave of court is not required to take more than 10 depositions if the parties stipulate to additional depositions. n4

2. If the person has already been deposed in the case unless the parties stipulate to the second deposition. n5 Courts generally disfavor second depositions, and absent a showing of need or good reason, a court generally will not require a deponent to appear for a second deposition. However, a second deposition may be justified in view of a subsequent disclosure or discovery occurring after the first deposition. n6

3. Before the parties have met to plan discovery as required by Rules 26(d) and (f). n7 There are two exceptions to this requirement. First, the parties may stipulate to the taking of the deposition without leave of court. n8 Second, a deposition may be taken before the discovery planning meeting if the deposition notice contains a certification that the person to be examined is expected to leave the United States and be unavailable for examination in the United States unless deposed before the discovery conference. n9

4. To perpetuate testimony before the formal commencement of a civil action. n10 A party must also make a motion in the district court to take a deposition to perpetuate testimony pending appeal from a district court judgment. n11

5. When the person to be deposed is confined in prison. There is no provision for allowing the parties to stipulate to the deposition of an inmate without leave of court. n12

As noted above, when a party requests leave of court to take a deposition the court must generally grant permission to the extent that the deposition would be consistent with the principles stated in Rule 26(b)(2), n13 which gives the court discretion to limit the number and length of depositions, n14 and requires the court to limit depositions to the extent that (1) the deposition is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the person taking the deposition has had ample opportunity already to obtain the information sought; or (3) the burden or expense of taking the deposition outweighs its likely benefit. n15

[3] Persons Subject to Deposition on Written Question n*

[a] Adverse Party, Individuals, or Organizations

Rule 31 provides that a party may take the testimony of any person, including a party, by means of a deposition on written questions. Thus, an adverse party or any witness may be deposed by written questions. n1 Furthermore, an organization may be deposed on written questions, in accordance with the provisions of Rule 30(b)(6), n2 which states that a party may name as a deponent in its notice or subpoena a public or private corporation, a partnership, an association, or a governmental agency without specifying a particular individual to be examined. In a subpoena or notice, the party noticing the deposition should describe with reasonable particularity the matters on which examination is requested. n3 However, the notice or subpoena need not specify who will be present at the taking of the deposition. n4 The organization must designate one or more officers, directors, managing agents, or other persons to testify on the organization's behalf. The organization may also indicate the matters on which the designated persons will testify. If the person designated by the organization does not have personal knowledge of the matters known to the organization, the court may grant sanctions to the opposition, because the organization is obligated to prepare the deponent designee to give knowledgeable and binding answers under Rule 30(b)(6). n5 Nonparty organizations must be notified by subpoena of this duty, and a deponent in these circumstances must testify as to matters known or reasonably available to the organization. n6

[b] Attorney Deposed As Fact Witness

The Federal Rules of Civil Procedure do not prohibit the obtaining discovery from a party's attorney, n7 provided that the party seeking discovery establishes that the information requested is relevant and explains why the information is crucial to preparation of its case and unavailable from another source. n8 The deposition of an attorney may be necessary and appropriate in certain cases, such as when the attorney is a fact witness or is the person with the best information concerning non-privileged matters relevant to the lawsuit. n9 However, because of the negative impact that deposing a party's attorney can have on the litigation process, the court may permit the taking of opposing counsel's deposition only in the limited circumstances when the party seeking to depose another party's attorney demonstrates the propriety and need for the deposition. n10

Most of the limitations imposed by courts on depositions of opposing counsel have been focused on oral depositions. Depositions on written questions, with their lower cost and lower potential for disruption, do not implicate the same degree of concern for courts, although relevance and privilege remain important issues. In this regard, courts have authorized depositions of counsel by written questions particularly when the attorney will serve as a fact witness. n11

[4] Procedure for Depositions On Written Questions n*

[a] Service and Notice

A party that wants to take a deposition on written questions must serve the questions and the notice of deposition on every other party. The notice must state the name and the address of the person who is to answer the questions, if the identity of that person is known. If the identity of the person who is to answer the deposition is not known, then the notice must contain a general description sufficient to identify the person who is to answer or the particular class or group to which that person belongs. The notice must also contain the name or descriptive title and address of the officer before whom the deposition is to be taken. The Rule does not require that the date and time of the deposition be stated in the notice. n1 That information is required, however, if a Rule 45 subpoena is issued to compel the witness's attendance at the deposition. n2

[b] Service of Cross Questions, Redirect Questions, and Recross Questions

Within 14 days after the party noticing the deposition first serves the questions and the notice on the parties, another

party may serve cross questions on all other parties. Then, within seven days after being served with cross questions, the noticing party may serve redirect questions on all other parties, and within seven days of being served with redirect questions, a non-noticing party may serve recross questions on all other parties. The court may for good cause shorten or enlarge any element of this timetable. n3 Thus, the total time involved in service of deposition questions under Rule 31 is 28 days, with a potential extension of time pursuant to Rule 6(a) and (b), which provides for an extension based on a showing of good cause. n4

[c] Officer Must Ask Deponent Questions

The party that has noticed the deposition must deliver to the designated officer the notice of deposition and a copy of all questions to be asked. n5 After the deposition officer has been served with all of the questions and the notice of deposition, or at the designated time and place, if the notice so provides the officer must promptly take the deponent's testimony in response to the questions; n6 Thus, the officer must put the witness under oath and record verbatim the responses of the witness to the written questions, subject to any objections. n7 The testimony may be taken stenographically or recorded by audiotape or videotape. n8

[d] Review, Certification, and Delivery of Completed Deposition

If the deponent or a party makes a request before completion of the deposition, the officer must notify the deponent when the transcript or recording is available, and the deponent then has 30 days to note changes in form or substance. The deponent must sign a statement setting forth any changes and the reasons for them. n9 The officer must certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. The officer must also certify if any review was requested by the deponent and must attach any changes made by the deponent. Then, the officer must send the deposition to the attorney who arranged for the transcript or the recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. n10 The federal rules direct that depositions ordinarily should not be filed. Only if the deposition is used in a proceeding should the attorney file it with the court. n11 Unless otherwise ordered by court or agreed to by the parties, the officer must retain stenographic notes or a copy of the recording of any deposition. The officer must then supply copies of the deposition to any party or the deponent on payment of reasonable charges. n12 Lastly, the party taking the deposition must notify all parties promptly when the deposition is filed. n13

[e] Objections to Deposition Procedures and Questions; Protective Orders

Objections to deposition procedures and questions are controlled primarily by Rule 32. An objection to the form of a question prevents a waiver of that objection, n14 but it does not operate to prevent the witness from answering the question n15 or create a right to a hearing. Furthermore, an objection is not an appropriate means to attempt to quash the deposition. The appropriate vehicle for any such relief is a motion for a protective order. n16 Prior to the time of the taking of testimony, a party or a person from whom discovery is sought may make a motion for a protective order under Rule 26(c). The party may file this motion in the district where the action is pending or in the district in which the deposition is to take place. n17

Thus, the court has the power to make a protective order that an oral deposition be taken instead of a deposition on written questions. n18 Or, even if the district court does not require that the direct examination be taken orally, it may in its discretion grant the adverse party leave to cross-examine orally after the written question is asked. n19

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 31.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 31(a)(1)*; *see Fed. R. Civ. P. 26(b)(2).*

(n3)Footnote 2. *Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 549 (S.D.N.Y. 1989)* .

(n4)Footnote 3. *See National Life Ins. Co. v. Hartford Acc. & Indem. Co., 615 F.2d 595, 600 n.5 (3d Cir. 1980)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 33(a)* (interrogatories limited to parties); [b], *below*.

(n6)Footnote 5. *Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219, 226 (2d Cir. 1980)* .

(n7)Footnote 6. *Henson v. East Lincoln Township, 814 F.2d 410, 412 (7th Cir. 1987)* (deposition on written questions given to members of defendant class).

(n8)Footnote 7. *See Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Delaware, Inc., 350 F.3d 65, 69 (2d Cir. 2003)* .

(n9)Footnote 8. *See Fed. R. Civ. P. 31*, Committee Note to 1970 Amendments.

(n10)Footnote 9. *Fed. R. Civ. P. 31(a)(1)*.

(n11)Footnote 10. *Fed. R. Civ. P. 33(a)(1)*.

(n12)Footnote 11. *Fed. R. Civ. P. 33(a)(1)*.

(n13)Footnote 12. *See Fed. R. Civ. P. 30*, *31*.

(n14)Footnote 13. *Fed. R. Civ. P. 26(b)(2)* (limitations on discovery); *Fed. R. Civ. P. 30(a)(2)(A)* (limit on number of people deposed is 10 people deposed per party).

(n15)Footnote 14. *Fed. R. Civ. P. 33(b)(5)* (answers to interrogatories must be signed by person making them).

(n16)Footnote 15. *Borzillieri v. American Nat'l Red Cross, 139 F.R.D. 284, 288-289 (W.D.N.Y. 1991)* (proposed deponent was blood donor in AIDS injury case, and court ordered donor's identity would be divulged only to court and to donor's court-appointed attorney).

(n17)Footnote 16. *Fed. R. Civ. P. 33(b)(1)*, *(3)*.

(n18)Footnote 17. *Fed. R. Civ. P. 31(b)(1)*.

(n19)Footnote 18. *See Fed. R. Civ. P. 30(c)*, *31(b)*, *33(b)(3)*.

(n20)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 31.04* (Matthew Bender 3d ed.).

(n21)Footnote 1. *Fed. R. Civ. P. 31(a)(1)*.

(n22)Footnote 2. *Fed. R. Civ. P. 26(d)*; *see Fed. R. Civ. P. 26(f)* (discovery planning conference must generally be held 21 days before scheduling conference held or scheduling order due).

(n23)Footnote 3. *Fed. R. Civ. P. 31(a)(2)*.

(n24)Footnote 4. *Fed. R. Civ. P. 31(a)(2)(A)(i)*.

(n25)Footnote 5. *Fed. R. Civ. P. 31(a)(2)(A)(ii)*.

(n26)Footnote 6. *See Dixon v. Certainteed Corp., 164 F.R.D. 685, 690 (D. Kan. 1996)* .

(n27)Footnote 7. *Fed. R. Civ. P. 31(a)(2)(A)(iii)*.

(n28)Footnote 8. *Fed. R. Civ. P. 31(a)(2)(A).*

(n29)Footnote 9. *Fed. R. Civ. P. 31(a)(2)(A)(iii).*

(n30)Footnote 10. *Fed. R. Civ. P. 28(a)*; see *§ 15.20[2].*

(n31)Footnote 11. *Fed. R. Civ. P. 28(b)*; *see § 15.20[3].*

(n32)Footnote 12. *Fed. R. Civ. P. 31(a)(2)(B).*

(n33)Footnote 13. *Fed. R. Civ. P. 31(a)(2).*

(n34)Footnote 14. *Fed. R. Civ. P. 26(b)(2)(A).*

(n35)Footnote 15. *Fed. R. Civ. P. 26(b)(2)(C).*

(n36)Footnote *. For a more complete discussion, *see* 7 *Moore's Federal Practice, § 31.03* (Matthew Bender 3d ed.).

(n37)Footnote 1. *Fed. R. Civ. P. 31(a)(1)*; *see Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 549 (S.D.N.Y. 1989)* .

(n38)Footnote 2. *Fed. R. Civ. P. 31(a)(4).*

(n39)Footnote 3. *Fed. R. Civ. P. 30(b)(6).*

(n40)Footnote 4. *Brant v. Principal Life & Disability Ins. Co., 195 F. Supp. 2d 1100, 1121 (N.D. Iowa 2002)* .

(n41)Footnote 5. *Paul Revere Life Ins. Co. v. Jafari, 206 F.R.D. 126, 127-128 (D. Md. 2002)* .

(n42)Footnote 6. *Fed. R. Civ. P. 30(b)(6).*

(n43)Footnote 7. *Dowd v. Calabrese, 101 F.R.D. 427, 439 (D.D.C. 1984)* (citing **Moore's Federal Practice**).

(n44)Footnote 8. *Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628-629 (6th Cir. 2002)* ; *Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)* .

(n45)Footnote 9. *See Fed. R. Civ. P. 26(b)(1).*

(n46)Footnote 10. *Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)* .

(n47)Footnote 11. *See Vargas v. Peltz, 901 F. Supp. 1572, 1576 (S.D. Fla. 1995)* .

(n48)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 31.10*-31.17 (Matthew Bender 3d ed.).

(n49)Footnote 1. *Fed. R. Civ. P. 31(a)(3).*

(n50)Footnote 2. *See Fed. R. Civ. P. 45(a)(1)(A)(iii).*

(n51)Footnote 3. *Fed. R. Civ. P. 31(a)(5).*

(n52)Footnote 4. *See Fed. R. Civ. P. 6(a), 6(b)*; Ch. 9 *Pleadings and Motions in General.*

(n53)Footnote 5. *Fed. R. Civ. P. 31(b).*

(n54)Footnote 6. *Fed. R. Civ. P. 31(b)(1)*; *see Fed. R. Civ. P. 30(c)*.

(n55)Footnote 7. *Fed. R. Civ. P. 31(b)(1)*; *see Fed. R. Civ. P. 30(c)*.

(n56)Footnote 8. *Fed. R. Civ. P. 30(b)(3)*, *30(c)*; *see Fed. R. Civ. P. 31(b)* (incorporating *Fed. R. Civ. P. 30(c)*, *30(e)*, and *30(f)*).

(n57)Footnote 9. *Fed. R. Civ. P. 30(e)*; *see Fed. R. Civ. P. 31(b)(2)* (incorporating *Fed. R. Civ. P. 30(c)*, *(e)*, and *(f)*).

(n58)Footnote 10. *Fed. R. Civ. P. 30(f)(1)*; *see Fed. R. Civ. P. 31(b)(3)* (incorporating *Fed. R. Civ. P. 30(c)*, *(e)*, and *(f)*).

(n59)Footnote 11. *Fed. R. Civ. P. 5(d)(1)*.

(n60)Footnote 12. *Fed. R. Civ. P. 30(f)(3)*; *see Fed. R. Civ. P. 31(b)(3)* (incorporating *Fed. R. Civ. P. 30(c)*, *(e)*, and *(f)*).

(n61)Footnote 13. *Fed. R. Civ. P. 31(c)*.

(n62)Footnote 14. *See Fed. R. Civ. P. 32(d)(3)(C)*.

(n63)Footnote 15. *Fed. R. Civ. P. 30(c)(2)*.

(n64)Footnote 16. *See Fed. R. Civ. P. 26(b)(2)(C)*, *26(c)(1)(A)*.

(n65)Footnote 17. *Fed. R. Civ. P. 26(c)(1)*.

(n66)Footnote 18. *Fed. R. Civ. P. 26(c)(1)(C)*.

(n67)Footnote 19. *Winograd Bros, Inc. v. Chase Bank, 31 F. Supp. 91, 91 (S.D.N.Y. 1939)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.23

§ 15.23 Officer's Control of Deposition Examination in United States and in Foreign Countries

[1] Persons Who May Take Deposition in United States n*

Absent stipulation, only the following persons may take depositions within the United States, or within territories or insular possessions subject to the jurisdiction of the United States: n1

1. An officer authorized to administer oaths under United States laws. n2

2. An officer authorized to administer oaths under the laws of the place where the examination is held. n3

3. A person appointed by the court where the action is pending. A person appointed by the court has the power to administer oaths and take testimony. n4 The court will typically make this type of appointment in an isolated place where there is no one readily available with the power to administer oaths and take testimony. It also provides a more convenient method of securing depositions when state lines intervene between the location of various witnesses otherwise rather closely grouped. n5

The parties may stipulate that depositions may be taken before any person unless the court orders to the contrary. n6

[2] Administration of Deposition in United States Must Be By Officer n*

Rules 30, 31, and 32 use the term "officer" when referring to the person who has the duties to administer a deposition. As used in these deposition rules, the term "officer" includes: n1 a person appointed by the court n2 or designated by the parties under Rule 29(a). n3 The person before whom the deposition is "taken," is ordinarily the court reporter who swears the witness and stenographically transcribes the testimony. n4 If the deposition is also recorded by sound or sound-and-visual means, the person making the nonstenographic record is not the person "taking" the deposition because he or she does not administer the oath and is not responsible for certifying the accuracy of the record. n5 In these circumstances, the person making the nonstenographic record is not subject to disqualification for interest under Rule 28(c). If the deposition is not recorded stenographically but only by sound or sound-and-visual means, the person before whom the deposition is "taken" within the meaning of Rule 28(a) is the notary public or court reporter who administers the oath and who must certify the accuracy of the recording pursuant to Rule 30(f)(1). That person, who

may or may not be the one making the recording, is the person subject to disqualification for interest; thus, he or she must be independent of the parties and counsel in the absence of a stipulation or court order to the contrary. n6

A deposition may also be taken over the telephone or other remote means. n7 Because *Rule 28(a) of the Federal Rules of Civil Procedure* states that a deposition must be taken before an officer authorized to administer oaths, Rule 30(c) states that the officer shall put the witness on oath and shall personally record the testimony of the witness, and Rule 30(b)(4) states that a telephonic or remote deposition is taken in the district and at the place where the deponent is to answer the questions, the applicable rules when read together require the notary public to be present with the witness, rather than in the presence of the persons remotely conducting the examination. n8

[3] Depositions and Other Discovery in Foreign Countries n*

[a] Methods for Taking Depositions in Foreign Countries

The Federal Rules of Civil Procedure provide four ways to take depositions in a foreign country:

1. Pursuant to a treaty such as the Hague Evidence Convention. n1

2. Pursuant to a letter of request seeking the voluntary assistance of the court or other agency of the foreign country to obtain evidence from the deponent. n2

3. On notice before a person authorized to administer oaths in the place in which the examination is held, either by the law of that place or by the law of the United States. n3

4. Before a person commissioned by the American court to administer any necessary oath and take testimony. n4

Each of the four methods is a separate means for taking a deposition in a foreign country, and any of the methods may be used independently of the other methods or in conjunction with another method, if appropriate. n5 In addition to providing for the four procedures for deposition, the Federal Rules also allow the parties to make a written stipulation providing for taking evidence in a foreign country. n6 Stipulated procedures are effective only if the witness is cooperative and the terms do not violate the law of the country where the deposition will take place. n7

[b] Foreign Deposition May be Taken By Means of Any Treaty or Convention

A party may take a deposition in a foreign country pursuant to any applicable treaty or convention and using the procedures specified in the treaty or convention itself. n8 Thus, the party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. n9 When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. n10

The most commonly utilized treaty for international depositions is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. n11 However, the procedures for taking depositions abroad of any similar treaty that the United States enters into in the future could also be used. n12 The Hague Evidence Convention authorizes three methods for pretrial discovery: a letter of request, which may be used to secure evidence from an uncooperative witness through the compulsory powers of a foreign court; notice to appear before a consular officer; and designation of a private commissioner. n13 However, the Hague Evidence Convention also itself contemplates that contracting states will employ methods for taking evidence not specified in the Convention, or permit less restrictive acts not expressed by the Convention's terms. n14 Thus, the Hague Evidence Convention does not prevent a signatory from using more liberal methods to render evidence than those expressly authorized. n15

[c] Letter of Request

The second method of deposition in a foreign country is by a letter of request. n16 A "letter of request" is essentially the same as the traditional "letter rogatory," which is a request by the district court to a court in the foreign country asking the latter court to cause to be examined a person who is within the jurisdiction of the foreign court. n17 Letters of request are a medium for one country to speak through its courts to another and to request assistance to administer justice in the former. Absent a treaty, the request is made and usually granted by reason of comity. n18 The term letter of request (rather than letter rogatory) is used in the current version of Rule 28(b) because the term is used to designate the primary method provided by the Hague Convention to obtain a deposition in a foreign country. n19 Generally, a party should use a letter of request when the deposition is to be taken in a non-common-law country that prohibits the execution of depositions through the notice or commission procedure, or where the witness is unwilling to appear and may be compelled only in aid of a letter of request. n20

The party seeking to take the deposition must apply to the district court, on notice to the other parties, for issuance of the letter of request. n21 The application need *not* show that taking the deposition in another manner is impracticable or inconvenient. n22 A party opposing the application must show good reason before a court will deny the application. Courts have inherent authority to issue letters of request, and a United States court may transmit them directly to the foreign tribunal. n23 The issuance of a letter of request, as in the case of the issuance of a commission, may be made on such terms as are "just and appropriate," and the issuance of a letter of request may be conditioned on such terms. n24 For example, the court may require a party to first attempt discovery by a less expensive method than oral depositions, such as by depositions by written questions under Rule 31. n25

If the court grants the application and issues a letter of request, it should be addressed "To the Appropriate Authority in _____ [name of country]." n26 Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States. n27

[d] Foreign Deposition by Notice

The third method of deposition in a foreign country is by notice, with examination before a person authorized to administer oaths either by federal law or by the law in the place of examination. n28 Under the notice procedure, the party intending to take the deposition may serve a notice of the taking of the deposition on the other parties in the manner prescribed in Rule 30, or in the manner prescribed in Rule 31, if the deposition is to be taken on written interrogatories. The party taking the deposition must state in the notice the name or descriptive title of the person before whom the deposition will be taken. n29

It is not necessary under the notice procedure to apply to the court in order to take depositions in foreign countries. However, it should be noted that the notice procedure may appropriately be used only in countries where it is legal. n30 Unlike a letter of request, the notice of deposition does usually not provide compulsory process. The witness must appear voluntarily, unless the foreign state affords aid to the process. n31

[e] Foreign Deposition by Commission

The fourth method of taking a deposition in a foreign country is a "deposition by commission," before a person commissioned by the court to administer any necessary oath and take testimony. n32 A court will issue a commission on application and notice and on terms that are appropriate. n33 The court may issue a commission without a showing that taking the deposition in another manner is impracticable or inconvenient. n34 A commission must designate the person before whom the deposition is to be taken either by name or descriptive title. n35 The commission may provide that the deposition be taken on oral examination. In that case, the attorneys for the parties conduct the examination and cross-examination, on written interrogatories, or on a variation of these methods. n36 Rule 28(b) specifically requires

that the witness testify "before" the commissioned official; consequently, the witness must be located in the same place as the official, and the official must be authorized to administer oaths where the examination is held. n37

[4] Disqualification of Persons to Take Deposition n*

A deposition must not be taken before any of the following persons as officer: n1

1. A party's relative, employee, or attorney.

2. A relative or employee of any party's attorney.

3. Any person who has any financial interested in the action.

However, this disqualification is waived if an objection is not made either before the deposition begins n2 or promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. n3

The parties may stipulate that a deposition be taken before one of these persons listed above unless the court orders to the contrary. n4 An otherwise disqualified person may administer the oath to a deponent if the party seeking the deposition has no objection and no compelling need exists for an independent third person to perform the function. n5

If a deposition is recorded by audio visual means, the parties are not required to hire an independent person to operate the recording device because the deposing party bears the burden of insuring the absence of any distortion under Rule 30(b)(5)(B), and because the deposed party may choose an additional method of recording the deposition under *Fed. R. Civ. P. 30(b)(3)*. n6 Thus, because the rules governing depositions do not specifically prohibit a party's attorney from operating the video camera during the course of a video deposition that is otherwise conducted in compliance with the rules, it is not improper, although an attorney's operation of the video camera is not the preferred method of conducting a video deposition. n7

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 28.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 28(a)(1)*.

(n3)Footnote 2. *Fed. R. Civ. P. 28(a)(1)(A)*.

(n4)Footnote 3. *Fed. R. Civ. P. 28(a)(1)(A)*.

(n5)Footnote 4. *Fed. R. Civ. P. 28(a)(1)(B)*.

(n6)Footnote 5. *See Fed. R. Civ. P. 28*, Committee Note.

(n7)Footnote 6. *Fed. R. Civ. P. 28(a), 29(a)*.

(n8)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, § 28.03* (Matthew Bender 3d ed.).

(n9)Footnote 1. *Fed. R. Civ. P. 28(a)(2)*.

(n10)Footnote 2. *See Fed. R. Civ. P. 28(a)(1)(B)*.

(n11)Footnote 3. *See Fed. R. Civ. P. 29(a)*.

(n12)Footnote 4. *Loughin v. Occidental Chem. Corp., 234 F.R.D. 75, 77 n.2 (E.D. Pa. 2005)* .

(n13)Footnote 5. *Fed. R. Civ. P. 30(f)(1)*.

(n14)Footnote 6. *Fed. R. Civ. P. 29(a)*.

(n15)Footnote 7. *Fed. R. Civ. P. 30(b)(4)*.

(n16)Footnote 8. *Hudson v. Spellman High Voltage, 178 F.R.D. 29, 32 (E.D.N.Y. 1998)* ; *see Loughin v. Occidental Chem. Corp., 234 F.R.D. 75, 77 n.2 (E.D. Pa. 2005)* .

(n17)Footnote *. For a more complete discussion, *see* 6 *Moore's Federal Practice, §§ 28.10*-28.17 (Matthew Bender 3d ed.).

(n18)Footnote 1. *Fed. R. Civ. P. 28(b)(1)(A)*; *see* [b], *below*.

(n19)Footnote 2. *Fed. R. Civ. P. 28(b)(1)(B)*; *see* [c], *below*.

(n20)Footnote 3. *Fed. R. Civ. P. 28(b)(1)(C)*; *see* [d], *below*.

(n21)Footnote 4. *Fed. R. Civ. P. 28(b)(1)(D)*; *see* [e], *below*.

(n22)Footnote 5. *Kreimerman v. Casa Veerkamp, 22 F.3d 634, 642 (5th Cir. 1994)* .

(n23)Footnote 6. See *Fed. R. Civ. P. 29*; *In re Anschuetz & Co., 754 F.2d 602, 609 (5th Cir. 1985)* , *vacated on other grounds, Anschuetz & Co. v. Mississippi River Bridge Auth., 483 U.S. 1002 (1987)* .

(n24)Footnote 7. *See Mead Digital Sys. Inc. v. A.B. Dick Co., 89 F.R.D. 318, 319 (S.D. Ohio 1980)* (parties agreed to take deposition of Great Britain company in England without process of the British Courts).

(n25)Footnote 8. *Fed. R. Civ. P. 28(b)(1)(A)*.

(n26)Footnote 9. *Fed. R. Civ. P. 28(b)*, Committee Note to 1993 Amendments.

(n27)Footnote 10. *Fed. R. Civ. P. 28(b)(3)*.

(n28)Footnote 11. *Ramirez de Arellano v. Starwood Hotels & Resorts Worldwide, 448 F. Supp. 2d 520, 529 (S.D.N.Y. 2006)* ; *see 23 U.S.T. 2555* , 847 U.N.T.S. 231 (1970), *28 U.S.C. § 1781*, note.

(n29)Footnote 12. *Fed. R. Civ. P. 28(b)*, Committee Note to 1993 Amendments.

(n30)Footnote 13. Hague Evidence Convention Arts. 1, 15-17.

(n31)Footnote 14. Hague Evidence Convention, Art. 27; *In re Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288, 300 (3d Cir. 2004)* ; *see International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 441-442 (S.D.N.Y. 1984)* (Article 27 establishes non-exclusive nature of the Hague Evidence Convention).

(n32)Footnote 15. Hague Evidence Convention, Art. 27; *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 538, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* (treaty sets minimum standards for discovery).

(n33)Footnote 16. *Fed. R. Civ. P. 28(b)(1)(B)*.

(n34)Footnote 17. *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 n.1, 124 S. Ct. 2466, 159 L.*

Ed. 2d 355 (2004) .

(n35)Footnote 18. *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)* .

(n36)Footnote 19. *See Fed. R. Civ. P. 28(b)*, Committee Note to 1993 Amendments.

(n37)Footnote 20. *See In re Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288, 300 (3d Cir. 2004)* .

(n38)Footnote 21. *Fed. R. Civ. P. 28(b)(2)(A)*.

(n39)Footnote 22. *Fed. R. Civ. P. 28(b)(2)(B)*.

(n40)Footnote 23. *DBMS Consultants Ltd. v. Computer Assoc. Int'l, 131 F.R.D. 367, 368 (D. Mass. 1990)* .

(n41)Footnote 24. *Fed. R. Civ. P. 28(b)(2)(A)*.

(n42)Footnote 25. *DBMS Consultants Ltd. v. Computer Assoc. Int'l, 131 F.R.D. 367, 369 (D. Mass. 1990)* .

(n43)Footnote 26. *Fed. R. Civ. P. 28(b)(3)*.

(n44)Footnote 27. *Fed. R. Civ. P. 28(b)(4)*.

(n45)Footnote 28. *Fed. R. Civ. P. 28(b)(1)(C)*.

(n46)Footnote 29. *Fed. R. Civ. P. 28(b)(3)*.

(n47)Footnote 30. *See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1150-1151 (C.D. Cal. 2005)* .

(n48)Footnote 31. *Zassenhaus v. Evening Star Newspaper Co., 404 F.2d 1361, 1362 fn.1 (D.C. Cir. 1968)* (method has drawback in that it does not embrace compulsory process, citing **Moore's Federal Practice**); *Estate of Ungar v. Palestinian Auth., 451 F. Supp. 2d 607, 612 (S.D.N.Y. 2006)* .

(n49)Footnote 32. *Fed. R. Civ. P. 28(b)(1)(D)*.

(n50)Footnote 33. *Fed. R. Civ. P. 28(b)(2)(A)*.

(n51)Footnote 34. *Fed. R. Civ. P. 28(b)(2)(B)*.

(n52)Footnote 35. *Fed. R. Civ. P. 28(b)(3)*.

(n53)Footnote 36. *See* In *Re Bankers Trust Co., 775 F.2d 545, 548 (3d Cir. 1985)* .

(n54)Footnote 37. *United States v. Ruiz-Castro, 92 F.3d 1519, 1532-33 (5th Cir.1996)* .

(n55)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice, §§ 28.30*-28.32 (Matthew Bender 3d ed.).

(n56)Footnote 1. *Fed. R. Civ. P. 28(c)*.

(n57)Footnote 2. *Fed. R. Civ. P. 32(d)(2)(A)*.

(n58)Footnote 3. *Fed. R. Civ. P. 32(d)(2)(B)*.

(n59)Footnote 4. *Fed. R. Civ. P. 29(a)* (if parties so stipulate, deposition taken before disqualified person may be used in the same way as any other deposition).

(n60)Footnote 5. *United States v. Hargro, 104 F.R.D. 451, 452 (N.D. Ga. 1984)* (counsel may administer oath when opponents do not object).

(n61)Footnote 6. *See Pioneer Drive, LLC v. Nissan Diesel Am., Inc., 2009 U.S. Dist. LEXIS 117032, at *8-*10 (D. Mont. 2009)* ; *see also Fed. R. Civ. P. 30(b)(3), (b)(5)(B).*

(n62)Footnote 7. *Ott v. Stripe Law Firm, 169 F.R.D. 380, 381 (E.D. Ok. 1996)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.24

§ 15.24 Use of Depositions in Court Proceedings

[1] Deposition Admissible for Use in Court Proceeding Based on Three-Part Test n*

In all trials, the testimony of witnesses generally must be taken orally in open court, unless otherwise provided by an Act of Congress, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. n1 Deposition testimony, because it is taken outside the presence of court and jury, is generally hearsay within the meaning of *Rule 801 of the Federal Rules of Evidence*, even though an adverse party had the right to cross-examine. To the extent that it is hearsay, deposition testimony is not admissible except as provided by the Federal Rules of Evidence or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. n2

However, despite the common-law preference for live testimony, Rule 32 was adopted to allow use of depositions at trial or other court proceedings, provided that the deposition qualifies under a three-part test, n3 as discussed in [2] and [3], *below*.

[2] Statement of Three-Part Test

At a hearing or trial, all or part of a deposition may be used against a party if it satisfies the following three conditions:

1. The party was present or represented at the taking of the deposition or had reasonable notice of it; n1

2. The deposition is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; n2 and

3. The deposition use is allowed considering seven specified criteria. n3

[3] Elements of Three-Part Test

[a] Presence of Party at Deposition

All or part of a deposition is available for use against a party at a hearing or the trial only if that party was present or

represented at the taking of the deposition or had reasonable notice of the deposition. n1 Thus, a deposition may not be used against a person who had no notice and who was not a party at the time the deposition was taken, because the party who later joined the action would not have had opportunity to cross examine the witness. n2 However, if the later-joined party was the deponent at the deposition, that deposition may be introduced against the witness in the action. n3

The rule does not specify what constitutes reasonable notice, and it is generally determined on the circumstances of the deposition. n4 However, if a party has received less than 14 days' notice of the deposition, and promptly files a motion for a protective order that is pending at the time the deposition is held, the deposition may not used against that party. n5

[b] Admissibility Under Federal Rules of Evidence

All or part of a deposition is available for use against a party at a hearing or the trial only to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying. n6 This means that, for example, deposition testimony may be used under the rules of evidence as an admission of a party-opponent under *Federal Rule of Evidence 801*. n7 On the other hand it also means that a deposition meeting the requirements under Rule 32 may nevertheless be excluded on other evidentiary grounds. For example, the deposition be excluded on the grounds that it is not relevant. n8

[c] Criteria That Allow Use of Deposition

All or part of a deposition is available for use against a party at a hearing or the trial only if the deposition is allowed based on the following criteria:

1. Impeachment or other use allowed by evidentiary rules. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. n9

2. Deposition of party, agent, or designated deponent for entity. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or person designated as a deponent under Rule 30(b)(6) or 31(a)(4). n10

3. Unavailable witness. A party may use for any purpose the deposition of a witness, whether or not a party to the action, if the court finds any of the following:

a. that the witness is dead; n11

b. that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; n12

c. that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; n13

d. that the party offering the deposition could not procure the witness's attendance by subpoena; n14 or

e. on motion and notice, that exceptional circumstances make it desirable, considering the interest of justice and the importance of live testimony in open court, to permit the deposition to be used. n15 Whether exceptional circumstances exist is determined based on the circumstances of each case. n16

4. Deposition use precluded for certain depositions taken on short notice and for unavailable deponents when the party could not obtain an attorney. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or

be taken at a different time or place, and this motion was still pending when the deposition was taken. n17 A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not obtain an attorney to represent it at the deposition, despite diligent efforts. n18

5. Using part of deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. n19

6. Substitution of party. If a party is substituted under Rule 25, the substitution does not affect the right to use a deposition previously taken. n20

7. Deposition taken in an earlier action. If a deposition has properly been taken and, if required, filed in any federal or state court action, the deposition may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. Such a deposition previously taken may also be used as allowed by the Federal Rules of Evidence. n21 Whether to admit a deposition from a prior lawsuit is a decision left to the district court's sound discretion. n22

[4] Objections to Deposition When Taken or When Introduced in Court Proceeding n*

[a] Time Objection Must Be Made

Certain objections to depositions must be made prior to or at the time the deposition is taken, or the objections are waived. n1 Other particular objections must be made at trial or other court proceeding, n2 including those based on a failure to satisfy the requirements to use the deposition in court under rule 32(a), n3 or for any reason that would require the exclusion of the evidence if the witness were then present and testifying, based in the Federal Rules of Evidence. n4

[b] Objections Based on Failure to Qualify Deposition for Use at Hearing or Trial

A deposition may generally be used in a civil case against any party in accordance with the provisions stated in Rule 32(a). n5 Those provisions specify the various conditions for use of the deposition at a civil hearing or trial. If a party introduces a deposition that does not comply with those provisions, a party who opposes use of the deposition may object to use of the deposition at a hearing or trial. n6 The proponent of the deposition may respond that the deposition does comply with Rule 32(a) or that the use is independently authorized by the Federal Rules of Evidence. On the other hand, even if a deposition satisfies all of the conditions of Rule 32(a) for admissibility, a party may, under Rule 32(b), object to use of the deposition for any reason that would require exclusion of the evidence if the person were testifying in person in court. n7

[c] Objections to Notice of Deposition

An objection to errors and irregularities in the notice for taking a deposition is waived unless it is made in writing and promptly served on the party giving notice. n8 This rule essentially requires that defects in the notice be pointed out promptly in order to give the erring party an opportunity to correct the mistake. n9

Even without regard to Rule 32(d), a deposition may be excluded if a party was given less than 11-days notice and has promptly made a motion for a protective order on that basis and the protective order is pending at the time of the deposition. n10

[d] Objections to Officer

An objection to taking a deposition because of disqualification of the officer before whom it is taken must be made

before the taking of the deposition begins or as soon thereafter as the disqualification becomes known n11 or could be discovered with reasonable diligence. n12 A party waives the objection by failing to object within the required time. n13 A party may also waive his or her objection to a disqualified person if the party has stipulated that the person may act as deposition officer. n14

[e] Objections That Must be Made When Deposition is Taken

If certain errors or irregularities occur at the oral examination of a deposition, an objection to that must promptly be made at the time the deposition is taken. n15 Thus, waiver occurs if objections to the following errors or irregularities are not made during the deposition: n16

1. The manner of taking the deposition.

2. The form of the questions.

3. The oath or affirmation.

4. The conduct of parties.

5. Errors of any kind that might be removed or cured if promptly presented. n17

On the other hand, an objection to a deponent's competence, or to the competence, relevance, or materiality of testimony, is not waived by a failure to make the objection before or during the deposition, unless the ground for that objection might have been corrected at that time. n18

[f] Objections to Form of Written Questions Given at Deposition

If a deposition is given on written questions, n19 any objection to the form of a written question is waived if not served in writing in a timely manner on the party submitting the question. Such objections are timely only if served within the time allowed for serving the succeeding responsive questions, or, if the question is a recross question, within 7 days after being served with the question. n20

[g] Objections to Completion and Return of Deposition

Objections regarding errors and irregularities in the completion and return of a deposition must be made by motion to suppress the deposition, or some part of the deposition, when the errors and irregularities relate to:

1. The manner in which the testimony is transcribed.

2. The manner in which the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise administered by the officer under Rules 30 and 31.

A party waives such objections by failing make the motion to suppress promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known. n21 However, the fact that a party has waived its right to attack a defective deposition, for example because it is not certified, does not compel the court to consider the deposition as evidence, and the court may properly exclude such deposition sua sponte on other grounds. n22

[5] Procedures for Use of Deposition in Court Proceeding n*

[a] Deposition Must Be Introduced in Evidence

A trial court may not use deposition testimony at trial if the deposition in question is not introduced into evidence. At the time the party introduces the deposition into evidence, the deposition is subject to whatever objections the law of evidence allows, pursuant to Rule 32(b), provided that objections have not been waived under Rule 32(d). n1 Even in a bench trial, the judge may not base his or her findings on depositions that are on file but that were not introduced into evidence, even though they could have been introduced. n2 The record on appeal should also include deposition evidence that has been admitted, to the extent the evidence is necessary to determine the issues in the case. n3

[b] All or Part of Deposition May Be Used

Provided that the requirements of Rule 32(a) are otherwise satisfied, a party may use all of a deposition at trial or other hearing. n4 However, because the trial court has discretion to control the manner in which deposition testimony is presented. n5 The court may exercise its discretion against admitting a full deposition when it is unnecessary or inadmissible, for example, when the testimony is cumulative of other evidence introduced in the proceedings. n6

Rather than an entire deposition, any party may offer in evidence a part of a deposition provided that the offered testimony is usable under Rule 32(a) or otherwise admissible under the Federal Rules of Evidence. n7 An attempt to introduce a lengthy, complete deposition into evidence is not only tactically ineffective; it is also generally disfavored by trial judges. Repetitious or immaterial matter may be excluded, and the court may require identification of the germane portions of a deposition by specific order. n8

When only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts. n9 Rule 32(a)(6) does not require introduction of the other salient excerpts of the deposition at that time, and trial courts have the discretion to require introduction either then or at a later stage in the proceedings. n10

[c] Form for Introduction of Deposition Testimony

Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. n11 This provision was added in 1993 in light of the increased availability for video recording and audio recording of depositions under Rule 30(b). n12

On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. n13 In other words, a party is free to use a nontranscript form for impeachment purposes, but if the deposition is used for purposes other than impeachment, the audio or visual form is preferred in front of a jury, because it most closely approximates live testimony. However, the court has discretion to decide that, in the circumstances, the use of a transcript is sufficient in front of a jury. n14

The court also has the discretion to require the use of deposition summaries, based on the court's inherent power to exercise reasonable control over the mode and order of presenting evidence under *Rule 611(a) of the Federal Rules of Evidence*. n15 Deposition summaries are especially useful in particularly complex large cases. n16

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 32.02*-32.32 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 43(a).*

(n3)Footnote 2. *See Fed. R. Evid. 802.*

(n4)Footnote 3. *See Fed. R. Civ. P. 32(a).*

(n5)Footnote 1. *Fed. R. Civ. P. 32(a)(1)(A)*; *see* [3][a], *below*.

(n6)Footnote 2. *Fed. R. Civ. P. 32(a)(1)(B)*; *see* [3][b], *below*.

(n7)Footnote 3. *Fed. R. Civ. P. 32(a)(1)(C)*; *see Fed. R. Civ. P. 32(a)(2)-(8)*; *see also* [3][c], *below*.

(n8)Footnote 1. *Fed. R. Civ. P. 32(a)(1)(A)*.

(n9)Footnote 2. *Hoover v. Switlik Parachute Co., 663 F.2d 964, 966 (9th Cir. 1981)* .

(n10)Footnote 3. *See Codeiro v. Levasseau, 112 F.R.D. 209, 210-211 (D.R.I. 1986)* .

(n11)Footnote 4. *See In re Sulfuric Acid Antitrust Litig., 231 F.R.D. 320, 327 (N.D. Ill. 2005)* ; *see also Fed. R. Civ. P. 30(b)(1)*.

(n12)Footnote 5. *Fed. R. Civ. P. 32(a)(5)(A)*; *see Fed. R. Civ. P. 26(c)(1)(B)* (motion for protective order).

(n13)Footnote 6. *Fed. R. Civ. P. 32(a)(1)(B)*.

(n14)Footnote 7. *See Shanklin v. Norfolk S. Ry. Co., 369 F.3d 978, 990* (th Cir. 2004).

(n15)Footnote 8. *See Fed. R. Evid. 401*.

(n16)Footnote 9. *Fed. R. Civ. P. 32(a)(2)*; *see* United States v. 23. *76 Acres of Land, 32 F.R.D. 593, 596 (D. Md. 1963)* (one of many uses of deposition testimony is that of cross-examination, citing **Moore's Federal Practice**).

(n17)Footnote 10. *Fed. R. Civ. P. 32(a)(3)*; *see Fed. R. Civ. P. 30(b)(6)*, *31(a)(4)*; *see also Sure-Safe Indus., Inc. v. C & R Pier Mfg., 851 F. Supp. 1469, 1474 (S.D. Cal. 1993)* .

(n18)Footnote 11. *Fed. R. Civ. P. 32(a)(4)(A)*; *see In re Case No. 00-55792, 276 B.R. 214, 216 (S.D. Ohio 2002)* (deposition may be used of deponent who dies prior to time deposition is offered at trial).

(n19)Footnote 12. *Fed. R. Civ. P. 32(a)(4)(B)*; *see Garcia-Martinez v. City & County of Denver, 392 F.3d 1187, 1191 (10th Cir. 2004)* (citing **Moore's Federal Practice**).

(n20)Footnote 13. *Fed. R. Civ. P. 32(a)(4)(C)*; *see, e.g., Griman v. Makousky, 76 F.3d 151, 154 (7th Cir. 1996)* (attorney must ensure that witness's release date did not occur before deposition).

(n21)Footnote 14. *Fed. R. Civ. P. 32(a)(4)(D)*; *see Thomas v. Cook County Sheriff's Dep't, 588 F.3d 445, 458 (7th Cir. 2009)* (offeror must have used reasonable diligence to secure witness's presence).

(n22)Footnote 15. *Fed. R. Civ. P. 32(a)(4)(E)*.

(n23)Footnote 16. *Banks v. Yokemick, 144 F. Supp. 2d 272, 288 (S.D.N.Y. 2001)* .

(n24)Footnote 17. *Fed. R. Civ. P. 32(a)(5)(A)*.

(n25)Footnote 18. *Fed. R. Civ. P. 32(a)(5)(B)*.

(n26)Footnote 19. *Fed. R. Civ. P. 32(a)(6)*.

(n27)Footnote 20. *Fed. R. Civ. P. 32(a)(7)*.

(n28)Footnote 21. *Fed. R. Civ. P. 32(a)(8)*.

(n29)Footnote 22. *Hub v. Sun Valley Co., 682 F.2d 776, 777-778 (9th Cir. 1982)* .

(n30)Footnote *. For a more complete discussion, *see* 7 *Moore's Federal Practice, §§ 32.40*-32.47 (Matthew Bender 3d ed.).

(n31)Footnote 1. *See* [c]-[f], *below*.

(n32)Footnote 2. *See* [b], *below*.

(n33)Footnote 3. *Fed. R. Civ. P. 32(b)*; *see Fed. R. Civ. P. 32(a)*.

(n34)Footnote 4. *Fed. R. Civ. P. 32(b)*; *see Mark IV Properties, Inc. v. Club Dev. & Management Corp., 12 B.R. 854, 858 (Bankr. S.D. Cal. 1981)* (objections regarding admissibility of any part of deposition evidence may be made at trial on same basis as if witness were actually in attendance, citing **Moore's Federal Practice**).

(n35)Footnote 5. *See Fed. R. Civ. P. 32(a)*; [2][b], *above*.

(n36)Footnote 6. *Fed. R. Civ. P. 32(b)*; *Vecchio v. Schaefer, 245 F.R.D. 642, 643 (W.D. Mo. 2007)* (such objections do not include objections to form of deposition).

(n37)Footnote 7. *See Fed. R. Civ. P. 32(a)(1)(B)*.

(n38)Footnote 8. *See Fed. R. Civ. P. 32(d)(1)*.

(n39)Footnote 9. *Brown Badgett, Inc. v. Jennings, 842 F.2d 899, 901 (6th Cir. 1988)* .

(n40)Footnote 10. *Fed. R. Civ. P. 32(a)(5)(A)*.

(n41)Footnote 11. *See Fed. R. Civ. P. 32(d)(2)(A)*.

(n42)Footnote 12. *See Fed. R. Civ. P. 32(d)(2)(A)*.

(n43)Footnote 13. *See Fed. R. Civ. P. 32(d)(2)*.

(n44)Footnote 14. *See Fed. R. Civ. P. 29(a)*.

(n45)Footnote 15. *See Fed. R. Civ. P. 32(d)(3)(B)(ii)*.

(n46)Footnote 16. *See Fed. R. Civ. P. 32(d)(3)(B)(i)*.

(n47)Footnote 17. *See Fed. R. Civ. P. 32(d)(3)(A)*.

(n48)Footnote 18. *See Fed. R. Civ. P. 32(d)(3)(A)*; *Harris v. Bornhorst, 513 F.3d 503, 525 (6th Cir. 2008)* .

(n49)Footnote 19. *See Fed. R. Civ. P. 31*.

(n50)Footnote 20. *Fed. R. Civ. P. 32(d)(3)(C)*.

(n51)Footnote 21. *See Fed. R. Civ. P. 32(d)(4)*.

(n52)Footnote 22. *Ullman v. Auto-Owners Mut. Ins. Co., 502 F. Supp. 2d 737, 744 (S.D. Ohio 2007)* (court held uncertified deposition invalid as summary judgment evidence under Rule 56).

(n53)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 32.60*-32.65 (Matthew Bender 3d ed.).

(n54)Footnote 1. *See Fed. R. Civ. P. 32(d)(3).*

(N55)Footnote 2. *See White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984)* .

(n56)Footnote 3. *See USX Corp. v. Tieco, Inc., 227 F.R.D. 680, 688 (N.D. Ala. 2004)* .

(n57)Footnote 4. *Fed. R. Civ. P. 32(a).*

(n58)Footnote 5. *See Fed. R. Evid. 611.*

(n59)Footnote 6. *See Grisom v. Logan, 334 F. Supp. 273, 279 (C.D. Cal. 1971)* .

(n60)Footnote 7. *Hupp v. City of Walnut Creek, 389 F. Supp. 2d 1229, 1231 n.2 (N.D. Cal. 2005)* ; *see Fed. R. Civ. P. 32(a)(6).*

(n61)Footnote 8. *Fey v. Walston & Co., Inc., 493 F.2d 1036, 1046 (7th Cir. 1974)* .

(n62)Footnote 9. *Fed. R. Civ. P. 32(a)(6).*

(n63)Footnote 10. *Fey v. Walston & Co., Inc., 493 F.2d 1036, 1046 (7th Cir. 1974)* .

(n64)Footnote 11. *Fed. R. Civ. P. 32(c).*

(n65)Footnote 12. *See Fed. R. Civ. P. 32(c)*, Committee Note to 1993 Amendments; *see also Little v. Mitsubishi Motors N. Am., Inc., 514 F.3d 699, 702 (7th Cir. 2008)* .

(n66)Footnote 13. *Fed. R. Civ. P. 32(c).*

(n67)Footnote 14. *See Fed. R. Civ. P. 32(c)*; *see also Planned Parenthood of the Colombia/Willamette, Inc. v. Am. Coalition, 290 F.3d 1058, 1118 (9th Cir. 2002)* .

(n68)Footnote 15. *See Fed. R. Evid. 611(a)*; *Oostendorp v. Khanna, 937 F.2d 1177, 1179-1180 (7th Cir. 1991)* (it is within trial judge's discretion under *Fed. R. Civ. P. 32* and *Fed. R. Evid. 611(a)* to require that deposition testimony be presented to jury in form of summary, rather than through reading of questions and answers).

(n69)Footnote 16. *See Nigh v. Dow Chem. Co., 634 F. Supp. 1513, 1519 (W.D. Wis. 1986)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.25

§ 15.25 Interrogatories to Party

[1] Purpose and Use of Interrogatories n*

[a] Characteristics and Types of Interrogatories

Interrogatories are written questions propounded by one party to another. n1 The scope of issues that interrogatories may cover is coextensive with that of other forms of discovery. Thus, interrogatories may relate to any matter, not privileged, relevant to the subject matter of the action. n2 The party receiving interrogatories must either answer the interrogatories in writing and under oath or object to them. n3 An answer to an interrogatory essentially constitutes an admission of a party opponent for evidentiary purposes, n4 and are admissible at trial to the extent permitted by the rules of evidence. n5

The two general types of interrogatories may be described as identification interrogatories and contention interrogatories. "Identification interrogatories" call for factual information. They are questions that require the responding party to identify pertinent documents, tangible things, or the identity of persons with knowledge of facts relevant to the action. n6

On the other hand, "contention interrogatories" inquire into an opinion or contention that relates to fact or the application of law to fact. n7 Contention interrogatories may, among other things, ask a party to (1) state what it contends or whether it is making a certain contention, (2) explain the facts underlying its contention, (3) assert a position or explain that position with regard to how the law applies to the facts, or (4) articulate the legal or theoretical reason for a contention. n8 While an interrogatory is not objectionable merely because its answer involves the responding party's opinion or contention, the court may order that answers to contention interrogatories be deferred until after other designated discovery has been completed. n9

[b] Purposes of Interrogatories

Interrogatories serve the same general purpose as other forms of discovery: to further the rational and balanced search for accurate facts related to the claims and issues of the case and to secure the just, speedy, and inexpensive determination of every action. More precisely, the function of interrogatories is to avoid unnecessary depositions, to

minimize delay, and to narrow the issues at trial in an inexpensive fashion. n10 By narrowing the issues, interrogatories also reduce the possibility of the negative effects of surprise on all parties. n11

Much of the information that was previously requested by interrogatories must now be automatically disclosed by the parties at the outset of litigation without a formal discovery request under the mandatory disclosure provisions of Rule 26(a). However, interrogatories may still be used alone or in conjunction with other techniques to obtain additional information beyond that provided under the mandatory disclosure requirements. n12

[c] Interrogatories May Be Used in Conjunction With Other Procedures

A party may use interrogatories in conjunction with other methods of discovery, such as requests for production or depositions. n13 Although the various discovery methods share a common purpose of seeking information, they do so through different procedures. n14 In other words, the various discovery techniques are complementary; they may be used singly or in conjunction with each other, provided that the party seeking discovery is not attempting to harass or overburden the responding party. n15 They may be used in any sequence unless the court orders otherwise after motion by the opponent. n16

A party may also use interrogatories in conjunction with other procedural devices, such as a motion for a more definite statement. n17 Therefore, objections to interrogatories may not be sustained merely because a motion for a more definite statement seeking the same information has been denied. On the other hand, it is inappropriate to use a motion for a more definite statement as a substitute for discovery, such as to obtain information that could be elicited through interrogatories. A motion for more definite statement is designed to remedy unintelligibility in the pleadings, not investigate factual assertions. n18

[d] Considerable Discretion of Court to Control Interrogatories

The district courts have considerable discretion to manage discovery, including interrogatories. n19 Thus, the court may grant the parties leave to serve more than 25 interrogatories; n20 deny interrogatories by sustaining objections by the responding party; n21 grant protective orders; n22 and compel answers to interrogatories. n23 Furthermore, if measures to compel the parties to respond to interrogatories or otherwise to provide discovery are ineffective, the court may impose sanctions, such as entry of an order that facts requested by interrogatories are taken to be established. n24

[2] Persons Subject to Interrogatories n*

[a] Only Parties May be Subject to Interrogatories

A party may serve interrogatories on any other party to the action. n1 Parties subject to interrogatories include any person or entity named in a pleading such as the complaint or answer, including public and private corporations, partnerships, associations, or governmental agencies. n2 On the other hand, interrogatories may not be served on a person who is not a party. As a similar alternative discovery device available when a person is a nonparty, an attorney should consider the deposition on written questions. n3

A person is subject to interrogatories only if the person is a party at the time the person is served with the interrogatory and the time the answer to the interrogatories is due. Thus, if a party is dismissed from a case before the answers to interrogatories are due, that party is not required to answer interrogatories served before the dismissal. n4 A party may serve any other party with interrogatories, even if their interests are not adverse. For example, a plaintiff may require that a third-party defendant respond to the plaintiff's interrogatories, even though the plaintiff is not claiming against the third-party defendant. n5

[b] Persons Considered Parties

Any natural person or entity may be served with interrogatories; because a corporation, partnership, association, or other business may be a party to a proceeding, it is subject to discovery through interrogatories. n6 However, interrogatories may not be directed to a particular person within a corporation or business entity if that person is not a party, and they must be directed to the corporation or business itself, which must furnish the information available to the entity through any officer or agent. n7

If a person named in a pleading is challenging the jurisdiction of the court, the person is nevertheless considered a party for purposes of discovery and answering interrogatories, until the jurisdictional issues are determined. n8 Furthermore, a party's failure to respond to interrogatories pertaining to jurisdiction may even result in sanctions, including a determination that personal jurisdiction exists. n9

In a class action proceeding, named members of a class are parties and are thus subject to interrogatories. Plaintiffs whose actions are consolidated as a class action are also deemed as parties properly subject to discovery without any showing of special circumstances. n10 Although unnamed class members are not technically parties within the meaning of the rules governing class action suits, n11 the court has discretion in the interest of justice to permit submission of interrogatories to unnamed but identifiable members of a class on a sample basis. n12

On the other hand, persons who are nonparties are not subject to interrogatories, even if they have some relationship to the litigation. Thus, interrogatories may not be served on a party's attorney. n13 Furthermore, when an action is brought on behalf of a nonparty, that nonparty is not required to answer interrogatories. n14 Similarly, when an insurer brings an action as an assignee of its insured, the insured is not subject to interrogatories. However, when the insurer answers interrogatories, it is required to provide information about the insured. n15

[3] Limitation on Number of Interrogatories n*

[a] Total Limit of Interrogatories

Absent court order or written stipulation of the parties, a party may serve each other party a maximum of 25 written interrogatories, including discrete subparts. A court may modify that 25 interrogatory maximum by court order in a particular case; n1 however, courts may not do so by local rule. n2 A party may serve a total of 25 interrogatories on each other party involved. For example, if there are three parties in the case other than the defendant, the defendant may serve a total of 75 interrogatories, subject, however, to objections based on duplication. n3

When a case with more than 25 outstanding interrogatories is removed from state court to federal court, the propounding party has three choices. n4 It may (1) move the court to permit the additional interrogatories, (2) specify which 25 of the interrogatories are to be answered, or (3) resubmit 25 interrogatories. n5

[b] Numerical Maximum Includes Discrete Subparts

The limit on the number of interrogatories a party may serve includes "all discrete subparts." n6 In other words, a party may not avoid the numerical limits by asking questions about distinct subjects, but numbering the questions as subparts. n7 Rule 33 does not define "discrete subparts." However, courts agree generally that a discrete subpart is one that is not logically or factually subsumed within and necessarily related to the primary question. Therefore, even if a question is listed as a subpart, if it can be answered independently from the primary question, that subpart must be counted as a separate interrogatory. On the other hand, multiple interrelated questions in subparts constitute a single interrogatory. For example, a subpart is not a separate interrogatory if it requests that the time, place, persons present, and contents be stated separately. n8

[c] Courts Have Discretion to Allow Additional Interrogatories

To serve more than 25 interrogatories to another party, a party must secure a court order or a written stipulation from

the responding party. n9 The court may grant leave to serve additional interrogatories, for example, when it issues a scheduling order before trial, n10 or at the pretrial conference. n11 The court may permit a party to serve additional interrogatories to the extent such additional discovery is consistent with Rule 26(b)(2)(C), which specifies factors governing limitations on discovery. The court should consider the following: whether the discovery would be cumulative or duplicative; whether the discovery may be obtained from some other source that would be more convenient, less burdensome, or less expensive; whether the propounding party has already had ample opportunity to obtain the information sought; and whether the burden or expense of the proposed discovery outweighs the likelihood of resolving the issue at stake. n12

The propounding party bears the burden of persuading the court that the additional interrogatories are necessary under the circumstances of the case. Some jurisdictions require an express showing of "good cause" before they will grant a request to serve more interrogatories. n13 Courts typically find additional interrogatories appropriate in a cases involving complex and technical litigation. n14

As an alternative to seeking permission from the court to serve more than 25 interrogatories, the parties may stipulate in writing to a greater number. n15

[d] Procedure When Maximum is Exceeded

When a party is served with interrogatories in excess of the numerical limits, the responding party may generally answer the first 25, and object to the remainder. n16 However, some district courts require that, when a party is served with interrogatories that exceed the number allowed to be propounded, the responding party must object to the excess numbers before responding to any interrogatories. If the interrogated party responds to some of the interrogatories before objecting, it may waive any objection based on the excess numbers. n17

[4] Scope and Content of Interrogatories n*

[a] Interrogatories Must Seek Discoverable Information

Interrogatories, like other discovery tools, may only inquire about any matter, not privileged, that is relevant to the claim or defense of any party, n1 as specified in Rule 26(b). n2 Therefore, the interrogatories may ask about any claim or defense of any party, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n3

Relevant matters are not limited to the exact issues framed by the pleadings or to the merits of either party's case. Nor are interrogatories limited to matters that may be admitted in evidence, but to matters that may lead to admissible evidence. n4 Although it is broad, the scope of relevant discovery is not unlimited. Courts are charged with preventing discovery from becoming an instrument of harassment and oppression. They may limit the frequency and extent of discovery through application of the benefits versus burden analysis set forth in Rule 26(b). n5

[b] Scope Does not Include Privileged Matter

Interrogatories may not inquire about privileged matters; n6 privilege is a valid objection to interrogatories. n7 A party, however, may waive the objection of privilege by answering an interrogatory. n8

A claim of privilege may not be used as a blanket assertion to justify refusing to answer interrogatories; rather, the privilege must be examined in the context of the case, and the responding party has an obligation to expressly claim a particular privilege and must describe the privileged or protected items in a manner that will reveal the nature of the

privilege. n9 Therefore, a responding party who wants to assert privilege should provide a responsive answer except for the specific items claimed to be privileged and should include a statement of the basis for the privilege. The party must describe the allegedly privileged material in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege, n10 such as the attorney-client privilege. n11

When a party asserts a claim of privilege in response to an interrogatory, the court has discretion to respond in one of several ways. The court may choose to (1) compel discovery, n12 (2) impose sanctions for failure to comply with discovery, n13 (3) recognize the asserted privilege and issue a protective order, n14 or (4) order that modified interrogatories be served, that is, interrogatories that have been redrafted to avoid the privileged communication. n15

[c] Work Product Doctrine May Limit Scope

Work product is protected from discovery. n16 The work product doctrine provides two kinds of protection. The first is a qualified protection under which a party may not discover documents and tangible things prepared in anticipation of litigation or for trial by or for a party or the party's representative. A party may not discover these types of non-opinion work product unless the party can show that it (1) has a substantial need for the documents and (2) is unable to obtain the documents by other means without undue hardship. n17

The second type of work product is known as core or opinion work product. This type of work product benefits from an unqualified protection under which the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation may not be discovered. Even if the court ultimately permits discovery of documents and tangible things on the requisite showing of need and undue hardship, the court must, in any case, protect against disclosure of opinion work product. n18 In other words, an interrogatory normally may inquire about the existence, though not the contents, of written information gathered by an attorney in preparation for trial. n19

When a party withholds answers by claiming they are subject to protection as trial-preparation materials, the withholding party has an obligation to make the claim expressly, and must describe the materials claimed to be protected as trial preparation in a manner that will reveal the nature of the claim. n20

[d] Trade Secrets or Confidential Information May Limit Scope

A party may protect trade secrets or confidential business information from disclosure through interrogatories, unless the trade secrets or business information themselves are the subject of the claim or defense. n21 In such cases, the party must make a motion for an order limiting discovery or a protective order preventing discovery. n22 Courts may be reluctant to completely strike interrogatories that request confidential information because these kinds of interrogatories normally request information that is quite relevant to the issues. By granting a limiting or protective order, the court may provide the propounding party with the information it needs while still shielding the information from public disclosure. n23

[5] Format of Interrogatories n*

[a] Interrogatories Must Be Clear and Concise

The Federal Rules of Civil Procedure do not prescribe any specific form for interrogatories. n1 However, interrogatories must be definite, clear, concise, and adequately inform the responding party of the information that is being requested. n2 To accomplish this purpose, the court may suggest the manner in which questions may be asked, although it may not substitute its own questions. n3 A party may ask detailed questions in complex cases if they may be reasonably expected to lead to the discovery of relevant information, and conform to the 25-question limit. n4 Before drafting interrogatories, the attorney should consult local rules. Most federal jurisdictions have rules that govern the format of interrogatories. For example, some federal district courts require that interrogatories must be numbered consecutively and provide space for the responding party's answer immediately following each interrogatory. n5

[b] Instructions, Definitions, and Forms

A party may include standard instructions on how to answer or may define certain terms at the beginning of its interrogatories, unless to do so would make the interrogatories unduly burdensome or unreasonable. n6 Local federal court rules should also be consulted because some specify the form of interrogatories. n7 Although form or pattern interrogatories are often criticized, they are not prohibited and, when they are tailored to the case and meet the standards discussed above, are not objectionable. n8 Furthermore, they may provide an inexpensive and efficient means of covering all aspects of a case. When pattern interrogatories are used, they must be used selectively as appropriate to the case, prepared by an attorney or under an attorney's direction. n9

[6] Timing of Service of Interrogatories n*

[a] Party May Not Serve Interrogatories Until After Discovery Conference

A party generally may not serve interrogatories until the parties have complied with the requirements of the discovery planning conference specified in Rule 26(f). n1 Rule 26(f) requires the parties to meet as soon as is practicable, and in any event at least 21 days before the scheduling conference occurs, to make an effort to settle the case and to develop a proposed discovery plan. n2

The various methods of discovery may be used in any sequence; thus, interrogatories may be served before or after any other discovery device has been employed by any party, unless the court orders otherwise for the convenience of the parties and witnesses and in the interests of justice. n3 Furthermore, the fact that a party is conducting a deposition or is in the midst of any other type of discovery does not operate to delay any other party's discovery. n4

[b] Party May Not Serve Interrogatories Until After Process Served

Because interrogatories only involve parties to an action, interrogatories may not be served before the summons and complaint have been served. n5 Interrogatories are treated differently in this respect than Rule 32 depositions, Rule 34 document and inspection requests, and Rule 35 physical examinations, all of which may be ordered prior to the commencement of suit, in the court's discretion. The court has no jurisdiction over the case or the parties prior to filing of the summons and complaint. Therefore, as one district court has held, a potential party who receives premature interrogatories has no duty to respond and no obligation to retain them in anticipation that they may become viable discovery requests in the future. n6

[c] Party May Not Serve Interrogatories Until After Automatic Disclosure Date

Rule 26(a) specifies a timetable which requires a party, absent court order or stipulation, to automatically disclose information. n7 Rule 26(a) contemplates that parties may use traditional discovery methods, including interrogatories, to obtain further information regarding these matters after the initial, automatic disclosures are made. To the extent that a party attempts to anticipate mandatory disclosures by serving interrogatories seeking the same information prior to the time that the disclosures are due, whether pursuant to the rule or court order, the interrogatories may be stricken as untimely. n8

[d] Type of Interrogatories May Control Timing

"Identification interrogatories," which are those that seek the identity of witnesses and the location of documents or other tangible things, may be served early in a case. n9 By contrast, "contention interrogatories" are those involving an opinion or a contention that relates to fact or the application of law to fact. n10 If a party serves contention interrogatories early in the litigation, the court may order that answers to them be deferred until after designated discovery has been completed or until a pretrial conference or other later time. n11

The primary objection to early service of contention interrogatories is that the responding party will not have had time to take substantial documentary or testimonial discovery and therefore will have been unable to gather sufficient information with which to answer. n12 Furthermore, a party may be required to set forth tentative and incomplete theories of its case if it is compelled to answer contention interrogatories too early in a case. n13 The court has authority to defer answers to contention interrogatories because they usually involve mixed questions of law and fact, creating disputes between the parties that often may only be resolved after more discovery is completed. n14

[e] Effect of Discovery Cut-Off Dates or Trial Setting

Rule 33 contains no express limit or deadline on how late in the proceedings interrogatories may be served. However, the right to serve interrogatories is subject to reasonable limitations, depending on the facts in the case, the complexity of the interrogatories, the proximity to the trial date, hardship to the responding party, and the amount of time that previously was available to propound interrogatories. A court may sustain objections when interrogatories are served at such a late stage in the proceeding that their disposition may delay the trial. n15 Furthermore, once the court has established a discovery deadline, a party must serve interrogatories in sufficient time to permit the responding party the 30-day response time allowed under Rule 33 before the discovery cut-off date. n16 Accordingly, a party must serve its interrogatories at least 30 days before the discovery deadline. n17

[7] Method of Service of Interrogatories n*

When a party serves interrogatories on one party, the serving party must also serve copies on all other parties, even though responses are only sought from one party, unless the court orders otherwise. n1 The Federal Rules of Civil Procedure also provide that interrogatories need not be filed with the court until they are used in the proceedings, unless the court orders filing. n2 Thus, interrogatories should only be filed if used, for example, in connection with a motion, a pretrial conference, or trial. Only those parts of interrogatories that are actually used should be filed, and a party should not file an entire set of interrogatories and responses when making reference to specific questions and responses. n3

[8] Obligations of Responding Party n*

[a] Responding Party Required to Answer, Object, or Move for Protective Order

A party that has received service of interrogatories must respond to each interrogatory, usually by answer or objection. n1 Under particular circumstances, an answer may take the form of production of business records. n2

If the responding party wishes to object to an interrogatory or to a portion of it, the party must state the reason for the objection, and must answer to the extent the interrogatory is not objectionable. This means that the responding party has a duty to answer any part of an interrogatory that is not objectionable. n3

In addition to answering or objecting, the responding party also has the option of moving for a protective order. n4 A party who simply ignores one or more interrogatories may be subject to sanctions for failing to answer or object, even though the party may be justified in not answering due to the opposing party's improper withholding of discovery. n5

[b] Responding Party Must Supply Separate, Complete, and Written Answer

The responding party must answer each interrogatory separately, completely, and in writing. n6 Answers must be responsive and not evasive. n7 Because responses to interrogatories must be verified under oath, if the answers are untrue the responding party will be subject to sanctions. n8

Answers to interrogatories must include sufficient detail to respond completely to the question. n9 A sufficient answer generally requires a conscientious and good faith effort to comprehend the question and to answer it explicitly. If the responding party is unable to give a complete answer by the time responses are due, but has access to the information,

the party must give whatever incomplete information it can and move to extend the time for serving a complete answer, giving an approximation of how much time will be needed. n10

A party answering interrogatories has an affirmative duty to furnish any and all information available to the party and controlled by a party. n11 In the case of an organization, the duty to provide all information available refers to any information imputed to the organizational party itself, including information possessed by officers, employees, and former employees of the party, as well as the party's attorneys. n12 A corporate officer or agent must furnish whatever information is available to the corporation through reasonable efforts, except for personal information acquired by a corporate officer outside the scope of official duties. n13

If a party is unable to reply because it lacks knowledge or information, the party may not simply refuse to answer. n14 Rather, the party must respond in a way that indicates to the requesting party that the information is unavailable to the responding party. The response to the interrogatory must state the party's inability to provide the information sought, disclose any information the party does have, and set forth specific efforts made to obtain the rest of the information. n15

[c] Incorporation by Reference Disfavored

Responses to interrogatories generally should not incorporate outside material by reference. n16 Answers to interrogatories must be responsive to the question, complete in themselves, and should not refer to pleadings, n17 depositions, other documents, or other interrogatories, at least when a reference to another interrogatory makes it difficult to ascertain if the original interrogatory has been answered completely without a detailed comparison of answers. n18 However, the incorporation of outside material by reference in responses to interrogatories is evaluated on a case-by-case basis, and the judge has discretion to find such a response acceptable, for example, to avoid unnecessary repetition; in such cases the reference must be clear and precise. n19

[d] Duty to Sign, Verify, and Certify Responses

[i] Interrogatories Served on Individual

Interrogatories directed to an individual party must be answered in writing under oath and signed by that responding party. n20 Even though a party often will receive assistance from the attorney in the preparation of responses to interrogatories, particularly complex interrogatories or those requesting opinions or contentions, it is not proper or acceptable for the attorney alone to sign or verify the responses. This rule applies regardless of the party's purported unavailability or how far the party lives from the attorney's office or the place of trial. n21 However, the attorney must certify the interrogatory responses by signing them in addition to the client. n22

[ii] Interrogatories Directed to Business and Governmental Entities

When the party served with interrogatories is a corporation, partnership, or association, the answers to the interrogatories must be signed by an officer or agent of the business. n23 The officer or agent has a duty to provide all information available to the corporation, but may sign and verify the interrogatories on the basis of knowledge, information, and belief, without firsthand knowledge of the information in the responses. n24 However, the corporate representative must verify that the persons who provided the facts had stated them to be true. n25

When interrogatories are directed to a corporation, partnership, or association, the organization is required to designate its own officer or agent to answer them. n26 Thus, the propounding party is not entitled to select the person who will answer for the company by directing the interrogatories to a particular officer or agent; rather, the interrogatories must be directed to the company as a whole. n27 In selecting its agent to answer interrogatories, a corporation or business has an obligation to appoint someone who has the capability to furnish the requested information, n28 because it is the collected knowledge of the organization that is requested, and not the agent's personal knowledge. n29 A corporation is

subject to sanctions if it abuses its powers of designation by selecting an agent who does not provide responsive answers. n30

An interrogatory addressed to a governmental agency must be answered by an officer or agent of the agency. n31 Governments and governmental agencies generally are governed by the same principles as corporate entities in designating agents to answer interrogatories, n32 as discussed above.

[iii] Attorney for Party Always Required to Certify Responses

In addition to being signed and verified by the party making them, responses to interrogatories must be signed by at least one attorney of record, and the attorney must include his or her address. An unrepresented party must certify the responses personally and state his or her address. n33 For discussion of the certification requirement under Rule 26(g)(1) and the sanctions that may be imposed for a violation of Rule 26(g)(1) in connection with the signing of discovery responses, *see § 15.08*.

[e] Option to Produce Business Records Instead of Answer

If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: n34

1. specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; n35 and

2. giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries. n36

Because of the complex nature of electronically stored business records, when a responding party uses the Rule 33(d) option for such records, the responding party may be required to provide some combination of technical support, information on application software, or other assistance, so that the interrogating party is enabled to derive or ascertain the answer from the electronically stored information as readily as the responding party. n37

[f] Continuing Duty to Supplement Answers

A responding party that has already served responses to interrogatories has a duty to supplement or correct its response:

1. in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; n38 or

2. as ordered by the court. n39

If a party fails to amend an interrogatory response under Rule 26(e), the party may not be permitted to use as evidence the information that was not disclosed in an amendment, unless the failure was harmless. n40

[g] Discretion of Court to Permit Withdrawal or Amendment of Answers

The district court has discretion to allow parties to withdraw or amend their answers to interrogatories, n41 which may be ordered on motion of the party to withdraw or amend its answers. Note that a party's need to change its answers may be obviated if the party has fulfilled it's duty to supplement incorrect or incomplete answers. n42 However, the trial court nevertheless has discretion to allow use of the original answer against the responding party as an evidentiary

admission. n43

[9] Time For Response to Interrogatories n*

[a] Responding Party Generally Has 30 Days to Answer

A party that has been served with interrogatories must serve a copy of the answers, and objections, if any, on the propounding party within 30 days after service of the interrogatories, n1 subject to any extension pursuant to Rule 6. n2 The court has discretion to order a shorter or longer time for responses, n3 or the parties, in the absence of a court order, may stipulate to a shorter or longer time. n4

A party completes service of interrogatory responses when the responses are (1) hand delivered to an unrepresented party or the attorney for a party; n5 (2) mailed to an unrepresented party or the attorney for a party; n6 (3) delivered to the court clerk when the address of the served party is unknown; n7 or (4) delivered by electronic transmission or in some other manner with the consent of the party served. n8 A pro se prison inmate litigant completes service of interrogatory responses when he or she submits them to the prison authorities for mailing, not when they are actually placed in the mail. n9 A party who fails to comply with an interrogatory deadline is subject to sanctions. n10

[b] Court's Discretion to Order Shorter or Longer Time

The court may order a shorter or longer time to serve answers than the 30 days specified in Rule 33. n11 A motion for an order extending the time for responses should show good cause for the extension. n12 A party may also move the court to delay answers to contention interrogatories. The court has authority to order that contention interrogatories need not be answered until after other, designated discovery has been completed, until a pretrial conference, or until some other time specified by the court. n13

[c] Parties May Stipulate to Shorter or Longer Time

If the court does not make an order specifying the time for service of answers to interrogatories, the parties may stipulate to a shorter or longer time limit than the 30 days specified in Rule 33. n14 The stipulation must be in writing and is subject to the provisions of Rule 29, n15 which requires court approval for a stipulation extending the time for responses if it would interfere with any dates set by the court for completion of discovery, for the hearing of a motion, or for trial. n16 If the stipulation would not interfere with any dates set by the court, it does not require the approval of the court. n17

[d] Effect of Removal

If a case is removed from state court to federal court and outstanding interrogatories have been served before the time of removal, the time for responses to interrogatories is measured from the date of the parties' discovery planning conference. n18 The conference requirements provide that the parties must meet as soon as practicable, or at least 21 days before the scheduling conference or a scheduling order is due, n19 to attempt to settle the case and to plan discovery issues. n20 The time for response to interrogatories is measured in this manner in a removed case because, under the federal rules, a party may not seek discovery from any source until the parties have had their discovery planning conference. n21

[10] Objections to Interrogatories n*

[a] Time for Objection

A responding party must serve all objections, and all answers to each interrogatory not objected to, within 30 days of service of the interrogatories, n1 subject to any extension pursuant to Rule 6. n2 If a party asserts that an interrogatory is

objectionable, the party may not simply refuse to answer; it must either answer or object. n3

The attorney for the responding party must sign the objections. n4 An objection to a specific interrogatory will only postpone the time to answer until the issue is determined by the court. However, if the objection is sustained, or a protective order is issued, no answer will be necessary. n5

[b] Required Specificity

An objection must specify which interrogatory is being challenged and must state each specific ground for the objection to that interrogatory. n6 Any ground not specifically stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. n7 The court may impose sanctions on a party and an attorney making an objection which was not substantially justified. n8

General or blanket objections are not acceptable. It is not sufficient merely to assert that one objects, that the interrogatories are burdensome, oppressive, duplicative, irrelevant, or that they require research. n9 The objecting party must explain why an interrogatory has any of these objectionable characteristics. n10

A party is entitled to withhold interrogatory answers that would otherwise be discoverable if the materials are privileged or constitute work product. To withhold materials under a claim of privilege or work product, the responding party must make the claim expressly n11 and must describe the nature of the things not answered in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the applicability of the privilege or protection. n12

[c] Typical Grounds for Objection

A responding party may object to interrogatories on any of the following grounds:

1. The interrogatories request information outside of the permissible scope of discovery. Thus, interrogatories are objectionable on the grounds that they ask for: irrelevant information, information not reasonably calculated to lead to the discovery of admissible evidence, privileged information, information protected as attorney work product, or purely legal conclusions. n13

2. The interrogatories exceed the limitations set forth in Rule 26(b)(2). Under the rule, interrogatories are objectionable when (1) they request information that is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) they request information that the propounding party has had ample other opportunities to obtain; or (3) the burden or expense of the interrogatories outweighs their likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the interrogatories in resolving the issues. n14

The determination of whether the nature and extent of the information requested entails an undue burden on the responding party is within the discretion of the court. n15 The responding party has the burden to specifically allege and show that an excessive burden will occur if relief is not granted. n16

3. The interrogatories are too broad, general, or all-inclusive. For example, the objecting party must show that an interrogatory is overbroad by specifically showing that it uses an omnibus term such as "relating to" or "concerning," and applies to a general category or group of documents or a broad range of information that could include nondiscoverable material. n17

[d] Waiver of Objection

A party may waive a valid interrogatory objection in two ways. The first way is by voluntarily answering an interrogatory. n18 Thus, a responding party objecting to the number of interrogatories must object to the court before responding or the objection is waived. n19 If the responding party both answers and objects to one particular interrogatory at the same time, the objection may be deemed waived, and a responsive answer will stand unless ordered otherwise by the court. n20

The second way to waive an objection is by failing to make the objection within 30 days of service of the interrogatory. n21 Any ground for objection not stated in a timely manner is waived unless the responding party seeks an extension of time to answer or object, or the party's failure to object is excused by the court for good cause shown. n22 If the responding party fails to seek an extension of time to answer or object, the party may be found to have waived all objections and be subject to sanctions for failure to answer. n23 Furthermore, regardless of the 30-day time limit for objections, an objection may not be made to an interrogatory after final judgment is entered. n24

[e] Resolution of Objection

If a responding party has made an objection, the parties must attempt to resolve the dispute without court action because an informal attempt at resolution is a prerequisite for a motion to compel answers. If the parties cannot resolve the dispute, the propounding party may move for an order to compel answers to the interrogatories. n25 If it fails to move to compel answers, the propounding party may waive the right to seek answers to interrogatories. n26 The burden falls on the objecting party to show why the interrogatory is objectionable. n27 In order to satisfy its burden, the objecting party must make a specific, detailed showing of how the interrogatory is objectionable. For example, if the objection is that it is burdensome, the party should detail the expense and time necessary to answer. n28 The court will rule on particular objections in the course of ruling on the motion to compel. n29

[11] Effect of Failure to Respond to Interrogatory n*

[a] Order to Compel Answers

If a responding party fails to answer an interrogatory, or answers evasively or incompletely, n1 the propounding party may, after conferring with the defaulting party, move for an order to compel discovery. n2 Rule 37 governs procedures for orders to compel discovery or sanctions when a party fails to make discovery. If a court has granted a motion to compel and has ordered a party to provide answers to interrogatories, Rule 37 also permits the court to impose sanctions for the failure to comply with that order. The court may impose such sanctions as are just. n3

[b] Sanctions

A court may generally impose immediate sanctions for the failure of a party to respond to an interrogatory. n4 However, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n5 This provision only restricts the imposition of "sanctions." It does not prevent a court from taking other action to manage discovery, for example, by ordering the responding party to respond to additional interrogatories. n6

The party propounding interrogatories may seek sanctions for failure to respond to the discovery request even without first filing a motion for an order to compel, n7 provided that the moving party includes a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer interrogatories in an effort to obtain the answers without court action. n8 A party's failure to answer interrogatories as required need not be willful or in bad faith for sanctions to apply; n9 however, the court may consider such factors in its determination of the severity of the sanctions it will impose. n10

[c] Attorney's Fees

If the court grants a motion to compel, or if the requested discovery is provided after a motion to compel has been filed, the court must order the party whose conduct necessitated the motion, or the party's attorney, or both of them, to pay the propounding party's reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds the propounding party failed to make a good faith effort at resolution, the opposing party's failure to respond to interrogatories was substantially justified, or other circumstances make an award of expenses unjust. n11

[12] Use of Answers to Interrogatories n*

A party that receives an answer to an interrogatory may use the answer to the extent allowed by the Federal Rules of Evidence. n1 Therefore, for example, the propounding party may use the answer for any of the following purposes:

1. As direct evidence at trial. n2 Note that an answer does not become evidence until it is offered at trial and admitted by the court. n3

2. As an admission of a party opponent. n4 An answer admitted as an admission, however, is not conclusive, and the answering party may introduce other evidence on the matter. n5

3. For purposes of impeaching a witness. n6

4. In support of or opposition to motions, such as a for summary judgment, n7

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.02*-33.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 33(a)(1), 33(b)(3).*

(n3)Footnote 2. *See Fed. R. Civ. P. 33(a)(2); Fed. R. Civ. P. 26(b).*

(n4)Footnote 3. *Fed. R. Civ. P. 33(b)(1), (3), (4).*

(n5)Footnote 4. *See Miroglio S.P.A. v. Conway Stores, Inc., 2007 U.S. Dist. LEXIS 8034, at *21 (S.D.N.Y. 2007)* ; *see also Fed. R. Evid. 801(d)(2).*

(n6)Footnote 5. *Fed. R. Civ. P. 33(c).*

(n7)Footnote 6. *Citibank (S.D.), N.A. v. Savage, 303 B.R. 766, 773-774 (D. Md. 2003)* .

(n8)Footnote 7. *Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 842 (9th Cir. 2007)* .

(n9)Footnote 8. *McCarthy v. Paine Webber Group, Inc., 168 F.R.D. 448, 450 (D. Conn. 1996)* .

(n10)Footnote 9. *Fed. R. Civ. P. 33(a)(2).*

(n11)Footnote 10. *In re Potash Antitrust Litig., 161 F.R.D. 405, 409 (D. Minn. 1995)* .

(n12)Footnote 11. *Burks v. City of Philadelphia, 904 F. Supp. 421, 424 (E.D. Pa. 1995)* (interrogatories provide opportunity for each party to determine basis for other party's claim or defense and to delineate facts and issues in dispute).

(n13)Footnote 12. *Fed. R. Civ. P. 26(a)*, Committee Note to 1993 Amendments; *see* former *Fed. R. Civ. P. 26(a)(5)*, Committee Note to 2007 Amendments.

(n14)Footnote 13. *Purofied Down Products v. Royal Down Products, 87 F.R.D. 685, 691 (W.D. Mich. 1980)* (plaintiff not precluded from noticing oral depositions of same parties defendant seeks to question by interrogatories, citing **Moore's Federal Practice**).

(n15)Footnote 14. *See Babcock Swine, Inc. v. Shelbco, Inc., 126 F.R.D. 43, 45 (S.D. Ohio 1989)* .

(n16)Footnote 15. *Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 97 (E.D. Pa. 1992)* (interrogatories and requests for production).

(n17)Footnote 16. *Fed. R. Civ. P. 26(d)(2)(a).*

(n18)Footnote 17. *Robinson v. Tracy, 16 F.R.D. 113, 116 (W.D. Mo. 1954)* ; *see Fed. R. Civ. P. 12(e).*

(n19)Footnote 18. *In re Argo Communications Corp., 134 B.R. 776, 798 (Bankr. S.D.N.Y. 1991)* .

(n20)Footnote 19. *Sempier v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995)* .

(n21)Footnote 20. *Fed. R. Civ. P. 33(a)(1).*

(n22)Footnote 21. *Fed. R. Civ. P. 33(b)(4)*; *see Fed. R. Civ. P. 26(b)(2).*

(n23)Footnote 22. *See Fed. R. Civ. P. 26(c)(1)(A),(C).*

(n24)Footnote 23. *Fed. R. Civ. P. 37(a)(3)(B)(iii).*

(n25)Footnote 24. *Fed. R. Civ. P. 37(b)(2)(A)(i).*

(n26)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 33.20* (Matthew Bender 3d ed.).

(n27)Footnote 1. *Fed. R. Civ. P. 33(a)(1), 33(b)(1).*

(n28)Footnote 2. *See Trane Co. v. Klutznick, 87 F.R.D. 473, 475-477 (W.D. Wis. 1980)* (citing **Moore's Federal Practice**); *Fed. R. Civ. P. 33(a)(1).*

(n29)Footnote 3. *Fed. R. Civ. P. 31(a)(1).*

(n30)Footnote 4. *Ellison v. Runyan, 147 F.R.D. 186, 189 (S.D. Ind. 1993)* .

(n31)Footnote 5. *Andrulonis v. United States, 96 F.R.D. 43, 45 (N.D.N.Y. 1982)* , citing **Moore's Federal Practice**); *see Fed. R. Civ. P. 33(a)*, Committee Note to 1970 Amendments.

(n32)Footnote 6. *See United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970)* .

(n33)Footnote 7. *Fed. R. Civ. P. 33(b)(1)(B).*

(n34)Footnote 8. *See, e.g., Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 438 (3d Cir. 1987)* .

(n35)Footnote 9. *See Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n36)Footnote 10. *In re Folding Carton Antitrust Litig., 83 F.R.D. 260, 264 (N.D. Ill. 1979)* .

(n37)Footnote 11. *See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333-336, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* (citing **Moore's Federal Practice**).

(n38)Footnote 12. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir. 1971)* (unnamed members must receive adequate notice so that they are completely informed of discovery order and potential consequences of noncompliance).

(n39)Footnote 13. *Steelman v. United States Fid. & Guar. Co, 35 F.R.D. 120, 120-121 (W.D. Mo. 1964)* .

(n40)Footnote 14. *Wirtz v. I.C. Harris & Co., 36 F.R.D. 116, 117 (E.D. Mich. 1964)* .

(n41)Footnote 15. *Firemen's Mut. Ins. Co. v. Erie-Lackawanna R.R., 35 F.R.D. 297, 299-300 (N.D. Ohio 1964)* .

(n42)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 33.30* (Matthew Bender 3d ed.).

(n43)Footnote 1. *Fed. R. Civ. P. 33(a)(1).*

(n44)Footnote 2. *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 217 F.R.D. 288, 289 (D. Mass. 2003)* (local rule, which limited interrogatories to 25 per adverse side, was superseded by Rule 33); *see Fed. R. Civ. P. 26(2)(A).*

(n45)Footnote 3. *See Fed. R. Civ. P. 26(2)(A).*

(n46)Footnote 4. *See Fed. R. Civ. P. 81(c)* (federal civil procedure rules govern removed cases).

(n47)Footnote 5. *Fed. R. Civ. P. 33(a)*, Committee Note to 1993 Amendments.

(n48)Footnote 6. *Fed. R. Civ. P. 33(a)(1).*

(n49)Footnote 7. *Fed. R. Civ. P. 33(a)*, Committee Note to 1993 Amendments).

(n50)Footnote 8. *Trevino v. ABC Am., Inc., 232 F.R.D. 612, 614 (N.D. Cal. 2006)* ; *see Banks v. Office of the Senate Sergeant-at-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004)* (whether one question is subsumed in and related to another or whether each question may stand alone and be answered irrespective of the answer to the others); *Myers v. United States Paint Co., Div. of Grow Group, Inc., 116 F.R.D. 165, 165-166 (D. Mass. 1987)* (subparts need not be counted as separate interrogatories if they are logical extension of basic interrogatory and seek specified additional information).

(n51)Footnote 9. *Fed. R. Civ. P. 33(a)(1).*

(n52)Footnote 10. *Fed. R. Civ. P. 33(a)*, Committee Note to 1993 Amendments.

(n53)Footnote 11. *See Fed. R. Civ. P. 6(a)*, Committee Note to 1983 Amendments.

(n54)Footnote 12. *Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).*

(n55)Footnote 13. *See, e.g., Lykins v. Attorney General, 86 F.R.D. 318, 318 (E.D. Va. 1980)* .

(n56)Footnote 14. *See, e.g., Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (E.D. Pa. 1980)* .

(n57)Footnote 15. *Fed. R. Civ. P. 33(a)(1).*

(n58)Footnote 16. *Valdez v. Ford Motor Co., 134 F.R.D. 296, 297 (D. Nev. 1991)* .

(n59)Footnote 17. *See Herdlein Techs., Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 104 (W.D.N.C. 1993)* .

(n60)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.60*-33.79 (Matthew Bender 3d ed.).

(n61)Footnote 1. *Fed. R. Civ. P. 33(a)(2)*.

(n62)Footnote 2. *See Fed. R. Civ. P. 26(b)*.

(n63)Footnote 3. *Fed. R. Civ. P. 26(b)(1)*.

(n64)Footnote 4. *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 144 F.R.D. 258, 263 (E.D. Pa. 1992)* (citing **Moore's Federal Practice**).

(n65)Footnote 5. *Fed. R. Civ. P. 33(a)(2)*; *see Fed. R. Civ. P. 26(b)(2)(C)*.

(n66)Footnote 6. *Fed. R. Civ. P. 33(a)(2)*; *see Fed. R. Civ. P. 26(b)(1)*.

(n67)Footnote 7. *Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 301 (E.D. Pa. 1980)* ; 3 *Weinstein's Federal Evidence,* Article V, *Privileges* (Matthew Bender 2d ed.).

(n68)Footnote 8. *See, e.g., B. Braun Med. Inc. v. Abbott Lab., 155 F.R.D. 525, 528 (E.D. Pa. 1994)* .

(n69)Footnote 9. *Fed. R. Civ. P. 26(b)(5)(A)*.

(n70)Footnote 10. *Fed. R. Civ. P. 26(b)(5)*; *see Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996)* .

(n71)Footnote 11. *Hoffman v. United Telecomms., Inc., 117 F.R.D. 436, 439 (D. Kan. 1987)* .

(n72)Footnote 12. *See Fed. R. Civ. P. 37(a)*.

(n73)Footnote 13. *See Fed. R. Civ. P. 37(b)*.

(n74)Footnote 14. *See Fed. R. Civ. P. 26(c)*.

(n75)Footnote 15. *See In re Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 633, 636 (S.D. Ohio 1984)* (court ordered plaintiff to draft less intrusive interrogatories on whether defendants consulted with counsel on relevant issues).

(n76)Footnote 16. *Fed. R. Civ. P. 33(a)(1)*; *see Fed. R. Civ. P. 26(b)(3)(A)*.

(n77)Footnote 17. *Fed. R. Civ. P. 26(b)(3)(A)(ii)*.

(n78)Footnote 18. *Fed. R. Civ. P. 26(b)(3)(B)*.

(n79)Footnote 19. *Hoffman v. United Telecomms., Inc., 117 F.R.D. 436, 439 (D. Kan. 1987)* .

(n80)Footnote 20. *Fed. R. Civ. P. 26(b)(5)(A)*.

(n81)Footnote 21. *Triple Tee Golf, Inc. v. Nike, Inc., 485 F.3d 253, 257 (5th Cir. 2007)* .

(n82)Footnote 22. *See Fed. R. Civ. P. 26(c)(1)(G)*; *see, e.g., Gelb v. American Tel. & Tel. Co., 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993)* .

(n83)Footnote 23. *Fed. R. Civ. P. 26(c)(1)(D),(G)*; *Stillman v. Vassileff, 100 F.R.D. 467, 468 (S.D.N.Y. 1984)*

(instead of protective order, court issued order limiting discovery).

(n84)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 33.31* (Matthew Bender 3d ed.).

(n85)Footnote 1. *See Fed. R. Civ. P. 33.*

(n86)Footnote 2. *United States ex rel. Fago v. M & T Mortg. Corp., 235 F.R.D. 11, 20 (D. D.C. 2006)* .

(n87)Footnote 3. *Sempier v. Johnson & Higgins, 45 F.3d 724, 736 (3d Cir. 1995)* .

(n88)Footnote 4. *United States ex rel. Fago v. M & T Mortg. Corp., 235 F.R.D. 11, 20 (D.D.C. 2006)* .

(n89)Footnote 5. *See, e.g.,* M.D. Fla., Rule 3.03(a).

(n90)Footnote 6. *Diversified Prods. Corp. v. Sports Ctr. Co., 42 F.R.D. 3, 4 (D. Md. 1967)* .

(n91)Footnote 7. *See, e.g.,* S.D.N.Y. Rule 33.3.

(n92)Footnote 8. *See, e.g., Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 57 (D.N.J. 1985)* .

(n93)Footnote 9. *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 113 n.5 (N.D. Tex. 1976)* .

(n94)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 33.41* (Matthew Bender 3d ed.).

(n95)Footnote 1. *Fed. R. Civ. P. 26(d)(1), 26(f).*

(n96)Footnote 2. *Fed. R. Civ. P. 26(f).*

(n97)Footnote 3. *Fed. R. Civ. P. 26(d)(2)(A).*

(n98)Footnote 4. *Fed. R. Civ. P. 26(d)(2)(A).*

(n99)Footnote 5. *Venezia v. Robinson, 16 F.3d 209, 212 (7th Cir. 1994)* .

(n100)Footnote 6. *Howard v. Heffron, 118 F.R.D. 590, 590 (W.D. Mich. 1988)* .

(n101)Footnote 7. *Fed. R. Civ. P. 26(a)(1)(C), (D).*

(n102)Footnote 8. *B.C.F. Oil Refining Inc. v. Consolidated Edison Co., 168 F.R.D. 161, 166 (S.D.N.Y. 1996)* .

(n103)Footnote 9. *Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 95 (E.D. Pa. 1992)* .

(n104)Footnote 10. *See Fed. R. Civ. P. 33(a)(2).*

(n105)Footnote 11. *Fed. R. Civ. P. 33(a)(2).*

(n106)Footnote 12. *See Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 95 (E.D. Pa. 1992)* .

(n107)Footnote 13. *Storie v. United States, 142 F.R.D. 317, 319 (E.D. Mo. 1992)* .

(n108)Footnote 14. *Fed. R. Civ. P. 33(b)*, Committee Note to 1970 Amendments.

(n109)Footnote 15. *Oskar Tiedemann & Co. v. United States, 172 F. Supp. 609, 610 (D. Del. 1959)* (sustaining objections to 42 sets of interrogatories filed five months after case set for trial, citing **Moore's Federal Practice**).

(n110)Footnote 16. *See Fed. R. Civ. P. 33(b)(2)*; *Northern Ind. Pub. Serv. Co. v. Colorado Westmoreland, Inc., 112 F.R.D. 423, 424 (N.D. Ind.)* , *aff'd without opinion, 845 F.2d 1024 (7th Cir. 1986)* .

(n111)Footnote 17. *Smith v. Principal Cas. Ins. Co., 131 F.R.D. 104, 105 (S.D. Miss. 1990)* .

(n112)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.42*, *33.43* (Matthew Bender 3d ed.).

(n113)Footnote 1. *Fed. R. Civ. P. 5(a)(1)(C)*.

(n114)Footnote 2. *Fed. R. Civ. P. 5(d)(1)*.

(n115)Footnote 3. *See Fed. R. Civ. P. 5(d)*, Committee Note to 2000 Amendments.

(n116)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.100*-33.107 (Matthew Bender 3d ed.).

(n117)Footnote 1. *Fed. R. Civ. P. 33(b)(1)(A)*, *(3)*, *(4)*.

(n118)Footnote 2. *Fed. R. Civ. P. 33(d)*; *see* [f], *below*.

(n119)Footnote 3. *Fed. R. Civ. P. 33(b)(3)*.

(n120)Footnote 4. *Fed. R. Civ. P. 26(c)(1)*.

(n121)Footnote 5. *Mahoney v. Kempton, 142 F.R.D. 32, 33 (D. Mass. 1992)* .

(n122)Footnote 6. *Fed. R. Civ. P. 33(b)(3)*; *see Sempier v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995)* .

(n123)Footnote 7. *See Truck Treads, Inc. v. Armstrong Rubber Co., 818 F.2d 427, 429 (5th Cir. 1987)* .

(n124)Footnote 8. *Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 350-354 (9th Cir. 1995)* .

(n125)Footnote 9. *Chubb Integrated Sys., Ltd. v. Nat'l Bank of Wash., 103 F.R.D. 52, 60-61 (D.D.C. 1984)* .

(n126)Footnote 10. *Association of Am. Physicians & Surgeons, Inc. v. Clinton, 837 F. Supp. 454, 457 (D.D.C. 1993)* ; *see Fed. R. Civ. P. 33(b)*, Committee Note to 1993 Amendments.

(n127)Footnote 11. *Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980)* (citing **Moore's Federal Practice**).

(n128)Footnote 12. *General Dynamics Corp. v. Selb Mfg., 481 F.2d 1204, 1210 (8th Cir. 1973)* .

(n129)Footnote 13. *Gerling Int'l Ins. Co. v. Commissioner of Internal Revenue, 839 F.2d 131, 137-139 (3d Cir. 1988)* .

(n130)Footnote 14. *See Fed. R. Civ. P. 37(d)(1)(A)(ii)* (party that does not answer nor object to each interrogatory subject to sanctions).

(n131)Footnote 15. *Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305-306 (E.D. Pa. 1996)* (citing **Moore's Federal Practice**).

(n132)Footnote 16. *Mahoney v. Kempton, 142 F.R.D. 32, 33 (D. Mass. 1992)* (improper for defendants in civil action to respond to interrogatories by referring to their testimony in prior criminal trial arising from same occurrence).

(n133)Footnote 17. *Scaife v. Boenne, 191 F.R.D. 590, 594 (N.D. In. 2000)* .

(n134)Footnote 18. *See Smith v. Logansport Community Sch. Corp., 139 F.R.D. 637, 650 (N.D. Ind. 1991)* .

(n135)Footnote 19. *See, e.g., Kenney v. Shaw Indus. Inc., 764 F. Supp. 1501, 1503 (N.D. Ga. 1991)* .

(n136)Footnote 20. *Fed. R. Civ. P. 33(b)(3),(5).*

(n137)Footnote 21. *McDougall v. Dunn, 468 F.2d 468, 472 (4th Cir. 1972)* .

(n138)Footnote 22. *Fed. R. Civ. P. 26(g)(1)*; *see* [iv], *below*.

(n139)Footnote 23. *Fed. R. Civ. P. 33(b)(1)(B), 33(b)(5).*

(n140)Footnote 24. *Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464, 476 (D. Kan. 1996)* , *vacated on other grounds, University of Texas v. Vratil, 96 F.3d 1337 (10th Cir. 1996)* (answers must provide composite knowledge of organization, whether or not officer or agent has personal knowledge of facts, citing **Moore's Federal Practice**).

(n141)Footnote 25. *Dial v. Travelers Indem. Co., 780 F.2d 520, 525 (5th Cir. 1986)* .

(n142)Footnote 26. *United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1969)* .

(n143)Footnote 27. *Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464, 476 (D. Kan. 1996)* , *vacated on other grounds, University of Texas v. Vratil, 96 F.3d 1337 (10th Cir. 1996)* (citing **Moore's Federal Practice**).

(n144)Footnote 28. *United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970)* .

(n145)Footnote 29. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1257 (E.D. Pa. 1980)* (citing **Moore's Federal Practice**).

(n146)Footnote 30. *Black Panther Party v. Smith, 661 F.2d 1243, 1257 (D.C. Cir. 1981)* , *vacated on other grounds, 458 U.S. 1118 (1982)* .

(n147)Footnote 31. *Fed. R. Civ. P. 33(b)(1)(B).*

(n148)Footnote 32. *Trane Co. v. Klutznick, 87 F.R.D. 473, 476-477 (W.D. Wis. 1980)* .

(n149)Footnote 33. *Fed. R. Civ. P. 26(g)(1).*

(n150)Footnote 34. *Fed. R. Civ. P. 33(d)*; *see In re Fine Paper Antitrust Litig., 685 F.2d 810, 823 (3d Cir. 1982)* (if propounding party would be more burdened, responding party may not use this option, and must instead obtain information itself and answer interrogatory).

(n151)Footnote 35. *Fed. R. Civ. P. 33(d)(1)*; *see Ohio Mgmt., LLC v. James River Ins. Co., 2006 U.S. Dist. LEXIS 47516, at *2 (E.D. La. 2006)* (provided party furnishes records from which answer may readily be derived, there is no reason why that party need produce all documents that may refer or relate to information sought by interrogatory).

(n152)Footnote 36. *Fed. R. Civ. P. 33(d)(2).*

(n153)Footnote 37. *Fed. R. Civ. P. 33(d)*, Committee Note to 2006 Amendments.

(n154)Footnote 38. *Fed. R. Civ. P. 26(e)(1)(A)*; *see Colon-Millin v. Sears Roebuck de P.R., Inc., 455 F.3d 30, 38-39 (1st Cir. 2006)* (it was clear violation of duty to supplement interrogatory when responding party failed to inform other party of new facts at time such facts were discovered).

(n155)Footnote 39. *Fed. R. Civ. P. 26(e)(1)(B)*.

(n156)Footnote 40. *Westefer v. Snyder, 422 F.3d 570, 584 (7th Cir. 2005)* .

(n157)Footnote 41. *Fed. R. Civ. P. 33(b)*, Committee Note to 1970 Amendments.

(n158)Footnote 42. *See* [f], *above*.

(n159)Footnote 43. *Bollard v. Volkswagen of Am., Inc., 56 F.R.D. 569, 574 (W.D. Mo. 1971)* (defendant's deliberate filing of different set of answers than those it served on propounding party constituted unauthorized amendment of answers); *see Fed. R. Evid. 801(d)(2)* (admission by party opponent).

(n160)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.120*-33.124 (Matthew Bender 3d ed.).

(n161)Footnote 1. *Fed. R. Civ. P. 33(b)(2)*.

(n162)Footnote 2. *See Fed. R. Civ. P. 6(b)*; *Ruszkowski v. Kaleida Health Sys., 2007 U.S. Dist. LEXIS 91683, at *6-*7 (W.D.N.Y. 2007)* .

(n163)Footnote 3. *See* [b], *below*.

(n164)Footnote 4. *See* [c], *below*.

(n165)Footnote 5. *Fed. R. Civ. P. 5(b)(2)(A)*; *see Fed. R. Civ. P. 5(b)(1)*.

(n166)Footnote 6. *See Fed. R. Civ. P. 5(b)(2)(B)*; *Fed. R. Civ. P. 5(b)(1)*.

(n167)Footnote 7. *See Fed. R. Civ. P. 5(b)(2)(C)*.

(n168)Footnote 8. *See Fed. R. Civ. P. 5(b)(2)(C)*.

(n169)Footnote 9. *Faile v. Upjohn Co., 988 F.2d 985, 988-989 (9th Cir. 1993)* .

(n170)Footnote 10. *Fed. R. Civ. P. 16(f)*; *Geiserman v. MacDonald, 893 F.2d 787, 791-792 (5th Cir. 1990)* .

(n171)Footnote 11. *Fed. R. Civ. P. 33(b)(2)*.

(n172)Footnote 12. *See Geiserman v. MacDonald, 893 F.2d 787, 793 (5th Cir. 1990)* .

(n173)Footnote 13. *Fed. R. Civ. P. 33(a)(2)*; *see* [1][a], *above*.

(n174)Footnote 14. *Fed. R. Civ. P. 33(b)(2)*.

(n175)Footnote 15. *Fed. R. Civ. P. 33(b)(2)*.

(n176)Footnote 16. *Fed. R. Civ. P. 29(b)*.

(n177)Footnote 17. *Fed. R. Civ. P. 29*, Committee Note to 1993 Amendments.

(n178)Footnote 18. *Fed. R. Civ. P. 33(a)*, Committee Note to 1993 Amendments.

(n179)Footnote 19. *Fed. R. Civ. P. 26(f)(1).*

(n180)Footnote 20. *Fed. R. Civ. P. 26(f)(1).*

(n181)Footnote 21. *Fed. R. Civ. P. 26(d)(1).*

(n182)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.170*-33.175 (Matthew Bender 3d ed.).

(n183)Footnote 1. *Fed. R. Civ. P. 33(b)(2),(3).*

(n184)Footnote 2. *See Fed. R. Civ. P. 6(b).*

(n185)Footnote 3. *See Fed. R. Civ. P. 37(d)(1)(A)(ii)* (party that does not answer or object to each interrogatory subject to sanctions).

(n186)Footnote 4. *Fed. R. Civ. P. 33(b)(5).*

(n187)Footnote 5. *See Fed. R. Civ. P. 33(b)(2),(3).*

(n188)Footnote 6. *Fed. R. Civ. P. 33(b)(4)*; *Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 593 (W.D.N.Y. 1996)* .

(n189)Footnote 7. *See Fed. R. Civ. P. 33(b)(4).*

(n190)Footnote 8. *See Fed. R. Civ. P. 37(a)(5)(A).*

(n191)Footnote 9. *Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418, 423-424 (N.D. W.Va. 2006)* ; *see Fed. R. Civ. P. 33(b)(4).*

(n192)Footnote 10. *Chubb Integrated Sys. v. National Bank of Washington, 103 F.R.D. 52, 59-60 (D.D.C. 1984)* (for example, objector must submit affidavits or offer evidence that shows how allegedly overbroad interrogatory contains information not subject to discovery).

(n193)Footnote 11. *Fed. R. Civ. P. 26(b)(5)(A)(i).*

(n194)Footnote 12. *Fed. R. Civ. P. 26(b)(5)(A)(ii).*

(n195)Footnote 13. *See Fed. R. Civ. P. 26(b)(1)*; *see also* [4], *above*.

(n196)Footnote 14. *Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).*

(n197)Footnote 15. *See, e.g., MacMillan, Inc. v. Federal Ins. Corp., 141 F.R.D. 241, 243 (S.D.N.Y. 1992)* .

(n198)Footnote 16. *Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 233 (N.D. Ind. 1992)* .

(n199)Footnote 17. *Moses v. Halstead, 236 F.R.D. 667, 672 (D. Kan. 2006)* .

(n200)Footnote 18. *Skelton & Co. v. Goldsmith, 49 F.R.D. 128, 130, n.1 (S.D.N.Y. 1969)* ; *see Fed. R. Civ. P. 33(b)(3).*

(n201)Footnote 19. *Herdlein Techs., Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 104 (W.D.N.C. 1993)* .

(n202)Footnote 20. *Moses v. State Farm Mut. Auto. Ins. Co., 104 F.R.D. 55, 58 (N.D. Ga. 1984)* .

(n203)Footnote 21. *Fed. R. Civ. P. 33(b)(2).*

(n204)Footnote 22. *Fed. R. Civ. P. 33(b)(4).*

(n205)Footnote 23. *Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)* ; *see Fed. R. Civ. P. 37(d)(1)(A)(ii).*

(n206)Footnote 24. *Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 985 (9th Cir. 1994)* .

(n207)Footnote 25. *Fed. R. Civ. P. 37(a)(1).*

(n208)Footnote 26. *Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 389 (5th Cir. 1989)* .

(n209)Footnote 27. *Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (E.D. Pa. 1980)* .

(n210)Footnote 28. *Pederson v. Preston, 250 F.R.D. 61, 65 (D.D.C. 2008)* .

(n211)Footnote 29. *Fed. R. Civ. P. 33(a)*, Committee Note to 1970 Amendments.

(n212)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 33.140*-33.143 (Matthew Bender 3d ed.).

(n213)Footnote 1. *See Fed. R. Civ. P. 37(a)(4).*

(n214)Footnote 2. *Fed. R. Civ. P. 37(a)(3)(B)(iii).*

(n215)Footnote 3. *See Fed. R. Civ. P. 37(a)(5).*

(n216)Footnote 4. *Fed. R. Civ. P. 37(d).*

(n217)Footnote 5. *Fed. R. Civ. P. 37(e)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* ("electronically stored information" includes, but is not limited to, items such as data files, program files, backup and archival tapes, and e-mail messages).

(n218)Footnote 6. *Fed. R. Civ. P. 37*, Committee Note to 2006 Amendments.

(n219)Footnote 7. *Fed. R. Civ. P. 37(d)(1)(A)(ii).*

(n220)Footnote 8. *Fed. R. Civ. P. 37(d)(1)(B).*

(n221)Footnote 9. *Fed. R. Civ. P. 37(d)*, Committee Note to 1970 Amendments.

(n222)Footnote 10. *See Collins v. Williams, 575 F. Supp. 2d 610, 617-618 (D. Del. 2008)* .

(n223)Footnote 11. *Fed. R. Civ. P. 37(a)(5)(A)(ii)(iii),(C)*, *37(b)(2)(C)*; 37(d)(3); *see, e.g., Beard v. Braunstein, 914 F.2d 434, 446-447 (3d Cir. 1990)* .

(n224)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 33.160* (Matthew Bender 3d ed.).

(n225)Footnote 1. *Fed. R. Civ. P. 33(c).*

(n226)Footnote 2. *Tamez v. City of San Marcos, 118 F.3d 1085, 1098 (5th Cir. 1997)* .

(n227)Footnote 3. *Bracey v. Grenoble, 494 F.2d 566, 570 n.7 (3d Cir. 1974)* .

(n228)Footnote 4. *See Fed. R. Evid. 801(d)(2)*; *see also Bell v. A-Leet Leasing Corp., 863 F.2d 257, 259 (2d Cir. 1988)* .

(n229)Footnote 5. *Fed. R. Civ. P. 33*, Committee note to 1970 Amendments; *see TexPar Energy, Inc. v. Murphy Oil USA, Inc., 45 F.3d 1111, 1115 (7th Cir. 1995)* .

(n230)Footnote 6. *Naeem v. McKesson Drug Co., 444 F.3d 593, 609 (7th Cir. 2006)* (impeached witness need not be same person who answered interrogatory); *see also Fed. R. Evid. 613*.

(n231)Footnote 7. *See Fed. R. Civ. P. 56(e)(1)*.

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.26

§ 15.26 Production of Documents, Electronically Stored Information, and Things, or Entry On Land

[1] Purpose and Use of Requests for Production and Inspection n*

[a] Types of Requests Permitted

Rule 34 permits any party to serve on any other party any of the following three types of requests, provided that the item requested is within the responding's party possession, custody, or control, and that the request is within the permissible scope of discovery: n1

1. A request to inspect, copy, test, or sample any designated documents or electronically stored information. Such items may include writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. n2 For example, the request may specify that the information produced should be in the form of a machine-readable data compilation such as Excel spreadsheets, if the responding party stores or can retrieve such information in machine-readable format. n3

2. A request to inspect, copy, test, or sample any designated tangible things. n4

3. A request to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on the property. n5

Rule 34 also recognizes that, pursuant to Rule 45, a party may obtain similar discovery from persons who are not parties to the action. n6

[b] Effect of Mandatory Disclosure Requirements

At the outset of litigation each party has an obligation to automatically disclose the following items to the other parties, without receiving a request from the other parties: a copy or a description by category and location of all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that

the disclosing party may use to support its claims or defenses; n7 the documents or other evidentiary materials, not privileged or protected from disclosure, on which damages computations are based, including materials bearing on the nature and extent of injuries suffered; n8 and for inspection and copying any insurance agreement under which an insurance business may be liable to satisfy part or all of a judgment. n9

These mandatory initial disclosures do not restrict a party from utilizing Rule 34 (or other discovery rules) to seek additional relevant documents, electronically stored information, tangibles, or permission to enter on land. n10 However, a party generally may not request additional discovery pursuant to Rule 34 until the required initial discovery conference of the parties has been held. n11 Because the required initial disclosures must generally occur within 14 days after the discovery conference, document requests will not usually precede receipt of these disclosures. This is clearly the intent of Rule 26, and is also supported by practical considerations, because the Rule 26(a) initial disclosures are likely to assist a party in formulating any Rule 34 requests for production. n12

[c] Request for Production or Entry Complements Use of Other Discovery Methods

[i] Use of Request for Production or Entry With Other Discovery

A request for production complements but does not replace other methods of discovery, which each have their own advantages and limitations; however, absent specific limitations in the rules the court has discretion to control the organization of discovery types, including the amount of discovery and the sequence of each type of discovery. n13 For example, in contrast to limitations on the number and length of oral depositions and the number of interrogatories and requests for admission, the Federal Rules place no absolute limits on the number of requests for production permitted under Rule 34. n14 However, the court has explicit discovery management authority to limit the number and length of requests under Rule 34 if: the production would be cumulative or duplicative or obtainable from some other source, the party seeking production has had other opportunity to obtain the information sought, or if the production would be burdensome or expensive. n15

Because most courts hold that Rule 27 authorizes the perpetuation of testimony and evidence, and not the discovery or uncovering of evidence, a person contemplating litigation has no absolute entitlement to early discovery under Rule 27. n16 However, the Rule 27 mechanism to perpetuate testimony or other evidence before any court action has been filed, or while an appeal from a judgment is pending, may be used to obtain production of documents of the character provided for by Rule 34 provided court approval has been obtained. n17

[ii] Use of Subpoena Duces Tecum

Rule 30 governs the procedure for noticing, taking, and recording oral depositions. The Rule provides that notice to a party deponent may be accompanied by a request pursuant to Rule 34 for the production of items at the taking of the deposition, and that the procedure of Rule 34 applies to such a request. n18 While Rule 30 requires only that a party give reasonable notice of the deposition to other parties, if the party initiating the deposition has also made a request for production of items at the deposition, the time limits set by Rule 34 apply. n19 Any request for items under Rule 34 that accompany the deposition notice must provide at least 30 days for service of a response, unless a shorter time is ordered by the court or agreed to in writing by the parties. n20 Furthermore, requests for production of items under Rule 34 are subject to limitations imposed by the court. Also, because Rule 34(b) allows parties 30 days to respond to requests for production, the request must be served at least 30 days prior to any "completion of discovery" deadline that has been established by the court. n21

[iii] Use of Subpoena to Nonparty

Rule 34 governs the pretrial production and inspection of documents, electronically stored information, and things from a party and the entry on a party's premises for inspection. n22 Rule 45 is the corresponding provision used when a party desires to obtain such materials in the possession of a nonparty in advance of trial. n23 Thus, the general provisions

governing discovery in Rule 26 apply to discovery under Rule 45. n24

Rule 45 also explicitly applies to trials and hearings, and thus may be used to subpoena any party or nonparty to produce books, documents, or tangible things at the trial. n25 However, Rule 45 is clearly intended to be used principally as a pretrial discovery device. n26 Furthermore, although Rule 45 is not limited by its terms to nonparties, it should not be used to obtain pretrial production of documents or things, or inspection of premises, from a party in circumvention of discovery rules or orders. Discovery from a party, as distinct from a nonparty, is governed by Rule 34, not Rule 45. n27

[2] Availability of Requests for Production or Entry n*

[a] Available in Civil Actions in District Court

Rule 34 applies in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. n1 Therefore, Rule 34 does not apply to actions in federal courts other than the district courts, n2 or before administrative agencies, n3 or to district court proceedings not of a civil nature unless some other source of authority makes the Rule applicable. n4

[b] Available Only During Discovery

Rule 34 is applicable only after an action has been commenced in the district court n5 because Rule 26(b)(1) defines the scope of discovery by reference to the subject matter involved in the pending action. n6 As an alternative, however, a party may obtain production or inspection of items by court order pursuant to Rule 27 prior to the initiation of a formal action. n7

Absent leave of court or a written stipulation, a request for production or for entry on land may not be served before the time specified in Rule 26(d). Thus, Rule 34 is designed to be used as a pretrial discovery device. n8 This is also made clear by its inclusion within the section of the Federal Rules denominated as "Depositions and Discovery." n9

There is nothing in Rule 34 concerning its applicability once a judgment has been obtained. However, Rule 69 explicitly allows the use of the procedures set forth in the federal discovery rules in aid of enforcement of a judgment. n10 While a case is on appeal, limited discovery is permitted with court approval, including production of documents or things. n11 After litigation has concluded, discovery under Rule 34 is not permitted. Even in those rare circumstances in which the court might permit production or inspection after litigation has concluded, the provisions of Rule 34 will not necessarily be applied in the same manner as in the pretrial phase. n12

[c] Persons Required to Respond to Requests

Rule 34 procedure generally is limited to parties to the action. n13 Any party may serve a request "on any other party." Coparties may serve Rule 34 requests on each other, and a plaintiff or defendant may serve a request on a third-party defendant, and vice versa. n14

Discovery similar to the type permitted by Rule 34 is available from nonparties pursuant to court order under Rule 27. n15 When production of documents or things is sought from a nonparty, or a party wants to enter on the land of a nonparty, Rule 34 provides that the procedures of Rule 45 may be used. n16

In class action litigation, unnamed class members are not considered "parties" within the meaning of Rule 34, n17 so requests for production may not be served on or by individual class members under that rule; n18 however, production of documents may instead be ordered of representative members of the class pursuant to Rule 23. n19 on a proper showing of particularized need. n20

[3] Scope of Requests n*

[a] Discoverable Items

A party may make three types of requests under Rule 34 for items that are within the scope of discovery under Rule 26(b) and that are in the responding party's possession, custody or control:

1. A party may request the responding party to produce and permit the requesting party to inspect, copy, test, or sample any designated documents or electronically stored information that has been translated when necessary by the responding party into reasonably usable form. Items in this first category include writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. n1 "Electronically stored information" includes, but is not limited to, items such as: voice mail messages and files; backup voice mail files; e-mail messages and files; backup e-mail files; deleted e-mails, data files, program files, backup and archival tapes, temporary files, system history files, web site information stored in textual, graphical or audio format; web site log files, cache files, and other information recorded by electronic means. n2

2. A party may request the responding party to produce and permit the requesting party to inspect, copy, test, or sample any designated tangible things. n3 The definition of "tangible things," is very broad and could include virtually any type of physical object, under appropriate circumstances. n4

3. A party may request the responding party to permit entry on designated land or other property in the possession or control of the party on whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the land or property. n5

[b] Admissibility Not a Limitation

The request for production or entry is not limited to discovery of items that would be admissible at trial, because the request is governed by Rule 26(b), n6 which explicitly also allows discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence. n7 Because courts favor liberal discovery, the responding party has the burden to produce or make available all the items requested, unless it can show why particular items could not reasonably lead to admissible evidence. n8

[c] Accessibility to Information from Another Source

A responding party generally may not object to a request for production or entry on the grounds that the requesting party may already have some knowledge of or access to the matters requested. n9 However, Rule 34 discovery is subject to the restrictions expressed in Rule 26, which allow a court to limit discovery that it finds to be cumulative or duplicative, burdensome or expensive, or directed at information that the discovering party has already had an ample opportunity to obtain by discovery. n10 Furthermore, a court may refuse to require a party to produce documents that the requesting party already has within its control, n11 and may also refuse to order production of public records that are equally accessible to all parties. n12

[4] Timing of Request n*

[a] Generally After Discovery Conference

Absent leave of court or a stipulation, a Rule 34 request may not be served prior to the time specified in Rule 26(d), which generally prohibits a party from seeking any discovery prior to the conference of the parties required by Rule 26(f). n1 The timing of such a conference is affected by the scheduling provisions of Rule 16. n2 Rule 26(f) provides that, subject to court order, the parties' discovery planning conference must be held at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), n3 which in turn provides that the scheduling order

must issue within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. n4

Thus, while the earliest time for a Rule 34 request is generally governed by the interaction of Rules 16, 26, and 34, thereafter the timing of such requests remains within the discretion of the parties, subject to the court's broad authority over the management and scheduling of discovery. The court may enter general orders affecting the extent and scheduling of discovery. n5 The court may also place specific limits on the frequency or extent of discovery based on factors such as burdensomeness, convenience, or expense. n6

[b] Request May Be Premature If Served Before Disclosure Due

Rule 26(a) contains a requirement providing for mandatory and automatic disclosure of specified information. In particular, in most types of cases, unless stipulated or directed by court order, a party must, even without a discovery request, provide to the other parties a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. n7 However, except in categories of proceedings exempted from initial mandatory disclosure, n8 as otherwise provided by the federal civil rules, or when authorized by court order or agreement of the parties, a party may not seek discovery from any source before the parties have had the discovery conference required by Rule 26(f). n9 Thus, it has been held that attempts to anticipate mandatory disclosures by serving production or inspection requests seeking the same information prior to the time that the disclosures are due (which is 14 days after the discovery conference) are untimely and should be stricken. n10 However, this general prohibition against discovery requests until initial disclosures have been made does not prevent otherwise timely discovery pursuant to Rule 34 of independently discoverable documents or things not generated for purposes of mandatory disclosure, such as certain types of impeachment evidence. n11

[5] Request Must Be Specific n*

[a] Writing Required

A Rule 34 request for production or to permit entry on land must be in writing because it must be served on the other parties n1 and must be signed by an attorney of record or by an unrepresented party. n2 If the request is not signed, other parties have no duty to act on the unsigned request until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention. n3 Thus, a court will refuse to compel production or entry if it finds that these formalities of Rule 34 are not satisfied. n4

[b] Request Must Be Stated With Particularity

A party must describe each item or category of items in the request with reasonable particularity. n5 The "reasonable particularity" standard does not have a precise definition, but the test is whether a reasonable person would know what documents or things are called for in the request. n6 Consequently, the more all-encompassing a request is, the more likely it likely it will be rejected on grounds of particularity. n7

Reasonable particularity is determined according to the facts and circumstances of each case. n8 The degree of specificity required may depend on the extent of the requesting party's knowledge of the documents sought, n9 and also the extent to which the proceedings have progressed at the time the request is made. n10

As noted above, a request for production under Rule 34 may identify the items to be inspected either by individual item or by category. n11 When a responding party is giving its response to a request for production of documents by category, the party must produce or object to the request by category. n12

[c] Specification of Time, Place, and Manner for Inspection

In addition to setting forth a description of the items sought, a Rule 34 request must specify a reasonable time, place, and manner for the inspection and related acts. n13 For example, the request may specify the documents must be produced at the offices of the requesting party or the responding party or at the offices of a party's attorney within the 30-day period allowed by Rule 34. n14 Other appropriate places could be at a party's place of business, or trade or manufacturing facilities. n15

[d] Specification of Format for Electronically Stored Information

A party requesting electronically stored information n16 has the option to specify that the opposition produce the information in a particular form or forms. n17 For example, the request may specify that the information produced should be in the form of a machine readable data compilation such as Excel spreadsheets, if the responding party stores or can retrieve such information in machine-readable format. n18 A party can be required to produce data in an electronic format even though it has already produced it in hard copy. However, the requesting party must keep in mind that some of the costs of production can be shifted to the requesting party if the burden is undue because, for example, sources are not reasonably accessible. n19

If a party does not specify in the request the form or forms for producing electronically stored information, unless ordered by the court or stipulated by the parties, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. n20 The Civil Rules encourage the parties to make agreements regarding electronic discovery, and specifically require that the parties discuss the form that production of electronically stored information should take. n21

[6] Response to Request n*

[a] Timing of Response

When a party is served with a request for production or entry pursuant to Rule 34, the party has 30 days from the time of service in which to file a written response, n1 subject to enlargement under Rule 6. n2 The court also has the option pursuant to Rule 34 to shorten or lengthen the 30-day time period for a response to a request for production, and the parties may agree in writing to a shorter or longer time, subject to Rule 29, governing stipulations. n3 Rule 29 requires court approval of any stipulation extending the time to respond to a Rule 34 request if the extension would interfere with a discovery cut-off date, a motion hearing, or trial. n4 If a shorter time has not been ordered by the court or agreed to between the parties but the requesting party has nevertheless specified a time for production that is less than the time allowed by the Rule for a response, the party may not move to compel discovery under Rule 37(a) until the time allowed by Rule 34 has expired. n5

[b] Permissible Responses

The party responding to a Rule 34 request must respond to each item or category of the request in one of two ways: the responding party must either state that inspection and related activities will be permitted as requested by the item or category, n6 or state an objection to the item or category, including the reasons for the objection. n7 The responding party may not simply refuse to answer; it must either state in writing whether it will comply or object. A party that neither sends its written response or objects to each item or category is subject to sanctions. n8 Also, the requesting party may move for an order to compel production when the party who must respond fails to respond or object, or if the response is insufficient in any way. n9

[c] Objections Must Be Specific

If a party responding to a Rule 34 request objects to a particular item or category of the request, the reason for the objection must be stated. n10 If the party objects to the production of an item or category in part rather than in its

entirety, the objection must specify the part to which the objection pertains. In that case, the responding party must permit inspection and related activities of the unobjectionable portions of the request. n11 If a party that has received a request fails to properly object to a request, the grounds for that objection may be waived. n12

A general claim of privilege is an inadequate response to a request. n13 In addition, the responding party usually may not object to assert the rights of third parties to protect their privileged, proprietary, or confidential information. n14

[d] Objection to Request for Production of Electronically Stored Information

If making a response to a request for production of electronically stored information, the party may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party must state the form or forms it intends to use. n15 Objections to electronically stored information also may be made on the same grounds as other requests. n16 Additionally, if requested to produce the same electronically stored information in more than one form, the responding party may object to that request on that ground. n17

[e] Waiver of Objections

If a responding party fails to make a proper objection in writing within the 30-day time limit, including a statement of the reasons for the objections, n18 the court may hold that the party has waived the objections that have not been adequately stated. n19 However, if objections have been stated, but the objections do not fully comply with the rule, the court may allow the responding party to make a more complete response. n20

[f] Unintentional Production of Protected Items

If a party makes an inadvertent production of a privileged or work product protected item during the course of Rule 34 discovery, the court may find that the party has waived the privilege or protection by that disclosure. n21 This issue typically arises in complex cases involving numerous items of production and especially in cases of discovery of an extensive amount of electronically stored information. n22 Most courts determine whether an unintended disclosure constitutes a waiver based on a balancing of several factors, such as the following: n23

1. The reasonableness of the efforts to avoid disclosure;

2. The delay in correcting the error;

3. The scope and burden of discovery;

4. The extent of disclosure;

5. Fairness; and

6. The time constraints related to the production of the information.

However, the federal rules specify a procedure to follow to maintain the status quo in cases of inadvertent disclosure of items until the issue of waiver is submitted to and determined by the court. n24 Additionally new *Federal Evidence Rule 502* provides for protection for attorney client material and work product material contained in an inadvertent disclosures made in federal court. n25 Such material is not waived, provided that the disclosing party had reasonably attempted to prevent the disclosure, and reasonably attempted to correct the mistaken disclosure. n26

[g] Availability of Protective Order to Avoid Production

A party that has received a Rule 34 discovery request may move for a protective order under Rule 26(c) when the request is improper. n27 A motion for a protective order may be filed in the district where the action is pending. n28 However, as a practical matter, a responding party will typically elect instead simply to make an objection, which will place the burden on the requesting party to make a motion to compel production or inspection under Rule 37(a). n29

The responding party usually may not seek a protective order asserting the rights of third parties to protect their privileged, proprietary, or confidential information. Any affected third party must intervene directly to seek a protective order to protect that information on its own behalf. n30

[7] Manner of Production, Inspection, or Entry n*

[a] Production, Inspection, or Entry Not Restricted to Territorial Jurisdiction of Court

Rule 34 permits a party to request the production, inspection, or related activities of any items within the possession, custody, or control of another party. n1 The rule does not require that the requested materials be within the territorial jurisdiction of the court, because a court having jurisdiction over the parties may enforce an order for production regardless of the physical location of the items. n2

If a party seeks to discover items located outside the United States from a foreign party over whom the court has personal jurisdiction, the party seeking production may employ Rule 34 without first resorting to the Hague Convention on the Taking of Evidence Abroad, n3 although the Hague Convention procedures are also available if they will facilitate discovery. n4

[b] Possession, Custody, or Control of Party

Rule 34 applies only to documents, electronically stored information, tangible things, or designated land or other property that are within the possession, custody, or control of a party. The terms "possession," "custody," or "control" are alternatives, and thus only one of these requirements need be met. n5 The converse of this rule is also true: a party may not be compelled to produce items or permit inspection of items that are not within its possession, its custody, or its control. n6 An item that does not exist is obviously not within the possession, custody, or control of a party. n7

Legal restrictions that may limit a party's ability to obtain certain items at a particular time or to disclose them to others will not necessarily preclude a finding that the party has possession, custody, or control over those items. n8 Therefore, legal ownership of the requested items or things is not determinative, nor is actual possession necessary if the party has control of the items. n9 However, control does include the legal right to obtain the items requested on demand. n10 Furthermore, control by a party over the person or entity in possession of the documents is sufficient to require that the party produce them. n11

The determination of whether a party is in possession or control of documents or other materials involves consideration of a several factors, including: the use or purpose to which the materials were employed; whether the materials were acquired or maintained with the party's assets; whether the party determined the materials' use, location, possession, or access; who actually had access to and use of the materials; the extent to which the materials serve the party's interests; and any formal or informal evidence of a transfer of ownership or title. n12 The burden of establishing control over the items sought is on the party seeking production. n13 However, if the requesting party demonstrates that its adversary has a legal right to obtain the requested items, the burden shifts to the adversary to show why it lacks control. n14

[c] Time, Place, and Manner of Production and Related Activities

A requesting party must specify a reasonable time, place, and manner for inspection. n15 Because such a request must be "reasonable," Rule 34(b)(1)(B) does not require a responding party to produce the documents at whatever location the requestor specifies. Therefore, a responding party may object to the location where requestor seeks to have the

documents produced, and such an objection is controlled as other objections under Rule 34. n16 The time for inspection specified in the request must take into account the 30-day time limit allowed in the rule for service of a response. n17 When the volume of responsive items is large, the request or the parties' agreement may provide for continuing access to the items over a period of time for purposes of inspection. n18

Rule 34 provides that the party producing items ordinarily must produce them as they are kept in the usual course of business or must organize and label them to correspond with the categories in the request. n19 If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which the party ordinarily maintains the information or in a form or forms that are reasonably usable. n20

After the requesting party makes its specification regarding the timing, location, and manner of production, and the responding party makes its response, the parties may discuss any differences, which normally can be resolved without the necessity of filing a motion, because these provisions may be altered by the parties' agreement. n21 However, the time, location, and manner of inspection may be the subject of dispute because of the costs and burdens that may have to be borne by the respective parties. The fact that production of items would be burdensome and expensive and would hamper the party's business operations is generally not a reason for refusing to order production of relevant items. n22

When there is a dispute, the court will ultimately decide the time, place, and manner of the production and inspection, with the party responsible for the dispute subject to sanctions, including the payment of expenses for the dispute. n23

[d] Costs of Production

The party making production of items under Rule 34 generally does not have to furnish copies or pay the expense of making copies for the requesting party. n24 However, the responding party is generally required to bear the cost of making documents or electronically stored information available in the form they are kept in the usual course of business or, if appropriate, organizing and labeling them to correspond to the categories in the request, or in a reasonably usable form. n25

When a party requests the production of electronically stored information that the responding party has determined to be overly burdensome to produce, the requesting party must show good cause to overcome the problems caused in producing it. n26 Even though there is a presumption that a responding party must bear the costs of complying with a discovery request, n27 the courts have developed a seven-part test for electronic discovery to determine whether it is appropriate to shift discovery related costs to the requesting party in cases where the burden of producing the documents is high. The nonexclusive relevant considerations in the test include: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. n28

If an item that must be produced is in a foreign language and no English version exists, the producing party is not required to translate the item into English at its own expense. n29 However, if the requesting party translates an item for its own use, it may seek to recover its translation expenses if it prevails in the litigation. n30

[e] Testing or Sampling of Items Produced

Rule 34 now authorizes a party to request testing or sampling of documents, electronically stored information, tangible things, or land or other property which are within the scope of permissible discovery under Rule 26(b). n31 Furthermore, a party may request production of items for the purposes of destructive testing or sampling of the items. If the opposition objects to production for purposes of destructive testing or sampling, the decision whether to allow such

tests rests within the sound discretion of the trial court, based on the circumstances of each case. In determining whether to permit destructive testing or sampling, the court uses a balancing test, considering the following factors: (1) whether the proposed testing is reasonable, necessary, and relevant to proving the requesting party's case; (2) whether the responding party's ability to present evidence at trial will be hindered, or whether the responding party will be prejudiced in some other way; (3) whether there are any less prejudicial alternative methods of obtaining the evidence sought; and (4) whether there are adequate safeguards to minimize prejudice to the responding party, particularly the responding party's ability to present evidence at trial. n32 Destructive testing or sampling may be denied if the entire item of evidence will be destroyed by the tests or if sufficient justification for this type of testing or sampling is not demonstrated. n33

[f] Entry on Premises

A party may request that the other party permit entry on designated land or other property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any object or operation located on the property. n34 The property must be within the possession or control of a party to the litigation in order for access to be obtained under Rule 34(a). n35 As with a request for the production of other tangible things under Rule 34(a)(1), the scope of a request to enter on property is limited only by the broad scope of examination permitted by Rule 26(b). n36 Thus, the results of the inspection need not be admissible at trial in order to warrant discovery but need only be reasonably calculated to lead to admissible evidence. n37 As is the case with the inspection of documents and other materials, a court may specify conditions or limitations that control the entry onto property and any related activities to safeguard against unnecessary disruptions and to protect against unwarranted disclosures. n38 For example, the court may order the inspecting party to pay compensation if any damage occurs during the course of the inspection or testing. n39

When it enters on land under Rule 34(a)(2), the requesting party may perform various activities in connection with entry onto property, including inspecting, measuring, surveying, photographing, testing, or sampling. However, these activities must be performed by the requesting party, and the rule does not authorize a court to order that the responding party actually conduct tests for the requesting party. n40 Whether a requesting party may interview employees or other agents of the party in control of the premises depends on the circumstances of the case, using a need versus burden balancing test. n41

[8] Enforcement By Court n*

[a] Use of Motion to Compel by Requesting Party

A responding party has an obligation to produce items or permit the requesting party to enter its land for all requests within the permissible scope of discovery pursuant to Rule 26(b). n1 If a party served with a Rule 34 request fails to respond to the request or fails to permit inspection, the remedies available to the requesting party are governed by *Rule 37 of the Federal Rules of Civil Procedure*, which include payment of expenses, attorney's fees, and restricting evidence on particular issues. n2 Therefore, the requesting party should move for an order under Rule 37(a) with respect to any failure to produce or permit inspection. n3

Rule 34 discovery normally operates without the necessity for intervention by the court. n4 Therefore, there is a requirement that a party may not move for court enforcement until the party certifies that it has attempted in good faith to resolve the matter without court action. n5 It should also be noted that an order compelling production or inspection is necessary only if the party from whom discovery is requested fails to respond, objects to the request, fails to permit discovery, or fails to completely comply with a proper request. n6

[b] Sanctions for Noncompliance With Obligation to Produce or Allow Inspection

The sanction provisions of Rule 37 are applicable to several types of situations involving Rule 34 requests. If the court

decides in favor of the requesting party and enters an order compelling discovery under Rule 37(a), the court may order expenses and attorney's fees be paid by the responding party. n7 The court may also order sanctions under Rule 37(b) if the order is not obeyed, n8 and may order sanctions under Rule 37(d) if a responding party has failed to serve any written response to a request for inspection submitted under Rule 34. n9 Finally, if a party refuses to obey a court order to produce or permit inspection, the court may issue further orders, such as the following:

1. Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action; n10

2. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; n11

3. Striking pleadings in whole or in part; n12

4. Dismissing the action or proceeding in whole or in part; n13 or

5. Rendering a default judgment against the disobedient party. n14

[c] Sanctions for Destruction of Potential Discovery Items

The destruction of evidence is referred to as "spoliation." Thus, spoliation is the destruction or the significant and meaningful alteration of a document or instrument. Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. n15 Spoliation of evidence includes the improper destruction of either traditional or electronic documents. n16 In the context of requests for production, there are two sources of authority for a district court to impose sanctions on a party who has despoiled evidence: (1) the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and (2) the availability of sanctions under Rule 37(b)(2)(C) against a party who fails to obey an order to provide or permit discovery. n17

If an item that is subject to a Rule 34 request for production is destroyed while in the possession, custody, or control of a party, sanctions may generally be imposed on that party. However, there are two exceptions. First, a party may not be sanctioned if the extent of destruction is within the scope of permissible testing or sampling. n18 Second, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n19 This provision applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may require a party to intervene to modify or suspend certain features of the routine operation to prevent the loss of information, when that information is subject to a preservation obligation. n20 If destruction of items other than electronically stored information occurs in the ordinary course pursuant to a regular document retention policy, that may be considered as a factor against the imposition of sanctions, but it does not provide a defense if the party had notice that the documents were relevant to a dispute. n21

The court has a number of options in choice of sanction for spoliation. The most drastic option, which is reserved for flagrant violations, is the entry of a dismissal, default, or other conclusive judgment against the party who destroyed the evidence. n22 Less drastic sanctions include deeming certain facts to be admitted, allowing the factfinder to draw an inference adverse to the offending party with regard to the subject matter of the destroyed evidence, or precluding the violating party from presenting any proof on that subject. n23 The court may also assess costs incurred in seeking the information from alternative sources, or attorney's fees for litigating the destruction issue. n24

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 34(a)*; *see Fed. R. Civ. P. 26(b)* (permissible scope of discovery).

(n3)Footnote 2. *Fed. R. Civ. P. 34(a)(1)(A)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* ("electronically stored information" includes, but is not limited to, items such as data files, program files, backup and archival disks and tapes, and e-mail messages).

(n4)Footnote 3. *Flying J, Inc. v. Pilot Travel Ctrs. LLC, 2009 U.S. Dist. LEXIS 55283, at *5 (D. Utah June 25, 2009)* .

(n5)Footnote 4. *Fed. R. Civ. P. 34(a)(1)(B)*.

(n6)Footnote 5. *Fed. R. Civ. P. 34(a)(2)(A)*.

(n7)Footnote 6. *Fed. R. Civ. P. 34(c)*.

(n8)Footnote 7. *Fed. R. Civ. P. 26(a)(1)(A)(ii)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* ("electronically stored information" includes, but is not limited to, items such as data files, program files, backup and archival disks and tapes, and e mail messages); *Flying J, Inc. v. Pilot Travel Ctrs. LLC, 2009 U.S. Dist. LEXIS 55283, at *5 (D. Utah June 25, 2009)* (electronic information produced should be in form of machine readable data compilation such as Excel spreadsheets, if producing party stores or can retrieve such information in machine-readable format).

(n9)Footnote 8. *Fed. R. Civ. P. 26(a)(1)(A)(iii)*.

(n10)Footnote 9. *Fed. R. Civ. P. 26(a)(1)(A)(iv)*.

(n11)Footnote 10. *Fed. R. Civ. P. 26(a)*, Committee Note to 2007 Amendments.

(n12)Footnote 11. *Fed. R. Civ. P. 26(d)(1)*.

(n13)Footnote 12. *Fed. R. Civ. P. 26*, Committee Note to 1993 Amendments.

(n14)Footnote 13. *Hall v. Sullivan, 231 F.R.D. 468, 475 (D. Md. 2006)* ; *see Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004)* .

(n15)Footnote 14. *See Fed. R. Civ. P. 34(a)*.

(n16)Footnote 15. *See Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii)*; *see also Dusa Pharms., Inc. v. New Eng. Compounding Pharm., Inc., 232 F.R.D. 153, 154 (D. Mass. 2005)* .

(n17)Footnote 16. *In re Landry-Bell, 232 F.R.D. 266, 267 (W.D. La. 2005)* .

(n18)Footnote 17. *See Fed. R. Civ. P. 27(a)(3), (b)(3)*.

(n19)Footnote 18. *Fed. R. Civ. P. 26(b)(2)*.

(n20)Footnote 19. *Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 624 (D. Mass. 1988)* .

(n21)Footnote 20. *Fed. R. Civ. P. 34(b)(2)(A)*.

(n22)Footnote 21. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* .

(n23)Footnote 22. *Fed. R. Civ. P. 34(a)* (request may be served by one party on any other party).

(n24)Footnote 23. *See Fed. R. Civ. P. 45(a)(1), (c).*

(n25)Footnote 24. *Fed. R. Civ. P. 26(a)(5)* (subpoena under Rule 45(a)(1)(C) listed as discovery method); *see United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 468-469 (6th Cir. 2006)* .

(n26)Footnote 25. *See Fed. R. Civ. P. 45(a)(2).*

(n27)Footnote 26. *See Goldy v. Beal, 91 F.R.D. 451, 456 (M.D. Pa. 1981)* ; *see also Colon v. Cole Bros. Circus, 2007 U.S. Dist. LEXIS 1403, at *4 (E.D.N.Y. 2007)* (discussing differences between discovery and trial subpoenas).

(n28)Footnote 27. *Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 (D. Mass. 1996)* .

(n29)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.03* (Matthew Bender 3d ed.).

(n30)Footnote 1. *Fed. R. Civ. P. 1.*

(n31)Footnote 2. *See Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972)* , *aff'd on other grounds, 479 F.2d 317 (3d Cir. 1973)* .

(n32)Footnote 3. *See United States ex rel. Lee Kum Hoy v. Shaughnessy, 16 F.R.D. 558, 559 (S.D.N.Y. 1955)* .

(n33)Footnote 4. *Trabon Eng'g Corp. v. Eaton Mfg. Co., 37 F.R.D. 51, 55 (N.D. Ohio 1964)* .

(n34)Footnote 5. *Fed. R. Civ. P. 34(a)*; *see United States ex rel. Camillo v. Ancilla Sys., 233 F.R.D. 520, 522 (S.D. Ill. 2006)* .

(n35)Footnote 6. *Fed. R. Civ. P. 26(b)(1).*

(n36)Footnote 7. *See Fed. R. Civ. P. 27(a)(3).*

(n37)Footnote 8. *Karak v. Bursaw Oil Corp., 288 F.3d 15, 21 (1st Cir. 2002)* .

(n38)Footnote 9. *See Fed. R. Civ. P. 26-37*; *see also United States ex rel. Free v. Peters, 826 F. Supp. 1153, 1154 (N.D. Ill. 1993)* .

(n39)Footnote 10. *See Fed. R. Civ. P. 69(a)(2).*

(n40)Footnote 11. *See Fed. R. Civ. P. 27(b)(3).*

(n41)Footnote 12. *See Goldy v. Beal, 91 F.R.D. 451, 456 (M.D. Pa. 1981)* .

(n42)Footnote 13. *See In re Greenwood Air Crash, 161 F.R.D. 387, 394-398 (S.D. Ind. 1995)* .

(n43)Footnote 14. *See Fed. R. Civ. P. 34(a)* (request may be served by one party on another party); *Miner v. Punch, 838 F.2d 1407, 1409 (5th Cir. 1988)* (provisions of *Fed. R. Civ. P. 34* apply only to parties of pending litigation, citing **Moore's Federal Practice**).

(n44)Footnote 15. *See Fed. R. Civ. P. 27(a), (b).*

(n45)Footnote 16. *See Fed. R. Civ. P. 34(c)*; *American Maplan Corp. v. Heilmayr, 203 F.R.D. 499, 502 (D. Kan. 2001)* (Rule 45 specifically confers jurisdiction only on court issuing subpoena).

(n46)Footnote 17. *Cooper v. Pac. Life Ins. Co., 2005 U.S. Dist. LEXIS 16465, at *6 (S.D. Ga. 2005)* .

(n47)Footnote 18. *See Devlin v. Scardelletti, 536 U.S. 1, 15-16, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

(n48)Footnote 19. *Fed. R. Civ. P. 23(d)(1)(C).*

(n49)Footnote 20. *In re Carbon Dioxide Indus. Antitrust Litig., 155 F.R.D. 209, 212 (M.D. Fla. 1993)* .

(n50)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.12* (Matthew Bender 3d ed.).

(n51)Footnote 1. *Fed. R. Civ. P. 34(a)(1)(A).*

(n52)Footnote 2. *Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n53)Footnote 3. *Fed. R. Civ. P. 34(a)(1)(B).*

(n54)Footnote 4. *Alford v. Northeast Ins. Co., 102 F.R.D. 99, 101 (N.D. Fla. 1984)* (production of fingerprints, citing **Moore's Federal Practice**); *see ACLU v. United States DOJ, 265 F. Supp. 2d 20, 22-24 (D.D.C. 2004)* (production of physical items).

(n55)Footnote 5. *Fed. R. Civ. P. 34(a)(2).*

(n56)Footnote 6. *Fed. R. Civ. P. 34(a).*

(n57)Footnote 7. *Fed. R. Civ. P. 26(b)(1).*

(n58)Footnote 8. *In re Sulfuric Acid Antitrust Litigation, 231 F.R.D. 331, 337 (N.D. Ill. 2005)* .

(n59)Footnote 9. Italia di *Navigazione, S.Pp.A. v. M.V. Hermes I, 564 F. Supp. 492, 495 (S.D.N.Y. 1983)* , *aff'd on other grounds, 724 F.2d 21 (2d Cir. 1983)* .

(n60)Footnote 10. *Fed. R. Civ. P. 26(b)(2)(C).*

(n61)Footnote 11. *Bartley v. Isuzu Motors, Ltd., 158 F.R.D. 165, 167 (D. Colo. 1994)* ; *see Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 598-599 (E.D. Wis. 2006)* .

(n62)Footnote 12. *Dushkin Publ'g Group, Inc. v. Kinko's Serv. Corp., 136 F.R.D. 334, 335 (D.D.C. 1991)* ; *see Snowden v. Connaught Lab., Inc., 137 F.R.D. 325, 333 (D. Kan. 1991)* (court may order production when it would be excessively burdensome, for financial or other reasons, for requesting party to obtain items).

(n63)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.10* (Matthew Bender 3d ed.).

(n64)Footnote 1. *Fed. R. Civ. P. 26(d)(1).*

(n65)Footnote 2. *See Fed. R. Civ. P. 16.*

(n66)Footnote 3. *See Fed. R. Civ. P. 26(f)*; *see also Fed. R. Civ. P. 16(b)(1).*

(n67)Footnote 4. *Fed. R. Civ. P. 16(b)(2).*

(n68)Footnote 5. *See Fed. R. Civ. P. 16(b)(2), (c)(2)(F)*; *see, e.g., Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* (court's "completion of discovery" deadline required that request for production be served at least 30 days prior to deadline because Rule 34(b) allows parties 30 days to respond to requests for production).

(n69)Footnote 6. *Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).*

(n70)Footnote 7. *Fed. R. Civ. P. 26(a)(1)(A)(i)-(iv).*

(n71)Footnote 8. *Fed. R. Civ. P. 26(a)(1)(B).*

(n72)Footnote 9. *Fed. R. Civ. P. 26(d)(1)*; *see Fed. R. Civ. P. 26(f)(1)(f).*

(n73)Footnote 10. *Farran v. Johnston Equip., Inc., 1995 U.S. Dist. LEXIS 6649, at *10-*11 (E.D. Pa. May 11, 1995)* (interrogatory requesting exhibit list in advance of time set by pretrial order or *Fed. R. Civ. P. 26(a)(3)* is premature (citing **Moore's Federal Practice**)).

(n74)Footnote 11. *See Corrigan v. Methodist Hosp., 158 F.R.D. 54, 58 (E.D. Pa. 1994)* .

(n75)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.11* (Matthew Bender 3d ed.).

(n76)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n77)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n78)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n79)Footnote 4. *See Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 501 n.2 (E.D. Cal. 1995)* .

(n80)Footnote 5. *Fed. R. Civ. P. 34(b)(1)(A).*

(n81)Footnote 6. *In re Folding Carton Antitrust Litig., 76 F.R.D. 420, 424 (N.D. Ill. 1977)* (citing **Moore's Federal Practice**).

(n82)Footnote 7. *Regan Touhy v. Walgreen Co., 526 F.3d 641, 650 (10th Cir. 2008)* (requests are especially disfavored if they request "all documents relating or referring to" broad type of claim).

(n83)Footnote 8. *Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709 (S.D.N.Y. 1979)* .

(n84)Footnote 9. *See Westhemco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709 (S.D.N.Y. 1979)* .

(n85)Footnote 10. *See Taylor v. Florida Atl. Univ., 132 F.R.D. 304, 305 (S.D. Fla. 1990)* , *aff'd without opinion, 976 F.2d 743 (11th Cir. 1992)* (plaintiff set forth categories of documents with as much reasonable particularity as can be expected at this stage of discovery).

(n86)Footnote 11. *Fed. R. Civ. P. 34(b)(1)(A).*

(n87)Footnote 12. *See Fed. R. Civ. P. 34(b)(2)(B)*; [7], *below.*

(n88)Footnote 13. *Fed. R. Civ. P. 34(b)(1)(B).*

(n89)Footnote 14. *Resolution Trust Corp. v. North Bridge Assocs., 22 F.3d 1198, 1201 (1st Cir. 1994)* ; *see Fed. R. Civ. P. 34(b)(2)(A).*

(n90)Footnote 15. *See Holliday v. Extex, 237 F.R.D. 425, 427 (D. Haw. 2006)* .

(n91)Footnote 16. *See Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* ("electronically stored information" includes, but is not limited to, items such as data files, program files, backup and

archival disks and tapes, and e-mail messages).

(n92)Footnote 17. *Fed. R. Civ. P. 34(b)(1)(C).*

(n93)Footnote 18. *Flying J, Inc. v. Pilot Travel Ctrs. LLC, 2009 U.S. Dist. LEXIS 55283, at *5 (D. Utah June 25, 2009)* .

(n94)Footnote 19. *Covad Communs. Co. v. Revonet, Inc., 254 F.R.D. 147, 150 (D.D.C. 2008)* .

(n95)Footnote 20. *Fed. R. Civ. P. 34(b)(2)(E)(ii).*

(n96)Footnote 21. *Fed. R. Civ. P. 26(f)(3)(C)*; *see ThiCovad Communs. Co. v. Revonet, Inc., 254 F.R.D. 147, 149 (D.D.C. 2008)* .

(n97)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.13* (Matthew Bender 3d ed.).

(n98)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(A).*

(n99)Footnote 2. *See Fed. R. Civ. P. 6(b)(1).*

(n100)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(A).*

(n101)Footnote 4. *Fed. R. Civ. P. 29(b).*

(n102)Footnote 5. *See GFI Computer Indus., Inc. v. Fry, 476 F.2d 1, 3-4 (5th Cir. 1973)* .

(n103)Footnote 6. *See* [7], *below.*

(n104)Footnote 7. *Fed. R. Civ. P. 34(b)(2)(B).*

(n105)Footnote 8. *See Fed. R. Civ. P. 37(d)(1)(A)(ii).*

(n106)Footnote 9. *See Fed. R. Civ. P. 37(a)(3)(B)(iv).*

(n107)Footnote 10. *Fed. R. Civ. P. 34(b)(2)(B).*

(n108)Footnote 11. *Fed. R. Civ. P. 34(b)(2)(C).*

(n109)Footnote 12. *Dine v. Metro. Life Ins. Co., 255 F.R.D. 534, 536 (C.D. Cal. 2009)* ; *see* [e], *below.*

(n110)Footnote 13. *See Obiajulu v. City of Rochester, 166 F.R.D. 293, 295 (W.D.N.Y. 1996)* .

(n111)Footnote 14. *Bush Devel. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1364 (E.D. Va. 1986)* .

(n112)Footnote 15. *Fed. R. Civ. P. 34(b)(2)(D).*

(n113)Footnote 16. *See Fed. R. Civ. P. 34(b)(2)(B),(C).*

(n114)Footnote 17. *See Fed. R. Civ. P. 34(b)(2)(E)(iii).*

(n115)Footnote 18. *Fed. R. Civ. P. 34(b)(2)(A)-(D).*

(n116)Footnote 19. *Dine v. Metro. Life Ins. Co., 255 F.R.D. 534, 536 (C.D. Cal. 2009)* ; *Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 182-185 (E.D. Cal. 1991)* (blanket objection constituted waiver of

attorney client privilege and work product protection).

(n117)Footnote 20. *Harris v. United States, 121 F.R.D. 652, 655 (W.D.N.C. 1988)* ; *see Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1409 (S.D. Cal. 1994)* (failure to specifically identify documents on privilege log does not automatically waive privilege for omitted documents).

(n118)Footnote 21. *Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 254 (D. Md. 2008)* .

(n119)Footnote 22. *See Fed. R. Civ. P. 26(b)(5)*, Committee Note to 2006 Amendments.

(n120)Footnote 23. *Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 254 (D. Md. 2008)* .

(n121)Footnote 24. *See Fed. R. Civ. P. 26(b)(5)(B)*; *see § 15.03[7][j]*.

(n122)Footnote 25. *See Fed. R. Evid. 502*.

(n123)Footnote 26. *Fed. R. Evid. 502(b)*; *see § 15.03[8]*.

(n124)Footnote 27. *See Fed. R. Civ. P. 26(c)(1)*; *see, e.g., Obiajulu v. City of Rochester, 166 F.R.D. 293, 297 (W.D.N.Y. 1996)* (protective order granted requiring execution of confidentiality order before production of documents).

(n125)Footnote 28. *Fed. R. Civ. P. 26(c)(1)*.

(n126)Footnote 29. *See Fed. R. Civ. P. 37(a)(3)(B)(iv)*; *Fed. R. Civ. P. 34(b)*, Committee Note to 2007 Amendments.

(n127)Footnote 30. *Blum v. Schlegel, 150 F.R.D. 38, 41-42 (W.D.N.Y. 1993)* ; *see also Fed. R. Civ. P. 24*.

(n128)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.14*-34.15 (Matthew Bender 3d ed.).

(n129)Footnote 1. *Fed. R. Civ. P. 34(a)(1), (2)*.

(n130)Footnote 2. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-540, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* .

(n131)Footnote 3. *See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, 847 U.N.T.S. 231 (1970)*, *28 U.S.C.S. § 1781*, note.

(n132)Footnote 4. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-541, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* .

(n133)Footnote 5. *Fed. R. Civ. P. 34(a)(1), (2)*.

(n134)Footnote 6. *See Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992)* (motion to compel denied because documents not shown to be in defendant's possession, custody, or control, citing **Moore's Federal Practice**).

(n135)Footnote 7. *See Gray v. Faulkner, 148 F.R.D. 220, 223-224 (N.D. Ind. 1992)* .

(n136)Footnote 8. *See* Societe Internationale Pour Participations Industrielles et *Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-206, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* .

(n137)Footnote 9. *Anderson v. Cryovac, Inc., 862 F.2d 910, 928-929 (1st Cir. 1988)* .

(n138)Footnote 10. *Green v. Fulton, 157 F.R.D. 136, 142 (D. Me. 1994)* .

(n139)Footnote 11. *See Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992)*

(n140)Footnote 12. *See McBryar v. U.A.W., 160 F.R.D. 691, 697 (S.D. Ind. 1993)* .

(n141)Footnote 13. *Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992)* .

(n142)Footnote 14. *Scott v. Arex, Inc., 124 F.R.D. 39, 42 (D. Conn. 1989)* .

(n143)Footnote 15. *Fed. R. Civ. P. 34(b)(1)(B).*

(n144)Footnote 16. *Petro v. Lighting Serv., 2009 U.S. Dist. LEXIS 55096, at *4 (S.D. Ohio June 29, 2009)* .

(n145)Footnote 17. *See Manning v. Trustees of Tufts College, 613 F.2d 1200, 1204 (1st Cir. 1980)* .

(n146)Footnote 18. *See Board of Educ. of Evanston v. Admiral Heating & Ventilating, Inc., 104 F.R.D. 23, 35-36 (N.D. Ill. 1984)* .

(n147)Footnote 19. *Fed. R. Civ. P. 34(b)(2)(E)(i).*

(n148)Footnote 20. *Fed. R. Civ. P. 34(b)(2)(E)(ii)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n149)Footnote 21. *Fed. R. Civ. P. 34(b)(2)(E).*

(n150)Footnote 22. *See Technograph, Inc. v. Texas Instruments, Inc., 43 F.R.D. 416, 419 (S.D.N.Y. 1967)* .

(n151)Footnote 23. *See Fed. R. Civ. P. 37(a)(3)(B)(iv), (a)(5).*

(n152)Footnote 24. *Fed. R. Civ. P. 34(a)(1)(2)* (activities related to production or inspection to be performed by requesting party); *Monarch Ins. Co. v. Spach, 281 F.2d 401, 413 n.30 (5th Cir. 1960)* (citing **Moore's Federal Practice**).

(n153)Footnote 25. *Fed. R. Civ. P. 34(b)(2)(E)*; *see In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 508-509 (1st Cir. 1982)* (if responding party's record-keeping system is such that items can only be read or comprehended by use of special procedures, responding party may be required to bear expense associated with producing items for inspection).

(n154)Footnote 26. *Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316 (S.D.N.Y. 2003)* .

(n155)Footnote 27. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n156)Footnote 28. *Quinby v. WestLB AG, 245 F.R.D. 94, 103-104 (S.D.N.Y. 2006)* .

(n157)Footnote 29. *In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 505-509 (1st Cir. 1982)* .

(n158)Footnote 30. *In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 506 (1st Cir. 1982)* .

(n159)Footnote 31. *Fed. R. Civ. P. 34(a)(1), (2).*

(n160)Footnote 32. *Mirchandani v. Home Depot, U.S.A., Inc., 235 F.R.D. 611, 614 (D. Md. 2006)* .

(n161)Footnote 33. *In re Newman, 782 F.2d 971, 974 (Fed. Cir. 1986)* .

(n162)Footnote 34. *Fed. R. Civ. P. 34(a)(2)*.

(n163)Footnote 35. *Santa Fe Int'l Corp. v. Potashnick, 83 F.R.D. 299, 300-301 (E.D. La. 1979)* .

(n164)Footnote 36. *Fed. R. Civ. P. 34(a)(2)*; *see Fed. R. Civ. P. 26(b)*; *Macort v. Goodwill Indus.-Manasota, Inc., 220 F.R.D. 377, 379 (M.D. Fla. 2003)* (denying request as overbroad when plaintiff requested unlimited access to defendant's business property for purposes of inspection).

(n165)Footnote 37. *Fed. R. Civ. P. 26(b)(1)*.

(n166)Footnote 38. *See Dusa Pharms., Inc. v. New Eng. Compounding Pharm., Inc., 232 F.R.D. 153, 154 (D. Mass. 2005)* (access denied to areas where inspection would be intrusive; defendant offered plaintiffs access to its premises under reasonable terms).

(n167)Footnote 39. *See Martin v. Reynolds Metals Corp., 297 F.2d 49, 57 (9th Cir. 1961)* .

(n168)Footnote 40. *See Sladen v. Girltown, Inc., 425 F.2d 24, 25 (7th Cir. 1970)* .

(n169)Footnote 41. *Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904, 907-908 (4th Cir. 1978)* .

(n170)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.16* (Matthew Bender 3d ed.).

(n171)Footnote 1. *See Fed. R. Civ. P. 34(a)*.

(n172)Footnote 2. *See* [b], *below*.

(n173)Footnote 3. *Fed. R. Civ. P. 37(a)(1), 37(a)(3)(B)(iv)*; *see Tenkku v. Normandy Bank, 348 F.3d 737, 743 (8th Cir. 2003)* .

(n174)Footnote 4. *Nash v. City of Oakwood, 90 F.R.D. 633, 637 (S.D. Ohio 1981)* .

(n175)Footnote 5. *Fed. R. Civ. P. 37(a)(1), (d)(1)(B)*.

(n176)Footnote 6. *See Hilgenberg v. Neth, 93 F.R.D. 325, 326 (E.D. Tenn. 1981)* (refusing to consider motion to produce until movant has first requested documents and opponent has refused to respond).

(n177)Footnote 7. *Fed. R. Civ. P. 37(a)(5)(A)(C)*.

(n178)Footnote 8. *Fed. R. Civ. P. 37(b)(2)*.

(n179)Footnote 9. *Fed. R. Civ. P. 37(d)(1)(A)(ii)*.

(n180)Footnote 10. *Fed. R. Civ. P. 37(b)(2)(A)(i)*.

(n181)Footnote 11. *Fed. R. Civ. P. 37(b)(2)(A)(ii)*.

(n182)Footnote 12. *Fed. R. Civ. P. 37(b)(2)(A)(iii)*.

(n183)Footnote 13. *Fed. R. Civ. P. 37(b)(2)(A)(v)*.

(n184)Footnote 14. *Fed. R. Civ. P. 37(b)(2)(A)(vi)*.

(n185)Footnote 15. *See Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001)* ; *Napier v. Cinemark USA, Inc., 635 F. Supp. 2d 1248, 1252 (N.D. Okla. 2009)* (noting that spoliation is grounds for discovery sanctions, and in some jurisdictions the basis of independent claim in tort).

(n186)Footnote 16. *Buckley v. Mukasey, 538 F.3d 306, 322 (4th Cir. 2008)* .

(n187)Footnote 17. *Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006)* .

(n188)Footnote 18. *See* [7][e], *above*.

(n189)Footnote 19. *Fed. R. Civ. P. 37(e)*.

(n190)Footnote 20. *Fed. R. Civ. P. 37*, Committee Note to 2006 Amendments.

(n191)Footnote 21. *See Lewy v. Remington Arms Co., 836 F.2d 1104, 1111-1112 (8th Cir. 1988)* .

(n192)Footnote 22. *See Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006)* ; *Fed. R. Civ. P. 37(b)(2)(A)(v), (vi)*; *see also Maynard v. Nygren, 332 F.3d 462, 467-468 (7th Cir. 2003)* (although spoliation permits ultimate sanction of dismissal, it does not require it; dismissal for spoliation under Rule 37 requires a finding of willfulness, bad faith or fault, and an explanation why lesser sanctions would not be appropriate).

(n193)Footnote 23. *See* 37(b)(2)(A)(i)-(iii).

(n194)Footnote 24. *Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 78 (S.D.N.Y. 1991)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.27

§ 15.27 Physical and Mental Examinations of Persons

[1] Requirements for Order of Physical and Mental Examination n*

[a] Party May Make Request for Examination in Any Civil Action

Whenever the mental or physical condition, including blood group, of a party or of a person in a party's custody or legal control is in controversy, the court, on a motion for good cause shown, may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce the person in the party's control for examination. n1

Although Rule 35 is most often invoked in personal injury actions where the plaintiff's mental or physical condition is obviously in controversy, the rule is available in any civil action, for example, in ERISA cases, n2 sexual harassment claims, n3 and employment discrimination claims. n4

[b] Required Showing of Controversy Involving Mental or Physical Condition

A court may order a mental or physical examination only when the mental or physical condition of the party or person in the party's custody is "in controversy." The Supreme Court has held that while Rules 26, 33, and 34 provide for discovery of material relevant to the subject matter involved in the pending action, the Rule 35 requirement that the condition of the person to be examined be "in controversy" is a much stricter requirement. This higher threshold may not be met by mere conclusory allegations of the pleadings, or by a simple showing of relevance to the case. Instead, the moving party must make an affirmative showing that each condition as to which the examination is sought is genuinely in issue regarding a claim or defense in the action, and that good cause exists for ordering each particular examination. n5

This rule does not mean that the moving party must prove its case on the merits or that an evidentiary hearing is required in all cases. Rather, it means that the moving party has the burden of producing sufficient information for the trial court to make an informed decision. The Court recognized that there are certain cases, such as personal injury negligence cases, in which both the "in controversy" and "good cause" requirements are satisfied on the basis of the pleadings alone, and that this applies as much to defendants who base their defenses on their physical or mental

condition, such as insanity, as it does to plaintiffs. n6

In applying the *Schlagenhauf* rule, district courts have emphasized the Supreme Court's guidance that reliance on conclusory allegations regarding mental condition in the pleadings or a showing of mere relevance to the case is insufficient. If the plaintiff has directly placed an ongoing mental illness to establish damages in issue, for example, to prove damages, the mental health is "in controversy" and provides defendant with "good cause" to request a mental examination. n7 One important factor is whether the plaintiff makes use of an expert witness to support the emotional distress claim. If the plaintiff does not intend to support a claim for emotional distress with expert testimony on that subject, the courts most likely will deny a motion for a mental examination. On the other hand, when the plaintiff retains an expert witness specifically to testify regarding the extent of the plaintiff's emotional injuries, the motion generally will be granted. n8 The court may also find that the plaintiff's mental condition is in controversy if the plaintiff has sought professional treatment for the alleged emotional injuries. n9

[c] Good Cause for Examination

In addition to proving that the mental or physical condition of the person to be examined is in controversy, the moving party under Rule 35 must show "good cause" for ordering the examination. n10 Factors used to determine whether good cause is established include relevance, necessity, n11 and the ability of the movant to obtain the desired information by other means. n12 Courts have used this language to find that good cause for ordering an examination may be lacking if the party's mental or physical condition can be established by referring to a prior examination or other documentary evidence. n13 On the other hand, if the party to be examined has alleged an ongoing injury or illness, a prior examination probably will not provide an adequate basis for evaluating the party's current condition. n14 Another primary factor in the "good cause" requirement is the scope of the proposed examination. In making its determination, the court should consider whether the type and extent of the examination is within that necessary to determine the issues in controversy, and may limit the examination accordingly. n15

[d] Court Has Broad Discretion to Enter Order

Even if a party establishes good cause for ordering the examination, the decision whether to order a mental or physical examination under Rule 35 is still within the sound discretion of the court. After good cause is shown, the court must still balance the right of the party to be examined to avoid personal invasion against the moving party's right to a fair trial. n16

For example, courts have exercised their discretion in the following circumstances:

1. To refuse to order the examination if it would be painful or dangerous to the party to be examined. If an examination is painful or risky, the court will require a substantial showing of its necessity. n17 Under a burden-shifting approach, the party to be examined must first show that the proposed test is prima facie painful or dangerous. Once this burden is satisfied, the burden shifts to the party seeking the examination to demonstrate the significant necessity for the examination and its safety. n18

2. To consider the scientific validity and reliability of the requested examination method, n19 including whether the scientific technique has been tested, and whether the technique has been subjected to peer review and publication. n20

3. To specify terms and conditions for the examination. n21

4. To issue an order protecting the person or party requested to be examined from annoyance, embarrassment, oppression, or undue burden or expense. n22

[e] Order Must Specify Parameters of Examination

When a court determines that there is good cause for the examination and grants the motion, the order must specify the time, place, manner, conditions, and scope of the examination, n23 as well as the person or persons who will perform it. n24 The court must order that a physical or mental examination be performed only by a suitably licensed or certified examiner. n25

[2] Procedural Considerations n*

[a] Request Made By Motion

A party that wants to compel an examination under Rule 35 must proceed by a motion filed within the time period permitted for discovery. n1 The requesting party must follow the general rules applicable to timing n2 and format of motions n3 and must provide notice to all parties and the person to be examined. n4 In addition, the motion must be specific as to the time, place, manner, conditions, and scope of the examination, and the person or persons by whom the examination is to be made. n5 However, in cases when there is not question that mental or physical condition is at issue, the parties have the option to forego the formal Rule 35 procedure and may agree to conduct physical or mental examinations by stipulation. n6

[b] Time for Filing Motion

A party may not request the court for an examination before the parties have conducted the discovery conference required under Rule 26(f), except when authorized by court order, or agreement of the parties. n7 The party also may not request an examination after the discovery cut-off date for discovery set by the court. n8 As an alternative to Rule 35, Rule 27 provides a mechanism to perpetuate testimony before any court action has been filed, n9 or while an appeal from a judgment is pending, n10 provided that the party obtains prior court approval. n11

[c] Parties May Stipulate to Examination

In cases where mental or physical condition is at issue, parties have the option to agree to conduct physical or mental examinations by way of stipulation or agreement. Thus, despite Rule 35's requirements, physical and mental examinations are typically arranged by stipulation of the attorneys, with the rule standing as a compulsory sanction that helps to produce stipulations. n12 Furthermore, if a party voluntarily submits to an examination by a physician selected by another party, the examined party waives his or her right to insist upon a Rule 35 motion for an order of examination. n13 Such agreements and stipulations offer the advantage of flexibility. However, even in cases when the examinations are made by agreement or stipulation of the parties, the Rule 35(b) requirement of the examiner's report will apply to the examination, unless the agreement expressly provides otherwise. n14

[3] Conduct of Examination n*

[a] Persons Subject to Examination

The court may order the examination of a party, or order that a party produce for examination a person in the custody or under the legal control of the party. n1 The purpose of the "custody or control" provision is to make it clear that the court may order a parent or guardian suing for personal injuries on behalf of a minor to produce the minor for examination, n2 and that blood tests may be ordered from minors in cases in which paternity is an issue. n3 Rule 35 is applicable to autopsies, and for purposes of ordering an autopsy under Rule 35, a decedent may be a person in the custody and control of a party. n4 Courts have rejected the argument that a decedent is not a "person" within the meaning of Rule 35(a), noting that the Rule does not expressly limit itself to the living. Thus, the surviving spouse had custody and control of the deceased's body. n5

Failure to comply with an order to produce another person for a Rule 35 examination be may sanctioned under Rule 37,

n6 except that such failure is excused on a showing of inability to produce the other party. n7

[b] Persons Allowed to Perform Examination

The court may order a physical or mental examination only by a suitably licensed or certified examiner. n8 Professionals satisfying this requirement include, among others, physicians, psychologists, psychiatrists, and vocational rehabilitation experts. n9 The purpose of the suitably licensed requirement is to ensure that the court examines the qualifications of the proposed examiner for the particular type of examination. Even a licensed physician may be unsuitable if the examination calls for an expertise that the physician does not have. n10 Rule 35 does not limit the number of persons who may examine a particular examinee. An examinee may be examined several times, and more than one person may participate at a specific examination. n11

Absent a lack of qualification, the court may honor the examining party's choice of an examiner. n12 The court also has discretion to make its own designations of examining experts to ensure an independent and impartial evaluation of the examinee's condition. Appointment of expert witnesses by the court is specifically provided for in the Federal Rules of Evidence. n13

[c] Persons Who May Attend Examination

The court must specify the type, scope, and conditions of the examination. n14 Courts thus may, but are not required to, prohibit the attorney for the party to be examined from attending the examination because the presence of the examinee's attorney could inhibit the examiner and also create the possibility that the attorney will become a trial witness. n15 Courts have allowed the attorney to be present when there is showing n16 that the examiner will probe beyond permissible limits and, in effect, transform the examination into a de facto deposition. n17 The modern trend is also to exclude the examined party's doctor from the examination unless there is a showing that the proposed examiner could resort to medically unsound techniques. n18

[d] Location of Examination

The court has discretion to specify the time and location of the examination. n19 The court typically requires an examination to be conducted in the district where the case will be tried. n20 When a plaintiff examinee is obligated to submit to an examination in the district where the plaintiff has filed suit, the plaintiff is responsible for his or her own travel expenses, unless the examinee can show unreasonable hardship or exceptional circumstances. n21

If the examining party makes a motion for an examination outside of the forum district, the party to be examined may oppose the motion on the basis of undue hardship. To decide the issue, the court will consider factors such as the availability of qualified examiners in close proximity to the examinee's residence or the forum district, the distance of the examination from the examinee's residence, and the physical condition of the examinee. n22

[4] Report of Examiner n*

[a] Requests for Report

When an examination is ordered under Rule 35(a), a request for a copy of an examiner's report may be made by the party against whom the examination order was issued or by the person examined. When a request is made, the party that moved for the examination must deliver a copy of the report to the requester, and also a copy of like reports of all earlier examinations of the same condition. n1 In a similar way, after delivering the reports, the party who moved for the examination may request, and is entitled to receive, from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. However, those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. n2 Note that the obligation to exchange reports is triggered by a request either by the party against whom the order was entered or by the

examined party; there is no obligation to exchange reports unless the examined party makes the initial request, n3 or it is ordered on the court's own initiative. n4 Requesters are entitled to receive a copy of a required report in sufficient time to use it in trial preparation. n5

If disclosure of certain information in the report to opposing parties would be unjustifiably prejudicial, a party may seek a protective order to restrict disclosure of the report. n6 Through in camera review prior to distribution of a report, the court may evaluate whether prejudicial passages in the report should be stricken. n7

[b] Contents of Report

The examiner's report must be in writing and must specify in detail the examiner's results and findings, including diagnoses, conclusions, and the results of any tests. n8 This means that the report must cover the topics contained in the court's examination order, which must specify the manner, conditions, and scope of the examination. n9

[c] Exclusion of Examiner's Testimony for Failure to Deliver Report

If a party fails to deliver a requested report, on motion the trial court may order delivery of the report; if a party then fails to deliver the report, the court has discretion to exclude the examiner's testimony at trial. n10 Furthermore, the rule does not limit the court to exclusion of testimony as the only remedy. If the sanction of exclusion would be inadequate, the court may order other Rule 37 sanctions for failure produce the report. n11

[d] Request for Report Waives Privilege of Requester

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege in that action or any other involving the same controversy regarding the testimony of any other person who examined or may examine the party with respect to the same condition. n12 However, if the examined party receives an unsolicited copy of the report, the examined party does not waive any privilege by that receipt. n13

[e] Discovery of Report Under Other Rules

Rule 35 provisions regarding the production and exchange of reports do not preclude the discovery of a physician's or other expert's report, or the taking of an expert's deposition pursuant to other discovery rules. n14 Thus, if a physician's report is not privileged, or the party possessing the report has waived the privilege by other means, the report may still be discovered, regardless of whether a request has been made pursuant to Rule 35(b). n15 For example, when examination reports are not privileged and not created in anticipation of litigation or in preparation for trial, they would fall within the general definition of the scope of discovery in Rule 26. n16

[f] Transcription of Examination

Courts generally do not permit the party to be examined to have the examination transcribed either by a stenographer or by electronic means, because of the potential intrusion on the examining process n17 and because of tendency to make examination adversarial. n18 In unusual circumstances, however, the court will permit transcription of the examination if there appears to be no other effective means of preserving the examined person's rights to produce a record of the examination. n19

[5] Enforcement of Order of Examination n*

Rule 37(b)(2) prescribes the possible sanctions for failure to comply with an order for an examination under Rule 35. These include refusing to allow the disobedient party to support or oppose designated claims or defenses or introduce designated matters into evidence, striking pleadings or parts of pleadings, staying the action until the order is obeyed, dismissing the action or parts of the action, or rendering a default judgment. n1 In a personal injury action, the court

often uses dismissal as a sanction against a plaintiff who unjustifiably refuses to comply with an order to submit to a physical or mental examination. n2 However, the court may not impose a contempt citation for disobeying an order to submit to a physical or mental examination. n3

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 35.02*-35.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 35(a)(1).*

(n3)Footnote 2. *Sloane v. Thompson, 128 F.R.D. 13, 15 (D. Mass. 1989)* .

(n4)Footnote 3. *Jansen v. Packaging Corp., 158 F.R.D. 409, 410 (N.D. Ill. 1994)* (former employee's allegation of ongoing harm in sexual harassment case placed her mental condition in controversy).

(n5)Footnote 4. *See Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412 (N.D. Ill. 1994)* .

(n6)Footnote 5. *Schlagenhauf v. Holder, 379 U.S. 104, 118, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

(n7)Footnote 6. *Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* ; *see In re Certain Asbestos Cases, 113 F.R.D. 612, 614 (N.D. Tex. 1986)* .

(n8)Footnote 7. *Smith v. Koplan, 215 F.R.D. 11, 13 (D.D.C. 2003)* (plaintiff alleged as element of damages that mental illness caused by defendant has prevented plaintiff from working).

(n9)Footnote 8. *Tomlin v. Holecek, 150 F.R.D. 628, 630 (D. Minn. 1993)* .

(n10)Footnote 9. *Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412 (N.D. Ill. 1994)* .

(n11)Footnote 10. *Fed. R. Civ. P. 35(a)(2)* (A).

(n12)Footnote 11. *Peters v. Nelson, 153 F.R.D. 635, 638-639 (N.D. Iowa 1994)* .

(n13)Footnote 12. *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

(n14)Footnote 13. *DeCrescenzo v. Maersk Container Serv. Co., 741 F.2d 17, 21 (2d Cir. 1984)* .

(n15)Footnote 14. *Duncan v. Upjohn Co., 155 F.R.D. 23, 25 (D. Conn. 1994)* .

(n16)Footnote 15. *See Herrera v. Lufkin Indus., 474 F.3d 675, 689 (10th Cir. 2007)* .

(n17)Footnote 16. *Shirsat v. Mutual Pharmaceutical Co., Inc., 169 F.R.D. 68, 72 (E.D. Pa. 1996)* ; *Green v. Branson, 108 F.3d 1296, 1304 (10th Cir. 1997)* (appellate court reviews decision on Rule 35 motion for medical examination under abuse of discretion standard).

(n18)Footnote 17. *Stinchcomb v. United States, 132 F.R.D. 29, 30 (E.D. Pa. 1990)* .

(n19)Footnote 18. *Pena v. Troup, 163 F.R.D. 352, 353 (D. Colo. 1995)* .

(n20)Footnote 19. *See, e.g., Usher v. Lakewood Engineering & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994)* .

(n21)Footnote 20. *See Daubert v. Merrell Dow, 509 U.S. 579, 593-594, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* .

(n22)Footnote 21. *In re American President Lines, Ltd., 929 F.2d 226, 228 (6th Cir. 1991)* .

(n23)Footnote 22. *See Fed. R. Civ. P. 26(c)(1)(A)*; *Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412-414 (N.D. Ill. 1994)* .

(n24)Footnote 23. *See Herrera v. Lufkin Indus., 474 F.3d 675, 689 (10th Cir. 2007)* .

(n25)Footnote 24. *Fed. R. Civ. P. 35(a)(2)(B)*.

(n26)Footnote 25. *Fed. R. Civ. P. 35(a)(1)*; *see* [3][b], *below*.

(n27)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 35.02* (Matthew Bender 3d ed.).

(n28)Footnote 1. *Fed. R. Civ. P. 35(a)(2)(A)*.

(n29)Footnote 2. *See Fed. R. Civ. P. 6(c)(1)*.

(n30)Footnote 3. *See Fed. R. Civ. P. 7(b)*.

(n31)Footnote 4. *Fed. R. Civ. P. 35(a)(2)(A)*.

(n32)Footnote 5. *Fed. R. Civ. P. 35(a)(2)(B)*.

(n33)Footnote 6. *Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 689 (10th Cir. 2007)* ; *see* [c], *below*.

(n34)Footnote 7. *See Fed. R. Civ. P. 26(d)(1)*; *see also Fed. R. Civ. P. 26(f)*.

(n35)Footnote 8. *See Fed. R. Civ. P. 16(b)(3)(A)*.

(n36)Footnote 9. *See Fed. R. Civ. P. 27(a)*.

(n37)Footnote 10. *See Fed. R. Civ. P. 27(b)*.

(n38)Footnote 11. *See Fed. R. Civ. P. 27(a)(3)*, *(b)(3)*.

(n39)Footnote 12. *See Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 689 (10th Cir. 2007)* .

(n40)Footnote 13. *Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 690 (10th Cir. 2007)* .

(n41)Footnote 14. *Fed. R. Civ. P. 35(b)(6)*.

(n42)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 35.06*-35.09 (Matthew Bender 3d ed.).

(n43)Footnote 1. *Fed. R. Civ. P. 35(a)(1)*.

(n44)Footnote 2. *See Schempp v. Reniker, 809 F.2d 541, 542-543 (8th Cir. 1987)* .

(n45)Footnote 3. *Fed. R. Civ. P. 35(a)*, Committee Note to 1970 Amendments.

(n46)Footnote 4. *Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 539, 541 (M.D. Pa. 2002)* .

(n47)Footnote 5. *In re Certain Asbestos Cases, 112 F.R.D. 427, 433 (N.D. Tex. 1986)* .

(n48)Footnote 6. *See Fed. R. Civ. P. 37(b)(2)(A)(i)-(iv).*

(n49)Footnote 7. *See Fed. R. Civ. P. 37(b)(2)(B).*

(n50)Footnote 8. *Fed. R. Civ. P. 35(a)(1).*

(n51)Footnote 9. *See Olcott v. LaFiandra, 793 F. Supp. 487, 492 (D. Vt. 1992)* .

(n52)Footnote 10. *Fed. R. Civ. P. 35(a)*, Committee note to 1991 Amendments.

(n53)Footnote 11. *See Fed. R. Civ. P. 35(a)* (examination order must specify "person or persons" by whom examination is to be made); *Little v. Howey, 32 F.R.D. 322, 323 (W.D. Mo. 1963)* (citing **Moore's Federal Practice**).

(n54)Footnote 12. *Powell v. United States, 149 F.R.D. 122, 123 (E.D. Va. 1993)* .

(n55)Footnote 13. *See Fed. R. Evid. 706(a).*

(n56)Footnote 14. *Fed. R. Civ. P. 35(a)(2)(B)*; *see Herrera v. Lufkin Indus., 474 F.3d 675, 689 (10th Cir. 2007)* .

(n57)Footnote 15. *Tomlin v. Holecek, 150 F.R.D. 628, 631 (D. Minn. 1993)* .

(n58)Footnote 16. *Sadler v. Acker, 263 F.R.D. 333, 339 (M.D. La. 2009)* (some courts permit party's attorney or doctor to be present on showing of good cause).

(n59)Footnote 17. *See Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984)* .

(n60)Footnote 18. *Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609-610 (C.D. Cal. 1995)* .

(n61)Footnote 19. *Fed. R. Civ. P. 35(a)(2)(B).*

(n62)Footnote 20. *Landry v. Green Bay & Western R.R. Co., 121 F.R.D. 400, 401 (E.D. Wis. 1988)* .

(n63)Footnote 21. *Matthews v. Watson, 123 F.R.D. 522, 523 (E.D. Pa. 1989)* .

(n64)Footnote 22. *Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 107 (E.D.N.C. 1993)* .

(n65)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 35.12* (Matthew Bender 3d ed.).

(n66)Footnote 1. *Fed. R. Civ. P. 35(b)(1).*

(n67)Footnote 2. *Fed. R. Civ. P. 35(b)(3).*

(n68)Footnote 3. *Fed. R. Civ. P. 35(b)(1),(3)*; *see FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1043-1044 (E.D. Cal. 2002)* .

(n69)Footnote 4. *Fed. R. Civ. P. 35(b)(5).*

(n70)Footnote 5. *Shapiro v. Win-Sum Ski Corp., 95 F.R.D. 38, 38-39 (W.D.N.Y. 1982)* .

(n71)Footnote 6. *See Fed. R. Civ. P. 26(c)(1)(G).*

(n72)Footnote 7. *See Swift v. Swift, 64 F.R.D. 440, 443 (E.D.N.Y. 1974)* .

(n73)Footnote 8. *Fed. R. Civ. P. 35(b)(2)*; *Sadler v. Acker, 263 F.R.D. 333, 339 (M.D. La. 2009)* .

(n74)Footnote 9. *Fed. R. Civ. P. 35(a)(2)(B)*; *see Herrera v. Lufkin Indus., 474 F.3d 675, 689 (10th Cir. 2007)* ; *see also Waggoner v. Ohio Cent. R.R., Inc., 242 F.R.D. 413, 413-414 (S.D. Ohio 2007)* (if court's examination order is not followed, court may exclude examiner's testimony at trial).

(n75)Footnote 10. *Fed. R. Civ. P. 35(b)(5)*.

(n76)Footnote 11. *Salvatore v. American Cyanamid Co., 94 F.R.D. 156, 157-158 (D.R.I. 1982)* ; *see Fed. R. Civ. P. 37(b)(2)(A)*.

(n77)Footnote 12. *Fed. R. Civ. P. 35(b)(4)*.

(n78)Footnote 13. *Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970)* .

(n79)Footnote 14. *Fed. R. Civ. P. 35(b)(6)*.

(n80)Footnote 15. *See Fed. R. Civ. P. 35(b)(3)*, Committee Note to 1970 Amendments.

(n81)Footnote 16. *See Fed. R. Civ. P. 26(b)(1)* (general scope of discovery); *Burlage v. Haudenshield, 42 F.R.D. 397, 398 (N.D. Iowa 1967)* (defendant permitted to depose plaintiff's physicians when privilege had been waived or would have to be waived at trial in order to prove damages; defendant not required to request independent examination under *Fed. R. Civ. P. 35*).

(n82)Footnote 17. *Favale v. Roman Catholic Diocese of Bridgeport, 235 F.R.D. 553, 557 (D. Conn. 2006)* .

(n83)Footnote 18. *Nicholas v. Wyndham Int'l, Inc., 218 F.R.D. 122, 124 (D.V.I. 2003)* .

(n84)Footnote 19. *Underwood v. Fitzgerald, 229 F.R.D. 548, 550 (M.D. Tenn. 2005)* .

(n85)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 35.11* (Matthew Bender 3d ed.).

(n86)Footnote 1. *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*.

(n87)Footnote 2. *See Fed. R. Civ. P. 37(b)(2)(A)(v)*; *Schempp v. Reniker, 809 F.2d 541, 542 (8th Cir. 1987)* .

(n88)Footnote 3. *Fed. R. Civ. P. 37(b)(2)(A)(vii)*.

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure § 15.28

§ 15.28 Requests For Admissions

[1] Purpose Is to Obtain Admissions by Opposition of Undisputed Facts n*

[a] Admissions Simplify Litigation and Save Expense

A request for admission is a request in writing served on a party to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: facts, the application of law to fact, or opinions about either facts or their application; n1 or the genuineness of any described documents. n2

If a fact, opinion, or the genuineness of a document is formally admitted under Rule 36, the matter is conclusively established, unless the court permits that the admission to be withdrawn or amended. n3 When a matter is admitted, the matter is set aside in the discovery process, and the party requesting an admission is entitled to rely on the conclusiveness of it. This process is extremely useful in expediting and simplifying litigation. Any matter admitted under Rule 36 is comparable to an admission in pleadings or a stipulation drafted by an attorney for use at trial, rather than to an evidentiary admission of a party, because a Rule 36 admission may not be rebutted by contrary testimony unless it is withdrawn or amended. n4 Requests for admission can save litigants considerable time and expense by avoiding the necessity to prove facts at trial, n5 or to establish certain facts through more complex and costly discovery procedures, such as interrogatories, depositions, and requests for the production of documents. n6

[b] Effect of Admissions

If a fact, opinion, or the genuineness of a document is formally admitted under Rule 36, the matter is conclusively established, unless the court permits the admission to be withdrawn or amended. n7 When a matter is admitted, the matter is set aside in the discovery process, and the party requesting an admission is entitled to rely on the conclusiveness of that matter. Any matter admitted under Rule 36 is comparable to an admission in pleadings or a stipulation drafted by an attorney for use at trial, rather than to an evidentiary admission of a party, because a Rule 36 admission may not be rebutted by contrary testimony unless it is withdrawn or amended. n8

An admission is binding only on the specific party to whom the request is directed. n9 Furthermore, an admission resulting from a party's failure to answer a request for admissions binds the non-responding party but not coparties on

the same side. n10 An admission made under Rule 36 is conclusive for the purpose of the matter admitted in the pending action only, n11 and may not be used as an admission for any other purpose or in any other proceeding. n12 Consequently, admissions made in accordance with Rule 36 have no collateral estoppel effect. n13

[2] Comparison With other Discovery Methods n*

The general limitations and deadlines applicable to other discovery devices also apply to requests for admission. n1 However, a request for an admission is different from other discovery devices because, rather that eliciting facts and evidence relevant to the claims and defenses in the case, the purpose of the request for admission is to have the other party acknowledge facts about which there is no real dispute. n2 Consequently, requests for admission may not be used instead of another discovery method to circumvent that method's particular requirements, such as the numerical limit of interrogatories. n3 Furthermore, requests for admission should not be used as a substitute for other discovery tools that are designed to elicit facts, gather information, or to obtain documents. n4 Conversely, pretrial stipulations should not be relied on as substitutes for requests for admission. n5

[3] Requirements for Requests for Admissions n*

[a] Requests Must Relate to Facts, Application of Law to Fact, Opinions, or Genuineness of Documents

A party may serve on any other party a written request to admit the truth of any matters within the scope of Rule 26(b)(1) relating to:

1. Facts or opinions about facts. n1 Therefore, requests may encompass all of the fact issues in the action. n2 Similarly, requests for admission and the resulting admissions may relate to the ultimate facts of a case. n3 Thus, an admission may serve as proof that is dispositive of an entire action, claim or defense, n4 admissions alone may be sufficient independent grounds to support a summary judgment. n5

2. Application of law to the facts or opinions about application of law to the facts. n6 A request may not be for a pure opinion of law. n7 Furthermore, requests for admissions of law unrelated to the facts of the case are not authorized by Rule 36, and a request for an admission based on an application of law to a hypothetical set of facts is improper. n8 On the other hand, because it relates to the facts of the current action, a party may be requested to admit what its obligations are as a matter of law. n9

3. The genuineness of any described documents. n10 Such requests may be particularly useful in helping parties determine which documents to be introduced at trial will present foundational problems and which will not. n11 A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. n12

[b] Requests Must Be Simple and Direct

Each request for admission must be stated separately n13 and must be simple and direct. n14 A party need not admit or deny a request that consists of statements that are vague or ambiguous. n15 The requesting party bears the burden of drafting the request clearly and specifically so that the responding party may simply admit or deny the statement. n16

[c] Number of Requests May Be Limited by Local Rule or Court Order

The number of requests for admission may be limited by local rule or by order of court. n17 Even in the absence of a local rule, the court is required to limit the number and length of requests for production if: the request is cumulative or duplicative or obtainable from some other source, the requesting party has had other opportunity to obtain the information sought, or if answering the request would be unduly burdensome or expensive. n18

[d] Signing and Service of Requests

A request for admission must be signed by the attorney for the requesting party or, if the requesting party is not represented by counsel, then by the party. Additionally, the attorney or the pro se party must give his or her address. n19 The signed request for admission must be served on the party from whom the admission is requested and copies of the request must be sent to all other parties. n20 Service of requests for admission generally may not be served before parties' Rule 26(f) discovery conference. Unless authorized by court order or by agreement of parties, a party may not seek discovery from any source until the parties have held their discovery plan conference as set forth in Rule 26(f). n21

[4] Requirements for Responses to Requests n*

[a] Responses Must Be Timely

The party to whom a request for admission has been directed must ascertain the truth of the request, n1 if the ability to do so is reasonably within the power of the responding party. n2 Then, the party must serve a written response on the party requesting the admission within 30 days of service of the request for admission or within any other time agreed to by the parties in writing or specified by the court. n3

[b] Content of Responses

Each response to a request for admission must respond to the separately stated matter in the request, n4 and must be signed by the party or its attorney, n5 whether it consists of an admission, denial, objection, qualification, or a mix of the possible responses. The reasons for any objection or an inability to respond must be set forth in the response. n6 An objection to any part of the request does not excuse the responding party from properly responding to the other parts of the request to which the responding party has raised no specific objection. n7 Unless the party is avoiding the response, for example by a request for extension of time, the response may consist of any of the following or a combination of any of the following:

1. Admissions. n8

2. Denials. n9

3. Objections. n10

4. Statement of lack of information or knowledge. n11

5. Motion for protective order. n12

The court has discretion pursuant to Rules 36(a)(3) and 37(c)(2) to award sanctions in favor of the requesting party if it finds that a party has failed to respond properly to requests for admissions. Sanctions may be in the form of fees and costs, or the court may deem the subject matter admitted. n13

[c] Authorized Types of Responses

[i] Admission

If the responding party determines that a statement in a request is true, a simple admission is all that is required by the rule. n14 An explicit admission requires no further explanation, and it is not necessary to produce any evidence or authority for an admission. n15 If the responding party cannot simply admit the matter stated in the request without some explanation or qualification, the responding party may admit with qualification. n16 An admission may require qualification when the request is true but the responding party cannot in good faith admit it without some necessary

contextual explanation to remedy any improper inferences. The responding party may qualify the response, or specify so much as is true and qualify the remainder. n17 A party may in good faith qualify its answer or deny only part of a requested matter, but it must state specifically what part of the request is true, and deny or qualify the rest. n18 Another way to admit a request for admission is simply to refrain from answering, because any request not responded to within 30 days or within any other time agreed to by parties or established by the court is deemed admitted. n19

[ii] Denial

A responding party may choose to deny completely a request for admissions. Alternatively, a responding party may choose not to deny the request completely but to deny only part of the request. The responding party may then, in good faith, qualify its answer or deny only part of a requested matter. In that case, the responding party must state specifically what part of the request is true, and deny only the rest. n20

Regardless whether a partial or a complete denial is intended by the responding party, the same standards and requirements of Rule 36 apply. The partial or complete denial must be set forth specifically and the response must fairly meet the substance of the requested admission. n21 These requirements are strictly construed n22 and failure to comply with the standards may warrant sanctions. n23

[iii] Objection

An objecting party must serve on the requesting party a written objection, addressed to the matter, specifically stating the reason or reasons for the objection, n24 within 30 days of service of the request, or within any other time determined by the parties or by the court. n25 A responding party may object to either the form n26 or the substance of the request. n27 If the responding party responds to the request without objecting to it, or before attempting to object to it, any objection is waived. n28

If a responding party objects in good faith to only a part of a matter, the answer must specify the part admitted and object to the rest. n29 Courts will sustain objections to the invalid request and direct the responding party to respond to the valid request. n30.

A responding party may validly object to a request for admissions if the requested matter goes beyond the scope of discovery, as set forth in Rule 26(b)(1). n31 An objection may also be based on the responding party's claim that the information sought is confidential or involves privileged matters, such as matters within the attorney-client privilege, the privilege against self-incrimination, or the government privilege. n32

[iv] Lack of Information or Knowledge

The answering party may assert lack of knowledge or information as a reason for failing to admit or deny provided that the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny the statement in the request. n33 The responding party may not simply respond that it lacks information or knowledge regarding the matter; it must make the statement that it has made a reasonable inquiry. n34 Furthermore, the party must show that the party did in fact make a reasonable inquiry. n35

[v] Motion for Protective Order

A party on whom a request for admission has been served may challenge a request for admission on the grounds, for example, that it is oppressive or would cause undue embarrassment, burden, or expense by filing with the court a motion for a protective order. n36 Although Rule 36 does not specifically refer to the filing of a motion for a protective order, Rule 26(c) applies to all discovery under the federal rules, and in this respect, requests for admissions are treated as normal discovery. For example, a responding party may file a motion for a protective order when the requests are voluminous or so poorly framed that it is burdensome to ascertain what is in dispute. Then the court must balance the

legitimate needs of the requesting party with the claim of oppression made by the responding party. The court may make any protective order that justice requires based on good cause shown. n37

[5] Withdrawal and Amendment of Admissions n*

The court may permit the withdrawal or amendment of an admission or other response, subject to the provisions of Rule 16. n1 There are two requirements: first, the court must determine that the presentation of the merits of the action will be promoted by the withdrawal or amendment, and second, that the party who obtained the admission or response will not be prejudiced in maintaining the action or its defense on the merits if the withdrawal or amendment is allowed. n2

The party moving for the withdrawal or amendment must convince the court that allowing the withdrawal or amendment will promote the presentation of the merits of the case. n3 On the other hand, the party who obtained the admission has the burden to show the court that it will be prejudiced if the amendment or withdrawal is allowed. n4 Prejudice from the withdrawal or amendment of an admission is more likely when the motion for withdrawal of the admission is made once trial has begun. Therefore, after trial has begun, the district judge may not permit withdrawal or amendment of a Rule 36 admission unless failure to do so would cause manifest injustice. n5

Some courts have found that a motion to file a late response to a request for admissions is the equivalent of a motion to file an amended response to a request, and have therefore held that a motion to file a late response must be governed by the same two-part test discussed above. n6

[6] Determination of Sufficiency by Court n*

[a] Challenge to Sufficiency of Responses

A party that has requested admissions may file a motion that asks the court to determine the sufficiency of the responding party's responses. n1 This is the equivalent of a motion asking a court to deem a matter admitted. n2 In the absence of such a motion, the sufficiency of a response does not come before the court. The party objecting to the request or the party opposing the challenge to the sufficiency of the response has the burden of persuasion to show the court that the objection to the request is warranted or that the answer to the request is sufficient. Unless the court determines that an objection is justified, it must order that an answer be served. On the other hand, if the court determines that an answer does not comply with the requirements of Rule 36, it may order that the matter is deemed admitted or that an amended answer must be served. n3 On the motion, the court may order that the losing party pay the winning party's fees and expenses in accordance with Rule 37(a)(5), n4 because the provisions of Rule 37 apply to the award of expenses incurred in relation to the motion. n5

[b] Challenge to Sufficiency of Objection to Request for Admissions

A party that has requested admissions may file a motion asking the court to determine the merit of the responding party's objection to a request for admission and ask for the court's ruling that the objection is improper. If the court determines that the responding party's objection to a request for admission is improper because it does not comply with Rule 36, the court may order that the matter is deemed admitted or that an amended answer be served, or it may order the matter to be deemed admitted. The court also has the alternative to defer its determination on the issue until the pretrial conference or some other time. n6 The party losing on the motion may be required to pay the winning party's fees and expenses in accordance with Rule 37(a)(5), n7 because the provisions of Rule 37 apply to the award of expenses incurred in relation to a Rule 36 motion. n8

[c] Challenge to Sufficiency of Denial or Statement of Inability to Respond

A requesting party may move the court to determine whether the responding party's denial is sufficient, or whether the responding party's explanation for an inability to admit or deny is adequate. n9 If the court determines that an answer is

insufficient and that it does not comply with the rule, the court may order that the matter be deemed admitted, reasoning that an insufficient response is no response at all, or the court may order that an amended answer be served. n10 If the court determines that an answer is not objectionable, that answer may be used in the pending action. If the court orders the matter deemed admitted, the admission may be conditioned on the party's failure to file a proper response within a certain time. n11 On the motion, the court may order that the losing party pay the winning party's fees and expenses in accordance with Rule 37(a)(5), n12 because the provisions of Rule 37 apply to the award of expenses incurred in relation to the motion. n13

[7] Enforcement of Obligation to Admit

If a party fails to admit what is requested under Rule 36, and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. n1 The court must make that order unless one of the following is true:

1. The request was held objectionable under Rule 36(a); n2

2. The admission requested was not of substantial importance; n3

3. The party failing to admit had a reasonable ground to believe that it might prevail on the matter; n4 or

4. There was other good reason for the failure to admit. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 34.02*-34.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 36(a)(1)(A).*

(n3)Footnote 2. *Fed. R. Civ. P. 36(a)(1)(B)*; *see Christian v. Janed Enters., 2009 U.S. Dist. LEXIS 52695, at *6 (M.D. Ga. June 23, 2009)* .

(n4)Footnote 3. *Fed. R. Civ. P. 36(b)*; *see* [5], *below.*

(n5)Footnote 4. *Armour v. Knowles, 512 F.3d 147, 154 (5th Cir. 2007)* ; *see Fed. R. Civ. P. 36(b).*

(n6)Footnote 5. *See Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir.1966)* .

(n7)Footnote 6. *Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3d Cir. 1992)* .

(n8)Footnote 7. *Fed. R. Civ. P. 36(b)*; *see* [5], *below.*

(n9)Footnote 8. *Armour v. Knowles, 512 F.3d 147, 154 (5th Cir. 2007)* ; *see Fed. R. Civ. P. 36(b).*

(n10)Footnote 9. *See Fed. R. Civ. P. 36(a)(3), 36(b).*

(n11)Footnote 10. *Riberglass v. Techni-Glass Indus., Inc., 811 F.2d 565, 566 (11th Cir. 1987)* .

(n12)Footnote 11. *Fed. R. Civ. P. 36(a)(1).*

(n13)Footnote 12. *Fed. R. Civ. P. 36(b).*

(n14)Footnote 13. *See In re Leon Pizante, 186 B.R. 484, 489-490 (B.A.P. 9th Cir. 1995) , aff'd without opinion,*

107 F.3d 878 (9th Cir. 1997) .

(n15)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.02* (Matthew Bender 3d ed.).

(n16)Footnote 1. *See Fed. R. Civ. P. 36(a)(1)* (general scope of discovery of Rule 26(b)(1) applies to admissions).

(n17)Footnote 2. *Armour v. Knowles, 512 F.3d 147, 154 (5th Cir. 2007)* .

(n18)Footnote 3. *See Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc., 2007 U.S. Dist. LEXIS 80182, at *21-*22 (S.D.N.Y. 2007)* .

(n19)Footnote 4. *See Safeco Ins. Co. of Am. v. Rawstron, 181 F.R.D. 441, 446 (C.D. Cal. 1998)* (citing **Moore's Federal Practice**).

(n20)Footnote 5. *United States v. Watchmakers of Switzerland Info. Ctr., Inc., 25 F.R.D. 346, 347 (S.D.N.Y. 1960)* .

(n21)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.10* (Matthew Bender 3d ed.).

(n22)Footnote 1. *Fed. R. Civ. P. 36(a)(1)(A).*

(n23)Footnote 2. *Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973)* .

(n24)Footnote 3. *Cereghino v. The Boeing Company, 873 F. Supp. 398, 403 (D. Or. 1994)* .

(n25)Footnote 4. *In re Niswonger, 116 B.R. 562, 566 (Bankr. S.D. Ohio 1990)* .

(n26)Footnote 5. *Dukes v. South Carolina Ins. Co., 770 F.2d 545, 548-549 (5th Cir. 1985)* ; *Universal City Studios Productions LLP v. Bigwood, 441 F. Supp. 2d 185, 187 (D. Me. 2006)* .

(n27)Footnote 6. *Fed. R. Civ. P. 36(a)(1)(A).*

(n28)Footnote 7. *United States v. Petroff-Kline, 557 F.3d 285, 293 (6th Cir. 2009)* (citing **Moore's Federal Practice**).

(n29)Footnote 8. *Abbott v. United States, 177 F.R.D. 92, 93 (N.D.N.Y. 1997)* .

(n30)Footnote 9. *Langer v. Monarch Life Ins. Co., 966 F.2d 786, 802 (3d Cir. 1992)* .

(n31)Footnote 10. *Fed. R. Civ. P. 36(a)(1)(A).*

(n32)Footnote 11. *Berry v. Federated Mut. Ins. Co., 110 F.R.D. 441, 443 (N.D. Ind. 1986)* .

(n33)Footnote 12. *Fed. R. Civ. P. 36(a)(2).*

(n34)Footnote 13. *Fed. R. Civ. P. 36(a)(2).*

(n35)Footnote 14. *United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 967-968 (3d Cir. 1988)* ; *Sommerfield v. City of Chicago, 251 F.R.D. 353, 355 (N.D. Ill. 2008)* .

(n36)Footnote 15. *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* (citing **Moore's Federal Practice**).

(n37)Footnote 16. *Safeco of America v. Rawstron, 181 F.R.D. 441, 447 (C.D. Cal. 1998)* .

(n38)Footnote 17. *See Fed. R. Civ. P. 26(b)(2)(A)*; *see, e.g.,* S.D. Ohio LR 36.1 (limited to 40); E.D. Wash. LR 36.1 (limited to 15).

(n39)Footnote 18. *See Fed. R. Civ. P. 26(b)(2)(C)(i)*.

(n40)Footnote 19. *Fed. R. Civ. P. 26(g)(1)*.

(n41)Footnote 20. *Fed. R. Civ. P. 5(a)(1)(C)*, *36(a)(1)*.

(n42)Footnote 21. *Fed. R. Civ. P. 26(d)(1)*, *(f)*.

(n43)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.11* (Matthew Bender 3d ed.).

(n44)Footnote 1. *See Fed. R. Civ. P. 36(a)(1)*.

(n45)Footnote 2. *Johnson Intern. Co. v. Jackson Nat'l Life Ins. Co., 812 F. Supp. 966, 987 (D. Neb. 1993)* , *aff'd on other grounds, 19 F.3d 431 (1993)* .

(n46)Footnote 3. *Fed. R. Civ. P. 36(a)(1)*; *see Fed. R. Civ. P. 29(b)* (stipulation extending time must be approved by court if it would interfere with time set for completing discovery, for hearing motion, or for trial).

(n47)Footnote 4. *See Fed. R. Civ. P. 36(a)(2)*.

(n48)Footnote 5. *See Fed. R. Civ. P. 36(a)(3)*.

(n49)Footnote 6. *See Fed. R. Civ. P. 36(a)(5)*.

(n50)Footnote 7. *Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139, 140 (E.D.N.Y. 1957)* .

(n51)Footnote 8. *See* [c][i], *below*.

(n52)Footnote 9. *See* [c][ii], *below*.

(n53)Footnote 10. *See* [c][iii], *below*.

(n54)Footnote 11. *See* [c][iv], *below*.

(n55)Footnote 12. *See* [c][v], *below*.

(n56)Footnote 13. *See Fed. R. Civ. P. 37(c)(2)*.

(n57)Footnote 14. *Fed. R. Civ. P. 36(a)(4)*.

(n58)Footnote 15. *Washington State Dep't of Transp. v. Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995)* .

(n59)Footnote 16. *Fed. R. Civ. P. 36(a)(4)*.

(n60)Footnote 17. *Nat'l Semiconductor Corp. v. Ramtron Int'l Corp., 265 F. Supp. 2d 71, 73 (D.D.C. 2003)* .

(n61)Footnote 18. *Fed. R. Civ. P. 36(a)(4)*.

(n62)Footnote 19. *Fed. R. Civ. P. 36(a)(3)*.

(n63)Footnote 20. *Fed. R. Civ. P. 36(a)(4).*

(n64)Footnote 21. *Fed. R. Civ. P. 36(a)*; *see Panara v. Hertz Penske Truck Leasing, Inc., 122 F.R.D. 14, 17 (E.D. Pa. 1988)* (ambiguous denial insufficient).

(n65)Footnote 22. *United States v. Jefferson Trust & Sav. Bank, 31 F.R.D. 137, 139 (S.D. Ill. 1962) .*

(n66)Footnote 23. *Martin v. Brown, 151 F.R.D. 580, 594 (W.D. Pa. 1993)* (when responding to requests for admissions, failure to meet requirements is ground for sanctions); *see also Fed. R. Civ. P. 26(g)(1)(B), 37(c)(2).*

(n67)Footnote 24. *Fed. R. Civ. P. 36(a)(5).*

(n68)Footnote 25. *Fed. R. Civ. P. 36(a)(3).*

(n69)Footnote 26. *Hesselbine v. Wedel, 44 F.R.D. 431, 433 (W.D. Okla. 1968) .*

(n70)Footnote 27. *Hesselbine v. Wedel, 44 F.R.D. 431, 433 (W.D. Okla. 1968)* (objection to request based on privilege).

(n71)Footnote 28. *Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 (W.D. Mo. 1973)* (objection waived by answering request for admissions).

(n72)Footnote 29. *See Fed. R. Civ. P. 36(a)(3).*

(n73)Footnote 30. *See also English v. Cowell, 117 F.R.D. 132, 135 (C.D. Ill. 1986) .*

(n74)Footnote 31. *Fed. R. Civ. P. 36(a)(1).*

(n75)Footnote 32. *United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996) .*

(n76)Footnote 33. *Fed. R. Civ. P. 36(a)(4).*

(n77)Footnote 34. *Han v. Food and Nutrition Serv., 580 F. Supp. 1564, 1566 (D.N.J. 1984) .*

(n78)Footnote 35. *In re Sweeten, 56 B.R. 675, 678 (Bankr. E.D. Pa. 1986)* (response inadequate if actual showing of reasonable inquiry not made).

(n79)Footnote 36. *See, e.g., Fed. R. Civ. P. 26(c)(1)(A).*

(n80)Footnote 37. *See Fed. R. Civ. P. 36(c)(1).*

(n81)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 34.13* (Matthew Bender 3d ed.).

(n82)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see Fed. R. Civ. P. 16(e)* (controlling modification of pretrial order to prevent manifest injustice).

(n83)Footnote 2. *Fed. R. Civ. P. 36(b).*

(n84)Footnote 3. *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995) .*

(n85)Footnote 4. *Perez v. Miami-Dade County, 297 F.3d 1255, 1266 (11th Cir. 2002)* (court is more likely to find prejudice when party seeks to withdraw its admissions once trial has already begun; mere inconvenience in having to gather evidence does not rise to required level of prejudice).

(n86)Footnote 5. *See American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991)* .

(n87)Footnote 6. *See Chancellor v. City of Detroit, 454 F. Supp. 2d 645, 666 (E.D. Mich. 2006)* .

(n88)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, § 36.12* (Matthew Bender 3d ed.).

(n89)Footnote 1. *Fed. R. Civ. P. 36(a)(6)*.

(n90)Footnote 2. *Szatanek v. McDonnell Douglas, 109 F.R.D. 37, 41 (W.D.N.Y. 1985)* .

(n91)Footnote 3. *Fed. R. Civ. P. 36(a)(6)*.

(n92)Footnote 4. *See Fed. R. Civ. P. 37(a)(5)*.

(n93)Footnote 5. *Fed. R. Civ. P. 36(a)(6)*.

(n94)Footnote 6. *Fed. R. Civ. P. 36(a)(6)*.

(n95)Footnote 7. *See Fed. R. Civ. P. 37(a)(5)*.

(n96)Footnote 8. *Fed. R. Civ. P. 36(a)(6)*.

(n97)Footnote 9. *Fed. R. Civ. P. 36(a)(6)*.

(n98)Footnote 10. *See Fed. R. Civ. P. 36(a)(6)*; *United States v. Kenealy, 646 F.2d 699, 702-703 (1st Cir. 1981)* .

(n99)Footnote 11. *Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981)* .

(n100)Footnote 12. *Fed. R. Civ. P. 36(a)(6)*; *see Fed. R. Civ. P. 37(a)(5)(a)*.

(n101)Footnote 13. *Fed. R. Civ. P. 36(a)(6)*.

(n102)Footnote 1. *Fed. R. Civ. P. 37(c)(2)*.

(n103)Footnote 2. *Fed. R. Civ. P. 37(c)(2)(A)*.

(n104)Footnote 3. *Fed. R. Civ. P. 37(c)(2)(B)*.

(n105)Footnote 4. *Fed. R. Civ. P. 37(c)(2)(C)*.

(n106)Footnote 5. *Fed. R. Civ. P. 37(c)(2)(D)*.

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
II. RULES FOR PARTICULAR METHODS OF DISCOVERY

2-15 Moore's Manual--Federal Practice and Procedure §§ 15.29-15.39

[Reserved]

§§ 15.29-15.39[Reserved]

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
III. MOTIONS AND SANCTIONS RELATED TO DISCOVERY VIOLATIONS OF CIVIL RULES

2-15 Moore's Manual--Federal Practice and Procedure § 15.40

§ 15.40 Motions to Compel Mandatory Disclosures or Discoveryn*

[1] Failure to Make Mandatory Disclosures

Rule 26(a) requires extensive mandatory, automatic disclosures during pretrial of three types of information:

1. General information about persons with knowledge; documents; damages claims; and insurance; n1

2. Information about retained expert witnesses, n2 and

3. Information about evidence that the parties contemplate using at trial. n3

Parties must make these three types of disclosures unless they have stipulated otherwise or the court orders otherwise. n4 If a party fails to make any of these three types of mandatory disclosures pursuant to Rule 26(a), Rule 37(a) authorizes parties to file motions for orders compelling such disclosures and for appropriate sanctions. The court will grant such a motion provided that the party has made a certification that it has failed in a good faith effort to resolve the matter with other parties through negotiations. n5

[2] Failure to Comply With Discovery Requests

Parties may file motions to compel adequate responses to discovery requests when good faith efforts to secure sufficient responses by conferring with the party to whom the discovery probes were directed are unavailing. n1 A motion to compel may be filed not only when a party fails entirely to provide any response, or responds only by objecting and without providing the requested information, but also when a response is provided, but it is at least partially incomplete. n2 The following types of discovery violations justify a motion to compel:

1. A deponent fails to answer a written or oral question propounded pursuant Rule 30 or 31. n3 Generally, an attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege; to enforce a limitation on evidence directed by the court; or to suspend a deposition in order to present a motion under Rule 30(d)(3) to terminate or limit the deposition. n4

2. A corporation or other entity fails to designate a person to testify as a deponent in accordance with Rule 30(b)(6) or 31(a)(4). n5

3. A party fails to answer an interrogatory served in accordance with Rule 33. n6 Absent a court order or a written stipulation extending the time to respond, a party must serve answers or objections to interrogatories within 30 days of being served with the questions. n7

4. A party fails to produce documents and things, or fails to permit an inspection requested pursuant to Rule 34. n8 Absent a court order or a written stipulation extending the period for responding, a party served with a request for production or inspection must serve responses or objections within 30 days after service of the request. n9

[3] Persons Who May File Motions to Compel

If a party fails to make a mandatory disclosure, n1 any other party may move to compel disclosure and for appropriate sanctions. n2 However, for any discovery requests and deposition questions only the party that made the discovery request or propounded the questions has the right to make a motion to compel compliance. n3

[4] Procedural Requirements

[a] Appropriate Court

If a motion to compel discovery or disclosure is directed toward a party, the motion must be filed with the court where the action is pending. n1 If a deposition of a corporate party is taken in another district through an officer, director, managing agent, or some other individual designated by the corporate party, n2 the forum court has the power to order the deponent to answer questions. n3

If a motion to compel discovery is directed toward a nonparty, the motion must be filed in the court in the district where the discovery response will be made or must be produced. n4

[b] Required Certification of Attempt to Resolve Discovery Dispute

Every motion to compel disclosure or discovery must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. n5 The certification requirement has two aspects. n6 First, the movant must state the actual certification, which must specifically convey to the court (1) the names of the parties who conferred or attempted to confer, (2) the manner by which they communicated, (3) the date and time of that communication, (4) specific discovery disputes discussed, and (5) the results of the discussion or an explanation why the parties did not have meaningful discussions. The second aspect is the performance of the good faith attempt to confer, which means that the party must have had or attempted to have had an actual meeting or conference to discuss each contested discovery dispute by a personal, live, two-way communication. n7

[c] Timing of Motion to Compel

The Federal Rules of Civil Procedure impose no specific time limit for a motion to compel disclosures or discovery responses. However, such limits may be imposed by local rules, standing orders, or orders entered by the court in individual cases. The absence of a specific time limit in the federal rules reflects the difficulty of establishing deadlines that would be appropriate in all cases and circumstances. n8 However, case law has established that, at the least, a party seeking discovery must provide sufficient time after a disclosure or discovery response is due to meet and confer with parties from whom discovery has been sought to complete the required informal negotiations to resolve the dispute. n9

On the other hand, a party entitled to discovery or disclosure does not have unlimited time to file a motion to compel,

which may be waived through inaction, particularly if the motion is not filed until the trial has concluded. n10 Courts have considerable discretion in deciding whether motions to compel have been timely filed. In making this determination, courts may take into account many factors, including: n11

1. The length of time in bringing the motion after the date the discovery deadline expired.

2. The length of time that the moving party has known about the discovery.

3. Whether the discovery deadline has been extended.

4. Any explanation for the tardiness or delay in filing the motion to compel.

5. Whether dispositive motions have been scheduled or filed.

6. The age of the litigation case.

7. Whether the delay was tactically inspired, the product of negligence, or was occasioned by good faith efforts to secure the information through negotiations or other discovery tools.

8. Whether the delay in filing the motion is likely to cause prejudice to or impose an undue hardship on any other party.

9. Whether permitting the motion would interfere with the pretrial schedule.

The consequences of failing to bring a timely motion to compel discovery may be significant and, ultimately, may mean that the moving party may not be able to rectify the discovery violation. n12

[d] Notice of Hearing Required

A party must generally make a motion to the court for an order compelling disclosures or discovery on notice to other parties and all affected persons. n13 The notice of the hearing must be served at least 7 days before the date set for the hearing. n14 The notice must comply with the requirements of due process, must be designed to actually communicate the required information, and must afford the noticed party or persons a meaningful opportunity to be heard. n15 To provide useful notice to the opposition, the motion to compel should identify specifically the portions of the responses that are inadequate and briefly explain what is missing or what kind of information would be necessary to make the responses adequate. n16

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.02*-37.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 26(a)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 26(a)(2).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(a)(3).*

(n5)Footnote 4. *Fed. R. Civ. P. 26(a).*

(n6)Footnote 5. *Fed. R. Civ. P. 37(a)(1), (a)(3)(A).*

(n7)Footnote 1. *Fed. R. Civ. P. 37(a)(1), (3)(B).*

(n8)Footnote 2. *Fed. R. Civ. P. 37(a)(4).*

(n9)Footnote 3. *Fed. R. Civ. P. 37(a)(3)(B)(i).*

(n10)Footnote 4. *Fed. R. Civ. P. 30(c)(2).*

(n11)Footnote 5. *Fed. R. Civ. P. 37(a)(3)(B)(ii).*

(n12)Footnote 6. *Fed. R. Civ. P. 37(a)(3)(B)(iii).*

(n13)Footnote 7. *Fed. R. Civ. P. 33(b)(2).*

(n14)Footnote 8. *Fed. R. Civ. P. 37(a)(3)(B)(iv).*

(n15)Footnote 9. *Fed. R. Civ. P. 34(b)(2)(A).*

(n16)Footnote 1. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n17)Footnote 2. *Fed. R. Civ. P. 37(a)(3)(A).*

(n18)Footnote 3. *Fed. R. Civ. P. 37(a)(3)(B), (C).*

(n19)Footnote 1. *Fed. R. Civ. P. 37(a)(2)*; *see Platypus Wear, Inc. v. K.D. Co., 905 F. Supp. 808, 810 (S.D. Cal. 1995)* (motion for order overruling defendant's claim of privilege regarding deposition questions was properly made in district court where action was pending, even though nonparty deponent was resident of another state and was being deposed out of state).

(n20)Footnote 2. *See Fed. R. Civ. P. 30(b)(6).*

(n21)Footnote 3. *Independent Prod. Corp. v. Loew's, Inc., 27 F.R.D. 426, 427 (S.D.N.Y. 1961)* .

(n22)Footnote 4. *Fed. R. Civ. P. 37(a)(2).*

(n23)Footnote 5. *Fed. R. Civ. P. 37(a)(1)*; *see Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1059 (7th Cir. 2000)* .

(n24)Footnote 6. *See Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 170-173 (D. Nev. 1996)* .

(n25)Footnote 7. *Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 170-173 (D. Nev. 1996)* ; *see Naviant Mktg. Solutions, Inc. v. Larry Tucker, Inc., 339 F.3d 180, 186-187 (3d Cir. 2003)* (sending letter to opposition attorney does not constitute conference).

(n26)Footnote 8. *Riley v. United Air Lines, Inc., 32 F.R.D. 230, 232-233 (S.D.N.Y. 1962)* (drafters of federal rules did not see fit to create this burden).

(n27)Footnote 9. *See Fed. R. Civ. P. 37(a)(1).*

(n28)Footnote 10. *Mercy v. County of Suffolk, New York, 748 F.2d 52, 55-56 (2d Cir. 1984)* .

(n29)Footnote 11. *Days Inn Worldwide, Inc., v. Sonia Investments, 237 F.R.D. 395, 397-98 (N.D. Tex. 2006)* .

(n30)Footnote 12. *United States Fidelity & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24, 29 (1st Cir. 1995)* (seeking reversal after unfavorable verdict is not appropriate remedy for parties who uncover discovery violations; motion to compel must occur at time violation occurs).

(n31)Footnote 13. *Fed. R. Civ. P. 37(a)(1)*; *see Fischer v. McGowan, 585 F. Supp. 978, 983 (D.R.I. 1984)* (nonparty deponent is "affected person" entitled to receive notice of motion to compel).

(n32)Footnote 14. *See Fed. R. Civ. P. 6(c)*.

(n33)Footnote 15. *Holcomb v. Allis Chalmers Corp., 774 F.2d 398, 401 (10th Cir. 1985)* .

(n34)Footnote 16. *James N. Pappas & Sons, Inc. v. McDonald's Corp., 21 Fed. R. Serv. 2d 773, 773 (D.D.C. 1976)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
III. MOTIONS AND SANCTIONS RELATED TO DISCOVERY VIOLATIONS OF CIVIL RULES

2-15 Moore's Manual--Federal Practice and Procedure § 15.41

§ 15.41 Court's Determination of and Order for Motions to Compel Discovery or Mandatory Disclosuren*

[1] Court Orders Available

In ruling on a motion to compel discovery or mandatory disclosure, the court may grant the motion completely, n1 deny the motion completely, n2 or grant the motion in part and deny the motion in part. n3 A party faced with a motion to compel discovery or mandatory disclosure who objects to the motion on the ground that it would cause annoyance, embarrassment, oppression, or undue burden or expense, may file a cross-motion for a protective order. n4 Furthermore, courts have authority to enter protective orders on their own initiative, without a motion first being brought by the objecting party. Specifically, if a motion to compel discovery or mandatory disclosure is denied in whole or in part, the court may enter any protective order authorized by Rule 26(c). n5 Additionally, an order granting a motion to compel in part may impose conditions or limitations when the discovery as requested would be unjustifiably burdensome. n6

[2] Factors Considered In Ruling on Motions to Compel

[a] Courts Apply Broader Standard for Discovery Requests Than for Mandatory Disclosures

The standards for ruling on motions to compel discovery are generally the same as the standards for mandatory disclosures under Rule 26(a). Thus, the court may compel either initial disclosures or general discovery when the matter in question involves information that is relevant to the claim or defense of any party. n1 With respect to mandatory disclosures, Rule 26(a) sets forth specific criteria for identifying the information that parties are obligated to disclose, absent a contrary stipulation or court order, including that the matter is used to support particular claims or defenses. n2 For matters of general discovery, the court has the option to expand discovery to any matters that are relevant to the subject matter involved in the action. n3

[b] Standard Applicable for Discovery Request Only

In ruling on a motion to compel discovery, the court's first determination is whether the information sought falls within the broad boundaries of the relevance standard, n4 which makes information discoverable if: (1) the information is not privileged, (2) the information is relevant to the claim or defense of any party, and (3) the relevant information, if not admissible in evidence, appears reasonably calculated to lead to the discovery of admissible evidence. n5 For good

cause, the court may expand the parameter of discoverable information to information that is relevant to the subject matter involved in the action, rather than merely relevant to a claim or defense. Thus, information is discoverable if either: (1) the information is relevant to claims or defenses or (2) there is "good cause" for the information and it is relevant to the subject matter of the action. This rule was designed to involve the court more actively in controlling the breadth of sweeping or contentious discovery. n6

A motion to compel discovery generally will be denied if the materials sought are privileged or protected by the work product doctrine, irrespective of whether the materials fall within the broad definition of relevance. n7 A party resisting discovery on the ground that the material sought is privileged or constitutes work product bears the burden of proving that the asserted privilege or protection attaches. n8

A court may deny a motion to compel discover under the "proportionality test," even if the information requested is relevant and not privileged or work product, n9 if the party opposing discovery establishes any of the following:

1. The discovery sought is unreasonably cumulative or duplicative; n10

2. The discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive; n11

3. The party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought, n12 or

4. The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. n13

The court may also deny a motion to compel discovery in two other situations: (1) if the propounding party's position was not warranted under existing law and could not be supported by good faith argument for modification of existing law; n14 or (2) the motion was filed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. n15

[3] Court Order of Expense Shifting Sanctions

[a] Presumption in Favor of Imposition of Expense Shifting Sanctions

An "expense shifting sanction" is an order of the court on a motion to compel which imposes the reasonable expenses incurred in the motion by the winning party, including attorney's fees, on the opposition party. When a party prevails on a motion to compel disclosures or discovery, there is a rebuttable presumption that expense shifting sanctions should be imposed on the party that lost the motion. n1 If the motion to compel is granted in part and denied in part, the court may apportion expenses among the parties in a just manner. n2

If a motion to compel is granted, the nonmovant may rebut the presumption in favor of expense shifting sanctions in several ways: by demonstrating that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action; n3 by showing that the opposing party's nondisclosure, response, or objection was substantially justified; n4 or by showing other circumstances make an award of expenses unjust. n5

If a motion to compel is denied, the movant may rebut the presumption that expense shifting sanctions be imposed against the movant by demonstrating that the making of the motion was substantially justified or other circumstances make an award of expenses unjust. n6

[b] No Sanctions if Unsuccessful Position Was Substantially Justified

A unsuccessful party to a motion to compel may rebut the presumption in favor of expense shifting sanctions by demonstrating that its position was substantially justified. n7 The Supreme Court has stated that the substantial justification standard is met when a party demonstrates that the dispute about the matter was genuine, meaning that reasonable lawyers could disagree about the appropriateness of the disputed position. n8

The substantial justification standard is objective, that is, whether a hypothetical reasonable attorney would engage in the dispute if confronted with the circumstances presented in the particular case. n9 Because the standard is objective reasonableness, a prevailing party may secure an expense sanction award without proving that the losing party acted in bad faith, and proof by the losing party that it acted in subjective good faith is not sufficient to defeat a request for sanctions. n10

[c] Other Circumstances Making Award of Expense Shifting Sanctions Unjust

An unsuccessful party on a motion to compel may rebut the presumption in favor of expense shifting sanctions by establishing that other circumstances make an award of expenses unjust, n11 for example when the prevailing party has acted unjustifiably. n12

A court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n13 This provision restricts only the imposition of "sanctions." It does not prevent a court from taking other action to manage discovery. For example, a court may order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or other substitutes or alternatives for the lost information. n14

[d] Persons Subject to Expense Shifting Sanctions

The court may impose expense shifting sanctions against both attorneys or parties who are responsible for taking the position that the court rejected when it ruled on a motion to compel, n15 and attorneys may not avoid sanction by shifting responsibility to their clients. n16 On the other hand, clients who are entirely responsible for providing clearly inadequate disclosures or discovery responses may not blame their attorneys. When the court apportions fault between attorney and client, the apportionment is committed to the sound discretion of the trial court. n17

[e] Protective Order Available When Motion Denied or Granted in Part and Denied in Part

If a motion to compel discovery or disclosure is denied, the court may issue protective orders authorized under Rule 26(c). n18 Expense shifting sanctions may be awarded in connection with expenses for the motion for a protective order itself. n19

If a motion to compel discovery or disclosure is granted in part and denied in part, the court also may enter any protective order authorized by Rule 26(c), as well as apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. n20 When a motion for an order to compel is granted in part and denied in part and there is a determination that many of the discovery objections were substantially justified, courts frequently refuse to award expense shifting sanctions to either party. n21

[f] Party May Not Be Sanctioned Without Opportunity to Be Heard

Before imposing expense shifting sanctions on a party who unsuccessfully made or opposed a motion to compel discovery or mandatory disclosures, the court must afford the persons or parties to be sanctioned an opportunity to be heard. n22 Courts may comply with this requirement either by holding an oral hearing on adequate notice, or by considering written submissions from the affected parties. n23

[g] Court Has Discretion to order Reasonable Expenses Incurred in Motion

Sanctions imposed against a party or attorney responsible for taking a position that the court rejected when ruling on a motion to compel are limited to the reasonable expenses incurred in connection with the motion, including attorney's fees. n24 Such expenses include attorney's fees incurred in preparing the motion for expense shifting sanctions itself, n25 as are expenses of defending on appeal an award of expense shifting sanctions. n26

The court has discretion to assess the reasonableness of the hours spent and rates charged in connection with a request for expense shifting sanctions. Most courts use the "lodestar formula" to compute attorney's fees as part of expense shifting sanctions, although not all of them articulate it as such. Under this formula, the number of hours spent by the attorneys is multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area. The party seeking reimbursement bears the burden of proving the hours spent and the prevailing rates charged. The lodestar figure may be increased or reduced as a result of consideration of a number of different factors, including the complexity of the issues involved, and the perceived skill and efficiency of counsel. n27

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.20*-37.23 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 37(a)(5)(B).*

(n3)Footnote 2. *Fed. R. Civ. P. 37(a)(5)(A).*

(n4)Footnote 3. *Fed. R. Civ. P. 37(a)(5)(C).*

(n5)Footnote 4. *See Fed. R. Civ. P. 26(c)(1).*

(n6)Footnote 5. *See Fed. R. Civ. P. 37(a)(4)(B),(C)*; *see also Fed. R. Civ. P. 26(c)(1), (2).*

(n7)Footnote 6. *See Fed. R. Civ. P. 26(c)(2).*

(n8)Footnote 1. *Compare Fed. R. Civ. P. 26(a)(1)(A)(i), (ii) with Fed. R. Civ. P. 26(b)(1).*

(n9)Footnote 2. *Fed. R. Civ. P. 26(a)(1)(A)(i).*

(n10)Footnote 3. *Fed. R. Civ. P. 26(b)(1).*

(n11)Footnote 4. *Oxford Assocs. Real Estate, L.P. v. TSI Soc'y Hill, Inc., 2006 U.S. Dist. LEXIS 76450, at *6 (E.D. Pa. 2006)* ; *see Fed. R. Civ. P. 37(a)(3)(B).*

(n12)Footnote 5. *Fed. R. Civ. P. 26(b)(1).*

(n13)Footnote 6. *In re Sealed Case (Medical Records), 381 F.3d 1205, 1215, n.11 (D.C. Cir. 2006) .*

(n14)Footnote 7. *See Fed. R. Civ. P. 26(b)(1)* (privilege); *Fed. R. Civ. P. 26(b)(3)* (work product doctrine).

(n15)Footnote 8. *See, e.g., Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) .*

(n16)Footnote 9. *Bowers v. NCAA, 2008 U.S. Dist. LEXIS 14944, at *14-*15 (D.N.J. 2008)* ; *Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) .*

(n17)Footnote 10. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n18)Footnote 11. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n19)Footnote 12. *Fed. R. Civ. P. 26(b)(2)(C)(ii).*

(n20)Footnote 13. *Fed. R. Civ. P. 26(b)(2)(C)(iii).*

(n21)Footnote 14. *Berube v. A&P, 2006 U.S. Dist. LEXIS 87354, at *18-*19 (D. Conn. 2006)* .

(n22)Footnote 15. *Bat v. A.G. Edwards & Sons, Inc., 2006 U.S. Dist. LEXIS 9542, at *5 (D. Colo. 2005)* .

(n23)Footnote 1. *See Fed. R. Civ. P. 37(a)(5)*; *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l. Development and Trade Services, Inc., 2005 U.S. Dist. LEXIS 16772, at *39 (S.D.N.Y. 2005)* (citing **Moore's Federal Practice**).

(n24)Footnote 2. *Fed. R. Civ. P. 37(a)(5)(C).*

(n25)Footnote 3. *Fed. R. Civ. P. 37(a)(5)(A)(i).*

(n26)Footnote 4. *Fed. R. Civ. P. 37(a)(5)(A)(ii)*; *see Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1310-1311 (3d Cir. 1995)* (discretion of court to determine issue).

(n27)Footnote 5. *Fed. R. Civ. P. 37(a)(5)(A)(iii).*

(n28)Footnote 6. *Fed. R. Civ. P. 37(a)(5)(B).*

(n29)Footnote 7. *Fed. R. Civ. P. 37(a)(5)(A)(ii), (B).*

(n30)Footnote 8. *Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* ; *see Fed. R. Civ. P. 37(a)*, Committee Note to 1970 Amendments.

(n31)Footnote 9. *See In re Omeprazole Patent Litig., 2005 U.S. Dist. LEXIS 6112, at *16-*17 (S.D.N.Y. 2006)* , citing **Moore's Federal Practice**).

(n32)Footnote 10. *Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 186 (E.D. Cal. 1991)* .

(n33)Footnote 11. *Fed. R. Civ. P. 37(a)(5)(A)(iii),(B).*

(n34)Footnote 12. *See Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 39 (S.D.N.Y. 1988)* (court said both parties should bear their own costs).

(n35)Footnote 13. *Fed. R. Civ. P. 37(e).*

(n36)Footnote 14. *Fed. R. Civ. P. 37(f)*, Committee Note to 2006 Amendments.

(n37)Footnote 15. *Fed. R. Civ. P. 37(a)(4)(A),(B).*

(n38)Footnote 16. *DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1162 (11th Cir. 1993)* .

(n39)Footnote 17. *Frazier v. Southeastern Pennsylvania Transp. Auth., 161 F.R.D. 309, 316-317 (E.D. Pa. 1995)* .

(n40)Footnote 18. *Fed. R. Civ. P. 37(a)(4)(C)*; *see also Fed. R. Civ. P. 26(c).*

(n41)Footnote 19. *See Fed. R. Civ. P. 26(c)(3)*; *Fed. R. Civ. P. 37(a)(5).*

(n42)Footnote 20. *Fed. R. Civ. P. 37(a)(4)(C)*; *see also Fed. R. Civ. P. 26(c).*

(n43)Footnote 21. *Cal Dive Int'l, Inc. v. M/V Tzimin, 127 F.R.D. 213, 218 (S.D. Ala. 1989)* (citing **Moore's Federal Practice**).

(n44)Footnote 22. *Fed. R. Civ. P. 37(a)(5)(A), (B).*

(n45)Footnote 23. *See Fed. R. Civ. P. 37(a)(4)*, Committee Note to 1993 Amendments; see also *Hayden Stone, Inc. v. Brode, 508 F.2d 895, 897 (7th Cir. 1974)* (upholding sanctions based on deposition transcripts and memoranda written by sanctioned party).

(n46)Footnote 24. *Fed. R. Civ. P. 37(a)(5)(A), (B).*

(n47)Footnote 25. *Sure Safe Indus. Inc. v. C & R Pier Mfg., 152 F.R.D. 625, 627 (S.D. Cal. 1993)* .

(n48)Footnote 26. *Rickels v. City of South Bend, 33 F.3d 785, 787 (7th Cir. 1994)* .

(n49)Footnote 27. *Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 267 (S.D.N.Y. 1995)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
III. MOTIONS AND SANCTIONS RELATED TO DISCOVERY VIOLATIONS OF CIVIL RULES

2-15 Moore's Manual--Federal Practice and Procedure § 15.42

§ 15.42 Sanctions for Failure to Comply with Discovery Ordern*

[1] Nature of Sanction for Failure to Comply With Order Compelling Discovery

Sanctions for failure to comply with discovery orders under Rule 37(b) differ from expense shifting sanctions under rule 37(a). Sanctions are available pursuant to Rule 37(b) only if a court has first entered an order compelling the discovery in question, and a party has disobeyed that order. Furthermore, Rule 37(b) sanctions apply only to orders regarding requests for discovery, and not to automatic disclosures. There is no requirement in Rule 37(b) that a party try to secure the discovery through negotiations before filing a motion for sanctions because the requirement of a preexisting court order for discovery obviates the need to meet and confer. Finally, only Rule 37(b)(1), governing a deponent's failure to be sworn or to answer a question after being directed to do so by the court, applies to nonparties. Rule 37(b)(2), governing all other failures to obey discovery orders, does not apply to nonparties. n1

[2] Sanctionable Conduct

A deponent, whether a party or a nonparty, is subject to sanctions for failing to be sworn or to answer a question, if the court in the district where the deposition is pending already has directed the deponent to appear at the deposition and answer questions. n1 The principal purposes of the contempt sanction are to secure compliance with the specific order that has been disobeyed to promote respect for court orders and to discourage noncompliance, and to impose punishment on a person who without justification ignores the law and forces the courts to consume limited resources on a matter that should require no judicial intervention. n2

A party is subject to sanctions for a failure to comply with an order under Rule 35(a) requiring it to produce another person for examination, unless the disobedient party shows that it cannot produce the other person. n3

For all other violations of discovery orders, including failure to comply with orders to provide or permit discovery under Rules 26(f), 35, or 37(a), the potential subjects of sanctions include parties, their officers, directors, or managing agents, and persons designated pursuant to Rule 30(b)(6) or 31(a) to testify on behalf of the parties and their attorneys. n4 These type of sanctions are designed to penalize those whose conduct warrants it, and to deter those who might be tempted to engage in such conduct in the absence of such a deterrent. n5 Other purposes include ensuring that a party will not be able to profit from its own failure to comply, securing compliance with the particular order under

consideration, n6 and compensating the court and other parties for the added expense caused by the abusive conduct. n7

[3] Necessity of Existing Court Order

[a] Discovery Order Directed at Party

Before the court may apply Rule 37(b), a court order or direction regarding discovery must be in effect and that order or direction must be violated. n1 The absence of a prior order or direction which compels discovery against the subject party precludes Rule 37(b) sanctions. n2 Whether a party has violated a particular discovery order is a determination in the discretion of the court that issued the order. A district court's findings of fact in connection with a motion for sanctions will be upheld unless the findings are clearly erroneous. n3

The order violated does not have to be a formal, written order. A verbal order will satisfy the prior order requirement if the party to whom the verbal order was directed was given adequate opportunity to try to persuade the trial court that the discovery in question should not be compelled, and the verbal order gave the party who failed to comply sufficiently clear notice of what the order required that party to do. n4 The order need not be in any particular form. Even informal, minute orders may be sufficient, provided they are clear. n5 However, a subpoena is not considered a prior order for purposes of Rule 37(b). n6

[b] Order Must Give Adequate Notice of Duty Imposed

Whether the discovery order alleged to have been violated is written or verbal, formal or informal, it must adequately identify the duties it imposes, n7 because the purpose of the prior order requirement is to ensure that the party to whom the order is directed both understands his or her obligations and has an opportunity to contest the discovery sought before being exposed to sanctions. n8 If the terms of a discovery order are too vague or general to give fair notice of its obligations, it will not support sanctions. n9 The burden of establishing that a discovery order was insufficiently clear to support a subsequent award of sanctions generally is on the party who allegedly disobeyed the order. n10

[c] Propriety of Order

When sanctions are sought pursuant to Rule 37(b) for failure to obey an earlier discovery order, the propriety of the underlying discovery order generally will not be considered by the court making the determination of the motion for sanctions, unless the party against whom sanctions are sought had no opportunity to contest the underlying order. Thus, the issues in the sanctions proceeding at the trial court level usually will be limited to whether there was a violation of the discovery order, and if so, which particular sanction is appropriate. However, a party may be given the opportunity at the appellate stage to challenge the propriety of the underlying discovery order. n11

[4] Procedural Requirements

[a] Timeliness of Motion

A party may file a motion for sanctions under Rule 37(b). n1 The Federal Rules of Civil Procedure do not establish any specific time limit for the filing of a Rule 37(b) motion. However, it has generally been held that such motions must be filed within a reasonable time after the alleged violation of the underlying discovery order occurred, was discovered, or should have been discovered through reasonable diligence. Thus, the longer the delay, the less likely the court will grant the motion. This rule is based on the purpose of the sanctions; thus, the deterrent effect of a punishment would be diluted considerably if the sanction were not imposed until long after the misconduct occurred. n2

[b] Form and Contents of Motion

A motion for sanctions predicated on a party's failure to comply with a discovery order generally must be made by

formal motion, n3 and notice of the hearing must be served at least 14 days before the date set for the hearing. n4 Local rules may provide additional requirements regarding the form and content of the moving papers. If it is impossible for the party accused of the violation to prepare an adequate defense to the motion within 14 days, due process may require more notice, depending on the circumstances and the nature of the alleged disobedience. n5

A motion for sanctions based on a party's failure to comply with a discovery order must describe the alleged disobedience with enough specificity to enable the accused party to understand the charges, so that he or she is given a fair opportunity to develop a defense. In short, the motion must comport with the requirements of due process; it must be reasonable and afford some opportunity to be heard. Absent a clear, contrary indication in the motion documents, a motion for sanctions based on a party's alleged violation of a discovery order places both the party and the party's counsel on notice that the court might assess sanctions against either or both, unless they provide the court with substantial justification for their conduct. n6 If the motion seeks an award of expenses, including attorney's fees, n7 it should describe the causal connection between the expenses and the alleged disobedience of the underlying court order, and it should set forth with particularity the nature of the services rendered, the amount of attorney time spent, and the billing rates to the client. n8

[c] Proper Court for Motion

If sanctions are sought pursuant to Rule 37(b)(1) against a deponent for failure to comply with a discovery order, the motion must be brought in the court that issued the discovery order. If the court which issued the discovery direction against the person is not the court in which the action is pending, the only sanction that the court may impose pursuant to Rule 37(b)(1) is contempt. n9 This limitation serves the purpose of confining the application of the results-oriented sanctions that are authorized by Rule 37(b)(2)(A) to the court in which the action is pending. n10

If sanctions are sought against a party for failure to comply with a discovery order, the motion may be brought in the court in which the action is pending. n11 The fact that a court has improperly accepted and maintained subject-matter jurisdiction over a case does not preclude its authority to impose Rule 37 sanctions. n12

[5] Factors for Court to Consider in Determining Motion for Sanctions

[a] Sanction Must Further Purposes of Discovery

Punishment and deterrence are valid and important considerations in determining whether to impose sanctions for failure to comply with a discovery order. n1 Courts must have the power to impose punitive measures if they are to preserve their capacity to promote the orderly progress of discovery in litigation. While the particular sanction must be sufficiently potent, it also must be narrowly tailored to serve only its necessary function. n2 The sanction must also promote compliance with the underlying discovery order alleged to have been violated. n3 Any sanction short of dismissal of the entire case or entry of default judgment on all claims may be used to promote this purpose. n4

[b] Discretion of Court in Sanctions Determinations

The court has broad discretion in deciding whether to impose sanctions and the particular type of sanctions to be imposed. n5 Therefore, the standard appellate courts apply when reviewing decisions imposing sanctions for violations of discovery orders is the deferential abuse of discretion standard. Pursuant to this test, the district court's decision will be disturbed only if the reviewing court has a definite and firm conviction, after weighing all the relevant factors, that the court below committed a clear error of judgment in the conclusion it reached. n6

All sanctions imposed for failing to comply with a discovery order must be reasonable in light of the circumstances. n7 A sanction is reasonable only if its character and magnitude are proportionate to the character and magnitude of the violation of the underlying discovery order and the harmful consequences of that violation. n8

[c] Additional Factors for Court to Consider Before Order of Dismissal or Default Sanctions

The court has the option to use dismissal and default sanctions against a party for failing to comply with a discovery order. n9 However, because of the harshness of these types of sanctions, and the strong policy favoring resolution of cases on their merits, courts have held that these sanctions require circumstances establishing egregious fault on the part of the violator. n10 Thus, these sanctions are appropriate only as a last resort or when less drastic sanctions would not ensure compliance with a court's orders. n11 Therefore, courts have considered the following factors when determining whether to impose a sanction of dismissal or default:

1. Willfulness or bad faith. Dismissal and default sanctions are likely to be reversed if the failure that occasioned the sanction was inadvertent, isolated, no worse than careless, or not a cause of serious inconvenience or prejudice. n12 Willfulness sufficient to support a dismissal or default sanction will be found if the court concludes that a party consciously and intentionally failed to comply with a discovery order, n13 or if the court finds an ongoing violation that is substantially prejudicial. n14

2. Whether the sanction would affect the merits of the action. Rather than imposing a sanction that would affect a party's ability to litigate the merits of the action, courts are more likely to impose sanctions that affect only the claims or defenses to which the discovery would have been pertinent. n15

3. Whether a warning was given. Some courts require that in most circumstances the district court should give advance warning before resorting to dismissal or default sanctions for a party's failure to comply with a discovery order, n16 especially if the sanctioned party is proceeding pro se. n17

[6] Particular Sanctions That Court May Impose for Failure to Comply With Discovery Order

When a party has failed to comply with a discovery order, the court in which the action is pending has discretion to make such orders in regard to the failure that are just. n1 Generally, the court should impose the least severe sanction that will achieve the purposes of the sanctions rules in the circumstances of the case at hand. n2 The following is a nonexclusive list of sanctions that the court may order:

1. Directing that matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims. n3 If deeming certain facts established is tantamount to disposing of claims, appellate courts require the same justification as needed for a dismissal or default judgment sanction. n4

2. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence. n5 Due process requires that the claim or defense that the disobedient party is prohibited from supporting or opposing must be related to the discovery order that was disobeyed. n6

3. Striking pleadings in whole or in part. n7 A sanctions order that strikes an entire pleading is more likely to be upheld if there are no less harsh sanctions available to the trial court. n8

4. Staying further proceedings until the order is obeyed. n9 This sanction is rarely used against a defendant, unless the court determines that the defendant has no interest in delaying the plaintiff's case. n10

5. Dismissing the action or proceeding in whole or in part. n11 Dismissal of an action is appropriate for repeated violations of various types of discovery orders. n12

6. Rendering a default judgment against the disobedient party. n13 The district court should provide a detailed evaluation on the record of factors considered prior to entering a default judgment. n14

7. Treating as contempt of court the failure to obey any order, except for an order to submit to a physical or mental examination. n15 Criminal contempt may not be imposed as a sanction for disobeying a discovery order unless the disobedience was willful or in bad faith. n16

8. Ordering the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure to comply with the order, unless the failure was substantially justified or other circumstances make an award of expenses unjust. n17

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.40*-37.51 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 37(b)*; *General Ins. Co. of Am. v. Eastern Consol. Util., Inc., 126 F.3d 215, 220 (3d Cir. 1997)* (citing **Moore's Federal Practice**).

(n3)Footnote 1. *Fed. R. Civ. P. 37(b)(2).*

(n4)Footnote 2. *See Powell v. Ward, 643 F.2d 924, 931 (2d Cir. 1981)* .

(n5)Footnote 3. *Fed. R. Civ. P. 37(b)(2)(B).*

(n6)Footnote 4. *Fed. R. Civ. P. 37(b)(2)(A).*

(n7)Footnote 5. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n8)Footnote 6. *United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369-1370 (9th Cir. 1980)* .

(n9)Footnote 7. *Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* .

(n10)Footnote 1. *See Fed. R. Civ. P. 37(b)(1), (2)*; United States v. One 1987 BMW 325, *985 F.2d 655, 660-661 (1st Cir. 1993)* .

(n11)Footnote 2. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* .

(n12)Footnote 3. *Stookey v. Teller Training Distribs., Inc., 9 F.3d 631, 634 (7th Cir. 1993)* .

(n13)Footnote 4. *Halas v. Consumer Servs., Inc., 16 F.3d 161, 165 (7th Cir. 1994)* .

(n14)Footnote 5. *Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 472-473 (7th Cir. 1984)* .

(n15)Footnote 6. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* (subpoena is not order issued by judicial officer in resolution of dispute).

(n16)Footnote 7. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1363 (2d Cir. 1991)* .

(n17)Footnote 8. *Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 557-558 (8th Cir. 1992)* .

(n18)Footnote 9. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40-41 (4th Cir. 1995)* .

(n19)Footnote 10. *Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542-1543 (11th Cir. 1993)* .

(n20)Footnote 11. *Diehl v. H.J. Heinz Co., 901 F.2d 73, 73-75 (7th Cir. 1990)* .

(n21)Footnote 1. *United States v. 49,000 Currency, 330 F.3d 371, 376 (5th Cir. 2007)* .

(n22)Footnote 2. *Zimmerman v. Bishop Estate, 25 F.3d 784, 790 (9th Cir. 1994)* .

(n23)Footnote 3. *See Fed. R. Civ. P. 7(b)(1).*

(n24)Footnote 4. *See Fed. R. Civ. P. 6(c)(1).*

(n25)Footnote 5. *Fed. R. Civ. P. 6(c)(3)* (court may order more time); *see, e.g., Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* (construing former time limits).

(n26)Footnote 6. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

(n27)Footnote 7. *Fed. R. Civ. P. 37(b)(2)(C).*

(n28)Footnote 8. *Henry v. Gill Indus., Inc., 983 F.2d 943, 946 (9th Cir. 1993)* .

(n29)Footnote 9. *Fed. R. Civ. P. 37(b)(1).*

(n30)Footnote 10. *See Fed. R. Civ. P. 37(b)(2)(a)(i)-(vi).*

(n31)Footnote 11. *See Fed. R. Civ. P. 37(b)(2)(A).*

(n32)Footnote 12. *See In re Exxon Valdez, 102 F.3d 429, 431 (9th Cir. 1996)* .

(n33)Footnote 1. *National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)* (per curiam).

(n34)Footnote 2. *F.D.I.C. v. Conner, 20 F.3d 1376, 1383 (5th Cir. 1994)* (narrowly tailored to serve necessary function).

(n35)Footnote 3. *See Fed. R. Civ. P. 37*, Committee Note (1937).

(n36)Footnote 4. *See, e.g., Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 88 (1st Cir. 1988)* .

(n37)Footnote 5. *Chilcutt v. United States, 4 F.3d 1313, 1324 (5th Cir. 1993)* .

(n38)Footnote 6. *Harmon v. CSX Transp., Inc., 110 F.3d 364, 366 (6th Cir. 1997)* .

(n39)Footnote 7. *Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453-1454 (11th Cir. 1985)* .

(n40)Footnote 8. *Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1383 (7th Cir. 1993)* .

(n41)Footnote 9. *Fed. R. Civ. P. 37(b)(2)(A)(v), (vi).*

(n42)Footnote 10. *See ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1299 (Fed. Cir. 2009)* .

(n43)Footnote 11. *Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* .

(n44)Footnote 12. *See Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1383 (7th Cir. 1993)* .

(n45)Footnote 13. *Bass v. Jostens, Inc., 71 F.3d 237, 241 (6th Cir. 1995)* .

(n46)Footnote 14. *McLeod, Alexander, Powel & Apffel v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990)* .

(n47)Footnote 15. *Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 559 (8th Cir. 1992)* .

(n48)Footnote 16. *Bass v. Jostens, Inc., 71 F.3d 237, 241-242 (6th Cir. 1995)* .

(n49)Footnote 17. *See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 50 (2d Cir. 1994)* .

(n50)Footnote 1. *Fed. R. Civ. P. 37(b)(2)(A),(B).*

(n51)Footnote 2. *Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* .

(n52)Footnote 3. *Fed. R. Civ. P. 37(b)(2)(a)(i).*

(n53)Footnote 4. *Commodity Futures Trading Comm'n v. Noble Metals Int'l, 67 F.3d 766, 770-772 (9th Cir. 1995)* .

(n54)Footnote 5. *Fed. R. Civ. P. 37(b)(2)(a)(ii).*

(n55)Footnote 6. *Jankins v. TDC Management Corp., Inc., 21 F.3d 436, 444 (D.C. Cir. 1994)* .

(n56)Footnote 7. *Fed. R. Civ. P. 37(b)(2)(a)(iii).*

(n57)Footnote 8. *Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 88 (1st Cir. 1988)* .

(n58)Footnote 9. *Fed. R. Civ. P. 37(b)(2)(a)(iv).*

(n59)Footnote 10. *Bell v. United States, 31 F.R.D. 32, 36 (D. Kan. 1962)* .

(n60)Footnote 11. *Fed. R. Civ. P. 37(b)(2)(a)(v).*

(n61)Footnote 12. *Serra-Lugo v. Consortium-Las Marias, 271 F.3d 5, 6 (1st Cir. 2001)* ; *see* [5][c], *above* (factors for court to consider to enter dismissal).

(n62)Footnote 13. *Fed. R. Civ. P. 37(b)(2)(a)(vi).*

(n63)Footnote 14. *P&G v. Haugen, 427 F.3d 727, 738-739 (10th Cir. 2005)* ; *see* [5][c], *above*.

(n64)Footnote 15. *Fed. R. Civ. P. 37(b)(2)(a)(vii).*

(n65)Footnote 16. *Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1479 (9th Cir. 1992)* .

(n66)Footnote 17. *Fed. R. Civ. P. 37(b)(2)(C).*

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
III. MOTIONS AND SANCTIONS RELATED TO DISCOVERY VIOLATIONS OF CIVIL RULES

2-15 Moore's Manual--Federal Practice and Procedure § 15.43

§ 15.43 Sanctions for Failure to Make Mandatory Disclosures or Supplementsn*

[1] Sanction of Preclusion

If a party fails to disclose without substantial justification any witness or information required to be disclosed pursuant to the mandatory disclosure requirements of Rule 26(a), n1 or the supplementation requirements of 26(e), n2 the failing party may not use testimony from that witness or the undisclosed information as evidence at trial, at a hearing, or in connection with a motion, unless the failure to disclose was harmless. n3 Instead of a preclusion sanction, the court on motion and after providing an opportunity to be heard, may impose other appropriate sanctions. n4

[2] Other Sanctions Available for Failure to Make Mandatory Disclosures or Supplements

In addition to or in lieu of an evidence preclusion sanction, n1 the court may impose other appropriate sanctions if a party, without substantial justification, violates its disclosure obligations pursuant to Rule 26(a) n2 or supplementation obligations pursuant to Rule 26(e), n3 and fails to show that the violation was harmless. n4 The principal reason this provision was added to the evidence preclusion rule was because preclusion of evidence is not an effective incentive to compel disclosure of information that would be helpful to an opposing party. n5

The sanctions that are authorized in addition to or instead of an evidence preclusion sanction include an order:

1. Requiring the payment of reasonable expenses, including attorney's fees, caused by the failure to make the mandatory disclosure. n6

2. Informing the jury of the party's failure. n7

3. Directing that the matters as to which the disclosure was not made, or any other designated facts, be taken as established for the purposes of the action in accordance with the claims of the party seeking disclosure. n8

4. An order prohibiting the disobedient party from supporting or opposing designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. n9

5. An order striking pleadings or parts of pleadings, staying further proceedings until the disclosure is made, dismissing the action or proceeding or any part of the action or proceeding, or entering a default judgment against the party who violated the disclosure rules. n10

[3] Sanctions Not Permitted if Failure to Disclose Was Substantially Justified

Sanctions may not be imposed if a party's failure to disclose information required by Rule 26(a) or to make supplementation required by Rule 26(e)(1) was substantially justified. n1 The rule does not provide a definition of "substantial justification." However, a party's position with respect to a discovery dispute is substantially justified if it appears that the dispute is genuine. n2 The term genuine means a dispute would be deemed genuine if reasonable attorneys, applying the relevant legal norms to the evidence, could disagree about how the dispute should be resolved. n3 For example, a party could be substantially justified in not disclosing evidence if the party could not have been expected to foresee its relevance. n4

[4] Sanction Prohibited if Failure to Disclose Harmless

The court may not imposed sanctions if a party's failure to disclose information required by Rule 26(a) or supplementation by Rule 26(e) was harmless. n1 Two examples of harmless failures to disclose are (1) the inadvertent omission from a Rule 26(a)(1) disclosure of the name of a potential witness known to all parties, and (2) the failure to list as a trial witness in a disclosure mandated by Rule 26(a)(3) a person also listed by another party. n2

Case law indicates that, while the motive or culpability of the party that failed to make the disclosure may have some bearing on a determination of harmlessness, a more significant factor is whether the omission caused other parties to suffer prejudice, n3 and if so, whether the negative effects of the nondisclosure can be remedied by ordering supplemental productions of information and by requiring the breaching party to reimburse its opponent for all the expenses, including attorney's fees, caused by the breach. n4

[5] Sanctions Not Permitted for Good Faith Loss of Electronically Stored Information

There is an explicit exception to the imposition of sanctions when a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n1 This provision applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith means that a party may not avoid sanctions by allowing the operation of the system to continue in order to destroy specific stored information that it is required to preserve. n2

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.60*-37.63 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n3)Footnote 2. *See Fed. R. Civ. P. 26(e)(1), (2).*

(n4)Footnote 3. *Fed. R. Civ. P. 37(c)(1).*

(n5)Footnote 4. *See Fed. R. Civ. P. 37(c)(1)(A)-(C), see also* [2], *below* (discussion of other available sanctions).

(n6)Footnote 1. *See* [1], *above.*

(n7)Footnote 2. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n8)Footnote 3. *See Fed. R. Civ. P. 26(e)(1),(2).*

(n9)Footnote 4. *Fed. R. Civ. P. 37(c)(1)*.

(n10)Footnote 5. *Fed. R. Civ. P. 37(c)*, Committee Note to 1993 Amendments.

(n11)Footnote 6. *Fed. R. Civ. P. 37(c)(1)(A)*.

(n12)Footnote 7. *Fed. R. Civ. P. 37(c)(1)(B)*.

(n13)Footnote 8. *Fed. R. Civ. P. 37(c)(1)(C)*; *see Fed. R. Civ. P. 37(b)(2)(a)(i)*.

(n14)Footnote 9. *Fed. R. Civ. P. 37(c)(1)(C)*; *see Fed. R. Civ. P. 37(b)(2)(a)(ii)*.

(n15)Footnote 10. *Fed. R. Civ. P. 37(c)(1)(C)*; *see Fed. R. Civ. P. 37(b)(2)(a)(iii)-(vi)*.

(n16)Footnote 1. *Fed. R. Civ. P. 37(c)(1)*.

(n17)Footnote 2. *See Fed. R. Civ. P. 37(a)(4)*, Committee Note to 1970 Amendments.

(n18)Footnote 3. *Nguyen v. IBP, Inc., 162 F.R.D. 675, 680 (D. Kan. 1995)* .

(n19)Footnote 4. *Fed. R. Civ. P. 26(a)*, Committee Note to 1993 Amendments.

(n20)Footnote 1. *Fed. R. Civ. P. 37(c)(1)*.

(n21)Footnote 2. *See Fed. R. Civ. P. 37(c)*, Committee Note to 1993 Amendments.

(n22)Footnote 3. *Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995)* .

(n23)Footnote 4. *Nguyen v. IBP, Inc., 162 F.R.D. 675, 682 (D. Kan. 1995)* .

(n24)Footnote 1. *Fed. R. Civ. P. 37(e)*.

(n25)Footnote 2. *Fed. R. Civ. P. 37(e)*, Committee Note to 2006 Amendments.

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2-15 Moore's Manual--Federal Practice and Procedure § 15.44

§ 15.44 Sanctions for Unreasonable Failure to Admitn*

[1] Prerequisites for the Imposition of Sanctions

If a party fails to admit what is requested under Rule 36, and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. n1 The court must make that order unless any one of the following is true:

1. The request was held objectionable under Rule 36(a); n2 this exception is available only if: the party who failed to make the admission made a timely objection, the requesting party filed a pretrial motion to determine the sufficiency of the objection, and the trial court ruled that the objection was substantial. n3

2. The admission requested was not of substantial importance; n4 "substantial importance" means that the admission would be material to the disposition of the case. n5

3. The party failing to admit had a reasonable ground to believe that it might prevail on the matter; n6 The true test for determining whether this exception applies is not whether a party would prevail at trial, but whether the party acted reasonably in believing that he or she might prevail. n7

4. There was any other good reason for the failure to admit. n8 For example, a good reason would be that to admit or deny the request, the party would have been required to undertake extraordinary efforts to gather and analyze a substantial amount of information that they did not have. n9

The purpose of this provision allowing expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission is to increase parties' incentives to respond reasonably and in good faith to appropriate requests for admissions. Admissions are extremely valuable because they eliminate unnecessary proof at trial, streamline discovery and motion practice, as well as settlement, and reduce many types of pretrial expenses, most obviously in discovery. n10

[2] Court Not Required to Impose Sanctions if Prerequisites Are Met

The court must make an order imposing sanctions only when the prerequisites are met. Thus, sanctions may be imposed only after the requesting party actually proves the genuineness of the document or the truth of the matter that was addressed in the request for admission. n1 Therefore, the court will refuse to award expense shifting sanctions to the plaintiff even though the plaintiff prevailed on the merits, and the defendant refused to make an admission, if the defendant stipulated to the matter at trial, and the plaintiff had never proven the subject of the requests for admission. n2

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission are limited to the reasonable expenses incurred in making the proof of the matter that the opposing party, without justification, did not admit, including reasonable attorney's fees. n3 In determining the amount of the expenses that the failure to admit caused the requesting party to incur, courts will require a sufficient relationship between the expenses claimed and the failure to admit. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.70*-37.76 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 37(c)(2).*

(n3)Footnote 2. *Fed. R. Civ. P. 37(c)(2)(A).*

(n4)Footnote 3. *Fed. R. Civ. P. 37(c)*, Committee Note to 1970 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 37(c)(2)(B).*

(n6)Footnote 5. *SEC v. Happ, 392 F.3d 12, 33-34 (1st Cir. 2004)* .

(n7)Footnote 6. *Fed. R. Civ. P. 37(c)(2)(C).*

(n8)Footnote 7. *Washington State Dep't of Transp. v. Natural Gas Co., 59 F.3d 793, 805-806 (9th Cir. 1995)* .

(n9)Footnote 8. *Fed. R. Civ. P. 37(c)(2)(D).*

(n10)Footnote 9. *Baird v. Consolidated City of Indianapolis, 830 F. Supp. 1183, 1189-1190 (S.D. Ind. 1993)* .

(n11)Footnote 10. *See Armour v. Knowles, 512 F.3d 147, 154 (5th Cir. 2007)* .

(n12)Footnote 1. *See Fed. R. Civ. P. 37(c)(2).*

(n13)Footnote 2. *Board of Dirs., Water's Edge v. Anden Group, 136 F.R.D. 100, 105 (E.D. Va. 1991)* .

(n14)Footnote 3. *Fed. R. Civ. P. 37(c)(2)*; *see generally Davis v. Noufal, 142 F.R.D. 258, 259 n.2 (D.D.C. 1992)* .

(n15)Footnote 4. *Marchand v. Mercy Med. Ctr., 22 F.3d 933, 939 (9th Cir. 1994)* .

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2-15 Moore's Manual--Federal Practice and Procedure § 15.45

§ 15.45 Sanctions for Failure to Appear at Deposition, Respond to Interrogatories, or Requests for Production or Inspectionn*

[1] Sanctionable Conduct

A party (or an officer, director, or managing agent of a party or a person designated pursuant to Rule 30(b)(6) or 31(a) to testify on behalf of a party) may be sanctioned for failing to do any of the following:

1. To appear before the officer who is to take a deposition. n1 Most courts also hold that sanctions may also be imposed when a party appears at the deposition, but either refuses to answer any questions, or without excuse provides completely inadequate responses to questions that should have been anticipated. n2

2. To serve answers or objections to interrogatories submitted pursuant to Rule 33. n3 A compete failure to respond to interrogatories is not necessary for the imposition of sanctions. n4 Rather, the court may impose sanctions if the responding party has made evasive or incomplete answers to proper interrogatories that impede discovery, or if the responding party has exhibited bad faith. n5

3. To serve a written response to a request for production or inspection submitted pursuant to Rule 34. n6 Some courts hold that a compete failure to respond to requests for inspection or production is not necessary for the imposition of sanctions. n7

Sanctions may be imposed to punish a party's failure to appear for deposition, or to respond to interrogatories or a request for production and inspection, even if the failure was not willful or in bad faith. n8

[2] Sanctions Not Permitted for Good Faith Loss of Electronically Stored Information

There is an exception to the imposition of sanctions when a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, unless there are exceptional circumstances. n1 This provision applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith means that a party may not avoid sanctions by allowing the operation of the system to continue in order to destroy specific stored information that it is required to preserve. n2

[3] Sanctions Not Permitted During Pending Motion for Protective Order

If the matter that underlies a party's failure to appear for deposition or to respond to interrogatories or a request for inspection is subject to a pending motion for a protective order as provided by Rule 26(c), that failure may be excused on the ground that the discovery sought is objectionable. n1 The purpose of this provision is to make clear that a party may not properly remain completely silent even when the party regards a notice to take his or her deposition or a set of interrogatories or requests to inspect as improper and objectionable. If the party desires not to appear or not to respond, he or she must apply for a protective order. Although the pendency of a motion for protective order may be urged as an excuse for not responding to a discovery probe, that source of possible excuse disappears once the motion is denied. n2

[4] Sanctions Not Permitted for Failure to Respond Unless Movant Has Attempted Conference With Adversary

A motion for sanctions based on a party's failure to serve answers or objections to interrogatories, or a written response to a request for inspection, must include a certification that the moving party has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain a response without court action. n1 Thus, the court may not consider a motion for Rule 37(d) sanctions unless the moving party has included the required certification. n2 This exception does not apply with respect to sanctions for failure to attend a deposition. n3

[5] Types of Sanctions That May Be Imposed

The district court have considerable broad discretion in determining whether to impose Rule 37(d) non-monetary sanctions or monetary sanctions or both. n1 Sanctions are not mandatory, even after finding that a party, without substantial justification, failed to appear for a deposition or to serve answers or objections to interrogatories or a written response to a request for inspection because the language of Rule 37(d) is permissive. n2 Similarly, once the district court decides that non-monetary sanctions are appropriate, the court has broad discretion in determining the type of sanction to be imposed. n3 These principles are reflected in the fact that appellate courts apply an abuse of discretion standard in reviewing Rule 37(d) sanctions awards. n4 For discussion of monetary sanctions, also referred to as expensive shifting sanctions, see [6], *below*.

The primary non-monetary sanctions authorized under Rule 37(d) for a party's failure to appear for deposition or to serve answers or objections to interrogatories or a written response to a request for inspection, are the various sanctions included in Rule 37(b)(2)(A)(i)-(vi). n5 In consideration of the fact that each of those sanctions could potentially affect litigation of the merits of the case, trial and appellate courts must conduct the same analysis as they would to determine whether any of those measures are appropriate under Rule 37(b) for a party's failure to comply with a discovery order. n6

[6] Court May Impose Expense Shifting Sanctions

Instead of, or in addition to, any non-monetary sanction order, the court must require that a party that fails to appear for deposition or to serve answers or objections to interrogatories or a written response to a request for inspection, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust. The amount of expense shifting sanctions is expressly limited to the reasonable expenses, including attorney's fees, caused by the discovery failure. n1

These monetary or expense shifting sanctions are considered mandatory, unless the party to be sanctioned can show that its "failure was substantially justified or other circumstances make an award of expenses unjust." n2 n3

The burden of establishing "substantial justification" is on the party who failed to appear for deposition, or to serve

answers or objections to interrogatories or a written response to a request for inspection. n4 Similarly the burden of demonstrating other circumstances that make an award of expenses unjust is on the party that failed to respond to the discovery request. The focus of these inquiries is on the original failure to respond to the discovery request, and not on subsequent efforts by the party or the party's attorney to defend against the motion for sanctions, or to avoid dismissal. n5

[7] Procedural Considerations

[a] Motion Must be Filed in Court Where Action is Pending

A motion for sanctions based on a party's failure to appear for deposition or failure to serve answers or objections to interrogatories or a written response to a request for inspection, must be brought in the court where the action is pending. n1 The court where the action is pending is the appropriate jurisdiction to hear the motion, even if the failure physically occurred in a different jurisdiction, because Rule 37(d) sanctions may be imposed only against a party or a party's attorney, and the court in which an action is pending must retain the power to discipline misconduct by parties who are using that court to for litigation of their disputes. n2

[b] Time for Filing Motion

The Federal Rules of Civil Procedure do not specify time limits for parties to file motions for sanctions based on a party's failure to appear for deposition, or failure to serve answers or objections to interrogatories or a written response to a request for inspection. n3 However, courts have acknowledged that the motion must be made within a reasonable time after the alleged failure. Thus, the longer the delay after the failure, the less likely the court will grant the motion. This rule is based on the purpose of the sanctions, and as a deterrent, a sanction would be ineffective if not imposed until long after the misconduct occurred. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.70*-37.76 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 37(d)(1)(A)(i).*

(n3)Footnote 2. *See Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995)* .

(n4)Footnote 3. *Fed. R. Civ. P. 37(d)(1)(A)(ii).*

(n5)Footnote 4. *See Thomas Consol. Indus. v. Herbst, 456 F.3d 719, 725 (7th Cir. 2006)* .

(n6)Footnote 5. *Evenflo Co. v. Hantec Agents Ltd., 2006 U.S. Dist. LEXIS 36342, at *4-*5 (S.D. Ohio 2006)* .

(n7)Footnote 6. *Fed. R. Civ. P. 37(d)(1)(A)(ii).*

(n8)Footnote 7. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995)* ; *Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1031 n.1 (5th Cir. 1990)* .

(n9)Footnote 8. *Fed. R. Civ. P. 37(d)*, Committee note to 1970 Amendments.

(n10)Footnote 1. *Fed. R. Civ. P. 37(e)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* (electronically stored information includes all information recorded by electronic means, such as computer data files, program files, backup and archival tapes, temporary files, and e-mail messages and files).

(n11)Footnote 2. *Fed. R. Civ. P. 37*, Committee Note to 2006 Amendments.

(n12)Footnote 1. *Fed. R. Civ. P. 37(d)(2).*

(n13)Footnote 2. *Fed. R. Civ. P. 37(d)*, Committee Note to 1993 Amendments.

(n14)Footnote 1. *Fed. R. Civ. P. 37(d)(1)(B).*

(n15)Footnote 2. *Blue Grass Steel, Inc. v. Miller Bldg. Corp., 162 F.R.D. 493, 495 (E.D. Pa. 1995)* (plaintiff did respond after motion for sanctions was filed).

(n16)Footnote 3. *Fed. R. Civ. P. 37(d)(1)(B)*; *see Fed. R. Civ. P. 37(d)(1)(A)(i)*; *see also Grand Oaks, Inc. v. Anderson, 175 F.R.D. 247, 250 (N.D. Miss. 1997)* (district court specifically rejected argument that certification requirement applies to sanctions for failure to appear for deposition).

(n17)Footnote 1. *See Fed. R. Civ. P. 37(d)(3).*

(n18)Footnote 2. *Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 10 (1st Cir. 1991)* ; see *Fed. R. Civ. P. 37(d)(1),(3).*

(n19)Footnote 3. *Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 10 (1st Cir. 1991)* (choice of sanction lies within sound discretion of trial court).

(n20)Footnote 4. *See Telluride Management Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 465-467 (9th Cir. 1995)* .

(n21)Footnote 5. *Fed. R. Civ. P. 37(d)(3)*; *see § 15.42[5]*(discussion of *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*).

(n22)Footnote 6. *Woodstock Ventures LC v. Perry, 164 F.R.D. 321, 322-323 (N.D.N.Y. 1996)* ; *see Fed. R. Civ. P. 37(b)*; *see also § 15.42[5].*

(n23)Footnote 1. *Fed. R. Civ. P. 37(d)(3).*

(n24)Footnote 2. *Lockette v. American Broad. Cos., Inc., 118 F.R.D. 88, 90-91 (N.D. Ill. 1987)* ; *see Fed. R. Civ. P. 37(d)(3).*

(n25)Footnote 3. *Fed. R. Civ. P. 37(d)(3).*

(n26)Footnote 4. *Telluride Management Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 466 (9th Cir. 1995)* .

(n27)Footnote 5. *Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994)* .

(n28)Footnote 1. *Fed. R. Civ. P. 37(d)(1)(a).*

(n29)Footnote 2. *See Fed. R. Civ. P. 37(d)(3).*

(n30)Footnote 3. *See Fed. R. Civ. P. 37(d)(1)(a).*

(n31)Footnote 4. *See United States v. Kungys, 575 F. Supp. 1208, 1209 (D.N.J. 1983)* .

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PART V Pretrial Stage
CHAPTER 15 DISCOVERY
III. MOTIONS AND SANCTIONS RELATED TO DISCOVERY VIOLATIONS OF CIVIL RULES

2-15 Moore's Manual--Federal Practice and Procedure § 15.46

§ 15.46 Sanctions for Failure to Participate in Discovery Plann*

[1] Court Has Discretion to Impose Sanctions for Failure to Participate

If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may require the party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. n1 A court considering imposing an expense shifting sanction under Rule 37(f) for failing to participate in good faith in the development of a discovery plan must afford the person who would be sanctioned an opportunity to be heard. n2

The language of this provision is permissive, not mandatory. Thus, a trial court has broad discretion to decide whether to impose this sanction, even if the failure was in bad faith. The only sanction authorized by this provision is monetary, and the monetary sanction may not exceed the reasonable expenses, including attorney's fees, caused by the failure. n3 However, a violation of a pretrial order directing the party or attorney to participate in the development of a discovery plan could subject the disobedient party or attorney to much more strict sanctions pursuant to Rule 16(f), which governs failure to obey a pretrial or scheduling order, and Rule 37(b)(2), which governs failure to comply with a discovery order. n4

[2] Sanctionable Failure to Participate in Mandatory Discovery Planning

If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may require the party or attorney to pay the reasonable expenses, including attorney's fees, caused by the failure. n1 The development of discovery plans is not optional, and is not dependent on the entry of a court order or a party's request. Rather, except in actions exempted by local rule or court order, parties must participate in the development of a proposed discovery plan in every civil action, which is expected to reflect the parties' views and proposals concerning all of the following:

1. Any changes that should be made in the timing, form, or requirement for automatic, mandatory disclosures under Rule 26(a), including a statement of when initial disclosures were made, or will be made. n2

2. Any subjects on which discovery may be needed, when discovery should be completed, and whether discovery

should be conducted in phases or be limited to or focused on particular issues. n3

3. Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced. n4

4. Any issues about claims of privilege or of protection as trial-preparation materials; n5

5. Any changes that should be made in the limitations on discovery imposed under the federal rules or local rules. n6

6. Any other orders that the court should issue under Rule 26(c) (regarding limitations on discovery) or under Rule 16(b) (contents of scheduling order) and 16(c) (pretrial conference matters). n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 7 *Moore's Federal Practice, §§ 37.110*-37.111 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 37(f)*; *see also Fed. R. Civ. P. 26(f)(3)*.

(n3)Footnote 2. *Fed. R. Civ. P. 37(f)*.

(n4)Footnote 3. *Fed. R. Civ. P. 37(f)*; *see Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 174 F. Supp. 2d 388, 397 (D. Md. 2001)* (court approved of and granted motion for order to compel defendant to participate in Rule 26(f) discovery conference).

(n5)Footnote 4. *See Fed. R. Civ. P. 16(f)(1)(C)*; *Fed. R. Civ. P. 37(b)(2)*; *see, e.g.,* United States for use of *Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 602-603 & n.3 (9th Cir. 1988)* .

(n6)Footnote 1. *Fed. R. Civ. P. 37(f)*; *see* [1], *above*.

(n7)Footnote 2. *Fed. R. Civ. P. 26(f)(3)(A)*.

(n8)Footnote 3. *Fed. R. Civ. P. 26(f)(3)(B)*.

(n9)Footnote 4. *Fed. R. Civ. P. 26(f)(3)(C)*; *see Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* (electronically stored information includes information such as data files, program files, backup tapes, voice mail files, and e-mail messages and files).

(n10)Footnote 5. *Fed. R. Civ. P. 26(f)(3)(D)*.

(n11)Footnote 6. *Fed. R. Civ. P. 26(f)(3)(E)*.

(n12)Footnote 7. *Fed. R. Civ. P. 26(f)(3)(F)*.

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure 16.syn

§ 16.syn Synopsis to Chapter 16: JUDGMENT ON THE PLEADINGS

§ 16.01 Use and Purpose of Judgment on Pleadings

§ 16.02 Timing of Motion for Judgment on Pleadings

§ 16.03 Initiation of Motion for Judgment on Pleadings

§ 16.04 Hearing to Determine Motion for Judgment on Pleadings

§ 16.05 Standard Used in Decision by Trial Court to Grant or Deny Judgment on Pleadings

[1] No Issues of Material Fact Presented

[2] Motion Equivalent to Motion to Dismiss

§ 16.06 Motion Treated as Motion for Summary Judgment

§ 16.07 Appeal of Grant or Denial of Motion for Judgment on Pleadings

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.01

§ 16.01 Use and Purpose of Judgment on Pleadingsn*

After the pleadings are closed, any party may move the court for a "judgment on the pleadings," n1 which is a device for use by a court when the moving party is entitled to judgment as a matter of law considering all allegations in the pleadings of the non-movant to be true. n2 In effect, when a court grants a motion for judgment on the pleadings it decides that it is beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim which would entitle the nonmoving party to relief, even after accepting all allegations in the pleadings, and drawing all inferences in favor of the nonmoving party. n3 Thus, when the nonmoving party is the plaintiff, the court will accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. n4 The court may not grant the motion unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle the plaintiff to relief. n5

A party may file a motion for judgment on the pleadings, n6 or the court may act sua sponte. n7 In determining the motion, the court may consider any of the pleadings, including the complaint, the answer, and any other documents attached to them. n8

A motion for judgment on the pleadings under Rule 12(c) n9 and a motion to dismiss under Rule 12(b)(6), n10 are very similar because the same standard generally applies to either. n11 The primary difference between the two motionsis timing. n12 If a motion is filed before the answer, the court may treat it as a motion to dismiss under Rule 12(b)(6). n13 On the other hand, if a motion designated as a motion to dismiss is filed after the pleadings have closed, it should be treated as a motion for judgment on the pleadings. n14 This practice is also supported by Rule 12(h)(2), which expressly allows a Rule 12(b)(6) motion to be made by motion for judgment on the pleadings. n15

A motion for judgment on the pleadings is also similar to a motion for summary judgment, except that in deciding a summary judgment motion the court may consider matters outside the pleadings if they are not otherwise excluded by the court; in such cases, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56. n16 In that case, the trial court must give the parties a reasonable opportunity to present all the material that is pertinent to the motion. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(c).*

(n3)Footnote 2. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* ; *McGann v. Ernst & Young, 102 F.3d 390, 391 (9th Cir. 1996) , cert. denied, 520 U.S. 1181 (1997) .*

(n4)Footnote 3. *Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003) .*

(n5)Footnote 4. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000) .*

(n6)Footnote 5. *Cirino v. Apfel, 34 F. Supp. 2d 861, 862-863 (E.D.N.Y. 1999)* (when firefighter sought social security disability benefits, claiming he suffered from sleep disorder and hypertension, reviewing court found plaintiff could prove no set of facts in support of claim that firefighter was disabled under Social Security Act).

(n7)Footnote 6. *Cirino v. Apfel, 34 F. Supp. 2d 861, 862-863 (E.D.N.Y. 1999)* (both parties brought motions for judgment on pleadings).

(n8)Footnote 7. *Ledford v. Sullivan, 105 F.3d 354, 358 (7th Cir. 1997)* (affirming sua sponte dismissal of prisoner's claim for violation of due process rights because prison officials temporarily withheld his medication; court found that because prisoner lacked substantive property right in medication, defendant was entitled to judgment on pleadings).

(n9)Footnote 8. *Northern Ind. Gun & Outdoor Shows v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998)* (court may consider letters as well as other documents such as affidavits, contracts, and loan documentation); *see Fed. R. Civ. P. 10(c)* (copy of instrument attached as exhibit is part of pleading for all purposes).

(n10)Footnote 9. *Fed. R. Civ. P. 12(c).*

(n11)Footnote 10. *Fed. R. Civ. P. 12(b)(6).*

(n12)Footnote 11. *See Narvarte v. Chase Manhattan Bank, N.A., 969 F. Supp. 10, 11 (S.D.N.Y. 1997)* (when defendant's motion to dismiss for failure to state claim was filed after answer, court treated motion as one for judgment on pleadings, although court applies same standard to both motions).

(n13)Footnote 12. *See National Assn. of Pharm. Mfrs., Inc. v. Ayerst Labs., Div. of/and Am. Home Prods. Corp., 850 F.2d 904, 909 fn.2 (2d Cir. 1988)* (although defendant should have named motion one for judgment on pleadings because notice of motion was filed after defendant had filed answer to complaint, under Rule 12(h)(2), court may treat motion as motion to dismiss); *Joe Hand Promotions v. Lott, 971 F. Supp. 1058, 1060 (E.D. La. 1997)* (when defendants filed motion to dismiss after answer to complaint, district court treated motion as motion for judgment on pleadings).

(n14)Footnote 13. *Seber v. Unger, 881 F. Supp. 323, 325 n.2 (N.D. Ill. 1995)* (court noted that because defendant's motion essentially served same purpose as a Rule 12(b)(6) motion to dismiss, it would adopt common practice of treating the premature Rule 12(c) motion as a Rule 12(b)(6) motion).

(n15)Footnote 14. *National Assn. of Pharm. Mfrs., Inc. v. Ayerst Labs., Div. of/and Am. Home Prods. Corp., 850 F.2d 904, 909 n.2 (2d Cir. 1988) .*

(n16)Footnote 15. *Fed. R. Civ. P. 12(h)(2)(B)*; *see Christy v. We the People Forms & Serv. Ctrs., United States, Inc., 213 F.R.D. 235, 238 (D. N.J. 2003)* (citing **Moore's Federal Practice**).

(n17)Footnote 16. *Fed. R. Civ. P. 12(d)*.

(n18)Footnote 17. *Fed. R. Civ. P. 12(d)*; *see Fed. R. Civ. P. 56(c)*; *see also § 16.07*.

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.02

§ 16.02 Timing of Motion for Judgment on Pleadingsn*

Rule 12(c) expressly provides that a party may make a motion for judgment on the pleadings only after the pleadings are closed. n1 The time when pleadings are closed is controlled by Rule 7(a), which indicates that, unless a reply is ordered or permitted by the court, pleadings close when the parties have filed the last of the following pleadings: n1.1 an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, and an answer to a third-party complaint. n2

In any event, a motion for judgment on the pleadings may not be filed before the answer. If the pleadings have not closed because the defendant has failed to answer, the plaintiff's remedy is to file a motion for default under Rule 55, not one for judgment on the pleadings. n3 Furthermore, if a motion for judgment on the pleadings is filed by the defendant before answering, the court should treat it as a motion to dismiss. n4

Once the pleadings are closed, the rule does not provide a specific time limit, but the motion must be made within such time as not to delay the trial. n5 Furthermore, the court may exercise its discretion under Rule 12(i) to defer the hearing or determination of the motion until the trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(c).*

(n3)Footnote 1.1. *See Doe v. United States, 419 F.3d 1058, 1061 (9th Cir. 2005) .*

(n4)Footnote 2. *See Fed. R. Civ. P. 7(a).*

(n5)Footnote 3. *Coca-Cola Bottling Co. v. Local Union 1035, 973 F. Supp. 270, 272 n.2 (D. Conn. 1997) , aff'd*

without op., 175 F.3d 1007 (2d Cir. 1999) ; *see Fed. R. Civ. P. 55.*

(n6)Footnote 4. *Seber v. Unger, 881 F. Supp. 323, 325 n.2 (N.D. Ill. 1995)* .

(n7)Footnote 5. *Fed. R. Civ. P. 12(c)*; *Wolfe v. George, 385 F. Supp. 2d 1004, 1008 (N.D. Cal. 2005)* .

(n8)Footnote 6. *See Fed. R. Civ. P. 12(i)*; *McIntosh v. Antonino, 71 F.3d 29, 38 (1st Cir. 1995)* .

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.03

§ 16.03 Initiation of Motion for Judgment on Pleadingsn*

Either party may move for judgment on the pleadings. n1 In the typical case the moving party is the defendant, and the court must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. n2

On the other hand, on the rarer occasions when the moving party is the plaintiff, the court will accept all allegations in the answer or other responsive pleading as true and draw all reasonable inferences in favor of the defendant. n3 Additionally, the court may, sua sponte, grant a judgment on the pleadings to a party even though the party has made no motion. n3.1 For example, in one case, the court granted a motion for judgment on the pleadings sua sponte to the defendants on a prisoner's due process claim for temporarily withholding of his medication because the prisoner lacked any substantive property right in the medication. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(c)*; *Qwest Communs. Corp. v. City of Berkeley, 208 F.R.D. 288, 291 (N.D. Cal. 2003)* .

(n3)Footnote 2. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* ; *see Toy v. United States, 263 F. Supp. 2d 1, 4 (D.D.C. 2004)* .

(n4)Footnote 3. *See Ramsey v. Amfac, Inc., 960 F. Supp. 1424, 1426 (N.D. Cal. 1997)* (plaintiff may move for judgment on pleadings).

(n5)Footnote 3.1. *Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003)* .

(n6)Footnote 4. *Ledford v. Sullivan, 105 F.3d 354, 358 (7th Cir. 1997)* ; *see Flora v. Home Fed. Sav. and Loan Ass'n, 685 F.2d 209, 211 (7th Cir. 1982)* (affirming sua sponte dismissal because one party clearly entitled to judgment as matter of law and both parties had opportunity to be heard).

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.04

§ 16.04 Hearing to Determine Motion for Judgment on Pleadingsn*

If a party makes a motion, the court has the option to hear and determine the motion for judgment on the pleadings before trial. Alternatively, the court may order that themotion be deferred until trial. n1 n2 A court may use the preliminary hearing as a method of disposing of a meritless case at an early stage of the litigation, and thus conserve judicial resources. If the case involves factual or legal questions, however, the court should delay consideration of the motion until trial rather than determine the merits of the case before all material evidence is presented. Such deferment will also provide the parties with the necessary time to complete pretrial discovery and more completely analyze the issues in the case before the trier of fact and the court consider the case on the merits. n3

At the hearing, the court must assume as true all of the well-pleaded factual allegations in the opposing party's pleadings and must assume as false all contravening assertions in the movant's pleadings. n4 Thus, for purposes of the motion for judgment on the pleadings only, the moving party is in effect conceding the truthfulness of the factual allegations in the opposition's pleading; however, the moving party is not conceding matters that would not be admissible in evidence at trial or allegations that constitute conclusions of law. n5

In addition to assuming the truthfulness of the factual allegations for purposes of the motion, the court will draw all reasonable inferences from these facts in favor of the nonmoving party. n6 Inferences drawn from the pleadings in favor of the nonmoving party must be reasonable, n7 and the court may not make inferences contrary to the clear and unambiguous words or actions of the parties or ones inconsistent with matters that are the subject of the judicial notice doctrine. n8 Furthermore, the court may not draw unwarranted factual inferences. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(i)*; *McIntosh v. Antonino, 71 F.3d 29, 38(1st Cir. 1995)* .

(n3)Footnote 2. [Reserved].

(n4)Footnote 3. *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1081 (8th Cir. 1999)* .

(n5)Footnote 4. *United States v. $3,148,884.40 United States Currency, 76 F. Supp. 2d 1063, 1065 (C.D. Cal. 1999)* ; *see Hal Roach Studios, Inc. v. Richard Feiner & Co., 883 F.2d 1429, 1436 (9th Cir. 1989)* (allegations of nonmoving party must be accepted as true, while the allegations of moving party that have been denied are assumed to be false).

(n6)Footnote 5. *See Northern Ind. Gun & Outdoor Shows v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998)* .

(n7)Footnote 6. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* .

(n8)Footnote 7. *Withrow v. Donnelly, 333 F. Supp. 2d 108, 109-110 (W.D.N.Y. 2004)* .

(n9)Footnote 8. *See Oh v. AT & T Corp. 76 F. Supp. 2d 551, 554 (D.N.J. 1999)* (while court will accept well-pleaded allegations as true for purposes of motion, it may not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in form of factual allegations).

(n10)Footnote 9. *Mixon v. Ohio, 193 F.3d 389, 400 (6th Cir. 1999)* .

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.05

§ 16.05 Standard Used in Decision by Trial Court to Grant or Deny Judgment on Pleadingsn*

[1] No Issues of Material Fact Presented

The trial court may grant a judgment on the pleadings pursuant to Rule 12(c) only if it appears beyond doubt that the nonmoving party cannot prove any facts that would support his or her claim for relief, after it has accepted all well-pleaded allegations in the pleading as true, and drawn all reasonable inferences in favor of the nonmoving party. n1 The requirement that the court must view the facts presented in the pleadings, and the inferences drawn from the facts, in the light most favorable to the nonmoving party, is designed to ensure that the rights of the nonmoving party are decided as fully and fairly on a Rule 12(c) motion as if there had been a trial on the merits. n2 Therefore, any issue of material fact in a case will preclude a judgment on the pleadings in favor of either party. n3

As with the Rule 12(b)(6) motion, n4 under Rule 12(c) the court must accept the nonmovant's allegations as true. n5 The trial court should grant judgment on the pleadings only if the movant is entitled to judgment as a matter of law. n6 However, the court is not required to ignore facts specified in the complaint that undermine the plaintiff's claim, nor is the court bound by assertions in the complaint that are merely unsupported conclusions of law. n7

When no reply is required by an answer, a defendant may not obtain a judgment on the pleadings based on the allegations in the answer, because under Rule 8(d) such allegations are deemed denied. n8 Similarly, a plaintiff may not move for judgment on the pleadings where the answer raises issues of fact that would defeat recovery, if proved. n9 Furthermore, courts have rejected the assertion that when both parties movefor judgment, it becomes a question of law to be decided on the facts on file. n10

[2] Motion Equivalent to Motion to Dismiss

If a motion for judgment on the pleadings is filed by the defendant before it files the answer, the court may treat it as a motion to dismiss under Rule 12(b)(6) because a Rule 12(c) motion is analyzed under the same standards as a Rule 12(b)(6) motion n1 and is essentially serving the same purpose as a Rule 12(b)(6) motion. n1.1 In such a situation, the ground for the motion for judgment on the pleadings is the nonmovant's failure to state a claim and the nonmovant may include in its opposition papers a request to amend the pleadings if they are found deficient. Consequently, it has been suggested that a slightly more detailed analysis than usual is necessary and the court must distinguish between failure to state a claim for substantive reasons and failure to state a claim for procedural reasons. When the moving party's

challenge to the nonmovant's claim is substantive, the movant is entitled to judgment on the pleadings. n2 On the other hand, if the challenge to the nonmovant's claim is procedural, the nonmoving party should be afforded an opportunity to amend the pleadings, provided the party meets the ordinary requirements for amendment. n3

Because a motion for failure to state a claim under Rule 12(b)(6) is analogous to a motion for judgment on the pleadings under Rule 12(c), n4 the extensive authority on Rule 12(b)(6) motions may be applied by analogy to the Rule 12(c) motion. In fact, many cases frequently discuss both motions. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* .

(n3)Footnote 2. *American Fire & Cas. Co. v. Broeren Russo Constr., Inc., 54 F. Supp. 2d 842, 845* (C.D. Ill. 1999 (Rule 12(c) judgment on pleadings is designed to provide a method for disposing of cases when material facts are not in dispute, and a judgment on the merits can be achieved in such motion by focusing on the content of pleadings and any facts of which court could take judicial notice).

(n4)Footnote 3. *Hellyer Communications, Inc. v. WRC Properties, Inc., 888 F. Supp. 94 (S.D. Ind. 1995)* (in tenant's action to recover rent overpayments, issue of material fact about when tenant should have discovered that tenant was paying for space that it did not occupy precluded judgment on pleadings for landlord).

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 5. *Rivera v. Heyman, 157 F.3d 101, 103 (2d Cir. 1998)* (court must accept all allegations in complaint as true, draw all inferences in favor of plaintiff, and grant motion only if it appears beyond doubt that plaintiff can prove no set of facts in support of claim that would entitle plaintiff to relief).

(n7)Footnote 6. *Latecoere Int'l, Inc. v. United States Dep't of the Navy, 19 F.3d 1342, 1356-1357 (11th Cir. 1994)* .

(n8)Footnote 7. *Northern Ind. Gun & Outdoor Shows v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998)* (court not obliged to ignore any facts set forth in complaint that undermine plaintiff's claim or to assign any weight to unsupported conclusions of law).

(n9)Footnote 8. *Parker v. DeKalb Chrysler Plymouth, 459 F. Supp. 184, 186-187 (N.D. Ga. 1978)* , aff. *673 F.2d 1178 (11th Cir. 1982)* (when defendant moves for judgment on pleadings, fact allegations of complaint must be taken as true, but those of answer are taken as true only if and to extent that they have not denied or do not conflict with those of complaint; however, because plaintiff was not required or permitted to reply to answer, averments in answer were deemed denied, and defendant was not entitled to judgment on pleadings).

(n10)Footnote 9. *Hal Roach Studios v. Richard Feiner & Co., 883 F.2d 1429, 1437 (9th Cir. 1989)* (when defendant denied claim that plaintiff was predecessor in interest of licensor, district court erred in granting plaintiff'smotion for judgment on pleadings because in light of pleadings plaintiff had to be considered stranger to license agreement with no legal interest in action).

(n11)Footnote 10. *See M. Snower & Co. v. United States, 140 F.2d 367, 371 (7th Cir. 1944)* .

(n12)Footnote 1. *Ziemba v. Wezner, 366 F.3d 161, 163 (2d Cir. 2004)* .

(n13)Footnote 1.1. *Seber v. Unger, 881 F. Supp. 323, 325 n.2 (N.D. Ill. 1995)* .

(n14)Footnote 2. *Bushnell Corp. v. ITT Corp., 973 F. Supp. 1276, 1282 (D. Kan. 1997)* (when opposition to claim is substantive, motion complies with usual purpose of a motion under Rule 12(c), and judgment in favor of defendant is appropriate if challenge is successful).

(n15)Footnote 3. *Bushnell Corp. v. ITT Corp., 973 F. Supp. 1276, 1284-1288 (D. Kan. 1997)* (when defendant moved for judgment on pleadings, court granted motion with respect to some claims because defendant's challenge to them was substantive, but permitted plaintiff to amend complaint as to other claims that were simply insufficiently pleaded); *see Miracle of Life, LLC v. N. Am. Van Lines, Inc., 368 F. Supp. 2d 494, 498 (D.S.C. 2005)* (after denial of Rule 12(c) motion, court allowed amendment of complaint to correct deficiencies).

(n16)Footnote 4. *Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983)* .

(n17)Footnote 5. *Smith v. City of Philadelphia, 345 F. Supp. 2d 482, 485 (S.D.N.Y. 2004)* .

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.06

§ 16.06 Motion Treated as Motion for Summary Judgmentn*

The trial court has discretion to consider matters and documents outside the pleadings, but if it does so, the court must treat the motion as one for summary judgment under Rule 56. n1 The court must give all parties notice of the change to a motion for summary judgment and a reasonable opportunity to present all material that would be pertinent to the motion by Rule 56. n2 The essential inquiry when determining if the district court correctly changed a motion to dismiss or for judgment on the pleadings into a motion for summary judgment is whether the nonmovant should reasonably have recognized the possibility that the motion might be changed into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to present or challenge alleged facts outside the pleadings. n3

The court need not provide notice of a change to a motion for summary judgment if it does not actually consider matters outside the pleadings. n4 Furthermore, a court need not convert a motion for judgment on the pleadings to one for summary judgment nor provide the parties with an opportunity to present material pertinent to a motion for summary judgment, nor provide additional discovery time, when the court is considering matters outside the pleadings that have not been "presented" by a party. For example, a court may permissively consider factors outside the pleadings when deciding whether a statute bears a rational relationship to a legitimate state purpose. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 12(d)*; *see Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 (6th Cir. 1997)* (when trial court considered matters outside pleadings in ruling on motion for judgment on pleadings, appellate court must apply summary judgment standard of review, regardless of how district court styled motion).

(n3)Footnote 2. *Fed. R. Civ. P. 12(d)*; *see Fed. R. Civ. P. 56(c)*; *Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689 (2d Cir. 1990)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *In re G. & A. Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985)* (all parties to be given reasonable opportunity to present all material).

(n5)Footnote 4. *Fed. R. Civ. P. 12(d)*; *see Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006)* (district court did not convert motion for judgment on pleadings to motion for summary judgment, even though matters outside pleadings were presented by parties, when court explicitly refused to consider those matters).

(n6)Footnote 5. *Mixon v. Ohio, 193 F.3d 389, 400 (6th Cir. 1999)* ; *see Heller v. Doe, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993)* (state statutes subject to rational basis review are presumed valid and should be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification).

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PART V Pretrial Stage
CHAPTER 16 JUDGMENT ON THE PLEADINGS

2-16 Moore's Manual--Federal Practice and Procedure § 16.07

§ 16.07 Appeal of Grant or Denial of Motion for Judgment on Pleadingsn*

If the trial court grants a motion for judgment on the pleadings, the judgment is immediately appealable as a final judgment on the merits of the case within the meaning of Rule 54. n1 On the other hand, if the trial court denies a motion for judgment on the pleadings, it does not constitute a final judgment on the merits, and the moving party does not have a right to immediately appeal the district court's decision. n2 When the court denies the motion, the lawsuit merely proceeds to a trial or otherdetermination on the merits. If the nonmovant then prevails at trial, the movant may raise the denial of the movant's Rule 12(c) motion as error on appeal, provided that the movant preserves the right to appeal and does not expressly or impliedly waive objections to the pleadings. n3

When a party appeals the district court's grant of a motion for judgment on the pleadings under Rule 12(c), the court of appeals reviews the judgment de novo, n4 in the same manner that it would review the grant of a motion to dismiss under Rule 12(b)(6). Thus, in its decision on review, the appellate court must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff; the appellate court will affirm only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his or her claim for relief. n5 For example, when a judgment on the pleadings has been granted to the defendants, the appellate court on review must construe the complaint in the light most favorable to the plaintiffs and must determine whether the plaintiffs undoubtedly can prove no set of facts in support of the claims that would entitle them to relief. The appellate court must accept all of the plaintiffs' factual allegations as true but need not accept as true legal conclusions or unwarranted factual inferences. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 2 *Moore's Federal Practice,* § 12.38 (Matthew Bender 3d ed.)

(n2)Footnote 1. *GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* .

(n3)Footnote 2. *Roth v. Veteran's Admin. of United States, 856 F.2d 1401, 1403 fn.1 (9th Cir. 1988)* ; *see 28 U.S.C. § 1291.*

(n4)Footnote 3. *Sinclair Refining Co. v. Stevens, 123 F.2d 186 (8th Cir. 1941)* , *cert. denied, 315 U.S. 804 (1941)* .

(n5)Footnote 4. *Mixon v. Ohio, 193 F.3d 389, 399 (6th Cir. 1999)* .

(n6)Footnote 5. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* .

(n7)Footnote 6. *Mixon v. Ohio, 193 F.3d 389, 400 (6th Cir. 1999)* .

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure 17.syn

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART I. SCOPE AND PURPOSE OF SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.01

§ 17.01 Function of Summary Judgment in Federal Litigationn*

Summary judgment is a procedure by which a moving party may obtain a determination of entire case, claims or defenses, or parts of claims or defenses in its favor without the necessity of completing a trial. To obtain summary judgment, the moving party must demonstrate to the court that there is no genuine dispute of any material fact and that the party is entitled to judgment as a matter of law. n1 Thus, summary judgment means entry of judgment without trial or specific fact finding by the court or jury as a trier of fact, because by definition there are actually no disputes of fact. n2

Unlike most of the Federal Rules of Civil Procedure, which are designed primarily to regulate the litigation process and not to resolve the dispute itself, Rule 56 is specifically designed to decide cases or portions of cases. n3 Summary judgment is a determination by the court concerning a case or a portion of a case that is made prior to trial that does away with the need for trial of the claim or defense or part of claim or defense matter that is the subject of the summary judgment. n4 Thus, if a court grants summary judgment as to an entire case, it eliminates the need for trial entirely, and the court's grant of summary judgment constitutes a final decision in the case and may be appealed by the opponent of the summary judgment just as a final judgment after trial is appealed. Summary judgment, like a judgment resulting from trial, also has a res judicata effect after appellate review has been completed. n5

A court may also enter summary judgment with respect to only a particular claim or defense or part of a claim or defense. n6 These partial summary judgment orders generally are not appealable final orders because the summary judgment leaves matters on which the court must hold trial before it may resolve the entire case. n7

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Shropshire v. Laidlaw Transit, Inc., 550 F.3d 570, 574 (6th Cir. 2008)* ; *see Fed. R. Civ. P. 56(a)*.

(n3)Footnote 2. *See T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F.3d 97, 114 (1st Cir. 2006)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 56*, Original Committee Note.

(n5)Footnote 4. *Fed. R. Civ. P. 56(a).*

(n6)Footnote 5. *Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278 (5th Cir. 1981)* .

(n7)Footnote 6. *Fed. R. Civ. P. 56(a).*

(n8)Footnote 7. *See 28 U.S.C. § 1291.* For further discussion of partial summary judgment, *see* § 17.64.

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART I. SCOPE AND PURPOSE OF SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.02

§ 17.02 Purposes of Summary Judgmentn*

Summary judgment has several purposes, which coincide precisely with the general purposes of the federal rules, which are to secure the just, speedy, and inexpensive determination of every action and proceeding. n1 Thus, the primary purpose of summary judgment is to eliminate a trial for claims and defenses when there is no genuine dispute of material fact presented because such a trial would result in considerable delay and expense. n2 Summary judgment is also used by the parties and the court to pierce any boilerplate in the pleadings and assess the parties' substantive proof in order to determine whether trial is actually required. n3 Summary judgment is also a device to be used by the courts to conserve its own scarce judicial resources. n4 In operation, a summary judgment motion requires the court to go beyond the pleadings and analyze the facts to determine if there is any factual dispute at all. n5 Summary judgment thus separates the merely formal existence of a dispute as specified in the pleadings from the actual substantive existence of a controversy requiring trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.07-56.08 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 1.*

(n3)Footnote 2. *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 862 (6th Cir. 2007)* .

(n4)Footnote 3. *United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 354-355 (2d Cir. 1993)* (motion for summary judgment enables court to pierce through adroit crafting of pleading to consider substance of claim).

(n5)Footnote 4. *Acumed LLC v. Advanced Surgical Servs., 561 F.3d 199, 224 (3d Cir. 2009)* .

(n6)Footnote 5. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (one significant purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses).

(n7)Footnote 6. *Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 140 (1st Cir. 2010)* (one role of summary judgment is to pierce pleadings and to determine whether there is genuine dispute of fact and need for trial).

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART I. SCOPE AND PURPOSE OF SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.03

§ 17.03 Comparison of Summary Judgment with Other Motions to Dispose of Claim or Defensen*

[1] Motions Which Challenge Power of Court to Hear Case

In considering the nature of a summary judgment motion, it is beneficial to consider it in the context of other similar motions that dispose of all or part of the claims in an action. For example, if the facts affecting jurisdiction or venue are not in dispute, a motion seeking dismissal for lack of jurisdiction or venue exhibits some of the characteristics of a summary judgment motion. A defendant may, in appropriate circumstances, thus prevail on a claim or an entire case through a motion to dismiss based, for example, on lack of subject matter jurisdiction; n1 lack of personal jurisdiction over a defendant; n2 improper venue; n3 insufficient form of process; n4 or inadequate service of the summons and complaint. n5 Summary judgment motions, however, differ from these Rule 12 motions in that these motions determine only the existence or nonexistence of the power of a particular court to hear a particular claim. n6 Such motions to dismiss result only in dismissal of the claim, which may be reinstituted in proper circumstances. On the other hand, summary judgment motions, if granted, result in final adjudication of a fact, claim, issue, or case, with subsequent preclusion of identical claims. n7

These motions also differ significantly from summary judgment motions because the court can look beyond the facts alleged in the pleadings, and the court may actually resolve factual disputes in order to determine these types of motions. n8 On the other hand, on a motion for summary judgment, the court may not decide disputed fact issues, and may not look beyond the record. n9 The court is limited to determine whether that there is any genuine dispute as to any material fact, and the court may grant summary judgment only if it has determined that there is no such genuine dispute. n10

[2] Motion for Judgment as Matter of Law

A similar standard applies to a determination of whether to grant a motion for summary judgment and a motion for judgment as a matter of law under Rule 50. n1 The essence of both motions is that there is no genuine dispute of material fact that can be determined by the trier of fact and that on the law applicable to the established facts the moving party is entitled to judgment. n2 Specifically, when considering either a summary judgment motion or a motion for judgment as a matter of law, a court must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence. The latter functions,

along with the drawing of legitimate inferences from the facts, are for the jury, not the court. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. n3

There are, however, significant differences between the two motions. One is that the motions are properly made at substantially different times during trial. n4 Because the primary purpose of a motion for summary judgment is to avoid an unnecessary trial, the motion may be made at an early stage of the litigation and should be made at such an early time before trial that it does not delay the trial; in any event a party may file a motion for summary judgment only until 30 days after the close of all discovery. n5 On the other hand, a motion for judgment as a matter of law may be made only after a party has been fully heard on an issue during a jury trial n6 up until the case is submitted to the jury. n7 Because of this timing different, in deciding a motion for judgment as a matter of law, the court has before it a rather more completely developed record based on the evidence developed during the pretrial phase of the case and also presented to the court at least through plaintiff's trial presentation of the case. On the other hand, the record forming the basis of a summary judgment motion is formed only by discovery, investigation, and affidavits assembled before trial, and not by the trial process. n8

There are other procedural differences between the motions. A court should not grant summary judgment when it could not properly enter judgment as a matter of law for the movant, although it may set a contrary verdict aside as against the weight of the evidence. n9 On the other hand, denial of summary judgment does not preclude a grant after trial of a motion for judgment as a matter of law. n10

[3] Motion to Dismiss for Failure to State Claim

A motion for summary judgment is similar to a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted in that when the court grants either motion the court may dismiss the action or claims or a part of a claim. n1 However, the motions differ significantly regarding the applicable standards. The issue in deciding a Rule 12(b)(6) dismissal motion is not whether the plaintiff will ultimately prevail but whether he or she is entitled to offer evidence to support the claims. n2 Therefore, the court may grant a motion to dismiss only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief. n3 In contrast, the question at the summary judgment stage of litigation, assuming the movant has met its initial burden, is whether there is a genuine dispute of any material fact n4 and whether the nonmovant's evidence would support a reasonable verdict in the nonmovant's favor. n5

The motions also differ significantly regarding the court's assumptions regarding the evidence. In ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must (1) consider only the allegations contained in the complaint, (2) accept as true all of the averments of the complaint, n6 and (3) draw all reasonable inferences in favor of the nonmovant pleader. n7 Thus, a party making a motion to dismiss for failure to state a claim faces a higher burden than a party proceeding on a motion for summary judgment because in a Rule 12(b)(6) motion the court may generally consider only matters in favor of the party making the claim. n8 Thus, in contrast to a motion to dismiss, in which the court must construe the complaint in favor of the nonmovant, n9 the court ruling on a summary judgment motion is not required to defer to all assertions of a party opposing summary judgment. For example, a court may grant summary judgment where the nonmovant makes objectively incredible claims in the form of an affidavit. n10 To defeat a properly made and supported summary judgment motion, the nonmovant must present specific facts showing that summary judgment is not proper and may not rely merely on allegations in a pleading, as may the respondent to a Rule 12(b)(6) motion to dismiss for failure to state a claim. n11

Finally, the motions also differ significantly regarding the documentation reviewed by the court in deciding the motion. Although a summary judgment motion may also focus primarily on the facts contained in the complaint, it differs from a Rule 12(b)(6) motion in that summary judgment usually involves a more extensive record involving disclosure, discovery responses, affidavits, and other materials of record or materials submitted to the court by either the movant or

nonmovant. n12 On the other hand, a court deciding a Rule 12(b)(6) motion generally may not consider material beyond the four corners of the complaint in determining the truth of the allegations of the complaint. n13 In this regard, if a party does present matters outside the complaint, the court must convert the motion to dismiss into a summary judgment motion. n14

[4] Motion for Judgment on Pleadings

A motion for summary judgment is also somewhat analogous to a Rule 12(c) motion for judgment on the pleadings, which is a device for use by the court to grant judgment after all pleadings are closed if the moving party is entitled to judgment as a matter of law. n1 For a Rule 12(c) motion, the court deems all allegations in the pleadings to be true. n2 Thus, when a court grants a motion for judgment on the pleadings, it decides that it is beyond doubt that the non-moving party can prove no set of facts in support of his or her claim which would entitle the non-moving party to relief, even after accepting all allegations in the pleadings, and drawing all inferences in favor of the nonmovant. n3 The grant of judgment on the pleadings, like a grant of summary judgment, constitutes entry of judgment and always operates as an adjudication on the merits. n4

However, the motions differ regarding timing and the documentation considered by the court. A Rule 12(c) motion may be made only after the pleadings are closed, n5 while a summary judgment motion may be made at any time until 30 days after the close of all discovery. n6

For a summary judgment motion, the court may consider matters outside the pleadings if they are not otherwise excluded by the court, n7 while the court may not consider matters outside the pleadings in a Rule 12(c) motion, n8 except for any facts of which the court may take judicial notice. n9 If on a Rule 12(c) motion for judgment on the pleadings, matters outside the pleadings are presented to and considered by the court, the motion must be treated as one for summary judgment. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 12(b)(1).*

(n3)Footnote 2. *See Fed. R. Civ. P. 12(b)(2).*

(n4)Footnote 3. *See Fed. R. Civ. P. 12(b)(3).*

(N5)Footnote 4. *See Fed. R. Civ. P. 12(b)(4).*

(n6)Footnote 5. *See Fed. R. Civ. P. 12(b)(5).*

(n7)Footnote 6. *See Cloverleaf Realty of N.Y., Inc. v. Town of Wawayanda, 572 F.3d 93, 95 (2d Cir. 2009) .*

(n8)Footnote 7. *See Griffin v. United States, 590 F.3d 1291, 1293 (Fed. Cir. 2009) .*

(n9)Footnote 8. *See Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) .*

(n10)Footnote 9. *Fed. R. Civ. P. 56(c)(3).*

(n11)Footnote 10. *Fed. R. Civ. P. 56(a).*

(n12)Footnote 1. *See Fed. R. Civ. P. 50(a)(1)(B), 56(a); Medlock v. UPS, Inc., 608 F.3d 1185, 1189 (10th Cir. 2010)* ; *see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (summary judgment should be granted when evidence is such that it would require directed verdict for moving party).

(n13)Footnote 2. *Beck v. Texas State Bd. of Dental Exam'rs, 204 F.3d 629, 633 (5th Cir. 2000)* .

(n14)Footnote 3. *Medlock v. UPS, Inc., 608 F.3d 1185, 1189 (10th Cir. 2010)* .

(n15)Footnote 4. *See PPM Am. v. Marriott Corp., 875 F. Supp. 289, 294-295 (D. Md. 1995)* .

(n16)Footnote 5. *Fed. R. Civ. P. 56(b).*

(n17)Footnote 6. *Fed. R. Civ. P. 50(a)(1).*

(n18)Footnote 7. *Fed. R. Civ. P. 50(a)(2).*

(n19)Footnote 8. *Compare Fed. R. Civ. P. 56(b) with Fed. R. Civ. P. 50(a)(1).*

(n20)Footnote 9. *Agosto v. Immigration & Naturalization Service, 436 U.S. 748, 98 S. Ct. 2081, 56 L. Ed. 2d 677 (1978)* .

(n21)Footnote 10. *PPM Am. v. Marriott Corp., 875 F. Supp. 289, 294-295 (D. Md. 1995)* .

(n22)Footnote 1. *Fed. R. Civ. P. 56(a); see Fed. R. Civ. P. 12(b)(6).*

(n23)Footnote 2. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)* .

(n24)Footnote 3. *McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)* (citing **Moore's Federal Practice**).

(n25)Footnote 4. *Fed. R. Civ. P. 56(a).*

(n26)Footnote 5. *Fed. R. Civ. P. 56(a); see Fed. R. Civ. P. 50(a)(1); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n27)Footnote 6. *Gorman v. Roberts, 909 F. Supp. 1493, 1501 (M.D. Ala. 1995)* .

(n28)Footnote 7. *Eidson v. Arenas, 910 F. Supp. 609, 612 (M.D. Fla. 1995)* .

(n29)Footnote 8. *McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)* (citing **Moore's Federal Practice**).

(n30)Footnote 9. *United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1203 (10th Cir. 2001)* .

(n31)Footnote 10. *Applegate v. Top Associates, Inc., 425 F.2d 92, 96 (2d Cir. 1970)* .

(n32)Footnote 11. *First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 1592-1593, 20 L. Ed. 2d 569 (1968)* .

(n33)Footnote 12. *See Fed. R. Civ. P. 56(c)(1)(A).*

(n34)Footnote 13. *Carey v. Mt. Desert Island Hosp., 910 F. Supp. 7, 9 (D. Me. 1995)* .

(n35)Footnote 14. *Fed. R. Civ. P. 12(d)*; *see United States v. Purdue Pharma L.P., 600 F.3d 319, 325-326 (4th Cir. 2010)* .

(n36)Footnote 1. *See Fed. R. Civ. P. 12(c)*.

(n37)Footnote 2. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)* .

(n38)Footnote 3. *Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 152 (2d Cir. 2003)* .

(n39)Footnote 4. *American Fire & Cas. Co. v. Broeren Russo Constr. 54 F. Supp. 2d 842, 845 (C.D. Ill. 1999)* (judgment on pleadings results in judgment rather than merely in dismissal and has preclusive and binding effect unless specifically limited by court).

(n40)Footnote 5. *Fed. R. Civ. P. 12(c)*.

(n41)Footnote 6. *Fed. R. Civ. P. 56(b)*.

(n42)Footnote 7. *See Downs v. Governor of Michigan, 622 F.3d 579, 585-586 (6th Cir. 2010)* .

(n43)Footnote 8. *See Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009)* .

(n44)Footnote 9. *American Fire & Cas. Co. v. Broeren Russo Constr., 54 F. Supp. 2d 842, 845 (C.D. Ill. 1999)* .

(n45)Footnote 10. *Fed. R. Civ. P. 12(d)*.

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART I. SCOPE AND PURPOSE OF SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.04

§ 17.04 Jury Trial Considerationsn*

Despite assertions to the contrary, it has consistently been decided that a properly granted motion for summary judgment does not violate the nonmovant's right to a jury trial under the *Seventh Amendment*. n1 The rationale for this principle is that if a court grants a summary judgment, it has made a determination that there is no genuine dispute as to any material fact. n2 Because it is a basic *Seventh Amendment* principle that a party is entitled to a jury trial only to the extent that triable issues of fact are present, n3 when no genuine dispute of material fact exists, the court has the power to grant summary judgment without denying a party's right to jury trial. n4 On the other hand, if a court improperly decides summary judgment, it is also erroneous because the court takes away from a party the right to jury for the materially factual disputes that actually exist. n5

Some courts have noted that summary judgment procedures have built-in protection for jury trial right on disputes of fact. n6 The Supreme Court has also stated that summary judgment procedures require the trial court to exercise great care in granting motions for summary judgment and to preserve a litigant's right to a trial when there is a doubt regarding the facts. For example, when damages are in dispute, the court should not grant a summary judgment on damages. Summary disposition of issues of damages should only be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict (now judgment as a matter of law) for the moving party. n7

For further discussion of the right to a jury trial under the *Seventh Amendment*, see Ch. 22, *Trial by Jury*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 811 (9th Cir. 2008)* .

(n3)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n4)Footnote 3. *Benjamin v. Traffic Executive Asso. Eastern Railroads, 869 F.2d 107, 115 n.11 (2d Cir. 1989)* .

(n5)Footnote 4. *Harris v. Interstate Brands Corp., 348 F.3d 761, 762 (8th Cir. 2003)* .

(n6)Footnote 5. *See McDougall v. Pioneer Ranch L.P., 494 F.3d 571, 575-576 (7th Cir. 2007)* .

(n7)Footnote 6. *Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 811 (9th Cir. 2008)* .

(n8)Footnote 7. *Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967 (1944)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.05

§ 17.05 Any Party May Make Motion for Summary Judgmentn*

Any party may file a motion for summary judgment with respect to all or part of a claim, whether the party has filed a claim for relief or is defending against a claim for relief. Thus, each party must identify each particular claim or defense for which that party is requesting summary judgment. n1 Thus, all types of claimants and defending parties may move for summary judgment, including original plaintiffs, counterclaimants, crossclaimants, third-party claimants, intervenors, and claimants in interpleader, as well as all parties defending any such claims. n2 Prior to the 2010 amendments, Rule 56 addressed motions by claiming and defending parties in separate subsections, and provided for a different time frame for filing a motion depending on whether the moving party was a claiming or defending party. The Rules Committee found that those timing provisions in former subdivisions (a) and (c) should be superseded, and that scheduling orders or other pretrial orders can regulate timing to fit the needs of the particular case. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 56(a)*, Committee Notes to 2007 Amendments; *see also § 17.21.*

(n4)Footnote 3. *Fed. R. Civ. P. 56(b)*, Committee Notes to 2010 Amendments.

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2-17 Moore's Manual--Federal Practice and Procedure § 17.06

§ 17.06 Summary Judgment Practice Under Local Rulesn*

In addition to the procedural requirements established by Rule 56 and other civil rules, current summary judgment practice is substantially affected by local rules of civil procedure that govern practice in each district court. Although local rules may not conflict with the general type or format of summary judgment motion papers required under Rule 56, nor impose more stringent requirements on the parties, n1 the particular local requirements should be followed or significant adverse repercussions may occur. For example, when motion papers required by local rule are missing or improperly prepared, courts may decide against the litigant on the issue, refuse to consider nonconforming papers, or decline to rule on the motion. Therefore, attorneys should always ensure not only that the content of the summary judgment motion papers is sufficient but also that the format of the motion and opposition papers meets the specific standards under applicable local rules. n2

It should also be recognized that some of the provisions of Rule 56 as rewritten in 2010 have adopted some common practices under local rules. For example, Subdivision (c), regarding supporting documentation, establishes a common procedure for several aspects of summary judgment motions which have been synthesized from similar elements developed in common practice or found in many local rules. n3 The new rule acknowledges that various aspects of procedure are best left to local rule. For example, Rule 56(c)(1)(A) describes the familiar record materials that are commonly relied upon in a motion for summary judgment, and must be included in the record. Once materials are placed in the record, the court by order, or a local rule may direct that the materials be gathered in an appendix, or that the parties may submit a joint appendix. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSummary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.61, 56.70, 56.82 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Mack v. Dillon, 594 F.3d 620, 623 (8th Cir. 2010)* ; *see Fed. R. Civ. P. 83(a)*.

(n3)Footnote 2. *Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1057 (7th Cir. 2000)* (in granting summary judgment for defendant, district court relied primarily on proposed findings of fact submitted by defendant because plaintiff had failed to comply with Eastern District of Wisconsin, Local Rule 6.05, requiring nonmoving party to submit specific response to movant's proposed findings of fact, clearly delineating only those findings for which genuine dispute of material fact existed).

(n4)Footnote 3. *Fed. R. Civ. P. 56(c)*, Committee Notes to 2010 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 56(c)(1)(A)*, Committee Notes to 2010 Amendments.

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2-17 Moore's Manual--Federal Practice and Procedure §§ 17.07-17.19

[Reserved]

§§ 17.07[Reserved]

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2-17 Moore's Manual--Federal Practice and Procedure § 17.20

§ 17.20 Statement of Standardn*

A court shall grant a summary judgment if the movant shows that: n1 (1) there is no genuine dispute as to any material fact; n2 and (2) the movant is entitled to judgment as a matter of law. n3 The court may grant judgment as a matter of law only if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis on which to find for that party on that issue. n4

A summary judgment movant must demonstrate legal entitlement to judgment. This means that the controlling law must require a decision in the movant's favor. In other words, summary judgment is not appropriate merely because there is no genuine dispute of material fact. For the court to grant summary judgment, the court must conclude that the movant must prevail as a matter of law. n5 An assertion of entitlement to judgment as a matter of law may fail, even in the absence of a genuine dispute as to any material fact, if the controlling law does not, on the set of undisputed facts in question, definitively require a particular outcome of the claim or defense. For example, if a claim turns on the reasonableness of a party's conduct, the controlling law might not definitively require a finding for either side, not even when there is an agreed set of facts. In that event, summary judgment would be inappropriate, despite the absence of a genuine dispute of material fact, because neither side would be able to show a legal entitlement to judgment. n6

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 2. *See §§ 17.21, 17.22.*

(n4)Footnote 3. *See § 17.23.*

(n5)Footnote 4. *Fed. R. Civ. P. 50(a)(1)*; *see* Ch. 22, *Trial by Jury.*

(n6)Footnote 5. *Fed. R. Civ. P. 56(a).*

(n7)Footnote 6. *See Fed. R. Civ. P. 50(a)(1)*; *Thompson v. District of Columbia, 573 F. Supp. 2d 64, 67 (D.D.C. 2008)* (although no genuine disputes of material fact existed, Court had to nevertheless evaluate defendant's motion for summary judgment to determine whether defendant is entitled to judgment as matter of law).

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2-17 Moore's Manual--Federal Practice and Procedure § 17.21

§ 17.21 Absence of Genuine Dispute of Factn*

[1] Movant Must Establish Nonexistence of Genuine Dispute of Fact

A court shall grant summary judgment only if there is no genuine dispute of material fact related to the claim or defense that is the subject of the motion. n1 A "genuine dispute" of fact sufficient to defeat summary judgment is present only if there exists evidence such that a reasonable trier of fact, either judge or jury as applicable, could return a verdict for the nonmoving party. In other words, facts are not "genuinely" in issue unless the factual dispute between movant and nonmovant requires trial of the case for resolution. n2

Thus, the Supreme Court has stated that the inquiry regarding genuineness is a determination of whether there is the need for a trial, that is, whether there are any factual issues that properly may be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. n3 Therefore, when a trial court is asked to rule on a summary judgment motion, the court must examine the submissions of the parties and determine whether there is any evidence showing a factual dispute exists sufficient to warrant a trial. n4 Thus, even if the parties differ about material facts, the factual dispute is not "genuine" if the nonmovant asserts facts and seeks a legally impermissible inference from the facts in order to prevail, or if the nonmovant seeks a factual inference that is objectively impossible. In such cases, the court may grant summary judgment because the court is not impermissibly assessing credibility, weighing evidence, or making fact findings. n5 When considering whether there is a genuine factual dispute, the court will not consider legal memoranda or oral argument as evidence, and such arguments do not in themselves create factual disputes sufficient to defeat a motion for summary judgment. n6

[2] Nonmovant Must Establish Existence of Genuine Dispute of Fact by Substantial Evidence n*

The Supreme Court has clarified that the substantial evidence standard used to decide motions for judgment as a matter of law also applies to summary judgment. Thus, summary judgment under Rule 56 is controlled by the same standard as judgment as a matter of law under Rule 50. n1 Consequently, summary judgment may be appropriate even if material facts are disputed if the nonmovant fails to provide substantial evidence of such contested facts. n2 Conversely, the trial court must treat a fact as genuinely in dispute if the nonmovant responding to a motion for summary judgment submits substantial evidence regarding the fact, such as through proper affidavits given by individuals with personal knowledge and through other significantly probative evidence, such that a reasonable juror drawing all inferences in favor of the

nonmovant could return a verdict in the nonmovant's favor. n3 For a discussion of the burdens of production and persuasion that movants and nonmovants must sustain on summary judgment motions, *see* § 17.63.

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 2. *Cline v. Industrial Maintenance Eng'g & Contr. Co., 200 F.3d 1223, 1229 (9th Cir. 2000)* (when employees brought action alleging violations of ERISA, district court entered summary judgment for defendants, and court of appeals found that employees failed to raise triable fact question as to whether defendants were plan "administrators" who could be held liable for failing to comply with ERISA reporting and disclosure requirements).

(n4)Footnote 3. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n5)Footnote 4. *Hunt v. Cromartie, 526 U.S. 541, 552-553, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999)* (genuine dispute of material fact existed when evidence showed possible racial intent when state legislature drew congressional redistricting plan).

(n6)Footnote 5. *United States v. Gilbert, 920 F.2d 878, 882 (11th Cir. 1991)* .

(n7)Footnote 6. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (mere allegations or assertions are not evidence of facts and may not defeat properly made summary judgment motion).

(n8)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.41 (Matthew Bender 3d ed.).

(n9)Footnote 1. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n10)Footnote 2. *See Fed. R. Civ. P. 56(e)(3)*; *Lohnes v. Level 3 Communs., Inc., 272 F.3d 49, 52-53 (1st Cir. 2001)* (in contract case, summary judgment may be appropriate even though there is ambiguity in contract language if evidence presented about the parties' intended meaning is so one-sided that no reasonable person could decide the contrary).

(n11)Footnote 3. *United States v. Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.22

§ 17.22 Materiality of Factual Issuen*

To avoid a summary judgment on the basis of the existence of a dispute of fact, the nonmovant must show that the dispute is regarding a material fact. A fact is "material" for purposes of a summary judgment motion only if existence of the fact in dispute could potentially affect the outcome of the claim or defense under the applicable substantive law. The mere existence of evidence of a factual dispute is insufficient to defeat summary judgment when consideration of such facts would not support nor defeat a claim or defense. n1 Factual disputes that are irrelevant or unnecessary are therefore not considered by the court. n2 Furthermore, if a party making a claim or defense has a complete failure of factual proof with respect to an essential element of the claim or defense, all other facts become immaterial, and the court should enter summary judgment for the movant on the summary judgment motion. n3

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.23 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162, 172 (3d Cir. 2008)* .

(n3)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n4)Footnote 3. *Massey v. Johnson, 457 F.3d 711, 716-720 (7th Cir. 2006)* ; *see Marathon Fin. Ins., Inc., RRG v. Ford Motor Co., 591 F.3d 458, 467-469 (5th Cir. 2009)* (summary judgment proper for movant defendant in tortious interference case because nonmovant plaintiff had burden to disprove justification, and failed to provide any factual evidence on that issue).

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2-17 Moore's Manual--Federal Practice and Procedure § 17.23

§ 17.23 Entitlement to Judgment as Matter of Lawn*

In addition to showing that there is no genuine dispute of material fact, n1 a movant for summary judgment must also establish that the moving party is entitled to judgment as a matter of law. n2 This means that the movant must demonstrate that the applicable governing law requires a trier of fact to find in the movant's favor on the claim or defense that is the subject of the motion. n3 Therefore, to obtain a summary judgment, a party must show a prevailing legal theory, because even if material facts are not disputed or otherwise established, the controlling legal issues may be incapable of determination at the summary judgment stage of litigation, or the trier of fact may have decisions that remain regarding the interpretation of facts or the inferences to be drawn from the facts. n4 From the other perspective, to defeat summary judgment, the nonmovant must present a feasible legal theory showing that the a trier of fact could determine that the nonmovant is entitled to relief should it prevail on the facts at trial. n5

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.20, 56.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 56(a)*; *see §§ 17.21*, *17.22*.

(n3)Footnote 2. *Fed. R. Civ. P. 56(a)*.

(n4)Footnote 3. *Fed. R. Civ. P. 50(a)(1)*.

(n5)Footnote 4. *See Thompson v. District of Columbia, 573 F. Supp. 2d 64, 67 (D.D.C. 2008)* .

(n6)Footnote 5. *Duffy v. Meconi, 508 F. Supp. 2d 399, 406 (D. Del. 2007)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.24

§ 17.24 Court May Not Weigh Evidence to Determine Summary Judgment Motionn*

In a court's determination of a summary judgment motion, the court may not weigh evidence to make fact findings, nor may it consider evidence to make credibility determinations. n1 In determining whether a factual dispute warranting trial exists, the court must view the record in the case and the summary judgment submissions in the light most favorable to the nonmovant. n2 In other words, the court deciding a summary judgment motion may not make a determination of any specific facts; rather, the court reviews the summary judgment motion and response papers and seeks to determine whether the record reveals a disputed factual issue material enough to require a trial and factfinder determination of the factual question. n3 It would be an inappropriate assessment of affiant's credibility, and the court could not grant summary judgment in favor of defendant because a particular affiant was more respected. Similarly, if a court is required to make a determination of which version of events is more likely, it is improperly weighing the evidence, and summary judgment may not be granted. n4

However, as a matter of law, the court is permitted to set the limits of permissible factual inferences based on the applicable substantive law; this principle applies because an inference must be "reasonable." n5 Thus, if the court determines that an inference that would be required for the nonmovant to prevail is legally impermissible, the court may grant summary judgment. In such circumstances, the court is not required to assess credibility, weigh evidence, or make fact findings. n6

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.24 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Sensing v. Outback Steakhouse of Fla., LLC, 575 F.3d 145, 163 (1st Cir. 2009)* .

(n3)Footnote 2. *Denzler v. Questech, Inc., 80 F.3d 97, 101 (4th Cir. 1996)* .

(n4)Footnote 3. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n5)Footnote 4. *See Sorlucco v. New York City Police Dep't, 888 F.2d 4, 7 (2d Cir. 1989)* .

(n6)Footnote 5. *See Maroules v. Jumbo, Inc., 452 F.3d 639, 643 (7th Cir. 2006)* (court decides whether inference

of *res ipsa loquitur* is permissible and, if so, trier of fact determines whether to draw inference).

(n7)Footnote 6. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (plaintiff's theory of case and requested factual inferences based on theory rejected).

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2-17 Moore's Manual--Federal Practice and Procedure §§ 17.25-17.39

[Reserved]

§§ 17.25[Reserved]

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART III. DOCUMENTATION REQUIREMENTS FOR MOTION AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.40

§ 17.40 Formal Motion Requiredn*

If a party meets the standards for summary judgment, the party must make a formal summary judgment motion to preserve the party's argument n1 and because a formal summary judgment motion forms the foundation to file accompanying supporting documentation and other exhibits. n2 The party making a motion for summary judgment is referred to in Rule 56 as the "movant." n3

The formal motion for summary judgment should contain the following items: (1) a notice of the motion specifying the date, time, and location of the hearing on the motion obtained through the clerk of the court that will hear and decide the motion; n4 (2) the text of motion itself, which must identify the party requesting summary judgment, the claims or defenses, or parts of claims or defenses, that are the subject of the request for summary judgment, n5 and the legal grounds and factual assertions for the motion; n6 (3) affidavits and other documentation in support of the motion; n7 and (4) if required or permitted by local rule, a proposed order that, if signed by the court, would provide the summary judgment sought. n8

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.70 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 7(b)(1)(A)* (requirement of writing).

(n3)Footnote 2. *See Fed. R. Civ. P. 56(b)* (motion must be filed); *see §§ 17.43*-17.45; *see also § 9.02* (general requirements of motions).

(n4)Footnote 3. *Fed. R. Civ. P. 56(a).*

(n5)Footnote 4. *See Fed. R. Civ. P. 6(c)(1)*; *see also § 9.47.*

(n6)Footnote 5. *Fed. R. Civ. P. 56(a).*

(n7)Footnote 6. *Fed. R. Civ. P. 7(b)(1)(B).*

(n8)Footnote 7. *Fed. R. Civ. P. 56(c)(1)(A), 56(e).*

(n9)Footnote 8. *See, e.g., Prusky v. ReliaStar Life Ins. Co., 532 F.3d 252, 267 (3d Cir. 2008)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.41

§ 17.41 Response by Nonmovantn*

A party opposing a summary judgment motion has a right to expressly respond to the motion. n1 and is referred to in Rule 56 as the "nonmovant." n2 Local rules and orders of court generally control most aspects of a summary judgment response and a failure to comply may limit the right to respond. Thus local rules or court scheduling orders commonly set time limits on filing a response to a motion for summary judgment. n3 Rule 56 requires all factual claims to be supported by citations to the record. Failure to comply could result in a court order that certain facts are undisputed for purposes of the motion, n4 or even a court order granting summary judgment if the movant's factual record is proper and the movant shows entitlement to judgment as a matter of law. n5

Rule 56 does not specify the format for a response to a motion for summary judgment. In the absence of local rule or court order, the nonmovant should file a response containing the same elements and in the same format as the proponent's motion. n6 The response is typically entitled the "Motion in Opposition to Summary Judgment." n7

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.80, 56.81 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 56(c)(4), 56(d), 56(e).*

(n3)Footnote 2. *Fed. R. Civ. P. 56(d), (f)(1).*

(n4)Footnote 3. *See Fed. R. Civ. P. 56(b)*, Committee Notes to 2010 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 56(e)(2).*

(n6)Footnote 5. *Fed. R. Civ. P. 56(e)(3).*

(n7)Footnote 6. *See § 17.40.*

(n8)Footnote 7. *See, e.g., Pardo-Kronemann v. Donovan, 601 F.3d 599, 618 (D.C. Cir. 2010)* ; *Perrey v.*

Donahue, 703 F. Supp. 2d 839, 858 (N.D. Ind. 2010) .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.42

§ 17.42 Reply by Movantn*

Rule 56 recognizes that, once the nonmovant has filed a response, the movant can in turn file a reply to counter the arguments and assertions in the response. n1 Generally, the permitted scope of such a reply, and the deadline for filing it, are controlled by local rules or court orders. Typically, the filing of a reply is optional. Most local rules that allow replies state that a party who has received opposition to a motion may file a reply. However, as a practical matter, a reply may be required to dispute additional facts raised by the opposing party in its response. Thus, Rule 56(e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. n2 Courts usually limit the scope of reply motions to direct rebuttal to the matters raised in the response motion. n3

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.83 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 56(e)*, Committee Notes to 2010 Amendments.

(n3)Footnote 2. *See Fed. R. Civ. P. 56(e)(2)*, Committee Notes to 2010 Amendments.

(n4)Footnote 3. *See United States v. Elizalde-Adame, 262 F.3d 637, 640 (7th Cir. 2001)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.43

§ 17.43 Summary Judgment Recordn*

[1] Contents of Record

The summary judgment record is the documentation in support of a motion for summary judgment or in support of a response which a court may, but is not required to, examine in its determination of the motion. The court is required to consider only those matters in the record cited by the movant or nonmovant. n1

The summary judgment record includes the official record in the action, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, and other materials. It also includes items placed in the record for purposes of the summary judgment motion. n2 Thus, Rule 56(c)(1)(A) describes the familiar record materials commonly relied upon. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record. n3

Discovery items that have been prepared for the case but have not yet been placed in the record may be submitted with the summary judgment motion. Because Rule 5 prohibits parties from filing most disclosure and discovery material until such material is used in the action or filing is ordered by the court, n4 parties should include such items in the record only if they will be referenced in the motion. n5

[2] Use of Record

A movant asserting that a fact cannot be genuinely disputed, or a nonmovant asserting that a fact is in genuine dispute, must support the assertion in one of two ways: by either citing to the particular parts of materials in the record under Rule 56(c)(1)(A), n1 or by showing under Rule 56(c)(1)(B) that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. n2 Rule 56(c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any

other materials, may respond or reply that materials already cited to dispute or support a fact do not actually establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact. n3

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.90 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(c)(3)*.

(n3)Footnote 2. *Fed. R. Civ. P. 56(c)(1)(A)*.

(n4)Footnote 3. *See Fed. R. Civ. P. 56(c)(1)(A)*, Committee Notes to 2010 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 5(d)(1)*.

(n6)Footnote 5. *See Fed. R. Civ. P. 56(c)(3)*.

(n7)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A)*.

(n8)Footnote 2. *Fed. R. Civ. P. 56(c)(1)(B)*.

(n9)Footnote 3. *Fed. R. Civ. P. 56(c)(1)(B)*, Committee Notes to 2010 Amendments.

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2-17 Moore's Manual--Federal Practice and Procedure § 17.44

§ 17.44 Affidavits in Support of Motion or Responsen*

[1] Use of Affidavits or Declarations

A movant or nonmovant may submit affidavits or declarations in support of or in opposition to a motion for summary judgment. n1 Affidavits or declarations may themselves provide evidence concerning the fact at issue. They may also be used to introduce documents that will supply the evidence but that need authentication by the affiant. n2 An affidavit used to support or oppose a motion for summary judgment is also known as an evidentiary or testimonial affidavit, whose form and content is governed by Rule 56(c)(4), as discussed in *§ 17.44[2]*, *below*. An affidavit or declaration is but one type of the permissible documents a court may consider in ruling on a motion for summary judgment. For example, a verified pleading may serve the same purpose as an affidavit. n3 For a discussion of other supporting documentation for a summary judgment motion, known as the summary judgment record, *see §§ 17.41*, *17.43*.

Rule 56 does not require that a party use affidavits either in support of or in opposition to a motion for summary judgment. n4 Thus, even if the moving party does not accompany its summary judgment motion with affidavits, the motion should be granted provided that the documentation presented to the court demonstrates that the standard set forth in Rule 56(a) for the entry of summary judgment is satisfied. n5

[2] Requirement for Affidavits and Declarations

[a] Must be Sworn or Subscribed as True Under Penalty of Perjury

An affidavit or declaration submitted to support or oppose summary judgment must be a sworn document or declared to be true under penalty of perjury. Courts will not ordinarily consider statements that do not meet one of these two standards. Prior to the 2010 Amendments, Rule 56 referred only to affidavits. Declarations were added in the 2010 Amendments in recognition of the fact that pursuant to Judiciary Code Section 1746, n1 a written unsworn declaration subscribed in proper form as true under penalty of perjury may be substituted for an affidavit whenever a law, rule, regulation, or order requires a matter to be supported by an affidavit. n2 In addition to unsworn or unsubscribed affidavits, courts will also disregard "sham affidavits," which are affidavits that a party files to create an issue of fact by contradicting the party's prior testimony, for example at a deposition. Thus, a party who has been examined at length on

deposition may not raise a dispute of fact on summary judgment merely by submitting an affidavit contradicting his own prior testimony. n3

[b] Content Must Be Based on Personal Knowledge of Competent Person

An affidavit or declaration used to support or oppose a motion for summary judgment must be made on personal knowledge of a person who is competent to testify to the matters stated in the affidavit or declaration. n4 If the affiant or declarant did not or could not observe the matter that is the subject of the testimony, he or she does not have personal knowledge. In that event, the court will not consider the affidavit or declaration. The affidavit or declaration must state facts that show personal knowledge of the substantive facts in the affidavit or declaration. n5 Sometimes personal knowledge may be inferred from the content or context of the affidavit, for example, if the description shows knowledge that could only be acquired by being present and active at a particular time, such as personal knowledge of employees about their employment conditions. n6 However, personal knowledge does not require contemporaneous knowledge, and an affidavit of a person regarding a particular transaction is proper even if the person learned of the transaction after it had occurred. n7

An attorney may submit an affidavit with respect to a summary judgment motion provided that he or she conforms to the general requirements applicable to all such affidavits, including that the statement is within the personal knowledge of the attorney. This means that an attorney's affidavit is not acceptable unless the attorney is a competent witness in regard to the subject matter, n8 and the attorney is in a position to provide an affidavit which presents admissible evidence, such as evidence relating to matters in the case, including identification of items in the record or items produced in discovery. n9

[c] Content Required To Be Admissible at Trial

The content of an affidavit or declaration used to support or oppose a motion for summary judgment must set out facts that would be admissible in evidence. n10 At the summary judgment stage, the examination is not on the form of the evidence as it is presented in an affidavit, but rather, whether at trial the matter stated in the affidavit would constitute admissible evidence. To be acceptable, the evidence must be admissible if presented at trial through the testimony of the affiant as a sworn witness. n11 Thus, an affidavit may be rejected because the affiant is incompetent to testify. n12 Similarly, an affidavit that consists of facts that could be presented at trial only through evidence that violates the prohibition against hearsay may not be admitted at the summary judgment stage, unless the affidavit contains evidence that is within a recognized hearsay exception. n13

An affidavit must also contain sufficiently specific statements to support the affiant's position. Affidavits that contain nothing more than conclusory allegations or speculation are not sufficient to be used by the court to consider a summary judgment motion. n14 Furthermore, allegations that provide only legal conclusions supporting the movant's position, but do not provide factual statements, may not serve as support for summary judgment. n15

[d] Affidavit of Expert

The court may consider affidavits setting forth expert testimony. n16 Expert opinion evidence stated in an affidavit must constitute admissible evidence, in that it must establish the competence of the affiant as an expert and be relevant to the issues raised by the summary judgment motion. n17 Generally, the underlying scientific methods must be explained in the affidavit. n18

In addition to satisfying the general requirements for consideration of evidence on a motion for summary judgment, expert testimony must also satisfy the requirements for admission of expert testimony. n19 First, the expert must have been designated as an expert witness under Rule 26(a)(2). n20 Second, the expert's testimony must satisfy the general admissibility criteria of Evidence Rule 702. n21 The expert must state the facts and reasons from which the expert's

opinion was derived, so that the court may look behind the expert's ultimate conclusion and evaluate the adequacy of its foundation. n22 To protect its right to discover the basis of an expert's affidavit, an opposition party may make a motion to require supplemental depositions or answers to interrogatories or further affidavits to obtain the underlying data of the affidavit, which the court may order in its discretion to require the expert to furnish the supporting data. n23

[3] Effect of Conflict in Affidavits

When a court considers summary judgment affidavits, the court may have to consider the "sham affidavit doctrine," which is premised on the theory that if a party could raise an issue of fact simply by submitting an affidavit contradicting the party's own prior testimony or affidavit, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. Therefore, if a party has submitted two conflicting affidavits, or an affidavit conflicting with a deposition, the conflict does not create an issue of fact, and denial of summary judgment is not required if the affidavits are a sham. n1

Summary judgment, however, will generally be denied if opposing parties submit affidavits that set forth specific facts showing a genuine dispute for trial. Furthermore, if a party's affidavit is inconsistent with that party's earlier affidavit or deposition statement, summary judgment may be denied by the creation of a fact issue, provided that such inconsistencies have a good faith basis. n2 Confusion, lack of access to material, or newly discovered evidence are all legitimate reasons for inconsistencies. n3 Alternatively, the court may ignore one of two conflicting documents. The court should consider all relevant evidence in the record to determine the effect to give to conflicting affidavits or deposition testimony. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.94 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A).*

(n3)Footnote 2. *See Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000)* .

(n4)Footnote 3. *Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1022 (9th Cir. 2010)* (verified complaint is equivalent of opposing affidavit for summary judgment purposes, when allegations contained in complaint are based on personal knowledge).

(n5)Footnote 4. *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* .

(n6)Footnote 5. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n7)Footnote 1. *See 28 U.S.C. § 1746.*

(n8)Footnote 2. *Fed. R. Civ. P. 56(c)(4)*, Committee Notes to 2010 Amendments.

(n9)Footnote 3. *Lykken v. Brady, 622 F.3d 925, 933 (8th Cir. 2010)* ; *see § 17.44[4], below.*

(n10)Footnote 4. *Fed. R. Civ. P. 56(c)(4).*

(n11)Footnote 5. *Wicker v. Oregon, 543 F.3d 1168, 1178 (9th Cir. 2008)* (court properly disregarded affidavit paragraphs describing negotiations that occurred at meeting not attended by affiants and indicated they had no other personal knowledge of meetings).

(n12)Footnote 6. *See FDIC v. Patel, 46 F.3d 482, 484 (5th Cir. 1995)* ; *White v. MPW Indus. Servs., 236 F.R.D. 363, 369 (E.D. Tenn. 2006)* .

(n13)Footnote 7. *Dalton v. FDIC, 987 F.2d 1216, 1223 (5th Cir. 1993)* .

(n14)Footnote 8. *See Fed. R. Civ. P. 56(c)(4).*

(n15)Footnote 9. *Sitts v. United States, 811 F.2d 736, 741-742 (2d Cir. 1987)* .

(n16)Footnote 10. *Fed. R. Civ. P. 56(c)(4).*

(n17)Footnote 11. *Gleklen v. Democratic Congressional Campaign Comm., Inc., 199 F.3d 1365, 1369 (D.C. Cir. 2000)* (while movant or nonmovant is not required to produce evidence in form that would be admissible at trial, evidence still must be capable of being converted into admissible evidence; *Fashakin v. Nextel Communs., 2009 U.S. Dist. LEXIS 25140, at *21 n.10 (E.D.N.Y. Mar. 25, 2009)* (citing **Moore's Federal Practice**).

(n18)Footnote 12. *Insurance & Consulting Assocs. LLC v. ITT Hartford Ins. Group, 48 F. Supp. 2d 1181, 1189 (W.D. Mo. 1999)* .

(n19)Footnote 13. *Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 702 (5th Cir.1991)* .

(n20)Footnote 14. *Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995)* .

(n21)Footnote 15. *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 922-923 (2d Cir. 1985)* .

(n22)Footnote 16. *See KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 427, 127 S. Ct. 1727, 167 L. Ed. 2d 705 (2007)* .

(n23)Footnote 17. *Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1382 (9th Cir. 1994)* .

(n24)Footnote 18. *Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)* .

(n25)Footnote 19. *Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 704 (7th Cir. 2009)* .

(n26)Footnote 20. *See Fed. R. Civ. P. 26(a)(2).*

(n27)Footnote 21. Fed. R. Civ. P. 702; *see Pro Serv. Auto., L.L.C. v. Lenan Corp., 469 F.3d 1210, 1214-1216 (8th Cir. 2006)* (expert testimony presented by plaintiffs was properly excluded because it did not satisfy *Fed. R. Evid. 702* standards for admissibility).

(n28)Footnote 22. *American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579-1580 (11th Cir. 1985)* .

(n29)Footnote 23. *See California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003)* .

(n30)Footnote 1. *Smith v. Johnson & Johnson, 593 F.3d 280, 285 (3d Cir. 2010)* (under sham affidavit doctrine, court will disregard affidavit inconsistent with an affiant's prior deposition testimony when party moves for summary judgment on the basis of the deposition unless the party relying on affidavit in opposition to motion can present a legitimate reason for discrepancies between deposition and affidavit); *Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1297 (7th Cir. 1993)* (parties may not intentionally create a triable issue of fact by submitting conflicting submissions).

(n31)Footnote 2. *EBC, Inc. v. Clark Bldg. Sys., 618 F.3d 253, 269 (3d Cir. 2010)* ; *Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 252-253 (3d Cir. 2007)* .

(n32)Footnote 3. *Russell v. Acme-Evans Co., 51 F.3d 64, 67-68 (7th Cir. 1995)* (in age discrimination action, court rejected claimant's affidavit made after deposition, when affidavit was designed to retract or explain away concessions that claimant had made in deposition, because court noted that no explanations for inconsistencies had been

offered).

(n33)Footnote 4. *Baer v. Chase, 392 F.3d 609, 624-626 (3d Cir. 2004)* (citing **Moore's Federal Practice**).

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2-17 Moore's Manual--Federal Practice and Procedure § 17.45

§ 17.45 Other Supporting Documentationn*

[1] Pleadings

It is possible that the movant may obtain a summary judgment from the district court from the pleadings alone, provided that the pleading used to support the motion for summary judgment is verified, shows that there is no genuine dispute with respect to any material fact and that the moving party is entitled to a judgment as a matter of law, and is based on personal knowledge. n1 A party that is using a pleading to support or oppose a summary judgment motion must specify to the court the items in the pleading that support its position and that it requests the court to consider. n2 Alternatively, the attorney may submit pleadings for consideration in a summary judgment motion by incorporating the pleadings with the movant or nonmovant's memorandum of law, such as by referring to specific paragraphs. n3

[2] Depositions

In its determination of a summary judgment motion, Rule 56(c) expressly provides that the court may consider deposition evidence cited by the movant or the nonmovant. n1 Furthermore, even if an entire deposition may not be used, for example, if it was not completed, the deposition may be used as an affidavit to the extent that it fulfills the requirements of an affidavit, because sworn deposition answers are as reliable as affidavits, provided that the content is otherwise admissible. n2 A deposition may also be considered in a summary judgment motion action against a party who was not joined at the time the deposition was taken, because even though deposition testimony could not be admitted as trial evidence against a party who did not have an opportunity to cross-examine the deponent, the deposition testimony could be admitted in lieu of a Rule 56(c) affidavit provided that it was based on personal knowledge and set forth facts admissible in evidence. n3

[3] Interrogatories

Either the movant or nonmovant may use interrogatory answers to support or oppose a summary judgment motion. When submitting interrogatory answers for consideration in the summary judgment determination, the attorney should cite to precisely the answers that the party is relying on for each argument or issue. n1 Interrogatories used in a summary judgment motion are governed by the same rules of admissibility as affidavits. Thus, the interrogatories must

be made on personal knowledge and must contain information which would be admissible at trial; interrogatories containing inadmissible hearsay will not be considered by the court. The information contained in the hearsay portions of interrogatories will be inadmissible, even if they are probative, and will not be considered by the court in the determination of the motion for summary judgment. n2

However, if a third party describes another person's testimony in an answer to an interrogatory, and the truth of the matter asserted has not been independently verified by the third party, the description is hearsay and not admissible for consideration by the court in a summary judgment motion. For example, when plaintiff's interrogatory answers contained statements that a physician was of the opinion that the defendant committed malpractice, the answers were hearsay and could not be considered by the court. Furthermore, the evidence could not support the motion for summary judgment when no affidavit or deposition from some other physician was submitted. n3

[4] Admissions

Rule 56 specifically provides that either the movant or nonmovant may use admissions to support or oppose a summary judgment motion. n1 Admissions typically mean admissions made in response to a request to admit propounded and served by a party under Rule 36. n2 Although Rule 36 admissions are perhaps the most potentially useful in seeking summary judgment, they are not the only form of useful admissions. Statements made in open court on the record or other representations to the court, including admissions in letters or other correspondence, may also qualify as admissions on file for purposes of seeking summary judgment. n3 When either a movant or a nonmovant is preparing for a summary judgment motion, the party is searching for the best evidence to support its summary judgment assertions, and Rule 36 admissions are of particular value because they provide a vehicle for establishing facts absolutely. Although admissions made outside Rule 36 also have this potential, these other admissions are subject to being disputed by the nonmovant, while Rule 36 admissions may not be contradicted. Unless the court permits an exception, a Rule 36 admission is conclusive proof and prevails over conflicting evidence. n4

Under Rule 36, if a request is made to a party, the matter raised in the request is considered admitted unless the statement or question propounded in the request is denied or qualified within 30 days after service of the request. n5 The response to the request must be by written answer or objection addressed to the matter, signed by the party or by the party's attorney, and stating a reason if an objection is made. The response must specifically deny the matter or describe the reasons the answering party may not admit or deny the matter. n6 In addition to admissions made as a direct response to a Rule 36 request, a party that fails to make a timely response to a Rule 36 request is in default and has made a "default admission" which, like an express admission, may serve as a factual predicate for summary judgment. A default admission occurs when a party fails to respond appropriately and in a timely manner. n7 When any matter is admitted, either pursuant to a request or by default, the matter is considered conclusively established. n8

In addition to admissions produced as a result of a formal demand under Rule 36, admissions which are prepared or received through pretrial discovery may be utilized as part of a summary judgment motion. n9 These other types of admissions may include, for example, admissions made in correspondence; admissions made in the opponent's own documents; n10 admissions made on the record in court proceedings such as a hearing or oral argument; or admissions contained in the official record of other cases. If an admission is a judicial admission, it constitutes unequivocal evidence. n11 Even if it does not constitute a binding, judicial admission, it nonetheless constitutes admissible evidence of the statement made by the opponent. n12

[5] Stipulations

Rule 56(c) expressly provides that the court in its determination of a summary judgment motion may consider stipulations submitted by the movant or the nonmovant. n1 A "factual stipulation" is a formal concession that has the effect of withdrawing a fact from issue and dispensing entirely with the need for proof of that fact. Thus, a stipulation is conclusive in the action, which means that the facts stated in a stipulation are not subject to subsequent denial or

variation; furthermore, the parties will not be permitted to deny the truth of the facts stated, nor to maintain a contention contrary to the stipulated statement of facts, nor to suggest on appeal that the facts were other than as stipulated or that any material fact was omitted. n2 Because of its powerful nature, a stipulation is a useful tool in a summary judgment motion or response. n3

[6] Facts Subject to Judicial Notice

A court in determination of a summary judgment motion may consider matters subject to judicial notice. n1 A court may take judicial notice of facts that are so well-established that they do not need to be proved by the introduction of evidence at trial. The court may take judicial notice of such facts on its own, n2 and must do so when requested by a party and supplied with the necessary information. n3 However, on request of the opposition party, the court must hear argument as to the propriety of taking judicial notice as to any particular fact. n4

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.94 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1022 (9th Cir. 2010)* .

(n3)Footnote 2. *Fed. R. Civ. P. 56(c)(1)(A).*

(n4)Footnote 3. *Brunet, Summary Judgment Materials, 147 F.R.D. 647, 649 (1993)* .

(n5)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A).*

(n6)Footnote 2. *In re Sunset Bay Assocs., 944 F.2d 1503, 1509 (9th Cir. 1991)* (court considered unsigned and incomplete deposition as affidavit in determination of summary judgment motion because deponent was sworn and deposition was made on personal knowledge and set forth facts that were admissible in evidence).

(n7)Footnote 3. *Hoover v. Switlik Parachute Co., 663 F.2d 964, 965-967 (9th Cir. 1981)* .

(n8)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A)*; *see In re Independent Serv. Orgs. Antitrust Litig., 114 F. Supp. 2d 1070, 1085 (D. Kan. 2000)* .

(n9)Footnote 2. *Garside v. Osco Drug, Inc., 895 F.2d 46, 49-50 (1st Cir. 1990)* (expert's anticipated testimony in plaintiff's interrogatory answer constituted inadmissible hearsay when offered as evidence of causation of child's injury); *Vidrine v. Enger, 752 F.2d 107, 110 (5th Cir. 1984)* (interrogatory answer containing third party's description of expert's anticipated testimony without independent corroboration by expert was inadmissible hearsay).

(n10)Footnote 3. *Vidrine v. Enger, 752 F.2d 107, 109 (5th Cir. 1984)* .

(n11)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A).*

(n12)Footnote 2. *See Fed. R. Civ. P. 36.*

(n13)Footnote 3. *See United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992)* (statement that property was used to facilitate drug transactions used as admission in civil forfeiture action brought by government).

(n14)Footnote 4. *Carney v. IRS (In re Carney), 258 F.3d 415, 420 (5th Cir. 2001)* ; *Appley v. West, 929 F.2d 1176, 1179-1180 (7th Cir. 1991)* (admission is unequivocal evidence); *see Fed. R. Civ. P. 36(b).*

(n15)Footnote 5. *Fed. R. Civ. P. 36(a)(3), (4).*

(n16)Footnote 6. *Fed. R. Civ. P. 36(a)(4).*

(n17)Footnote 7. *See Fed. R. Civ. P. 36(a)(3).*

(n18)Footnote 8. *See Fed. R. Civ. P. 36(b).*

(n19)Footnote 9. *See Welker Bearing Co. v. PHD, Inc., 550 F.3d 1090, 1099 (Fed. Cir. 2008)* .

(n20)Footnote 10. *Solana v. GSF Dev. Driller I, 587 F.3d 266, 272-273 (5th Cir. 2009)* (admissions contained in opposition affidavits).

(n21)Footnote 11. *Tobey v. Extel/JWP, Inc., 985 F.2d 330, 333 (7th Cir. 1993)* (failure to challenge defendant's statement of facts in sex discrimination action brought against plaintiff's former employer supported use of those statements as admissions against plaintiff for purpose of summary judgment).

(n22)Footnote 12. *United States v. Allegheny Ludlum Corp., 366 F.3d 164, 174 (3d Cir. 2004)* ; *Wright v. Illinois Dep't of Corrections, 204 F.3d 727, 735 (7th Cir. 2000)* .

(n23)Footnote 1. *Fed. R. Civ. P. 56(c)(1)(A).*

(n24)Footnote 2. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, ___ U.S. ___, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 853-854 (2010)* .

(n25)Footnote 3. *Kirtley v. Sovereign Life Ins. Co. (In re Durability, Inc.), 212 F.3d 551 (10th Cir. 2000)* .

(n26)Footnote 1. *Island Software & Computer Serv. v. Microsoft Corp., 413 F.3d 257, 261 (2d Cir. 2005)* ; *see* 1 *Weinstein's Federal Evidence, § 201.32[2]* (Matthew Bender, 2d ed.).

(n27)Footnote 2. *See* Fed. R. Evid. 202(c).

(n28)Footnote 3. *See Fed. R. Evid. 201(d).*

(n29)Footnote 4. *Fed. R. Evid. 201(e).*

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART III. DOCUMENTATION REQUIREMENTS FOR MOTION AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

2-17 Moore's Manual--Federal Practice and Procedure § 17.46

§ 17.46 Objection to Supporting Documentationn*

A party may object that an item of documentation cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. n1 This objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent of the material to show that the material is admissible as presented or to explain the admissible form that is anticipated. Under the new rule, a party should not make a separate motion to strike, n2 which was the procedure utilized for an objection prior to the 2010 Amendments. n3

If the action goes to trial, a party's failure to challenge admissibility of any document at the summary judgment stage does not forfeit the right to challenge admissibility at trial. n4 However, if a party fails to object to the inadmissibility of evidence submitted by its opponent in the summary judgment proceedings, the court may consider the evidence at the summary judgment stage. n5 In other words, a failure to raise the issue in the district court constitutes a waiver of the objection only for purposes of summary judgment. n6

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.91 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(c)(2)*.

(n3)Footnote 2. *Fed. R. Civ. P. 56(c)(2)*, Committee Notes to 2010 Amendments.

(n4)Footnote 3. *See, e.g., Ogletree v. City of Auburn, 619 F. Supp. 2d 1152, 1159 n.3 (M.D. Ala. 2009)* .

(n5)Footnote 4. *Fed. R. Civ. P. 56(c)(2)*, Committee Notes to 2010 Amendments.

(n6)Footnote 5. *See Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 613 n.3 (6th Cir. 2007)* .

(n7)Footnote 6. *Fed. R. Civ. P. 56(c)(2)*, Committee Notes to 2010 Amendments.

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2-17 Moore's Manual--Federal Practice and Procedure §§ 17.47-17.59

[Reserved]

§§ 17.47[Reserved]

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2-17 Moore's Manual--Federal Practice and Procedure § 17.60

§ 17.60 Cross-Motion for Summary Judgmentn*

Although not expressly considered by Rule 56, the cross-motion for summary judgment has been recognized by the courts. A cross-motion for summary judgment is a motion initiated by a nonmovant who is already responding to a motion for summary judgment by an opposition party. The most significant aspect of the cross-motion is that the cross-motion movant (original motion nonmovant) identifies its own claims or defenses, or parts of claims or defenses, for which it requests a grant of summary judgment; n1 the cross-motion may be used because any party may move for summary judgment. n2 The court may be required to examine a separate set of documentation to determine the cross-motion. n3

When a court is presented with cross-motions for summary judgment, the court must consider each party's motion individually to determine if that party has satisfied the summary judgment standard. In practice, therefore, a cross-motion for summary judgment operates like a single summary judgment motion. n4 This means that even when litigants concurrently pursue summary judgment, it is not necessarily true that at least one party inevitably will be entitled to summary judgment. In other words, the denial of one cross-motion does not imply the grant of the opponent's cross-motion. Each individual summary judgment motion must be evaluated independently to determine whether there exists a genuine dispute of material fact and whether the movant is entitled to judgment as a matter of law. n5 Before granting summary judgment with respect to either movant, the court must be satisfied that under the governing legal standard, the facts are not genuinely in dispute. Whether a factual dispute exists is a legal inquiry for the court and may not be waived by agreement of the parties. n6

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.120 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Westfield Ins. Co. v. Tech Dry Inc., 336 F.3d 503, 506 (6th Cir. 2003)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 56(a).*

(n4)Footnote 3. *CQ Inc. v. TXU Mining Co. LP, 565 F.3d 268, 274 (5th Cir. 2009)* ; *see Fed. R. Civ. P. 56(c)(1), (3).*

(n5)Footnote 4. *Chevron U.S.A., Inc. v. Mobil Producing Tex. & N.M., 281 F.3d 1249, 1253 (Fed. Cir. 2002)* (when parties bring cross-motions for summary judgment, each nonmovant receives benefit of favorable inferences).

(n6)Footnote 5. *See Fed. R. Civ. P. 56(a).*

(n7)Footnote 6. *Fed. R. Civ. P. 56(a)*; *see Griffis v. Delta Family-Care Disability, 723 F.2d 822, 824 (11th Cir. 1984)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.61

§ 17.61 Summary Judgment Initiated by Courtn*

[1] Options For Court

After providing the parties with notice and a reasonable time to respond, the court may take any of the following three actions on the express authority of Rule 56:

1. The court may grant summary judgment for a nonmovant. n1

2. The court has the option to grant summary judgment to a party on grounds not raised by the party in its motion. n2

3. The court may consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute. n3

These three related procedures have been developed in practice by the courts, and now are included in the text of Rule 56. n4 Even without authority of Rule 56, courts have also historically exercised their discretion to accomplish the same result by simply inviting a party to move for summary judgment; in that event, the regular procedures applicable to summary judgment motions under Rule 56(c) will apply. n5

Rule 56 does not specify the precise requirements for a court to provide the parties with notice and a reasonable time to respond to proposals for court-initiated summary judgment procedures. Formal, explicit notice of a district court's intent to grant summary judgment certainly is sufficient, n6 but is not always required. Even in the absence of formal notice, some appellate courts have held that adequate notice may be inferred from the facts and circumstances of a case. n7

Rule 56(f) also does not specify what constitutes a reasonable time to prepare a proper summary judgment response to a proposed sua sponte summary judgment ruling by the court. This determination must be made on the particular facts of each case. As a minimum notice, Rule 6 provides for at least 14 days' notice of a written motion. n8

[2] Grant of Summary Judgment to Nonmovant

The court may grant summary judgment for a nonmovant. n1 Thus, rather than grant summary judgment for the party that has filed a motion for summary judgment, the court has the option to grant summary judgment to the party responding to the motion in opposition, even if the nonmovant has not filed its own cross-motion for summary judgment. In essence, the court is deciding that, not only is the movant's motion denied, but that it is sua sponte granting summary judgment to the nonmovant on the claims or defenses specified in the movant's motion. To do so, the court must independently determine that the nonmovant has met the standard for summary judgment specified in Rule 56(a). n2

[3] Grant of Summary Judgment on Grounds Not Raised in Motion

The court may grant summary judgment to a party even on grounds not raised by the party in its motion. n1 In such circumstances, the grounds actually relied on by the court must meet the standard for summary judgment specified in Rule 56(a) that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. The court must also state on the record the grounds and reasons for granting. n2 As with other court initiated summary judgment determinations, the court may not act until after it has provided the parties with notice and a reasonable time to respond. n3

[4] Procedural Considerations

The court may consider summary judgment on its own, even without a motion filed by a party, provided that it has identified for the parties material facts that may not be genuinely in dispute. n1 This procedure has frequently been used by the courts before its 2010 codification. It requires an appropriate record, n2 notice to the party against which the court is contemplating summary judgment, a reasonable time for that party to present evidence and arguments in opposition, n3 and compliance with the standard for summary judgment specified in Rule 56(a). n4 A court ordinarily may order summary judgment on its own initiative only when discovery is sufficiently advanced that parties have enjoyed a reasonable opportunity to obtain material facts. n5 To grant summary judgment sua sponte, a court need not actually receive submissions of the parties but must at least provide parties with a sufficient opportunity to submit materials and cite to materials and to argue supporting or opposing the motion. n6

Some courts have recognized an exception to an express notice requirement in cases where summary judgment is granted sua sponte when the following conditions are present: (1) the point at issue is purely legal; (2) the record was fully developed; and (3) the failure to give notice does not prejudice the party. n7 However, the notice requirement for sua sponte summary judgment demands at the very least that the parties be made aware of the court's intention to consider such a procedure and be given the minimum 14-day period mandated by Rule 6 to respond to a motion. A court's sua sponte entry of summary judgment without appropriate notice is often grounds for reversal. On the other hand, if the party was not procedurally prejudiced by the lack of adequate notice in that the party was not actually deprived of the opportunity to present evidence in support of its position as a result of the unfair surprise, then the failure to provide notice is harmless error. n8

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.71 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(f)(1)*; *see § 17.61[2], below*.

(n3)Footnote 2. *Fed. R. Civ. P. 56(f)(2)*; *see § 17.61[3], below*.

(n4)Footnote 3. *Fed. R. Civ. P. 56(f)(3)*; *see § 17.61[4], below*.

(n5)Footnote 4. *Fed. R. Civ. P. 56(f)*.

(n6)Footnote 5. *Fed. R. Civ. P. 56(f)*, Committee Notes to 2010 Amendments.

(n7)Footnote 6. *NetJets Aviation, Inc. v. LHC Communs., LLC, 537 F.3d 168, 178 (2d Cir. 2008)* .

(n8)Footnote 7. *See Acumed LLC v. Advanced Surgical Servs., 561 F.3d 199, 223-224 (3d Cir. 2009)* .

(n9)Footnote 8. *Fed. R. Civ. P. 6(c)(1)*.

(n10)Footnote 1. *Fed. R. Civ. P. 56(f)(1)*.

(n11)Footnote 2. *Acton v. City of Columbia, 436 F.3d 969, 975 (8th Cir. 2006)* (district court has discretion to grant nonmovant summary judgment, even when nonmovant has not filed cross-motion for summary judgment).

(n12)Footnote 1. *Fed. R. Civ. P. 56(f)(2)*.

(n13)Footnote 2. *Fed. R. Civ. P. 56(a)*; *see Island Park, LLC v. CSX Transp., 559 F.3d 96, 99 (2d Cir. 2009)* (district court denied party's motion for summary judgment, but sua sponte granted it summary judgment on claim not specified in motion).

(n14)Footnote 3. *Fed. R. Civ. P. 56(f)*; *see § 17.61[1], above*.

(n15)Footnote 1. *Fed. R. Civ. P. 56(f)(3)*.

(n16)Footnote 2. *Fed. R. Civ. P. 56(c)*.

(n17)Footnote 3. *Fed. R. Civ. P. 56(f)*.

(n18)Footnote 4. *NetJets Aviation, Inc. v. LHC Communs., LLC, 537 F.3d 168, 178 (2d Cir. 2008)* ; *see Fed. R. Civ. P. 56(a)*.

(n19)Footnote 5. *Frederique-Alexandre v. Dep't of Natural & Envtl. Res., 478 F.3d 433, 438-439 (1st Cir. 2007)* .

(n20)Footnote 6. *Seamons v. Snow, 206 F.3d 1021, 1025-1026 (10th Cir. 2000)* ; *see Fed. R. Civ. P. 56(f)*; *§ 17.61[1], above* .

(n21)Footnote 7. *Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 219 (3d Cir. 2004)* .

(n22)Footnote 8. *Wells Real Estate Inv. Trust II, Inc. v. Chardon/Hato Rey P'ship, S.E., 615 F.3d 45, 52 (1st Cir. 2010)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.62

§ 17.62 Time Requirementsn*

[1] Requirements for Filing and Responding to Motion

Generally, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery, unless a different time is set by local rule or the court orders otherwise. n1 Thus, other than for this general rule allowing a summary judgment motion until 30 days after the close of discovery, local rules and court scheduling orders commonly set all other time limits on filing a motion and response to a motion for summary judgment. The timing provisions in former Rule 56 have been superseded. n2 The current rule allows a motion for summary judgment to be filed as early as the commencement of an action; however, in most cases the motion will be premature until the nonmovant has had time to file a responsive pleading, and other pretrial proceedings and conferences have been held. n3 Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case. n4 In particular, at an early pretrial conference, the court and attorneys may consider and take action on the appropriateness and timing of summary judgment motions under Rule 56. n5

[2] Request by Nonmovant for Additional Time to Ascertain Facts

[a] Options for Trial Court When Nonmovant Requests Additional Time

In relatively simple cases, a party may move for summary judgment well before discovery is complete. n1 However, it frequently occurs that, because of more access to the facts regarding the claims and defenses, a movant may have more documentation to prepare for a summary judgment motion than a nonmovant may have documentation to prepare for a response in opposition to the motion. n2 In contemplation of such circumstances, Rule 56 authorizes a procedure that allows the nonmovant to request the court for additional time in which to conduct discovery. n3

Under Rule 56(d), a nonmovant may request an order for more time to respond to a motion for summary judgment by showing by affidavit or declaration that the nonmovant cannot present facts essential to justify its opposition, and specifying the reasons it cannot. n4 On such a showing, the court has three alternatives: n5

1. The court may defer considering the motion for summary judgment or may deny the motion for summary judgment. n6

2. The court may allow the nonmovant time to obtain affidavits or declarations or to take discovery. n7

3. The court may issue any other appropriate order. n8

[b] Diligence Required by Party Requesting Additional Time

A party making a Rule 56(f) motion must state the reasons it cannot present facts essential to justify its opposition. n9 This means that the party must demonstrate it exercised due diligence both in attempting discovery before the summary judgment motion, n10 and in requesting an extension of time after the summary judgment motion has been made. n11 The courts consider many factors in determining whether a party has been diligent in pursuing discovery: (1) the length of the pendency of the case prior to the Rule 56(d) request for additional time; (2) whether and when the party could have anticipated its need for the requested discovery; (3) the previous efforts, if any, made to obtain the needed information through formal discovery or otherwise; (4) the degree and type of discovery already taken; (5) any limitations placed on discovery by the trial court; (6) any prior requests of or provisions for discovery by the trial court; (7) any warning that, absent a more prompt request, discovery might be denied; and (8) whether the requested information was accessible to the requesting party. n12

With respect to whether a party has exercised due diligence in seeking a Rule 56(d) extension of time, the courts have decided that a request for additional time for discovery must be made within a reasonable time following receipt of the motion for summary judgment. n13 The request should generally precede or accompany the response to the summary judgment motion. At the least, the request should be made before any court imposed deadline for completion of discovery. n14 There may be extenuating circumstances under which a party opposing a summary judgment motion may not realize until the initial round of oral argument that additional discovery is required. However, oral argument is a maximum limit, and a Rule 56(d) extension request made after the conclusion of oral argument on a summary judgment motion ordinarily is too late. n15

[c] Party Must Submit Affidavit or Declaration to Request Additional Time

A district court may make an order under Rule 56(f) extending time for discovery n16 only if the opposition party files an affidavit or declaration that specifies the reasons it cannot present facts essential to justify its opposition. n17 The courts have interpreted this language to mean that a person with knowledge of the reasons for failure to present facts must submit the affidavit or declaration to the district court before the party is entitled to an order of relief extending time or denying the motion for summary judgment. Most courts have then found that this affidavit or declaration need not be filed with a separate, formal motion pursuant to Rule 56(d), but rather that the party opposing it must attach it to the party's memorandum in opposition to a motion for summary judgment. The courts require some type of separate affidavit or declaration, rather than merely an obscure request in the body of the summary judgment motion or supporting legal memorandum. n18 In other words, a simple reference to the need for discovery in other motion papers is insufficient to meet the requirements for a Rule 56(d) motion. n19

Furthermore, the failure to file an affidavit or declaration is by itself, sufficient grounds for denial of a request for further discovery. Rule 56(d) has been referred to as a carefully crafted rule that serves as a vehicle through which the nonmovant meets its obligation to inform the district court of its need for discovery, n20 and therefore it is extremely important that a party comply with Rule 56(d)'s requirement through the use an affidavit or declaration, as opposed to use of a brief. n21 For example, a mere reference to Rule 56(d) and to the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(d) affidavit, and the failure to file an affidavit under Rule 56(d) is in itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate. n22

Most circuits have developed language specifying the precise requirements for the content of an affidavit or declaration

in support of a Rule 56(d) motion; the basic requirements are all similar. Some circuits require that the affidavit contain the following information: (1) what facts are sought and the manner in which they are to be obtained; (2) how these facts are reasonably expected to raise a genuine dispute of material fact; (3) what efforts the affiant has made to obtain them; and (4) why the affiant's efforts were unsuccessful. n23 The Third Circuit applies a similar three-part requirement; it requires that the affidavit specify: (1) what particular information is sought; (2) if uncovered, how that information would preclude summary judgment; and (3) why it has not previously been obtained. n24 The Tenth Circuit requires that the affidavit: (1) identify the probable facts that are unavailable and the steps already taken to obtain these facts; (2) state with specificity why extra time is needed; and (3) state how the additional time and material will rebut the summary judgment motion. n25

[d] Party Must State How Additional Discovery Will Aid in Opposition to Summary Judgment Motion

When the nonmovant in the summary judgment motion requests additional discovery, the nonmovant must state specifically how a continuance for further discovery will enable that party to oppose the assertions contained in the pending summary judgment motion. n26 In other words, the movant must show how deferring the determination on the summary judgment motion will enable the movant, by discovery or other means, to show that there is a genuine dispute of fact in the underlying case. n27

To satisfy this requirement, the requesting party may not merely rely on vague assertions that additional discovery will produce needed but unspecified facts. n28 Rather, the party must state in a detailed manner the factual material sought and precisely how those materials will help in opposing summary judgment. n29

[e] Waiver for Failure to Request Additional Time

Courts have consistently held that to obtain an order compelling time for further discovery on a summary judgment motion, a nonmovant must submit the required affidavit or declaration requesting additional time under Rule 56(d) prior to the district court's decision on the summary judgment motion itself. n30 Failure to submit the affidavit or declaration constitutes waiver. Furthermore, if the party fails to file a Rule 56(d) affidavit in the lower court, the appellate court will not consider the argument that the losing party lacked adequate time to perform the discovery needed to oppose the motion for summary judgment. n31 For example, in a civil RICO case the plaintiff could not argue on appeal that the defendants refused to turn over telephone records as requested by the plaintiff during discovery nor that such telephone records would have proven on summary judgment that alleged telephone conversations were conducted interstate. n32

[f] Appeal of Denial of Motion for Additional Discovery

A denial of a request for additional time for discovery to respond to a summary judgment motion constitutes a conclusive determination for the purposes of allowing an interlocutory appeal under *28 U.S.C. § 1291*, and therefore is immediately appealable. n33 If the trial court has denied a motion for further discovery under Rule 56(d), the circuit court reviews that denial under the abuse of discretion standard. n34 The circuit court will find an abuse of discretion in a trial court's denial of a motion for further discovery only if there is a showing that further discovery would lead to denial of the underlying motion for summary judgment. n35 Furthermore, when the circuit court reviews a denial of a Rule 56(f) motion for abuse of discretion, the appellate court will not consider justifications for the request for time for further discovery that were not presented with the original motion. n36

If a district court failed to consider a Rule 56(d) motion before it granted summary judgment, the de novo standard of review applies. n37 However, the trial court need not explicitly state its decision on a Rule 56(d) motion, and when a trial court simply grants a summary judgment, the appellate court will assume that the Rule 56(d) motion was denied, and apply the abuse of discretion standard to the implied denial. n38

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.61, 56.82, 56.100 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(b).*

(n3)Footnote 2. *See Fed. R. Civ. P. 56(b)*, Committee Notes to 2010 Amendments.

(n4)Footnote 3. *See Fed. R. Civ. P. 16(b)(1)* (scheduling conference).

(n5)Footnote 4. *See Fed. R. Civ. P. 56(b)*, Committee Notes to 2010 Amendments.

(n6)Footnote 5. *Fed. R. Civ. P. 16(c)(2)(E)*; *see Allstate Ins. Co. v. Passaro-Henry, 660 F. Supp. 2d 317, 319 (D. Conn. 2009)* .

(n7)Footnote 1. *Ballard v. Heineman, 548 F.3d 1132, 1136 (8th Cir. 2008)* .

(n8)Footnote 2. *Willis v. Town of Marshall, 426 F.3d 251, 264 (4th Cir. 2005)* .

(n9)Footnote 3. *See Allen v. Sybase, Inc., 468 F.3d 642, 661-662 (10th Cir. 2006)* ; *see also Fed. R. Civ. P. 56(d).*

(n10)Footnote 4. *Fed. R. Civ. P. 56(d)*, Committee Notes to 2010 Amendments.

(n11)Footnote 5. *Fed. R. Civ. P. 56(d).*

(n12)Footnote 6. *Fed. R. Civ. P. 56(d)(1)*; *see Aspex Eyewear, Inc. v. United Syntek Corp., 2008 U.S. Dist. LEXIS 18404, at *24-*26 (W.D.N.C. Mar. 7, 2008)* (denial of pending summary judgment pending further discovery).

(n13)Footnote 7. *Fed. R. Civ. P. 56(d)(2).*

(n14)Footnote 8. *Fed. R. Civ. P. 56(d)(3).*

(n15)Footnote 9. *Fed. R. Civ. P. 56(d).*

(n16)Footnote 10. *Rivera-Torres v. Rey-Hernandez, 502 F.3d 7, 10-11 (1st Cir. 2007)* (rule may not be used to give relief to those who sleep on their rights).

(n17)Footnote 11. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* (if party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of shelter provided by rule by filing affidavit or declaration, court may grant summary judgment); *see Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 92 (1st Cir. 1996)* (rule is designed to protect vigilant litigants).

(N18)Footnote 12. *Theotokatos v. Sara Lee Personal Prods., 971 F. Supp. 332, 343-344 (N.D. Ill. 1997)* (party had not been dilatory in pursuing discovery considering that delay was only three months and third-party defendant was waiting for court to rule on its motion to dismiss before commencing discovery).

(n19)Footnote 13. *Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 22-23 (1st Cir. 1999)* (district court properly denied plaintiff's request for further discovery when motion was made after court's grant of summary judgment because party must move for a discovery continuance within reasonable time; party may not merely attempt to address

summary judgment motion on merits and then fall back on Rule 56(f) if unsuccessful).

(n20)Footnote 14. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* .

(n21)Footnote 15. *Massachusetts Sch. of Law v. ABA, 142 F.3d 26, 44 (1st Cir. 1998)* (plaintiff's request for additional discovery was too late when filed three weeks after oral argument on summary judgment motion).

(n22)Footnote 16. *Fed. R. Civ. P. 56(d)(2)*.

(n23)Footnote 17. *Fed. R. Civ. P. 56(d)*.

(n24)Footnote 18. *McKissick v. Yuen, 618 F.3d 1177, 1190 (10th Cir. 2010)* .

(n25)Footnote 19. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* (affidavit required to show why party making request for extension of discovery is unable to present facts essential to justify the party's opposition to summary judgment).

(n26)Footnote 20. *Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir. 2000)* .

(n27)Footnote 21. *McKissick v. Yuen, 618 F.3d 1177, 1190 (10th Cir. 2010)* .

(n28)Footnote 22. *Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir. 2000)* .

(n29)Footnote 23. *Gualandi v. Adams, 385 F.3d 236, 244 (2d Cir. 2004)* ; *see Massachusetts Sch. of Law v. ABA, 142 F.3d 26, 44-45 (1st Cir. 1998)* .

(n30)Footnote 24. *Doe v. Abington Friends Sch., 480 F.3d 252, 256 (3d Cir. 2007)* .

(n31)Footnote 25. *Southway v. Cent. Bank of Nig., 149 F. Supp. 2d 1268, 1277-1278 (D. Colo. 2001)* (plaintiff's affidavit did not comply with Tenth Circuit's requirements for such affidavit).

(n32)Footnote 26. *See Fed. R. Civ. P. 56(d)*; *Raby v. Livingston, 600 F.3d 552, 561 (5th Cir. 2010)* (request to defer summary judgment decision must set forth plausible basis for believing that specified facts probably exist and indicate how emergent facts would influence outcome of pending summary judgment motion).

(n33)Footnote 27. *Everson v. Leis, 556 F.3d 484, 493 (6th Cir. 2009)* ; *Allen v. Bridgestone/Firestone, 81 F.3d 793, 797-798 (8th Cir. 1996)* .

(n34)Footnote 28. *Johnston v. Simmons, 45 F. Supp. 2d 1220, 1225-1226 (D. Kan. 1999)* (district court denied plaintiff's motion to stay summary judgment determination because plaintiff failed to state with specificity how additional time would enable him to obtain evidence to oppose the summary judgment motion, and plaintiff's mere assertions that discovery was incomplete were insufficient to invoke procedures of Rule 56(f)); *Promuto v. Waste Mgmt., Inc., 44 F. Supp. 2d 628, 650 (S.D.N.Y. 1999)* (district court refused to grant defendants' request for further discovery because defendants failed to provide any basis to believe that further discovery would alter outcome of summary judgment motion).

(n35)Footnote 29. *Wiggins v. DaVita Tidewater, LLC, 451 F. Supp. 2d 789, 794-795 (E.D. Va. 2006)* .

(n36)Footnote 30. *Hackworth v. Progressive Cas. Ins. Co., 468 F.3d 722, 725 (10th Cir. 2006)* (opposing party moving for protections of Rule 56(f) must attempt to do so by submitting affidavit in direct response to motion for summary judgment, not following district court's disposition of that motion).

(n37)Footnote 31. *Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1242-1243 (10th Cir. 2010)* ;

Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552 (6th Cir. 2008) .

(n38)Footnote 32. *Annulli v. Panikkar, 200 F.3d 189, 201-202 (3d Cir. 1999)* (Rule 56(f) specifies procedure to be followed and provides that party must file affidavit setting forth why time is needed).

(n39)Footnote 33. *Garrett v. Stratman, 254 F.3d 946, 956 (10th Cir. 2001)* .

(n40)Footnote 34. *Cyberworld Enter. Techs., Inc. v. Napolitano, 602 F.3d 189, 200 (3d Cir. 2010)* ; *Moss v. United States Secret Serv., 572 F.3d 962 (9th Cir. 2009)* .

(n41)Footnote 35. *Waterloo Furniture Components v. Haworth, 467 F.3d 641, 648 (7th Cir. 2006)* (court did not abuse discretion in denying motion request further time for discovery because information plaintiff requested to discover would not have affected outcome).

(n42)Footnote 36. *Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534-535 (5th Cir. 1999)* .

(n43)Footnote 37. *Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir. 1998)* (de novo review of failure to address Rule 56(f) motion).

(n44)Footnote 38. *Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998)* .

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART IV. SUMMARY JUDGMENT PROCEDURAL REQUIREMENTS

2-17 Moore's Manual--Federal Practice and Procedure § 17.63

§ 17.63 Summary Judgment Motion Burdensn*

[1] Burdens for Movant

[a] Movant's Initial Burden of Production

Although Rule 56 does not explicitly refer to the burdens of production and persuasion placed on the parties to a summary judgment motion, n1 consideration of any burdens involved is always useful to understand the exact requirements that each party must meet in the summary judgment process. A "burden of production" is an obligation on a particular party to make some factual, probative, evidentiary presentation at a particular stage of the summary process. n2 There is always a burden of production that is imposed on the movant at the time the motion for summary judgment is filed to present facts establishing the summary judgment standard with respect to claims or defenses that constitute the subject matter of the motion. n3 Then, there is a counter burden of production imposed on the summary judgment nonmovant when the movant has satisfied the movant's initial burden of production. n4

The movant for summary judgment bears the initial burden of production to demonstrate at the time of the motion that the requisite standard for summary judgment as set forth in Rule 56 has been satisfied: n5 that there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. n6 This burden means that the movant must make a prima facie showing that the motion satisfies the standard for obtaining summary judgment. In this context, a prima facie showing means that, in the absence of evidence to the contrary, the movant's evidence is sufficient to entitle the movant to summary judgment. n7

The movant may not meet this burden merely by making conclusory assertions that summary judgment should be granted, n8 nor is the initial burden satisfied by unsupported factual allegations. n9 The movant must direct the court to the documentation in the summary judgment record which supports the motion and also the appropriate legal and factual contentions. n10 If the movant fails to meet its burden of production to show that there exists no genuine dispute of material fact, or fails to show entitlement to judgment as a matter of law, the court may not grant the motion for summary judgment. n11 The burden of production ordinarily requires some submission of affidavits or declarations. The optional nature of submitting affidavits is evidenced by the language of Rule 56(c) itself, which describes supporting papers for the movant as, the pleadings, the discovery, and the disclosure materials on file, and "any affidavits" which show that there is no genuine dispute as to any material fact. n12 The reference to affidavits as an

option, and not as a mandatory part of the supporting documentation, establishes that the burden of production may be met through the identification of supporting material other than affidavits. n13

The burden of production on the movant can be affected by the burden of persuasion. Thus, the movant need not produce documentation in addition to the pleadings, such as affidavits which demonstrate the absence of a genuine dispute of fact, if the movant does not have the ultimate burden of persuasion on a particular claim at trial. In such circumstances, it may satisfy its initial burden by specifying that the record lacks substantial evidence to support a necessary element of the nonmovant's claim. n14

[b] Movant's Initial Burden Affected by Burden of Persuasion

If the movant is also the party bearing the burden of persuasion at trial to prevail on a claim, its initial summary judgment burden for that claim is higher than for the ordinary initial burden of production claim. n15 The burden of persuasion means that the movant at trial would have to establish that the weight of evidence is in its favor and that it is entitled to prevail on the particular claim or defense. n16 When the movant has the burden of persuasion for a claim or defense, the movant must show that the record contains evidence satisfying the burden of persuasion; therefore, the evidence must be so persuasive that no reasonable trier of fact could disbelieve the evidence; in other words, the movant must introduce supporting evidence that would conclusively establish movant's right to a judgment after trial. n17

When the movant has the ultimate burden of persuasion, the movant must still satisfy its burden by showing that it is entitled to judgment as a matter of law even in the absence of an adequate response by the nonmovant. Consequently, a party that has both the burden of production and the ultimate burden of persuasion must meet a more stringent standard in order to satisfy the initial burden in a summary judgment motion. n18 On the other hand, if the nonmovant bears the ultimate burden of persuasion at trial, the movant may satisfy its initial burden by establishing that there is evidence which negates a required element of the nonmovant's claim or defense or that there is insufficient evidence in the record for the nonmovant to establish an element of the opponent's claim or defense. n19

[2] Burdens for Nonmovant

[a] Nonmovant's Initial Burden of Production in Response to Motion for Summary Judgment

If the movant has not met its initial burden of production, n1 the nonmovant has no burden of production. However, if the movant has met the initial burden of production, the burden shifts to the nonmovant to produce evidence or designate specific facts showing that there is a genuine dispute issue for trial, or that the movant is not entitled to judgment as a matter of law. n2 This burden on the nonmovant to respond cannot be satisfied merely by allegations or denials in its own pleading. Rather, the nonmovant must cite to specific matters its own pleadings that support its response; its response may also consist of depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. n3 If the nonmovant does not respond in a sufficient manner, the court may enter summary judgment against the nonmovant. n4 or give the nonmovant an opportunity to properly produce facts to support its position. n5 The court must determine at this stage whether there are any genuine factual disputes that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. n6

Unless it can show that the movant is not entitled to judgment as a matter of law, it is essential that the nonmovant produce significantly probative evidence that shows the existence of a genuine dispute of material fact. n7 Even if the supporting documentation presented to the court by the movant contains arguments or defenses that could potentially defeat the movant's claim or defense, if developed, summary judgment could still be granted, unless the nonmovant indicates to the court the specific facts that establish a particular issue for trial. n8 In other words, the court is not required to discover or develop an argument or defense sua sponte. n9 Furthermore, the court need not augment a nonmovant's position with its own speculation; all the court need do is provide the nonmovant with an adequate

opportunity to respond to the motion. n10

[b] Nonmovant's Initial Burden Affected by Burden of Persuasion

The summary judgment nonmovant's initial burden of production n11 may be affected if the nonmovant has the ultimate burden of persuasion at trial. n12 The burden of persuasion means that the nonmovant at trial would have to establish that the weight of evidence is in its favor and that it is entitled to prevail on the particular claim or defense. n13 When the nonmovant would have the burden of persuasion at trial, there is a second step to the court's evaluation of the sufficiency of the evidence presented by the nonmovant in opposition to the summary judgment motion. The court must evaluate the evidence presented by considering the substantive evidentiary burden on the claim and determine whether there is a triable issue of fact based on the quantum and quality of proof the nonmovant must meet at trial. Thus, the court is required to review the facts based on whether the standard is the preponderance of the evidence, clear and convincing evidence, or some other standard. n14

The standard of proof that the nonmovant has at trial also directly affects its burden on summary judgment. If the nonmovant party will bear the burden of proof at trial on a dispositive issue, the nonmovant bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine dispute for trial based on its standard of proof for that claim. n15 For example, when the trial court was to evaluate the evidence presented for summary judgment in a libel case, it had to consider the higher burden of persuasion a plaintiff on a libel claim must meet at trial, specifically that plaintiff must prove "actual malice," that is, statements made with knowing falsity or reckless disregard for the truth, by clear and convincing evidence. Using that standard, the court had to consider whether a jury reasonably could find for either party at trial, and if so, could not grant summary judgment. n16

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 56.*

(n3)Footnote 2. *White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Bayle v. Allstate Ins. Co., 615 F.3d 350, 359 (5th Cir. 2010)* ; *see Fed. R. Civ. P. 56(a), (c).*

(n5)Footnote 4. *See* § 17.63[2][a], *below*; *see also Fed. R. Civ. P. 56(c)(1), (e).*

(n6)Footnote 5. *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., 598 F.3d 257, 271 (6th Cir. 2010)* ; *see Fed. R. Civ. P. 56(a), (c)(1).*

(n7)Footnote 6. *See Fed. R. Civ. P. 50(a).*

(n8)Footnote 7. *McBeth v. Himes, 598 F.3d 708, 724-725 (10th Cir. 2010)* (defendant movant for summary judgment on basis of qualified immunity satisfied initial burden of production by making prima facie showing of objective reasonableness, and that showing shifted burden of production to plaintiff nonmovant).

(n9)Footnote 8. *Ass'n of Flight Attendants-CWA v. United States DOT, 564 F.3d 462, 466 (D.C. Cir. 2009)* (summary judgment must be supported by "specific facts" stated in affidavits, and not conclusory allegations).

(n10)Footnote 9. *Reese v. Herbert, 527 F.3d 1253, 1268-1269 (11th Cir. 2008)* (summary judgment cannot be based on factual assertions that are unsupported in the record).

(n11)Footnote 10. *Reese v. Herbert, 527 F.3d 1253, 1268-1269 (11th Cir. 2008)* (summary judgment cannot be

based on factual assertions that are unsupported in the record).

(n12)Footnote 11. *Castro v. Collecto, Inc,, 668 F. Supp. 2d 950, 957 (W.D. Tex. 2009)* (if movant fails to meet initial burden of production, motion must be denied regardless of nonmovant's response).

(n13)Footnote 12. *Fed. R. Civ. P. 56(c)(1)(A).*

(n14)Footnote 13. *See Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1032 (D.C. Cir. 1988)* .

(n15)Footnote 14. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ; *see* § 17.63[1][b], *below*.

(n16)Footnote 15. *Pelt v. Utah, 539 F.3d 1271, 1280 (10th Cir. 2008)* .

(n17)Footnote 16. *Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 425 (5th Cir. 2008)* .

(n18)Footnote 17. *Enzo Biochem, Inc. v. Applera Corp., 599 F.3d 1325, 1337 (Fed. Cir. 2010)* (citing **Moore's Federal Practice**).

(n19)Footnote 18. *Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 736 (8th Cir. 2008)* .

(n20)Footnote 19. *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1263 (Fed. Cir. 2008)* ; *see* § 17.63[1][a], *above*, § 17.63[2][b], *below*.

(n21)Footnote 1. *See* § 17.63[1][a], *above*.

(n22)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n23)Footnote 3. *Fed. R. Civ. P. 56(c)(1)(A), (3)*; *see Triple Tee Golf, Inc. v. Nike, Inc., 485 F.3d 253, 261 (5th Cir. 2007)* .

(n24)Footnote 4. *Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1032 (D.C. Cir. 1988)* ; *Fed. R. Civ. P. 56(e)(3).*

(n25)Footnote 5. *Fed. R. Civ. P. 56(e)(1).*

(n26)Footnote 6. *Wiley v. Glassman, 511 F.3d 151, 155 (D.C. Cir. 2007)* .

(n27)Footnote 7. *Fed. R. Civ. P. 56(a)*; *see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (existence only of some alleged factual disputes between parties will not defeat otherwise properly supported motion for summary judgment).

(n28)Footnote 8. *United States v. Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999)* .

(n29)Footnote 9. *Fed. R. Civ. P. 56(c)(3).*

(n30)Footnote 10. *Blue Cross & Blue Shield v. Weitz, 913 F.2d 1544, 1550 (11th Cir. 1990)* (court had no obligation to develop arguments that were evidenced by documentation but not actually articulated in opposition to summary judgment).

(n31)Footnote 11. *See* § 17.63[2][a], *above*.

(n32)Footnote 12. *Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851 (10th Cir. 2003)* .

(n33)Footnote 13. *Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 425 (5th Cir. 2008)* .

(n34)Footnote 14. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (in deciding summary judgment motion, court considers evidence based on substantive evidentiary burdens that would be present at trial).

(n35)Footnote 15. *Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 174 L. Ed. 2d 490, 511 (2009)* .

(n36)Footnote 16. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (but directing entry of summary judgment when plaintiff nonmovant could not make this showing).

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2-17 Moore's Manual--Federal Practice and Procedure § 17.64

§ 17.64 Partial Summary Judgmentn*

[1] Summary Judgment for Less Than Entire Case

The court has considerable flexibility to divide a lawsuit and to grant summary judgment for only a portion of the lawsuit. First, the court has discretion to grant summary judgment on any claim or defense, or only a part of any claim or defense, that has been identified by a movant in the movant's motion for summary judgment. n1 Additionally, the court has discretion to order summary judgment on its own initiative after it has identified for the parties material facts that not genuinely in dispute n2 for the claims or defenses, or parts of claims or defenses, as identified by the court. n3

A summary judgment ruling that disposes of fewer than all claims and defenses, or fewer than all parties, is commonly referred to as a "partial summary judgment." Effective December 1, 2010, the term "partial summary judgment" is also referred to in the Rule 56(a) heading. n4 The first sentence of Rule 56(a) was added to make clear that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The Rule 56(a) heading adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion. n5 However, the term "partial summary judgment"' may be something of a misnomer, in that any ruling that disposes of less than all issues and fewer than all parties in an action is not a true judgment within the meaning of Rule 54, n6 which provides that a judgment includes any form of order from which an appeal lies. n7 Generally, any order or other decision that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties is an interlocutory order that may be revised at any time before there is an final judgment in the case. Therefore, most partial summary judgment rulings are not appealable judgments. n8

[2] Partial Summary Judgment Procedure

If a court decides not to grant summary judgment for all the relief requested in the summary judgment motion, the court may enter an order stating any material fact or facts, including an item of damages or other relief, that is not genuinely in dispute and will thereafter treat the such fact as established in the case. n1 The court will enter an order stating which facts are in dispute only after the court has applied the summary judgment standard specified in Rule 56(a) to each claim or defense, or part of a claim or defense, identified by the motion. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may

feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under Rule 56(g) or otherwise deemed to have been accepted for other purposes. n2

The purpose of Rule 56(g) is to conserve some of the judicial resources involved in the denial of a motion for summary judgment and to streamline the litigation process by narrowing the triable issues. n3 Once the court has made a statement of facts that are not genuinely in dispute, in any subsequent trial, the court will limit evidence based on those factual limitations, and the limitations will preclude the ability of the parties to offer proof on those facts. n4 However, although the result of an order stating that a fact is not genuinely in dispute is that the fact is established in the case, the court is not precluded from reconsidering and modifying this interlocutory order before the final judgment. Once a fact is ordered established in the case, however, the court will disturb that ruling only in special circumstances. The parties have the right to rely on the ruling in their preparation for trial. However, on an appropriate showing, the court has the power to modify the ruling, provided that it gives the parties fair notice of the change and an opportunity to respond, and to permit them to prepare for the changed circumstances of trial. n5

[3] Appealability of Partial Summary Judgment

A partial summary judgment order is an interlocutory order because it is entered prior to the final disposition of a case in the district court, and therefore not generally immediately appealable. n1 Furthermore, a district court should not enter a Rule 54(b) certification that a judgment is final unless there is a complete disposition of a claim. n2 However, the district court may certify a claim for immediate appeal if it finds that the partial summary judgment involves a close and controlling legal question and if early appeal may advance disposition of the matter. n3

On the other hand, the appellate court is not bound by the trial court's determination of appealability and may reject a certification if the appellate court is unpersuaded of the efficiency of early appeal. n4 It is an abuse of discretion for the court to certify as a final judgment a partial summary judgment in connection with a claim or party when there are no considerations of efficiency or judicial economy that would support the finding and when the inability to take an immediate appeal would not create hardship or delay. n5 There are circumstances, however, in which a ruling made prior to trial may allow for the entry of a partial final judgment pursuant to Rule 54(b), n6 which would then allow an immediate appeal. For example, in an action by an insured to force the insurer to defend the insured in an administrative action, the court determined that certification of finality of a partial judgment under Rule 54(b) was appropriate because the claims were separable, involved different questions of fact and law, and could have been separately enforced. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.122 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 56(f)(3).*

(n4)Footnote 3. *See, e.g., Kannady v. City of Kiowa, 590 F.3d 1161, 1171 (10th Cir. 2010)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 56(a).*

(n6)Footnote 5. *Fed. R. Civ. P. 56(a)*, Committee Notes to 2010 Amendments.

(n7)Footnote 6. *Brauer v. Pannozzo, 232 F. Supp. 2d 814, 818 (N.D. Ohio 2002)* .

(n8)Footnote 7. *Fed. R. Civ. P. 54(a).*

(n9)Footnote 8. *Fed. R. Civ. P. 54(b)*; *see also* § 17.81[2][b].

(n10)Footnote 1. *Fed. R. Civ. P. 56(g).*

(n11)Footnote 2. *Fed. R. Civ. P. 56(g)*, Committee Notes to 2010 Amendments.

(n12)Footnote 3. *Fed. R. Civ. P. 56(g)*, Committee Notes to 2010 Amendments; *Geneva Int'l Corp. v. Petrof, Spol, S.R.O., 608 F. Supp. 2d 993, 1004-1005 (N.D. Ill. 2009)* ; *McCollough v. Johnson, Rodenberg & Lauinger, 587 F. Supp. 2d 1170, 1177 (D. Mont. 2008)* .

(n13)Footnote 4. *Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 1007-1008 (E.D. Wis. 2000)* .

(n14)Footnote 5. *Huss v. King Co., 338 F.3d 647 (6th Cir. 2003)* .

(n15)Footnote 1. *Landry v. G.B.A., 762 F.2d 462, 464 (5th Cir. 1985)* (district court judgment that did not entirely dispose of any one claim was not appealable order under *Fed. R. Civ. P. 54(b)*, and appellate court lacked jurisdiction).

(n16)Footnote 2. *Holber v. Jacobs (In re Jacobs), 381 B.R. 147, 158 (Bankr. E.D. Pa. 2008)* .

(n17)Footnote 3. *See 28 U.S.C. § 1332(b).*

(n18)Footnote 4. *See Hamblin v. British Airways PLC, 717 F. Supp. 2d 303, 308 (E.D.N.Y. 2010)* .

(n19)Footnote 5. *Little Earth of United Tribes, Inc. v. United States Dep't of Housing & Urban Dev., 738 F.2d 310, 312-314 (8th Cir. 1984)* .

(n20)Footnote 6. *Fed. R. Civ. P. 54(b).*

(n21)Footnote 7. *Avondale Industries, Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1202-1204 (2d Cir. 1989)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.65

§ 17.65 Discretionary Summary Judgment Hearingn*

[1] Movant and Nonmovant Not Entitled Hearing

Rule 56 does not make any express refer to a summary judgment "hearing." n1 Prior to recent amendments, Rule 56 referred to a hearing in the context of the deadline for filing opposing affidavits, but that reference was not interpreted as an entitlement by the parties to an actual live hearing for the court to take evidence and consider oral arguments. n2 Some courts have stated that a hearing could actually be detrimental in that it could lead to an improper credibility determination by the court. n3 Rule 56 requires only that the parties have an opportunity to submit their evidentiary material and arguments in writing. n4 Furthermore, another federal rule express provides that the court has discretion to provide by rule or order for the submission and determination of motions on briefs without oral hearings. n5 However, many courts still refer to a summary judgment hearing as if it were an automatic occurrence, and it is universally accepted that a court has discretion to hold an oral hearing, especially in complex cases. n6 However, there are limitations on a court's use of evidence obtained and argument made at a hearing. n7

[2] Discretion of Court to Hold Hearing

Even though the parties are not entitled to a summary judgment hearing, the court has discretion to hold an oral hearing after it has had an opportunity to determine if the supporting documentation justifies a hearing. n1 In actual practice, the "hearing" referred to in Rule 56(c) usually is an oral argument held after submission of documentation in support of or opposition to the motion. n2 However, oral legal argument is not required on a motion for summary judgment. Thus, a court has discretion to deny a request for oral argument to give the attorneys an opportunity to explain and elaborate on submitted documentation when the documentation is sufficient to present the positions of the movant and nonmovant, and when the summary judgment motion is held entirely on legal rather than factual disputes, courts have particularly wide discretion to reject an oral hearing. n3 The procedure for a party to request an oral argument is typically governed by applicable local rules for the district in which the court is located. n4 Any conflicts that exist between local rules and the Federal Rules of Civil Procedure must be resolved in favor of the federal rules. n5

[3] Limitations on Oral Testimony at Summary Judgment Hearing

Rule 56 does not expressly require or even authorize the trial court to take oral evidence and receive other evidence in a

hearing setting. However, courts have found such permission implicit in Rule 43, which governs use of testimonial evidence for a procedural motion and grants a court discretionary authority to direct any portion of a motion to be heard on oral testimony or deposition. n1 There are some unusual circumstances in which oral testimony may be the most efficient or effective means of determining whether there is a genuine dispute of material fact. In such these circumstances, the facts considered at the evidentiary hearing must relate to foundations for questions of law, or mixed questions of fact and law, rather than to merely common factual determinations. n2

On the other hand, the court does have unlimited discretion at a summary judgment hearing to take oral testimony with respect to factual matters. Evidentiary materials in support of and in opposition to the motion should be submitted and cited by the parties and made part of the record, n3 and it is on this record that the court should ordinarily decide the motion. n4 Because the court should not resolve any existing genuine disputes of fact nor or make credibility determinations regarding witnesses, n5 there should ordinarily be no need for oral testimony. n6

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.110 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *March v. Levine, 249 F.3d 462, 473 (6th Cir. 2001)* .

(n3)Footnote 2. *See March v. Levine, 249 F.3d 462, 473 (6th Cir. 2001)* .

(n4)Footnote 3. *See Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir. 2000)* (verbal testimony at summary judgment stage creates considerable temptation for court to assess witness credibility, which court is not allowed to do).

(n5)Footnote 4. *See Fed. R. Civ. P. 56(b), (c)(1)(A).*

(n6)Footnote 5. *Fed. R. Civ. P. 78(b)*; *see Jorgensen v. Cassiday, 320 F.3d 906, 913 (9th Cir. 2003)* .

(n7)Footnote 6. *See, e.g., Equitable Res., Inc. v. United Steel, Local 8-512, 621 F.3d 538, 545-546 (6th Cir. 2010)* .

(n8)Footnote 7. *See* § 17.65[3], *below*.

(n9)Footnote 1. *March v. Levine, 249 F.3d 462, 473 (6th Cir. 2001)* (even though oral testimony is not favored in summary judgment proceedings due to well-founded reluctance to turn summary judgment hearing into trial, court has discretion to hear evidence on motions by oral testimony or on affidavits; citing **Moore's Federal Practice**).

(n10)Footnote 2. *See Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218, 1222 (11th Cir. 2008)* (three summary judgment hearings held in one month primarily for oral legal argument).

(n11)Footnote 3. *Cray Communications v. Novatel Computer Sys., 33 F.3d 390, 395-396 (4th Cir. 1994)* .

(n12)Footnote 4. *Lake at Las Vegas Investors Group v. Pacific Malibu Dev. Corp., 933 F.2d 724, 729 (9th Cir. 1991)* .

(n13)Footnote 5. *Fed. R. Civ. P. 83(a)*; *Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1993)* .

(n14)Footnote 1. *Fed. R. Civ. P. 43(c)*; *see* Arista Records LLC v. Does 1-27, *584 F. Supp. 2d 240, 255 n.19 (D. Me. 2008)* (citing **Moore's Federal Practice**).

(n15)Footnote 2. *See County of Oakland v. City of Berkley, 742 F.2d 289, 297-298 (6th Cir. 1984)* (court ordered evidentiary hearing to determine structure of complex agreement that formed basis of claims and defenses).

(n16)Footnote 3. *See Fed. R. Civ. P. 56(c)(1).*

(n17)Footnote 4. *See Fed. R. Civ. P. 56(c)(3)*; *see March v. Levine, 249 F.3d 462, 473 (6th Cir. 2001)* .

(n18)Footnote 5. *Vital v. Interfaith Med. Ctr., 168 F.3d 615, 621-622 (2d Cir. 1999)* (district court may take oral testimony on summary judgment motion pursuant to *Fed. R. Civ. P. 43* to determine whether there are disputes of material fact, but not to assess credibility of witnesses or resolve issues of fact).

(n19)Footnote 6. *Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir. 2000)* ; *see Thompson v. Mahre, 110 F.3d 716, 720 (9th Cir. 1997)* (taking of oral testimony on summary judgment should be rare because it would ordinarily be unproductive).

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART IV. SUMMARY JUDGMENT PROCEDURAL REQUIREMENTS

2-17 Moore's Manual--Federal Practice and Procedure § 17.66

§ 17.66 Determination of Summary Judgment Motion by Courtn*

[1] Court has Discretion to Determine Motion

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. n1 The rules committee restored the term "shall" to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use, but Rule 56 was amended in 2007 to replace "shall" with "should" as part of the style project revisions, under a convention that prohibited any use of shall. However, the committee has concluded that neither of the terms "must" or "should" is suitable in view of the case law on whether a district court has discretion to deny summary judgment. Consequently "shall" has been restored to avoid creating an unacceptable risk of changing the summary judgment standard, and "shall" avoids the unintended consequences of any other word. n2 In this regard, the Supreme Court has stated the plain language of Rule 56 mandates the entry of summary judgment, after adequate time for discovery and on motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. n3 At the same time, the court has admonished that, when there appears to be no genuine dispute as to any material fact, the trial courts should act with caution in granting summary judgment, and the trial court may deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. n4

[2] Procedure of Court to Determine Motion

In its determination of the motion, the court need consider only the materials cited by the movant and the nonmovant, but it may consider any other materials in the record. n1 This rule reflects judicial opinions and local rules provisions which state that the court may decide a motion for summary judgment without always undertaking an independent search of the record. n2 If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, the court has all of the following options:

- Give an opportunity to the party to properly support or address the fact; n3 this provision recognizes that affording a party an opportunity to properly support or address the fact will often be the court's preferred first step. n4

- Consider the fact undisputed for purposes of the motion; n5 this approach reflects the requirements stated in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute. n6

- Grant summary judgment if the motion and supporting materials, including any facts considered undisputed, show that the movant is entitled to it; n7 if a party has made a proper response or reply with respect to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts, both those it has chosen to consider undisputed because of a lack of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply, it must determine the legal consequences of these facts and permissible inferences from them. n8

- Issue any other appropriate order. n9 The court should make its choice of order to encourage proper presentation of the record. Many courts exercise extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. n10

Whatever the court decides on the summary judgment motion, the court must state on the record the reasons for granting or denying the motion. Among other purposes, this statement of reasons can facilitate an appeal or subsequent trial court proceedings. It is particularly important to state the reasons if a court grants summary judgment; the form and detail of the statement of reasons are left to the court's discretion. A statement on denying summary judgment need not state every available reason, but identification of central issues assists the parties to focus further proceedings. n11

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.99 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(a)*; *see § 17.20* et seq. (summary judgment standard).

(n3)Footnote 2. *Fed. R. Civ. P. 56(a)*, Committee Notes to 2010 Amendments.

(n4)Footnote 3. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n5)Footnote 4. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n6)Footnote 1. *Fed. R. Civ. P. 56(c)(3)*.

(n7)Footnote 2. *Fed. R. Civ. P. 56(c)(3)*, Committee Notes to 2010 Amendments.

(n8)Footnote 3. *Fed. R. Civ. P. 56(e)(1)*.

(n9)Footnote 4. *Fed. R. Civ. P. 56(e)(1)*, Committee Notes to 2010 Amendments.

(n10)Footnote 5. *Fed. R. Civ. P. 56(e)(2)*.

(n11)Footnote 6. *Fed. R. Civ. P. 56(e)(2)*, Committee Notes to 2010 Amendments.

(n12)Footnote 7. *Fed. R. Civ. P. 56(e)(3)*.

(n13)Footnote 8. *Fed. R. Civ. P. 56(e)(3)*, Committee Notes to 2010 Amendments.

(n14)Footnote 9. *Fed. R. Civ. P. 56(e)(4)*.

(n15)Footnote 10. *Fed. R. Civ. P. 56(e)(4)*, Committee Notes to 2010 Amendments.

(n16)Footnote 11. *Fed. R. Civ. P. 56(a)*, Committee Notes to 2010 Amendments; *see Hulsey v. Pride Rests., LLC, 367 F.3d 1238, 1244 (11th Cir. 2004)* .

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2-17 Moore's Manual--Federal Practice and Procedure § 17.67

§ 17.67 Effect of Court's Determination on Summary Judgmentn*

[1] Effect of Grant of Summary Judgment

If a court enters an order of summary judgment with respect to all parties and claims and defenses, the judgment is a final adjudication of the merits of the claims and defenses presented. When granted in favor of the claimant, the summary judgment affirmatively decides the merits of the claim; if granted in favor of the defendant, it is an absolute bar to the claim, rather than merely a matter in abatement such as a dismissal. In this regard, matters in bar are those such as res judicata, release, statute of frauds, statute of limitations, and laches, all of which block the claimant's recovery. n1 On the other hand, matters in abatement, such as lack of jurisdiction over the subject matter or the person, improper venue, insufficiency of process, and failure to join an indispensable party result only in a dismissal of the action without prejudice, or, if the action is not then dismissed, the prosecution is merely stayed or transferred to another forum. n2

However, if the court grants partial summary judgment, which is a summary judgment for less than all claims or defenses, or for fewer than all parties, it does not constitute a final adjudication. However, a partial summary judgment still alters the nature of the case by eliminating claims, narrowing issues, and consequently affecting the proof presented at trial. Thus, even the grant of a partial summary judgment may affect the final result, even in a jury trial, by controlling the material presented to the jury. n3

[2] Effect of Denial of Summary Judgment

[a] Denial Generally Does Not Have Preclusive Effect

In contrast to a grant of summary judgment on all claims and defenses, which constitutes a final adjudication on the merits, n1 denial of summary judgment is not a final adjudication, but an interlocutory order, n2 and is non-appealable unless it falls within some statutory classification that permits an appeal from such an interlocutory order. n3 Furthermore, the denial of a motion for summary judgment is not res judicata and does not have a preclusive effect. n4 Consequently, the denial of summary judgment generally establishes only that there is a factual dispute to be resolved at trial, and the trial proceeds as usual. n5

A denial of summary judgment, however, is generally treated as "law of the case," at least with respect to the legal issue involved. The law of the case doctrine provides that a court's decision on a matter generally will not be re-examined by the court during the course of the litigation. Note that the doctrine of the law of the case is sufficiently flexible to permit a court to reconsider a decision when warranted. This flexibility allows the trial court discretion to deny a motion for summary judgment without prejudice to a later renewal; n6 and, even when a motion is denied without any provision for renewal, the court may permit renewal. The court, for example, may consider a renewal motion when the new motion is sufficiently distinct because of additional facts developed during litigation. n7 A court may also consider additional or repeated motions if new precedent raises the possibility of a change in the court's ruling. On the other hand, renewed motions are not favored, n8 and a court may exercise its discretion to prohibit repetitive motions even where the subsequent motions differ from the previous motions if the court finds this necessary to prevent harassment, delay, or needless increase in costs. n9

[b] Court That Denies Summary Judgment May Order That Material Fact Is Not in Dispute

Rule 56 expressly provides that if the court denies summary judgment on part of the case or for all the relief requested, and a trial is therefore necessary, the court may nevertheless ascertain what material facts are not genuinely in dispute; thereafter, such material facts are deemed established, and the trial must be conducted accordingly. n10 If, however, the court merely denies the motion for summary judgment and does not specify what facts are not in good faith controverted, all of the issues are open for trial, as framed by the pleadings. n11 If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event. n12

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.07, § 56.130 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *American Fire & Cas. Co. v. Broeren Russo Constr., 54 F. Supp. 2d 842, 845 (C.D. Ill. 1999)* ; *see Morris v. Wachovia Secs., 448 F.3d 268, 275 (4th Cir. 2006)* .

(n3)Footnote 2. *Cubie v. Bryan Career College, Inc., 244 F. Supp. 2d 1191, 1201 (D. Kan. 2003)* .

(n4)Footnote 3. *Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 1007-1008 (E.D. Wis. 2000)* ; *see* § 17.64.

(n5)Footnote 1. *See* § 17.67[1], *above*.

(n6)Footnote 2. *Weise v. Casper, 507 F.3d 1260, 1269-1270 (10th Cir. 2007)* .

(n7)Footnote 3. *See § 17.61*.

(n8)Footnote 4. *C & M Props., L.L.C. v. Burbidge (In re C & M Props., L.L.C.), 563 F.3d 1156, 1166 (10th Cir. 2009)* .

(n9)Footnote 5. *Kutner Buick, Inc. v. American Motors Corp., 868 F.2d 614, 618 (3d Cir. 1989)* .

(n10)Footnote 6. *Zarnow v. City of Wichita Falls Tex., 614 F.3d 161, 171 (5th Cir. 2010)* .

(n11)Footnote 7. *Curran v. Ho Sung Kwon, 153 F.3d 481, 487 (7th Cir. 1998)* .

(n12)Footnote 8. *Allstate Finance Corp. v. Zimmerman, 296 F.2d 797, 799 (5th Cir. 1961)* (courts do not approve

of piecemeal consideration of successive motions for summary judgment because parties should ordinarily be required to present their strongest case for summary judgment when matter is first raised; however, rules do not prohibit consideration by trial court of second motion if different than that of earlier summary judgment motions).

(n13)Footnote 9. *See Fed. R. Civ. P. 1.*

(n14)Footnote 10. *Fed. R. Civ. P. 56(g).*

(n15)Footnote 11. *Kutner Buick, Inc. v. American Motors Corp., 868 F.2d 614 (3d Cir. 1989)* .

(n16)Footnote 12. *Fed. R. Civ. P. 56(g)*, Committee Notes to 2010 Amendments.

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2-17 Moore's Manual--Federal Practice and Procedure § 17.68

§ 17.68 Court Has Discretion to Order Sanctions for Bad Faith Affidavit or Declaration or Frivolous Motionn*

[1] Sanctions for Bad Faith Affidavit or Declaration

If the court determines that an affidavit or declaration has been submitted in bad faith or solely for delay in connection with a summary judgment motion, the court may, after providing notice and a reasonable time to respond, order the party that submitted the affidavit or declaration to pay the other party reasonable expenses, including attorney's fees, that the opposition party incurred as a result of the submission. The court may also hold the party or the attorney who submitted the bad faith affidavit or declaration in contempt or order other appropriate sanctions against the party or attorney. n1 The rules committee has stated that there are three important aspects to this provision. First, these sanctions are discretionary, not mandatory, and reflect the experience that most courts do not frequently use this independent Rule 56 authority to impose sanctions. Second, the rule text has been expanded to recognize that the court must provide notice and a reasonable time to respond to a proposed order of sanctions. Third, the court has explicit authority to impose other appropriate sanctions. n2

The "bad faith" standard stated in Rule 56(h) obviously encompasses affidavits and declarations that contain perjurious or blatantly false allegations or that omit facts concerning issues central to the resolution of the case, n3 but also includes circumstances when the party or attorney subjectively knew that its affidavit or declaration was false, used solely as a delaying tactic, or recklessly drafted with disregard of the truth. The focus in the inquiry is on the submitting person's state of mind, rather than that of the objective standard of a reasonable person. n4

[2] Sanctions for Frivolous Summary Judgment Filings

Rule 56(h) is not the exclusive grounds for a court to sanction attorneys or parties for inappropriate behavior in connection with a summary judgment motion. Frivolous or bad faith affidavits or declarations could result in the imposition of sanctions for violation of the certification and representation standards in Rule 11 n1 or under *28 U.S.C. § 1927* for unreasonable and vexatious multiplication of proceedings. n2 Courts also have inherent power to impose sanctions for bad-faith conduct in the course of litigation. n3

Numerous Rule 11 sanctions have involved attorneys that have moved for frivolous or otherwise inappropriate summary judgment at the expense of opposing parties or the judiciary. n4 The district court has power to impose

sanctions for filing of frivolous opposition to summary judgment motion, as well as to a motion in favor of summary judgment. n5 Under Rule 11, a potential violator now has the opportunity to avoid sanctions by withdrawing the violating motion or assertion within 21 days of its filing. n6 For further discussion of sanctions motions under Rule 11, see Ch. 9, *Pleadings and Motions in General*.

A court may impose statutory sanctions for continued or unreasonable assertions of a summary judgment argument by an attorney; thus, an attorney that multiplies the proceedings in any case unreasonably and vexatiously may be ordered by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of the conduct. n7 Note, however, that it is an abuse of a district court's discretion under the statute if it does not make it clear that an attorney might be sanctioned pursuant to the statute, which requires a finding of bad faith for the imposition of sanctions, n8 as distinguished from Rule 11 sanctions, which do not require a finding of bad faith. n9

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.94 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(h)*.

(n3)Footnote 2. *Fed. R. Civ. P. 56(h)*, Committee Notes to 2010 Amendments.

(n4)Footnote 3. *Jaisan, Inc. v. Sullivan, 178 F.R.D. 412, 415-416 (S.D.N.Y. 1998)* .

(n5)Footnote 4. *Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 548-549, 111 S. Ct. 922, 112 L. Ed. 1140 (1991)* ; *see United States v. Bolden, 325 F.3d 471, 494 (4th Cir. 2003)* .

(n6)Footnote 1. *See Fed. R. Civ. P. 11(a), (b)*.

(n7)Footnote 2. *See 28 U.S.C. § 1927*.

(n8)Footnote 3. Inherent power to sanction. *Chambers v. NASCO, 501 U.S. 32, 42-43, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* ; *see Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1308 (11th Cir. 2002)* .

(n9)Footnote 4. *See Coonts v. Potts, 316 F.3d 745, 749 (8th Cir. 2003)* .

(n10)Footnote 5. *Hurd v. Ralphs Grocery Co., 824 F.2d 806, 809 (9th Cir. 1987)* .

(n11)Footnote 6. *Fed. R. Civ. P. 11(c)(2)*.

(n12)Footnote 7. *28 U.S.C. § 1927*; *see Rentz v. Dynasty Apparel Indus., 556 F.3d 389, 393 (6th Cir. 2009)* .

(n13)Footnote 8. *Hackman v. Valley Fair, 932 F.2d 239, 241-242 (3d Cir. 1991)* .

(n14)Footnote 9. *See Anjelino v. New York Times Co., 200 F.3d 73, 100-101 (3d Cir. 1999)* (although trial court has considerable discretion in imposing sanctions, it must provide attorney with notice and opportunity to be heard on possibility of being sanctioned, consistent with requirements of due process; furthermore, required notice must be particularized so that party is aware of factors that party must address if he or she is to avoid sanctions).

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17.69-17 Moore's Manual--Federal Practice and Procedure §§ 17.69-17.79

[Reserved]

§§ 17.69[Reserved]

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PART V Pretrial Stage
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PART V. APPEAL OF TRIAL COURT DETERMINATION OF SUMMARY JUDGMENT MOTION

2-17 Moore's Manual--Federal Practice and Procedure § 17.80

§ 17.80 Appeal of Summary Judgment Disposing of Entire Casen*

[1] Grant of Summary Judgment Immediately Appealable

If a trial court grants summary judgment with respect to all of the pending claims and defenses in a case, and with respect to all parties, the decision is a final judgment. Such a decision completes the adjudication and disposition of the case at the district court level. n1 It is a final judgment because it ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment. n2 A circuit court of appeals has jurisdiction to hear an appeal of complete summary judgment because the circuit courts have jurisdiction over final decisions made in the district courts. n3

A circuit court also has jurisdiction over a summary judgment ruling when it disposes entirely of a case which had been consolidated with other cases. n4 On the other hand, because a grant of partial summary judgment resolves only some of the claims and defenses raised by the pleadings, a partial summary judgment is not an final judgment; n5 therefore, an order granting partial summary judgment is generally not immediately appealable. n6

[2] Denial of Summary Judgment Not Immediately Appealable

The denial of a summary judgment motion is not a "final judgment," because it does not constitute a complete disposition of all of the claims and decisions on the merits; ordinarily, a denial of summary judgment does not give the moving party the right to immediate appellate review. n1 However, when the appeal from a denial of summary judgment is presented together with an appeal from a grant of summary judgment, the circuit court has jurisdiction to review the denial. n2 Furthermore, review is sometimes available for the denial of summary judgment when the denial prevents a defense that would preclude the entire suit. For example, a party may take an immediate appeal from a summary judgment on immunity grounds because the immunity encompasses immunity from both suit and liability. n3 However, appeal of such decisions is limited to issues of law, such as whether an act was truly legislative or whether constitutional rights at issue were clearly established. The defendants may not file an immunity appeal simply on the ground that they did not do what the plaintiffs allege. Such fact-based appeals inappropriately ask the appellate court to revisit the trial court's decision that the pretrial record sets forth a genuine issue of fact for trial. n4

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.130 (Matthew Bender 3d ed.).

(n2)Footnote 1. *DIRECTV Inc. v. Budden, 420 F.3d 521, 525 (5th Cir. 2005)* .

(n3)Footnote 2. *Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)* ; *Tucker v. Tennessee, 539 F.3d 526, 528 (6th Cir. 2008)* .

(n4)Footnote 3. *See 28 U.S.C. § 1291*; *see also United States v. Bergbauer, 602 F.3d 569, 574 (4th Cir. 2010)* .

(n5)Footnote 4. *Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 551 (6th Cir. 1994)* (after case had been consolidated with another in wrongful death action, summary judgment granted against one defendant on claim of destruction of evidence by plaintiff could be appealed).

(n6)Footnote 5. *H.D.V. -Greektown, LLC v. City of Detroit, 568 F.3d 609, 619 (6th Cir. 2009)* ; *see 28 U.S.C. § 1291*.

(n7)Footnote 6. *Mueller v. Auker, 576 F.3d 979, 1001 (9th Cir. 2009)* ; *see* § 17.81[2][b].

(n8)Footnote 1. *Deutsch v. Jordan, 618 F.3d 1093, 1099 (10th Cir. 2010)* ; *see 28 U.S.C. § 1291*.

(n9)Footnote 2. *Thomas v. United States, 166 F.3d 825, 828 (6th Cir. 1999)* .

(n10)Footnote 3. *Amore v. Novarro, 610 F.3d 155, 161 (2d Cir. 2010)* .

(n11)Footnote 4. *Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 7-8 (1st Cir. 2000)* (immediate appeal from summary judgment denial of qualified immunity is available only when appeal is based on purely legal ground, but not when it challenges sufficiency of evidence).

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2-17 Moore's Manual--Federal Practice and Procedure § 17.81

§ 17.81 Appeal of Interlocutory Summary Judgment Decisionsn*

[1] Interlocutory Orders Generally Not Immediately Appealable

Summary judgment may be granted for either a movant or nonmovant with respect to less than the entire case; n1 such an order is known as a partial summary judgment. n2 Any summary judgment decision that does not dispose of the entire case on the merits is deemed an "interlocutory order" rather than final order; therefore, the losing party has no automatic right to be heard by the appellate court. n3 However, a partial summary judgment decision is appealable under certain limited circumstances. n4

The Supreme Court has emphasized that allowing an interlocutory appeal is the exception to the rule and that to permit too many interlocutory appeals may cause harm because it may make it more difficult for trial judges to accomplish their primary function: to supervise litigation and trial proceedings. It may also threaten those proceedings with delay, adding costs, and diminishing coherence. n5 In its decision, the Court mentioned the most frequent bases for permitting interlocutory appeal in summary judgment cases: the collateral order doctrine; n6 a directed entry of final judgment as to fewer than all claims or parties; n7 and the discretionary certification of controlling and doubtful questions of law in order to facilitate efficient resolution of the case. n8

[2] Appealable Interlocutory Orders

[a] Collateral Order Doctrine

Under the collateral order doctrine, a court of appeals may consider an immediate appeal of an interlocutory order when, even though the trial court order does not dispose of the entire case, it makes other conclusive decisions that resolve significant matters separate and apart from the merits. There are three criteria for appellate court review of the collateral order doctrine: the district court must have conclusively decided a contested issue, the issue decided was important and separate from the merits of the action, and the district court's disposition was not effectively reviewable later in the litigation. n1 If a court denies summary judgment and thus rejects a defendant's claim of immunity, for example, the decision is considered final because it forces the defendant to undergo litigation even if the defendant ultimately prevails. n2 A failure to find immunity and thus to avoid further litigation in effect becomes the final determination of the issue. Consequently, immediate appeal is available under the collateral order doctrine. n3

[b] Judgment with Respect to Fewer Than All Claims or Parties

If the court grants a summary judgment with respect to fewer than all claims or parties, as is the case with a partial summary judgment, the order is appealable if the district court certifies the judgment for appeal by an express determination pursuant to Rule 54(b) that there is no reason to delay the entry of a final judgment on its decision. n4

The circuit court may take an appeal with respect to fewer than all claims or parties only if the district court makes an express determination that the action involved separate claims, that there was a final decision as to at least one claim, and that there was no just reason to delay the appeal. n5 The district court may make such an express determination regarding a summary judgment ruling which is dispositive of an entire claim in accordance with a motion made pursuant to Rule 56(a). This should be distinguished from a ruling made pursuant to Rule 56(g), which permits the court to enter an order that a material fact is not genuinely in dispute, but that does not fully adjudicate a claim. n6

When a case involves more than two parties, it is possible for the trial court to enter a summary judgment ruling that fully adjudicates all claims between less than all of the parties. In such a circumstance, Rule 54(b) controls whether the ruling is subject to immediate appeal. n7 Such an appeal is permissible only if there is an express certification by the trial court that there is no just reason for delay, and only on an express direction for the entry of judgment. n8 This express certification is within the sound discretion of the district court, and requires the judge to evaluate such factors as the interrelationships of the claims in order to prevent piecemeal appeals in cases which should be reviewed only as single units. n9 Certification of an appeal is justifiable when the ruling is entirely dispositive of the litigation as applied to some of the parties, even when others remain, because the ruling is entirely distinct from the remainder of the action. n10 If the trial court declines to make an express determination that the ruling as to less than all of the parties is final, an appeal is not appropriate. n11 Similarly, if the trial court retains jurisdiction over matters that would make review of the appeal premature and impractical, the ruling is not final and appealable. n12

[c] Close and Controlling Question of Law

Pursuant to statute, n13 discretionary interlocutory appeal is available if the trial court certifies that the summary judgment decision rendered involves a close and controlling question of law, and that immediate appeal is likely to expedite ultimate resolution of the case. n14 The district court's determination is not binding on the appellate court, which may reject the certification and refuse to hear the interlocutory appeal. n15 For example, a court faced with uncontroverted facts may deny summary judgment based on its own determination of the law, but acknowledge that the question is close. If the competing legal view would result in the grant of summary judgment rather than a long trial, such a case would satisfy the *28 U.S.C. § 1292(b)* certification standard. n16

[d] Interlocutory Order Factually Intertwined with Appealable Order

An appeals court has discretion to take an interlocutory appeal when it determines that it has "pendent appellate jurisdiction." This occurs when an ordinarily unappealable interlocutory order is inextricably entwined factually with an appealable order. n17 The Supreme Court has stated that this type of interlocutory review is rarely appropriate and requires a very close connection between the appealable claim and the ordinarily unappealable matter. n18 In other words, to be inextricably intertwined the pendent claim must be coterminous with, or subsumed in, the claim properly before the court. n19

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.130 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 56(a).*

(n3)Footnote 2. *Mueller v. Auker, 576 F.3d 979, 1001 (9th Cir. 2009)* .

(n4)Footnote 3. *Poolaw v. Marcantel, 565 F.3d 721, 728 (10th Cir. 2009)* .

(n5)Footnote 4. *Johnson v. Jones, 515 U.S. 304, 313-314, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)* (interlocutory appeals may be allowed in certain circumstances such as to avoid injustice by quickly correcting a trial court's error, or on other grounds specified in "immediate appeal" statutes).

(n6)Footnote 5. *Johnson v. Jones, 515 U.S. 304, 313, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)* .

(n7)Footnote 6. *See* § 17.81[2][a], *below*.

(n8)Footnote 7. *See* § 17.81[2][a], *below*.

(n9)Footnote 8. *See* § 17.81[2][a], *below*.

(n10)Footnote 1. *Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819, 835 (2007)* .

(n11)Footnote 2. *Cmty. House, Inc. v. City of Boise, 623 F.3d 945, 952 (9th Cir. 2010)* .

(n12)Footnote 3. *Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* (denial of summary judgment motion asserting official immunity is immediately appealable under collateral order doctrine); *Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 7-8 (1st Cir. 2000)* (pre-trial qualified immunity decisions are immediately appealable as collateral orders when immunity claim presents a legal issue that may be decided without considering correctness of plaintiff's version of facts).

(n13)Footnote 4. *Fed. R. Civ. P. 54(b)*; *see Bonner v. Perry, 564 F.3d 424, 427 (6th Cir. 2009)* .

(n14)Footnote 5. *Avondale Industries Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1203-1204 (2d Cir. 1989)* .

(n15)Footnote 6. *See Deimer v. Cincinnati Sub-Zero Prods., 990 F.2d 342, 344 (7th Cir. 1993)* .

(n16)Footnote 7. *Banque Paribas v. Hamilton Indus. Int'l, 767 F.2d 380, 383 (7th Cir. 1985)* (certification for appeal in multiple party case was proper because district court's ruling disposed of entire dispute between two parties).

(n17)Footnote 8. *Fed. R. Civ. P. 54(b)*.

(n18)Footnote 9. *Federal Sav. & Loan Ins. Corp. v. Cribbs, 918 F.2d 557, 559 (5th Cir. 1990)* .

(n19)Footnote 10. *Ford v. Elsbury, 32 F.3d 931, 934-935 (5th Cir. 1994)* (trial court was correct to certify appeal of partial summary judgment which was granted as to two parties when court ruled that joinder of parties had been fraudulent).

(n20)Footnote 11. *Castleberry v. Goldome Credit Corp., 408 F.3d 773, 780 (11th Cir. 2005)* .

(n21)Footnote 12. *Network Communications v. Michigan Bell Tel. Co., 906 F.2d 237, 238-239 (6th Cir. 1990)* .

(n22)Footnote 13. *28 U.S.C. § 1292(b)*.

(n23)Footnote 14. *See 28 U.S.C. § 1292(b)*; *see also Penthouse Owners Ass'n, Inc. v. Certain Underwriters, 612 F.3d 383, 385-386 (5th Cir. 2010)* ; *Lion's Volunteer Blind Indus. v. Automated Group Admin., Inc., 195 F.3d 803, 805 (6th Cir. 1999)* ("permissive interlocutory appeal" pursuant to *28 U.S.C. § 1292(b)*).

(n24)Footnote 15. *Cardwell v. Chesapeake & O. R. Co., 504 F.2d 444, 446-447 (6th Cir. 1974)* (both district and circuit courts have complete discretion regarding issue of interlocutory appeal under statute).

(n25)Footnote 16. *Lion's Volunteer Blind Indus. v. Automated Group Admin., Inc., 195 F.3d 803, 806 (6th Cir. 1999)* (district court granted partial summary judgment on defendants' claim for benefits and their allegation under ERISA of breach of fiduciary duty, but based on its reading of court of appeals prior decisions, district court denied summary judgment as to state law misrepresentation claim, agreeing with plaintiffs that it was not preempted by ERISA; on defendant's motion, district court certified interlocutory appeal on preemption question and court of appeals accepted issue for review).

(n26)Footnote 17. *Montano v. City of Chicago, 375 F.3d 593, 599-600 (7th Cir. 2004) .; Martin v. Consultants & Admrs., 966 F.2d 1078, 1083-1086 (7th Cir. 1992)* ; *see C&W Asset Acquisition LLC v. Knox, 104 Fed. Appx. 936, 937-938 (5th Cir. 2004)* (unpublished).

(n27)Footnote 18. *Swint v. Chambers County Commn, 514 U.S. 35, 45-51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)* (denial of defendant's motion for summary judgment not appealable as collateral order; noting that only when essential to the resolution of properly appealed collateral orders should courts extend their collateral order and interlocutory appellate jurisdiction to rulings that would not otherwise qualify for expedited consideration).

(n28)Footnote 19. *Lee v. Nicholl, 197 F.3d 1291, 1297 (10th Cir. 1999)* (appellate court did not exercise pendent appellate jurisdiction over denial of motion for summary judgment filed by board of county commissioners in former employee's § 1983 free speech action, because neither of theories under which board was potentially liable was coterminous with county official's qualified immunity claim, which was under appellate court's jurisdiction).

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART V. APPEAL OF TRIAL COURT DETERMINATION OF SUMMARY JUDGMENT MOTION

2-17 Moore's Manual--Federal Practice and Procedure § 17.82

§ 17.82 Standards for Appellate Court Review of Summary Judgment Ordern*

[1] Standard of Review for Grant of Summary Judgment

If a party properly appeals the grant of a motion for summary judgment, the appellate court's review of the decision is de novo, which means that the appellate court considers all of the same factors regarding summary judgment that should have been used by the district court in its determination of whether to grant summary judgment at the district court level. n1 Therefore, in reviewing a decision which has granted summary judgment, the appeals court must determine whether there existed a genuine dispute of material fact, and whether the moving party was entitled to a judgment as a matter of law. n2 In its determination of whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law, the appellate court must review all the record, the affidavits, other documentation, and all factual inferences in the manner most favorable to the nonmovant party. n3

The court of appeals has the discretion to affirm a grant of summary judgment on any ground fairly presented by the summary judgment record. n4 Consequently, an appellate court may affirm a grant of summary judgment if the trial court's ultimate judgment is correct, even if the reasoning given by the trial court is erroneous. n5 An important focus of the review is the correct application of the applicable substantive state or federal law to the claims and defenses in dispute. n6

When questions of law are presented to the appellate court in the course of reviewing the determination of a summary judgment motion, the questions are also subject to de novo review. n7 For example, the question of whether a contract is ambiguous under governing state law is a question of law that may be decided by the appellate court, although there may be factual issues regarding the intent of the parties, as well as performance under the contract. If an unambiguous contract exists between the parties, the appellate court has the duty to determine the meaning of the agreement as a matter of law. If, however, questions of law involve the interpretation of ambiguous language in the contract, summary judgment is not proper, and the court of appeals will reverse the entry of summary judgment, because these determinations are questions of fact for a jury unless applicable law requires that ambiguities be resolved against the party that drafted the contract. n8 Questions of law are not limited to contract disputes, and other common legal issues include constitutional claims, assertions of fraud, and cases involving the defense of immunity, which must be resolved by the appellate court in its review of a summary judgment ruling. n9

[2] Standard of Review for Denial of Summary Judgment

As is the case with the review of the grant of summary judgment, the circuit court generally applies the de novo standard of review for a denial of summary judgment. n1 However, it has been argued that because the district court does have discretion to deny a motion for summary judgment, even if the Rule 56 standard is met, if the decision is based on considerations of fairness or other important policies, that an abuse of discretion standard should apply. n2 In that case, the trial court has discretion to deny a motion for summary judgment, even if it determines that a party is entitled to summary judgment, if the claim would benefit from a full hearing, n3 for example, if policy considerations call for denial. n4 Unless the trial court abuses its discretion in denying the motion, the court's discretion will not be disturbed. n5 On the other hand, if the standard for summary judgment was not satisfied, the trial court must deny the motion for summary judgment; consequently, in such circumstances the standard for review is the de novo standard. n6

The denial of a summary judgment motion is not reviewable after a full trial on the merits. An order denying summary judgment retains its interlocutory character as simply a step along the route to final judgment. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion. n7

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, § 56.131 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Addicks Servs. v. GGP-Bridgeland, LP, 596 F.3d 286, 293 (5th Cir. 2010)* .

(n3)Footnote 2. *Temme v. Bemis Co., 622 F.3d 730, 734 (7th Cir. 2010)* ; *see Fed. R. Civ. P. 56(a)*; *see also Fed. R. Civ. P. 50(a)*.

(n4)Footnote 3. *Dahl v. Rice County, 621 F.3d 740, 743 (8th Cir. 2010)* ; *Bishop v. Children's Ctr. for Developmental Enrichment, 618 F.3d 533, 536 (6th Cir. 2010)* .

(n5)Footnote 4. *Miller v. Scottsdale Ins. Co., 410 F.3d 678, 680 (11th Cir. 2005)* ; *see In re Jones, 966 F.2d 169, 172-174 (5th Cir. 1992)* (summary judgment in favor of creditors affirmed based on court's determination that debtors had violated bankruptcy court's order not to encumber proceeds of insurance policy without court's permission).

(n6)Footnote 5. *Craig v. M&O Agencies, Inc., 496 F.3d 1047, 1053 (9th Cir. 2007)* ; *see Rodrigue v. Western & Southern Life Ins. Co., 948 F.2d 969, 971 (5th Cir. 1991)* (appellate court may affirm grant of summary judgment regardless of correctness of district court's ruling if appellate court finds in record adequate independent basis for that result).

(n7)Footnote 6. *See Charry v. California, 13 F.3d 1386, 1388 (9th Cir. 1994)* .

(n8)Footnote 7. *Eckert v. Titan Tire Corp., 514 F.3d 801, 804 (8th Cir. 2008)* .

(n9)Footnote 8. *See Sayers v. Rochester Tel. Corp. Supplemental Management Pension Plan, 7 F.3d 1091, 1096-1097 (2d Cir. 1993)* (ambiguous contract language normally precludes summary judgment because questions of contract meaning based on extrinsic evidence present questions of fact).

(n10)Footnote 9. *Billish v. Chicago, 962 F.2d 1269, 1276-1277 (7th Cir. 1992)* , *vac. o.g., 1992 U.S. App. LEXIS 15278 (1992)* .

(n11)Footnote 1. *Anderson v. Family Dollar Stores of Ark., Inc., 579 F.3d 858, 861-862 (8th Cir. 2009)* .

(n12)Footnote 2. *Johnson v. Bryant, 671 F.2d 1276, 1279 (11th Cir. 1982)* (trial court did not abuse discretion in denying plaintiff's motion for summary judgment based on personal injuries); *see also* 11 ***Moore's Federal Practice**, § 56.131[2]*.

(n13)Footnote 3. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986)* .

(n14)Footnote 4. *Marcus v. St. Paul Fire & Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981)* .

(n15)Footnote 5. *United States v. Certain Real & Personal Property Belonging to Hayes, 943 F.2d 1292, 1297 (11th Cir. 1991)* .

(n16)Footnote 6. *Clark v. Wilson, 625 F.3d 686, 690 (10th Cir. 2010)* .

(n17)Footnote 7. *Ortiz v. Jordan, ___ U.S. ___, 131 S. Ct. 884, 178 L. Ed. 2d 703, 709 (2011)* .

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PART V Pretrial Stage
CHAPTER 17 SUMMARY JUDGMENT
PART V. APPEAL OF TRIAL COURT DETERMINATION OF SUMMARY JUDGMENT MOTION

2-17 Moore's Manual--Federal Practice and Procedure § 17.83

§ 17.83 Procedural Considerations for Appellate Court Review of Summary Judgment Ordern*

[1] Appellate Court's Consideration of Record

[a] Appellate Court Generally Will Not Consider Matter Raised for First Time on Appeal

Generally, appellate review of a lower court's determination of a summary judgment motion is limited to the record before the district court, n1 and arguments and factual matters not presented in the district court in connection with the summary judgment motion are deemed waived on appeal. n2 An appellate court, however, has discretion in its review to allow exceptions to this rule, and to consider matters raised for the first time on appeal. The circuits have allowed two exceptions: (1) if the issues only involve purely questions of law; n3 or (2) if injustice would result if the arguments were not considered. n4

Under the first exception, issues of law that neither affect nor rely on the facts contained in the record may be considered by the court on appeal. For example, the limited question of the appropriate state law to be applied in a diversity action is an issue of law that the appellate court may consider even if the issue was not raised in the trial court. n5 The second exception provides for review in the interests of justice, and may be used by the appellate court in situations when an injustice would otherwise result if an unraised issue were not considered on appeal. n6 For example, one appellate court granted a party's request for remand for clarification of a clause that might support the party's contract claims; the appellate court determined that it would have been unjust to have prevented the party's right to pursue the claim, although not raised in the lower court. n7 When a party presents conclusory arguments in the lower court, however, they will not be considered on appeal, because the appellate court does not have an obligation to provide details and fully elaborate an argument that a party has presented only in conclusory terms. n8

[b] District Court Reasoning

Rule 56 expressly requires the district court to specify its reasons for granting or denying a motion for summary judgment. n9 Appellate courts have also emphasized the importance of the district court including a statement of reasons for granting or denying summary judgment because, except in very simple cases, a statement of reasoning facilitates appellate review. n10 Appellate review of the district court decision is an error-correcting function, n11 and an unexplained summary judgment order may deny the appellate court the tools necessary for review. A lack of a

statement of reasons could require the appellate court to search the record in order to find evidence in support of its decision. n12 If the basis for the district court's decision cannot be ascertained, the appellate court will remand the case, because it is improper for the appellate court to speculate regarding the reasons the district court may have had for granting or denying summary judgment in a case. n13

However, even though a statement of reasoning by the district court facilitates review by the appellate court, the appellate court need not rely on the district court's grounds or reasoning for the appellate court's own decision. In other words, the appellate court will conduct its own independent review, and the court of appeals has the discretion to affirm a grant of summary judgment on any ground fairly presented by the summary judgment record. For example, an appellate court may affirm a grant of summary judgment if the trial court's ultimate judgment is correct, even if the reasoning given by the trial court is erroneous. n14

[2] Appellate Review After Trial of Prior Denial of Summary Judgment

If a district court has denied a summary judgment based on the existence of material factual disputes, the moving party may not appeal that denial on an appeal from a final judgment entered after a trial has been held. n1 Thus, if a party asserts that the district court erroneously denied summary judgment based on factual disputes, the proper procedure is for the party to make a motion under Rule 50(a) for judgment as a matter of law at the close of evidence. On final judgment, the appellate court may then review the denial of that Rule 50(a) motion. n2 Furthermore, if a party fails to renew a summary judgment argument in a motion for judgment as a matter of law at the close of all the evidence, the court of appeals will consider that failure as a waiver of the issue on appeal. n3

On the other hand, when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a strictly legal question, a party may appeal denial of the motion after final judgment. n4 It has been suggested that attorneys should not rely on their own determination of whether an issue is a question of law or fact, because the distinction is not always clearly defined. Rather, in the interest of caution, counsel should always state the summary judgment grounds in a Rule 50 motion for judgment as a matter of law at the close of all the evidence, and renew that argument after the jury has returned a verdict, if necessary. n5

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 11 *Moore's Federal Practice*, §§ 56.130, 56.131 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Martin v. Russell, 563 F.3d 683, 686 (8th Cir. 2009)* .

(n3)Footnote 2. *Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F.3d 705, 715 (8th Cir. 2004)* .

(n4)Footnote 3. *Gilbert v. Des Moines Area Cmty. College, 495 F.3d 906, 915 (8th Cir. 2007)* .

(n5)Footnote 4. *Defabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 80 (2d Cir. 2010)* .

(n6)Footnote 5. *In re Pacific Trencher & Equipment, Inc., 735 F.2d 362, 364 (9th Cir. 1984)* .

(n7)Footnote 6. *Robinson v. Gov't of Malay., 269 F.3d 133, 146 (2d Cir. 2001)* .

(n8)Footnote 7. *Roberts v. Hollandsworth, 582 F.2d 496, 499-500 (9th Cir. 1978)* .

(n9)Footnote 8. *United States v. Rode Corp., 996 F.2d 174, 176 (7th Cir. 1993)* .

(n10)Footnote 9. *Fed. R. Civ. P. 56(a).*

(n11)Footnote 10. *Trimed, Inc. v. Stryker Corp., 608 F.3d 1333, 1342-1343 (Fed. Cir. 2010)* .

(n12)Footnote 11. *Clay v. Equifax, Inc. 762 F.2d 952, 957 (11th Cir. 1985)* .

(n13)Footnote 12. *Trimed, Inc. v. Stryker Corp., 608 F.3d 1333, 1343 (Fed. Cir. 2010)* .

(n14)Footnote 13. *McIncrow v. Harris County, 878 F.2d 835, 836 (5th Cir. 1989)* .

(n15)Footnote 14. *Craig v. M&O Agencies, Inc., 496 F.3d 1047, 1053 (9th Cir. 2007)* (court of appeals may affirm even if the district court relied on an erroneous ground).

(n16)Footnote 1. *Wolfgang v. Mid-America Motorsports, 111 F.3d 1515, 1521 (10th Cir. 1997)* .

(n17)Footnote 2. *Studnicka v. Pinheiro, 618 F.3d 799, 801 (8th Cir. 2010)* .

(n18)Footnote 3. *Allahar v. Zahora, 59 F.3d 693, 695-696 (7th Cir. 1995)* .

(n19)Footnote 4. *F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958, 961 (9th Cir. 2010)* .

(n20)Footnote 5. *Wolfgang v. Mid-America Motorsports, 111 F.3d 1515, 1521 (10th Cir. 1997)* (although defendants argued that district court's ruling was based on erroneous interpretation of strictly legal question, court of appeals decided that ruling was based on factual dispute).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

2-18 Moore's Manual--Federal Practice and Procedure 18.syn

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[2] Flexibility to Manage Case

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§ 18.03 Pretrial Conference Procedure

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure § 18.01

§ 18.01 Purposes of Pretrial Conferencesn*

[1] General Purpose To Promote Speedy, Efficient Trial

An initial pretrial conference is a powerful device used by a district court to plan, organize, manage, and expedite a civil case, with the participation and cooperation of all of the attorneys and the parties. n1 It is designed to reach a speedy, inexpensive, and just resolution of the litigation. n1.1 Rule 16(a) specifically provides the district court with discretion to direct the attorneys for the parties and any unrepresented parties to appear before the court for a conference or conferences before trial, in order to: n2 (1) expedite the disposition of the action; (2) establish early and continuing control to prevent the case from becoming protracted because of lack of management; (3) discourage wasteful pretrial activities; (4) improve the quality of the trial through more thorough preparation; and (5) facilitate the settlement of the case.

Rule 16(a) reflects the premise that the judiciary must serve as the critical source of structure and discipline in the federal trial system. After considering the input and requirements of the parties through a conference, the court has the responsibility to ensure that a disposition is reached in each case quickly and efficiently. n3 Another primary purpose of the pretrial conference is to inform the parties precisely what is in controversy, and the pretrial order that is formulated from the conference is considered as superseding the pleadings and as establishing the issues to be considered at trial. n4

While avoidance of unnecessary cost and unjustifiable delay are two of the primary goals of a pretrial conference, many of the provisions of Rule 16 are designed to secure justice on the merits. Therefore, one of the principal purposes of the rule has been to reduce the likelihood that the outcome of civil litigation will be decided on a procedural technicality or unfair tactical advantage. The pretrial conference has always been designed to encourage better preparation and to reduce surprise at trial as well as to discourage the practice of filing motions at the last minute before trial, either to cause delay or to distract and confuse an opponent or the court. The current version of Rule 16 encourages active intervention by judges throughout the pretrial period and is designed to reduce the opportunity for parties to gain unfair advantage by obscuring issues, blocking efficient access to important evidence, or attempting to surprise anopponent with new theories or information produced at the last minute. n5

Under the current version of Rule 16(a), the focus of a pretrial conference is toward more extensive judicial control of the entire pretrial phase, not just the trial. n5.1 This expanded role of Rule 16 is apparent from reading the several objectives of the conference listed above. There has been a shift in emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery. n6

[2] Flexibility to Manage Case

Even though the drafters of the modern form of Rule 16 wanted the rule generally to encourage much early and active case management by the federal courts, they also recognized that some cases would require much less management than others, and that even in complex cases it would be impractical to require rigid judicial management of all of the details of the pretrial process. Therefore, Rule 16 allows the district court flexibility to apply the tools provided to the specific needs and circumstances of each individual case. n1 For example, the rules give discretion to the trial court to decide whether to hold a pretrial conference at all. n2

Furthermore, the federal rules are not always the exclusive source of a federal court's powers in civil cases. Federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively and to ensure obedience to their orders. n2.1 Thus, a district court has inherent power to order parties to appear at a pre-trial settlement conference, even though Rule 16(a) provides only that a court may direct a party's attorneys or unrepresented parties to attend such a conference. The mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure does not mean that such a procedure is prohibited. n3 On the other hand, district courts do not have unlimited discretion regarding conferences and must exercise their discretion in manner that is in harmony with Federal Rules of Civil Procedure or their actions may be overturned. For example, a district court abused its discretion in utilizing Rule 16(a) to compel the parties to participate in a jury minitrial that would be open to the media and public and to order sanctions against counsel for not participating. The court of appeals held that a district court lacked authority under the federal rules to compel participation in a minitrial. n4

Another aspect of the flexibility given to modern federal courts under Rule 16 is based on a recognition that there is a risk of judicial over-regulation in some cases, because some civil cases are significantly simpler than others. n5 Therefore, when disposition of a case is based on relatively straightforward development of evidence from predictable sources or on an easily identifiable legal issue, significant managerial activity by a judge may be unnecessary and requiring a detailed management plan in such a case may waste the resources of both the parties and the court. Therefore, judges have the flexibility to allow the parties to control pretrial activity or to work out a settlement within reasonable deadlines or by a speedy streamlined trial. n6

Rule 16 also recognizes the advantage of creating unique sets of administrative procedures and pretrial rules for each category of case and gives district courts discretion to determine which categories of cases should be excluded from compliance with the management requirements that apply to the general civil action. n7 Furthermore, many courts have established a series of separate, specially tailored management tracks for special types of cases, such as social security cases, prisoner petitions, habeas corpus, or civil rights actions. Similarly, many courts assign a case to a "standard track" for a case with few legal issues, routine discovery, and up to 10 fact witnesses, and to a "complex track" if the case has numerous, complicated, and possibly unique legal issues and requires extensive discovery. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.03* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Potthast v. Metro-North R.R., 400 F.3d 143, 153 (2d Cir. 2005)* .

(n3)Footnote 1.1. *Vivid Techs., Inc. v. American Science & Eng'g, Inc., 200 F.3d 795, 804 (Fed. Cir. 1999)* .

(n4)Footnote 2. *Fed. R. Civ. P. 16(a)(1)-(5).*

(n5)Footnote 3. *Fed. R. Civ. P. 16(a)(1) see Geders v. United States, 425 U.S. 80, 86, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976)* ; *Fed. R. Civ. P. 1* (federal civil rules construed and administered to secure just, speedy, and inexpensive determination of every action).

(n6)Footnote 4. *Erff v. Markhon Indus., Inc., 781 F.2d 613, 617 (7th Cir. 1986)* .

(n7)Footnote 5. *See Koch v. Koch Indus., 203 F.3d 1202, 1222-1223 (10th Cir. 2000)* (considerations involved in modification of order following final pretrial conference).

(n8)Footnote 5.1. *Potthast v. Metro-North R.R., 400 F.3d 143, 153-154 (2d Cir. 2005)* .

(n9)Footnote 6. *Fed. R. Civ. P. 16(a)(2)-(5).*

(n10)Footnote 1. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments; *see Woodson v. Surgitek, 57 F.3d 1406, 1417 (5th Cir. 1995)* (court has inherent discretionary power to manage cases).

(n11)Footnote 2. *Mizwicki v. Gerald Helwig, 196 F.3d 828, 833 (7th Cir. 1999)* (no requirement that court hold pretrial conference and court's discretion will not be disturbed on review unless it is clear that no reasonable person would rule as did district court).

(n12)Footnote 2.1. *Aloe Vera of Am., Inc. v. United States, 376 F.3d 960, 964-965 (9th Cir. 2004)* .

(n13)Footnote 3. *Natural Gas Pipeline Co. v. Energy Gathering, 2 F.3d 1397, 1406 (5th Cir. 1993)* .

(n14)Footnote 4. *In re NLO, 5 F.3d 154, 157 (6th Cir. 1993)* (granted mandamus to vacate district court's order compelling participation in jury minitrial under threat of sanctions and that such order was clearly erroneous as matter of law).

(n15)Footnote 5. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments.

(n16)Footnote 6. *Mizwicki v. Gerald Helwig, 196 F.3d 828, 833 (7th Cir. 1999)* (pretrial conferences discretionary).

(n17)Footnote 7. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments.

(n18)Footnote 8. *See, e.g.*, N.D. Ohio Local Rule 16.2(b)(3).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure § 18.02

§ 18.02 Number and Time of Pretrial Conferencesn*

Although a court will usually call at least one pretrial conference, there is no requirement that any be held, and, therefore, there is no requirement of a minimum number of conferences. n1 Furthermore, the rules do not specify any deadlines for the completion of any pretrial conferences, n1.1 except for the scheduling conference. n1.2

Thus, a trial court has discretion to specify in the pretrial scheduling order thenumber of any pretrial conferences to be held and the particular time that each pretrial conference will be held. n2 For example, in complex cases, the court may deem it useful to have one or more early pretrial conferences, perhaps limited to particular topics or issues. In lengthy cases, it may be desirable to have a number of conferences, starting shortly after the initial claims have been filed, to enable the court and parties to plan the course of discovery and motion proceedings, n3 and to make decisions about the consolidation or separation of trials when multiple parties and issues are involved.

When pretrial conferences are held, the final pretrial conference must be held as close to the time of trial as reasonable under the circumstances. n4 The court still has discretion to set the time for the final pretrial conference but the intent of the rule is that the time between any final pretrial conference and trial should be as short as possible, to be certain that the parties make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the final pretrial conference and trial. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.13[3]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Mizwicki v. Gerald Helwig, 196 F.3d 828, 833 (7th Cir. 1999)* (district court did not abuse its discretion in not holding pretrial conference in Title VII action).

(n3)Footnote 1.1. *Fed. R. Civ. P. 16(b)(3)(B)(v)* (court has discretion to set times for any pretrial conferences).

(n4)Footnote 1.2. *Fed. R. Civ. P. 16(b)(2)* (scheduling order, which is issued after any scheduling conference is held, must be entered within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant).

(n5)Footnote 2. *Fed. R. Civ. P. 16(b)(3)(B)(v)*.

(n6)Footnote 3. *See Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments; *Fed. R. Civ. P. 16(c)(2)(F)*.

(n7)Footnote 4. *Fed. R. Civ. P. 16(e)*.

(n8)Footnote 5. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments.

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CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure § 18.03

§ 18.03 Pretrial Conference Proceduren*

As noted earlier, district courts have considerable discretion and flexibility in their conduct of pretrial conferences. n1 Years ago, the Judicial Conference of the United States printed recommended procedural steps, as outlined in its "Handbook for Effective Pretrial Procedure." The following are some of those recommendations: n2

> 1. The court should ensure that the discovery processes are used promptly and expeditiously in advance of further procedural steps in the litigation. n3
>
> 2. The parties must be given notice as to when and where the pretrial conference will take place. Notice is particularly important considering the 1983 amendment to Rule 16 that requires at least one attorney for each party participating in any conference to have authority to enter into stipulations and make admissions regarding all matters that the participants may reasonably anticipate may be discussed. n4 The rule also requires attendance at the final pretrial conference by at least one of the attorneys who will conduct the trial for each party and by any unrepresented parties n5 and imposes sanctions for non-appearance at conferences and unpreparedness to participate at them. n6
>
> 3. The attorneys should meet before the conference, so that they will have had an opportunity to reach agreement on the items which will be raised at the conference. n7
>
> 4. The attorneys may be required to submit written memoranda to the court prior to the conference. These should contain summaries of the facts each party intends to prove and of legal propositions relied on, supported by citations. They should also contain descriptive lists of exhibits to be offered and should specify documents which a party concedes to be genuine and those as to which a concession is requested. n8
>
> 5. Planning of the conference should be left to the discretion of the judge. Different types of cases call for different procedures, and each judge has an individual preferences and capabilities. n9
>
> 6. The judge should take an active role in the conference and must be willing to take the initiative in

overcoming the natural reluctance of counsel to make disclosures and concessions. n10

7. The conference may be used to satisfy the Rule 16 requirement of the preparation of a pretrial order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.13* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 18.01*.

(n3)Footnote 2. "Handbook For Effective Pretrial Procedure," *Adopted by the Judicial Conference of the United States, 37 F.R.D. 255 (1964)* ; *see Titus v. Mercedes Benz of North America, 695 F.2d 746, 762-763 (3d Cir. 1982)* ; *McCargo v. Hedrick, 545 F.2d 393, 396-397 (4th Cir. 1976)* .

(n4)Footnote 3. *Fed. R. Civ. P. 16(c)(2)(f)*.

(n5)Footnote 4. *See Fed. R. Civ. P. 16(c)(1)*.

(n6)Footnote 5. *See Fed. R. Civ. P. 16(e)*.

(n7)Footnote 6. *See Fed. R. Civ. P. 16(f)(1)(A)-(B)*; *Goldman, Antonetti v. Medfit Int'l, Inc., 982 F.2d 686, 692 (1st Cir.1993)* (dismissal with prejudice for failure to attend pretrial and settlement conference).

(n8)Footnote 7. *See Olgyay v. Society for Envtl. Graphic Design, 169 F.R.D. 219, 219-220 (D.D.C. 1996)* .

(n9)Footnote 8. "Handbook For Effective Pretrial Procedure," *Adopted by the Judicial Conference of the United States, 37 F.R.D. 255, 266 (1964)* .

(n10)Footnote 9. "Handbook For Effective Pretrial Procedure," *Adopted by the Judicial Conference of the United States, 37 F.R.D. 255, 268-270 (1964)* ; *see Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments.

(n11)Footnote 10. *Fed. R. Civ. P. 16(a)(2)*; *Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 489 (9th Cir. 1986)* (it was proper for parties to submit direct questions of witness and defendant's objections before trial).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure § 18.04

§ 18.04 Attendance at Pretrial Conferencesn*

Every unrepresented party and at least one attorney for each represented party must participate in pretrial conferences, n1 and courts have authority to impose sanctions if no appearance is made on behalf of a party at a scheduling or pretrial conference. n2 Whether the attendance requirement involves attendance in person or participation bytelephone may depend on the sitting judge or local rule. At least one of the participating attorneys for each represented party must have authority to enter stipulations and make admissions with respect to any matter that he or she should reasonably anticipate may be discussed at the conference. n3

In addition to the basic attendance requirements described in the preceding paragraph, local rules, general orders, or the assigned judge's standing orders may also impose requirements about who must participate in pretrial conferences. Some courts, for example, require the lawyer who will serve as lead trial counsel to participate. This requirement reflects the courts' viewpoint that significant decisions are likely to be made at pretrial conferences and their preference to have present all the people who would be necessary to maximize the reliability of those decisions. n4

Sometimes, a court will require parties to attend a pretrial conference. The probability that a court will order the parties to attend an initial case management conference increases with the complexity and the projected cost of the litigation. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement. n5 A party or its representative means the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else. Additionally in cases involving large amounts of money or large organizations, there may be no one with complete settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.10* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Erff v. Markhon Indus., Inc., 781 F.2d 613, 617 (7th Cir. 1986)* ; *see Fed. R. Civ. P. 16(c)(1)*, *16(e)*.

(n3)Footnote 2. *Fed. R. Civ. P. 16(f)(1)(A)*.

(n4)Footnote 3. *Fed. R. Civ. P. 16(c)(1)*.

(n5)Footnote 4. *Ha-Lo Indus. v. Your Favorite Producers, 164 F.R.D. 233, 234 (N.D. Ill. 1995)* (third chair counsel representing defendant lacked sufficient familiarity with case to discuss all aspects; principal counsel ordered to pay opposition's costs because he wasted time at pretrial conference).

(n6)Footnote 5. *Fed. R. Civ. P. 16(c)(1)*.

(n7)Footnote 6. *Fed. R. Civ. P. 16(c)*, Committee Note to 1993 Amendments.

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2-18 Moore's Manual--Federal Practice and Procedure § 18.05

§ 18.05 Matters Considered at Pretrial Conferencesn*

[1] All Case Management Issues

This section discusses the topics that are usually covered in the initial pretrial conference, which is known as the "case management conference" to distinguish it from a "final pretrial conference," which is a special type of conference used to formulate a plan for trial. n1 A case management conference, on the other hand, is a pretrial conference which is used by the court to manage the initial stages of litigation and may include any type of special pretrial conference, such as a scheduling conference. n2 It is important to remember that the court has considerable discretion in managing its own case and any of the many subjects listed in Rule 16(b) or Rule 16(c) may be included on the agenda of an initial case management conference. n3 This section discusses those topics that are more likely to receive the court's emphasis at an initial case management conference, while the topics covered by the final pretrial conference are discussed in *§ 18.20* et seq. The likely subjects to be considered at the case management conference are set out below roughly in the chronological order that the court may consider them.

In addition to the matters set out below, an attorney new to a particular court should determine other matters considered at pretrial conferences by consulting the local rules of the district court, any applicable general orders the court has issued, and any standing orders of the sitting judge, or the attorney should contact the assigned judge's courtroom clerk or deputy. n4

[2] Factual Contentions and Stipulations

Many courts begin the initial case management conference by asking the attorneys to describe in their own terms the primary and significant events or circumstances that have precipitated the litigation. After listening to the attorney's descriptions of the underlying events that give rise to the litigation, the judge may consider examining the possibility of obtaining admissions of fact or stipulations that would avoid unnecessary proof. n1 "Factual stipulations" are formal concessions that have the effect of withdrawing a fact from issue and dispensing entirely with the need for proof of the fact. A judicial admission is conclusive in the case, which means that the facts stated in a stipulation are not subject to subsequent variation; furthermore, the parties will not be permitted to deny the truth of the facts stated, nor to maintain a contention contrary to the stipulated statement of facts, nor to suggest on appeal that the facts were other than as stipulated or that any material fact was omitted. n2 Consequently, attorneys should not make factual stipulations unless

they are absolutely certain of their content after thorough investigation. Judges, actively encourage factual stipulations because they significantly eliminate the time and expense of proof, reduce appreciably the scope of necessary discovery, and may also reduce the need for evidentiary motions and rulings.

By using stipulations to remove some matters from contention right at the outset, a judge may better focus disclosure and discovery activity, n3 which may save the parties time and expense. In complex litigation, the savings in time and expense achieved by this early focus may be particularly significant. n4

[3] Addition of Parties and Amendments to Pleadings

Early in the case, the court will want to know whether there are additional parties that the current parties intend to name as defendants in the complaint or in a counterclaim or cross-claim. After considering the attorneys' input on these matters, the judge will usually set deadlines for joining and serving any additional parties. n1 At an early case management conference, most judges also will ascertain whether the parties intend to add claims or defenses and will specify deadlines for filing amended pleadings. n2 If the court addresses these matters actively early in the pretrial period, it may avoid the delays and the wasteful repetition of discovery events that are often required when amendments must be made later in the pretrial period. n3

One of the most frequent causes of delay at trial is parties that wait until the time of trial to request permission to amend the pleadings; this often results in an adjournment when opposition parties claim surprise. A pretrial conference may help prevent this delay by requiring the amendment of pleadings well before trial. Later in the pretrial process after the court has held at least one pretrial conference, the court is likely to deny permission to amend when such amendment will result in any delay, except when amendment matters have arisen after the pretrial conference or when matters existing at the time of that hearing were not discovered until later and the attorney was not negligent in failing to obtain the information earlier. n4

[4] Formulation and Simplification of the Issues

One of the most important functions of the case management conference is the formulation and simplification of the issues. n1 Under the notice style of pleading required by the federal rules, n2 the pleadings frequently do not define the issues with any degree of sharpness; the real issues are often defined by use of the deposition and discovery procedures under Rules 26 through 37. n3 Rule 16(c)(1) governs the formulation of the issues at the case management pretrial conference and also calls for the elimination of frivolous claims or defenses at that conference. n4

The conference also enables the parties, under the supervision of the court, to substantiate the real issues and eliminate those that are without merit or not really controverted. This serves the purposes of eliminating surprise, assisting the parties in preparing for trial, and avoiding the necessity of preparing nonexistent or marginal issues for trial. n5 In addition to promoting efficiency and conservation of judicial resources, Rule 16(c)(1) confirms the court's power to identify the issues that are subject to litigation and eliminate frivolous claims or defenses without awaiting a summary judgment or other motion by the parties. n6 Nevertheless, the attorneys for the parties bear a significant responsibility in formulating the triable issues in that they must identify these issues for the court or they waive the right to have them tried. n7 Consequently, the trial court need not take final action on apparently weak or questionable claims or defenses at an early stage in litigation but may compel the parties to substantiate them through discovery, n8 motions, or otherwise. n9

[5] Consideration of Settlement and Alternative Dispute Resolution Procedures n*

[a] Use of Settlement and Alternative Dispute Resolution

In many cases, it is appropriate for the judge and parties to consider settlement or the use of alternative dispute resolution (ADR) procedures at an early case management conference when authorized by statute or local rule. n1 At

that time, the judge will have listened to the attorneys' descriptions of the underlying events and circumstances of the claims and have worked with the lawyers to identify the most important claims and defenses and the underlying key factual and legal issues. n2

A common approach to case management to foster settlement is the "two-stage" approach discussed in [b], *below*. When the court considers the subject of settlement during the initial case management conference, the judge may also want to consider which of the many different settlement and ADR procedures best fits the needs of the case and the parties' circumstances outside the litigation. Two of the most commonly used of the ADR procedures are mediation and arbitration. Mediation is discussed in [c], *below,* and arbitration is discussed in [d], *below*.

The Alternative Dispute Resolution Act of 1998 requires that each United Statesdistrict court authorize the use of alternative dispute resolution processes in all civil actions. By local rule, each district court must devise and implement its own alternative dispute resolution program, to encourage and promote the use of ADR in the district. n3 An "alternative dispute resolution process" includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration. n4 Each district court must ensure that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation, and all district courts are empowered to require participation in mediation, but the use of arbitration is subject to the consent of the parties. n5 Furthermore, each district may exempt from the ADR process specific cases or categories of cases in which the use of ADR would not be appropriate. n6 If a district court has not adopted formal rules regarding alternative dispute resolution programs, nor any local rules that specify the permissible characteristics of mediation orders, n7 the court may not impose mandatory mediation or other ADR under its inherent judicial powers unless adequate safeguards are adopted to limit the scope and expense of the ADR process. n8

[b] Two-Stage Case Management

One case management plan that the court may use is the "two-stage" approach to discovery and motion practice planning. Under this approach, discovery and motion practice is limited during the first stage of the pretrial period to development of the primary matters that must be addressed to set the case for serious settlement negotiations. The goal in the first stage is to examine only the most consequential evidence and perhaps make rulings on critical legal issues. At the end of this first stage, all formal pretrial activity is put on hold for approximately a month. During this time the parties concentrate on settlement, through direct negotiations, settlement conferences, or through ADR. The parties move into stage two of the pretrial period only if they fail to settle the entire action. If there is no settlement, the parties may then conduct full trial oriented discovery. Thus, there are two key features this approach: (1) limiting discovery in the first stage to the matters on which the success of settlement negotiations are likely to turn and (2) assuring the attorneys and parties that if no settlement is reached at the end of stage one, their full discovery rights will be preserved for stage two. n9

[c] Mediation Procedure

The term "mediation" generally means a relatively informal non-binding process in which a neutral third person attempts to assist opposing parties reconcile their positions consensually. The mediator assists the parties to communicate with each other, describes their positions and underlying interests or concerns, and devises mutually agreeable options for resolving the dispute without a trial. Mediation is a relatively inexpensive process with a good rate of success that has met with considerable litigant satisfaction. n10

The ADR Act n11 lists mediation as an appropriate process for the court to use. It also approves the participation of professional neutrals from the private sector as mediators. While the ADR Act requires district courts to obtain litigants' consent when the court orders arbitration, consent is not necessary for the court to order non-binding mediation or the use of other ADR mechanisms. It is within a district court's inherent power to order non-consensual mediation in those

cases in which that step serves the interests of justice, provided that the order ensures procedural fairness and shields objecting parties from undue burdens. The district court has inherent power to appoint persons unrelated to the court to aid judges in the performance of specific judicial duties. In the context of non-binding mediation, a mediator does not decide the merits of the case and has no authority to coerce settlement. Therefore, it is acceptable for the district court to appoint a qualified and neutral private party as a mediator. n12

[d] Arbitration Procedure

Arbitration is an ADR procedure in which a third person known as the arbitrator resolves either an entire dispute or particular aspects of the dispute. Arbitration in a federal civil proceeding may be of two types: binding and nonbinding. n13 In a "binding arbitration," a court may order that the parties unequivocally abide by the arbitrator's decision on a particular dispute or claim, provided that the court is satisfied that the parties actually and explicitly agreed to such an arbitration under contract principles. To determine whether such a binding arbitration agreement exists, the court must resolve any issue that challenges the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. When there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability. n14

The Federal Arbitration Act (FAA) provides that when a written contract involving commerce provides for arbitration of any dispute arising from the contract, a federal court will enforce the provision, except when grounds that exist at law or in equity provide for the revocation of any contract. n15 Thus, the FAA places arbitration agreements on an equal footing with other contracts, and requires federal courts to enforce them according to their terms, except when they may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. n16

As a gateway matter in each case of arbitration, the court must determine whether the parties have agreed to submit the particular dispute to arbitration. This question of "arbitrability" is presumed to be an issue for judicial determination unless the agreement of the parties has explicitly stated that the arbitrator is to decide such "questions of arbitrability." n17 The Supreme Court has distinguished such questions of arbitrability, which are presumed to be for the court to decide, from preliminaryprocedural questions that the parties would likely expect an arbitrator to decide, such as allegations of waiver or delay; in federal litigation, these are matters for the arbitrator to determine. n18

In summary, parties that ultimately contest a dispute in federal litigation have the option to voluntarily engage in arbitration. An arbitration agreement is enforceable whether made before of after litigation has been commenced, and may specify unique procedures. Parties are generally free to structure their arbitration agreements in the particular manner they want. For example, parties may agree to limit the issues they choose to arbitrate and may agree on rules under which any arbitration will proceed. They may choose who will resolve specific disputes. n19 In another example, the parties may freely elect binding arbitration preceded by no judicial discovery. n20 Because of the flexibility to specify a tailored arbitration process to fit the varying requirements of individual cases or claims, n21 the parties, court, and attorneys must always ensure that they are explicit about arbitration process that they are applying to a particular claim or dispute. n22

[6] Matters of Proof

[a] Evidentiary Subjects in General

At any pretrial conference, the court may take steps to avoid unnecessary proof and cumulative evidence. n1 The court may also seek to obtain stipulations regarding the authenticity of documents, make advance rulings on the admissibility of evidence, and investigate the possibility of obtaining admissions of facts and documents. n2 For example, in cases involving a large amount of documentary evidence, the court may secure the agreement of the attorneys that certain exhibits be received in evidence without the time and cost of authenticating the documents. The admissibility of evidence and the taking of judicial notice have also been subjects of consideration at pretrial conferences. n3 No proof

need be offered at trial as to any factual issue that has been admitted at the pretrial conference. n4 Note, however, that although Rule 16(c)(3) encourages stipulations as to the authenticity of documents, parties may not be compelled to stipulate to facts. n5

Rule 16(c)(7) also addresses a variety of subjects regarding final trial preparation of matters of proof, which are designed to eliminate surprise at trial. These are the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates of further conferences and trial. n6 Thus, the district courts may require that the parties reveal the names of the witnesses they intend to call. Failure to supply these names, unless excusable, may result in the dismissal or default of cases, or in the refusal to hear the testimony of undisclosed witnesses. n7

[b] Evidence Obtained From Experts

In early case management conferences, many courts request that the parties discuss and make plans regarding identity of expert witnesses and reports, disclosures, and proposed testimony submitted by experts. n8 Such a conference will typically occur after the parties have made their mandatory initial disclosures regarding experts. n9 The court has discretion at any pretrial conference to limit the use of expert testimony under *Rule 702 of the Federal Rules of Evidence*. n10 Thus, even when proposed expert testimony is admissible under the standards of Evidence Rules 403 and 702, n11 the court may deny or limit proposed expert testimony to reasonably limit the expense and expenditure of time required for such testimony. In its determination, the court may consider factors such as the expense to opposition parties of securing testimony on the same subjects by other experts, the other expert testimony in the case, and the other evidence available at trial. n12 The court may also limit the number of experts that may be used or the subjects about which expert testimony may be offered, or both. n13

The court may also use an early case management conference to specify the sequence and the deadlines for identifying expert witnesses, for producing their reports, and for taking their depositions. n14 Typically, courts should prescribe a time for expert witness disclosures in the scheduling order and, in most cases, the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to the issue. The court should also consider the right of parties to name, and the duty to file reports from, rebuttal experts. A scheduling order that is silent on this issue may be construed as leaving an unnecessary ambiguity as to whether or when rebuttal expert evidence is permitted or required. n15

[7] Referral of Matters to Magistrate Judge or Master

An important subject for the trial court to consider at a case management conference, especially in larger or more complex cases, is the advisability of using theservices of a magistrate judge or special master, and if so, the manner in which to utilize the magistrate judge or master. n1 Considering the congested dockets in most district courts and the need to allocate precious judicial resources, the ability to appoint magistrate judges, particularly with respect to scheduling and planning, may be very useful. n2 There are many types of assignments that may be given to magistrate judges, such as, whether to assign the case to a magistrate judge for all purposes, including presiding at a jury or bench trial. n3

With respect to masters, some district courts on occasion assign responsibility for case management, discovery, or settlement to special masters, either under their inherent authority, or under Rule 53. n4 These referrals are usually made in complex cases, in nonjury actions for matters of account and difficult computation of damages, in nonjury actions on a showing that the appointment is required by some exceptional condition, and when the parties consent to the appointment of a magistrate judge to serve as a special master. n5 The purpose of a special master is to assist the district judge by supervising various pretrial phases of litigation, reporting on matters such as accountings, directing complex burdensome discovery tasks, negotiating settlements, and issuing rulings on preliminary issues. n6 For a complete discussion of the roles of magistrate judges and masters, see Ch. 21, *Masters and Magistrate Judges*.

[8] Other Miscellaneous Subject Matter

A court may consider several other topics for discussion at a pretrial conference. Two of these are the form and substance of the pretrial order n1 and the disposition of pending motions. n2 A court may also use a pretrial conference to consider the question of jurisdiction, on its own motion or on motion of a party, and dismiss the action if subject matter jurisdiction is lacking. n3

When appropriate, the court may consider the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems. Pretrial procedures to expedite such cases have actually been in use in some district courts for many years. The four characteristics outlined in the rule are not intended to be an exhaustive list. n4 The Supreme Court cited this provision in holding that district courts have discretion to facilitate notice to potential plaintiffs in actions under the Age Discrimination in Employment Act. n5

The general residual phrase in Rule 16, that the court may consider such other matters as may facilitate the just, speedy, and inexpensive disposition of the action, n6 is a further example of the flexibility the court has in the conduct of pretrial conferences. n7 Also considered under the residual clause has been a ruling on the right to a jury trial. n8 Parties have also been allowed to stipulate as to matters that may be handled by the court, for example, whether to have bifurcated trials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.30* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(c), 16(e); see Rockwell Int'l Corp. v. United States, 549 U.S. 457, 474, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007)* (noting that final pretrial order supersedes all prior pleadings and controls subsequent course of trial and litigation).

(n3)Footnote 2. *See Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995)* (district court set number of dates at case management conference, including discovery deadline; dispositive motion deadline; motion in limine deadline; final witness and exhibit exchange; and expert witness exchange); *see also Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3d Cir. 1986)* (Rule 16 recognizes that scheduling is at heart of case management).

(n4)Footnote 3. *Dodson v. Runyon, 86 F.3d 37, 39 (2d Cir. 1996)* (case management tools of Federal Rule 16, added in 1983, were expressly designed to enable district courts to better manage their expanding dockets).

(n5)Footnote 4. *Vulcan Tools v. Makita USA, 23 F.3d 564, 565 n.2 (1st Cir. 1994)* .

(n6)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(C), (D).*

(n7)Footnote 2. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, ___ U.S. ___, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 853-854 (2010)* .

(n8)Footnote 3. *Fed. R. Civ. P. 16(c)(2)(F).*

(n9)Footnote 4. *See Matter of Maurice, 21 F.3d 767, 772 (7th Cir. 1994)* (one purpose of requiring parties to

complywith prehearing or pretrial order is to resolve discovery and evidentiary disputes in advance of trial in order to narrow issues and expedite trial).

(n10)Footnote 1. *Fed. R. Civ. P. 16(b)(3)(A)*; *see Bylin v. Billings, 568 F.3d 1224, 1231 (10th Cir. 2009)* (while it is not absolutely necessary for court to set deadline for adding parties, attorneys should ensure that court does so in order to avoid enforcement problems and preclude attempts to add parties at late date).

(n11)Footnote 2. *See Fed. R. Civ. P. 16(b)(3)(A), (c)(2)(B).*

(n12)Footnote 3. *See Parker v. Columbia Pictures Indus., 204 F.3d 326, 339-341 (2d Cir. 2000) .*

(n13)Footnote 4. *See Johnson v. Mammoth Recreations, 975 F.2d 604, 607-608 (9th Cir. 1992)* (motion to amend complaint after scheduling order deadline denied when party did not show good cause); *Marcum v. Zimmer, 163 F.R.D. 250, 253-254 (S.D. W.Va. 1995)* (parties seeking to amend after deadline in scheduling order must satisfy both Rules 15(a) and 16(b)).

(n14)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(A).*

(n15)Footnote 2. *See Fed. R. Civ. P. 8.*

(n16)Footnote 3. *Fed. R. Civ. P. 16(c)(2)(F).*

(n17)Footnote 4. *Fed. R. Civ. P. 16(c)(2)(A).*

(n18)Footnote 5. *Rogan v. Menino, 175 F.3d 75, 81 (1st Cir. 1999)* (Rule 16 permits court to dispose of marginal claims or issues that do not warrant full-dress trial).

(n19)Footnote 6. *Rogan v. Menino, 175 F.3d 75, 80 (1st Cir. 1999) .*

(n20)Footnote 7. *Fed. R. Civ. P. 16(c)*, Committee Note to 1983 Amendments.

(n21)Footnote 8. *Fed. R. Civ. P. 16(c)(2)(F).*

(n22)Footnote 9. *Berkowitz v. Home Box Office, 89 F.3d 24, 28-29 (1st Cir. 1996)* (courts may use case management tools to particularize claims or defenses to afford notice to opposing party).

(n23)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.50* et seq. (Matthew Bender 3d ed.).

(n24)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(I)*; *see* Lewis v. Sch. Dist. # 70, *2009 U.S. Dist. LEXIS 28267, at *21-*22 (S.D. Ill. Apr. 6, 2009)* (these procedures are voluntary, and court cannot compel binding mediation or arbitration on litigants).

(n25)Footnote 2. *See Geno Enters., Inc. v. Newstar Energy USA, Inc., 280 B.R. 623, 626 (W.D. Mich 2002)* (many issues identified at first pretrial conference).

(n26)Footnote 3. *28 U.S.C. § 651(b).*

(n27)Footnote 4. *28 U.S.C. § 651(a).*

(n28)Footnote 5. *28 U.S.C. § 652(a)*; *see Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 622-624 (2010)* (foundational principle of arbitration by agreement is that it is matter of consent); Lewis v. Sch. Dist. # 70, *2009 U.S. Dist. LEXIS 28267, at *21-*22 (S.D. Ill. Apr. 6, 2009)* (court cannot compel binding mediation or arbitration on litigants).

(n29)Footnote 6. *28 U.S.C. § 652(b).*

(n30)Footnote 7. *See In re African-American Slave Descendants' Litig., 272 F Supp 2d 755, 760 (N.D. Ill. 2003) .*

(n31)Footnote 8. *In re Atlantic Pipe Corp., 304 F.3d 135, 145 (1st Cir. 2002) .*

(n32)Footnote 9. *See Klein v. King, 132 F.R.D. 525, 529-533 (N.D. Cal. 1990)* (two-stage plan described in detail); *see also Fed. R. Civ. P. 16(c)(2)(F)* (conference specifications regarding discovery).

(n33)Footnote 10. *Cf. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 269 (6th Cir. 1985) .*

(n34)Footnote 11. *28 U.S.C.S. §§ 651-658.*

(n35)Footnote 12. *In re Atlantic Pipe Corp., 304 F.3d 135, 141-146 (1st Cir. 2002) .*

(n36)Footnote 13. *See Qorvis Communs., LLC v. Wilson, 549 F.3d 303, 310 (4th Cir. 2008) .*

(n37)Footnote 14. *Granite Rock Co. v. Int'l Bhd. of Teamsters, ___ U.S. ___, 130 S. Ct. 2847, 177 L. Ed. 2d 567, 579 (2010) .*

(n38)Footnote 15. *9 U.S.C. § 2.*

(n39)Footnote 16. *Rent-A-Center, W., Inc. v. Jackson, ___ U.S. ___, 130 S. Ct. 2772, 177 L. Ed. 2d 403, 410 (2010) .*

(n40)Footnote 17. *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* (typical questions of "arbitrability" are whether parties are bound by binding arbitration agreement or whether particular dispute is within scope of arbitration agreement).

(n41)Footnote 18. *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-86, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) .*

(n42)Footnote 19. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 623 (2010)* (as with any other contract, parties' intentions control).

(n43)Footnote 20. *See Metro E. Ctr. for Conditioning & Health v. Qwest Communs. Int'l, 294 F.3d 924, 927 (7th Cir. 2002) .*

(n44)Footnote 21. *See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 234-235, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) .*

(n45)Footnote 22. *See Pokorny v. Quixtar, Inc., 601 F.3d 987, 998-1000 (9th Cir. 2010)* (interpretation of agreement to arbitrate).

(n46)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(D).*

(n47)Footnote 2. *Fed. R. Civ. P. 16(c)(2)(C).*

(n48)Footnote 3. *Miller v. Los Angeles County Bd. of Education, 799 F.2d 486, 489 (9th Cir. 1986)* (before trial, district court ordered plaintiff to submit questions he intended to ask on direct examination and ordered defendant to present objections, which court then ruled on; court of appeals affirmed on ground that procedure expedited trial in accordance with Rule 16 by allowing plaintiff to present his case with minimum of interruption).

(n49)Footnote 4. *Jones v. Wal-Mart Stores, Inc., 870 F.2d 982 (5th Cir. 1989) .*

(n50)Footnote 5. *Cf. Waldorf v. Borough of Kenilworth, 878 F. Supp. 686, 691 (D.N.J. 1995)* .

(n51)Footnote 6. *Fed. R. Civ. P. 16(c)(2)(G)*.

(n52)Footnote 7. *See Brock v. R.J. Auto Parts & Serv., Inc., 864 F.2d 677, 679-680 (10th Cir. 1988)* .

(n53)Footnote 8. *Fed. R. Civ. P. 16(c)(2)(D), (G)*.

(n54)Footnote 9. *See Fed. R. Civ. P. 26(a)(2)(D)* (expert witness disclosures must be made at times and in sequence that court orders); *see also Fed. R. Civ. P. 26(a)(2)(A)-(C)* (content of required disclosures).

(n55)Footnote 10. *Fed. R. Civ. P. 16(c)(2)(D)*.

(n56)Footnote 11. *See Fed. R. Evid. 403, 702*.

(n57)Footnote 12. *See, e.g., Treaster v. Healthsouth Corp., 2006 U.S. Dist. LEXIS 36507, at *3-*5 (D. Kan. June 5, 2006)* .

(n58)Footnote 13. *See Fed. R. Civ. P. 16(c)*, Committee Note to 1993 Amendments.

(n59)Footnote 14. *See Fed. R. Civ. P. 26(a)(2)(D)* (expert witness disclosures must be made at times and in sequence that court orders); *see also Fed. R. Civ. P. 26(a)(2)(A)-(C)* (content of required disclosures); *Fed. R. Civ. P. 26(b)(4)(A)* (expert depositions).

(n60)Footnote 15. *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note to 1993 Amendments.

(n61)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(H)*.

(n62)Footnote 2. *See 28 U.S.C. § 636*; *see also Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041 (7th Cir. 1984)* (magistrate judge reference system intended to provide quicker and less costly alternative to usually more delayed adjudication in district court).

(n63)Footnote 3. *28 U.S.C. § 636(c)*; *see Fed. R. Civ. P. 73*.

(n64)Footnote 4. *Fed. R. Civ. P. 53(a), (b)*.

(n65)Footnote 5. *Goldstein v. Kelleher, 728 F.2d 32, 35 (1st Cir. 1984)* , *cert. denied, 469 U.S. 852 (1984)* .

(n66)Footnote 6. *Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274, 282-283 (N.D. Ind. 1995)* .

(n67)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(J)*; *see § 18.40* et seq.

(n68)Footnote 2. *Fed. R. Civ. P. 16(c)(2)(K)*.

(n69)Footnote 3. *Nelson v. Keefer, 451 F.2d 289, 293 (3d Cir. 1971)* (affirming dismissal during pretrial phase for failure to satisfy jurisdictional amount).

(n70)Footnote 4. *Fed. R. Civ. P. 16(c)*, Committee Note to 1983 Amendments.

(n71)Footnote 5. *Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)* (names and addresses of discharged employees in age discrimination suit discoverable).

(n72)Footnote 6. *Fed. R. Civ. P. 16(c)(2)(P)*.

(n73)Footnote 7. *Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 335 (5th Cir. 1995)* , *cert. denied, 516 U.S. 862 (1995)* (noting that under this provision district court may authorize party to produce trial exhibits; however, absent pretrial approval, party may not later request court to tax to opponent production costs of exhibits).

(n74)Footnote 8. *Fields Engr. & Equip., Inc. v. Cargill, Inc., 651 F.2d 589, 592 (8th Cir. 1981)* (plaintiff waived jury demand by orally consenting to bench trial at pretrial conference).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure § 18.06

§ 18.06 Scheduling Conferencesn*

[1] Discretion of Court to Utilize Scheduling Conference

A "scheduling conference" is a particular type of pretrial conference in which the district court formulates a scheduling order, after consulting with the attorneys for the parties and any unrepresented parties. n1 A scheduling order is an order that the court makes to specify the following time limits: n2 joining other parties; amending the pleadings; filing motions; completing discovery; modifying times specified in the rules for making disclosures; disclosing or discovering electronically stored information; making any agreements for asserting claims of privilege or of protection as trial-preparation material after production; holding pretrial conferences and commencing trial; and any other matters appropriate in the circumstances of the case.

The court is not required to hold a formal scheduling conference, nor any other type of pretrial conference. n3 Consequently, the court may issue its scheduling order after any appropriate communication with the parties. n3.1 For example, the court may make a scheduling order after consulting with the parties by telephone, mail, or othersuitable means, or after receiving a report from the parties under Rule 26(f). n4

[2] Attendance at Scheduling Conference

If the court holds a scheduling conference, the court may also specify attendance and participation requirements. The court may require that an attorney for each represented party, and every unrepresented party, attend and actively participate in the scheduling conference. n1 The court may also require that a party or the party's representative be present or reasonably available by telephone to consider the possible settlement of the suit. n2 The term "representative" may be someone other than an attorney, such as an officer of a corporate party, a representative from an insurance carrier, or someone else, depending on the circumstances. n3 At least one of the lawyers for each party participating in a scheduling conference must have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. n4 Local rules may also impose attendance requirements on scheduling conferences. For example, a local rule may require the attendance of the attorney who is expected to try the case. n5

[3] Subject Matter of Scheduling Conference

Even though it is designated as a "scheduling conference," Rule 16 provides that the court may use the conference to deal with any other matters appropriate in the circumstances of the case. n1 Therefore, the attorneys should be prepared for any of the topics listed in Rule 16(c) that the court has indicated will be included on the agenda. n2 Local rules may require that counsel meet with the court and consult before the scheduling conference and to propose deadlines for the various matters, such as a specific date for the completion of all discovery. n3

After holding the scheduling conference or other meetings with the attorneys, the court will issue a pretrial "scheduling order" which establishes deadlines that are binding on the parties and their counsel, and the court should not grant extensions or continuances for those deadlines except on a timely showing of good cause. n4 Therefore, once a schedule is set at the scheduling conference in the scheduling order, there is a firm presumption against the granting of continuances. Even though the parties may request extensions for deadlines and the court has discretion to grant such requests on a showing of good cause, n5 adherence to the schedule set by the court under Rule 16 serves several important purposes, including sharpening the preparation and presentation of cases, eliminating trial surprise, and facilitating the early settlement of disputes. n6

"Good cause" for an extension under Rule 16(b) must by shown by the moving party's diligence in attempting to meet the case scheduling order's requirements. n7 If a party shows good cause, a reasonable extension of time for a particular deadline may be granted by the court; however, stipulations by the parties should not be accepted in the absence of good cause. n8

The court will often in its pretrial scheduling order set a deadline for the parties to amend the pleadings, n9 and under Rule 16(b), the court also has the power to amend its scheduling order to permit an extension of the deadline to amend the pleadings. n10 Because it involves two rules, the determination of a motion to extend the deadline to amend pleadings a two-step analysis: the moving party must first demonstrate to the court that it has "good cause" for seeking modification of the scheduling deadline under Rule 16(b) and then must meet the requirements for permission to amend under Rule 15(a). n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.10* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 16(b), (c).*

(n3)Footnote 2. *Fed. R. Civ. P. 16(b)(3).*

(n4)Footnote 3. *See Fed. R. Civ. P. 16(a)-(c); Mizwicki v. Gerald Helwig, 196 F.3d 828, 833 (7th Cir. 1999)* (pretrial conferences discretionary).

(n5)Footnote 3.1. *See Fed. R. Civ. P. 16*, Committee Note to 1983 Amendment.

(n6)Footnote 4. *Fed. R. Civ. P. 16(b)(1)(B); see, e.g., Restrepo v. Colgate Univ., 149 F.R.D. 17, 19 (N.D.N.Y. 1993)* (court conducted telephone conference with attorneys before filing scheduling order); *see also Fed. R. Civ. P. 26(f)* (report setting forth parties' plan for discovery).

(n7)Footnote 1. *Fed. R. Civ. P. 16(a), (c)(1)*; *see Crossman v. Raytheon Long Term Disability Plan, 316 F.3d 36, 38 (1st Cir. 2002)* .

(n8)Footnote 2. *Fed. R. Civ. P. 16(c)(1)*.

(n9)Footnote 3. *Fed. R. Civ. P. 16*, Committee Note to 1993 Amendments.

(n10)Footnote 4. *Fed. R. Civ. P. 16(c)(1)*.

(n11)Footnote 5. *Northern District of California, Local Rule 16-8(a)*.

(n12)Footnote 1. *Fed. R. Civ. P. 16(b)(3)(B)(vi)*.

(n13)Footnote 2. *See Fed. R. Civ. P. 16(c)(2)*; *see also Hernandez-Santiago v. Ecolab, Inc., 397 F.3d 30, 32 (1st Cir. 2005)* (court utilized scheduling conference to discuss factual circumstances of product liability, and to order defendants to produce discovery regarding entity that had actually sold product that was subject matter of claim).

(n14)Footnote 3. *Olgyay v. Society for Envtl. Graphic Design, 169 F.R.D. 219, 219-220 (D.D.C. 1996)* ; *see Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 142 (D. Me. 1985)* (by requesting scheduling conference, parties may prevent additional expenditures of time).

(n15)Footnote 4. *Fed. R. Civ. P. 16(b)(4)*; *see § 18.42[5]*.

(n16)Footnote 5. *Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 161 F.R.D. 426, 427 (D. Haw. 1995)* (at initial scheduling conference, magistrate judge set deadline for filing of all motions, and this deadline was extended pursuant to plaintiffs' request).

(n17)Footnote 6. *Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995)* .

(n18)Footnote 7. *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* (good cause was not established when plaintiff made only limited efforts to obtain new attorney after her initial attorney withdrew from case); *Hansen v. Schubert, 459 F. Supp. 2d 973, 999-1000 (E.D. Ca. 2006)* (when evaluating whether party was diligent, focus of inquiry is on moving party's reasons for modification of schedule).

(n19)Footnote 8. *Olgyay v. Society for Envtl. Graphic Design, 169 F.R.D. 219, 220 (D.D.C. 1996)* .

(n20)Footnote 9. *See Fed. R. Civ. P. 16(b)(3)(A)*.

(n21)Footnote 10. *See Fed. R. Civ. P. 16(b)(4)*.

(n22)Footnote 11. *Hansen v. Schubert, 459 F. Supp. 2d 973, 1001-1002 (E.D. Ca. 2006)* .

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART I. INITIAL PRETRIAL CONFERENCES

2-18 Moore's Manual--Federal Practice and Procedure §§ 18.07through 18.19

[Reserved]

§§ 18.07[Reserved]

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART II. FINAL PRETRIAL CONFERENCE

2-18 Moore's Manual--Federal Practice and Procedure § 18.20

§ 18.20 Significance of Final Pretrial Conferencen*

A trial court has discretion to hold a final pretrial conference in any civil case. n1 As the name implies, the final pretrial conference is the last conference before trial and must be held as close to the time of trial as reasonable under the circumstances. n2

The significance of a final pretrial conference, in contrast to an ordinary case management conference, is that a final pretrial conference is used to formulate a plan for the trial itself; n3 a case management conference, on the other hand, is a pretrial conference which is used by the court to manage the initial stages of litigation, such as the formulation of issues, the discussion of settlement, and the scheduling of pretrial matters. n4 Furthermore, while an ordinary pretrial conference controls the subsequent course of action unless modified by subsequent order, the final pretrial order that results from the final pretrial conference controls the subsequent course of the trial and may be amended only to prevent manifest injustice. n5 For example, the court in the final pretrial conference may exclude from use at trial any nonconforming evidence. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.70* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(e)*; *see MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1169 (7th Cir. 1983*) (Rule 16(d) gives court discretion to hold final pretrial conference).

(n3)Footnote 2. *Fed. R. Civ. P. 16(e).*

(n4)Footnote 3. *See Fed. R. Civ. P. 16(e).*

(n5)Footnote 4. *See Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995)* ; *see also § 18.01* et seq.

(n6)Footnote 5. *Ramirez Pomales v. Becton Dickinson & Co., S.A., 839 F.2d 1, 3 (1st Cir. 1988)* ; *see Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* .

(n7)Footnote 6. *Ramirez Pomales v. Becton Dickinson & Co., S.A., 839 F.2d 1, 3 (1st Cir. 1988)* (issues not included in final pretrial order ordinarily are waived).

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CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART II. FINAL PRETRIAL CONFERENCE

2-18 Moore's Manual--Federal Practice and Procedure § 18.21

§ 18.21 Timing of Final Pretrial Conferencen*

The district courts must hold any final pretrial conference as close to the time of trial as is reasonable under the circumstances. n1 This provision was added to clarify that the time between a final pretrial conference, which could also be the only pretrial conference, and the trial should be as short as possible to ensure that the parties make substantial progress with the case and to avoid the inefficiency involved in having the preparations repeated because of a delay between the last conference and trial. n2 Ultimately, how close to the trial date is reasonable under the circumstances is a matter determined by the sound discretion of the sitting judge. n3

One court has suggested that in most cases the optimum time for holding the final pretrial conference should be between 10 and 14 days before trial, and another, has suggested that generally final pretrial conferences should be held only about five days before trial. Given the many variables that influence the time frame, the drafters concluded that it would be inappropriate for the rule to prescribe a precise time. n4 Such variables include the complexity of the case, the number of parties, the amount and nature of the evidence likely to be offered at trial, the number, difficulty, and importance of unresolved issues, the relative clarity or obscurity of the applicable law, and the need for special or detailed jury instructions.

In most circumstances, courts will need to give counsel at least three weeks between the time they make their final pretrial disclosures and the time they file their final pretrial conference statements. Rulings on disputes about important proffered evidence, lines of argument, or legal issues may have a significant effect on other matters that normally would be addressed at a final pretrial conference, such as which witnesses will be called, which documents will be offered into evidence, what the order of proof should be, which jury instructions should be given, and how much time each party should be allotted to try its part of the case. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.74* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(e).*

(n3)Footnote 2. *Fed. R. Civ. P. 16(e)*, Committee Note to 1983 Amendments.

(n4)Footnote 3. *Fort Howard Paper Co. v. Standard Havens, Inc., 119 F.R.D. 397, 400 (E.D. Wis. 1988) , aff'd on other grounds, 901 F.2d 1373 (7th Cir. 1990)* (final pretrial conference less than three weeks before trial date).

(n5)Footnote 4. *Fed. R. Civ. P. 16(e)*, Committee Note to 1983 Amendments.

(n6)Footnote 5. *Paradigm Sales v. Weber Marking Sys., 880 F. Supp. 1247, 1249 (N.D. Ind. 1995)* (pretrial motions in patent infringement case).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
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2-18 Moore's Manual--Federal Practice and Procedure § 18.22

§ 18.22 Attendance at Final Pretrial Conferencen*

The final pretrial conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented party. n1 This special attendance requirement indicates the significance of the final pretrial conference, in that other earlier pretrial conferences require the attendance of only one of the attorneys for each represented party, plus any unrepresented party. n2 The presence of the attorneys who will be involved in the trial is especially important for the trial court to supervise a more effective trial. n3 As with all pretrial conferences, at least one of the participating attorneys for each party must have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably expect could be discussed. n4 The form of attendance is not prescribed by rule, and some judgespermit counsel to participate in final pretrial conferences by telephone or video conference. n5 A judge may sanction either a lawyer or a party who was required to attend or participate in a final pretrial conference but failed without sufficient excuse to attend or participate. n6

In addition to attorneys or unrepresented parties, a court may, based on its own inherent power, require represented parties to attend a final pretrial conference. A court will most likely require a represented party to attend, in person or by telephone or video conference, when it wants to explore the possibility of settlement negotiations. The court may also want to consider whether it would be appropriate to refer the parties to a settlement conference with another judge or some type of alternative dispute resolution. n7 The careful attorney will also be aware of any local rules, or general or standing orders, issued by the district court, that create additional attendance requirements for a final pretrial conference. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.75* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(e).*

(n3)Footnote 2. *See Fed. R. Civ. P. 16(c)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 16(e)*, Committee Note to 1983 Amendments.

(n5)Footnote 4. *Fed. R. Civ. P. 16(c)(1). See Lucien v. Breweur, 9 F.3d 26, 28 (7th Cir. 1993)* (judge may compel appearance of unrepresented party at pretrial conference and dismiss for noncompliance); *Ha-Lo Indus. v. Your Favorite Producers, 164 F.R.D. 233, 234 (N.D. Ill. 1995)* (final pretrial conference stayed when primary counsel for defendant did not attend and attorney who did attend lacked sufficient familiarity with case to discuss all aspects).

(n6)Footnote 5. *Wollenburg v. Comtech Mfg. Co., 201 F.3d 973, 977-978 (7th Cir. 2000)* .

(n7)Footnote 6. *Harris v. Marsh, 679 F. Supp. 1204, 1389-1390 (E.D.N.C. 1987)* , *aff'd on other grounds, 914 F.2d 525 (4th Cir. 1990)* (district court properly imposed sanctions for failure to participate in final pretrial conference and comply with final pretrial order).

(n8)Footnote 7. *Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1406 (5th Cir. 1993)* .

(n9)Footnote 8. *Cf. Ha-Lo Indus., Inc. v. Your Favorite Producers, 164 F.R.D. 233, 234 (N.D. Ill. 1995)* (final pretrial conference stayed and attorney's fees awarded to opposing party for lead counsel's failure to attend conference).

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART II. FINAL PRETRIAL CONFERENCE

2-18 Moore's Manual--Federal Practice and Procedure § 18.23

§ 18.23 Procedures at Final Pretrial Conferencen*

Rule 16(d) does not prescribe any specific procedures that courts must follow when they conduct final pretrial conferences and actual practice varies from court to court. Some judges conduct final pretrial conferences in chambers, others permit conference appearances by telephone, n1 and some do not require that the proceedings be stenographically or electronically recorded. n2

One generalization that may be made is that final pretrial conferences are likely to be more formal than conferences held earlier in the pretrial period, and are more likely to be held in the courtroom and on the record, with the participants appearing in person rather than by telephone or video conference. n3 The reason for more formality at the final pretrial conference is that the consequences of the final pretrial order are more significant, in that it will be the last conference, and therefore the order prevails over the orders from previous conferences; thus, the order following a final pretrial conference may be modified only to prevent manifest injustice. n4 In contrast, schedules specified in earlier orders may be modified on a showing of good cause. n5 Another factor contributing to more formality at the final pretrial conference is that the primary purpose of the final pretrial conference is the formulation of the plan for trial, including a program for facilitating the admission of evidence. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.76* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Lucien v. Breweur, 9 F.3d 26, 28 (7th Cir. 1993)* (local rule authorized telephonic participation at final pretrial conference; however, judge is not required to follow this procedure absent extraordinary circumstances).

(n3)Footnote 2. *See Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433 (7th Cir. 1986)* (final pretrial conference recorded, and transcript in effect constituted final pretrial order); *In re Beard, 811 F.2d 818, 833-834 (4th Cir. 1987)* (party complained that telephone call should have been put on the record).

(n4)Footnote 3. *See Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* (considerations of formality).

(n5)Footnote 4. *Fed. R. Civ. P. 16(d).*

(n6)Footnote 5. *Fed. R. Civ. P. 16(b)(4).*

(n7)Footnote 6. *Fed. R. Civ. P. 16(d).*

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART II. FINAL PRETRIAL CONFERENCE

2-18 Moore's Manual--Federal Practice and Procedure § 18.24

§ 18.24 Subject Matter at Final Pretrial Conferencen*

[1] All Case Management Issues May Be Included

The subject matter commonly included in the final pretrial conference is controlled by its primary purpose to formulate a specific plan for the trial of the action, including a program for facilitating the admission of evidence. n1 Thus, the goal of the court will be to plan the trial as specifically as possible, to resolve all remaining disputes about the law governing the case, and to resolve as many of the parties' disputes about the admissibility of evidence as possible; thus, the trial court will provide the parties with fair notice of the basic rules under which the trial will operate and the expectations of the court. A good final pretrial conference also directs the attorneys to focus their final preparations toward the matters on which the trial will concentrate. Therefore, the final pretrial conference will definitively sharpen and simplify the issues to be tried, and represents a complete statement of all the contentions of the parties. n2

Any of the subjects that could be discussed in scheduling and other pretrial conferences may also be included by the court on the agenda of a final pretrial conference. n3 The considerations that are listed in the following subsections are not intended to be exhaustive, but represent the most common final pretrial conference subjects.

Many courts by local rule or by standing order impose a substantial list of pretrial obligations on the attorneys or parties. The careful attorney should always check these local rules and the standing orders of the assigned judge to determine the applicable practice with respect to preparation for the final pretrial conference. n4

[2] Settlement

Before actually preparing and planning for trial, the court may use the final pretrial conference as a last, but important, effort to settle the case. n1 There are several reasons why the final pretrial conference is a meaningful opportunity for settlement. Discovery is completed at this point and the court will have ruled on the most significant substantive motions.

Moreover, to prepare for the final pretrial conference, the parties will have been forced to review and analyze the case systematically. Some parties remain unprepared, or unwilling, to make the hard decisions that settlement often requires until they reach this point in the litigation. By the time of the final pretrial conference, they usually have virtually all of

the information about the case that they may expect to get before the trial begins and have an adequate basis for making their judgments about the settlement value of the action. Thus, in combination with the foreseeable cost of the trial, the heightened risk aversion that pending trial may foster may bring on a heightened interest in settlement. n2

[3] Discovery

At the final pretrial conference, the court should resolve any remaining disputes about disclosures or discovery and, if applicable, order that the parties promptly complete any required discovery obligations. When considering the parties' compliance with their disclosure and discovery obligations, the court may need to determine whether a party has violated discovery obligations to the extent that the court should order sanctions in the form of precluding the offending party's use of particular evidence at trial or ordering that certain facts or claims be deemed established for purposes of the trial. n1 A court may particularly focus on how the parties have responded to requests for admissions because one of the primary purposes of requests for admissions is to eliminate the need to spend time at trial proving matters that cannot reasonably be contested. Courts are specifically authorized to determine the final disposition of disputes arising out of requests for admissions at a pretrial conference or at a designated time before trial. n2 Furthermore, if the court determines that an answer to a request for admissions does not comply with the requirements of Rule 36(a), the court may order that the matter be considered admitted. n3

[4] Issues for Trial

One of the most important subjects for the court and parties is the formulation, simplification, and identification of issues for trial to promote efficiency and conserve judicial resources. Thus, the court and parties at the final pretrial conferences must review the remaining claims and defenses and refine the issues for trial. n1 This review ensures that the parties understand the nature of the claims and defenses that will be tried, determines whether amendments to the pleadings are necessary, and determines whether any claims or defenses may be eliminated voluntarily or by order. n2

If any motions for summary judgment remain pending, the court should rule on them before or during the final pretrial conference, so that the parties may focus their final preparations on the claims and defenses that remain assertable. Further, when the final pretrial conference shows undisputed facts that entitle a party to judgment as a matter of law, the court may grant summary judgment sua sponte. n3 The court must be careful, even at this mature stage of the litigation, not to dismiss claims or defenses, over objection, without giving the adversely affected parties sufficient advance notice and opportunity to present evidence and argument in support of the challenged claim. n4

[5] Sequencing or Separation of Trial

In connection with its review of the remaining claims and defenses, n1 the court may also consider whether it would be appropriate to litigate one or more particular claims or defenses before other claims or defenses. One of the primary purposes of the 1993 amendments to Rule 16(c) is to provide easier facilitation for structuring trials under Rules 42, 50, and 52. n2 To further that purpose, the Advisory Committee added paragraphs 13 and 14 to Rule 16(c). n3 Under Paragraph 13, courts may, when appropriate at pretrial conferences, enter an order for a separate trial n4 with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case. n5 Under Paragraph 14, a court may direct a party or parties to present evidence early in the trial with respect to a manageable issue that could, onthe evidence, be the basis for a judgment as a matter of law n6 or a judgment on partial findings. n7

A court may also consider whether the case should be bifurcated and some part tried in subsequent proceedings, either to the same jury, immediately or shortly after the liability phase is concluded, or to a separate jury, shortly after the liability phase or later, after any necessary discovery and motion activity. n8

A party, especially the defendant, commonly asks the court to bifurcate the damages issues for later litigation; n9 requests to bifurcate litigation of claims for punitive damages are also common. n10 At the final pretrial conference, the

party seeking bifurcation has the burden of establishing that bifurcation is proper, and that the moving party will be prejudiced if separate trials are not granted. n11 The determination of whether or not to bifurcate is left to the discretion of the trial judge. n12

[6] Detailed Trial Outline

Many judges use the final pretrial conference to establish a detailed outline for the presentation of evidence over the course of the trial. n1 While this kind of outline is not as necessary in smaller or simpler cases, it may be important to maintain order in larger, more complicated cases or in particularly rancorous litigation. Such a trial outline may dictate the format and how much time will be allotted for the opening statements; the order in which each witness will testify; the sequence in which the documentary and other exhibits will be introduced; whether demonstrative evidence will be permitted or site visits made; and the format for closing arguments.

When a case will be tried to the court instead of a jury, a trial outline should specify which documentary material will be the subject of oral testimony and which will simply be submitted for careful review by the judge after the proceedings in court have been concluded. The court also may want counsel to present much of the direct testimony through written narratives, especially when the source of the testimony is an expert witness. n2

[7] Stipulations and Additional Admissions

At the final pretrial conference, the court may request that the parties stipulate or admit to as many factual, evidentiary, and procedural matters as are appropriate. n1 When appropriate, a court may also ask counsel to stipulate to facts that are subject to judicial notice. By using admissions and judicial notice, the court and parties enable the jury to focus without distraction, on the critical disputed issues and the evidence that is pertinent to resolving those issues. n2 Counsel should, however, review any pretrial stipulations and admissions in the final pretrial order because the parties may be bound even by erroneous information; n3 once incorporated in a final pretrial order, the court will relieve a party from a stipulation only to prevent manifest injustice. n4

[8] Motions in Limine Regarding Evidence

At the final pretrial conference, counsel should be prepared to discuss the evidence that the parties plan to offer at trial and the manner in which they plan to present it. The attorneys also should ensure that they are prepared for Rule 16's directive that the parties obtain advance rulings from the court on the admissibility of evidence. n1 The court will probably prefer to rule on motions in limine before trial, rather than taking these motions under submission for later ruling at trial, so that the attorneys will have advance notice of the ground rules that will apply at trial. n2 Motions in limine may have considerable impact on the scope of the trial and on the order in which evidence is presented. Therefore, it is important that the motions be determined before the attorneys begin their final intensive preparations for trial.

A party may make a motion in limine requesting the exclusion of specified evidence or argument and base the motion on any of the grounds available under the Federal Rules of Evidence. n3 Under *Federal Rule of Evidence 104(a)*, the court is responsible for determining preliminary questions concerning the qualifications of a person to bea witness, the existence of a privilege, or the admissibility of evidence, except when admissibility turns on relevancy and relevancy depends on the satisfaction of a condition of fact. n4 If the court were to postpone rulings on these motions it could result in considerable delay of the trial. To counter the possibility of delay, many courts try to resolve many evidentiary motions in limine considerably before the trial begins. Some judges order the parties to file motions well before the final pretrial conference. After the motions are filed, the court may determine whether it should have an evidentiary hearing, separate from the final pretrial conference, to establish the record necessary to support the required rulings, or whether, given the character of the motions, rulings may fairly be made at the final pretrial conference. n5

Motions in limine are also commonly filed regarding expert testimony. For example, a party may seek an order preventing an expert from offering opinions on any matters not covered in written reports or deposition, or from suggesting any bases for opinions that were not disclosed in those reports or in deposition testimony. Alternatively, a party may use a motion in limine to try to limit the fields or subjects with respect to which a particular witness is qualified as an expert or to limit the number of experts who will be permitted to testify about certain subjects or issues. n6

The frequency of motions in limine directed toward limiting expert testimony may increase as a result of the 1993 amendment to subparagraph (4) of Rule 16(c). This amendment was intended to clarify that in advance of trial the court may consider the use of and possible limitations on expert testimony under *Rule 702 of the Federal Rules of Evidence*. n7 Because of the mounting concern about the expense of expert testimony and also the reliability and the utility of some kinds of evidence offered from persons called experts, the drafters of the 1993 amendments suggested that even when proposed expert testimony may be admissible under *Rule 403* and *702 of the Federal Rules of Evidence*, courts may preclude or limit this testimony if the cost to the parties would be unduly expensive given the needs of the case and the other evidence available at trial. n8

[9] Exhibits and Documents

In many final pretrial conferences, the court will ensure that all proffered documents and other exhibits, other than those to be offered only for impeachment purposes, have been identified and marked in advance in a logical system. The court will also address any remaining disputes about demonstrative evidence, visual aids, summaries, charts, or other graphics, including the submission and exchange of all proposed items. n1

In complex cases, the court may encourage the attorneys to reduce the sheer number of documents they think they need to introduce into evidence. Alternatively, opposing counsel may stipulate to facts that some documents would be used to establish, and sometimes summaries of voluminous documents will be admissible and suffice for the purpose offered. If some of the documents are cumulative of other evidence, and thus unnecessary, the court may simply exclude their admission. n2

[10] Witnesses

One of the most important tasks for the court and the attorneys at the pretrial conference is to review and organize the parties' plans for the presentation of testimony from witnesses. n1 Some courts use the final pretrial conference to question the attorneys about the scope, purposes, form, and projected duration of each witness's testimony, including testimony to be read to the jury or into the record from deposition transcripts. n2 These questions may help the judge (1) determine the appropriate order of proof, (2) determine whether some of the proffered testimony is unnecessary, and (3) suggest areas of testimony that may best be presented in a written or oral narrative. The use of these narratives may be especially appropriate for background testimony from expert witnesses. n3

When appropriate, the court may determine whether and how testimony from depositions should be presented. n4 In some cases, the parties may be concerned about whether the court will permit a person to assume the role of the deponent and to sit in the witness box when reading the deponent's answers. If the court permits the presentation of the deposition testimony in this manner, additional concerns may arise about who will play the role of the deponent and what limitations should be imposed on his or her demeanor. n5

[11] Time Limits

At the pretrial conference, the trial court may issue orders that establish a reasonablelimit on the time allowed for presenting evidence. n1 Additionally the court may limit the length of trial. Such a limitation may provide the attorneys and parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when

the limits are imposed during trial, as they may be under the Rules of Evidence. n2 Any time limits imposed by the court must be reasonable under the circumstances, and generally the court should not specify exact time limits until they have considered the parties' submissions about the expected nature and estimated duration of direct and cross-examination testimony. n3

[12] Jury Instructions and Interrogatories

One of the most important matters that the court and attorneys consider at the final pretrial conference is jury instructions. At that time, the parties have usually submitted and exchanged proposed draft jury instructions; this process requires the attorneys to further analyze the elements of the claims and defenses and the evidence. Some judges require the attorneys to confer before the conference and to have submitted a preliminary set of instructions. n1 It is usually at the final pretrial conference that judges consider objections to the instructions that each party has submitted.

Of course, the court may draft instructions of its own or substantially rewrite the instructions that have been proposed by the parties. A court that drafts its own instructions or rewrites the instructions proposed by counsel should provide the parties with final instructions before the first day of trial to give the parties an opportunity not only to file objections but also to conform their final trial preparations to the law as the court will articulate it to the jury. n2

Although the consideration of jury instructions at the final pretrial conference focuses on their content, counsel or the court sometimes also raise questions about the sequence in which the instructions should be given and the form of the instructions. The participants in the conference also may discuss at what stages in the proceedings instructions should be given. Counsel should know, for example, whether the court will give the final jury instructions before or after their closing arguments. n3

At the final pretrial conference, the court may also try to resolve any disputes about the form of the verdict and special interrogatories, if applicable. A court's submission of special interrogatories to the jury is becoming more common. n4 The court and attorneys must draft special interrogatories with considerable care so that the special interrogatories or verdict forms do not misstate the law, or implicitly mislead or confuse the jury about the applicable law. It is common for verdict forms to contain many questions; however, the greater the number of questions, the higher the risk that the form itself will result in jury confusion or error. Therefore, the instructions that accompany the questions must be clear so that after they answer each question, the jurors will understand how they are to answer the next question or fill out the next form. n5

[13] Findings of Fact and Conclusions of Law

When the case will be tried to the court rather than tried to a jury, the final pretrial conference is the appropriate occasion for court and counsel to review and to discuss the proposed findings of fact and conclusions of law that the court has required the parties to submit. These proposed findings and conclusions are important, not only because they require the attorneys to consider in detail the possible results of the trial, but also because a court may use them before and during trial to understand the evidence as it is presented and the theory of the case. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.77* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(e)*; *see Fed. R. Civ. P. 16(a)(4)*.

(n3)Footnote 2. *Koch v. Koch Indus., 203 F.3d 1202, 1222-1223 (10th Cir. 2000)* (many years of draft pretrial orders, district court orders, and discovery served to focus legal and factual contentions of parties and culminated in final pretrial order; because numerous draft pretrial orders were produced over many years of litigation, plaintiffs could not claim that they lacked opportunities to draft order to clearly encompass their claims).

(n4)Footnote 3. *Fed. R. Civ. P. 16(b)(3)*, *(c)(2)*.

(n5)Footnote 4. *G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 831 (10th Cir. 1990)* (counsel appearing before district court have duty to know court's practices).

(n6)Footnote 1. *Connolly v. National Sch. Bus Serv., 177 F.3d 593, 599 (7th Cir. 1999)* (judge may not delegate power to conduct pretrial settlement conferences to law clerk, even though law clerk may assist trial judge in settlement efforts).

(n7)Footnote 2. *St. Paul Fire & Marine Ins. Co. v. CEI Fla., 152 F.R.D. 95, 98 (E.D. Mich. 1993)* (significant opportunity for settlement when counsel and all parties required to attend final pretrial conference); *Wilson v. Westmoreland Farm, Inc., 989 F. Supp. 451, 454 (E.D.N.Y. 1998)* (clients and principals with authority to settle ordered to be present at final pretrial and settlement conference).

(n8)Footnote 1. *Fed. R. Civ. P. 16(f)*; *see, e.g., Fed. R. Civ. P. 37(b)(2)(A)*.

(n9)Footnote 2. *See Fed. R. Civ. P. 36(a)(6)*.

(n10)Footnote 3. *Fed. R. Civ. P. 36(a)(6)*.

(n11)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(a)*.

(n12)Footnote 2. *Gillming v. Simmons Indus., 91 F.3d 1168, 1172-1173 (8th Cir. 1996)* (important objective of civil procedure rules is to eliminate surprise).

(n13)Footnote 3. *Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985)* (district court has authority to grant summary judgment sua sponte in context of final pretrial conference).

(n14)Footnote 4. *Rogan v. Menino, 175 F.3d 75, 80 (1st Cir. 1999)* (even though Rule 16(c)(1) authorizes district courts to eliminate frivolous claims or defenses at pretrial conferences, court may not use rule to avoid procedural test of summary judgment rule, which requires advance notice of basis of any pending dismissal).

(n15)Footnote 1. *See* [3], *above*.

(n16)Footnote 2. *Fed. R. Civ. P. 16(c)*, Committee Note to 1993 Amendments; *see Fed. R. Civ. P. 42*, *50*, and *52*.

(n17)Footnote 3. *See Fed. R. Civ. P. 16(c)(2)(M)*, *(N)*.

(n18)Footnote 4. *See Fed. R. Civ. P. 42(b)*; *Miller New Jersey Transit Auth. Rail Operations, 160 F.R.D. 37, 38 (D.N.J. 1995)* .

(n19)Footnote 5. *Fed. R. Civ. P. 16(c)(2)(M)*;

(n20)Footnote 6. *See Fed. R. Civ. P. 50(a)*.

(n21)Footnote 7. *Fed. R. Civ. P. 16(c)(2)(N)*; *Fed. R. Civ. P. 52(c)*.

(n22)Footnote 8. *Fed. R. Civ. P. 16(c)(2)(N)*; *Fed. R. Civ. P. 42(b)*; *see Miller New Jersey Transit Auth. Rail Operations, 160 F.R.D. 37, 38 (D.N.J. 1995)* (Rule 16(c) permits courts as a matter of efficient case management to issue orders for separate trials or separate presentation of evidence at trial on different issues).

(n23)Footnote 9. *Franklin Music Co. v. American Broadcasting Cos., 616 F.2d 528, 538 (3d Cir. 1979)* (granting bifurcation); *Windham v. American Brands, Inc., 565 F.2d 59, 70-72 (4th Cir. 1977)* (denying bifurcation).

(n24)Footnote 10. *Jenkins v. Raymark Indus., 782 F.2d 468, 474 (5th Cir. 1986)* .

(n25)Footnote 11. *Miller v. New Jersey Transit Auth. Rail Operations, 160 F.R.D. 37, 39-40 (D.N.J. 1995)* (defendant met burden and court trifurcated personal injury action into liability, damages, and indemnification phases).

(n26)Footnote 12. *Lis v. Robert Packer Hosp., 579 F.2d 819, 824-825 (3d Cir. 1978)* , *cert. denied, 439 U.S. 955 (1978)* (decision to bifurcate liability and damages issues is decided on case-by-case basis, subject to informed discretion of court).

(n27)Footnote 1. *Fed. R. Civ. P. 16(e)*.

(n28)Footnote 2. *See Fed. R. Civ. P. 16(e)* (participants at final pretrial conference should formulate plan for trial, including program for facilitating admission of evidence).

(n29)Footnote 1. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments.

(n30)Footnote 2. *Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 489 (9th Cir. 1986)* .

(n31)Footnote 3. *Louis Vuitton S.A. v. Lee, 875 F.2d 584, 588 (7th Cir. 1989)* (court properly refused to modify stipulation which was incorporated into court's final pretrial order; stipulation was in conformity with party's deposition).

(n32)Footnote 4. *Waldorf v. Borough of Kenilworth, 878 F. Supp. 686, 692-694 (D.N.J. 1995)* .

(n33)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(C)*, *(c)(2)(D)*.

(n34)Footnote 2. *Robinson v. Missouri Pac. R.R., 16 F.3d 1083, 1089 n.6 (10th Cir. 1994)* (parties should obtain advance rulings on admissibility, especially when evidence is scientific or novel).

(n35)Footnote 3. *See Koch v. Koch Indus., 203 F.3d 1202, 1212 (10th Cir. 2000)* (in ruling on defense motion in limine seeking to exclude some of plaintiffs' expert testimony on accounting claims, district court responded to parties' arguments about parameters of these claims).

(n36)Footnote 4. *Fed. R. Evid. 104*.

(n37)Footnote 5. *See Koch v. Koch Indus., 203 F.3d 1202, 1222 (10th Cir. 2000)* .

(n38)Footnote 6. *Fed. R. Civ. P. 16(c)(2)(D)*.

(n39)Footnote 7. *Fed. R. Civ. P. 16(c)(2)(D)*, Committee Note to 1993 Amendments.

(n40)Footnote 8. *Fed. R. Civ. P. 16(c)(2)(D)*; *Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005, 1013-1014 (10th Cir. 1993)* (court may limit experts provided that witnesses are not excluded arbitrarily or on numeric basis).

(n41)Footnote 1. *United States v. Rayco, Inc., 616 F.2d 462, 463-464 (10th Cir. 1980)* (unlisted evidence may be excluded at trial).

(n42)Footnote 2. *See Fed. R. Evid. 403*; *Fed. R. Civ. P. 16(c)(2)(D)* (authorizing courts to take action at final pretrial conferences to avoid unnecessary proof and cumulative evidence).

(n43)Footnote 1. *Fed. R. Civ. P. 16(a)(4)*, *(b)(3)(B)(iv)*, *(c)(2)(C)*, *(D)*, *(G)*.

(n44)Footnote 2. *Fed. R. Civ. P. 26(a)* (designation of deposition excerpts read into evidence); *Sterkel v. Fruehauf Corp., 975 F.2d 528, 532 (8th Cir. 1992)* (disclosure requirement of all witnesses except impeachment witnesses).

(N45)Footnote 3. *Fed. R. Civ. P. 16(c)(2)(D)*, *(G)*; *Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 489 (9th Cir. 1986)* (it was proper for parties to submit direct questions of witness and defendant's objections before trial).

(n46)Footnote 4. *Tucker v. Ohtsu Tire & Rubber Co., 49 F. Supp. 2d 456, 461 (D. Md. 1999)* .

(n47)Footnote 5. *See also Mark IV Properties, Inc. v. Club Dev. & Management Corp., 12 B.R. 854, 860 (S.D. Cal. 1981)* (use of videotaped depositions at trial).

(n48)Footnote 1. *Fed. R. Civ. P. 16(c)(2)(O)*.

(n49)Footnote 2. *Fed. R. Civ. P. 16*, Committee Note to 1993 Amendments.

(n50)Footnote 3. *General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1508 (9th Cir. 1995)* (14-day total limit for trial reasonable under circumstances).

(n51)Footnote 1. *Fort Howard Paper Co. v. Standard Havens, Inc., 119 F.R.D. 397, 400-401 (E.D. Wis. 1988)* , *aff'd on other grounds, 901 F.2d 1373 (7th Cir. 1990)* (both parties required to submit proposed jury instructions).

(n52)Footnote 2. *See Koch v. Koch Indus., 203 F.3d 1202, 1222 (10th Cir. 2000)* .

(n53)Footnote 3. *Stonehocker v. General Motors Corp., 587 F.2d 151, 157 (4th Cir. 1978)* (court should instruct jury completely after arguments are completed).

(n54)Footnote 4. *Fort Howard Paper Co. v. Standard Havens, Inc., 119 F.R.D. 397, 400-401 (E.D. Wis. 1988)* , *aff'd on other grounds, 901 F.2d 1373 (7th Cir. 1990)* .

(n55)Footnote 5. *See Koch v. Koch Indus., 203 F.3d 1202, 1227 n.13, 1230 n.14 (10th Cir. 2000)* .

(n56)Footnote 1. *See* In *Matter of Dupree, 197 B.R. 928, 931-932 (N.D. Ala. 1996)* ; *see also In re Orange Boat Sales, 239 B.R. 471, 474 (S.D.N.Y. 1999)* .

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART II. FINAL PRETRIAL CONFERENCE

2-18 Moore's Manual--Federal Practice and Procedure §§ 18.25through 18.39

[Reserved]

§§ 18.25[Reserved]

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART III. Pretrial Orders

2-18 Moore's Manual--Federal Practice and Procedure § 18.40

§ 18.40 Types of Pretrial Ordersn*

There are three basic types of orders that the court will issue in relation to a pretrial conference, based the stage of the litigation when the conference is held: (1) a case management order; (2) a scheduling order; and (3) the final pretrial order. A case management order results from a pretrial conference that is held at the very first stages of the litigation after a complaint is filed. It is used to make orders to collect information through discovery and to begin formulating the issues in the case. n1 A scheduling order is a special type of case management order in which the court orders specific deadlines to accomplish pretrial tasks. n2 A "final pretrial order" is an order made by the court just before trial which supercedes and controls over all existing orders and which implements the final trial plan. n3

The significance of the final pretrial order, in contrast to an ordinary pretrial case management order or a scheduling order is that the final pretrial order is used to formulate a binding plan for the trial itself, n4 while an ordinary case management order or scheduling order is used by the court to manage the initial stages of litigation and establish the pretrial schedule. n5 Furthermore, initial case management orders control the subsequent course of action n6 only until modified by a subsequent order, n7 while the final pretrial order controls the entire course of the trial n8 and may be modified only to prevent manifest injustice. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.77* (Matthew Bender 3d ed.).

(n2)Footnote 1. *In re Factor VIII or IX Concentrate Blood Products Litigation, 169 F.R.D. 632, 635 (N.D. Ill. 1996)* ; *see § 18.41*.

(n3)Footnote 2. *Fed. R. Civ. P. 16(b)(3)*; *see Fed. R. Civ. P. 16(e)*; § 18.42.

(n4)Footnote 3. *Fed. R. Civ. P. 16(e)*; *see § 18.43*.

(n5)Footnote 4. *See Fed. R. Civ. P. 16(e).*

(n6)Footnote 5. *See Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995)* ; *see also § 18.01* et seq.

(n7)Footnote 6. *Ramirez Pomales v. Becton Dickinson & Co., S.A., 839 F.2d 1, 3 (1st Cir. 1988)* .

(n8)Footnote 7. *Fed. R. Civ. P. 16(d).*

(n9)Footnote 8. *Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* ; *see Fed. R. Civ. P. 16(d).*

(n10)Footnote 9. *Fed. R. Civ. P. 16(e).*

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART III. Pretrial Orders

2-18 Moore's Manual--Federal Practice and Procedure § 18.41

§ 18.41 Case Management Ordern*

[1] Nature of Basic Pretrial Order

A court may enter an order specifying the action taken by the court or the parties after any pretrial conference, regardless of the stage during the pretrial period at which the conference is held. n1 If such an order is not a special type of order, such as a "pretrial scheduling order" or the "final pretrial order," it is typically referred to as a "case management order" n2 or basic "pretrial Order." n2.1 Although Rule 16(e) [now Rule 16(d)] was written in mandatory "shall" terms, the United States Supreme Court has stated that Rule 16(e) [now Rule 16(d)] is permissive rather than mandatory; thus, a district court need not make an order after every pretrial conference. The use of the word "shall" was construed by the court in this instance to be synonymous with "may." n3 In contrast to the routine pretrial order, if the order follows a scheduling conference, it is mandatory. n4

In any event, most courts routinely issue orders following all pretrial case management conferences. Such an order assists the court and parties in keeping track of the litigation n4.1 and provides a record for appellate review. n5 At a minimum, the court should enter a pretrial order whenever an affirmative action is taken by the parties or the court, n6 and the court should draft the order to meet the requirements of the parties. n7

Rule 16(e) does not specify the manner of preparation of a pretrial order. Many courts require, either by local rule or standing order, that counsel for plaintiff or defendant, or both, either separately or jointly, prepare a proposed order, case management plan, pretrial statement, or stipulation. n8 The form and content of such an order, statement, or stipulation may be specified in a local rule, or the court may prepare the order on its own initiative without drafting assistance from counsel. n9 In any event, the attorneys should be given a reasonable opportunity to file any objections they may have to the order. n10

[2] Discretion of Court to Modify Basic Pretrial Order

A case management pretrial order controls the remaining course of the action related to the subject matter of the order, unless it is modified by a subsequent order. n1 Although scheduling orders may not be modified except on a showing of good cause, n2 and a final pretrial order may be modified only to prevent manifest injustice, n3 Rule 16 does not identify the standard to apply when a court is asked to modify the terms of an order entered after a basic pretrial

conference. n4

Even though there is no specific standard for determining whether to allow modification of a case management order, most opinions on the topic have stated that modifications should not be liberally granted but should only be modified on good cause. n5 At the same time, courts recognize that modifications should be granted when necessary, especially when a pretrial order from one pretrial conference may have to be altered at a subsequent conference due to changing circumstances. n6

[3] Appellate Review of Basic Pretrial Orders

A pretrial case management order is generally not final because it may be modified later in the pretrial period. Because it is not final, a pretrial order may not generally be appealed until the litigation is concluded at the trial court level. Once a final judgment is entered in the case, the initial case management order is appealable, n1 provided that a timely objection was registered with the trial court. n2

Certain pretrial rulings are appealable, either directly or by writ of mandamus. n3 For example, if the court orders the dismissal of a claim or defense, makes an express determination that no just cause exists for delay of appeal, and gives an express direction for entry of judgment stating its reasons, a Rule 54(b) appeal may be taken. A court may certify the ruling for interlocutory appeal because it may speed up final resolution of the remaining litigation. n4

Whether an appellate court reviews a pretrial order immediately on entry, or after final judgment, the order is reviewed for an abuse of discretion. n5 Abuse of discretion generally occurs when no reasonable person could take the view adopted by the trial court; if reasonable persons could differ, no abuse of discretion exists. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, §§ 16.37*, *16.63* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(d).*

(n3)Footnote 2. *United States v. Michigan, 424 F.3d 438, 442 (6th Cir. 2005)* (case management order specifying deadlines for filing all motions for joinder of parties and all motions to amend pleadings).

(n4)Footnote 2.1. *Jorgensen v. Cassiday, 320 F.3d 906, 913 (9th Cir. 2003)* .

(n5)Footnote 3. *Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 429-431, 115 S. Ct. 2227, 2235 n.9, 132 L. Ed. 2d 375 (1995)* ("shall" authorizes, but does not mandate, pretrial order).

(n6)Footnote 4. *See § 18.42.*

(n7)Footnote 4.1. *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* .

(n8)Footnote 5. *Wilson v. Kelkhoff, 86 F.3d 1438, 1442 n.6 (7th Cir. 1996)* (pretrial conference and order aids parties and court in preparation for and conduct of trial; order should clearly state various issues that parties intend to litigate).

(n9)Footnote 6. *Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 185, 188-189 (4th Cir. 1994)* (plaintiff could not complain when two witnesses, not revealed by defendant before trial, testified: no pretrial order governing management of action was entered or requested and no mechanism existed to preclude witness's testimony).

(n10)Footnote 7. *Wilson v. Kelkhoff, 86 F.3d 1438, 1442 n.6 (7th Cir. 1996)* (order should clearly state various issues that parties intend to litigate).

(n11)Footnote 8. *Neilson v. United States (In re Olshan), 356 F.3d 1078, 1085 (9th Cir. 2004)* .

(n12)Footnote 9. *McCargo v. Hedrick, 545 F.2d 393, 401 (4th Cir. 1976)* (noting that rule contemplates that judge will specify pretrial order).

(n13)Footnote 10. *Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* (when parties to a lawsuit fail to object or move to amend pretrial order, that order measures dimensions of lawsuit both in trial court and on appeal).

(n14)Footnote 1. *Fed. R. Civ. P. 16(d)*; *Erff v. Markhon Indus., Inc., 781 F.2d 613, 617 (7th Cir. 1986)* (pretrial order supersedes pleadings and establishes issues to be considered at trial).

(n15)Footnote 2. *See § 18.42*.

(n16)Footnote 3. *See § 18.43*.

(n17)Footnote 4. *See Fed. R. Civ. P. 16(d)*.

(n18)Footnote 5. *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* .

(n19)Footnote 6. *Davidson v. Goord, 215 F.R.D. 73, 83 (W.D.N.Y. 2003)* .

(n20)Footnote 1. *Miera v. First Sec. Bank, N.A., 776 F.2d 902, 906 (10th Cir. 1985)* (interlocutory nature of pretrial orders generally precludes immediate review).

(n21)Footnote 2. *Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* (when parties to lawsuit fail to object to pretrial order, that order measures dimensions of lawsuit both in trial court and on appeal).

(n22)Footnote 3. *In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995)* , *cert. denied, 116 S. Ct. 184 (1995)* .

(n23)Footnote 4. *Fed. R. Civ. P. 54(b)*.

(n24)Footnote 5. *Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)* (modification or enforcement of pretrial order reviewed for abuse of discretion).

(n25)Footnote 6. *Durr v. Intercounty Title Co., 14 F.3d 1183, 1187 (7th Cir. 1994)* .

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART III. Pretrial Orders

2-18 Moore's Manual--Federal Practice and Procedure § 18.42

§ 18.42 Scheduling Ordern*

[1] Use of Mandatory Scheduling Order

A "scheduling order" is an order that the court makes after receiving the parties' conference report n1 or after consultation with the attorneys or unrepresented parties n1.1 to specify deadlines and other matters. n1.2

The scheduling order *must* limit the time to: join other parties, amend the pleadings, complete discovery, and file motions. n1.3

The scheduling order *may* specify the following matters: n1.4 a modification of the timing of disclosures under Rules 26(a) and 26(e)(1); a modification of the extent of discovery; provisions for disclosure or discovery of electronically stored information; an inclusion of any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced; a specification of the dates for pretrial conferences and for trial; and an inclusion of other appropriate matters. Because of its importance as a tool to manage the court's calendar and to ensure that parties and attorneys are timely in performing their pretrial obligations, n2 the court must enter a scheduling order in every action except in categories of cases that are specifically exempted by local rule from the scheduling order requirement. n2.1

A scheduling order controls the subsequent course of litigation as specified in the order, unless modified by a subsequent order made only for good cause and with the judge's consent. n3 Rule 16 mandates a pretrial scheduling order because when the district court sets specific deadlines for completing the most important aspects of case development, the case will be disposed of by settlement or trial more efficiently and with less cost and delay than if the parties were to set their own schedules. n4 Scheduling orders are so important that it is the only act that Rule 16 requires judges to perform,except in categories of cases exempted by local rule. In contrast, Rule 16 gives the district court considerable discretion whether to hold any pretrial conferences. n5

[2] Consultation Required With Attorneys

Judges may not issue a scheduling order without having first either received from the parties the proposed discovery plan n1 or consulted with the attorneys for the parties and any unrepresented parties in a scheduling conference, by

telephone, mail, or other designated means. n2 This consultation allows the court to tailor the scheduling order to the requirements of the individual case, even when the court does not hold an optional scheduling conference. n3 Furthermore, interaction between the court and the attorneys is an effective means to assert control over and manage the litigation and the parties from the outset of the case. Consultation permits the parties to inform the court of crucial procedural and substantive issues that may have an impact on the schedule to be set by the court, which gives the court the opportunity to avoid potential conflicts. n4

Rule 16(b) does not require a particular manner of communication between the court and the parties (or through counsel when counsel is retained) that must precede the court's scheduling order. The contact need not be in person or even over the telephone. Rather, it is sufficient to solicit and receive input from counsel in writing or electronically. What form the contact takes is committed to the discretion of the district court. n5

[3] Time Limit for Court to Issue Scheduling Order

The district court must issue a scheduling order within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. The rule also requires that the district court issue the scheduling order as soon as practicable. n1 This means that the court should make the order earlier than the specified deadlines, whenever possible--the deadlines are not intended to encourage unnecessary delays in entering the scheduling order but rather to allow more flexibility in multi-defendant cases. On the other hand, an order filed after the deadline is not invalid. n2 The deadlines are not designed to be used tactically; rather, they are intended to cause litigation to proceed at a reasonable pace. n3

In entering its scheduling order, the court must incorporate the discovery requirements of Rule 26 because the discovery plan conference is also important to the court's management plan under the scheduling order. The court has discretion to set the date of the conference which the parties generally must use to implement discovery early in the case. The rule requires that the parties generally must hold the discovery conference as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). n4

The parties must also submit to the court within 14 days after the discovery conference a written report outlining the discovery plan. However, if necessary to comply with its expedited schedule for a Rule 16(b) scheduling conference, a court may by local rule require that the discovery conference between the parties occur fewer than 21 days before the pretrial scheduling conference is held or a pretrial scheduling order is due under Rule 16(b), n5 and require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties. The court may also excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference. n6 Because the receipt of a written report outlining the discovery plan is one of the means by which a court may satisfy the requirement that the court secure input from the parties before issuing a scheduling order, a court that receives a Rule 26(f) report need not further consult the parties before issuing a scheduling order regarding discovery. n7

[4] Contents of Scheduling Order

[a] Mandatory Contents of Scheduling Order

[i] Court Must Specify Deadlines

Rule 16(b) divides scheduling subjects into two categories: mandatory subjects for which district courts must specify deadlines in the scheduling order, n1 and optional subjects for which the district courts may set deadlines. n2 With respect to the mandatory category, the court must specify time limits for (1) joining other parties and amending the pleadings; (2) filing motions; and (3) completing discovery. n3 The rationale for requiring the scheduling order to specify these deadlines is because they are the primary functions necessary to set the fundamental parameters of the case. These functions must be substantially completed before the court may determine whether the litigation may be

concluded by dispositive motion or by summary judgment, and before the parties will have the information necessary to engage in productive settlement negotiations. n4

Consequently, these deadlines may be modified only on a showing of good cause. n5 The primary measure of the "good cause" standard of Rule 16(b) is whether the moving party can show that it used diligence in attempting to meet the order's deadline. Cases reviewing Rule 16(b) rulings focus in the first instance (and usually solely) on the diligence of the party who sought modification of the order. Thus, a court may modify the schedule on a showing of good cause if it the schedule cannot reasonably be met despite the diligence of the party moving for a modification. The court may also consider a lack of prejudice to the nonmoving party that would result from modification of the scheduling order. However, a court will not consider prejudice if the moving party has not been diligent in meeting the scheduling order's deadlines. n6

Although in the process of developing the case through investigation, disclosures, and discovery the parties sometimes identify additional parties, claims, or defenses that should be added to the case, in most cases the principals are readily identifiable at the outset, just as the kinds of claims and defenses that are likely to come into play are fairly predictable. Therefore, in most cases it is feasible and fair to require the parties to decide relatively early who will be named as parties, and what claims and defenses the pleadings will contain. n7

[ii] Deadline for Joining Other Parties and Amending Pleadings

Scheduling order deadlines may be modified only on a showing of good cause, n8 and the court has considerable discretion in determining good cause. n9 The primary measure of good cause is whether the moving party can show that it used diligence in attempting to meet the order's deadlines. n10

Case precedent has reconciled the potential conflict between Rule 16(b)'s requirement that the scheduling order specify a deadline for amending pleadings and Rule 15(a)'s directive that leave to amend the pleadings be freely given when justice so requires. n11 The settled rule is that the district court's filing a pretrial scheduling order establishes the deadline for amending pleadings, and after that time, Rule 16(b)'s standards control rather than the more liberal Rule 15 standards. In other words, once the pretrial order is entered, the need to support effective case management prevails over the general pleading rules. Consequently, even if an amendment would be permitted under Rule 15 standards, a party may not add a claim or defense after a deadline fixed in a scheduling order without first making a showing of good cause. n11.1

When a motion to amend the pleadings is filed after the scheduling order deadline, the court should apply a two-step analysis, under which the movant must first demonstrate to the court that it has "good cause" for seeking modification of the scheduling deadline under Rule 16(b). Then the moving party must meet the requirements for amendment under Rule 15(a). n11.2

[iii] Deadline for Filing Motions

The scheduling order must specify deadlines for filing motions. n11.3 The purpose of this requirement is to prevent parties from filing substantive motions at the last minute or even during trial, sometimes as a tactic to buy more time to prepare for trial or to disrupt an opponent's presentation of the case. n11.4 The last-minute filing of substantive motions also may impose great burdens and pressures on the court by requiring the court to choose between holding the trial date firm and increasing the risk of ruling erroneously on the motions, on the one hand, and, on the other, continuing the trial date in order to increase the time available for researching the issues presented in the motions. Consequently, if a party exceeds the scheduling order deadline for filing a motion, the court may refuse to consider the motion and relieve the opposing party of any duty it otherwise would have to respond. n11.5 However, some courts have held that there is an exception to Rule 16(b)(2) when the federal rules expressly allocate a particular time for filing a motion, for example, the Rule 56(b) provision which expressly allows a party to file a motion for summary judgment at any time. n11.6

[iv] Deadline for Discovery

The scheduling order must specify a deadline for the completion of discovery. n11.7 Many commentators have stated that, other than for the trial date, the discovery deadline is the most important time limit in civil cases, because most cases turn on the facts and the evidence that establishes facts, rather than on subtle arguments about thelaw. n11.8 Furthermore, even with the new mandatory disclosure rules, n12 discovery remains the primary means for learning about the evidence; because so much dependson discovery, completing it in a timely manner is important. n12.1 Consequently, all courts agree that setting a firm deadline for completing discovery is an essential element of case management. n13

[b] Discretionary Contents of Scheduling Order

[i] Court's Discretion to Include Variety of Matters in Scheduling Order

Rule 16 expressly allows, but does not require, the court to include the following optional matters in its scheduling order: n14 (1) a modification of the time for any disclosure required by a party or an adjustment in the extent of discovery; n15 (2) provisions for disclosure or discovery of electronically stored information; n16 (3) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; n17 (4) a specification of the date for any conference before trial, for the final pretrial conference, or for the trial itself; n17.1 and (5) any other matters appropriate under the circumstances of the case. n17.2 Based on these optional provisions of Rule 16(b), most courts now routinely specify in their pretrial orders the times for disclosures, the extent of discovery, and conference and trial dates. n17.3

[ii] Court May Adjust Disclosure Time or Limit Discovery

In its pretrial order, the court has the option to modify the times for mandatory disclosures and adjust limits on the scope and extent of discovery. n18 Thus, the court has the option to override the default time limits specified in Rule 26(a)(2) to make disclosures. n18.1 It may be important for the court to specify the times for the parties to meet their disclosure obligations or modify the disclosure dates because, even though the parties often have completed some of the initial disclosures required under Rule 26(a)(1) before the judge has the opportunity to issue the scheduling order, in many cases these early exchanges of basic information have not been completed. This occurs because Rule 26(a) permits attorneys, unless otherwise ordered, to extend indefinitely by stipulation the deadlines for making their disclosures under Rule 26(a)(1). n19

Additionally, if a party objects to mandatory disclosure, the court must rule on the objection by determining what disclosures if any are to be made and setting the time for the disclosures. n20 Therefore, the assigned judge should inquire in all cases about the status of disclosures under Rule 26(a)(1) and, after considering the parties' input, specify a date or a set of dates by which these initial disclosures must be completed. n21 This preliminary step is important because the information covered by the initial and pretrial disclosure obligations is essential to the remainder of the case management plan. n21.1

[iii] Specifications for Disclosure or Discovery of Electronically Stored Information

In its scheduling order, the court has the option to require that the parties make disclosures or provide discovery of electronically stored information. n21.2 "Electronically stored information" is text, data, or other records stored in computers, computer peripherals, electronic equipment or digital media such as disks, tapes, or semiconductor chips. Common examples of electronically stored information include computer data files and computer email files. n21.3 Rule 16(b)(5) is a new provision designed to remind the court of the possible need to address the handling of discovery of electronically stored information early in litigation when such discovery is expected to occur in the action. n21.4

[iv] Inclusion of Party Agreements Made Regarding Claims of Privilege or Trial-Preparation Material

The court has the option to include in its scheduling order any agreements that the parties may have made for asserting claims of privilege or of protection as trial-preparation material after production of the item or material. n21.5 Alternatively, thecourt may adopt such an agreement by entering a case management or other order. These types of agreements are made to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. For example, the parties may agree to the initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. When a party receives information under such an arrangement, the receiving party may not assert that production of the information waived a claim of privilege or of protection as trial-preparation material. n21.6

[v] Conference and Trial Dates

A court has the authority but not the obligation in its pretrial order to specify dates for status or pretrial case management conferences, for a final pretrial conference, and for trial. n22 There is no absolute requirement that the court hold any pretrial conferences, n23 and in very simple cases, there may be no need for the court to schedule formal contact with the parties, or perhaps only once at a final pretrial conference. However, in almost all cases, it is advantageous for the court to have some planning communication between the court and attorneys. n23.1

The initial scheduling order should set the date for any desired conferences. n24 Additionally, most courts find that specifying a date for trial in the initial scheduling order is the most important case management tool. Nothing else is as effective to get parties to perform more efficient pretrial work or to seriously consider settlement than an early, firm trial date. n24.1 Thus, most judges prefer to set the trial date in the first scheduling order they enter. n25

After the trial date has been set, the court has the opportunity to select the date for the final pretrial conference. n25.1 To fix the date for that conference when no trial date is contemplated would violate Rule 16(d), which expressly requires the final pretrial conference to be held as close to the time of trial as reasonable under the circumstances. n26 This requirement is intended to ensure that the parties make substantial progress with the case before the final conference is held and to avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. Recognizing that many variables influence the decision of when to hold a pretrial conference, the Advisory Committee decided that it would be inappropriate to mandate a precise period by which the final conference should precede the trial. n27

[vi] Other Matters

Courts may include in the scheduling order any other matters that are appropriate in the circumstances of the case. n28 Even though it is referred to as a "scheduling order," the catchall provision of Rule 16(b)(8) allows the court to include case management directives in its scheduling order, not just matters related to the case schedule, time limits, or deadlines. For example, the court may include provisions regarding substantive issues in the case. n29

The likelihood that a court will address issues beyond those identified in the first seven subparts of Rule 16(b) increases when the court holds a scheduling conference before issuing a scheduling order. When the court holds a scheduling conference, rather than simply issuing the scheduling order after considering written or electronic input from the parties, the court may address any of the subjects outlined in paragraph (c) of Rule 16 in that order. n30 For example, the court may specify a deadline regarding motions for summary judgment, n31 or a deadline for the identification of witnesses and documents. n32

[5] Modification of Scheduling Order

[a] Modification Allowed Only on Good Cause

A trial court may modify or amend a scheduling order only when the moving party establishes "good cause" and the court (either a district judge or a magistrate judge when authorized by local rule) grants leave to modify. n1 Good cause is required because scheduling orders and their enforcement are regarded as the essential mechanism for cases becoming trial-ready in an efficient, just, and conclusive manner. The control of these schedules is deliberately reposed in the court, and not in counsel, so that this endmay be achieved. n2 If courts permitted modification too easily, the orders would not provide the discipline to prepare that is essential to timely case development and effective docket management. On the other hand, imposing too demanding a standard for modification is unrealistic and may be counterproductive. Thus, because it is made much earlier in the litigation, changes in the scheduling order are evaluated by the good cause standard, while changes in the later, final pretrial order are evaluated under the manifest injustice standard. n2.1 In essence, the drafters of the rule selected a standard for approving changes in scheduling orders that is essentially midway between "freely given," on the one hand and "manifest injustice" on the other hand. n3

[b] Discretion of Court to Determine Good Cause

Trial courts have considerable discretion in determining what kind of showing satisfies the good cause standard. The primary factor considered is whether the party moving for modification has been diligent. n4 In other words, a court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. n5 Carelessness or oversight is not compatible with a finding of diligence and provides no reason to grant relief. n6

The existence or degree of prejudice to the party opposing modification is also a factor in the decision whether to grant a motion to modify a scheduling order, but the absence of prejudice is irrelevant to whether the opposition was diligent and, by itself, does not establish good cause. n7 Another factor is whether the deadline in question has already passed. Thus, unless a court order specifically permits modification, if a party files a motion after the motion deadline has already passed, the motion is untimely and may be denied solely on that basis. n8

On the other hand, a court will grant extension in the schedule when the moving party shows that it has performed diligently to prepare the case but that unforeseeable circumstances or events beyond its control have intervened to the extent that the moving party will not have a fair opportunity to develop the evidence it needs if the original schedule remains in effect. For example, an untimely filing of a new claim by an opponent could constitute good cause. n9

A court will grant an extension of a deadline to a moving party if it has already granted extensions to an opponent, and refusing to grant comparable relief would put the moving party at an unfair disadvantage. n10 Similarly, although the "good cause" standard must be satisfied for every modification of a scheduling order, the likelihood that a court will grant a modification of a deadline generally increases if both parties approach the court jointly. n11 Some courts will modify a scheduling order if parties expressly stipulate to the change, and hold that by so stipulating, the parties do not need to move the court for a modification and do not need to demonstrate good cause. n12 Other courts strictly adhere to the good cause showing even in cases of stipulation. n13

[6] Sanctions for Violation of Scheduling Order

Pursuant to either Rule 16(f) or its inherent powers, a court may sanction an attorney or an unrepresented party who fails to obey a scheduling order, fails to appear at a scheduling conference, is substantially unprepared to participate in it, or fails to participate at the conference in good faith. n1 When a party commits a material violation of a scheduling order, the court will not be reluctant to impose sanctions. n2 Courts recognize that a failure to enforce its deadlines under scheduling orders will ultimately result in substantial increases in litigation delays and in the backlog of pending cases. n2.1 Although a finding of "willfulness" is not a prerequisite to imposing sanctions under Rule 16(f), one of the factors that is likely to affect the severity of the sanction is the intent that accompanied the violation, such as whether

the violation was willful, reckless, negligent, or essentially free of culpability, as when the tardiness was no fault of the party but resulted from forces beyond its control. n3 There are several types ofsanctions available for a violation, including banning the disobedient party from supporting or opposing designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence, n3.1 reprimanding the violator, imposing monetary sanctions, dismissing the claim or action, or entering a default judgment. Sanctions are discussed in detail in Part IV. n4

[7] Appellate Review of Scheduling Order

Courts have generally ruled that scheduling orders are "interlocutory," which means that they are not "final" and are not subject to immediate appellate review. n1 Scheduling orders are interlocutory because they do not directly resolve the merits of claims or defenses, do not terminate litigation at the trial court level, and remain subject to modification on a showing of good cause throughout the pretrial period. n2 Furthermore, scheduling orders do not cause a party to suffer significant and immediate consequences that are irreversible. Therefore, appellate review is ordinarily available only after final judgment is entered on the merits. n3

When properly appealed, an appellate court will review the scheduling decisions of a trial judge under the deferential abuse of discretion standard, n4 because an appellate court is reluctant to upset a district court's interpretation of its own order. n5 A party may not challenge a scheduling order for the first time during an appeal after final judgment. n6 Rather, a party that wishes to preserve its challenge to a pretrial scheduling order must first raise a timely objection at the trial court level. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.10* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(b)(1)(A)*; *see Fed. R. Civ. P. 26(f)*.

(n3)Footnote 1.1. *See Fed. R. Civ. P. 16(b)(1)(B)*.

(n4)Footnote 1.2. *See Fed. R. Civ. P. 16(b)(3)*.

(n5)Footnote 1.3. *See Fed. R. Civ. P. 16(b)(3)(A)*.

(n6)Footnote 1.4. *See Fed. R. Civ. P. 16(b)(3)(B)(i)-(vi)*.

(n7)Footnote 2. *O'Connell v. Hyatt Hotels, 357 F.3d 152, 154 (1st Cir. 2004)* (purpose of scheduling order).

(n8)Footnote 2.1. *Fed. R. Civ. P. 16(b)(1)*.

(n9)Footnote 3. *Fed. R. Civ. P. 16(b)(4), 16(e)*; *see O'Connell v. Hyatt Hotels, 357 F.3d 152, 155 (1st Cir. 2004)* .

(n10)Footnote 4. *Fed. R. Civ. P. 16(b)*, Committee Note to 1983 Amendments.

(n11)Footnote 5. *See Fed. R. Civ. P. 16(a), (c)*.

(n12)Footnote 1. *Fed. R. Civ. P. 16(b)(1)(A), 26(f)*.

(n13)Footnote 2. *Fed. R. Civ. P. 16(b)(1)(B).*

(n14)Footnote 3. *See § 18.01* et seq.

(n15)Footnote 4. *See O'Connell v. Hyatt Hotels, 357 F.3d 152, 155-156 (1st Cir. 2004)* .

(n16)Footnote 5. *Fed. R. Civ. P. 16(b)(1)(B)*; *see, e.g., Restrepo v. Colgate Univ., 149 F.R.D. 17, 19 (N.D.N.Y. 1993)* (court conducted telephone conference with attorneys before filing scheduling order).

(n17)Footnote 1. *Fed. R. Civ. P. 16(b)(2).*

(n18)Footnote 2. *Fed. R. Civ. P. 16(b)*, Committee Note to 1993 Amendments.

(n19)Footnote 3. *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608 n.5 (9th Cir. 1992)* (scheduling order entered 126 days after filing of complaint is not invalid).

(n20)Footnote 4. *Fed. R. Civ. P. 26(f)(1).*

(n21)Footnote 5. *Fed. R. Civ. P. 26(f)(2), (f)(4)(A).*

(n22)Footnote 6. *Fed. R. Civ. P. 26(f)(4)(B).*

(n23)Footnote 7. *Fed. R. Civ. P. 16(b)(1)(A)*; *see Sempier v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995)* .

(n24)Footnote 1. *Fed. R. Civ. P. 16(b)(3)(A).*

(n25)Footnote 2. *Fed. R. Civ. P. 16(b)(3)(B)(i)-(vi).*

(n26)Footnote 3. *Fed. R. Civ. P. 16(b)(3)(A).*

(n27)Footnote 4. *Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 716-717 (8th Cir. 2008)* .

(n28)Footnote 5. *Fed. R. Civ. P. 16(b)(4).*

(n29)Footnote 6. *Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 717 (8th Cir. 2008)* .

(n30)Footnote 7. *See O'Connell v. Hyatt Hotels, 357 F.3d 152, 155 (1st Cir. 2004)* .

(n31)Footnote 8. *Fed. R. Civ. P. 16(b)(3)(A), (b)(4)* (court may not modify scheduling order except on showing of good cause).

(n32)Footnote 9. *Colorado Visionary Academy v. Medtronic, Inc., 194 F.R.D. 684, 687-688 (D. Colo. 2000)* (defendants failed to establish good cause to support their motion to amend because delay in seeking amendment resulted from their earlier failure to do research necessary to recognize applicability of defense they sought to add).

(n33)Footnote 10. *Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 717 (8th Cir. 2008)* ; *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* ; *see* [i], *above.*

(n34)Footnote 11. *McKinley v. Kaplan, 177 F.3d 1253, 1257 (11th Cir. 1999)* (district court erred in denying leave to amend based on deadline established in parties' proposed joint scheduling order because such joint scheduling order was never entered and never became binding; in absence of dispositive scheduling order, whether leave to amend should be granted is governed by more liberal standard set forth in Rule 15(a)).

(n35)Footnote 11.1. *Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 716 (8th Cir. 2008)* ; *see Parker v.*

Columbia Pictures Indus., 204 F.3d 326, 339-341 (2d Cir. 2000) (district court did not abuse its discretion in denying leave to amend pleadings after deadline set in scheduling order, because moving party failed to establish good cause through diligence).

(n36)Footnote 11.2. *O'Connell v. Hyatt Hotels, 357 F.3d 152, 154-156 (1st Cir. 2004)* .

(n37)Footnote 11.3. *Fed. R. Civ. P. 16(b)(3)(A)*.

(n38)Footnote 11.4. *Fed. R. Civ. P. 16(b)*, Committee Note to 1993 Amendments.

(n39)Footnote 11.5. *Dedge v. Kendrick, 849 F.2d 1398 (11th Cir. 1988)* .

(n40)Footnote 11.6. *Johnson v. United States, 460 F.3d 616, (5th Cir. 2006)* (district court had authority to grant summary judgment notwithstanding fact that motion was filed later than provided in retrial scheduling order).

(n41)Footnote 11.7. *Fed. R. Civ. P. 16(b)(3)(A)*.

(n42)Footnote 11.8. *See Joseph L. v. Conn. Dep't of Children & Families, 225 F.R.D. 400, 401-403 (D. Conn. 2005)* .

(n43)Footnote 12. *See Fed. R. Civ. P. 26(a)*.

(n44)Footnote 12.1. *See Bolden v. City of Topeka, 441 F.3d 1129, 1149 (10th Cir. 2006)* (court may refuse further consideration of discovery once deadline has passed).

(n45)Footnote 13. *Wollenburg v. Comtech Mfg. Co., 201 F.3d 973, 977-978 (7th Cir. 2000)* (Rule 16(b) authorizes district judges to set schedule that limits time to complete discovery; because party offered no good cause for her tardy subpoena duces tecum demanding that opposition produce any copies it held of particular documents, it was within discretion of trial court to quash subpoena duces tecum); *Saavedra v. Murphy Oil U.S.A., Inc., 930 F.2d 1104, 1107 (5th Cir. 1991)* (no abuse of discretion for court to deny plaintiff's motion to extend discovery after defendant moved for summary judgment, when plaintiff had ample opportunity to conduct discovery on statutory employer issue and failed to seek extension of discovery deadline as required by scheduling order).

(n46)Footnote 14. *Fed. R. Civ. P. 16(b)(3)(B)*.

(n47)Footnote 15. *Fed. R. Civ. P. 16(b)(3)(B)(i), (ii)* (modify extent of discovery); *see* [ii], *below*.

(n48)Footnote 16. *Fed. R. Civ. P. 16(b)(3)(B)(iii)*; *see* [iii], *below*.

(n49)Footnote 17. *Fed. R. Civ. P. 16(b)(3)(B)(iv)*; *see* [iv], *below*

(n50)Footnote 17.1. *Fed. R. Civ. P. 16(b)(3)(B)(v)*; *see* [v], *below*.

(n51)Footnote 17.2. *Fed. R. Civ. P. 16(b)(3)(B)(vi)*; *see* [vi], *below*.

(n52)Footnote 17.3. *See O'Connell v. Hyatt Hotels, Nos. 02-1571, 357 F.3d 152, 155 (1st Cir. 2004)* .

(n53)Footnote 18. *Fed. R. Civ. P. 16(b)(3)(B)(i), (ii)*; *see Fed. R. Civ. P. 26(b)(1)* (court may specify scope of discovery).

(n54)Footnote 18.1. *Verzwyvelt v. St. Paul Fire & Marine Ins. Co., 175 F. Supp. 2d 881* , at **25 (W.D. La. 2001) (memorandum ruling); *see Fed. R. Civ. P. 26(a)(2)(C)*.

(n55)Footnote 19. *Fed. R. Civ. P. 26(a)(1)(A)*.

(n56)Footnote 20. *Fed. R. Civ. P. 26(a)(1)(A).*

(n57)Footnote 21. *Fed. R. Civ. P. 16(b)*, Committee Note to 1993 Amendments.

(n58)Footnote 21.1. *Serrano-Perez v. FMC Corp., 985 F.2d 625, 628 (1st Cir. 1993)* (use of disclosure dates as case management tool).

(n59)Footnote 21.2. *Fed. R. Civ. P. 16(b)(3)(B)(iii).*

(n60)Footnote 21.3. *See Anadarko Petroleum Corp. v. Billy Don Davis & Geosouthern Energy Corp., 2006 U.S. Dist. LEXIS 93594, at *77-81 (E.D.N.Y. 2006)* .

(n61)Footnote 21.4. *Fed. R. Civ. P. 16(b)*, Committee Note to 2006 Amendments.

(n62)Footnote 21.5. *Fed. R. Civ. P. 16(b)(3)(B)(iv).*

(n63)Footnote 21.6. *Fed. R. Civ. P. 16(b)*, Committee Note to 2006 Amendments.

(n64)Footnote 22. *Fed. R. Civ. P. 16(b)(3)(B)(v).*

(n65)Footnote 23. *Farrell v. Commissioner, 136 F.3d 889, 894 (2d Cir. 1998)* .

(n66)Footnote 23.1. *See Fed. R. Civ. P. 16*, Committee Note to 1983 Amendment.

(n67)Footnote 24. *Fed. R. Civ. P. 16(b)(3)(B)(v).*

(n68)Footnote 24.1. *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn, P.C., 388 F.3d 976, 983 (6th Cir. 2004)* .

(n69)Footnote 25. *See Olgyay v. Society for Envtl. Graphic Design, 169 F.R.D. 219, 220 (D.D.C. 1996)* .

(n70)Footnote 25.1. *Bosley v. Singleton, 237 F.R.D. 401, 404-405 (S.D. Oh. 2005)* (court may set final pretrial conference and trial date in same order).

(n71)Footnote 26. *Fed. R. Civ. P. 16(e).*

(n72)Footnote 27. *Fed. R. Civ. P. 16*, Committee Note to 1983 Amendments; *see § 18.02.*

(n73)Footnote 28. *See Fed. R. Civ. P. 16(b)(3)(B)(vi).*

(n74)Footnote 29. *See Fed. R. Civ. P. 16(b)*, Committee Notes to 1983 amendment; *see, e.g., Hernandez-Santiago v. Ecolab, Inc., 397 F.3d 30, 32 (1st Cir. 2005)* (court utilized scheduling conference to resolve factual issues of products liability).

(n75)Footnote 30. *Fed. R. Civ. P. 16(c)(2).*

(n76)Footnote 31. *Fed. R. Civ. P. 16(c)(2)(E).*

(n77)Footnote 32. *Fed. R. Civ. P. 16(c)(2)(F).*

(n78)Footnote 1. *Fed. R. Civ. P. 16(b)(4)*; *see Parker v. Columbia Pictures Indus., 204 F.3d 326, 339-341 (2d Cir. 2000)* (finding of "good cause" depends on diligence of moving party); *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-609 (9th Cir. 1992)* (attorney's failure to recognize that not all necessary parties were named in complaint was not good cause).

(n79)Footnote 2. *Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1198 (N.D. Iowa 1994)* .

(n80)Footnote 2.1. *See Northeast Drilling v. Inner Space Servs., 243 F.3d 25, 36-37 (1st Cir. 2001)* .

(n81)Footnote 3. *Fed. R. Civ. P. 16(b)*, Committee Note to 1983 Amendments.

(n82)Footnote 4. *Hussain v. Nicholson, 435 F.3d 359, 367 (D.C. Cir. 2006)* .

(n83)Footnote 5. *Fed. R. Civ. P. 16(d)*, Committee Note to 1983 Amendments.

(n84)Footnote 6. *Geiserman v. MacDonald, 893 F.2d 787, 791 (5th Cir. 1990)* (scheduling error in counsel's office not good cause to modify scheduling order as to designation of expert witness).

(n85)Footnote 7. *Amcast Indus. Corp. v. Detrex Corp., 132 F.R.D. 213, 217 (N.D. Ind. 1990)* (absence of prejudice to defendant was insufficient showing of good cause to modify scheduling deadline to file amendments to pleading).

(n86)Footnote 8. *United States Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985)* (motion for summary judgment filed after deadline denied because party failed to seek modification of order).

(n87)Footnote 9. *Wisland v. Admiral Beverage Corp., 119 F.3d 733, 737 (8th Cir. 1997)* (defendant permitted to amend answer to include statute of limitation as defense after original scheduling deadline because original returns of service were in possession of plaintiff's attorney and were not filed with court in timely fashion).

(n88)Footnote 10. *Robinson v. T.J. Maxx, Inc., 148 F.R.D. 490, 492 (S.D.N.Y. 1993)* (when plaintiff's time to depose defendant's witness extended, court extended defendant's time to file summary judgment motion; extension not sought as means to stall case).

(n89)Footnote 11. *Harding v. Federal Reserve Bank of New York, 707 F.2d 46, 51-52 (2d Cir. 1983)* (when both attorneys fail to observe time limits, judges should grant reasonable requests for extensions and continuances).

(n90)Footnote 12. *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163, 1166 (7th Cir. 1994)* (parties may stipulate to abbreviated, informal procedure for amending pretrial orders).

(n91)Footnote 13. *See, e.g., Chiropractic Alliance of New Jersey v. Parisi, 164 F.R.D. 618, 619-622 (D.N.J. 1996)* (parties' stipulation did not extend deadline in scheduling order for filing dispositive motions; parties should have requested extension).

(n92)Footnote 1. *Fed. R. Civ. P. 16(f)(1)(A)-(C).*

(n93)Footnote 2. *See, e.g., In re LTV Steel Co., 307 B.R. 37, 48-50 (N.D. Oh. 2006)* .

(n94)Footnote 2.1. *See Harding v. Federal Reserve Bank of New York, 707 F.2d 46, 52 (2d Cir. 1983)* .

(n95)Footnote 3. *See Rushing v. Kansas City Southern Railway Company 185 F.3d 496, 509 (5th Cir. 1999)* (trialcourt has considerable discretion whether to impose sanctions for violations of scheduling order, and choice of sanction).

(n96)Footnote 3.1. *O2 Micro Int'l, Ltd. v. Monolithic Power Sys., 467 F.3d 1355, 1364 (Fed. Cir. 2006)* .

(n97)Footnote 4. *See § 18.60* et seq.

(n98)Footnote 1. *28 U.S.C. § 1291.*

(n99)Footnote 2. *Vulcan Tools v. Makita USA, 23 F.3d 564, 565 (1st Cir. 1994)* .

(n100)Footnote 3. *In re Recticel Foam Corp., 859 F.2d 1000, 1003 (1st Cir. 1988)* (appealability of case management order).

(n101)Footnote 4. *Munoz v. Orr, 200 F.3d 291, 303 (5th Cir. 2000)* (district court did not abuse its discretion in striking affidavit seeking to introduce new statistical evidence in civil rights action after extension for filing of such reports under scheduling order had already passed).

(n102)Footnote 5. *Vulcan Tools v. Makita USA, 23 F.3d 564, 565 (1st Cir. 1994)* (district court's decision not to consider summary judgment order filed after motion deadline reviewed under abuse of discretion standard).

(n103)Footnote 6. *Ehm v. Amtrak Bd. of Dirs., 780 F.2d 516, 518 (5th Cir. 1986)* (scheduling order may not be first challenged on appeal).

(n104)Footnote 7. *Shearson/Am. Express, Inc. v. Mann, 814 F.2d 301, 305 (6th Cir. 1987)* .

Moore's Manual--Federal Practice and Procedure

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART III. Pretrial Orders

2-18 Moore's Manual--Federal Practice and Procedure § 18.43

§ 18.43 Final Pretrial Ordern*

[1] Use of Final Pretrial Order

A court uses the final pretrial order just before trial to implement the binding final plan to be used at trial. n1 One of the primary characteristics of the final pretrial order is that the order may be modified only to prevent manifest injustice. n2 Thus, the final pretrial order is used to formulate a binding plan for the trial itself, n3 while the ordinary case management order or scheduling order is used by the court to manage the initial stages of litigation and establish the pretrial schedule. n4

The Supreme Court has indicated that use of the final pretrial order is not absolutely essential. n5 Similarly, the courts of appeal have generally held that a failure to enter a final pretrial conference order either does not violate Rule 16(e) or if it does, the failure is not the type of violation that supports appellate relief. n6

As a practical matter, it is important for a trial court to enter orders that recite the principal decisions made at the final pretrial conference. n7 A clear and comprehensive final pretrial order is very effective in ensuring a fair, orderly, and efficient trial. In a pretrial order, the court may set out the basic ground rules that will control the trial. n8 At a minimum, the court should order production of a transcript of the final pretrial conference to serve as a basis for resolving any disputes that arise about rulings entered during the conference. n9

[2] Contents

Most courts request the attorney for the plaintiff to draft the final pretrial order, and he or she may be required to do so on a court form. In some courts, the judge may either assign the task to any party or prepare his or her own order. n1 Whoever prepares the final pretrial order should ensure that it recites all actions taken and rulings made at the final pretrial conference. n2

A complete pretrial order informs the attorneys, the parties, and the court of all of the following: all rulings made at the final pretrial conference; discovery excerpts from stenographic and video depositions, responses to interrogatories and requests for admission; undisputed facts and judicially noticed facts; the claims and defenses thatwill be tried and how the applicable legal principles will be construed; any procedures for consolidation, severance, or transfer of the case; the

jury composition and how the jury will be selected, instructed, and managed; what evidence may and what evidence may not be presented and the exhibits to be offered by each side; which witnesses may be called and in what order; what subjects their testimony may address and how long they may testify; the order of proof, including the procedures for presenting testimony and exhibits; the order in which counsel will present closing arguments and how much time they will be allotted for that purpose; how much time each party will be allocated for presentation of each aspect of its case; which questions the jury will be asked to address when it delivers its verdict; objections that are sustained, denied, or deemed waived; and the date and time that the trial will commence. n3

[3] Effect of Final Pretrial Order

An order entered after a final pretrial conference supersedes the parties' pleadings and controls the subsequent course of the action unless modified by a subsequent order. n1 Thus, once the final pretrial order is entered and the parties to the lawsuit do not object to it, that order controls the dimensions of the lawsuit, both in the trial court and on appeal. n2 Both the parties and the court must abide by the terms of a final pretrial order unless and until it is changed. n3

The district court has discretion to rule that a party that has failed to specify that an issue is to be included in the pretrial order has waived the issue. n3.1 Either a legal or factual issue is subject to waiver. n4 For example, a defendant may waive a potential defense by failing to ensure that the issue is clearly preserved in the pretrial order. n5 However, waiver is not automatic, because the trial court has discretion to permit a change in a pretrial order if the party shows manifest injustice. n6

[4] Modification of Final Pretrial Order

[a] Modification Must Cure Manifest Injustice

The court may modify a final pretrial order only to prevent manifest injustice. n1 Although Rule 16(e) does not define manifest injustice, the standard is more stringent than standards courts apply when deciding whether to grant motions to modify orders entered after conferences held earlier in the pretrial period, n2 and courts often deny motions to modify final pretrial orders under this stringent standard. n3 Some courts have used a flexible approach, granting the motion when the interests of justice make modification desirable. n4 In recent years, however, some courts have developed lists of very specific factors to consider when a motion is made to modify. The factors are discussed in [b], *below*.

[b] Factors Used to Determine Existence of Manifest Injustice

Several courts have developed tests that require the trial court to consider four factors in determining whether to permit a party to modify a final pretrial order to prevent manifest injustice. The most common test is as follows: n5 (1) the prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) any disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) any bad faith by the party seeking to modify the order. The moving party has the burden to show that a review of these factors results in a conclusion that manifest injustice would result if the pretrial order is not modified. n6

In its determination whether to modify the pretrial order, the court must consider the specific circumstances of the case and weigh applicable factors when determining whether a party has shown that it is necessary to modify a final pretrial order in order to prevent manifest injustice. Thus, the trial court should weigh the possible hardships imposed on the respective parties n7.1 and balance the need for doing justice on the merits between the parties against the need for maintaining orderly and efficient procedural arrangements. n8

[5] Appellate Review of Final Pretrial Order

[a] Appealability of Final Pretrial Order

The circuit courts may generally review only final orders of the district courts of theUnited States. n1 An order is final when it completely resolves the contested matter, leaving nothing to be done except execution of the judgment. n2 Most final pretrial orders, like most case management orders, are interlocutory in nature, rather than final; they concern preliminary matters, leading up to but not including trial, and may still be modified by the court on a showing of manifest injustice. n3 Therefore, most final pretrial orders are not subject to immediate appellate review; rather, an aggrieved party may not generally obtain appellate review until a final judgment is entered in the action. n4

Nonetheless, certain limited types of pretrial orders are immediately appealable, including the following: a contempt order for defying a pretrial order; n5 orders constituting a clear abuse of discretion in circumstances when the court's legal obligation is plainly established or the court is patently erroneous may be reviewed by way of writ of mandamus; n6 orders entering final judgment as to one or more but less than all claims or parties, provided that the district court makes an express certification that no just reason exists for delay and gives an express direction for entry of judgment; n7 and orders that involve a controlling question of law when (1) there is substantial ground for difference of opinion and (2) an immediate appeal would materially advance the ultimate termination of the litigation. n8

[b] Standard of Review

An appellate court reviews district or magistrate judge's decision concerning the amendment, modification or enforcement of a final pretrial order, using the abuse of discretion standard. n9 In general, an abuse of discretion occurs when no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion may be found. n10 In making the determination of whether or not the court abused its discretion, a trial court's interpretation of its own final pretrial order is given great deference on appeal. n11 Trial attorneys should also note that the federal appellate courts will not consider an objection to a final pretrial order for the first time on appeal; a condition to such consideration is a ruling on the matter by the district court. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, §§ 16.78, 16.79* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(e).*

(n3)Footnote 2. *Fed. R. Civ. P. 16(e).*

(n4)Footnote 3. *Fed. R. Civ. P. 16(e).*

(n5)Footnote 4. *See Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995)* ; *see also § 18.01* et seq.

(n6)Footnote 5. *Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 429-431, 115 S. Ct. 2227, 2235 n.9, 132 L. Ed. 2d 375 (1995)* (Rule 16(e) [now Rule 16(d)] uses "shall" to authorize but not to require pretrial orders).

(n7)Footnote 6. *See Video Components, Inc. v. Laird Telemedia, Inc., 574 F.2d 1061, 1062-1063 (10th Cir. 1978)* ; *see MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1169 (7th Cir. 1983) , cert. denied, 464 U.S. 891 (1983)* (Rule 16(d) gives court discretion to hold final pretrial conference).

(n8)Footnote 7. *See Fed. R. Civ. P. 16(d), (e).*

(n9)Footnote 8. *Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1089 n.6 (10th Cir. 1994)* (pretrial order regarding advance rulings on admissibility of evidence).

(n10)Footnote 9. *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433 (7th Cir. 1986)* (final pretrial conference recorded; transcript in effect final pretrial order).

(n11)Footnote 1. *Miera v. First Sec. Bank, 776 F.2d 902, 906 (10th Cir. 1985)* .

(n12)Footnote 2. *Fed. R. Civ. P. 16(e).*

(n13)Footnote 3. *See Fed. R. Civ. P. 16(b)(3), (c)(2).*

(n14)Footnote 1. *Fed. R. Civ. P. 16(e)*; *see* [4], *below.*

(n15)Footnote 2. *Koch v. Koch Indus., 203 F.3d 1202, 1221 (10th Cir. 2000)* .

(n16)Footnote 3. *Correa v. Hospital San Francisco, 69 F.3d 1184, 1195 (1st Cir. 1995)* ; *Harris v. Marsh, 679 F. Supp. 1204, 1389-1390 (E.D.N.C. 1987)* , *aff'd on other grounds, 914 F.2d 525 (4th Cir. 1990)* ; *see* [4], *below.*

(n17)Footnote 3.1. *Springer v. Henry, 435 F.3d 268, 275 (3d Cir. 2005)* .

(n18)Footnote 4. *Morro v. City of Birmingham, 117 F.3d 508, 516 n.3 (11th Cir. 1997)* .

(n19)Footnote 5. *Kay-Cee Enters., Inc. v. Amoco Oil Co., 45 F. Supp. 2d 840, 846 (D. Kan. 1999)* (district court granted plaintiff's motion for partial summary judgment with respect to defendant's affirmative defense of failure of consideration because defendant waived its right to assert defense by failing to preserve it in pretrial order).

(n20)Footnote 6. *Springer v. Henry, 435 F.3d 268, 275 n.4 (3d Cir. 2005)* (citing **Moore's Federal Practice**).

(n21)Footnote 1. *Fed. R. Civ. P. 16(e).*

(n22)Footnote 2. *Fed. R. Civ. P. 16(e)*, Committee Note to 1983 Amendments.

(n23)Footnote 3. *Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)* (court found there was no manifest injustice to permit modification of jury instruction to include causation theory, when such theory was not disclosed in final pretrial order, and defendant knew of theory at pretrial conference but did not raise it until closing argument at trial).

(n24)Footnote 4. *Madison Consultants v. Federal Deposit Ins. Corp., 710 F.2d 57, 62 n.3 (2d Cir. 1983)* (court allowed plaintiff to amend pretrial order when defendants were not prejudiced); *Eldridge v. Springs Indus., Inc., 882 F. Supp. 356, 358 (S.D.N.Y. 1995)* (court allowed modification when it added one witness and substituted few documents to establish defendant's position; amendments were modest, contained no new claims, and served only to streamline and clarify defendant's presentation, and therefore did not prejudice plaintiff).

(n25)Footnote 5. *Davey v. Lockheed Martin Corp., 301 F.3d 1204, 1209-1212 (10th Cir. 2005)* .

(n26)Footnote 6. *Byrd v. Guess, 137 F.3d 1126, 1132 (9th Cir. 1998)* .

(n27)Footnote 7.1. *Galdamez v. Potter, 415 F.3d 1015, 1020 (9th Cir. 2005)* ; *Potthast v. Metro-North R.R., 400 F.3d 143, 153 (2d Cir. 2005)* .

(n28)Footnote 8. *Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)* .

(n29)Footnote 1. *28 U.S.C. § 1291.*

(n30)Footnote 2. *In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294 (7th Cir. 1995)* , *cert. denied, 516 U.S. 867 (1995)* (final order is one that winds up litigation in district court).

(n31)Footnote 3. *See Fed. R. Civ. P. 16(e).*

(n32)Footnote 4. *In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)* (pretrial orders not final, and not appealable under collateral order doctrine, because they do not resolve parties' rights in any definitive way).

(n33)Footnote 5. *Bennett v. City of Boston, 54 F.3d 18, 20 (1st Cir. 1995)* .

(n34)Footnote 6. *In re NLO Inc., 5 F.3d 154, 157 (6th Cir. 1993)* (upholding use of mandamus to reverse pretrial order requiring participation in summary jury trial).

(n35)Footnote 7. *Fed. R. Civ. P. 54(b).*

(n36)Footnote 8. *28 U.S.C. § 1292(b)*; *see Coopers Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n37)Footnote 9. *Koch v. Koch Indus., 203 F.3d 1202, 1215-1217 (10th Cir. 2000)* ; *Morro v. City of Birmingham, 117 F.3d 508, 515-516 (11th Cir. 1997)* ; *Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)* .

(n38)Footnote 10. *Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 (7th Cir. 1995)* .

(n39)Footnote 11. *Hall v. State Farm Fire & Cas. Co., 937 F.2d 210, 212 (5th Cir. 1991)* (court's interpretation of own order is reviewed for abuse of discretion).

(n40)Footnote 12. *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433-1434 (7th Cir. 1986)* .

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART III. Pretrial Orders

2-18 Moore's Manual--Federal Practice and Procedure §§ 18.44through 18.59

[Reserved]

§§ 18.44[Reserved]

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART IV. Sanctions for Violation of Pretrial Obligations

2-18 Moore's Manual--Federal Practice and Procedure § 18.60

§ 18.60 Source of Authority for Sanctionsn*

[1] Express Provision of Pretrial Rule

Rule 16 expressly authorizes the trial court to impose sanctions for failure to comply with pretrial orders and other pretrial requirements. n1 The authority to impose sanctions under Rule 16 on offending parties, their attorneys, or both, applies in four situations. n2 This sanction authority is designed to encourage forceful judicial case management, n3 to enforce compliance with the applicable procedural rules at the pretrial stage of litigation, and to ensure the parties' adherence to reasonable management requirements for case preparation. n4 The sanction authority also serves a punitive purpose in that it punishes noncompliance with pretrial orders and compensates an opposing party for inconvenience and expense incurred because of any noncompliance with the reasonable management orders of the court. n5

[2] Inherent Authority

District courts have inherent power to control their dockets and may impose sanctions, including dismissal, in the exercise of that discretion. n1 Thus, courts may impose sanctions for failure to comply with pretrial procedures under their inherent authority to regulate litigation. n2 The court's inherent authority is essential to the administration of justice and exists in addition to sanctions available under specific statutes or the federal rules. Because inherent powers are shielded from directlegislative controls, they must be exercised with restraint and discretion. n3 Thus, a federal court may invoke its inherent power only when necessary to protect its ability to function, n4 and a court may not impose sanctions under its inherent authority if the sanction would contravene a statute or rule or unnecessarily enlarge the courts' authority. n5

The inherent authority of courts to impose sanctions generally requires a finding of bad faith. n6 The courts inherent power to issue sanctions encompasses the power to order sanctions under local rules and under standing orders. n7 Sanctions imposed under a court's inherent authority are reviewed for abuse of discretion. n8

[3] Other Federal Rules

In addition to authority under Rule 16, n1 a district court may impose sanctions for inappropriate conduct in pretrial proceedings under other federal rules. In many instances, the same misconduct may be sanctionable under more than

one rule. In such circumstances, the sanction should ordinarily be imposed under the most applicable rule, as this is the point where appellate courts begin their review. n2 With respect to sanctions relating to pretrial proceedings, the following are the most important supplemental rules:

1. Sanctions under Rule 11 for baseless filings. Rule 11 is designed to deter the filing of baseless pleadings, motions, and other papers not related to discovery or disclosures. n3 It applies to matters presented in filed papers as well as to subsequent oral argument on matters presented earlier in filed papers. n4 Rule 11 sanctions may be imposed when a frivolous pleading, motion or other paper is filed, n5 but may not be imposed for disclosure and discovery violations. n6

2. Discovery sanctions under Rule 37. Rule 37 permits a court to strike pleadings or dismiss an action when a party fails to obey an order to provide or permit discovery, or to appear for his or her deposition. n7 The imposition of sanctions under Rule 37 is within the discretion of the district court, and a decision to dismiss an action for failure to comply with discovery orders will be reversed only if the decision constitutes an abuse of discretion. n8 Rule 16(f) specifically authorizes sanctions pursuant to Rule 37(b)(2)(B), (C), and (D), but not subsection (A). Based on the specific omission of Rule 37(b)(2)(A) sanctions from Rule 16, one court has ruled that Rule 37(b)(2)(A) sanctions are not available for violation of a scheduling order. In the case, the court of appeals held that the district court abused its discretion in imposing Rule 37(b)(2)(A) sanctions because Rule 16(f) specifically omits Rule 37(b)(2)(A), which provides too harsh a sanction for violation of scheduling order. n9

3. Rule 41(b) allows a defendant to move for dismissal of a claim or the entire action if the plaintiff fails to prosecute or to comply with a court order. n10 Although dismissal pursuant to Rule 41(b) is a matter committed to the discretion of the district court, n11 it is a harsh remedy to be utilized only in extreme situations. n12 When reviewing an order to dismiss an action under Rule 41(b) for failure to comply with a court order, the appellate court reviews for abuse of discretion, assessing the dismissal in light of the record as a whole. n13 Noncompliance is frequently treated as a failure to prosecute and courts usually apply the same test used to evaluate both types of dismissals. n14 The various circuits have enumerated many factors that the court should consider in making the determination of whether the dismissal for failure to prosecute constituted an abuse of discretion, including the following list: the effect of the failures on the judge's calendar and time; the probable merits of the claim; the consequences of dismissal for the social objectives of the type of litigation that the suit represents; the degree of personal responsibility for the failures, in contrast to the attorney's responsibility; n15 the duration of the plaintiff's failures; whether the plaintiff received notice that further delays would result in dismissal; whether the defendant was prejudiced by possible further delay; whether the district judge balanced the interest of alleviating the court calendar congestion with protecting a party's right to due process; whether the judge adequately assessed the efficacy of lesser sanctions; n16 whether the party's failure was due to willfulness, bad faith, or fault; n17 and whether the plaintiff hada history of dilatoriness. n18 Even though most courts have held that the district court must give an explicit warning about continued violations before the case is dismissed, there is no requirement the district court is obligated to warn a plaintiff repeatedly, nor is the court required to issue a formal rule to show cause before dismissing a case. n19 For a further discussion of the considerations of the court of appeals when reviewing a dismissal, *see* 8 *Moore's Federal Practice, §§ 41.51*, *41.52* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.90* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(f)(1).*

(n3)Footnote 2. *See Fed. R. Civ. P. 16(f)*; *see also § 18.61.*

(n4)Footnote 3. *Fed. R. Civ. P. 16(f)*, Committee Note to 1983 Amendments.

(n5)Footnote 4. *Olcott v. Delaware Flood Co., 76 F.3d 1538, 1555 (10th Cir. 1996)* .

(n6)Footnote 5. *Lindsey v. United States, 693 F. Supp. 1012, 1025 (W.D. Okla. 1988)* (compliance with pretrial orders required to promptly process and adjudicate cases).

(n7)Footnote 1. *Atchison, Topeka and Santa Fe Railway Company v. Hercules Inc., 146 F.3d 1071, 1074 (9th Cir. 1998)* .

(n8)Footnote 2. *Link v. Wabash R.R. Co., 370 U.S. 626, 630-631, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* (court's inherent power to manage docket includes imposition of sanctions).

(n9)Footnote 3. *Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n10)Footnote 4. *United States v. Providence Journal Co., 485 U.S. 693, 701, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988)* .

(n11)Footnote 5. *In re Novak, 932 F.2d 1397, 1406 n.17 (11th Cir. 1991)* .

(n12)Footnote 6. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-766, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n13)Footnote 7. *Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 520 (9th Cir. 1983)* .

(n14)Footnote 8. *Link v. Wabash R.R. Co., 370 U.S. 626, 633, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* .

(n15)Footnote 1. *See* [1], *below*.

(n16)Footnote 2. Socit Internationale Pour Participations Industrielles et *Commerciales, S.A. v. Rogers, 357 U.S. 197, 207, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (because Rule 37 addresses with particularity the consequences of failure to make discovery, there was no need to resort to Rule 41(b), which lacks such specific references to discovery).

(n17)Footnote 3. *Fed. R. Civ. P. 11*; *Simpson v. Welch, 900 F.2d 33, 36 (4th Cir. 1990)* .

(n18)Footnote 4. *Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 813 (9th Cir. 1989)* , *aff'd on other grounds, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* .

(n19)Footnote 5. *Sanko S.S. Co. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987)* .

(n20)Footnote 6. *See Fed. R. Civ. P. 11(c), (d)*.

(n21)Footnote 7. *Fed. R. Civ. P. 37(b)(2), (d)*.

(n22)Footnote 8. *Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-764 (2d Cir. 1990)* , *cert. denied, 499 U.S. 943 (1991)* (dismissal of plaintiff's action for failure to appear at deposition).

(n23)Footnote 9. *Smith v. Chicago Sch. Reform Bd. of Trustees, 165 F.3d 1142, 1145 (7th Cir. 1999)* .

(n24)Footnote 10. *Fed. R. Civ. P. 41(b)*.

(n25)Footnote 11. *Harding v. Federal Res. Bank of N.Y., 707 F.2d 46, 50 (2d Cir. 1983)* .

(n26)Footnote 12. *Link v. Wabash R.R. Co., 370 U.S. 626, 633, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* .

(n27)Footnote 13. *Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988)* .

(n28)Footnote 14. *See, e.g., Simmons v. Abruzzo, 49 F.3d 83, 87 (2d Cir. 1995)* .

(n29)Footnote 15. *Aura Lamp & Lighting, Inc. v. International Trading Corp., 325 F.3d 903, 908 (7th Cir. 2003)* .

(n30)Footnote 16. *Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988)* .

(n31)Footnote 17. *Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 589 (6th Cir. 2001)* .

(n32)Footnote 18. *Guy v. City of Wilmington, 169 F.R.D. 593, 596 (D. Del. 1996)* .

(n33)Footnote 19. *Aura Lamp & Lighting, Inc. v. International Trading Corp., 325 F.3d 903, 908 (7th Cir. 2003)* .

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PART V Pretrial Stage
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2-18 Moore's Manual--Federal Practice and Procedure § 18.61

§ 18.61 Sanctionable Conductn*

A court may impose sanctions under Rule 16 against a party, a party's attorney, or both, for engaging in any of four types of conduct: n1

1. Failure to obey a scheduling or pretrial order. n2

2. Failure to appear at a scheduling or pretrial conference. n3

3. Substantial failure to prepare to participate in a scheduling or pretrial conference. n4

4. Failure to participate in good faith. n5

The court may impose sanctions under Rule 16(f) for any of the violations listed above, and in some instances the conduct may be a violation subject to other provisions for sanctions, n6 including violations of discovery orders. For example, a delay in responding to discovery requests or in producing requested documents, in addition to being a violation of a discovery order, may constitute a violation of a scheduling or other pretrial order and be subject to sanctions under Rule 16(f) under item 1, listed above. n7

One of the important attributes of requesting the imposition of sanctions under Rule 16(f) is that Rule 16(f) does not require a finding of bad faith. Therefore, a negligent failure to comply with a court order may justify the imposition of sanctions under Rule 16(f). n8 Another important attribute is that the imposition of monetary sanctions under Rule 16(f) does not require a showing of prejudice in order to justify the sanctions. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.91* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(f)(1)(A)-(C).*

(n3)Footnote 2. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995)* (default sanction for violation of scheduling order authorized by Rule 16(f)).

(n4)Footnote 3. *Lucien v. Breweur, 9 F.3d 26, 28-29 (7th Cir. 1993)* ; *Cuyos v. Texas Mobile Health Inc., 10 F. Supp. 2d 750, 752-753 (S.D. Tex. 1998)* .

(n5)Footnote 4. *Comcoa, Inc. v. NEC Tel., Inc., 931 F.2d 655, 666-667 (10th Cir. 1991)* .

(n6)Footnote 5. *Guillory v. Domtar Indus., Inc., 95 F.3d 1320, 1334-1335 (5th Cir. 1996)* (court had authority to impose sanctions against party that never intended to settle but participated in settlement conference without informing court of its position).

(n7)Footnote 6. *Lillie v. United States, 40 F.3d 1105, 1110 (10th Cir. 1994)* .

(n8)Footnote 7. *Rabb v. Amatex Corp., 769 F.2d 996, 999 (4th Cir. 1985)* .

(n9)Footnote 8. *Former Emples. of Tyco Elecs v. United States DOL, 259 F. Supp. 2d 1246, 1251 (Ct. Int'l Trade 2003)* ; *see Ayers v. City of Richmond, 895 F.2d 1267, 1269 (9th Cir. 1990)* (court did not abuse discretion by imposing sanction in amount of opposing counsel's costs when counsel failed to attend one pretrial conference due to inadvertence); *Martin Family Trust v. NECO/Nostalgia Enters. Co., 186 F.R.D. 601, 604 (E.D. Cal. 1999)* (court may impose sanctions under Rule 16(f) for party's unexcused failure to comply with court order, even if that failure was not in bad faith; counsel's mistaken belief that he was not required to file status report because of ongoing settlement negotiations was insufficient to excuse imposition of sanctions).

(n10)Footnote 9. *John v. Louisiana, 899 F.2d 1441, 1448-1449 (5th Cir. 1990)* .

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2-18 Moore's Manual--Federal Practice and Procedure § 18.62

§ 18.62 Discretion of Court to Impose Sanctionsn*

The decision of the trial court to impose or not to impose sanctions under Rule 16(f) is discretionary. In general, a court need not impose a sanction even after finding a violation. n1 However, the court's discretion is limited by the requirement that a judge must require the party, the attorney representing the party, or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust. This award may be in lieu of or in addition to any other sanction. n2 This provision creates a presumption that, once a violation has occurred, the court should impose expense-shifting sanctions. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.91* (Matthew Bender 3d ed.).

(n2)Footnote 1. *S.E.C. v. First Houston Capital Resources Fund, Inc., 979 F.2d 380, 381 (5th Cir. 1992)* .

(n3)Footnote 2. *Fed. R. Civ. P. 16(f).*

(n4)Footnote 3. *Cf. Fed. R. Civ. P. 37*, Committee Note to 1970 Amendments.

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2-18 Moore's Manual--Federal Practice and Procedure § 18.63

§ 18.63 Types of Sanctions Availablen*

[1] Selection of Type of Sanction In General

Courts have broad discretion in fashioning appropriate sanctions for sanctionable conduct under Rule 16. The trial court may, on motion or the judge's own initiative, impose any sanctions that are just. n1 A court may take into account a number of factors in determining which sanctions should be imposed, including the nature and consequences of the misconduct or neglect or failure to comply with the court's order; n2 who is responsible for misconduct, either the attorney, the client, or both; n3 which sanctions are available to the court; n4 what purposes will be served by imposing sanctions and what is the least severe sanction that will achieve the intended purpose; n5 and whether the sanctionable conduct was willful or negligent. n6

As is the case with the determination of whether or not to impose sanctions, the selection of an appropriate sanction is within the trial court's discretion. n7 This discretion has limits, in that only sanctions that are "just in the circumstances" may be imposed. n8 Furthermore, the scope of discretion becomes more limited as the sanctions become more severe. n9 However, the determination of the correct sanction is a fact-specific inquiry that the trial court is best qualified to make. n10 For examples of specific types of sanctions that the court may impose, *see* [2] through [4], *below*.

[2] Dismissal and Default Judgment

Although dismissal with prejudice is an extreme and harsh sanction that is in contradiction to policy considerations in favor of disposing of cases on the merits, n1 it is authorized by Rule 16(f). n2 Thus, fairness requires that some limits be placed on its use. n3 Likewise, default judgment is a harsh sanction that runs against policy considerations in favor of disposing of cases on the merits. n4 When imposed, the sanction of dismissal with prejudice serves two purposes. Dismissal penalizes the party whose conduct warrants the sanction and discourages those who may be tempted to employ such conduct absent a deterrent. n5

When considering the extreme sanctions of dismissal and default, the court should balance the policy of giving the plaintiff its day in court against the policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures. The balancing test concentrates on the severity of the conduct that prompted the sanction and, to a lesser extent, the adverse impact that conduct has on the opposition and the orderly administration of justice in

the courts. n6 In determining whether or not misconduct is sufficiently serious to deserve dismissal, the court should review many factors, including: the degree of actual prejudice to the opposing party; n7 the amount of interference with the judicial process; n8 the offender's culpability; n9 whether the court warned the party that dismissal of the action would be a likely sanction for noncompliance; n10 and the availability and efficacy of lesser sanctions. n11

[3] Monetary Sanctions

On motion or on its own initiative, a district court may issue any just order for violation of Rule 16. n1 The district court must require a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by the other party as a result of noncompliance with Rule 16, unless the court finds that the noncompliance was substantially justified or that other circumstances make such an award unjust. n2 As with other sanctions, the court should consider the least severe sanction adequate to deter and punish the party against whom the sanctions are imposed. n3 Monetary sanctions for breaches of pretrial duties serve to compensate the party harmed by the breach and to deter and, if necessary, punish improper conduct. n4 Monetary sanctions ensure compliance with reasonable management requirements for case preparation and compensate opposing parties for inconvenience and expense incurred because of any noncompliance with the reasonable management orders of the court. n5

In setting the amount of monetary sanctions, the trial court should focus on all the purposes of sanctions, not only on fee shifting. n6 The court should consider the following factors: the reasonableness of the amount; the minimum amount necessary to deter noncompliance; the offender's ability to pay; the offender's history, experience, and ability; the severity of the violation; the extent of malice or bad faith that contributed to the violation; and any other factors that the court may deem appropriate. n7

[4] Preclusion of Evidence or Testimony

If a party or a party's attorney engages in sanctionable conduct, the trial court may enter an order refusing to allow the offending party to support or oppose specifiedclaims or defenses or prohibiting that party from introducing designated matters in evidence. n1 For example, if an attorney fails to provide or permit discovery as required by court order, the court may sanction the attorney by precluding the admission of specified evidence or witness testimony. n2 However, preclusion of evidence or testimony is a harsh sanction. n3 In determining whether or not evidence should be precluded from trial based on a violation of a pretrial order, the court should consider: the explanation for the failure to identify a witness, document, or other evidence; the importance of the testimony or other evidence; the potential prejudice of allowing the testimony or evidence to be admitted; and the availability of a continuance to cure the prejudice. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.92* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 16(f)(1)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*; *see also In re Baker, 744 F.2d 1438, 1440 (10th Cir. 1984)* (broad range of sanctions for failure to comply scheduling orders).

(n3)Footnote 2. *M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 872-873 (10th Cir. 1987)* (harsh sanction of default judgment requires failure to be result of willfulness or bad faith).

(n4)Footnote 3. *Newton v. A.C. & S. Inc., 918 F.2d 1121, 1127 (3d Cir. 1990)* .

(n5)Footnote 4. *S.E.C. v. First Houston Capital Resources Fund, Inc., 979 F.2d 380, 382-383 (5th Cir. 1992)*

(abuse of discretion to impose default sanction when district judge's order fails to indicate why default judgment appropriate sanction for failure to attend pretrial conference or whether other measures considered).

(n6)Footnote 5. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

(n7)Footnote 6. *M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 872-873 (10th Cir. 1987)* .

(n8)Footnote 7. *See Rushing v. Kansas City Southern Railway Company 185 F.3d 496, 509 (5th Cir. 1999)* (trial court has considerable discretion whether to impose sanctions for violations of scheduling order, and also choice of sanction); *Jones v. Winnepesaukee Realty, 990 F.2d 1, 5 (1st Cir. 1993)* .

(n9)Footnote 8. *Ehrenhaus v. Reynolds, 965 F.2d 916, 920-921 (10th Cir. 1992)* (discretion to choose sanction is limited in that chosen sanction must be both just and related to particular claim in issue).

(n10)Footnote 9. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995)* .

(n11)Footnote 10. *Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett, 24 F.3d 136, 139 (10th Cir. 1994)* .

(n12)Footnote 1. *Woodson v. Surgitek, Inc., 57 F.3d 1406, 1417 (5th Cir. 1995)* .

(n13)Footnote 2. *Fed. R. Civ. P. 16(f)(1), 37(b)(2)(A)(v), (vi)*; *see World Thrust Films, Inc. v. International Family Entertainment, Inc., 41 F.3d 1454, 1456-1457 (11th Cir. 1995)* .

(n14)Footnote 3. *Velazquez-Rivera v. Sea-Land Serv., Inc., 920 F.2d 1072, 1075 (1st Cir. 1990)* .

(n15)Footnote 4. *Coleman v. Smith, 814 F.2d 1142, 1145-1146 (7th Cir. 1987)* .

(n16)Footnote 5. *Jones v. Thompson, 996 F.2d 261, 264-265 (10th Cir. 1993)* (upholding dismissal of legal malpractice action for violation of numerous court orders, failure to prosecute, and abuse of discovery).

(n17)Footnote 6. *Omaha Indian Tribe v. Track I--Blackbird Bend Area, 933 F.2d 1462, 1468 (8th Cir. 1991)* .

(n18)Footnote 7. *Brinkmann v. Abner, 813 F.2d 744, 749 (5th Cir. 1987)* .

(n19)Footnote 8. *Shea v. Donohoe Constr. Co., 795 F.2d 1071, 1075-1076 (D.C. Cir. 1986)* .

(n20)Footnote 9. *In re Baker, 744 F.2d 1438, 1442 (10th Cir. 1984)* , *cert. denied, 471 U.S. 1014 (1985)* .

(n21)Footnote 10. *Johnson v. United States Dep't of Treasury, 939 F.2d 820, 825 (9th Cir. 1991)* .

(n22)Footnote 11. *S.E.C. v. First Houston Capital Resources Fund, Inc., 979 F.2d 380, 382 (5th Cir. 1992)* (court must find that lesser sanctions would not have served the interests of justice).

(n23)Footnote 1. *Fed. R. Civ. P. 16(f)(1).*

(n24)Footnote 2. *Fed. R. Civ. P. 16(f)(2)*; *Kiser v. Boeing Co., 163 F.R.D. 13, 14 (D. Kan. 1995)* .

(n25)Footnote 3. *White v. General Motors Corp., 908 F.2d 675, 683-684 (10th Cir. 1990)* , *cert. denied, 498 U.S. 1069 (1991)* .

(n26)Footnote 4. *Media Duplication Servs. Ltd. v. HDG Software, 928 F.2d 1228, 1242 (1st Cir. 1991)* .

(n27)Footnote 5. *Olcott v. Delaware Flood Co., 76 F.3d 1538, 1557 (10th Cir. 1996)* .

(n28)Footnote 6. *Kiser v. Boeing Co., 163 F.R.D. 13, 15 (D. Kan. 1995)* .

(n29)Footnote 7. *White v. General Motors Corp., 908 F.2d 675, 684-685 (10th Cir. 1990)* , *cert. denied, 498 U.S. 1069 (1991)* .

(n30)Footnote 1. *Fed. R. Civ. P. 16(f)(1)*; *see Fed. R. Civ. P. 37(b)(2)(A)(i)-(iii)*.

(n31)Footnote 2. *Beech Aircraft Corp. v. United States, 51 F.3d 834, 842 (9th Cir. 1995)* ; *In re Maurice, 21 F.3d 767, 771-773 (7th Cir. 1994)* .

(n32)Footnote 3. *Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988)* (testimony of expert witness not identified in pretrial order not precluded when witness was identified in pretrial memoranda, when opposing party deposed witness, and when there was no showing of prejudice).

(n33)Footnote 4. *Geiserman v. MacDonald, 893 F.2d 787, 791 (5th Cir. 1990)* .

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2-18 Moore's Manual--Federal Practice and Procedure § 18.64

§ 18.64 Procedures for Imposition of Sanctionsn*

[1] Requirement of Notice and Opportunity to Be Heard

Before imposing a sanction, a court must give the disobedient party sufficient advance notice and an opportunity to be heard. n1 The requirement of notice and a hearing gives the parties an opportunity to explain the offending conduct before sanctions are imposed and also provides a record for appellate review. n2 The extent of due process required depends on the nature of the alleged misconduct and the severity of the sanction under consideration. n3 The court may provide notice sua sponte by issuing an order to show cause why sanctions should not be imposed, specifying the alleged misconduct; the court may also provide notice after a formal motion of the party requesting that the court impose sanctions. An oral hearing is not required. The court may make a decision on the record before it, provided that the party has had an opportunity to be heard. n4

[2] Determination and Entry of Order

After it has provided due process, the court may make its determination of whether to impose sanctions. Sanctions may be imposed on the judge's own initiative or on motion. n1 In general, the proper time and procedure for imposing sanctions depends on the basis for their imposition and the severity of the sanction. For example, an oral reprimand or warning may be used to deter or reprove courtroom conduct that plainly violates a pretrial order because the order itself gives adequate notice that the offense is unacceptable. This lesser type of sanction should be made promptly after the improper conduct to maximize its deterrent effect so that the court will not need to resort to more severe sanctions. n2

To ensure a complete record for appellate review, the court should memorialize its findings and reasons on the record or in a written order. The findings should identify the objectionable conduct, as well as state the factual and legal reasons for the action taken by the court, including the need for a particular sanction. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.93* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Discon, Inc. v. NYNEX Corp., 4 F.3d 130, 134 (2d Cir. 1993)* .

(n3)Footnote 2. *Newton v. A.C. & S., Inc., 918 F.2d 1121, 1127 (3d Cir. 1990)* (benefits of notice and hearing).

(n4)Footnote 3. *See, e.g., In re Baker, 744 F.2d 1438, 1440 (10th Cir. 1984)* , *cert. denied, 471 U.S. 1014 (1985)* (process due when district court threatens to strike testimony is more substantial than that required for imposition of attorneys' fees and costs related to a deposition).

(n5)Footnote 4. *G.J.B. & Assocs. v. Singleton, 913 F.2d 824, 830 (10th Cir. 1990)* (district court must issue particularized statement on choice of sanctions and identity of sanctioned persons).

(n6)Footnote 1. *Fed. R. Civ. P. 16(f).*

(n7)Footnote 2. *See Chilcutt v. United States, 4 F.3d 1313, 1324 n. 30 (5th Cir.1993)* .

(n8)Footnote 3. *G.J.B. & Assocs. v. Singleton, 913 F.2d 824, 830 (10th Cir. 1990)* .

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PART V Pretrial Stage
CHAPTER 18 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
PART IV. Sanctions for Violation of Pretrial Obligations

2-18 Moore's Manual--Federal Practice and Procedure § 18.65

§ 18.65 Appellate Review of Sanctionsn*

[1] Appealability of Sanction Order

Circuit courts have jurisdiction over appeals only from final decisions in the district courts, n1 The Supreme Court has described a final decision as one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. n2 Therefore, if a sanction order consists of entry of a default judgment or dismissal of an entire complaint, the order is reviewable immediately on appeal. n3 On the other hand, sanctions such as the imposition of monetary expenses on a party or on a party and its attorney, generally are considered interlocutory in nature because there is no final adjudication on the merits of the underlying controversy and are not immediately appealable. n4

To come within the small category of decisions excepted from the final judgment rule under the collateral order doctrine, an interlocutory order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. n5 Even if a sanction order may be appealed separately from the merits of the underlying action, the amount of the sanction must be reduced to a sum certain before review; a sanction order that leaves the amount of the sanction for later determinationis not proper for immediate review. n6

[2] Standard of Review

A decision to impose sanctions is reviewed under an abuse of discretion standard. n1 Because the choice of sanctions lies with the district court, an appellate court may not lightly disturb its decision. n2 Thus, the appellate court will overturn a dismissal sanction only on a definite and firm conviction that the dismissal was clearly outside the acceptable range of sanctions. n3 In determining whether the court abused its discretion, the appellate court must examine the totality of the circumstances, including the specific case under review, the management problems presented to the trial court by the violating conduct, and access and expense problems for parties. n4 Whenever two permissible views of the evidence exist, the fact finder's choice between them is not clearly erroneous. n5

A court abuses its discretion when its decision is based on clearly erroneous factual findings, n6 an incorrect legal standard, n7 or when the court committed a clear error of judgment in its conclusion after weighing the relevant factors. n8 Although sanctions are reviewable under the abuse of discretion standard, appellate courts have reversed sanctions

that are considered too harsh or severe. n9 The factual determinations underlying the imposition of sanctions, such as a finding of willful misconduct, are reviewed under a clearly erroneous standard. n10 Even when a reviewing court determines that a sanction was improperly imposed, the court of appeals will not reverse the judgment in the underlying action if the effect of the sanction constitutes harmless error. For example, if the sanctioned party cannot show that an improper evidence preclusion sanction prevented the party from introducing some material portion of the case, the decision will not be reversed on appeal. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 3 *Moore's Federal Practice, § 16.94* (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1291.*

(n3)Footnote 2. *Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945) .*

(n4)Footnote 3. *Brinkmann v. Abner, 813 F.2d 744, 749 (5th Cir. 1987) .*

(n5)Footnote 4. *DeSisto College, Inc. v. Line, 888 F.2d 755, 761-762 (11th Cir. 1989) , cert. denied, 495 U.S. 952 (1990) .*

(n6)Footnote 5. *Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430-431, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985) .*

(n7)Footnote 6. *Discon, Inc. v. NYNEX Corp., 4 F.3d 130, 132 (2d Cir. 1993) .*

(n8)Footnote 1. *Acuna v. Brown & Root, Inc., 200 F.3d 335, 340 (5th Cir. 2000)* (district court did not abuse discretion in issuing orders requiring plaintiffs to establish certain elements of their claims through expert affidavits and subsequently dismissing cases for failure to comply with orders).

(n9)Footnote 2. *Velazquez-Rivera v. Sea-Land Serv., Inc., 920 F.2d 1072, 1075 (1st Cir. 1990) .*

(n10)Footnote 3. *Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987) , cert. denied, 488 U.S. 819 (1988) .*

(n11)Footnote 4. *Thibeault v. Square D Co., 960 F.2d 239, 246 (1st Cir. 1992) .*

(n12)Footnote 5. *Olcott v. Delaware Flood Company, 76 F.3d 1538, 1558 (10th Cir. 1996) .*

(n13)Footnote 6. *Ayers v. City of Richmond, 895 F.2d 1267, 1269-1270 (9th Cir. 1990) .*

(n14)Footnote 7. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) .*

(n15)Footnote 8. *United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir. 1988) .*

(n16)Footnote 9. *Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1091-1092 (D.N.J. 1992) .*

(n17)Footnote 10. *Ayers v. City of Richmond, 895 F.2d 1267, 1269-1270 (9th Cir. 1990) .*

(n18)Footnote 11. *Ford v. Alfaro, 785 F.2d 835, 839-840 (9th Cir. 1986) .*

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure 19.syn

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART I. USE OF DISMISSALS IN FEDERAL COURT

2-19 Moore's Manual--Federal Practice and Procedure § 19.01

§ 19.01 Nature of Voluntary and Involuntary Dismissalsn*

There are two types of dismissals available in federal district courts: n1 voluntary dismissals n2 and involuntary dismissals. n3 There are two distinctions between the two types of dismissals. First, as the name implies, a voluntary dismissal is one that the plaintiff or other claimant has initiated, or at least the plaintiff has agreed to with the opposition party. n4 On the other hand, an involuntary dismissal is a dismissal that the court or the defendant has initiated because of the fault of the plaintiff, either because the plaintiff has failed to prosecute the claim or to comply with the federal civil rules or any order of the court. n5 The second primary distinction between the two basic types of dismissals concerns the effect of the dismissal. n6 Unless it clearly specifies otherwise, a voluntary dismissal is made without prejudice, which means that the claimant may later reinstitute litigation on the same subject matter and with the same defendant. n7 On the other hand, unless it clearly specifies otherwise an involuntary dismissal is made with prejudice, which means that the dismissal operates as an adjudication on the merits, and the claimant may not refile an action based on the same alleged wrong. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* §§ 41.02, 41.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 296-298 (6th Cir. 1975)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 41(a)*; *see § 19.20* et seq.

(n4)Footnote 3. *See Fed. R. Civ. P. 41(b)*; *see § 19.100* et seq.

(n5)Footnote 4. *See Fed. R. Civ. P. 41(a).*

(n6)Footnote 5. *Fed. R. Civ. P. 41(b).*

(n7)Footnote 6. *See Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325, 1327-1328 (11th Cir. 2004)* (citing **Moore's Federal Practice**).

(n8)Footnote 7. *Fed. R. Civ. P. 41(a).*

(n9)Footnote 8. *Fed. R. Civ. P. 41(b)*; *see Orca Yachts L.L.C. v. Mollicam, Inc., 287 F.3d 316, 319 (4th Cir. 2004)* (when claim or counterclaim is dismissed with prejudice, further action on claim is barred by the doctrine of res judicata).

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART I. USE OF DISMISSALS IN FEDERAL COURT

2-19 Moore's Manual--Federal Practice and Procedure § 19.02

§ 19.02 Governing Rulesn*

[1] Federal Rules Control Methods of Dismissal

Rule 41 establishes a uniform procedure in federal district courts governing the two general types of dismissals of claims, n1 voluntary and involuntary. n2 There are three categories of voluntary dismissals, n3 and only one category of involuntary dismissals. n4 Voluntary dismissals are dismissals (1) initiated by the plaintiff by notice; n5 (2) by the consent of the parties; n6 and (3) by order of the court. n7 Rule 41(b) governs involuntary dismissals, which are dismissals initiated either by the defendant or the court for the plaintiff's failure to prosecute or comply with the federal rules. n8

A plaintiff's right to voluntarily dismiss by notice or stipulation is ordinarily unconditional. However, the voluntary dismissal procedures are subject to restrictions on dismissals in class actions, n9 in actions in which a receiver has been appointed, n10 and when restricted by federal statute. In such actions, the plaintiff must seek court approval for a dismissal. n11 If a federal statute is involved, a voluntary dismissal may be subject to court approval or other conditions depending on the particular statute in question. n12

[2] Federal Dismissal Rule Controls Over Conflicting State Rule

Voluntary dismissals were formerly controlled by state statutes. Rule 41 brought standardization to federal procedure regarding dismissals, n1 and the provisions of Rule 41 now control over conflicting state law. n2 This conclusion follows the general proposition that procedural rules promulgated pursuant to the Federal Rules Enabling Act n3 prevail over state law when such rules only incidentally affect substantive rights and are reasonably necessary to maintain the rules' procedural integrity. n4 Thus, Rule 41 controls the procedure for dismissal of any action pending in federal court, whether the action was originally commenced in federal court or was removed from state court to federal court. n5 However, if a party in federal court is attempting to file an action infederal court that has previously been dismissed in state court according to state court procedure, the federal court will give effect to that state court dismissal. n5.1

Even though federal procedural law controls the procedure for dismissals, provisions of state law that affect substantive rights control in certain cases. For example, when applying a state statute of limitation, a substantive law, a federal court will apply those provisions of the state voluntary dismissal statute that are deemed to be integral to the policies behind

the statute of limitation. n6 Furthermore, a federal court will give res judicata effect to a second voluntary dismissal in state court, if the state has enacted its own version of the "two dismissal rule" (under which a second voluntary dismissal operates as an adjudication on the merits). n6.1 The items of costs payable to a defendant for defending a previously dismissed action may also be determined under state law. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* §§ 41.02, 41.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a),(b).*

(n3)Footnote 2. *D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 296-298 (6th Cir. 1975)* (Rule 41 brought standardization to federal practice regarding voluntary dismissals, which was formerly controlled by state statutes).

(n4)Footnote 3. *See Fed. R. Civ. P. 41(a)*; § 19.20 et seq.

(n5)Footnote 4. *See Fed. R. Civ. P. 41(b)*; § 19.100 et seq.

(n6)Footnote 5. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n7)Footnote 6. *Fed. R. Civ. P. 41(a)(1)(A)(ii).*

(n8)Footnote 7. *See Fed. R. Civ. P. 41(a)(2)*; *see § 19.80.*

(n9)Footnote 8. *Fed. R. Civ. P. 41(b)*; *see § 19.60* et seq.

(n10)Footnote 9. *See Fed. R. Civ. P. 23(e), 23.1(c), 23.2.*

(n11)Footnote 10. *Fed. R. Civ. P. 66.*

(n12)Footnote 11. *See Fed. R. Civ. P. 41(a)(1)(A).*

(n13)Footnote 12. *See § 19.24[2][d].*

(n14)Footnote 1. *D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 296-298 (6th Cir. 1975)* .

(n15)Footnote 2. *Harvey's Wagon Wheel, Inc. v. Van Blitter, 959 F.2d 153, 155 (9th Cir. 1992)* (Rule 41(b) controls over state law); *Kahn v. Sturgil, 66 F.R.D. 487, 491 (M.D.N.C. 1975)* (provisions of Rule 41(d) giving federal court discretion to permit recommencement of voluntarily dismissed suit on payment of costs controlled over state statute which required dismissal where costs of previously dismissed suit had not been paid).

(n16)Footnote 3. *28 U.S.C. § 2072.*

(n17)Footnote 4. *Burlington N. R. Co. v. Woods, 480 U.S. 1, 4-5, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987)* .

(n18)Footnote 5. *See Shah v. Racetrac Petroleum Co., 338 F.3d 557, 565 (6th Cir. 2003)* .

(n19)Footnote 5.1. *Ater v. Follrod, 238 F. Supp. 2d 928, 942 (S.D. Ohio 2002)* .

(n20)Footnote 6. *Scoggins v. Douglas, 760 F.2d 535, 537 (4th Cir. 1985)* (Virginia tolling provision requiring refiling of suit within six months of voluntary dismissal controlled even though dismissal was taken under federal rule).

(n21)Footnote 6.1. *See Ater v. Follrod, 238 F. Supp. 2d 928, 952-954 (S.D. Ohio 2002)* .

(n22)Footnote 7. *Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103, 107 (8th Cir. 1992)* (although expert fees might not be available to prevailing defendant under federal law, defendant could recover them under Rule 41(d) where previously dismissed action was commenced in state court).

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART I. USE OF DISMISSALS IN FEDERAL COURT

2-19 Moore's Manual--Federal Practice and Procedure § 19.03

§ 19.03 Dismissal Rule Applies to All Types of Claimsn*

The federal rule controlling dismissals applies not only to the claim in a complaint but also to any other affirmative claim for relief, such as a dismissal of a counterclaim, cross-claim, or third-party claim. n1 Thus, the rules governing both voluntary and involuntary dismissals apply to dismissals of any of the following types of claims: n2

1. A claim contained in complaint, which is an affirmative pleading that specifies a claim for relief. n3

2. A counterclaim, which is any affirmative claim for relief by a defending party. Thus, a defendant's claim for relief against the plaintiff is a counterclaim. The claims for relief in any counterclaim denominated as such must be answered by the opposition's answer. n4

3. A cross-claim, which is a claim against a person that is aligned on the same side as a co-party in the litigation. n5

4. A third-party claim, which is a claim for relief filed by a defendant against a third-party when the third-party would be secondarily or derivatively liable to the defendant in the event the defendant is held liable to the plaintiff. n6

Rule 41(c) applies to both voluntary dismissals under Rule 41(a) n7 and to involuntary dismissals under Rule 41(b). n8 Rule 41(c) clarifies the time when a defending party may unilaterally dismiss any of its own claims by notice. A defending party may dismiss until the time that the opposition has filed a responsive pleading, n9 or if none is required, until the introduction of evidence at the trial or hearing. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.60 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 41(c)*; *see also Busch v. Doyle, 141 B.R. 432, 434 (D. Utah 1992)* (defendant's motion for voluntary dismissal of counterclaim).

(n3)Footnote 2. *Fed. R. Civ. P. 41(c)*; *see Brown v. Brown, 343 F. Supp. 2d 195, 197 (E.D.N.Y. 2004)* (procedure for dismissals for all types of claims treated precisely the same).

(n4)Footnote 3. *Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1224 (4th Cir. 1998)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 7(a)(3)*.

(n6)Footnote 5. *Fed. R. Civ. P. 13(g)*; *see Wake v. United States, 89 F.3d 53, 62-63 (2d Cir. 1996)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 14(a)(1)*; *see also Watergate Landmark Condominium Unit Owners' Ass'n v. Wiss, Janey, & Elstner, 117 F.R.D. 576, 577 (E.D. Va. 1987)* .

(n8)Footnote 7. *Victory Beauty Supply, Inc. v. La Maur, Inc., 98 F.R.D. 306, 307-308 (N.D. Ill. 1983)* (defendant sought voluntary dismissal by court order under Rule 41(a)(2)).

(n9)Footnote 8. *Sea-Land Service, Inc. v. Banca De Republica De Dominica, 697 F. Supp. 253, 260 (E.D. La. 1988)* (when defendant deliberately failed to prosecute counterclaim, it was properly dismissed under Rule 41(b)).

(n10)Footnote 9. *Fed. R. Civ. P. 41(c)(2)*.

(n11)Footnote 10. *Fed. R. Civ. P. 41(c)(2)*.

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART I. USE OF DISMISSALS IN FEDERAL COURT

2-19 Moore's Manual--Federal Practice and Procedure § 19.04

§ 19.04 Costs for Bringing Previously Dismissed Actionn*

[1] Court Has Discretion to Order Stay

If a plaintiff has dismissed an action but then commences a separate action against the same defendant based on or including the same claim, the court may order the plaintiff to pay all or part of the costs of that previous action. n1 Furthermore, the court may stay the current proceedings until the plaintiff has paid such costs. n1.1 The purpose of the rule is to prevent forum shopping and vexatious litigation. n2 An award of costs is discretionary with the district court. n3 Consequently, the order granting or denying a stay may be overturned on appeal only under the abuse of discretion standard. n4 Furthermore, the grant of a stay of an action pursuant to Rule 41(d) is appealable sinceit effectively keeps the plaintiff out of court. n5

[2] Requirements for Order of Stay

[a] Refiling of Action After Dismissal

The court may award costs Under Rule 41(d) if the first action has been dismissed and a second action has been commenced. Therefore, the court may not impose costs under Rule 41(d) as a condition of dismissing the first action, because there has been no dismissal yet, and no commencement of a second action on the same claim; n1 however, payment of costs may be available as a term or condition for the court's dismissal of an action under Rule 41(a)(2). n2

It is not clear whether Rule 41(d) applies in the situation when a second action has been brought, but the second action was commenced before the first action was dismissed. Some courts have found that although a technical reading of the rule might preclude costs under such circumstances, an award should nonetheless be permitted to promote the underlying purpose of the rule to discourage vexatious litigation. n3 At least one court, has held that the pendency of the first action barred an order of costs, because the costs could have been sought in the first action under Rule 41(a)(2). n4

[b] Voluntary Dismissal of First Action

Under the terms of Rule 41(d), the court may order a stay only when the dismissal in the first case was by the voluntary unilateral act of the plaintiff. Thus, most courts hold that when the first case was an involuntary dismissal, the court may

not order a stay or costs. n5 Some courts, however, have held that the rule does not limit the inherent power of the court to dismiss an action for failure to pay costs incurred in defending an action that was previously the subject of an involuntary dismissal. n6

[c] Second Suit Based on Same Claims Against Same Defendants

A court may condition the filing of a new action on the payment of costs if the action is based on or includes the same claim against the same defendant. The second action need not be identical to the first, provided that there is a substantial identity of claims and parties. n7 The inclusion of new legal claims in the second action does not defeat an award of costs if the operative facts are the same as those in the first suit. n8 Conversely, when the second action is substantially different because, for example, it raises claims that could not have been brought in the prior action or seeks different relief, Rule 41(d) does not apply. n9

Note that there must be identity of defendants in both suits. A party who was not a party to a previous lawsuit incurred no costs with respect to that lawsuit and, accordingly, is not entitled to an award of costs pursuant to Rule 41(d). Such an award would go beyond the objective of Rule 41(d) of preventing repetitive vexatious suits. The addition of new defendants in a second suit, however, does not preclude the court from awarding costs to one who was a party to the previous action, nor does it prevent the court from granting a stay of proceedings pursuant to Rule 41(d) as against all defendants pending payment of an award of costs to the defendant who was named in both the prior and current suits. n10

[3] Factors Considered in Determination Whether to Order Stay

There are numerous factors that the court should consider when determining a motion for a stay or imposition of costs, including: whether the delay will be substantial when a new lawsuit is filed; whether the court believes that the plaintiff is engaging in "forum shopping"; whether the plaintiff or attorney engaged in egregious conduct; whether the plaintiff's conduct has prejudiced and harmed the defendant, monetarily or otherwise; and whether the defendant has expended a great deal of time and incurred very substantial expenses in defending the litigation which was precipitously ended by plaintiff's voluntary act, and the amount of wasted effort because matters that were done during the first litigation will have to be redone in the second lawsuit. n1

The court may deny an order of conditional costs under Rule 41(d) when the plaintiff is financially unable to pay them, or when the plaintiff has acted in good faithand had a legitimate reason for dismissing the prior action. n2 Other courts follow the rule strictly and have stated that the plaintiff's reason for the previous dismissal is irrelevant. n3

[4] Items of Costs That Court May Order

Once the plaintiff has commenced the second action based on the same claim against the same defendant, the court may make any order for the payment of costs of the action previously dismissed as the court deems proper. n1 Under Rule 41(d), the court may require the payment of all of the reasonable costs incurred by the defendant in the first action. n2 Courts have held that the costs available under Rule 41(d) include attorney's fees, as well as the usual items of court costs. n3 In deciding this issue, one court has reasoned that "costs" does not mean only those items that are traditionally considered to be costs in the American legal system. The court found that under the rule the trial court also has discretion to include as costs all attorney's fees reasonably incurred. Otherwise, if the court could impose only costs which a winning party would be entitled to recover under Rule 54(d) and *28 U.S.C. § 1920*, then Rule 41(d) would have no teeth and would be useless; if the court could not impose attorney's fees, the rule would not serve its intended purpose to discourage forum shopping. n4 It has also been held that when the previously dismissed suit was in litigation in state court, the defendant may recover whatever items of costs are compensable under state law, regardless of whether they would be available under federal law. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.70 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(d)(1).*

(n3)Footnote 1.1. *Fed. R. Civ. P. 41(d)(1).*

(n4)Footnote 2. *Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103, 107 (8th Cir. 1992)* (citing **Moore's Federal Practice,** costs may be imposed when prior dismissed action was in state court); *Esquivel v. Arau, 913 F. Supp. 1382, 1386 (C.D. Cal. 1996)* (serves as deterrent to forum shopping).

(n5)Footnote 3. *Larsen v. Senate of the Commonwealth, 955 F. Supp. 1549, 1582 (M.D. Pa. 1997)* (citing **Moore's Federal Practice,** decision whether to stay action and impose costs is within broad discretion of trial court); *Zucker v. Katz, 708 F. Supp. 525, 539 (S.D.N.Y. 1989)* (award of costs from previous litigation is under court's discretion).

(n6)Footnote 4. *Kern v. TXO Production Corp., 738 F.2d 968, 973 (8th Cir. 1984)* (trial court abused its discretion by denying motion to impose costs on plaintiff as condition for suit; appellate court ordered trial court to determine amount of fees and expenses reasonably incurred by defendant up through order of dismissal and to condition voluntary nonsuit on payment of such sum if case was refiled).

(n7)Footnote 5. *See Behrle v. Olshansky, 139 F.R.D. 370, 373-374 (W.D. Ark. 1991) .*

(n8)Footnote 1. *Der v. E. I. Dupont de Nemours & Co., 142 F.R.D. 344, 346 (M.D. Fla. 1992)* (Rule 41(d) applies only to claims that have previously been dismissed and refiled).

(n9)Footnote 2. *Fed. R. Civ. P. 41(a)(2).*

(n10)Footnote 3. *Esquivel v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996) .*

(n11)Footnote 4. *White v. Telelect, Inc., 109 F.R.D. 655, 656-657 (S.D. Miss. 1986) .*

(n12)Footnote 5. *Chang v. Meese, 660 F. Supp. 782, 786 (D.P.R. 1987)* (Rule 41(d) is by its terms applicable only when plaintiff "has once dismissed an action" and does not extend to cases in which there was involuntary dismissal); *Duchardt v. Ewing, 571 F.2d 869, 870 (5th Cir. 1978)* (only if dismissal is voluntary).

(n13)Footnote 6. *Hilgeford v. Peoples Bank, 110 F.R.D. 700, 701-702 (N.D. Ind. 1986)* (citing **Moore's Federal Practice**); *Hacopian v. United States Dep't of Labor, 709 F.2d 1295, 1297 (9th Cir. 1983)* (court's inherent power to order conditional payment of costs in second suit should not be limited by Rule 41(d)).

(n14)Footnote 7. *Esquivel v. Arau, 913 F. Supp. 1382, 1386 (C.D. Cal. 1996)* (costs may be imposed under Rule 41(d) when plaintiff has brought second identical or nearly identical claim and has requested identical or nearly identical relief).

(n15)Footnote 8. *Esquivel v. Arau, 913 F. Supp. 1382, 1387 (C.D. Cal. 1996)* (second action based on same claims as first despite addition of claims for constructive fraud, invasion of privacy, commercial misappropriation, and unfair competition).

(n16)Footnote 9. *Larsen v. Senate of the Commonwealth, 955 F. Supp. 1549, 1582 (M.D. Pa. 1997)* (although plaintiff raised "similar" claims in both actions, district court refused to impose Rule 41(d) costs because some claims in second action could not have been raised in first).

(n17)Footnote 10. *Simeone v. First Bank Nat'l Ass'n, 125 F.R.D. 150, 154 (D. Minn. 1989)* ; *cf. Loubier v. Modern Acoustics, 178 F.R.D. 17, 20-21 (D. Conn. 1998)* (although there was not exact identity of parties, there was sufficient relationship between parties for rule to apply).

(n18)Footnote 1. *See Behrle v. Olshansky, 139 F.R.D. 370, 373-374 (W.D. Ark. 1991)* (court granted motion for stay because it believed that it had no alternative but to make such order for payment of costs of action previously dismissed by plaintiff).

(n19)Footnote 2. *Zucker v. Katz, 708 F. Supp. 525, 539-540 (S.D.N.Y. 1989)* (ordering costs in this case because plaintiff did not raise inability to pay as defense to motion).

(n20)Footnote 3. *Activox Inc. v. Envirotech Corp., 532 F. Supp. 248, 251 (S.D.N.Y. 1981)* (whatever strategy of plaintiff used in dismissing its previous action, under Rule 41(d) it was subject to payment of costs of action previously dismissed).

(n21)Footnote 1. *Fed. R. Civ. P. 41(d).*

(n22)Footnote 2. *Zucker v. Katz, 708 F. Supp. 525, 539 (S.D.N.Y. 1989)* (reasonable costs must be paid, but not necessarily actual costs if they are unreasonable).

(n23)Footnote 3. *Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980)* ; *Esquivel v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996)* .

(n24)Footnote 4. *Behrle v. Olshansky, 139 F.R.D. 370, 373-375 (W.D. Ark. 1991)* .

(n25)Footnote 5. *Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103, 107-108 (8th Cir. 1992)* (when previously dismissed action was commenced in state that did not limit recovery of expert fees, defendant was entitled to such expert fees on commencement of suit in federal court on same claim, even if expert fees would not be available under federal law).

Moore's Manual--Federal Practice and Procedure

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART I. USE OF DISMISSALS IN FEDERAL COURT

2-19 Moore's Manual--Federal Practice and Procedure §§ 19.05through 19.19

[Reserved]

§§ 19.05[Reserved]

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
A. VOLUNTARY DISMISSALS IN GENERAL

2-19 Moore's Manual--Federal Practice and Procedure § 19.20

§ 19.20 Use of Voluntary Dismissal Rulen*

[1] General Purposes for Voluntary Dismissal

The purposes of Rule 41(a), which governs voluntary dismissals of actions, n1 are to authorize a plaintiff to abandon litigation, n2 to take a voluntary nonsuit and start litigation over, provided that the defendant is not hurt, n3 and to regulate the timing, frequency and conditions of such dismissals and, therefore, protect defendants from harassment and prejudice. n4 Thus, Rule 41(a) allows a voluntary dismissal, whether by notice, by stipulation, or by court order, without prejudice to further litigation. n5

While it may seem unusual for a plaintiff to file and then initiate dismissal of an action, there are many reasons a plaintiff may seek a voluntary dismissal without prejudice. One example occurs when the plaintiff wants to take corrective measures to cure defects that might otherwise ultimately cause the failure of the plaintiff's suit. Thus, a plaintiff may want to temporarily end the litigation to accumulate new evidence needed to state or support a claim n6 or to correct the pleadings. n7

Voluntary dismissals are also used for reasons of forum shopping. For example, a plaintiff may request a dismissal to defeat federal subject matter jurisdiction by dismissing federal claims; n8 to avoid unfavorable state law by refiling in a state or federal court in a different jurisdiction; n9 to avoid a particular federal judge by refiling in state court in anticipation that a different judge could be assigned to the case on removal by the defendant; n10 to ensure a trial before a particular federal judge by filing multiple actions and dismissing those that are not assigned to that judge; n11

A plaintiff may also dismiss an action for practical or tactical reasons. For example, the plaintiff may request dismissal to refile a complaint containing a jury demand; n12 delay or avoid discovery; n13 or eliminate a party as a defendant when the party is obstructing settlement negotiations. n14

[2] Plaintiff's Motives for Taking Voluntary Dismissal

A plaintiff's motive for dismissal is generally irrelevant where the dismissal is effected by notice in the early stages of the litigation. n1 Similarly, a dismissal by stipulation of all the parties is usually not subject to judicial review. n2 Once

leave of court is required under Rule 41(a)(2), however, the plaintiff's motive may either defeat the right to dismiss entirely or subject the dismissal to certain conditions. n3 Generally, the court will be less inclined to allow dismissal when the dismissal is sought late in the litigation, n4 when the dismissal is requested to facilitate certain forms of forum shopping, n5 or when it is intended primarily to delay an adverse adjudication on the merits. n6

[3] Defendant's Motives for Opposing Voluntary Dismissal

When a plaintiff takes a voluntary dismissal merely to abandon the litigation, n1 the defendants probably will not oppose dismissal of litigation against them. However, when a plaintiff takes a voluntary dismissal with the intent of later recommencing the action, the defendant may oppose the dismissal for several reasons. For example, the defendant may rather proceed to the merits of the suit and avoid the additional expense and inconvenience of responding to a newaction. In this regard, one of the central purposes behind the enactment of Rule 41(a) was to limit the ability of the plaintiff at common law to potentially harass a defendant through the repeated filing and dismissal of the same litigation. n2

Usually, the defendant's motive for opposing a dismissal will be the converse of the plaintiff's motive for taking it. This is because a plaintiff will tend to dismiss actions that do not look promising, while a defendant generally will want to obtain an adjudication on the merits in precisely such a case. n3 For example, a defendant may prefer the litigation to take place in the original forum instead of in another where the plaintiff could refile, and when the forum shopping involves a choice between federal and state jurisdictions, the dismissal is often precipitated by the defendant's prior removal of the action to federal court. n4 In another example, the defendant may want to complete discovery quickly and proceed to trial against a possibly unprepared adversary. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.10 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a).*

(n3)Footnote 2. *Lapierre v. Executive Indus., 117 F.R.D. 328, 329 (D. Conn. 1987)* (under Rule 41(a)(2), plaintiff that has filed suit may review claims, determine merits of claims, and dismiss claims rather than face adverse judgment and subsequent award of costs).

(n4)Footnote 3. *See McCall-Bey v. Franzen, 777 F.2d 1178, 1184 (7th Cir. 1985)* ; *see Fed. R. Civ. P. 41(a).*

(n5)Footnote 4. *Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971)* (court may allow dismissal only at early stage of litigation); *Harvey Aluminum Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953)* , *cert. denied, 345 U.S. 964 (1953)*

(n6)Footnote 5. *Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180, 1190 (8th Cir. 1984)* .

(n7)Footnote 6. *Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987)* .

(n8)Footnote 7. *Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* (note, however, that when plaintiff seeks temporary dismissal of fewer than all claims, dismissal may be treated as amendment of pleadings).

(n9)Footnote 8. *Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1393 (9th Cir. 1988)* .

(n10)Footnote 9. *Manshack v. Southwestern Electric Power Co., 915 F.2d 172, 173 (5th Cir. 1990)* .

(n11)Footnote 10. *Jorgensen v. Prudential Ins. Co., 852 F. Supp. 255, 260 (D.N.J. 1994)* .

(n12)Footnote 11. *Murray v. Sevier, 145 F.R.D. 563, 563-564 (D. Kan. 1993)* .

(n13)Footnote 12. *Paturzo v. Home Life Ins. Co., 503 F.2d 333, 335-336 (4th Cir. 1974)* .

(n14)Footnote 13. *Greguski v. Long Island R.R., 163 F.R.D. 221, 223-224 (S.D.N.Y. 1995)* .

(n15)Footnote 14. *Aggregates (Carolina), Inc. v. Kruse, 134 F.R.D. 23, 24 (D.P.R. 1991)* .

(n16)Footnote 1. *See, e.g., Merit Ins. Co. v. Leatherby Ins. Co., 581 F.2d 137, 142-143 (7th Cir. 1978)* .

(n17)Footnote 2. *Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 81 fn. 21 (3d Cir. 1994)* .

(n18)Footnote 3. *Brooks v. State Bd. of Elections, 173 F.R.D. 547, 549 (S.D. Ga. 1997)* .

(n19)Footnote 4. *Philan Ins., Ltd. v. Frank B. Hall & Co., 786 F. Supp. 345, 349 (S.D.N.Y. 1992)* (voluntary dismissal of certain claims denied when litigation had been pending more than four years).

(n20)Footnote 5. *Anders v. FPA Corp., 164 F.R.D. 383, 387 (D.N.J. 1995)* (plaintiff advanced arguments to show that it had acted in good faith and had not engaged in forum-shopping).

(n21)Footnote 6. *Williams v. Ford Motor Credit Co., 627 F.2d 158, 159 (8th Cir. 1980)* (district court abused discretion in granting dismissal when plaintiff anticipated that court would grant defendant's motion for judgment notwithstanding verdict).

(n22)Footnote 1. *See, e.g., Lapierre v. Executive Indus., 117 F.R.D. 328, 329 (D. Conn. 1987)* .

(n23)Footnote 2. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397, 110 S. Ct. 2447, 110 L. Ed. 2d 359, 377 (1990)* .

(n24)Footnote 3. *Thorp v. Scarne, 599 F.2d 1169, 1171-1176 (2d Cir. 1979)* .

(n25)Footnote 4. *See, e.g., American Nat'l Bank & Trust Co. v. Bic Corp., 931 F.2d 1411, 1412 (10th Cir. 1991)* .

(n26)Footnote 5. *See, e.g., Greguski v. Long Island R.R., 163 F.R.D. 221, 223-224 (S.D.N.Y. 1995)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
A. VOLUNTARY DISMISSALS IN GENERAL

2-19 Moore's Manual--Federal Practice and Procedure § 19.21

§ 19.21 Three Categories of Voluntary Dismissaln*

A voluntary dismissal is an option that may be used by the plaintiff to either abandon a civil action or to voluntarily dismiss and start a civil action over. The plaintiff may take a voluntary dismissal provided that the defendant is not adversely affected. n1 Thus, by complying with the voluntary dismissal procedure, the plaintiff may freely dismiss an action without prejudice. n2 This means that the plaintiff has the ability to bring a new action provided the dismissal is taken before the defendant has answered the complaint or moved for summary judgment. n3

There are three distinct methods of voluntary dismissal of a claim. In the first two methods, the claimant has a right to dismissal. n4 When using the third method, the claimant must have the voluntary dismissal approved by court order. n5 More specifically, the three methods of voluntary dismissal are: n5.1 (1) voluntary dismissals initiated by the plaintiff by notice; n6 (2) voluntary dismissal effected by the stipulation of the parties; n7 and (3) voluntary dismissal effected by approval and order of the court. n8 The plaintiff may dismiss an action without the court's permission under the first two categories which are specified in Rule 41(a)(1), dismissal by notice and dismissal by stipulation, n9 but must have the court's permission in order to obtain a dismissal under the third category specified in Rule 41(a)(2). n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Echols v. EBA Krug & Priester GmbH & Co., 225 F.R.D. 518, 519-520 (E.D.N.C. 2005)* ; *Fed. R. Civ. P. 41(a).*

(n3)Footnote 2. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505-506, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

(n4)Footnote 3. *Fed. R. Civ. P. 41(a)(1)(A)(i)*; *see* Medina v. New York State Dep't of Corr. Servs., 03 Civ. 9249 (RWS) *2004 U.S. Dist. LEXIS 21485, *5 (S.D.N.Y. 2004)* .

(n5)Footnote 4. *Fed. R. Civ. P. 41(a)(1)*.

(n6)Footnote 5. *Fed. R. Civ. P. 41(a)(2)*.

(n7)Footnote 5.1. *Loubier v. Modern Acoustics, 178 F.R.D. 17, 21 (D. Conn. 1998)* .

(n8)Footnote 6. *See Fed. R. Civ. P. 41(a)(1)(A)(i)*; *see § 19.40*.

(n9)Footnote 7. *See Fed. R. Civ. P. 41(a)(1)(A)(ii)*; § 19.60.

(n10)Footnote 8. *See Fed. R. Civ. P. 41(a)(2)*; § 19.80.

(n11)Footnote 9. *See Fed. R. Civ. P. 41(a)(1)*.

(n12)Footnote 10. *See Fed. R. Civ. P. 41(a)(2)*; *Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987)* (requires plaintiff to move for leave to dismiss by order of court).

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A. VOLUNTARY DISMISSALS IN GENERAL

2-19 Moore's Manual--Federal Practice and Procedure § 19.22

§ 19.22 Voluntary Dismissal Must Terminate Action Against At Least One Partyn*

[1] Plaintiff Must Dismiss All Claims Against Defendant

The voluntary dismissal rule refers to dismissal of an "action" rather than a "claim." n1 Consequently, to use the voluntary dismissal procedure, a party must dismiss all of that party's claims against at least one defending party. n2 Even though the rule does not refer to dismissal of a "defendant," courts have held that to terminate an action, at least one defending party must be entirely dismissed. n3 This interpretation is based on the fact that the language of the rule only refers to dismssal of an action, and if the drafters intended to authorize the involuntary dismissal of individual claims instead of the entire action, they could have clearly stated the rule in that language. n4 Another reason for the principle is the general policy of the federal rules to avoid piecemeal dismissals. n5

Consequently, if a claimant wants to dismiss less than all claims against a defendant, the plaintiff should not file a Rule 41(a) motion for voluntary dismissal, but shouldabandon the claim by amendment of the complaint under Rule 15(a). n6 However, if some of the claims against a defendant have previously been dismissed by court order, the plaintiff may voluntarily dismiss all of the remaining claims because the claims remaining after a partial dismissal are deemed to comprise the entire "action" as against that one defendant for Rule 41(a)(1) purposes. n7

[2] Dismissal of Fewer Than All Claims By Amendment

Because the courts have held that a plaintiff or other party that has filed claims for relief may not dismiss under Rule 41(a) fewer than all claims against any defendant, n1 the claimant wishing to dismiss fewer than all claims must amend its complaint or other pleading under Rule 15(a). n2 There are several differences between the rules that become significant under some circumstances. First, in the early stages of the litigation, Rule 15(a) amendment as of right is available longer than dismissal as of right. Entitlement to amendment as of right is cut off only by an answer, n3 while right to a unilateral dismissal by the filing of a notice without leave of court is extinguished by the service of either a summary judgment motion or an answer. n4 Thus, a claim may be deleted by amendment after service of a motion for summary judgment, while voluntary dismissal could not be taken after such a motion. n5

In later stages of an action, the consequences of a purported voluntary dismissal of a claim may differ when the deletion

is deemed an amendment rather than a dismissal. For example, appellate jurisdiction may be lost when the claims dismissed form the basis for federal jurisdiction as the resulting "amended pleading" which omits the claim will no longer arise under federal law. n6

Otherwise, courts have noted that the rules have the same effect: both rules are addressed to the discretion of the court when leave is required, require that leave be granted freely unless the defendant is prejudiced, and permit the court to deny leave or impose curative conditions if leave is granted. Also, both rules leave the parties in the same legal position with respect to the claims as if they had never been filed; and the withdrawal of the action is without prejudice. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 41(a).*

(n3)Footnote 2. *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 688 (9th Cir. 2005)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *DIRECTV, Inc. v. Benson, 333 F. Supp. 2d 440, 443 (M.D.N.C. 2004)* (noting that to dismiss action, claimant need not dismiss all of named defending parties).

(n5)Footnote 4. *New W. Urban Renewal Co. v. Viacom, Inc., 230 F. Supp. 2d 568, 571 (D.N.J. 2002)* (citing **Moore's Federal Practice** for authority that rule applies to dismissals of entire actions and not to individual claims).

(n6)Footnote 5. *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 687-688 (9th Cir. 2005)* (citing **Moore's Federal Practice**).

(n7)Footnote 6. *See* [2], *below*; *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 687-688 (9th Cir. 2005)* .

(n8)Footnote 7. *Wilson-Cook Medical, Inc. v. Wilson, 942 F.2d 247, 251 (4th Cir. 1991)* .

(n9)Footnote 1. *See* [1], *above*.

(n10)Footnote 2. *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 687-688 (9th Cir. 2005)* (citing **Moore's Federal Practice**).

(n11)Footnote 3. *See Fed. R. Civ. P. 15(a).*

(n12)Footnote 4. *Fed. R. Civ. P. 41(a).*

(n13)Footnote 5. *See Fed. R. Civ. P. 41(a).*

(n14)Footnote 6. *Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* .

(n15)Footnote 7. *Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1364-1365 (Fed. Cir. 2000)* (citing **Moore's Federal Practice**).

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2-19 Moore's Manual--Federal Practice and Procedure § 19.23

§ 19.23 Rule Permits Dismissal of Fewer Than All Defending Parties or Claiming Partiesn*

[1] General Rule

A claimant may take a voluntary dismissal against fewer than all defending parties in an action, n1 provided that when a voluntary dismissal is taken against a defendant all claims against that defendant are dismissed. n2 In other words, the term "action" does not mean the entire controversy (all claims against all parties pending before the district court), rather, only the totality of claims against any single defendant. n3 When a dismissal of an action is sought with respect to fewer than all defendants, all defendants are entitled to notice, and the request for dismissal should be made by motion served on all parties who have appeared. n4

Under the same rationale authorizing the dismissal of fewer than all defending parties, courts have held that Rule 41(a) permits fewer than all plaintiffs to withdraw from an action. n5 The same requirements also apply. Thus, the notice of dismissal of two, but less than all plaintiffs, was effective to dismiss the action as to the two plaintiffs, because each plaintiff in the diversity action had separate and distinct claims and because the defendants had filed neither answers nor motions for summary judgment. n6

[2] Voluntary Dismissal of Nondiverse Parties

As noted above, n1 Rule 41(a) permits dismissal of less than all of the opposition parties. Consequently, a dispensable nondiverse party may be voluntarily dismissed to preserve a court's diversity jurisdiction. n2 A party could achieve the same effect by dropping a party under Rule 21 n3 or by amending the complaint to delete the nondiverse party under Rule 15(a) n4 Courts considering the question have noted that which one ofthese procedural rules is used to preserve jurisdiction is generally immaterial. n5

[3] Voluntary Dismissal of Misjoined Parties Permissible

The general rule is that a party may take a voluntary dismissal to eliminate misjoined parties. Although Rule 21 specifically governs the dropping of misjoined parties, its provisions do not necessarily preclude like dismissals under Rule 41 or Rule 15(a). n1 However Rule 41(a) differs from Rule 21 in that early in the litigation, a voluntary dismissal

may be effected under Rule 41(a) without leave of court by notice or stipulation. n2 On the other hand, Rule 21 always requires a court order to drop a party. n3 Thus, because either rule may be employed to eliminate a party, a plaintiff may avoid the necessity of a motion by proceeding under Rule 41(a) when available early in the litigation. On the other hand, because voluntary dismissal is no longer available as of right after service of a summary judgment motion, a plaintiff still desiring to dismiss another party unilaterally at that point may resort to amendment under Rule 15(a), which is available until the service of an answer. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Letherer v. Alger Group, L.L.C., 328 F.3d 262, 266 (6th Cir. 2003)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *See § 19.22[1].*

(n4)Footnote 3. *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 687 (9th Cir. 2005)* .

(n5)Footnote 4. *Slotkin v. Brookdale Hospital Center, 377 F. Supp. 275, 279 (S.D.N.Y. 1974)* .

(n6)Footnote 5. *Koefoot v. American College of Surgeons, 652 F. Supp. 882, 895 (N.D. Ill. 1986)* (granting motion of two of several antitrust plaintiffs to withdraw on eve of trial).

(n7)Footnote 6. *Miller v. Stewart, 43 F.R.D. 409, 412-413 (E.D. Ill. 1967)* (court denied motion to vacate notice of dismissal filed by only two of five plaintiffs).

(n8)Footnote 1. *See* [1], *above.*

(n9)Footnote 2. *Bumberger v. Insurance Co. of N. Am., 952 F.2d 764, 766-767 (3d Cir. 1991)* (noting that plaintiff could voluntarily dismiss defendant's insurer under Rule 41(a) to preserve diversity jurisdiction if on remand district found insurer was dispensable party).

(n10)Footnote 3. *See Fed. R. Civ. P. 21.*

(n11)Footnote 4. *Fed. R. Civ. P. 15(a).*

(n12)Footnote 5. *Brown v. Texas & Pac. R.R. Co., 392 F. Supp. 1120, 1123 (W.D. La. 1975)* .

(n13)Footnote 1. *Allen v. Indeck Corinth L.P., 161 F.R.D. 233, 235 (N.D.N.Y. 1995)* (court allowed voluntary dismissal because prejudice would not result to other party).

(n14)Footnote 2. *Fed. R. Civ. P. 41(a)(1).*

(n15)Footnote 3. *Fed. R. Civ. P. 21.*

(n16)Footnote 4. *See Fed. R. Civ. P. 15(a).*

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
A. VOLUNTARY DISMISSALS IN GENERAL

2-19 Moore's Manual--Federal Practice and Procedure § 19.24

§ 19.24 Determination Whether Court Order Requiredn*

[1] Two Methods for Voluntary Dismissal Without Court Order

A plaintiff may use two methods to voluntarily dismiss an action without filing a motion or obtaining an order of the court. First, the plaintiff may unilaterally dismiss an action by filing a notice of dismissal with the district court before the person defending the claim files an answer or a motion for summary judgment. n1 Second, the plaintiff may file a stipulation signed by all the parties at any time. n2 These two methods are the exclusive means of terminating an action as of right, in other words, without approval or court order. n3

If the claiming party takes any other unilateral action, the action may not be effective as a dismissal, even if it indicates an intent to abandon the litigation or a particular claim. n4 Thus, a plaintiff who has attempted to voluntarily dismiss all claims and withdraw as a party without following the statutory procedures may later be bound by the res judicata effect of a judgment in the action. n5 Similarly, a plaintiff who has requested dismissal of a claim without complying with Rule 41 may not object to the admission of evidence relevant to that claim at trial. n6 Conversely, a defendant may not assert that plaintiff's conduct effected a dismissal when neither a notice of dismissal nor a stipulation has been filed. n7

[2] Exceptions to Unilateral Right to Voluntarily Dismiss

[a] Court Approval Required in Certain Types of Cases

A plaintiff's right to voluntarily dismiss by notice or stipulation is normally absolute and unconditional when the defending party has not yet served an answer or a summary judgment motion. n1 However, Rule 41(a)(1) provides that such dismissals by notice or stipulation are subject to Rules 23(e), 23.1(c), and 23.2 (class actions), n2 Rule 66 (actions involving receivers), n3 and any statute of the United States. n4 When Rule 41(a)(1) is read together with these rules and statutes, the claims specified in these rules or statutes may not be dismissed or settled at any time without approval of the court. n5

[b] Class Actions

Unlike an ordinary claim which may be voluntarily dismissed by mere notice to the court or by stipulation, a class claim may ordinanly not be dismissed or settled withoutcourt approval. n6 In particular, once a class action claim has been filed in the district court, even proposed class actions not yet certified by the court must have court approval for settlement. n7 Additionally, court approval is required even in cases where it is clear that the dismissal will not adversely affect the rights of absent class members. n8

Despite the need for a court order to dismiss a class action, it has been held that the standard for court-ordered dismissals under Rule 41(a)(2) is not mandatory. When the motion is made prior to the service of an answer or motion for summary judgment, the motion is still treated as one under 41(a)(1), subject only to the Rule 23(e) inquiry concerning whether the plaintiff class would be prejudiced. n9 Therefore, the court may not consider, as it must under Rule 41(a)(2), whether the defendant would be prejudiced by the dismissal, and may not impose conditions on behalf of the defendants; n10 rather, the court may only impose conditions on behalf of the plaintiff class. n11 After an answer or motion for summary judgment has been served, however, the court may consider both the prejudice to the defendants under Rule 41(a)(2) and the prejudice to the plaintiff class under Rule 23(e). n12

The Federal Rules also limit the right to dismiss two types of class actions not governed by Rule 23. Under Rule 23.1, a shareholders' derivative action must not be dismissed or compromised without the approval of the court. n13 Similarly, under Rule 23.2, an action brought by or against the members of an unincorporated association must not be dismissed or compromised without the approval of the court. n14

[c] Actions Involving Receivers

Although a plaintiff's right to a voluntary dismissal by notice or stipulation is ordinarily unconditional, under Rule 41(a)(1), the dismissal procedures are subject to the provisions of Rule 66. n15 Consequently, in actions in which a receiver has been appointed, the action may not be dismissed except by order of the court. n16 Thus, in one case, the United States as the plaintiff and the defendant were not allowed to voluntarily dismiss a foreclosure action without approval of the court because a receiver involved did not agree or consent to the proposed settlement and Rule 66 required court approval prior to dismissal of any aspect of the litigation. n17

[d] Statutes Controlling Dismissal

Various statutes in the United States Code limit a plaintiff's right to voluntarily dismiss certain types of actions, and Rule 41(a)(1) provides that dismissals by notice or stipulation are subject to such statutes. Consequently, if a statute specifies that dismissal of an action requires court approval, it means that court approval is necessary even before the defending party files an answer or motion for summary judgment. For example, the Clayton Act n18 provides that actions under section 15c(a)(1), which permits state attorneys general to prosecute antitrust actions on behalf of state residents, must not be dismissed or compromised without the approval of the court. n19

The False Claims Act, n20 provides that a civil "qui tam" action brought by a private person on behalf of the United States may not be dismissed unless the court and the Attorney General give written consent to the dismissal and their reasons for consenting to the dismissal. n21 Also, when the government moves for a voluntary dismissal, the original plaintiff is entitled to notice and a hearing. n22 It has been held, however, that the consent of the Attorney General is required only where a plaintiff seeks voluntary dismissal under Rule 41(a)(1), and not where the court orders an involuntary dismissal. n23

In another example, the Immigration and Nationality Act provides that no suit or proceeding for a violation of the Act may be settled, compromised, or discontinued without the consent of the court and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor. n24

[3] Voluntary Dismissal With Court Order

A party making a claim may request a voluntary dismissal by court order n0.1 when a voluntary dismissal is no longer available as of right because the defending party has already filed an answer or motion for summary judgment, n1 and the party making theclaim cannot obtain consent to a stipulated dismissal. n2 The purpose of a Rule 41(a)(2) voluntary dismissal is to permit the plaintiff to take a voluntary nonsuit and start over, provided that the defending party is not prejudiced. n3 The court may avoid prejudice to the defendant, even though the voluntary dismissal is requested later in the case than a dismissal as of right by exercising its discretion to make three determinations: whether or not to grant the dismissal; if so, whether to grant the dismissal with or without prejudice; and what conditions, if any, should be imposed on the dismissal. n4 For a complete discussion of a voluntary dismissal granted by court order, see *§ 19.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.30 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(i)*; *see § 19.40* et seq.

(n3)Footnote 2. *Fed. R. Civ. P. 41(a)(1)(A)(ii)*; *see § 19.60* et seq.

(n4)Footnote 3. *Camacho v. Mancuso, 53 F.3d 48, 51-52 (4th Cir. 1995)* (under Federal Rules of Civil Procedure, these are only two ways in which plaintiff may dismiss an action without consent of court).

(n5)Footnote 4. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407, 1413 (8th Cir. 1983)* (plaintiff's nonrenewal of attorney's contract and passage of resolution to pursue constitutional remedies to recover land instead of money damages against United States was unilateral action insufficient to constitute withdrawal from proceedings, when plaintiff admittedly failed to follow either method for voluntary dismissal under Rule 41(a)).

(n6)Footnote 5. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407, 1413-1414 (1983)* (tribe bound by $100 million judgment in prior action and precluded from suing to recover lands).

(n7)Footnote 6. *Paturzo v. Home Life Ins. Co., 503 F.2d 333, 336 (4th Cir. 1974)* (when plaintiff's attempt to voluntarily dismiss without prejudice claim for dividend was denied, plaintiff was required either to present evidence or suffer consequences of failure to do so; because plaintiff adduced no evidence to support dividend claim court appropriately decided claim against plaintiff).

(n8)Footnote 7. *G. A. Thompson & Co. v. Partridge, 636 F.2d 945, 951-952 (5th Cir. 1981)* .

(n9)Footnote 1. *American Soccer Co. v. Score First Enters., 187 F.3d 1108, 1110 (9th Cir. 1999)* .

(n10)Footnote 2. *Fed. R. Civ. P. 41(a)(1)(A)*; *see* [b], *below*.

(n11)Footnote 3. *Fed. R. Civ. P. 41(a)(1)(A)*; *see* [c], *below*.

(n12)Footnote 4. *Fed. R. Civ. P. 41(a)(1)(A)*; *see* [d], *below*.

(n13)Footnote 5. *Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995)* (public interest in

class actions requires court approval for dismissal); *Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986)* (with some stipulated dismissals, such as class actions, court approval is required, and judge must determine whether the settlement is fair, adequate, and reasonable).

(n14)Footnote 6. *Fed. R. Civ. P. 41(a)(1)*; *see Fed. R. Civ. P. 23(e), 23.1(c), 23.2*; *Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995)* .

(n15)Footnote 7. *Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995)* .

(n16)Footnote 8. *Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995)* (public interest in class actions requires court approval for dismissal).

(n17)Footnote 9. *In re Phillips Petroleum Sec. Litigation, 109 F.R.D. 602, 605 (D. Del. 1986)* (dismissal under 41(a)(2) is at discretion of court).

(n18)Footnote 10. *Clarkson Gen. Hosp., Ltd. v. American Tel. & Tel. Co., 93 F.R.D. 497, 499-502 (E.D. Pa. 1982)* .

(n19)Footnote 11. *In re Phillips Petroleum Sec. Litigation, 109 F.R.D. 602, 605-607 (D. Del. 1986)* .

(n20)Footnote 12. *Wimber v. Department of Social & Rehabilitation Servs., 156 F.R.D. 259, 260 (D. Kan. 1994)* .

(n21)Footnote 13. *Fed. R. Civ. P. 23.1*.

(n22)Footnote 14. *See Fed. R. Civ. P. 23.2*; *see also Fed. R. Civ. P. 23(e)*.

(n23)Footnote 15. *Fed. R. Civ. P. 41(a)(1)*; *see Fed. R. Civ. P. 66*.

(n24)Footnote 16. *See Fed. R. Civ. P. 66*.

(n25)Footnote 17. *United States v. Mansion House Center North, 95 F.R.D. 515, 517 (E.D. Mo. 1982)* .

(n26)Footnote 18. *15 U.S.C. § 15c et seq*.

(n27)Footnote 19. *15 U.S.C. § 15c(c)*.

(n28)Footnote 20. *31 U.S.C. § 3729 et seq*.

(n29)Footnote 21. *31 U.S.C. § 3729 et seq*.

(n30)Footnote 22. *United States v. TRW, Inc., 4 F.3d 417, 425 (6th Cir. 1993)* .

(n31)Footnote 23. *Minotti v. Lensink, 895 F.2d 100, 102-103 (2d Cir. 1990)* .

(n32)Footnote 24. *8 U.S.C. § 1329*.

(n33)Footnote 0.1. *See Fed. R. Civ. P. 41(a)(2)*.

(n34)Footnote 1. *See Fed. R. Civ. P. 41(a)(1)(A)(i)*.

(n35)Footnote 2. *See Fed. R. Civ. P. 41(a)(1)(A)(ii)*.

(n36)Footnote 3. *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274 (5th Cir. 1990)* .

(n37)Footnote 4. *Spencer v. Moore Business Forms, Inc., 87 F.R.D. 118, 119 (N.D. Ga.. 1980)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
A. VOLUNTARY DISMISSALS IN GENERAL

2-19 Moore's Manual--Federal Practice and Procedure §§ 19.25through 19.39

[Reserved]

§§ 19.25[Reserved]

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
B. VOLUNTARY DISMISSAL BY FILING OF NOTICE

2-19 Moore's Manual--Federal Practice and Procedure § 19.40

§ 19.40 Nature of Voluntary Dismissaln*

[1] Absolute Right to Dismiss

A plaintiff or other claimant may dismiss an action by filing a notice of dismissal at any time before the adverse defending party serves an answer or a motion for summary judgment. n1 Rule 41(a)(1) provides for "automatic dismissal" without court order, provided that the plaintiff files a notice of voluntary dismissal before the defendant has either answered or moved for summary judgment. n2 The purpose of allowing unilateral voluntary dismissal by notice is to provide the plaintiff or other claimant with the right to reconsider and dismiss an action for whatever reason but only when the dismissal occurs at a sufficiently early stage of the litigation so that the defendant is not harmed by making useless trial preparation. n3 Voluntary dismissal by notice provides the exclusive method by which a plaintiff may dismiss an action without the consent of the court or any other party. Although the rule may not be invoked by a defendant to dismiss the plaintiff's action, it is available to defendants who wish to dismiss their own claims through Rule 41(c). n4

Because it is assumed that it takes place at a time that the defending party will not be harmed, courts have stated that a plaintiff's right to file a notice of dismissal before the service of an answer or motion for summary judgment is absolute n5 and unconditional. n6 Thus, the plaintiff's motive for filing the notice is irrelevant. n7 Furthermore, the court may not prohibit the filing of a timely notice of dismissal n8 or vacate a timely and properly filed notice. n9

[2] Court May Not Impose Conditions on Dismissal by Notice

The unconditional nature of the voluntary dismissal by notice is based on the fact that, unlike Rule 41(a)(2), Rule 41(a)(1) does not contain a provision authorizing the imposition of terms and conditions on a dismissal. Thus, the trial court lacks power to impose any conditions on a dismissal made by notice. n1 For example, the court may not direct that the dismissal be with prejudice; n2 even if the prejudice would extend only to refiling in the same circuit. n3 Furthermore, a court may not require the payment of attorney's fees or costs as a condition of dismissal. n4 However, even if the court may not impose conditions on the actual dismissal by notice, the court may prohibit the refiling of the dismissed complaint if it is frivolous within the meaning of Rule 11. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n3)Footnote 2. *Medina v. New York State Dep't of Corr. Servs., 2004 U.S. Dist. LEXIS 21485, at *7 (S.D.N.Y. 2004)* .

(n4)Footnote 3. *Swedberg v. Marotzke, 339 F.3d 1139, 1142 (9th Cir. 2003)* ; *In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 220 (8th Cir. 1977)* (rule allows unilateral dismissal only up to point at which resources of court and defendant are committed to extent that preclusive consequences must be imposed for dismissal).

(n5)Footnote 4. *See Fed. R. Civ. P. 41(c)*; *see also Victory Beauty Supply, Inc. v. La Maur, Inc., 98 F.R.D. 306, 307-308 (N.D. Ill. 1983)* (defendant was required to seek voluntary dismissal by court order under Rule 41(a)(2) because responsive pleading had already been filed).

(n6)Footnote 5. *Janssen v. Harris, 321 F.3d 998, 1001-1001 (10th Cir. 2003)* ; *Carter v. United States, 547 F.2d 258, 259 (5th Cir. 1977)* .

(n7)Footnote 6. *Janssen v. Harris, 321 F.3d 998, 1001 (10th Cir. 2003)* ; *see Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries, Inc., 198 F.3d 685, 689 (8th Cir. 1999)* .

(n8)Footnote 7. *Merit Ins. Co. v. Leatherby Ins. Co., 581 F.2d 137, 142-143 (7th Cir. 1978)* (stating that courts have allowed dismissals even when there is indication that plaintiffs are attempting to avoid litigation in particular forum).

(n9)Footnote 8. *Williams v. Ezell, 531 F.2d 1261, 1263 (5th Cir. 1976)* .

(n10)Footnote 9. *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 545 (4th Cir. 1993)* .

(n11)Footnote 1. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010 (10th Cir. 2004)* (court loses jurisdiction at time notice of dismissal is filed and may not reinstate dismissed action); *Janssen v. Harris, 321 F.3d 998, 1001 (10th Cir. 2003)* (at time valid notice of dismissal is filed, district court loses jurisdiction over dismissed claims and may not issue further orders pertaining to claims); *American Soccer Co. v. Score First Enters., 187 F.3d 1108, 1110 (9th Cir. 1999)* (plaintiff has absolute right to voluntarily dismiss action if defending party has not yet served answer or summary judgment motion, and this absolute right leaves no room for court to take any action).

(n12)Footnote 2. *Brackett v. State Highways & Transp. Commission of Mo., 163 F.R.D. 305, 306-307 (W.D. Mo. 1995)* .

(n13)Footnote 3. *Scam Instrument Corp. v. Control Data Corp., 458 F.2d 885, 886-887 (7th Cir. 1972)* .

(n14)Footnote 4. *Williams v. Ezell, 531 F.2d 1261, 1264 (5th Cir. 1976)* (reversing grant of motion for attorney's fees made after improper denial of pre-answer motion for voluntary dismissal).

(n15)Footnote 5. *See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396-398, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
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B. VOLUNTARY DISMISSAL BY FILING OF NOTICE

2-19 Moore's Manual--Federal Practice and Procedure § 19.41

§ 19.41 Format Requirements of Noticen*

The voluntary dismissal notice must meet all of the requirements listed below to constitute proper notice under the rule:

1. Written notice. The party who filed the claim for relief must "file" a voluntary dismissal notice for the claim; n1 therefore the person must use a written document. Oral notice or other conduct indicating a request for voluntary dismissal is not sufficient. n2

2. Indication of intent to dismiss. Rule 41(a)(1)(A)(i) does not prescribe the precise label or form of a notice of voluntary dismissal. n2.1 The fact that the claimant does not label the document a "notice of dismissal" is generally harmless if the intent is clear, n2.2 and the plaintiff does not request any additional action by the court. n3 Therefore, if a claimant designates the notice as a "motion to dismiss" or a "request for dismissal" it is still effective as notice. n4 Furthermore, the failure to make specific reference to Rule 41(a)(1)(i) in the notice is not a defect that makes the notice ineffective. n5

3. Notice may not contain conditions. The plaintiff may not include any conditions in the notice of dismissal. The rule was intended to provide a speedy, automatic method of terminating an action, and a conditional notice of dismissal would require the clerk of the court to perform more than the ministerial act of closing the file, in that the clerk would have to determine whether the condition was met. n6 It is not advisable to include the reasons for the dismissal in the text of the notice or in an accompanying affidavit; however, unless it actually imposes a condition, it is still effective as a notice. n7

4. Statement regarding prejudice. Although a notice of dismissal may not contain conditions, as specified in item 3, above, the plaintiff may provide in the notice that the dismissal is with prejudice, n8 because Rule 41(a)(1)(B) provides that a dismissal by notice is presumptively without prejudice, n8.1 and that the claimant may provide for the contrary effect by otherwise stating it in the notice of dismissal. n9

5. Statement regarding persons who are objects of dismissal. The plaintiff should specify which

defendants are the objects of the dismissal, n10 if it is effective against fewer than all defendants. n11 A partial notice of dismissal is permitted because an "action" may be dismissed by eliminating all of the claims against a single defendant, without dismissing all claims against all defendants. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 41(a)(1)(A).*

(n3)Footnote 2. *G. A. Thompson & Co., Inc. v. Partridge, 636 F.2d 945, 951-952 (5th Cir. 1981)* (plaintiff's statement at unrecorded conference on first day of trial that it would only pursue one claim did not constitute voluntary dismissal of other claims because plaintiff did not follow procedures of Rule 41(a)(1)).

(n4)Footnote 2.1. *See Logan v. Burgers Ozark Country Cured Hams, Inc., 263 F.3d 447, 453 (5th Cir. 2001)* (request to court for dismissal of action is more important than label of request).

(n5)Footnote 2.2. *See Commercial Space Mgmt. Co. v. Boeing Co., 193 F.3d 1074, 1080, (9th Cir. 1999) .*

(n6)Footnote 3. *Wilson & Co. v. Fremont Cake & Meal Co., 83 F. Supp. 900, 903 (D. Neb. 1949)* (document was sufficient when it was captioned "Motion," stated that it was plaintiff's "notice of dismissal of the above entitled action," and did not invite, assume, or require any action by court).

(n7)Footnote 4. *Matthews v. Gaither, 902 F.2d 877, 880 (11th Cir. 1990)* (fact that a notice of dismissal styled as motion to dismiss rather than notice of dismissal is without consequence).

(n8)Footnote 5. *Leroux v. Lomas & Nettleton Co., 626 F. Supp. 962, 966 (D. Mass. 1986) .*

(n9)Footnote 6. *Hyde Constr. Co. v. Koehring Co., 388 F.2d 501, 507 (10th Cir. 1968) , cert. denied, 391 U.S. 905 (1968) .*

(n10)Footnote 7. *Universidad Central del Caribe, Inc. v. Liaison Comm. on Medical Educ., 760 F.2d 14, 19 (1st Cir. 1985) .*

(n11)Footnote 8. *Joyner v. Triple Check Fin. Serv., 782 F. Supp. 364, 369 (W.D. Tenn. 1991) .*

(n12)Footnote 8.1. *See Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010 (10th Cir. 2004) .*

(n13)Footnote 9. *See Fed. R. Civ. P. 41(a)(1)(B).*

(n14)Footnote 10. *James v. Powell, 765 F. Supp. 314, 315 (E.D. Va. 1991)* (confusion as to defendant).

(n15)Footnote 11. *Winterland Concessions Co. v. Smith, 706 F.2d 793, 796 (7th Cir. 1983) .*

(n16)Footnote 12. *See Fed. R. Civ. P. 41(a); Reetz v. Jackson, 176 F.R.D. 412, 413 (D.D.C. 1997) ; see § 19.23[1].*

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
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B. VOLUNTARY DISMISSAL BY FILING OF NOTICE

2-19 Moore's Manual--Federal Practice and Procedure § 19.42

§ 19.42 Procedure for Dismissal by Noticen*

[1] Filing of Notice With Court

The express terms of Rule 41(a)(1), require the "filing" of the notice of dismissal by the claimant n0.01, and notice becomes immediately effective on filing with the court. n0.1 Service alone is insufficient to effect a dismissal. n1 In fact, even though Rule 5(a) generally requires that every written notice be served on all of the parties to the action, service of the notice of dismissal on the adverse party is not required to make it effective--because the rule permits dismissal as of right, it requires only notice to the court, not a motion. n2

Even though the rule requires that a notice be filed, most courts hold that if a claimant inadvertently files a "motion" it will nevertheless be considered a notice and effective when filed. n3 Therefore, as long as the intent for voluntary notice is clear, the court should not negate, or attach conditions to, the dismissal. n4 It has also been held that the plaintiff may properly resort to a motion when prior efforts to file a notice were refused by the clerk of the court. n5 Other courts, which more strictly construe the rule, have held that a plaintiff who specifically invokes the court's discretion by making a motion under Rule 41(a)(2) has technically waived the otherwise absolute right to dismiss by mere notice and thus subjects itself to conditions on dismissal. n6

[2] Time for Filing Notice

[a] Timely Filing Requirements

A party that wants to dismiss claims must file a notice of voluntary dismissal at any time before the service of an answer or motion for summary judgment. n1 Courts have interpreted this provision literally; therefore, on a challenge to a notice of dismissal, they have generally adopted a test that limits the inquiry to the narrow question of whether an answer or motion for summary judgment has been served. n2 Absent service of the answer or summary judgment motion, the courts have generally rejected challenges to dismissal by notice when the challenge is made on the grounds that the merits of the action have been addressed through the procedural equivalent of an answer or summary judgment motion, n2.1 or that the action has progressed to an advanced stage and caused the defending party significant expense. n3

A voluntary dismissal becomes effective immediately on filing of the notice with the clerk of the court. n4 If the clerk of the court is unable or refuses to accept the notice for filing, filing is considered effective at the time the clerk should have accepted tender of the instrument. n5 If a motion is mistakenly employed in place of a notice, the timeliness of the dismissal is considered effective at the time of the filing, rather than the service, of the motion. n6

[b] Defendant's Service That Cuts Off Claimant's Absolute Right to Dismissal

[i] Service on All Parties Required

The claimant may file a voluntary notice of dismissal at any time before the service of an answer or motion for summary judgment. n7 Consequently, the defendant's mere filing of responsive papers with the court will not cancel the plaintiff's right to dismiss. n8 Similarly, a defendant's in-court, oral denial of the allegations of the complaint will not substitute for the service of an answer. n9 Under Rule 5(b), service of an answer or other pleading is deemed complete on hand delivery, mailing, or electronic transmission; n10 therefore, if the plaintiff files a notice of dismissal after the delivery, mailing, or transmission, the notice will be ineffective. However, if an answer is mailed on the same day that the notice of dismissal is filed, the dismissal will be effective unless the defendant can establish that the answer was placed in a mailbox before the time stamped on the notice on filing. n11

Once a defendant has responded to the original complaint with an answer or motion for summary judgment, the plaintiff may not revive the right to dismiss under Rule 41(a)(1)(A)(i) by filing an amended complaint containing the same or substantially similar claims. n12 The mere amendment of the complaint, however, will not terminate the plaintiff's right to a voluntary dismissal if the defendant has not served an answer or a motion for summary judgment in response to either the original or amended pleading. n13

[ii] Service Required by Defendants Who Are Object of Dismissal

A claimant may want to dismiss the action with respect to fewer than all defendants, n14 and in such a case, the service of an answer or motion for summary judgment by some defendants will not defeat the plaintiff's right to dismiss against any of the non-answering or non-moving defendants. n15 The notice will be effective asagainst a non-answering defendant, even if the same notice improperly names other defendants who have answered or moved for summary judgment. n16

[c] Right to Dismiss Terminated Only by Answer or Motion for Summary Judgment

[i] Rule Strictly Followed

Most courts adhere to a strict bright line test that allows the filing of a notice of voluntary dismissal provided that neither an answer nor a summary judgment motion has been served. n17 This is true even though the merits of an action may have been reached, or claims resolved, through motions, pleadings and procedural devices other than an answer or a motion for summary judgment. Consequently, arguments that other motions or proceedings constitute the "equivalent" of an answer or a motion for summary judgment have been generally unsuccessful. n18 Courts have reached this conclusion by relying on the plain language of the statute and reasoning that the purpose of Rule 41(a)(1)(A)(i) would be defeated if they were required to make case-by-case determinations whether the action had reached a sufficiently advanced stage n19 or whether the defendant had been put to extensive time and expense defending the action. n20 Courts have also relied on the fact that the rule was amended in 1946 to give the service of a summary judgment motion the same preclusive effect as an answer but failed to extend that power to any other motion. n21

[ii] Right to Dismiss Questioned in Cases of Lack of Jurisdiction and Bad Faith

Although, technically, a plaintiff's right to file a notice of dismissal under Rule 41(a)(1)(A)(i) is absolute, there are

courts that have qualified that right in two circumstances. First, some courts have held that a court may not permit a voluntary dismissal until the court determines that it has subject matter jurisdiction over the claim and party. n21.1 Second, some courts have indicated that a plaintiff's right to voluntarily dismiss an action may be qualified if it is based on a bad faith attempt to manipulate jurisdiction. The court noted that a trial court should have the right to curb a plaintiff's right of voluntary dismissal when used as a tactical tool to frustrate removal in such a way that prejudices a defendant's statutory right to choose a forum. n21.2

[iii] Requirement for Summary Judgment Motion

A plaintiff's absolute right to a voluntary dismissal is cut off when a defending party files a motion for summary judgment. n22 This rule is strictly followed, and the court will not accept "equivalents" for summary judgment, except when the defending party makes a Rule 12(b)(6) motion to dismiss for failure to state a claim and the court converts the claim to one for summary judgment. In that case, the plaintiff's right to a voluntary dismissal is not cut off until the court has actually ordered the conversion to a motion for summary judgment. n23 Furthermore, the motion must be accompanied by affidavits or other materials which raise facts outside the pleadings. Affidavits which merely attack the legal sufficiency of the complaint, without introducing extrinsic facts, will not transform the motion into one for summary judgment for Rule 41 purposes. n24

Because rule 41(a)(1) is strictly construed, the right to voluntarily dismiss the action is terminated *only* by the filing of an answer or a motion for summary judgment, and not by any other procedural service, including the defendant's service of a cross claim n25 or a motion to dismiss under Rule 12. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 0.01. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n3)Footnote 0.1. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010 (10th Cir. 2004)* ; *see Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n4)Footnote 1. *Wilson v. San Jose, 111 F.3d 688, 692 (9th Cir. 1997)* .

(n5)Footnote 2. *Safeguard Business Sys., Inc. v. Hoeffel, 907 F.2d 861, 863 (8th Cir. 1990)* (citing **Moore's Federal Practice**).

(n6)Footnote 3. *Logan v. Burgers Ozark Country Cured Hams, Inc., 263 F.3d 447, 453 (5th Cir. 2001)* .

(n7)Footnote 4. *Williams v. Ezell, 531 F.2d 1261, 1263-1264 (5th Cir. 1976)* .

(n8)Footnote 5. *Aero-Colours, Inc. v. Propst, 833 F.2d 51, 52 (5th Cir. 1987)* .

(n9)Footnote 6. *Parker v. Freightliner Corp., 940 F.2d 1019, 1022-1023 (7th Cir. 1991)* .

(n10)Footnote 1. *See Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n11)Footnote 2. *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 546 (4th Cir. 1993)* (giving the

rule its "plain meaning").

(n12)Footnote 2.1. *See* [c], *below*.

(n13)Footnote 3. *D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 298 (6th Cir. 1975)* (court's only function on challenge to dismissal is whether answer or motion for summary judgment has in fact been served prior to filing of notice of dismissal).

(n14)Footnote 4. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010 (10th Cir. 2004)* ; *see Fed. R. Civ. P. 41(a)(1)(A)(i)*.

(n15)Footnote 5. *Aero-Colours, Inc. v. Propst, 833 F.2d 51, 52 (5th Cir. 1987)* .

(n16)Footnote 6. *Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Miss. 1992)* .

(n17)Footnote 7. *See Fed. R. Civ. P. 41(a)(1)(A)(i)*; *Exxon Corp. v. Maryland Casualty Co., 599 F.2d 659, 662 (5th Cir. 1979)* (motion for partial summary judgment terminates plaintiff's right to file notice of dismissal just as effectively as summary judgment motion directed at entire complaint).

(n18)Footnote 8. *Lockary v. Kayfetz, 917 F.2d 1150, 1157 (9th Cir. 1992)* (appellate court reversed district court's denial of motions for voluntary dismissals when defendant filed but did not serve answer on all plaintiffs).

(n19)Footnote 9. *Winterland Concessions Co. v. Smith, 706 F.2d 793, 795 (7th Cir. 1983)* (requiring that notice be filed).

(n20)Footnote 10. *Fed. R. Civ. P. 5(b)(2)(A)-(F)*.

(n21)Footnote 11. *Keal v. Monarch Life Ins. Co., 126 F.R.D. 567, 568 (D. Kan. 1989)* (defendant must show proof of actual service).

(n22)Footnote 12. *Tedeschi v. Barney, 95 F.R.D. 182, 183 (S.D.N.Y. 1982)* .

(n23)Footnote 13. *In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219-220 (8th Cir. 1977)* .

(n24)Footnote 14. *See § 19.23*.

(n25)Footnote 15. *Plains Growers, Inc. by Florists' Mut. Ins. Co. v. Ickes-Braun Glasshouses, Inc., 474 F.2d 250, 254 (5th Cir. 1973)* ; *Doran v. McGinnis, 158 F.R.D. 383, 389 (E.D. Mich. 1994)* ; *Aggregates (Carolina), Inc.v. Kruse, 134 F.R.D. 23, 25 (D.P.R. 1991)* (may still dismiss non-answering parties).

(n26)Footnote 16. *Plains Growers, Inc. by Florists' Mut. Ins. Co. v. Ickes--Braun Glasshouses, Inc., 474 F.2d 250, 254 (5th Cir. 1973)* .

(n27)Footnote 17. *Johnson Chem. Co., Inc. v. Home Care Prods., Inc., 823 F.2d 28, 30 (2d Cir. 1987)* ; *Jorgensen v. Prudential Ins. Co., 852 F. Supp. 255, 259 (D.N.J. 1994)* .

(n28)Footnote 18. *Santiago v. Victim Servs. Agency of the Metro. Assistance Corp., 753 F.2d 219, 221 (2d Cir. 1985)* (court declined to treat motion for preliminary injunction, where a hearing has been held and issue has been joined, as equivalent of answer or motion for summary judgment under Rule 41).

(n29)Footnote 19. *Aamot v. Kassel, 1 F.3d 441, 444 (6th Cir. 1993)* .

(n30)Footnote 20. *Exxon Corp. v. Maryland Casualty Co., 599 F.2d 659, 662 (5th Cir. 1979)* .

(n31)Footnote 21. *Fed. R. Civ. P. 41(a)*, Committee Note to 1946 Amendments.

(n32)Footnote 21.1. *Murray v. Conseco, Inc., 467 F.3d 602, 604-605 (7th Cir. 2006)* ; *University of S. Alabama v. American Tobacco Co., 168 F.3d 405, 409 (11th Cir. 1999)* .

(n33)Footnote 21.2. *Nogueras-Cartagena v. Rossello-Gonzalez, 182 F.R.D. 380, 386 (D.P.R. 1998)* .

(n34)Footnote 22. *Fed. R. Civ. P. 41(a)(1)(i)*.

(n35)Footnote 23. *Swedberg v. Marotzke, 339 F.3d 1139, 1146 (9th Cir. 2003)* .

(n36)Footnote 24. *Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Corp., 109 F.3d 993, 996 (4th Cir. 1997)* (citing **Moore's Federal Practice)**; *see Berthold Types Ltd. v. Adobe Sys. Inc., 242 F.3d 772, 776 (7th Cir. 2001)* (court rejected defendant's argument that its motion to dismiss was actually summary judgment motion because motion referred to and attached documents outside complaint; court held that plaintiff would not be precluded from filing notice of dismissal until court actually considered such documentation).

(n37)Footnote 25. *See Ecuadorian Gulf Oil Co. v. Atlantic Richfield Co., 73 F.R.D. 99, 100 (C.D. Cal. 1976)* .

(n38)Footnote 26. *See Arndt v. UBS AG, 342 F. Supp. 2d 132, 136 (E.D.N.Y. 2004)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
B. VOLUNTARY DISMISSAL BY FILING OF NOTICE

2-19 Moore's Manual--Federal Practice and Procedure § 19.43

§ 19.43 Effect of Filing Notice of Voluntary Dismissaln*

[1] Action is Immediately Terminated

When a claimant files a notice of dismissal, n1 the filing immediately terminates the action. n2 The notice is self-executing, which means that it automatically terminates the action n2.1 with no need for a further order, action or approval of the court. n2.2

Once a notice of dismissal is filed, the case is closed and the plaintiff may not unilaterally withdraw or amend the notice. n3 The effect of the dismissal is "to put the claimant and the party defending the claim in a legal position as if the plaintiff had never commenced the action." n4 Neither the parties nor the court may reinstate the case. Some courts hold that voluntary dismissal under Rule 41(a)(1)(i) does not constitute a "proceeding" within the meaning of Rule 60(b) and consequently, a party may not obtain court relief from a voluntary dismissal even if it was obtained by mistake or excusable neglect. n4.1 On the other hand, some courts have held that a claimant may move the court to vacate a dismissal under Rule 60(b) for mistake, inadvertence, surprise, or excusable neglect, or on a showing of other good cause. n4.2 For example, a plaintiff may ask that the court vacate a notice that erroneously provided that the dismissal was with prejudice instead of without prejudice. n5

[2] Termination Without Prejudice Unless Otherwise Specified

Unless the notice of voluntary dismissal states otherwise, the dismissal is without prejudice to the commencement of another action based on the same claim. n1 The dismissal thus leaves matters as if no action were ever filed, and neither res judicata nor collateral estoppel result from a dismissal by notice. n2

If the notice does explicitly provide that the dismissal is with prejudice, the dismissal by notice operates as an adjudication on the merits. n3 The rule also provides that the dismissal operates as an adjudication on the merits when the notice is filed by a plaintiff who has already once dismissed in any court of the United States or of any state an action based on or including the same claim. n4 This exception is known as the "two dismissal rule" and is discussed in *§ 19.44*.

[3] Effect on Court's Jurisdiction

[a] General Rule

Once the claimant files a notice of dismissal without prejudice, the court loses jurisdiction over the case and may not address the merits of the action or issue further orders. n1 Thus, the court may not rule on a pending motion to dismiss, and any decision addressing the merits of such a motion is a nullity. n2 Similarly, it is improper for the court to issue an order after the notice of dismissal that directs that the dismissal be with prejudice instead of without prejudice. n3 Finally, orders issued by the court during the pendency of the action are nullified and are rendered void. n4 Such orders have no collateral estoppel effect in later litigation. n5

[b] Exception for Collateral Matters

Although jurisdiction to pass on the merits of an action is lost once a notice of dismissal has been filed, n6 the Supreme Court has held that a court retains the power to resolve certain collateral issues even after the case is no longer pending. n7 Thus, a Rule 41(a)(1)(A)(i) voluntary dismissal by notice does not deprive the court of jurisdiction to consider a Rule 11 motion and impose sanctions, n7.1 including attorney's fees, for the filing of a frivolous complaint or other pre-dismissal conduct. n8 In other words, the filing of a Rule 11 motion does not preclude a plaintiff from later filing a voluntary dismissal under Rule 41(a)(1)(A)(i), and the district court retains jurisdiction to impose Rule 11 sanctions based on frivolous claims even after the time those claims have been voluntarily dismissed. n8.1 Note, however, that under Rule 11(c) a plaintiff may avoidsanctions by filing the notice of dismissal within 21 days after service of the Rule 11 motion. n9 It should also be noted that a federal court lacks jurisdiction to impose sanctions if the action was originally filed in state court, and the plaintiff voluntarily dismisses without committing any further sanctionable conduct after removal to the federal forum. n10 Furthermore, even though sanctions may be awarded after a voluntary dismissal, neither the court nor the defendant may seek to prevent the dismissal itself by conditioning the exercise of the right on the payment of sanctions. n11

The imposition of Rule 11 sanctions does not act as an adjudication on the merits or convert the dismissal to one with prejudice, even if on reviewing the merits the district court concludes that the complaint was not factually or legally well founded for Rule 11 purposes. n12

In addition to Rule 11 sanctions, and consistent with the exception under which the district court retains jurisdiction to resolve collateral issues, it has been held that statutory sanctions and attorney's fees may been imposed following the filing of a notice of voluntary dismissal. Thus, for example, a court may impose sanctions for vexatious conduct tending to multiply the proceeding prior to the dismissal, n13 or award attorney's fees to a prevailing party. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedurePretrial JudgmentsNonsuitsVoluntary Nonsuits

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n3)Footnote 2. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010 (10th Cir. 2004) .*

(n4)Footnote 2.1. *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 545-548 (4th Cir. 1993) .*

(n5)Footnote 2.2. *Hamilton v. Shearson-Lehman Am. Express, Inc., 813 F.2d 1532, 1534-1535 (9th Cir. 1987)* .

(n6)Footnote 3. *Noland v. Flohr Metal Fabricators, 104 F.R.D. 83, 87 (D. Ark. 1984)* (filing of plaintiff's "Amended Notice of Dismissal," was ineffective in attempt to reinstate defendant who plaintiff mistakenly dismissed in original notice of dismissal).

(n7)Footnote 4. *Harvey Specialty Supply Inc. v. Anson Flowline Equipment, Inc., 434 F.3d 320, 324 (5th Cir. 2005)* .

(n8)Footnote 4.1. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010-1011 (10th Cir. 2004)* .

(n9)Footnote 4.2. *Warfield v. Allied Signal TBS Holdings, Inc., 267 F.3d 538, 542 (6th Cir. 2001)* (court may vacate voluntary dismissal if dismissal is not free, calculated, and deliberate choice; for example, such dismissal may be vacated as void judgment under Rule 60(b)(4) or for any other reason justifying relief from operation of judgment under Rule 60(b)(6)).

(n10)Footnote 5. Witlin v. Gallagher Basset Serv., 1993 U.S. Dist. LEXIS 5543 (E.D. Pa. 1993) (court permitted amendment of docket to reflect correction when plaintiff attorney's associate mistakenly filed notice "with prejudice").

(n11)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(B).*

(n12)Footnote 2. *Harvey Specialty Supply Inc. v. Anson Flowline Equipment, Inc., 434 F.3d 320, 324 (5th Cir. 2005)* .

(n13)Footnote 3. *Concha v. London, 62 F.3d 1493, 1506-1507 (9th Cir. 1995)* (citing **Moore's Federal Practice** in dictum).

(n14)Footnote 4. *Fed. R. Civ. P. 41(a)(1)(B).*

(n15)Footnote 1. *Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1049 (9th Cir. 2001)* (court loses jurisdiction over dismissed action because action is deemed to have never been filed); *Janssen v. Harris, 321 F.3d 998, 1001 (10th Cir. 2003)* (citing **Moore's Federal Practice**); *Foss v. Federal Intermediate Credit Bank of St. Paul, 808 F.2d 657, 659 (8th Cir. 1986)* (reversing district court's order which accepted magistrate's recommendation of dismissal on merits).

(n16)Footnote 2. *Manze v. State Farm Ins. Co., 817 F.2d 1062, 1065-1066 (3d Cir. 1987)* .

(n17)Footnote 3. *Williams v. Ezell, 531 F.2d 1261, 1264 (5th Cir.1976)* (reversing order which reinstated prior dismissal with prejudice).

(n18)Footnote 4. *In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977)* (voluntary dismissal "carries down" with it previous proceedings and orders in action, all pleadings of both plaintiff and defendant, and all issues with respect to plaintiff's claim).

(n19)Footnote 5. *See In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977)* .

(n20)Footnote 6. *See* [a], *above*.

(n21)Footnote 7. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* (well established that collateral issues may be considered after action is no longer pending).

(n22)Footnote 7.1. *Zeisl v. Watman (In re Austrian & German Bank Holocaust Litig.), 317 F.3d 91, 98 (2d Cir. 2003)* .

(n23)Footnote 8. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* (costs, attorney's fees, contempt sanctions, and Rule 11 sanctions are not judgments on merits of action; rather, they are determination of collateral issues that may be made after principal suit has been terminated).

(n24)Footnote 8.1. *See Zeisl v. Watman (In re Austrian & German Bank Holocaust Litig.), 317 F.3d 91, 98 (2d Cir.2003)* ; *Adams v. NVR Homes, Inc., 193 F.R.D. 257, 260 (D. Md. 2000)* .

(n25)Footnote 9. *Fed. R. Civ. P. 11(c)(2).*

(n26)Footnote 10. *Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256-257 (4th Cir. 1987)* (after removal to federal court and plaintiff's attorney dismissed first four counts, sanctions may not be imposed).

(n27)Footnote 11. *See Aggregates (Carolina), Inc. v. Kruse, 134 F.R.D. 23, 26 (D.P.R. 1991)* .

(n28)Footnote 12. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396-398, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n29)Footnote 13. *Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992)* (pendency of motion for section 1927 sanctions (like Rule 11 motion) presents a collateral issue appropriate for resolution once court has addressed merits); *see 28 U.S.C. § 1927.*

(n30)Footnote 14. *Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 544 (3d Cir. 1994)* (judgment not required to have party considered prevailing party); *see* 28 U.S.C. § 1988.

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
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2-19 Moore's Manual--Federal Practice and Procedure § 19.44

§ 19.44 Operation of Two Dismissal Rulen*

[1] Rule Makes Second Voluntary Dismissal "With Prejudice"

After a plaintiff or claimant has voluntarily dismissed an action in federal or state court, a subsequent voluntary notice of dismissal based on, or including, the same claim operates as an adjudication on the merits. n1 The effect of this rule, known as the "two dismissal rule," is that the second dismissal taken on the same claim must be with prejudice. n2 The rule is an exception to the general rule that a dismissal by notice is without prejudice. n3 The effect of the rule is that the plaintiff is barred from litigating a third action on the claim. n3.1 The purpose of the two dismissal rule is to prevent the harassment of the defendant through the repeated commencement and dismissal of actions based on the same claim. n4

Some courts have reasoned that the two dismissal exception should be construed narrowly to preserve the plaintiff's right to be heard on the merits, particularly in the absence of any intent to harass. n5 However, other courts have taken the position that the rule should be applied literally to all dismissals coming within its terms, regardless of the plaintiff's subjective intent, n6 and that when the rule applies, an attorney's ignorance of the rule, or of the potentially preclusive effect of taking a second dismissal, is irrelevant. n7

[2] Requirements for Two Dismissal Exception to Apply

[a] Events Triggering Application of Rule

[i] First Dismissal

Generally, any type of dismissal, including a dismissal by notice, stipulation, or court order, may qualify as the first dismissal under the two dismissal rule; the rule merely refers to "plaintiff who has once dismissed." A mere deletion of a claim by amendment under Rule 15(a), however, will not count as a first dismissal. n1 In addition, the Second Circuit has held that when the first dismissal is accomplished by a stipulation without prejudice which is knowingly executed by all parties, a second dismissal by notice will not trigger the rule. Although the court agreed that the rule by its literal terms makes no distinction between a dismissal by notice and one by stipulation, it noted that the danger of repeated unilateral dismissals is not implicated by a consensual, stipulated dismissal, and that a defendant wishing to limit

futurelitigation may either refuse to sign the stipulation or require that it be made with prejudice. n2

Using this reasoning, one trial court has stated that the two dismissal rule is also inapplicable when, although the first dismissal is by notice rather than by a formal stipulation, the notice results from negotiations and a consent agreement among the parties. n3 The Eleventh circuit has stated that the two dismissal rule does not apply when the first dismissal is by a plaintiff's motion and order of the court. n4 Some courts have also ruled that the two dismissal rule is inapplicable when the first dismissal was by court order or otherwise involuntary. n5

The two dismissal rule applies whenever the first action has been voluntarily dismissed, even if it is asserted that the first action was a nullity for some reason. Thus, the first dismissal of an action will still count for the purposes of the two dismissal rule even though the court had not acquired personal jurisdiction over the defendant at time of the voluntary dismissal. n6 Similarly, an action may still be voluntarily dismissed for the purposes of the rule even though the complaint was already subject to dismissal because the plaintiff lacked capacity to sue. n7

[ii] Second Dismissal

The two dismissal rule applies only when the second dismissal is a dismissal by notice under Rule 41(a)(1)(i). n8 Thus, the third action will not be barred where the second dismissal was pursuant to a court order under Rule 41(a)(2), n9 or a stipulation under Rule 41(a)(1)(ii), n10 or when claims were dropped through amendment of the complaint rather than by a notice of dismissal. n11 Accordingly, a plaintiff who wants to avoid the effect of the two dismissal rule should wait until a responsive pleading is served and seek a court-ordered dismissal under Rule 41(a)(2), or seek the defendant's consent to a stipulated dismissal without prejudice. n12

The question occasionally arises whether the second dismissal was by notice or by court order. One court has held that when the method of filing is consistent with a unilateral, voluntary dismissal, the two dismissal rule will apply even though the second dismissal was ultimately so ordered by the court. n13 Other courts have held that when the defendant becomes aware that the plaintiff will seek a second dismissal by court order and does not object, the two dismissal rule is inapplicable even though the plaintiff does not make a formal motion and requests dismissal at a time it could have been obtained by notice. n14

[b] Effect of Litigation in Federal or State Court

The plain language of the rule provides that the first dismissal may be in either state court or federal court. n15 However, the two dismissal rule applies only where the second dismissal is taken in federal court. It does not apply when the second dismissal occurs in state court, n16 even if the first dismissal was in federal court. n17 If the second dismissal occurs in federal court following removal of the action originally filed in state court, the dismissal of the second action following removal will trigger the rule. n18

On the other hand, the two dismissal rule still applies, even win the second dismissal occurred in state court, if the state has a two dismissal rule. Thus, the federal court will give res judicata effect to such a dismissal if the state has enacted its own version of the two dismissal rule. n19

[c] Identity of Claims

The two dismissal rule does not apply unless the second dismissal is of an actionbased on or including the "same claim" as the first dismissal. n20 Some courts have interpreted this requirement to mean that the two dismissal rule does not apply unless the second dismissed action was based on both the identical legal theory and the same operative facts as the first dismissed action. n21 On the other hand, other courts have held that the rule applies when the factual allegations of the prior two suits were substantially the same, regardless of the legal theories asserted. n22

Note that actions brought after the second action will not be barred by the two dismissal rule if they are not based on the same claim as the earlier dismissed actions. n23

[d] Identity of Parties

The two dismissal rule does not apply unless the defending party asserting the rule is the same defendant or in privity with the defendant who was the object of the two prior dismissed actions. n24 Consequently, a defendant who was not actually a defending party or in privity with a defending party in the two prior dismissals may not utilize the two dismissal rule to bar the third action, even if the third action is based on the same claim. n25 A motion to dismiss based on the two dismissal rule should be denied if a factual question exists regarding the existence of privity between the defendants. n26 The mere identity of interest between the plaintiffs in the first two suits is not sufficient to trigger the two dismissal rule, if the defendants are not in privity. n27

Two dismissal rule issues may also arise regarding the defending parties. Thus, a defendant voluntarily dismissed from two successive actions may invoke the two dismissal rule even though the second dismissal was not taken as against all of the other defendants to that action. n28 The two dismissal rule does not apply if the first dismissal eliminated fewer than all claims against the defendant but not the entire action. n29

[3] Relief From Two Dismissal Rule

When extenuating circumstances exist, a plaintiff may move the district court to vacate the second notice of dismissal triggering the two dismissal rule. n1 As with other dismissals by notice, the motion should be made under Rule 60(b), which allows relief from mistake, inadvertence, surprise, or excusable neglect, or on a showing of other good cause. n2 The second dismissal is not, however, subject to a collateral attack through the institution of a third action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesTwo-Dismissal Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(B).*

(n3)Footnote 2. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n4)Footnote 3. *Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 17 (1st Cir. 2004)* ; *see Fed. R. Civ. P. 41(a)(1)(B).*

(n5)Footnote 3.1. *See Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 923-924 (7th Cir. 2003)* .

(n6)Footnote 4. *D.C. Elecs., Inc., v. Nartron Corp., 511 F.2d 294, 298 (6th Cir. 1975)* (built into Rule 41(a) is overall provision that plaintiff may but once voluntarily dismiss without prejudice; thus, plaintiff's ability to harass defendant by the filing and dismissing of successive actions involving the same claim is limited).

(n7)Footnote 5. *Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 640-641 (7th Cir. 1987)* (courts should be careful not to extend scope of such narrow exception when purpose for exception would not be served).

(n8)Footnote 6. *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 728 (9th Cir. 1991)* (dismissals which fall within language of rule should not be read out of it through inquiry into plaintiff's

intent to harass).

(n9)Footnote 7. *Engelhardt v. Bell & Howell Co., 299 F.2d 480, 485-486 (8th Cir. 1962)* (to assert that plaintiff's attorney may have been ignorant of two dismissal rule and its effect, and that plaintiff should be relieved of effects is but to argue that attorney has no authority to try case incorrectly and, if attorney does, his or her client is not bound by result).

(n10)Footnote 1. *Smith, Kline & French Labs. v. A. H. Robins Co., 61 F.R.D. 24, 29, 30-31 (E.D. Pa.1973))* .

(n11)Footnote 2. *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery, 534 F.2d 1012, 1017 (2d Cir. 1976)* .

(n12)Footnote 3. *Island Stevedoring, Inc. v. Barge CCBI, 129 F.R.D. 430, 432 (D.P.R. 1990)* .

(n13)Footnote 4. *ASX Inv. Corp. v. Newton, 183 F.3d 1265, 1268 (11th Cir. 1999)* .

(n14)Footnote 5. *Loubier v. Modern Acoustics, Inc., 178 F.R.D. 17, 20-22 (D. Conn. 1998)* (earlier state court dismissals for lack of prosecution were not unilateral, voluntary dismissals by plaintiff so as to qualify as first dismissal for purposes of two dismissal rule).

(n15)Footnote 6. *Engelhardt v. Bell & Howell Co., 299 F.2d 480, 484-485 (8th Cir. 1962)* (jurisdiction over defendant is not essential to commencement of action, and plaintiff's contention that dismissal of first action was mere nullity because dismissal was filed at time before court had acquired jurisdiction over defendant is without merit.).

(n16)Footnote 7. *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 726 (9th Cir. 1991)* .

(n17)Footnote 8. *Fed. R. Civ. P. 41(a)(1)*; *see Allianz CP Gen. Ins. Co. v. Blue Anchor Line, 2004 U.S. Dist. LEXIS 8175, at *7 (S.D.N.Y. 2004)* .

(n18)Footnote 9. *Manning v. South Carolina Dep't of Highway & Pub. Transp., 914 F.2d 44, 47 (4th Cir. 1990)* (two dismissal rule applies when second dismissal is by notice, but not when defendant is dismissed by motion or by stipulation).

(n19)Footnote 10. *Allianz CP Gen. Ins. Co. v. Blue Anchor Line, 2004 U.S. Dist. LEXIS 8175, at *7 (S.D.N.Y. 2004)* (two dismissal rule did not apply when second dismissal was pursuant to a stipulation under Rule 41(a)(1)(ii), even if first dismissal was by notice under Rule 41(a)(1)(i)); *Kuhn v. Williamson, 122 F.R.D. 192, 195 (E.D.N.C. 1988)* (plaintiff could pursue section 1983 civil rights claim in third action when it was dismissed by stipulation without prejudice in second action).

(n20)Footnote 11. *Smith, Kline & French Labs. v. A. H. Robins Co., 61 F.R.D. 24, 29-30 (E.D. Pa. 1973)* .

(n21)Footnote 12. *Engelhardt v. Bell & Howell Co., 299 F.2d 480, 484 (8th Cir. 1962)* .

(n22)Footnote 13. *Gioia v. Blue Cross Hosp. Serv., Inc., 641 F.2d 540, 545 (8th Cir. 1981)* .

(n23)Footnote 14. *Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 641 (7th Cir. 1987)* (when defendant raised no objections court did not consider defendant harassed litigant).

(n24)Footnote 15. *Fed. R. Civ. P. 41(a)(1)*; *see Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 726 (9th Cir. 1991)* (court found that filing in state court commenced action); *Schott v. Hepler, 101 F.R.D. 99, 100 (N.D. Ind. 1984)* (dismissal of first suit in state court counted as dismissal).

(n25)Footnote 16. *Stewart v. Stearman, 743 F. Supp. 793, 794 (D. Utah 1990)* (rejecting assertion that two prior state court dismissals barred third suit in federal court); *Kuhn v. Williamson, 122 F.R.D. 192, 194 (E.D.N.C. 1988)* (citing **Moore's Federal Practice**).

(n26)Footnote 17. *Rader v. Baltimore & Ohio. R. Co., 108 F.2d 980, 986 (7th Cir. 1940)* .

(n27)Footnote 18. *Engelhardt v. Bell & Howell Co., 299 F.2d 480, 484 (8th Cir. 1962)* .

(n28)Footnote 19. *Kuhn v. Williamson, 122 F.R.D. 192, 194 (E.D.N.C. 1988)* (citing **Moore's Federal Practice**).

(n29)Footnote 20. *Fed. R. Civ. P. 41(a)(1)(B)*; *see Ater v. Follrod, 238 F. Supp. 2d 928, 937-938 (S.D. Ohio 2002)* (same claim was not asserted when first action was based on facts related to early stages of pregnancy, while other suit was base on allegation of facts related to birth).

(n30)Footnote 21. *Kuhn v. Williamson, 122 F.R.D. 192, 194-195 (E.D.N.C. 1988)* (plaintiff could pursue federal civil rights and state law negligence claims against police officer in third action because, even though both were based on same underlying shooting incident, negligence claim was not asserted in first action and civil rights claim was dismissed by stipulation in second).

(n31)Footnote 22. *Schott v. Hepler, 101 F.R.D. 99, 100-101 (N.D. Ind. 1984)* (two dismissal rule applies when factual allegations of first state court suit and second federal court suit were substantially same, even though federal suit contained additional claim for deprivation of federal rights under section 1983).

(n32)Footnote 23. Brown v. Hartshorne Pub. Sch. Dist. #1, *926 F.2d 959, 961 (10th Cir. 1991)* (third and fourth actions not barred by rule when they complained of discriminatory conduct occurring years after dismissal of first two suits).

(n33)Footnote 24. *Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 17 (1st Cir. 2004)* (citing **Moore's Federal Practice**); *see Manning v. South Carolina Dep't of Highway & Pub. Transp., 914 F.2d 44, 48 (4th Cir. 1990)* (party asserting two dismissal rule must same party or privity who owned interests that constituted subject matter of both dismissed actions).

(n34)Footnote 25. *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 728 (9th Cir. 1991)* .

(n35)Footnote 26. *Murray v. Sevier, 145 F.R.D. 563, 566-567 (D. Kan. 1993)* (finding application of two dismissal rule tenuous where it was not clear whether interests of defendants were so interrelated that each represented same legal right).

(n36)Footnote 27. *Murray v. Sevier, 145 F.R.D. 563, 566-567 (D. Kan. 1993)* (certain plaintiffs did not twice dismiss against some defendants in suit).

(n37)Footnote 28. *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 727-728 (9th Cir. 1991)* , *cert. denied, 503 U.S. 920 (1991)* .

(n38)Footnote 29. *Arnesen v. Shawmut County Bank, N.A., 504 F. Supp. 1077 (D. Mass. 1980)* (two dismissal rule did not bar assertion of claim in third action, when claim had been dismissed from prior action which went to trial against defendants on other counts).

(n39)Footnote 1. *Randall v. Merrill Lynch, 820 F.2d 1317, 1321 (D.C. Cir. 1987)* (vacating second dismissal which was filed because of plaintiff's disabling illness and the resulting depletion of his assets).

(n40)Footnote 2. *See Fed. R. Civ. P. 60(b)*; *see also § 19.43[1].*

(n41)Footnote 3. *Merrill Lynch v. Randall, 110 F.R.D. 499, 500 (E.D. Cal. 1985)* (when plaintiffs contend that application of rule is unduly harsh, proper remedy is for them to move to vacate second dismissal before original district court, rather than making third attempt to litigate the claim).

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PART V Pretrial Stage
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2-19 Moore's Manual--Federal Practice and Procedure § 19.45

§ 19.45 Appeal Regarding Dismissal by Noticen*

[1] Standard of Review on Appeal

When the trial court makes an order either granting or denying a motion to vacate a notice of dismissal filed under Rule 41(a)(1), the appellate court will apply a de novo standard of review because a pure legal question concerning whether plaintiff's notice was timely is generally presented. n1 The abuse of discretion standard, which governs review of court-ordered voluntary dismissals under Rule 41(a)(2), n2 is not applicable because the court has no discretion to deny or condition a timely filed notice.

When the plaintiff's right to dismiss is affected by the conversion of a motion to dismiss to one for summary judgment, an abuse of discretion standard may apply to whether the conversion was proper. Courts that have adhered to a literal interpretation of Rule 41 and require a formal conversion to terminate the right to dismiss havegenerally viewed the question as one of pure law. n3

[2] Court Actions That Parties May Appeal

A plaintiff may immediately appeal the district court's order vacating a notice of dismissal, even though the order does not finally dispose of the action but rather reopens the case for adjudication on the merits. n1 Such an appeal has been permitted on the ground that any orders entered by the district court after the filing of the notice of dismissal are void. n2 The plaintiff may also take a direct appeal from an order improperly conditioning the dismissal. n3 When the court disregards a notice of dismissal and directs that the action be dismissed with prejudice, n4 or dismisses it after either vacating the notice n5 or treats it as a motion under Rule 41(a)(2), n6 the plaintiff may simply appeal from the resulting judgment. Similarly, when the court vacates the notice of dismissal and enters a judgment after trial or other proceedings on the merits of the action, the plaintiff may raise the order vacating the notice as part of the appeal of the judgment. n7

A defendant may appeal the denial of a motion to vacate a notice of dismissal, since the dismissal results in a final judgment terminating the action. n8 Similarly, an order granting the plaintiff's motion for a dismissal as of right under Rule 41(a)(1)(i) is appealable by the defendant. n9

[3] Effect of Prejudice on Dismissal

A plaintiff may not generally appeal an order granting a voluntary dismissal without prejudice because it does not qualify as an involuntary adverse judgment, in that the plaintiff receives the relief requested and is free to recommence the action. The same reasoning should apply when an appeal is attempted from a voluntary dismissal by notice, n1 which is without prejudice unless otherwise stated. n2 When a document requesting dismissal is construed as a notice under Rule 41 and the case is ordered dismissed, the plaintiff may not appeal the dismissal. n3

If a dismissal was with prejudice, an order denying a plaintiff's motion to vacate a notice of dismissal is appealable. Relief from the operation of the two dismissal rule may be obtained on appeal if the district court refuses to vacate the notice on the grounds of mistake, inadvertence, surprise, excusable neglect, or other good cause. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 545 (4th Cir. 1993)* (scope of Rule 41 is question of law subject to de novo review).

(n3)Footnote 2. *See Fed. R. Civ. P. 41(a)(2).*

(n4)Footnote 3. *See Kolman v. Milwaukee Area Technical College, 548 F. Supp. 684, 685 (E.D. Wis. 1982) .*

(n5)Footnote 1. *D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 298 (6th Cir. 1975) .*

(n6)Footnote 2. *Thorp v. Scarne, 599 F.2d 1169, 1172, 1173 (2d Cir. 1979)* ; *Littman v. Bache & Co., 246 F.2d 490, 491-492 (2d Cir. 1957) .*

(n7)Footnote 3. *Scam Instrument Corp. v. Control Data Corp., 458 F.2d 885, 890-891 (7th Cir. 1972) .*

(n8)Footnote 4. *Foss v. Federal Intermediate Credit Bank of St. Paul, 808 F.2d 657, 660 (8th Cir. 1986) .*

(n9)Footnote 5. *Winterland Concessions Co. v. Smith, 706 F.2d 793, 795 (7th Cir. 1983) .*

(n10)Footnote 6. *Hamilton v. Shearson-Lehman Am. Express, Inc., 813 F.2d 1532, 1534-1535 (1987) .*

(n11)Footnote 7. *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 545 (4th Cir. 1993) .*

(n12)Footnote 8. *Merit Ins. Co. v. Leatherby Ins. Co., 581 F.2d 137, 144 (7th Cir. 1978)* (appeal from order denying motion to vacate and quash the notice of dismissal).

(n13)Footnote 9. *Aero-Colours, Inc. v. Propst, 833 F.2d 51, 52 (5th Cir. 1987) .*

(n14)Footnote 1. *Concha v. London, 62 F.3d 1493, 1493, 1507 (9th Cir. 1995)* ; *see Fed. R. Civ. P. 41(a)(1)(A).*

(n15)Footnote 2. *Fed. R. Civ. P. 41(a)(1)(B).*

(n16)Footnote 3. *Geaney v. Carlson, 776 F.2d 140, 142 (7th Cir. 1985) .*

(n17)Footnote 4. *Randall v. Merrill Lynch, 820 F.2d 1317, 1321 (D.C. Cir. 1987)* .

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2-19 Moore's Manual--Federal Practice and Procedure §§ 19.46through 19.59

[Reserved]

§§ 19.46[Reserved]

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2-19 Moore's Manual--Federal Practice and Procedure § 19.60

§ 19.60 Parties Have Absolute Right to Stipulate To Dismissal of Actionn*

All of the parties who have appeared in an action have the power to terminate an action by the filing a stipulation signed by all of them. n1 In addition to facilitating the mutual resolution of disputes, the rule insures that the plaintiff will not be able to take a voluntary dismissal at a late stage of the action without the defendant's consent. Subject only to the specific provisions of other rules or statutes, n2 the parties' right to terminate the action by stipulation is absolute. n3 Thus, a voluntary stipulation under Rule 41(a)(1)(A)(ii) does not require court approval. n4 There is authority to the effect that the court has the inherent authority to investigate behind a stipulation to determine whether collusion or improper conduct gave rise to the dismissal, at least in cases involving the public interest. n5

Because the parties' right to a stipulated dismissal is absolute, the court may not impose conditions on the stipulation. n6 Thus, the court may not provide that the dismissal will be with prejudice if the parties have not so provided, n7 nor may the court"order" the stipulation, and by the order make it enforceable by contempt. n8 An order requiring the parties to make the terms of their settlement agreement public also imposes an invalid condition. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.34 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(ii).*

(n3)Footnote 2. *See §§ 19.24[2][d].*

(n4)Footnote 3. *Gardiner v. A. H. Robins Co., 747 F.2d 1180, 1189 (8th Cir. 1984)* (in ordinary lawsuits between private parties, courts recognize that settlement of dispute is solely in the hands of parties, and parties may prevent a court from becoming involved in the settlement process by agreeing that plaintiff will dismiss lawsuit by stipulation).

(n5)Footnote 4. *Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* (noting that stipulated dismissal under Rule 41(a)(1)(ii) does not require entry of order by court).

(n6)Footnote 5. *United States v. Mercedes-Benz of N. Am., Inc., 547 F. Supp. 399, 400 (N.D. Cal. 1982)* (in antitrust settlement, court stated that in exercise of inherent judicial powers court could look behind it to determine whether there is collusion or other improper conduct giving rise to dismissal).

(n7)Footnote 6. *Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir. 1998)* (court lacked authority to condition stipulated dismissal on compliance with parties' settlement agreement); *Republic of Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 81 fn. 21 (3d Cir. 1994)* .

(n8)Footnote 7. *McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 934-935 (11th Cir. 1987)* (district court was without authority to dismiss claim with prejudice when dismissal was presumed to be without prejudice because parties' stipulation was silent on issue).

(n9)Footnote 8. *Gardiner v. A. H. Robins Co., 747 F.2d 1180, 1190 (8th Cir. 1984)* .

(n10)Footnote 9. *Smith v. Phillips, 881 F.2d 902, 905 (10th Cir. 1989)* .

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2-19 Moore's Manual--Federal Practice and Procedure § 19.61

§ 19.61 Contents of Stipulation of Dismissaln*

[1] Unequivocal Provision for Dismissal

A stipulation of dismissal will not be effective unless it unequivocally indicates that parties have agreed to a dismissal. n1 If the court has any question whether the stipulation was intended to dispose of the action, it should seek clarification from the parties. n2

[2] Signatures of All Parties Who Have Appeared in the Action

A stipulation of dismissal must be executed by "all parties who have appeared in the action. n1 A document signed by only one party will not be effective, n2 even if the parties acknowledge that they intended to dismiss the lawsuit. n3 In multi-party litigation the parties may stipulate to dismiss some, but fewer than all, of the defendants. n4 Similarly, where several actions are consolidated, the parties to each individual case may settle their claims separately. n5 A partial stipulation, however, is not effective to dismiss the action with respect to any defending party who has not signed, and a stipulation which purports to dismiss the entire action without the consent of all parties may be considered ineffective. n6 On the other hand, a person who has not appeared as a party may not have a settlement stipulation set aside merely because the person would otherwise have the right to intervene as a party. n6.1

Courts have also held that the parties to a third-party action may dismiss it without the consent of any party to the main action. n7 To be effective, the stipulation need only be executed by those defendants who have actually "appeared" in the action, not all of those named in the caption. n8

Occasionally, an action may not be disposed of under Rule 41(a)(1)(ii) because a real party in interest lacks capacity to sign the stipulation. For example, an action on behalf an of incompetent person may not be terminated by stipulation, but requires court approval of the settlement. n9 On the other hand, a party is generally bound by counsel's decision to execute a stipulation of dismissal. n10 A stipulation so executed may be vacated, however, on the ground that the attorney lacked authority to settle on the client's behalf. n11

[3] Terms and Conditions

The parties are free to include in their stipulation any terms or conditions they consider appropriate because court approval is not required for the stipulation. n1 They may provide that the dismissal is with prejudice or agree to embody the terms of their settlement agreement in the stipulation or dismissal order. n2 The parties are bound by the terms or conditions specified in the stipulation. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.34 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(ii)*; *see, e.g., Pipeliners Local 798, Tulsa, Okla. v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974)* (parties explicitly and unqualifiedly stipulated that all actions as to all parties with exception of parties to counterclaim were dismissed with prejudice).

(n3)Footnote 2. Vuitton et *Fils, S.A., v. J. Young Enters., Inc., 609 F.2d 1335, 1337 (9th Cir. 1979)* (court erred making assumptions regarding stipulation).

(n4)Footnote 1. *Fed. R. Civ. P. 41(a)(1)(A)(ii).*

(n5)Footnote 2. *Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* ; *Morris v. City of Hobart, 39 F.3d 1105, 1109 (10th Cir. 1994)* .

(n6)Footnote 3. *Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* (unilateral "Notice of Dismissal" signed only by plaintiffs and filed after defendants had answered ineffective even though filed with consent of defendants counsel).

(n7)Footnote 4. *Moller v. North Shore Univ. Hosp., 12 F.3d 13, 16 (2d Cir. 1993)* (stipulation expressly preserved plaintiff's right to continue action against remaining defendants).

(n8)Footnote 5. *United States v. Altman, 750 F.2d 684, 695 (8th Cir. 1984)* .

(n9)Footnote 6. *Alholm v. American Steamship Co., 167 F.R.D. 75, 79 (D. Minn. 1996)* .

(n10)Footnote 6.1. *GMAC Commercial Mortgage Corp. v. LaSalle Bank N.A., 213 F.R.D. 150, 150-151 (S.D.N.Y. 2003)* (citing **Moore's Federal Practice** for principle that voluntary stipulation to dismiss filed during pendency of motion to intervene is effective to dismiss the action, because proposed intervenors could not become parties within meaning of Rule until their motion is granted).

(n11)Footnote 7. *First Nat'l Bank of Toms River, N.J. v. Marine City, Inc., 411 F.2d 674, 677 (3d Cir. 1969)* .

(n12)Footnote 8. *In re Wolf, 842 F.2d 464, 466 (D.C. Cir. 1988)* .

(n13)Footnote 9. *Miener v. Missouri Dep't of Mental Health, 62 F.3d 1126, 1127 (8th Cir. 1995)* .

(n14)Footnote 10. *Samuels v. Northern Telecom, Inc., 942 F.2d 834, 836 (2d Cir. 1991)* .

(n15)Footnote 11. *Thomsen v. Terrace Navigation Corp., 490 F.2d 88, 89 (2d Cir. 1974)* .

(n16)Footnote 1. *See, e.g., Muze Inc. v. Digital on Demand, Inc., 356 F.3d 492, 494 (2d Cir. 2004)* (dismissal

pending finalization of settlement agreement with right to reinstatement of case if settlement is not finalized); *see Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir. 1998)* (because court has no authority to place conditions on dismissal by stipulation, court lacked authority to condition dismissal on compliance with parties' settlement agreement); *Gardiner v. A. H. Robins Co., 747 F.2d 1180, 1189 (8th Cir. 1984)* (in lawsuits between private parties, settlement of dispute is solely in the hands of parties and parties may prevent court from becoming involved in settlement process by agreeing that plaintiff will dismiss lawsuit by stipulation); *see also § 19.60*.

(n17)Footnote 2. *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (even when dismissal is pursuant to Rule 41(a)(1)(ii), court is authorized to embody settlement contract in its dismissal order if parties agree).

(n18)Footnote 3. *Camerson v. City Escort Patrol, Inc., 787 F.2d 588, 588 (6th Cir. 1986)* .

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2-19 Moore's Manual--Federal Practice and Procedure § 19.62

§ 19.62 Filing of Stipulation To Dismissaln*

[1] Requirement of Filing

A stipulation generally must be filed before it is effective. n0.1 It will not be effective if unfiled, even if it is fully executed and provides that it may be filed without further notice. n1 Mere inclusion of the stipulation as an exhibit to motion papers does not constitute filing; n2 nor does the submission of a stipulation which is not signed by the necessary parties fulfill the filing requirement. Furthermore, a stipulation filed after a judgment on the merits has been rendered is ineffective. n3

The parties may dismiss the action by stipulation at any time before a judgment on the merits is entered. n4 Unlike a dismissal by notice under Rule 41(a)(1)(A)(i), the time to dismiss by stipulation is not restricted to the time before the defendant has answered or moved for summary judgment. n5

[2] Exception for Oral Stipulation on Record

There is an exception to the requirement of filing: an oral stipulation of dismissal communicated to the court on the record meets the requirements of Rule (a)(1)(A)(ii), n1 even though the plain language of the rule anticipates a written stipulation capable of being signed and physically filed. n2 The rationale for a court to accept an oral stipulation on the record is that the stipulation is ultimately reduced to a written document, and such a stipulation sufficiently informs the court and all other parties of the dismissal. n3 Thus, courts have accepted oral stipulations made in open court. n4 An off-the-record oral stipulation, however, does not satisfy the requirements of the rule. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.34 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *Fed. R. Civ. P. 41(a)(1)(A).*

(n3)Footnote 1. *Orsini v. Kugel, 9 F.3d 1042, 1045 (2d Cir. 1993)* (unlike voluntary notice of dismissal, stipulation of dismissal is not self-executing).

(n4)Footnote 2. *Orsini v. Kugel, 9 F.3d 1042, 1045 (2d Cir. 1993)* .

(n5)Footnote 3. *McCall-Bey v. Franzen, 777 F.2d 1178, 1186 (7th Cir. 1985)* (later-filed stipulation of dismissal with prejudice ineffective where court had already ordered the case dismissed without prejudice).

(n6)Footnote 4. *Republic of Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 81 (3d Cir. 1994)* (court noted that parties to civil action may stipulate to dismissal of action at any time).

(n7)Footnote 5. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n8)Footnote 1. *Broadcast Music, Inc. v. M.T.S. Enters., Inc., 811 F.2d 278, 279-280 fn.1 (5th Cir. 1987)* (plaintiff's counsel's statement to trial court that claims against two defendants were not being pursued constituted voluntary dismissal under Rule 41(a)(1)(ii).

(n9)Footnote 2. *Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Servs., Inc., 799 F.2d 213, 218 (5th Cir. 1986)* (although Rule 41 requires written stipulation, courts have not insisted on writing when it is clear that parties have in fact entered into contemplated stipulation).

(n10)Footnote 3. *Camacho v. Mancuso, 53 F.3d 48, 49 (4th Cir. 1995)* ; *Kaplan Early Learning Co. v. Midbar Kodesh Temple, 2004 U.S. Dist. LEXIS 9037, at *4 n.1 (M.D.N.C. 2004)* .

(n11)Footnote 4. *Pipeliners Local 798, Tulsa, Okla. v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974)* .

(n12)Footnote 5. *Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Servs., Inc., 799 F.2d 213, 218 (5th Cir. 1986)* (nothing in record showed consent by all parties).

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2-19 Moore's Manual--Federal Practice and Procedure § 19.63

§ 19.63 Effect of Stipulation To Dismissaln*

[1] General Effects of Stipulation on Action

On the filing of a stipulation of dismissal under Rule 41(a)(1)(A)(i), all of the following results take effect:

1. A voluntary dismissal by stipulation terminates the action immediately when it is filed by the parties, whether or not the court approves or implements the stipulation. n0.1 The dismissal also terminates the jurisdiction of the court regarding the merits of the action. n1 n2

2. A stipulation of dismissal terminates the action without prejudice unless otherwise specified by the parties. n3

3. When a stipulation is made with prejudice, the voluntary dismissal has the same res judicata effect as a final adjudication on the merits favorable to the defendant. n4

4. When a stipulation is made without prejudice, the voluntary dismissal terminates the action as if it were never filed, n5 subject to any conditions the parties incorporated into the stipulation. n6

5. Once a stipulation dismissing an action is filed, any second stipulation by the parties attempting to vacate the dismissal will be ineffective absent the existence of grounds for vacating the dismissal under Rule 60(b), n7 such as, mistake, inadvertence, surprise, excusable neglect, or other good cause. n8

6. The statute of limitation is not tolled by the commencement of an action that is later dismissed by stipulation of the parties. n9

7. A voluntary dismissal moots all motions pending before the court. n10

[2] Effects of Stipulation on Courts Continuing Jurisdiction

After the filing of a stipulation of dismissal, the court lacks jurisdiction to enter further orders and any orders entered

are of no effect n1 and are considered superfluous n2 or are prohibited. n3 The court may not take action on the merits, n3.1 such as granting summary judgment on the claims that are the subject of the stipulation. n4 An unconditional dismissal by stipulation terminates the district court's jurisdiction; n5 because the district court lacks jurisdiction after dismissal, it may not enforce a settlement agreement once the underlying action has been dismissed by stipulation, n6 unless the parties agree. Thus, if the parties include the provision in the stipulation, the court may retain jurisdiction following a stipulated dismissal by incorporating the settlement in its dismissal order. n7 In other words, a district court does not retain supplemental enforcement jurisdiction over a settlement unless the parties either have agreed to incorporate the terms of the settlement into the dismissal order or have executed a stipulation authorizing the court to retain jurisdiction over the implementation of the settlement. n7.1 However, the court may refuse to dismiss the action when the conditions named by the parties are unacceptable to the court. n8

There are two exceptions to the general rule that the court loses jurisdiction on the filing of a stipulated dismissal. First, the court retains jurisdiction to vacate a stipulation of dismissal under Rule 60(b), enabling it to reopen the case on grounds such as mistake and fraud. n9 Second, the district court retains jurisdiction following a stipulated dismissal to impose Rule 11 sanctions when applicable. n10 This latter authority is based on the court's inherent power to administer its own proceedings regarding collateral matters that do not constitute decisions on the merits. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.34 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *Fed. R. Civ. P. 41(a)(1)(B).*

(n3)Footnote 1. *Gambale v. Deutsche Bank AG, 377 F.3d 133, 139 (2d Cir. 2004)* ; *see* [2], *below.*

(n4)Footnote 2. [Reserved].

(n5)Footnote 3. *Fed. R. Civ. P. 41(a)(1)(B)*; *Golden v. David Barenborg & Salomon Bros., Inc., 53 F. 3d 866, 868 (7th Cir. 1995)* (such a rule promotes judicial economy).

(n6)Footnote 4. *Kaspar Wire Works, Inc. v. Leco Eng. & Mach., Inc., 575 F.2d 530, 534 (5th Cir. 1978)* (dismissal with prejudice same as adjudication on merits).

(n7)Footnote 5. *Beck v. Caterpillar Inc., 50 F.3d 405, 407 (7th Cir. 1995) .*

(n8)Footnote 6. *Camerson v. City Escort Patrol, Inc., 787 F.2d 588, 588 (6th Cir. 1986)* ; *see § 19.61[3].*

(n9)Footnote 7. *Martino v. Consolidated Rail Corp., 1988 U.S. Dist. LEXIS 14243 88-0532, at *3 (E.D. Pa. Dec. 21, 1988) .*

(n10)Footnote 8. *Fed. R. Civ. P. 60(b).*

(n11)Footnote 9. *Beck v. Caterpillar Inc., 50 F.3d 405, 406 (7th Cir. 1995) .*

(n12)Footnote 10. *See GMAC Commer. Mortg. Corp. v. LaSalle Bank N.A., 213 F.R.D. 150, 150-151 (S.D.N.Y. 2003) .*

(n13)Footnote 1. *United States v. Kellogg, 12 F.3d 497, 501 (5th Cir. 1994)* ; *see, e.g., Municipality of San Juan v. Rullan, 318 F.3d 26, 27 (1st Cir. 2004)* ; *see also § 19.60.*

(n14)Footnote 2. *Meinecke v. H & R Block of Houston, 66 F.3d 77, 82 (5th Cir. 1995)* .

(n15)Footnote 3. *Mutual Produce, Inc. v. Penn Cent. Transp. Co., 119 F.R.D. 619, 620 (D. Mass. 1988)* .

(n16)Footnote 3.1. *Gambale v. Deutsche Bank AG, 377 F.3d 133, 139 (2d Cir. 2004)* .

(n17)Footnote 4. *Meinecke v. H & R Block of Houston, 66 F.3d 77, 80 (5th Cir. 1995)* (grant of summary judgment void).

(n18)Footnote 5. *Hinsdale v. The Farmers Nat'l Bank and Trust Co., 823 F.2d 993, 995 (6th Cir. 1987)* .

(n19)Footnote 6. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

(n20)Footnote 7. *Marino v. Pioneer Edsel Sales, Inc., 349 F.3d 746, 752 (4th Cir. 2003)* ; *see Glaxo Group Ltd. v. Dr. Reddy's Labs., Ltd., 325 F. Supp. 2d 502, 508 (D.N.J. 2004)* (when parties stipulate to dismissal under Rule 41(a)(1)(ii), court is authorized to embody the settlement contract in its dismissal order but is not required to do so).

(n21)Footnote 7.1. *Municipality of San Juan v. Rullan, 318 F.3d 26, 27 (1st Cir. 2004)* .

(n22)Footnote 8. *Alelly v. Mines Ltd. v. Pelletier, 90 F.R.D. 626, 627 (E.D. Tenn. 1981)* .

(n23)Footnote 9. *Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986)* (dismissal of appeal is without prejudice to party seeking relief before district court from judgment of voluntary dismissal with prejudice for reasons of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1)).

(n24)Footnote 10. *Fox v. Acadia State Bank, 937 F.2d 1566, 1569 fn.2 (11th Cir. 1991)* .

(n25)Footnote 11. *Gambale v. Deutsche Bank AG, 377 F.3d 133, 139-140 (2d Cir. 2004)* (even after dismissal by stipulation court has power to modify or vacate its own protective orders with respect to sensitive documents filed in case).

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
C. VOLUNTARY DISMISSAL BY STIPULATION OF PARTIES

2-19 Moore's Manual--Federal Practice and Procedure § 19.64

§ 19.64 Appeal Regarding Dismissal by Stipulationn*

A party may generally not appeal from a stipulated dismissal with prejudice because it is not an involuntary adverse judgment. n1 Some courts have permitted an appeal when the stipulation expressly preserved the right to appeal, n2 while other courts have rejected such a stipulation, on the grounds that voluntary consent to entry of judgment precludes an appeal. n3 The parties may also appeal an order of the trial court that denies effect to a stipulated dismissal or imposes conditions on it. n4 A writ of mandamus challenging the court order may also be appropriate. n5

An appellate court applies a de novo standard of review on appeal when it considers the propriety of a district court order determining whether a stipulation of dismissal complies with the filing and execution requirements of Rule 41(a)(1)(ii). n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.34 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986)* (parties deprive appellate court and any other court of jurisdiction over action by stipulating to voluntary dismissal with prejudice).

(n3)Footnote 2. *Dorse v. Armstrong World Indus., 798 F.2d 1372, 1375 (11th Cir. 1986)* .

(n4)Footnote 3. *Dorse v. Armstrong World Indus., 798 F.2d 1372, 1375 (11th Cir. 1986)* .

(n5)Footnote 4. *Smith v. Phillips, 881 F.2d 902, 905 (10th Cir. 1989)* (reversing order directing parties to make settlement terms public).

(n6)Footnote 5. *In re Wolf, 842 F.2d 464, 466 (D.C. Cir. 1988)* (mandamus appropriate when court deprived parties of unconditional right to stipulated dismissal by directing that case be dismissed with prejudice if not reopened within 30 days).

(n7)Footnote 6. *Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* .

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2-19 Moore's Manual--Federal Practice and Procedure §§ 19.65through 19.79

[Reserved]

§§ 19.65[Reserved]

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
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2-19 Moore's Manual--Federal Practice and Procedure § 19.80

§ 19.80 Nature and Purpose of Voluntary Dismissal by Court Ordern*

A plaintiff may request a voluntary dismissal from the court, which the court has discretion to grant or deny by order, n1 when a dismissal is no longer available as of right, n2 and the plaintiff cannot obtain consent to a stipulated dismissal. n3 The purposeof a voluntary dismissal by court order is to allow the plaintiff to voluntarily dismiss the action at a later stage in the litigation, while allowing the court to prevent prejudice to the defendant by entering a court order that imposes curative conditions. n4 As discussed in the remainder of this part, in making the decision whether to order the dismissal n5 the court generally must make three separate determinations: (1) whether the dismissal should be allowed at all; (2) whether the dismissal should be with or without prejudice; and (3) what terms and conditions, if any, are appropriate. n6 A defendant may not move for a voluntary dismissal of the plaintiff's action. If the plaintiff joins one of several defendants moving for a voluntary dismissal, however, the court may grant the motion over the objection of the other defendants n7 and need not treat the motion as one for summary judgment. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(2)*; *see § 19.81.*

(n3)Footnote 2. *Fed. R. Civ. P. 41(a)(1)(A)(i)*; *see* Part B, *above.*

(n4)Footnote 3. *Fed. R. Civ. P. 41(a)(1)(A)(ii)*; *see* Part C, *above.*

(n5)Footnote 4. *Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325, 1327 (11th Cir. 2004)* ; *County of Santa Fe v. Public Serv. Co., 311 F.3d 1031, 1047 (10th Cir. 2002)* ; *Virgil v. Montgomery, 353 F. Supp. 2d 620, 622 (E.D.N.C. 2005)* .

(n6)Footnote 5. *See § 19.81*.

(n7)Footnote 6. *Burnette v. Godshall, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993)* (three determinations whether to grant dismissal); *Spencer v. Moore Business Forms, Inc, 87 F.R.D. 118, 119 (N.D. Cal. 1980)* (three predismissal determinations listed).

(n8)Footnote 7. *Southern Elec. Generating Co. v. Allen-Bradley Co., 30 F.R.D. 135, 136 (S.D.N.Y. 1962)* (although Rule 41(a)(2) specifically provides for dismissal on application of plaintiff, rule may be applied to request by defendant when plaintiff consents to granting of dismissal).

(n9)Footnote 8. *See Plasterer v. Hahn, 103 F.R.D. 184, 185 (M.D. Pa. 1984)* .

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2-19 Moore's Manual--Federal Practice and Procedure § 19.81

§ 19.81 Court Has Discretion to Order Voluntary Dismissaln*

The court generally has discretion to grant or deny a voluntary dismissal under Rule 41(a)(2). n1 However, the scope of the trial court's discretion does not allow the court to act arbitrarily, unreasonably, or to refuse to exercise discretion. n2 In order to facilitate appeal and to allow the understanding of its order, the court should state the reasons for the manner in which it exercises its discretion. n3 The court's discretion extends to whether dismissal should be made with or without prejudice, n4 and to whether costs or attorney's fees should be imposed. n4.1

Some courts take the position that a court does not have discretion to deny a plaintiff's motion for a voluntary dismissal under Rule 41(a)(2) with prejudice. These courts reason that when the plaintiff requests a voluntary dismissal with prejudice, the defendant receives all the relief that could have been obtained after a full trial and is therefore protected from future litigation by the doctrine of res judicata. However, these courts recognize that when a dismissal with prejudice would not dispose of the entire litigation, the court must determine whether the remaining parties would be prejudiced by the dismissal. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Finch v. Ford Motor Co., 327 F. Supp. 2d 942, 945 (N.D. Ill. 2004)* .

(n3)Footnote 2. *Eagles, Ltd. v. Am. Eagle Found., 356 F.3d 724, 730 (6th Cir. 2004)* .

(n4)Footnote 3. *See United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)* .

(n5)Footnote 4. *Holbrook v. Andersen Corp., 130 F.R.D. 516, 519 (D. Me. 1990)* (court has discretion whether to

dismiss with or without prejudice).

(n6)Footnote 4.1. *Trujillo v. Banco Cent. Del Ecuador, 379 F.3d 1298, 1301-1302 (11th Cir. 2004)* .

(n7)Footnote 5. *ITV Direct, Inc. v. Healthy Solutions, LLC, 2006 U.S. App. LEXIS 9587, *9 n.2 (1st Cir. 2006)* (court had to consider any possible prejudice to third party intervenor; citing **Moore's Federal Practice**).

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2-19 Moore's Manual--Federal Practice and Procedure § 19.82

§ 19.82 Motion and Hearing for Court Ordern*

The plaintiff's request for a voluntary dismissal by court order should generally be made by a formal motion in writing, n0.1 because a court order is required. n1 Additionally, the opposing party is generally entitled to notice of the motion. n2 Because the rule does not require that the plaintiff's request take any specific form, the court may enter an order dismissing the case under Rule 41(a)(2) whenever appropriate under the circumstances. n3 Thus, an oral motion may be appropriate when dismissal is sought during a hearing or trial, n4 and the court has authority to order dismissal sua sponte when appropriate. n5 Furthermore, the district court has discretion to grant or deny a motion for a voluntary dismissal without holding an evidentiary hearing on the applicable issues. n6

If the plaintiff has filed a notice of dismissal despite the expiration of the plaintiff's time to do so under Rule 41(a)(1)(A)(i), the court has the option to treat the notice as a motion under Rule 41(a)(2) n7 but is not required to do so and may simply vacate the notice. n8 Similarly, if the plaintiff requests the equivalent of a voluntary dismissal through some other procedural tool, the court may treat the application as if made under Rule 41(a)(2). n9

The plaintiff may move for a court order to effect a voluntary dismissal at any time n10 and must do so to obtain a voluntary dismissal if the defending party has already served an answer or motion for summary judgment and the adverse party is unwilling to stipulate. n10.1 If the motion is made at a time when the plaintiff could have voluntarily dismissed as of right under Rule 41(a)(1)(A)(i), n11 the court has the option to deal with the motion as a notice of dismissal and automatically grant the dismissal; however, in circumstances when the court should impose conditions, it should do so under Rule 41(a)(2). n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *Berishev v. Chertoff, 486 F. Supp. 2d 202, 205-206 (D. Mass. 2007)* ; *see Fed. R. Civ. P. 41(a)(2).*

(n3)Footnote 1. *Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967)* (dismissal should be requested by motion); *Wilson v. Eli Lilly & Co., 222 F.R.D. 99, 99-100 (D. Md. 2004)* .

(n4)Footnote 2. *Barber v. General Elec. Co., 648 F.2d 1272, 1275 (10th Cir. 1981)* (district court properly vacated order granting voluntary dismissal when defendant did not receive notice of motion or opportunity to be heard); *Wilson v. Eli Lilly & Co., 222 F.R.D. 99, 99-100 (D. Md. 2004)* .

(n5)Footnote 3. *Nunez v. IBP, Inc., 163 F.R.D. 356, 358-359 (D. Kan. 1995)* (only approval is required).

(n6)Footnote 4. *See, e.g., Kenrose Mfg. v. Fred Whitaker Co., 53 F.R.D. 491, 493-495 (W.D. Va. 1971)* , *aff'd on other grounds, 512 F.2d 890 (4th Cir. 1992)* .

(n7)Footnote 5. *Kotzen v. Levine, 678 F.2d 140, 141 (11th Cir. 1982)* (court sua sponte dismissed under Rule 41(a)(2) for technical failure of proof without waiting for plaintiff's motion).

(n8)Footnote 6. *McLaughlin v. Cheshire, 676 F.2d 855, 857 (D.C. Cir. 1982)* (district court has discretion to rely entirely on written submissions from parties or to hold evidentiary hearing to resolve issues of fact if they may not be resolved on papers submitted).

(n9)Footnote 7. *Estate of Williams-Moore v. Alliance One Receivables Mgmt., Inc., 2004 U.S. Dist. LEXIS 19075, at *13 (M.D.N.C. 2004)* .

(n10)Footnote 8. *Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971)* .

(n11)Footnote 9. *See, e.g., Dee-K Enterprises, Inc. v. Heveafil SDN. BHD., 177 F.R.D. 351, 356 (E.D. Va. 1998)* (district court treated plaintiff's motion to amend complaint to eliminate all causes of action againstparticular defendant as motion to dismiss under Rule 41(a)(2)).

(n12)Footnote 10. *See Kenrose Mfg. v. Fred Whitaker Co., 53 F.R.D. 491, 493-495 (W.D. Va. 1971)* (motion at trial).

(n13)Footnote 10.1. *Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325, 1327 (11th Cir. 2004)* ; *see Fed. R. Civ. P. 41(a)(1).*

(n14)Footnote 11. *Fed. R. Civ. P. 41(a)(1)(i).*

(n15)Footnote 12. *Parker v. Freightliner Corp., 940 F.2d 1019, 1022-1023 (7th Cir. 1991)* .

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2-19 Moore's Manual--Federal Practice and Procedure § 19.83

§ 19.83 Grounds for Court Ordered Dismissaln*

[1] Absence of Legal Prejudice to Defending Party

The primary purpose of Rule 41(a)(2) is to protect the interests of the defendant, n1 although the court should weigh the equities and do justice to all the parties in the case. n2 A dismissal without prejudice should be denied when the defendant will suffer "plain legal prejudice," which occurs when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. n2.1 Factors to consider in determining legal prejudice include the defendant's effort and expense involved in preparing for trial; excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; insufficient explanation of the need to take a dismissal; the current stage of the proceedings; n2.2 and the fact that summary judgment has been filed by the defendant. n3 Thus, in the absence of such prejudice, the court should normally grant an order for voluntary dismissal. n4 Furthermore, the court should grant a motion for voluntary dismissal that is not opposed or that is not countered with a relevant objection. n5

The mere filing of a responsive pleading or motion is not alone enough to deny a voluntary dismissal without prejudice. n6 The expense associated with the preparation for trial or of a summary judgment motion may be considered in determining whether the defendant has been prejudiced. n7 Because one of the primary purposes of Rule 41(a) is to permit the plaintiff to dismiss an action and start over again, it has been frequently held that the mere prospect of a second lawsuit following a voluntary dismissal without prejudice does not constitute plain legal prejudice. n8 Even the fact that the plaintiff may obtain some tactical advantage by taking a voluntary dismissal is not sufficient grounds to deny a motion under Rule 41(a)(2). n9

[2] Factors Considered in Determination of Whether Defendant Suffered Prejudice

[a] Focus on Rights and Defenses Available to Defendant

"Plain legal prejudice" sufficient for the court to deny a motion for voluntary dismissal under Rule 41(a)(2) occurs when the defending party's actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. n1 In this determination, courts focus on the rights and defenses available to the defendant, including whether there is prejudice to some legal interest, claim, or argument of the defendant, such as the loss of a federal

forum, or the inability to conduct meaningful discovery. n2

Courts have enumerated a number of factors relevant to the consideration of whether the defendant will be prejudiced by the grant of a voluntary dismissal without prejudice. No one set of factors has been adopted in any particular circuit; the lists formulated have been non-exclusive and are meant to serve merely as guidelines for the district court. n3 Some factors commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, (2) the plaintiff's diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanationfor the need to dismiss. n4 Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case n5 and any vexatious conduct or bad faith on plaintiff's part. n6

[b] Progress of Litigation

Unlike the firm deadline for a notice of dismissal as of right, n7 there is no firm cutoff for a motion for dismissal by court order, n8 and the court is more likely to order a voluntary dismissal the earlier the stage of the litigation. Dismissals are routinely granted when the action has not been pending long and there has been little discovery or motion practice. n9 Conversely, a dismissal may be denied when it is sought late in the litigation and the defendant has been put to great effort and expense in defending the action. n10 However, the advanced stage of the litigation and the expense to the defendant do not by themselves mandate denial of the motion. n11 In this regard, a defendant does not suffer prejudice merely because some discovery has been done in a case, especially when the arguments and evidence sought to be presented by the defendant may be used by the defendant in the event the plaintiff refiles the case. n11.1 Thus, a court may grant a dismissal after the completion of pre-trial proceedings and during the trial itself. n12 Regardless of the stage of the litigation, the court should grant the motion when the prejudice to the defendant may be cured through the imposition of terms or conditions. n13

[c] Adequacy of Plaintiff's Reasons for Dismissal

Although some courts have held that the plaintiff's motive for seeking a voluntary dismissal is irrelevant or a secondary consideration, n14 most courts consider the plaintiff's good or bad faith at least one of the factors in a determination of whether to grant an order of dismissal. n15 Thus, all of the following reasons have at one time or other been considered by the courts:

1. A plaintiff's intention to refile and pursue the litigation in state court is a factor but does not by itself constitute prejudice sufficient to justify denial of a motion for a voluntary dismissal. n16 The fact that the original forum is more convenient than the new forum does not necessarily constitute prejudice to the defendant. n17 A difference in the law applied by the two forums may be prejudicial, however. n18

2. The voluntary dismissal of a non-diverse defendant in order to preserve federal diversity jurisdiction. n19

3. The intent to refile a new complaint to correct mistakes in the original pleading. n20 Similarly, a dismissal to secure new or additional evidence supporting plaintiff's claims may be allowed, n21 unless the plaintiff has not been diligent in pursuing the case. n22

4. Voluntary dismissal made for the purpose of remedying a failure to demand a jury trial; however, a court will normally deny the motion. n23 When it does not appear that the voluntary dismissal was sought as a subterfuge to obtain ajury trial, the possibility that the plaintiff might regain that right after refiling in state court does not require denial of the motion. n24

5. To avoid an adverse determination on the merits of the action; a court will deny a motion for dismissal made for this

reason. n25 In particular, the court will not permit a plaintiff to use a voluntary dismissal as an indirect method to correct an initial failure to pursue a case in a timely fashion. n26

6. There is a split of authority regarding whether a plaintiff should be permitted voluntarily to dismiss an action without prejudice in order to defeat defenses. Thus, for example, some courts have found that the loss of the statute of limitation defense constitutes plain legal prejudice adverse to the defendant, prohibiting the grant of a motion of dismissal, n27 while other courts have not. n28 Similarly, one court of appeals has held that a voluntary dismissal should not be granted when it is sought to defeat the defendant's defense of forum non conveniens. n29

7. The district court should not grant a motion for voluntary dismissal merely to substitute for an adjournment of a scheduled trial. n30

8. The district court should not permit the plaintiff voluntarily to dismiss the action merely to thwart discovery deadlines. n31

[d] Dismissal to Facilitate Final Judgment for Immediate Appeal

A party may expedite the appeal of an adverse ruling that disposes of fewer than all claims in the action by voluntarily dismissing the remaining claims. For example, the plaintiff may appeal a summary judgment order dismissing most of its claims by dismissing the remaining claims. Some circuits hold that the plaintiff may not revive those claims voluntarily dismissed. n32 Other circuits have permitted appeals when the unadjudicated claims were dismissed without prejudice. n33 Courts are unanimous in holding that the claims voluntarily dismissed may not be reviewed or revived on appeal. n34 Furthermore, a plaintiff may not take voluntary dismissal to obtain appellate review of a claim that was not dismissed on the merits. n35

[3] Denial of Dismissal to Preserve Counterclaim

A court will deny a plaintiff's motion for a voluntary dismissal if the defendant has asserted a compulsory counterclaim that is inextricably linked to the claims the plaintiff wants dismissed. n1 Furthermore, if a counterclaim has been pleaded by a defendant prior to the service on the defendant of the plaintiff's motion to dismiss, the court will not dismiss the action over the defendant's objection unless the counterclaim will remain pending for independent adjudication by the court. n2 Accordingly, a plaintiff may not dismiss an action when the dismissal would destroy federal jurisdiction and prevent the court from adjudicating the defendant's counterclaim. When, however, there is an independent jurisdictional basis for the counterclaim, Rule 41 does not prohibit dismissal of the underlying complaint. n3 The pendency of a compulsory counterclaim will not defeat dismissal, since the court may retain jurisdiction over a compulsory counterclaim under Rule 13 provided that it had subject matter jurisdiction over the main claim. n4

There are several other situations when the existence of a counterclaim will not defeat voluntary dismissal. A defendant may not object to a voluntary dismissal on the grounds that a counterclaim is pending unless the counterclaim was interposed prior to the service of the plaintiff's motion to dismiss. n5 An action may be voluntarily dismissed despite the pendency of a counterclaim if the counterclaim fails to state a claim or is otherwise improperly asserted. n6 Counterclaims that have been dismissed also pose no bar to dismissal of the main claim. n7 Because of the equitable nature of declaratory relief claims, the district court may also grant a plaintiff's Rule 41(a)(2) motion to dismiss despite the existenceof a defendant's pending counterclaim that requests declaratory relief on state law causes of action, at least where that claim could be determined in a pending state court lawsuit also being pursued by the plaintiff. n7.1 Finally, while Rule 41(a)(2) limits the dismissal of an action in which a counterclaim is pending, it does not prohibit dismissal when cross-claims are pending. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325, 1327 (11th Cir. 2004)* ; *Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993)* ; *Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir. 1985)* ; *Mercer Tool Corp. v. Friedr. Dick GmbH, 175 F.R.D. 173, 175 (E.D.N.Y. 1997)* .

(n3)Footnote 2. *Correspondent Servs. Corp. v. First Equities Corp., 338 F.3d 119 (2d Cir. 2004)* ; *Burnette v. Godshall, 828 F. Supp. 1439, 1444 (N.D. Cal. 1993)* .

(n4)Footnote 2.1. *United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)* .

(n5)Footnote 2.2. *County of Santa Fe v. Public Serv. Co., 311 F.3d 1031, 1047 (10th Cir. 2002)* .

(n6)Footnote 3. *Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000)* ; *United States v. Berg, 190 F.R.D. 539, 543 (E.D. Cal. 1999)* ; *see* [2], *below*.

(n7)Footnote 4. *Andes v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986)* .

(n8)Footnote 5. *Bishop v. West Am. Ins. Co., 95 F.R.D. 494, 495 (N.D. Ga. 1982)* .

(n9)Footnote 6. *Metropolitan Fed. Bank of Iowa, F.S.B. v. W.R. Grace, 999 F.2d 1257, 1262 (8th Cir. 1993)* .

(n10)Footnote 7. *Philan Ins., Ltd. v. Frank B. Hall & Co., 786 F. Supp. 345, 349 (S.D.N.Y. 1992)* .

(n11)Footnote 8. *Sox v. Estes Express Lines, 92 F.R.D. 71, 72 (D.S.C. 1981)* .

(n12)Footnote 9. *Grynberg Prod. Corp. v. British Gas, P.L.C., 149 F.R.D. 135, 138 (E.D. Tex. 1993)* .

(n13)Footnote 1. *United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)* ; *SmithKline Beecham Corp. v. Pentech Pharms., Inc., 261 F. Supp. 2d 1002, 1007 (N.D. Ill. 2003)* ; *United States v. Berg, 190 F.R.D. 539, 543 (E.D. Cal. 1999)* ; *see Watson v. Clark, 716 F. Supp. 1354, 1356 (D. Nev. 1989) , aff'd without op., 909 F.2d 1490 (9th Cir. 1990)* ; *Mayes v. Fujimoto, 181 F.R.D. 453, 456 (D. Haw. 1998) , aff'd without op., 173 F.3d 861 (9th Cir. 1999)* .

(n14)Footnote 2. *Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir. 1996)* (citing **Moore's Federal Practice**).

(n15)Footnote 3. *Kovalic v. DEC Int'l, 855 F.2d 471, 473 (7th Cir. 1988)* .

(n16)Footnote 4. *Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000)* ; *see, e.g., Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994)* (noting factors of defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on part of plaintiff in prosecuting action, insufficient explanation for need to take dismissal, and whether motion for summary judgment has been filed by defendant).

(n17)Footnote 5. *Ratkovich v. Smith Kline, 951 F.2d 155, 157-158 (7th Cir. 1991)* ; *see, e.g., Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000)* (appellate court remanded for reconsideration of defendant's motion for summary judgment where factors favored defendant, and summary judgment in favor of defendant would probably be res judicata as to parallel state proceeding against party in privity with defendant).

(n18)Footnote 6. *Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)* , *cert. denied, 498 U.S. 899 (1990)* .

(n19)Footnote 7. *See § 19.42[2][a].*

(n20)Footnote 8. *Fed. R. Civ. P. 41(a)(2).*

(n21)Footnote 9. *See, e.g., Grynberg Prod. Corp. v. British Gas, P.L.C., 149 F.R.D. 135, 138-139 (E.D. Tex. 1993)* .

(n22)Footnote 10. *Unida v. Levi Strauss & Co., 986 F.2d 970, 974 (5th Cir. 1993)* .

(n23)Footnote 11. *Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir. 1982)* .

(n24)Footnote 11.1. *Berry v. General Star Nat'l Ins. Co., 190 F.R.D. 697, 698 (M.D. Ala. 2000)* .

(n25)Footnote 12. *Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir. 1982)* .

(n26)Footnote 13. *Der v. E. I. Dupont de Nemours & Co., 142 F.R.D. 344, 346 (M.D. Fla. 1992)* .

(n27)Footnote 14. *B & J Mfg. v. D.A. Frost Indus., Inc., 106 F.R.D. 351, 352 (D. Ohio 1985)* .

(n28)Footnote 15. *Read Corp. v. Bibco Equip. Co., 145 F.R.D. 288, 291 (D.N.H. 1993)* (finding of good faith on part of plaintiff is relevant factor in evaluating whether defendant has or will suffer substantial prejudice).

(n29)Footnote 16. *Le Compte v. Mr. Chip, Inc., 528 F.2d 601, 604, 605 (5th Cir. 1976)* ; *see San Marco v. City of St. Petersburg, 185 F.R.D. 679, 680-681 (M.D. Fla. 1999)* (district court granted plaintiff's motion to dismiss voluntarily so that plaintiff could pursue earlier-filed case in state court because defendant who chose not to remove identical state action to federal court would not be prejudiced by voluntary dismissal of federal action so suit could be pursued in state court.

(n30)Footnote 17. *Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 146 (9th Cir. 1982)* (doctrine of forum non conveniens is inapplicable to motions to dismiss under Rule 41(a)(2)).

(n31)Footnote 18. *Grynberg Production Corp. v. British Gas, P.L.C., 149 F.R.D. 135, 138 (E.D. Tex. 1993)* (no legal prejudice when Texas state court would apply same forum non conveniens analysis as federal court).

(n32)Footnote 19. *Carson v. Allied News Co., 529 F.2d 206, 208 (7th Cir. 1976)* .

(n33)Footnote 20. *Cf. Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* .

(n34)Footnote 21. *Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 755, 91 L. Ed. 849 (1947)* (may dismiss to gather evidence).

(n35)Footnote 22. *Saviour v. Revco Discount Drug Ctr., Inc., 126 F.R.D. 569, 570 (D. Kan. 1989)* .

(n36)Footnote 23. *Russ v. Standard Ins. Co., 120 F.3d 988, 990 (9th Cir. 1997)* (district court abused its discretion when it permitted plaintiff to dismiss action under Rule 41(a)(2) for admitted purpose of refiling and making demand for jury trial).

(n37)Footnote 24. *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1275 (5th Cir. 1990)* .

(n38)Footnote 25. *Kapoulas v. Williams Ins. Agency, Inc., 11 F.3d 1380, 1383 (7th Cir. 1993)* ; *see RMD Concessions, L.L.C. v. Westfield Corp., 194 F.R.D. 241, 243 (E.D. Va. 2000)* (citing **Moore's Federal Practice** for proposition that dismissal to avoid effect of unfavorable, but not necessarily dispositive, rulings by court may constitute

legal prejudice).

(n39)Footnote 26. *St. Clair v. General Motors Corp., 10 F. Supp.2d 523, 530-531 (M.D.N.C. 1998)* .

(n40)Footnote 27. *Metropolitan Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co., 999 F.2d 1257, 1259 (8th Cir. 1993)* .

(n41)Footnote 28. *Germain v. Semco Serv. Machine Co., 79 F.R.D. 85, 86 (E.D.N.Y. 1978)* (plaintiff allowed to attempt to find different forum with more advantageous statute of limitation).

(n42)Footnote 29. *Quintero v. Klaveness Ship Lines, 914 F.2d 717, 725 (5th Cir. 1990)* , *cert. denied, 499 U.S. 925 (1991)* .

(n43)Footnote 30. *Greguski v. Long Island R.R., 163 F.R.D. 221, 223-224 (S.D.N.Y. 1995)* (plaintiff sought delay to correct complaint).

(n44)Footnote 31. *In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996)* (trial court did not abuse its discretion in denying motion to dismiss, when motion was thinly veiled attempt to avoid discovery by movants whose total failure to respond to discovery orders prejudiced defendants).

(n45)Footnote 32. *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 94 (2d Cir. 1987)* .

(n46)Footnote 33. *Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987)* .

(n47)Footnote 34. *McGregor v. Board of Comr. of Palm Beach County, 956 F.2d 1017, 1021 (11th Cir. 1992)* .

(n48)Footnote 35. *Laczay v. Ross Adhesives, 855 F.2d 351, 354-355 (6th Cir. 1988)* , *cert. denied, 489 U.S. 1014 (1989)* .

(n49)Footnote 1. *Bosteve, Ltd. v. Marauszwki, 110 F.R.D. 257, 259 (E.D.N.Y. 1986)* (it would be inefficient use of court's resources to adjudicate defendant's claims only, when they are inextricably linked to plaintiff's).

(n50)Footnote 2. *Fed. R. Civ. P. 41(a)(2).*

(n51)Footnote 3. *Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc., 142 F.R.D. 179, 180 (N.D. Ga. 1991)* (counterclaim had independent jurisdictional basis).

(n52)Footnote 4. *Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1198 (10th Cir. 1974)* .

(n53)Footnote 5. *United States v. Professional Air Traffic Controllers Org., 449 F.2d 1299, 1300 (3d Cir. 1971)* (motion to dismiss served before counterclaim).

(n54)Footnote 6. *Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328, 1332 (11th Cir. 1984)* .

(n55)Footnote 7. *SEC v. Lorin, 869 F. Supp. 1117, 1118 (S.D.N.Y. 1994)* .

(n56)Footnote 7.1. *Bader v. Electronics for Imaging, Inc., 195 F.R.D. 659, 663-664 (N.D. Cal. 2000)* (decision whether to entertain declaratory relief action is within discretion of court, considering (1) whether exercising jurisdiction over the declaratory relief action would require it to needlessly determine issues of state law; (2) whether the declaratory judgment action is a means of forum shopping; and (3) whether exercising jurisdiction over the declaratory action would defeat a policy of avoiding duplicative litigation; in this case, all three factors weighed against leaving defendants' declaratory relief counterclaim pending).

(n57)Footnote 8. *See Fed. R. Civ. P. 41(a)(2).*

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART II. VOLUNTARY DISMISSALS
D. VOLUNTARY DISMISSAL BY ORDER OF COURT

2-19 Moore's Manual--Federal Practice and Procedure § 19.84

§ 19.84 Effect of Court Ordered Voluntary Dismissaln*

When a court orders a voluntary dismissal on a motion of a claimant, all of the following results take effect:

1. A voluntary dismissal by a court order is without prejudice unless otherwise specified in the order. n1

2. A voluntary dismissal without prejudice under Rule 41(a)(2) renders the proceedings a nullity and puts the parties in the position they would have if the action had never been filed. n2 The dismissal does not have res judicata or collateral estoppel effect on later proceedings. The district court may, in imposing conditions on the dismissal, decline to vacate all prior orders. n3

3. A dismissal with prejudice is a complete adjudication and a bar to a further action between the parties. n4

4. A statute of limitation is generally not tolled by the commencement of an action that is later voluntarily dismissed by court order. n5

5. Although a court-ordered voluntary dismissal normally terminates the action as if never commenced (as stated in item 2, above), the court retains jurisdiction following the dismissal for certain collateral matters. n5.1 Thus, the court may retain jurisdiction to impose Rule 11 sanctions n6 and to award attorney's fees. n7 The district court also retains jurisdiction following a voluntary dismissal by its order to entertain a motion to vacate the dismissal under Rule 60(b) n8 on the grounds of mistake, inadvertence, surprise, excusable neglect, or other good cause. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Wilson-Cook Medical, Inc. v. Wilson, 942 F.2d 247, 252 (4th Cir. 1991)* .

(n3)Footnote 2. *Robinson v. Willow Glen Acad., 895 F.2d 1168, 1169 (7th Cir. 1990)* ; *Moore v. Chicago, 2004 U.S. Dist. LEXIS 19739, at *6-*7 (N.D. Ill. 2004)* .

(n4)Footnote 3. *National R.R. Passenger Corp. v. International Ass'n of Machinists and Aerospace Workers, 915 F.2d 43, 48 (1st Cir. 1990)* .

(n5)Footnote 4. *Ferrato v. Castro, 888 F. Supp. 33, 34 (S.D.N.Y. 1995)* .

(n6)Footnote 5. *Basco v. American Gen. Ins. Corp., 43 F.3d 964, 965 (5th Cir. 1994)* .

(n7)Footnote 5.1. *Chambers v. Time Warner, Inc., 2003 U.S. Dist. LEXIS 3652, at *4 (S.D.N.Y. 2003)* .

(n8)Footnote 6. *Dunn v. Gull, 990 F.2d 348, 350 (7th Cir. 1993)* ; *see Fed. R. Civ. P. 11.*

(n9)Footnote 7. *Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist., 71 F. 3d 1053, 1055 (2d Cir. 1995)* ; *see 42 U.S.C. § 1988.*

(n10)Footnote 8. *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp., 997 F.2d 39, 44 (5th Cir. 1993)* .

(n11)Footnote 9. *See Fed. R. Civ. P. 60(b).*

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2-19 Moore's Manual--Federal Practice and Procedure § 19.85

§ 19.85 Terms and Conditions of Dismissaln*

[1] Purpose to Protect Defendant

When it grants an order of voluntary dismissal, the district court has discretion to impose terms and conditions in the order. n1 Because the purpose of this rule is to protect the defendant, n2 the conditions may vary, depending on whether the defendant has suffered any "legal prejudice," which occurs when the defending party's actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. n2.1 Courts impose few or no conditions early in a case when the defendant faces at most the mere prospect of relitigation in another forum. n3 In contrast, courts impose more stringent conditions when the case has reached an advanced stage. n4

[2] Permissible Terms and Conditions

[a] Condition That Dismissal be With Prejudice

The district court may impose a condition on a voluntary dismissal requiring that the dismissal be with prejudice. n1 The factors considered in determining whether the dismissal should be with prejudice are essentially the same as those considered in determining whether the dismissal should be permitted at all: (1) the defendant's effort and expense in preparing for trial, (2) the plaintiff's lack of diligence in prosecuting the action, and (3) the sufficiency of plaintiff'sexplanation for seeking the dismissal. n2 The court may also consider whether the action or claim sought to be voluntarily dismissed is meritorious. n3

As a general rule, the court must grant a motion for dismissal if the plaintiff requests that the dismissal be with prejudice. If the plaintiff fails to specify whether the dismissal requested is to be with or without prejudice, or requests that it be without prejudice, the decision is left to the district court. Thus, the district court does not abuse its discretion by dismissing with prejudice when the request for dismissal does not specify whether it is to be with or without prejudice. For example, in an action alleging violations of both state and federal securities laws, the district court granted plaintiffs' Rule 41(a)(2) motion for voluntary dismissal, ruling that the dismissal would be without prejudice to plaintiffs' asserting their state law causes of action in a pending state court case, but that the dismissal would be with prejudice in two respects: first, the plaintiff would be prohibited from reasserting the causes of action in federal court,

and second, the plaintiff would be prohibited from asserting the federal claims in the state court action. n3.1

Dismissals without prejudice are usually granted only if the plaintiff pays expenses incurred by the defendant in defending the suit. When a plaintiff seeks a dismissal but asks the court to waive costs, a court may be justified in construing the request as one for a dismissal with prejudice. n4

[b] Costs

[i] Determination of Whether to Condition Dismissal on Payment of Costs

The most common condition of a dismissal without prejudice under Rule 41(a)(2) is the payment of the defendant's costs in the litigation. n5 The court may order the condition sua sponte. n6 If the district court denies costs when the dismissal is without prejudice, the court should provide its reasons for the denial. n7 On the other hand, if the voluntary dismissal is granted with prejudice, the court should deny a condition of costs and attorney's fees, because the defendant will not be burdened by the future risk of litigation. n8 As a matter of tactics, a plaintiff faced with the imposition of attorney's fees and costs on a court-ordered motion to dismiss may request that the action be dismissed with prejudice to avoid payment of costs. n9 There may be extraordinary circumstances, however, when the plaintiff's conduct has been so vexatious that an award of costs is nevertheless appropriate even in a dismissal with prejudice. n10

To determine whether to award costs and attorney's fees to defendants after a voluntary dismissal without prejudice, the court should consider the following factors: (1) any excessive and duplicative expense of a second litigation; (2) the effort and expense incurred by a defendant in preparing for trial; (3) the extent to which the litigation has progressed; and (4) the plaintiff's diligence in moving to dismiss. n11

[ii] Availability of Types of Costs

The court typically awards as a term and condition of dismissal without prejudice the expenses the defendant has incurred in defending the suit, including reasonable attorney's fees. n12 The court also requires the payment of costs to deter vexatious litigation. n13 Accordingly, the costs available under the rule are not limited to taxable costs, but may include compensation for all litigation-related costs, including attorney's fees. n14

An award of costs is particularly appropriate when the dismissal was for the purpose of refiling the action in state court. n15 The court may also award the defendant the costs expended in removing the action, whether or not the plaintiff took the dismissal for the purpose of refiling in state court. n16 The court should grant an award of costs for expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim. n17 Thus, an award of attorney's fees should be limited to compensation for work that may not beused in a second contemplated litigation or in other pending litigation between the parties, and should not be awarded for fees that were incurred unnecessarily. n18

On the other hand, costs should be denied for expenses incurred for work that will be useful in defending subsequent litigation. n19 Costs may also be denied when the defendant's fees were paid by a third party, n20 or when both parties should be held responsible for the expense of the action. n21 One court refused to impose attorney's fees and costs under Rule 41(a)(2) after it required the plaintiff to execute a covenant not to sue the defendants in the future. This court noted that the purpose of an award of attorney's fees and costs is to reimburse the defendant for litigation costs incurred, considering the risk that the same suit will be refiled and will result in duplicative expenses. n22

[c] Other Conditions That Court May Impose

The district court may impose conditions prohibiting refiling of the action in the original forum or requiring refiling in a particular forum, n23 although it generally does not constitute an abuse of discretion to decline to do so. n24 The court may also condition the dismissal on the plaintiff's stipulation not to oppose the use of existing discovery in the refiled

action. n25 Similarly, the court may condition a voluntary dismissal on the plaintiff's production of documents and evidence. n26

[3] Prohibited Terms and Conditions

The court may not impose conditions on the nonmoving defending party to protect the plaintiff from the consequences of the dismissal. Thus, for example, the district court may not dismiss an action on condition that non-moving defendant waive a statute of limitation defense to a claim once the action is refiled in state court. n1 On the other hand, the court may not award the defendant more relief than the defendant could have obtained through an adjudication of the lawsuit on the merits. n2 Furthermore, Rule 41(a)(2) does not provide an independent basis for imposing conditional sanctions on attorneys. n3 Thus, the Eleventh Circuit held that a district court abused its discretion in retaining jurisdiction to assess attorney's fees and costs against the plaintiff and his attorneys in the event that any of the plaintiff's present attorneys brought an action against the defendants in another forum, because the court implicitly held that sanctions were not available in the present action, and a court has no authority to impose sanctions in a case brought in another court. n4

[4] Plaintiff's Response to Imposition of Terms and Conditions

If the plaintiff accepts the dismissal but fails to comply with the conditions imposed by the court, the court may dismiss the action with prejudice. n1 Some appellate courts require the district court to explicitly warn the plaintiff that dismissal with prejudice will result from a failure to comply. n2

As an alternative to a refusal to comply, a plaintiff that believes it may not accept the terms or conditions set by the court need not accept the dismissal but may withdraw the motion and proceed with the action. n3 An order that awards costs and attorney's fees outright, without expressly conditioning the dismissal on their payment, will nonetheless be considered conditional pursuant to the language of Rule 41(a)(2). n4 If it appears that the plaintiff was not aware of the option to withdraw the motion, the matter should be remanded to the district court to present the plaintiff with the choice. n5 However, if a plaintiff knew or should have known of the option to withdraw, but nevertheless accepted the dismissal, the plaintiff may not then object to the conditions. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 41(a)(2).*

(n3)Footnote 2. *Cross Westchester Dev. Corp. v. Chiulli, 887 F.2d 431, 432 (2d Cir. 1989)* (purpose of authorizing terms and conditions on voluntary dismissal is to protect defendant from prejudice).

(n4)Footnote 2.1. *See Pontenberg v. Boston Sci. Corp., 252 F.3d 1253, 1255-1256 (11th Cir. 2001)* ; *Thomas v. N.Y. State Dep't of Corr. Servs., 2004 U.S. Dist. LEXIS 16573, at *10 (S.D.N.Y. 2004)* ; *Boyce v. Augusta-Richmond County, 111 F. Supp. 2d 1363, 1374 (S.D. Ga. 2000)* .

(n5)Footnote 3. *D'Alto v. Dahon Cal., Inc., 100 F.3d 281, 283 (2d Cir. 1996)* .

(n6)Footnote 4. *Brooks v. State Bd. of Elections, 173 F.R.D. 547, 549-550 (S.D. Ga. 1997)* .

(n7)Footnote 1. *Andes v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986)* (plaintiff deserved notice of court's

intent to dismiss with prejudice); *Brooks v. State Bd. of Elections, 173 F.R.D. 547, 549-550 (S.D. Ga. 1997)* (dismissal with prejudice was appropriate condition in class action that had been litigated for almost nine years).

(n8)Footnote 2. *Ratkovich v. Smith Kline, 951 F.2d 155, 158 (7th Cir. 1991)* .

(n9)Footnote 3. *Burnette v. Godshall, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993)* , *aff'd on other grounds sub nom. Burnette v. Lockheed Missiles & Space Co., 72 F.3d 766, 767 (9th Cir. 1995)* .

(n10)Footnote 3.1. *Bader v. Electronics for Imaging, Inc., 195 F.R.D. 659, 663 (N.D. Cal. 2000)* .

(n11)Footnote 4. *Babcock v. McDaniel, 148 F.3d 797, 799 (7th Cir. 1998)* (district court did not abuse its discretion in granting voluntary dismissal with prejudice because plaintiff's request for dismissal did not specify whether he was seeking dismissal with or without prejudice, and plaintiff conditioned dismissal on waiver of costs); *see* [b], *below*.

(n12)Footnote 5. *Westlands Water Dist. v. United States, 100 F.3d 94, 97-98 (9th Cir. 1996)* .

(n13)Footnote 6. *Manshack v. Southwestern Elec. Power Co., 915 F.2d 172, 174 (5th Cir. 1990)* .

(n14)Footnote 7. *Schwarz v. Folloder, 767 F.2d 125, 127 (5th Cir. 1985)* .

(n15)Footnote 8. *Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985)* .

(n16)Footnote 9. *Horton v. TWA Corp., 169 F.R.D. 11, 18 (E.D.N.Y. 1996)* .

(n17)Footnote 10. *Aerotech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997)* (for example, when litigant makes repeated practice of bringing claims and then dismissing claims).

(n18)Footnote 11. *United States ex rel. Haskins v. Omega Inst., 25 F. Supp. 2d 510, 515-516 (D.N.J. 1998)* .

(n19)Footnote 12. *United States ex rel. Stone v. Rockwell Int'l Corp., 282 F.3d 787, 810 (10th Cir. 2004)* ; *Gossard v. Washington Gas Light Co., 217 F.R.D. 38, 40-41 (D.D.C. 2003)* .

(n20)Footnote 13. *Bishop v. West Am. Ins. Co., 95 F.R.D. 494, 495 (N.D. Ga. 1982)* .

(n21)Footnote 14. *McCants v. Ford Motor Co., 781 F.2d 855, 859-860 (11th Cir. 1986)* .

(n22)Footnote 15. *Taragan v. Eli Lilly & Co., Inc., 838 F.2d 1337, 1340 (D.C. Cir. 1988)* .

(n23)Footnote 16. *Bishop v. West Am. Ins. Co., 95 F.R.D. 494, 495 (N.D. Ga. 1982)* .

(n24)Footnote 17. *Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985)* (purpose is to compensate for unnecessary expense).

(n25)Footnote 18. *United States ex rel. Haskins v. Omega Inst., Inc., 25 F. Supp. 2d 510, 516 (D.N.J. 1998)* ; *but see LeBlang Motors, Ltd. v. Subaru of America, Inc., 148 F.3d 680, 685-686 (7th Cir. 1998)* (court is not absolutely prohibited from awarding fees for work that may be useful in later case).

(n26)Footnote 19. *Bath Iron Works Corp. v. Parmatic Filter Corp., 736 F. Supp. 1175, 1178 (D. Me. 1990)* .

(n27)Footnote 20. *Read Corp. v. Bibco Equip. Co., 145 F.R.D. 288, 290 (D.N.H. 1993)* .

(n28)Footnote 21. *Puerto Rico Maritime Shipping Auth. v. Leith, 668 F.2d 46, 51 (1st Cir. 1981)* .

(n29)Footnote 22. *Westlands Water Dist. v. United States, 100 F.3d 94, 97-98 (9th Cir. 1996)* (avoidable costs should not be awarded).

(n30)Footnote 23. *See, e.g., Bader v. Electronics for Imaging, Inc., 195 F.R.D. 659, 663 (N.D. Cal. 2000)* (district court granted plaintiffs' Rule 41(a)(2) motion for voluntary dismissal, ruling that dismissal would be without prejudice to plaintiffs' asserting their state law causes of action in pending state court case, provided that plaintiff would not reassert causes of action in federal court and that plaintiff would not assert federal claims in state court action).

(n31)Footnote 24. *American Nat'l Bank & Trust Co. of Sapulpa v. Bic Corp., 931 F.2d 1411, 1412 (10th Cir. 1991)* .

(n32)Footnote 25. *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1275-1276 (5th Cir. 1990)* .

(n33)Footnote 26. Hunter v. Surgitek Medical Engr. Corp., 1992 U.S. Dist. LEXIS 9696, at *11-*12 (N.D. Ind. 1992) (court may condition dismissal on production of documents and evidence).

(n34)Footnote 1. *Cross Westchester Dev. Corp. v. Chiulli, 887 F.2d 431, 432 (2d Cir. 1989)* .

(n35)Footnote 2. *Ferrato v. Castro, 888 F. Supp. 33, 34 (S.D.N.Y. 1995)* (court refused to impose condition that would protect defendant from all future copyright infringement claims, regardless of circumstances).

(n36)Footnote 3. *Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993)* .

(n37)Footnote 4. *Woodard v. STP Corp., 170 F.3d 1043, 1045 (11th Cir. 1999)* .

(n38)Footnote 1. *LeBlang Motors, Ltd. v. Subaru of America, Inc., 148 F.3d. 680, 687 (7th Cir. 1998)* .

(n39)Footnote 2. *Choice Hotels Int'l, Inc. v. Goodwin & Boone, 11 F.3d 469, 471 (4th Cir. 1993)* ; *Medina v. Chase Manhattan Bank, N.A., 737 F.2d 140, 143 (1st Cir. 1984)* .

(n40)Footnote 3. *Gravatt v. Columbia Univ., 845 F.2d 54, 55-56 (2d Cir. 1988)* (opportunity to withdraw motion for dismissal without prejudice must be afforded plaintiff before dismissal is converted to one with prejudice).

(n41)Footnote 4. *Beard v. Sheet Metal Works Union, 908 F.2d 474, 476 (9th Cir. 1990)* .

(n42)Footnote 5. *Lau v. Glendora Unified Sch. Dist., 792 F.2d 929, 931 (9th Cir. 1986)* .

(n43)Footnote 6. *McGregor v. Board of Comm'rs of Palm Beach County, 956 F.2d 1017, 1021 (11th Cir. 1992)* .

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2-19 Moore's Manual--Federal Practice and Procedure § 19.86

§ 19.86 Appeal of Voluntary Dismissal by Court Ordern*

[1] Appealability of Voluntary Dismissal Orders

An order granting a voluntary dismissal without prejudice is final and is immediately appealable by the defendant. n1 On the other hand, the plaintiff generally may notappeal a voluntary dismissal without prejudice because it generally does not constitute an involuntary adverse judgment. n2 Furthermore, even if the court imposes costs and fees as a condition of voluntary dismissal, there is no legal prejudice and, therefore, the voluntary dismissal is not adverse and appealable by the plaintiff. n3 However, some courts have held that the award of costs is appealable if the amount is so clearly unreasonable as to constitute legal prejudice. n4 Other courts have held that an award of costs or fees is always appealable but that the review must be limited to whether the district court abused its discretion in awarding the costs or fees. n5

[2] Standard of Review

The grant or denial of a motion for a voluntary dismissal is reviewable under the abuse of discretion standard. n1 In its determination of abuse of discretion, the court of appeals considers the following factors, which are the same that the district court should use in its initial determination: (1) the degree of defendant's effort and expense involved in preparing for trial; (2) whether there has been excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) the sufficiency in the plaintiff's explanation of the need to take the dismissal; and (4) the present stage of litigation, for example, whether a motion for summary judgment had been filed by the defendant. n2 The appellate court also reviews conditions placed on a Rule 41(a)(2) motion for voluntary dismissal for abuse of discretion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate Review

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.40 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Brown v. Baeke, 413 F.3d 1121, 1124 n.3 (10th Cir. 2005)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC, 548 F.3d 738, 747-748 (9th Cir. 2008)* .

(n4)Footnote 3. *Trujillo v. Banco Cent. Del Ecuador, 379 F.3d 1298, 1302 (11th Cir. 2004)* .

(n5)Footnote 4. *Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325, 1327 (11th Cir. 2004)* .

(n6)Footnote 5. *Duffy v. Ford Motor Co., 218 F.3d 623, 628 (6th Cir. 2000)* (review of award of attorney's fees is limited to whether district court abused its discretion); *GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367-368 (D.C. Cir. 1981)* (conditions may be overturned on appeal if not reasonable).

(n7)Footnote 1. *103 Investors I, L.P. v. Square D Co., 372 F.3d 1213, 1218 (10th Cir. 2004)* ; *Elbaor v. Tripath Imaging, Inc., 279 F.3d 314, 317-318 (5th Cir. 2002)* ; *Tolle v. Carroll Touch, Inc., 23 F.3d 174, 177 (7th Cir. 1994)* .

(n8)Footnote 2. *See Elbaor v. Tripath Imaging, Inc., 279 F.3d 314, 317-318 (5th Cir. 2002)* ; *Witzman v. Gross, 148 F.3d 988, 992 (8th Cir. 1998)* .

(n9)Footnote 3. *Coliseum Square Ass'n v. Jackson, 465 F.3d 215, 249 (5th Cir. 2006)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
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D. VOLUNTARY DISMISSAL BY ORDER OF COURT

2-19 Moore's Manual--Federal Practice and Procedure §§ 19.87through 19.99

[Reserved]

§§ 19.87[Reserved]

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.100

§ 19.100 Use of Involuntary Dismissaln*

[1] Nature of Involuntary Dismissal

The trial court has express authority in the federal rules to dismiss an action when a claimant fails to prosecute its claim or refuses to comply with a court order or federal civil rule. n1 The purposes of this "involuntary dismissal" authority are to achieve the orderly disposition of cases, n2 prevent undue delay in the disposition of pending cases, and to avoid congestion in the calendar of the court. n3 The district court has authority to order involuntary dismissals for two types of misconduct: n4 failure to prosecute n5 and failure to comply with a court order or a Federal Rule of Civil Procedure. n6 The court may dismiss either an action or any claim against the defendant. n7 Consequently, the court need not dismiss the entire lawsuit but may eliminate individual causes of action. Similarly, the court may dismiss fewer than all the defendants. n8

[2] Drastic Remedy That May be Granted in Discretion of Court

The district court has discretion whether to order an involuntary dismissal for a plaintiff's failure to prosecute or to comply with a court order or federal civil rule. n1 However, the discretion is limited because dismissal is such a severe sanction that it should be imposed only after careful consideration. n2 A dismissal for failure to prosecute or to comply with a court order is such a severe sanction that it may be used only in extreme circumstances, n3 as it generally has the same effect of an adjudication on the merits. n4 Consequently, when determining whether or not to dismiss a case under Rule 41(b), a district court should first consider whether any less severe sanction could adequately remedy the effect of the delay on the court and the prejudice to the opposing party. n5

In applying the rule, the court must strike a balance between the competing interests of efficiently managing its docket and deciding cases on their merits. n6 Courts should be especially careful not to prematurely dismiss a case involving civil rights claims n7 or a pro se plaintiff. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.50 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n3)Footnote 2. United States v. United States Currency in the Amount of Six Hundred Thousand Three Hundred & Forty One Dollars & No Cents (*$600,341.00), 240 F.R.D. 59, 64, n.8 (E.D.N.Y. 2007)* .

(n4)Footnote 3. *Mann v. Lewis, 108 F.3d 145, 147 (8th Cir. 1997)* .

(n5)Footnote 4. *Fed. R. Civ. P. 41(b).*

(n6)Footnote 5. *See § 19.101.*

(n7)Footnote 6. *See § 19.101.*

(n8)Footnote 7. *Fed. R. Civ. P. 41(b).*

(n9)Footnote 8. *Colle v. Brazos Cty., Tex., 981 F.2d 237, 240 (5th Cir. 1993)* .

(n10)Footnote 1. *Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)* .

(n11)Footnote 2. *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000)* .

(n12)Footnote 3. *Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1339 (11th Cir. 2005)* .

(n13)Footnote 4. *Fed. R. Civ. P. 41(b)*; *see Beck v. Bassett (In re Southeast Banking Corp.), 204 F.3d 1322, 1331 (11th Cir. 2000)* ; *see also § 19.104.*

(n14)Footnote 5. *Smith v. Gold Dust Casino, 526 F.3d 402, 406 (8th Cir. 2008)* .

(n15)Footnote 6. *Mann v. Lewis, 108 F.3d 145, 147 (8th Cir. 1997)* (district court must weigh need to advance docket against consequence of irreversibly extinguishing litigant's claim).

(n16)Footnote 7. *Minnette v. Time Warner, 997 F.2d 1023, 1025 (2d Cir. 1993)* .

(n17)Footnote 8. *Schilling v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 277 (7th Cir. 1986)* (need for district court to exercise discretion in deciding among alternative sanctions was especially great because of plaintiff's pro se status).

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.101

§ 19.101 Dismissal for Failure to Prosecuten*

[1] Purpose of Dismissal for Failure to Prosecute

A district court has authority under the federal rules to dismiss an action for the plaintiff's failure to prosecute. n1 District court local rules commonly set guidelines that specify the consequences of failure to prosecute. n2 The purposes of the authority to dismiss for failure to prosecute are to achieve the orderly disposition of cases, n3 prevent undue delay in the cases, and to avoid congestion in the calendar of the court. n4 It imposes a duty of due diligence on a plaintiff, based on the policy favoring the prompt disposition of cases. n5 However, a Rule 41(b) dismissal is considered by the courts to be a harsh remedy appropriate only in severe situations; thus, the courts should be especially hesitant to dismiss for procedural deficiencies when the failure to prosecute is by a pro se litigant. n6

[2] Factors Considered in Determination of Dismissal for Failure to Prosecute

[a] In General

A district court must base a dismissal for failure to prosecute on the record as a whole and in consideration of the totality of circumstances. n1 Failure to prosecute is not defined in the rule n2 but may occur either through simple inaction or through a deliberate pattern of delay. n3 Ordinarily, a single instance of misconduct is not sufficient to dismiss under Rule 41(b). n3.1 However, a particular instance may be the culminating event for a dismissal, at least when accompanied by a warning. For example, a plaintiff's failure to respond to a particular motion which delays the litigation may be the basis for a dismissal for lack of prosecution, but the judge must warn the plaintiff that dismissal is a possibility from the failure to respond, either expressly or by making clear that no further extensions of time to respond will be granted. n3.2

Most of the circuits have developed various tests under the rule, with overlapping or similar factors. n3.3 Typical is the Second Circuit, which applies the following factors in making its determination of whether the district court acted within its discretion in dismissing plaintiff's action for failure to prosecute: (1) the duration of the plaintiff's failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether the defendant is likely to be prejudiced by further delay, (4) whether the district judge has taken care to strike a balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and (5) whether the judge

has adequately assessed the efficacy of lesser sanctions. n4

Similarly, the Fifth and Eleventh Circuits have adopted a standard authorizing a dismissal for failure to prosecute only when: (1) there is a clear record of delay or contumacious conduct by the plaintiff; and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution or the record shows that the district court employed lesser sanctions that proved to be futile, and, in close cases, one of three aggravating factors was present: (a) delay caused by the plaintiff rather than the attorney; (b) actual prejudice to the defendant; or (c) delay caused by intentional conduct. n5

In any event, the court should balance all of the applicable factors considered in the case, and not focus on any particular factors, n6 although in a given case any one may be controlling. n7 In order to facilitate appellate review, the trial court should specify its findings on the dismissal issue; n8 otherwise, an appellate court may reverse and remand when the district court's order does not contain express findings on which the dismissalwas based and the reason is not clear from the record. n8.1

[b] Duration and Number of Failures to Prosecute

With respect to the factor regarding the duration of a failure to prosecute, the court will consider whether the failure is significant in duration or number and whether attributable to the plaintiff. n9 There is no specific rule defining the length of delay or number of delays that will constitute a failure to prosecute, and the degree of failure is on a continuum. n10 Thus, a court may clearly dismiss an action when the delays or omissions are repeated or of long duration, n11 and conduct resulting in a relatively short period of delay may still justify dismissal when it is part of a deliberate pattern of obstinance. n12 A failure to prosecute occurring at a later stage of the action is more likely to result in dismissal. n13 Disobedience of multiple court orders may subject the plaintiff to a dismissal for failure to prosecute, regardless of the total duration of the action. n14 On the other hand, dismissal will not be justified by isolated delays of short duration, n15 or a single violation. n16 Furthermore, a court may excuse much longer delays if there are no other aggravating factors. n17

[c] Responsibility for Delay

In making its determination whether to order an involuntary dismissal, a court should consider only those delays that are the claiming party's or attorney's personal responsibility; n18 the court may ignore delays attributable to the defendant. n19 For example, one appellate court reversed a dismissal when a six-month delay in an action was explained in part by the transfer of the pro se inmate plaintiff to a county prison facility that was lacking a library and legal assistance resources needed by the plaintiff to pursue the claim. n20 The fact that both the plaintiff and defendant were dilatory may not always excuse plaintiff's conduct. n21

[d] Excuses for Plaintiff's Delay

Circumstances beyond the plaintiff's control may excuse delay in prosecution of an action. The most typical example is the illness of the plaintiff or the plaintiff's attorney, either or which is a valid excuse for a delay under Rule 41(b). n22 More weight may be placed on this factor if the ill attorney is the only attorney responsible for the case. n23 Assertions of illness must be substantiated, n24 however, and dismissal may be justified despite assertion of an illness when the illness does not prevent the attorney from proceeding with the case. n25 Similarly, a delay caused by the plaintiff's substitution of counsel will generally be sufficient to justify an involuntary dismissal, absent evidence that the substitution was part of a strategy of delay. n26 Finally, dismissal should not be granted when a delay is attributable to ongoing settlement negotiations. n27

On the other hand, the plaintiff's financial difficulties do not excuse a failure to prosecute or to comply with a court order. n28 Thus, a party's claim that destitution prevented him from complying with the order is not an absolute bar to

dismissal, especially when the dismissal is also based on other factors. n29 Furthermore, a dismissal attributable to the unexcused conduct of counsel does not necessarily impose an unjust penalty on the client. n30 Some courts are reluctant to grant dismissal based on conduct attributable to counsel, however, and in close cases dismissal may be denied if the plaintiff was not personally responsible for the delay. n31

[e] Contumacious Conduct

Willful contempt (contumacious conduct) is so harmful to the orderly and expeditious litigation process that, if egregious, it may alone be grounds for a Rule 41(b) order of dismissal. n32 Furthermore, when there has been a deliberate, contemptuous refusal to proceed with trial, some courts may order involuntary dismissal evenwhen the threatened delay is short, and may dispense with the consideration of less severe alternative sanctions. n32.1 It should also be noted that the presence of merely intentional or aggravating conduct may also justify dismissal in an otherwise close case. n33

[f] Prejudice to Defendant

If a delay is unreasonable, a showing of prejudice to the defendant may be presumed or may be unnecessary. n34 When moderate or more excusable delays are involved, the court may consider the degree of actual prejudice. n35 Prejudice may be caused by many types of events, such as, when the pendency of the action impairs the parties' pecuniary and property interests, n36 or when the defendant has expended substantial time and money in the preparation of papers and appearances at hearings. n37 The mere fact that the defendant will be required to fund a defense if the suit continues is not prejudice of the sort that will mandate dismissal. n38

[g] Notice of Impending Dismissal

Whether or not the district court has given an express prior warning or some other notice regarding the possibility of dismissal is a factor to be considered in whether dismissal should be ordered. However, a failure to warn does not make an order invalid. n39 Thus, some warning should usually be given, and dismissal may be an abuse of discretion if it is not, particularly if the dismissal is made sua sponte, n40 or against a pro se litigant. n41 Notice is not required when dismissal follows a noticed motion by the defendant. n42 Also, express notice may not be required when the plaintiff or plaintiff's counsel was clearly put on notice from the circumstances that dismissal was likely. n43 Notice on plaintiff's counsel alone is sufficient. n44

[h] Balancing Expediency With Due Process Rights of Plaintiff

In its determination of whether to dismiss, the court should balance the need to alleviate calendar congestion with the plaintiff's rights to due process and should consider the overall effect of the plaintiff's conduct on other cases pending on its docket. Thus, dismissal may be particularly justified when a failure to appear at trial is involved, because such failures are among the primary causes in creating a backlog of cases on the calendar. n45 The length that the case had been pending should also be considered. n46 A dismissal may represent an abuse of discretion, however, if the burden on the court's calendar is not truly attributable to the plaintiff's conduct. n47 In determining whether plaintiff's due process rights have been violated, the court should consider the merits of plaintiff's action n48 and whether the plaintiff had a fair opportunity to be heard before the dismissal. n49

[i] Availability of Less Drastic Sanctions

Unless willful contempt is involved, n50 the district court should always consider first whether any sanction which is less severe than dismissal could adequately remedy the effect of the delay on the court and the prejudice to the opposing party. n51 Furthermore, to facilitate appellate review, the district court's consideration of the possibility of lesser sanction should be evident from the record. n51.1 There is no requirement, however, that the district court make specific findings regarding alternative sanctions, particularly when the parties have discussed the potential remedies in their

papers. n52 The alternative sanctions that the court should consider include the assessment of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. n53

A court may grant an involuntary dismissal with prejudice when lesser sanctions have already proved futile, n54 when the defendant has already been irreversibly prejudiced, n55 or when the defendants would be forced to bear the costs for plaintiff's misconduct. n56 When the plaintiff's case appears meritless, and proceeding to trial would prove futile, dismissal with prejudice would be a lesser sanction than dismissing without prejudice and imposing costs. n57

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.51 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n3)Footnote 2. *See Employee Painters' Trust v. Ethan Enters., 480 F.3d 993, 997 (9th Cir. 2007)* .

(n4)Footnote 3. United States v. United States Currency in the Amount of Six Hundred Thousand Three Hundred & Forty One Dollars & No Cents (*$600,341.00), 240 F.R.D. 59, 64, n.8 (E.D.N.Y. 2007)* .

(n5)Footnote 4. *Mann v. Lewis, 108 F.3d 145, 147 (8th Cir. 1997)* .

(n6)Footnote 5. *Ahmed v. I.N.S., 911 F. Supp. 132, 134 (S.D.N.Y. 1996)* (defendant may move for dismissal where plaintiff fails to prosecute).

(n7)Footnote 6. *Mendez v. Walker, 110 F. Supp.2d 209, 216 (W.D.N.Y. 2000)* (district court refused to dismiss complaint after pro se plaintiff failed to comply with court order requiring plaintiff to submit documents in English instead of Spanish).

(n8)Footnote 1. *Jackson v. City of New York, 22 F.3d 71, 74 (2d Cir. 1994)* .

(n9)Footnote 2. *Lyell Theatre Corp. v. Loews Corp. 682 F.2d 37, 42 (2d Cir. 1982)* .

(n10)Footnote 3. *Lyell Theatre Corp. v. Loews Corp. 682 F.2d 37, 42 (2d Cir. 1982)* .

(n11)Footnote 3.1. *Gardner v. United States, 211 F.3d 1305, 1308 (D.C. Cir. 2000)* , *cert. denied, 531 U.S. 1114 (2000)* (court abused its discretion when it dismissed pro se plaintiff's complaint for single failure to appear at motion hearing).

(n12)Footnote 3.2. *Bolt v. Loy, 227 F.3d 854, 856 (7th Cir. 2000)* .

(n13)Footnote 3.3. *Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)* (specifying six factors).

(n14)Footnote 4. *Shannon v. GE, 186 F.3d 186, 193-194 (2d Cir. 1999)* .

(n15)Footnote 5. *Colle v. Brazos Cty., Tex., 981 F.2d 237, 242, 244 (5th Cir. 1993)* .

(n16)Footnote 6. *Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)* .

(n17)Footnote 7. *Ball v. City of Chicago, 2 F.3d 752, 756 (7th Cir. 1993)* .

(n18)Footnote 8. *Shannon v. GE, 186 F.3d 186, 193 (2d Cir. 1999)* .

(n19)Footnote 8.1. *Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994)* .

(n20)Footnote 9. *Jackson v. City of New York, 22 F.3d 71, 75 (2d Cir. 1994)* .

(n21)Footnote 10. *Lyell Theatre Corp. v. Loews Corp. 682 F.2d 37, 42 (2d Cir. 1982)* .

(n22)Footnote 11. *3 Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337, 339 (7th Cir. 1987)* .

(n23)Footnote 12. *Peart v. City of New York, 992 F.2d 458, 460-463 (2d Cir. 1993)* .

(n24)Footnote 13. *Salinas v. Sun Oil Co., 819 F.2d 105, 106 (5th Cir. 1987)* .

(n25)Footnote 14. *Ball v. City of Chicago, 2 F.3d 752, 755 (7th Cir. 1993)* (although case only twenty-seven months old, dismissal warranted when attorneys failed to appear at four status conferences or to respond in timely manner to discovery requests).

(n26)Footnote 15. *McNeal v. Papasan, 842 F.2d 787, 789-790 (5th Cir. 1988)* .

(n27)Footnote 16. *In re Bluestein & Co., 68 F.3d 1022, 1027 (7th Cir. 1995)* .

(n28)Footnote 17. *Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 109 (2d Cir. 1992)* .

(n29)Footnote 18. *Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)* .

(n30)Footnote 19. *Romandette v. Weetabix Co., 807 F.2d 309, 312 (2d Cir. 1986)* .

(n31)Footnote 20. *Romandette v. Weetabix Co., 807 F.2d 309, 311 (2d Cir. 1986)* .

(n32)Footnote 21. *See Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d 1058, 1063 (7th Cir. 1989)* (delay not excused when course of litigation was within control of plaintiff).

(n33)Footnote 22. *Taylor v. Combustion Engr., Inc., 782 F.2d 525, 528 (5th Cir. 1986)* .

(n34)Footnote 23. *Dickerson v. Board of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1118 (7th Cir. 1994)* .

(n35)Footnote 24. *Dickerson v. Board of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1118 (7th Cir. 1994)* .

(n36)Footnote 25. *Ball v. City of Chicago, 2 F.3d 752, 754 (7th Cir. 1993)* (dismissal despite heart attack of plaintiff's lead counsel justified when excuse was applicable only to small portion of total course of conduct of delay).

(n37)Footnote 26. *Ball v. City of Chicago, 2 F.3d 752, 754 (7th Cir. 1993)* (dismissal despite heart attack and continuing coronary problems of plaintiff's lead counsel warranted when the excuse was applicable only to a small portion of the total course of conduct).

(n38)Footnote 27. *GCIU Employer Retirement Fund v. Chicago Tribune Co., 8 F.3d 1195, 1201 (7th Cir. 1993)* .

(n39)Footnote 28. *In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994)* .

(n40)Footnote 29. *Moon v. Newsome, 863 F.2d 835, 839 (11th Cir. 1989)* .

(n41)Footnote 30. *Knoll v. AT&T Co., 176 F.3d 359, 363-364 (6th Cir. 1999)* ; *Pyramid Energy, Ltd. v. Heyl &*

Patterson, Inc., 869 F.2d 1058, 1061 (7th Cir. 1989) .

(n42)Footnote 31. *Lowe v. City of E. Chicago, Ind., 897 F.2d 272, 274 (7th Cir. 1990)* (appellate court reluctant to affirm dismissal when there was no sign of either client neglect of court processes or knowledge of attorney's neglect).

(n43)Footnote 32. *Sealed Appellant v. Sealed Appellee, 452 F.3d 415, 417-418 (5th Cir. 2006)* .

(n44)Footnote 32.1. *Peart v. New York, 992 F.2d 458, 461 (2d Cir. 1993)* .

(n45)Footnote 33. *Malone v. United States Postal Serv., 833 F.2d 128, 131-132 (9th Cir. 1987)* , *cert. denied, 488 U.S. 819 (1988)* .

(n46)Footnote 34. *Daniels v. Brennan, 887 F.2d 783, 788-789 (7th Cir. 1989)* .

(n47)Footnote 35. *Lyell Theatre Corp. v. Loews Corp. 682 F.2d 37, 43 (2d Cir. 1982)* .

(n48)Footnote 36. *In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994)* .

(n49)Footnote 37. *West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1524 (9th Cir. 1990)* .

(n50)Footnote 38. *Rogers v. Kroger Co., 669 F.2d 317, 319-321 (5th Cir. 1982)* .

(n51)Footnote 39. *Smith v. Gold Dust Casino, 526 F.3d 402, 405-406 (8th Cir. 2008)* .

(n52)Footnote 40. *Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 499 (9th Cir. 1987)* .

(n53)Footnote 41. *See Smith v. Gold Dust Casino, 526 F.3d 402, 406 (8th Cir. 2008)* .

(n54)Footnote 42. *Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991)* (notice only required if sua sponte).

(n55)Footnote 43. *See In re Bluestein & Co., 68 F.3d 1022, 1026 (7th Cir. 1995)* .

(n56)Footnote 44. *In re Bluestein & Co., 68 F.3d 1022, 1026 (7th Cir. 1995)* .

(n57)Footnote 45. *Peart v. City of New York, 992 F.2d 458, 461-462 (2d Cir. 1993)* .

(n58)Footnote 46. *In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994)* .

(n59)Footnote 47. *Nita v. Connecticut Dep't of Envtl. Protection, 16 F.3d 482, 485-486 (2d Cir. 1994)* .

(n60)Footnote 48. *Ball v. City of Chicago, 2 F.3d 752, 759 (7th Cir. 1993)* .

(n61)Footnote 49. *Jackson v. City of New York, 22 F.3d 71, 75-76 (2d Cir. 1994)* .

(n62)Footnote 50. *See Sealed Appellant v. Sealed Appellee, 452 F.3d 415, 417-418 (5th Cir. 2006)* ; *see* [e], *above*.

(n63)Footnote 51. *Smith v. Gold Dust Casino, 526 F.3d 402, 406 (8th Cir. 2008)* .

(n64)Footnote 51.1. *Berry v. Cigna/RSI Cigna, 975 F.2d 1188, 1191 (5th Cir. 1992)* .

(n65)Footnote 52. *Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991)* .

(n66)Footnote 53. *Boudwin v. Graystone Ins. Co., Ltd., 756 F.2d 399, 401 (5th Cir. 1985)* .

(n67)Footnote 54. *Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1160 (5th Cir. 1985)* .

(n68)Footnote 55. *In re Eisen, 31 F.3d 1447, 1453 (9th Cir. 1994)* .

(n69)Footnote 56. *Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989)* .

(n70)Footnote 57. *Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1160 (5th Cir. 1985)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.102

§ 19.102 Dismissal for Failure to Comply With Court Ordern*

[1] Nature and Purpose of Rule

The district court has the discretion under Rule 41(b) to order an involuntary dismissal for a plaintiff's failure to comply with the Federal Rules of Civil Procedure or a court order. n1 Noncompliance may be treated as a failure to prosecute, and courts usually apply the same test used to evaluate a dismissal for a failure to prosecute in considering a dismissal for failure to comply with a court order. n2 Noncompliance with rules includes a failure to comply with local rules of the district court. n3

The provision of Rule 41(b) for dismissal due to noncompliance with orders overlaps with the provision of Rule 37(b)(2)(C) n4 authorizing dismissal for disobedience of discovery orders. Furthermore, Rule 16(f), which sanctions a failure to obey a scheduling or pre-trial order, incorporates the provisions of Rule 37. n5 Although the criteria for sanctions pursuant to the three rules are the same, n6 the specific provisions of Rule 16 or Rule 37, rather than the general provisions of Rule 41(b), should govern in any case of disparity between the rules. n7 Nonetheless, a repeated failure to comply with discovery orders may qualify for dismissal under Rule 41(b). n8

Because an involuntary dismissal with prejudice is a severe sanction, the court may impose the sanction only for willful disobedience of a court order. n9 To satisfy the requirement, the district court need only find that a party acted deliberately rather than accidentally and need not find bad faith. n10

[2] Orders Subject to Noncompliance Rule

If a claimant fails to comply with any of the following types of orders, the action or claim is subject to involuntary dismissal:

1. Orders regarding pleadings. For example, a dismissal may be ordered under Rule 41(b) for failure to obey an order to file an amended complaint complying with the requirement of Rule 8 that the pleading be short, plain and concise n1 or for failing to meet the deadline for filing the amended complaint. n2

2. Pre-Trial orders. The willful violation of a pre-trial order may be sanctioned with dismissal under Rule 41(b). n3

3. Orders relating to service or filing of papers. The district court may dismiss an action when the plaintiff fails to comply with an order to serve or file papers in compliance with Rule 5. n4

4. Discovery orders. The district court may dismiss an action for failure to comply with court orders related to discovery. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.52 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 41(b)*; *see Bowling v. Hasbro, Inc., 403 F.3d 1373, 1375 (Fed. Cir. 2005)* .

(n3)Footnote 2. *Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987)* , *cert. denied, 488 U.S. 819 (1988)* ; *see § 19.101[2][a].*

(n4)Footnote 3. *World Thrust Films, Inc. v. International Family Entertainment, Inc., 41 F.3d 1454, 1456 (11th Cir. 1995)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 37(b)(2).*

(n6)Footnote 5. *See Fed. R. Civ. P. 16(f).*

(n7)Footnote 6. *Lucien v. Breweur, 9 F.3d 26, 29 (7th Cir. 1993)* .

(n8)Footnote 7. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A., 357 U.S. 197, 207, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* .

(n9)Footnote 8. *Roland v. Salem Contract Carriers, Inc., 811 F.2d 1175, 1178 (7th Cir. 1987)* .

(n10)Footnote 9. *Smith v. Gold Dust Casino, 526 F.3d 402, 406 (8th Cir. 2008)* (sanction imposed by district court must be proportionate to litigant's transgression).

(n11)Footnote 10. *Hutchins v. A.G. Edwards & Sons, Inc., 116 F.3d 1256, 1260 (8th Cir. 1997)* .

(n12)Footnote 1. *Simmons v. Abruzzo, 49 F.3d 83, 87 (2d Cir. 1995)* .

(n13)Footnote 2. *Harding v. Federal Reserve Bank of New York, 707 F.2d 46, 50-51 (2d Cir. 1983)* .

(n14)Footnote 3. *Malone v. United States Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987)* , *cert. denied, 488 U.S. 819 (1988)* .

(n15)Footnote 4. *St. Michael Balzarini v. Borg, 976 F.2d 736 (9th Cir. 1992)* .

(n16)Footnote 5. *Hutchins v. A.G. Edwards & Sons, Inc., 116 F.3d 1256, 1260 (8th Cir. 1997)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.103

§ 19.103 Procedure for Involuntary Dismissaln*

[1] Initiation of Request for Involuntary Dismissal

Rule 41(b) indicates that it may be requested by motion by a defending party. n1 The sanction it provides may be employed only by a defending party against a plaintiff, n2 although a plaintiff as a defending party to a counterclaim may use it to seek dismissal of the counterclaim. n3 Furthermore, the court has inherent power to order an involuntary dismissal sua sponte. n4

[2] Hearing Generally Required

The court should generally hold a hearing to determine whether to enter an order of involuntary dismissal, n1 because the involuntary dismissal with prejudice is a severe sanction. n1.1 For example, a hearing may be held to determine the credibility of the plaintiff's explanation. n2 In extraordinary circumstances, a hearing may not be necessary. One district court concluded that no hearing was required when the plaintiff, who was an attorney who was representing himself, failed to respond to the motion to dismiss. In that case the court held that no hearing was necessary because the attorneyhad independent knowledge that his delinquency could be grounds for dismissal. n3 Furthermore, no remand for a hearing was necessary when it was clear that the district court had a lesser remedy at its disposal. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsHearingsCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.50[6] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 41(b).*

(n3)Footnote 2. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357*

U.S. 197, 207, 78 S. Ct. 1087, 1093, 2 L. Ed. 2d 1255 (1958) .

(n4)Footnote 3. *Fed. R. Civ. P. 41(c).*

(n5)Footnote 4. *Minnette v. Time Warner, 997 F.2d 1023, 1027 (2d Cir. 1993)* .

(n6)Footnote 1. *Dewdney v. Eckerd Corp., 2008 U.S. Dist. LEXIS 44854, at *9-*10 (M.D. Fla. June 6, 2008)* .

(n7)Footnote 1.1. *Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1339 (11th Cir. 2005)* ; *see § 19.100[2].*

(n8)Footnote 2. *Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* .

(n9)Footnote 3. *Guy v. City of Wilmington, 169 F.R.D. 593, 596 (D. Del. 1996)* .

(n10)Footnote 4. *Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.104

§ 19.104 Effect of Involuntary Dismissaln*

[1] Constitutes Adjudication on Merits

Any involuntary dismissal operates as an adjudication on the merits n1 and precludes a subsequent action on the claim under the doctrine of res judicata unless the court specifies otherwise in its order or by local rule. n2 When the court dismisses an action sua sponte, rather than pursuant to the rule, the dismissal is still on the merits because it qualifies as a dismissal "not provided for in this rule." n3 Dismissals "not provided for in this rule," have included dismissals for failure to comply with a discovery order under Rule 37, n4 to state a claim under Rule 12(b)(6), n5 and to file suit within the applicable statute of limitation. n6

Because dismissal of an action under Rule 41(b) for failure to prosecute or to comply with a court order constitutes an adjudication on the merits unless the court orders otherwise, the rule puts the burden on the plaintiff to persuade the district court to specify that a dismissal is without prejudice. n7 When the district court elects to dismiss an action without prejudice under Rule 41(b), the dismissal leaves the parties in the same legal position as if no suit had been filed. n8 Thus, in such a case, the statute of limitation would not be tolled by the filing of the original suit. n9

[2] Exception for Certain Dismissals

Rule 41(b) provides specific exemptions for certain dismissals from the presumption that a dismissal under the rule is with prejudice, including dismissals for lack of jurisdiction, improper venue, and failure to join a party under Rule 19. n1 Thus, a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) (or a dismissal under the other two types of exempt dismissals) constitutes a dismissal without prejudice under Rule 41(b). n2 It should be noted, however, that a failure to respond to a motion to dismiss, even if made on jurisdictional grounds, may be deemed to be a failure to prosecute and thus a dismissal with prejudice under Rule 41(b). n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.50[7] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n3)Footnote 2. *LeBlang Motors, Ltd. v. Subaru of Am., Inc., 148 F.3d 680, 687 (7th Cir. 1998)* .

(n4)Footnote 3. *Kimmel v. Texas Commerce Bank, 817 F.2d 39, 40-41 (7th Cir. 1987)* .

(n5)Footnote 4. *Papilsky v. Berndt, 466 F.2d 251, 255 (2d Cir. 1972)* , *cert. denied, 409 U.S. 1077 (1972)* .

(n6)Footnote 5. *Paganis v. Blonstein, 3 F.3d 1067, 1070-1071 (7th Cir. 1993)* .

(n7)Footnote 6. *PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 (2d Cir. 1983)* , *cert. denied, 464 U.S. 936 (1983)* .

(n8)Footnote 7. *LeBeau v. Taco Bell, Inc., 892 F.2d 605, 608 (7th Cir. 1989)* .

(n9)Footnote 8. *Hilbun v. Goldberg, 823 F.2d 881, 883 (5th Cir. 1987)* , *cert. denied, 485 U.S. 962 (1988)* .

(n10)Footnote 9. *Hilbun v. Goldberg, 823 F.2d 881, 884 (5th Cir. 1987)* , *cert. denied, 485 U.S. 962 (1988)* .

(n11)Footnote 1. *See Fed. R. Civ. P. 41(b).*

(n12)Footnote 2. *Costello v. United States, 365 U.S. 265, 284, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)* .

(n13)Footnote 3. *Kimmel v. Texas Commerce Bank, 817 F.2d 39, 40-41 (7th Cir. 1987)* .

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PART V Pretrial Stage
CHAPTER 19 DISMISSALS
PART III. INVOLUNTARY DISMISSALS

2-19 Moore's Manual--Federal Practice and Procedure § 19.105

§ 19.105 Appeal of Order Regarding Involuntary Dismissaln*

An order to dismiss for failure to prosecute or to comply with a court order or rule is immediately appealable n1 and is reviewable under an abuse of discretion standard. n2 In its review on appeal under that standard, the appellate court must consider the procedural history of the case and its status at the time of dismissal to determine whether the record supports the trial court's findings in the balancing of factors to determine whether to order an involuntary dismissal. n2.1 If the trial court ordered a dismissal without prejudice, the court of appeals will rarely find an abuse of discretion because the plaintiff may simply refile the suit. n3 It should be noted that because the commencement of a suit later dismissed under Rule 41(b) does not toll the statute of limitation, n4 a dismissal without prejudice that is ordered after the suit is time-barred may be treated as tantamount to a dismissal with prejudice. n5 When the appeal is from the district court's denial of a motion under Rule 60(b) to vacate the order of dismissal, the scope of appellate review is much narrower, and the dismissal may be affirmed even if it might have been overturned as an abuse of discretion on a direct appeal. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsAppellate Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 41.53 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Rogers v. Andrus Transp. Servs., 502 F.3d 1147, 1151 (10th Cir. 2007)* .

(n3)Footnote 2. *Wynder v. McMahon, 360 F.3d 73, 76 (2d Cir. 2004)* .

(n4)Footnote 2.1. *Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)* ; *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d 1058, 1061 (7th Cir. 1989)* .

(n5)Footnote 3. *McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988)* .

(n6)Footnote 4. *See § 19.104[1].*

(n7)Footnote 5. *Rogers v. Kroger Co., 669 F.2d 317, 321 (5th Cir. 1982)* .

(n8)Footnote 6. *Dickerson v. Board of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1116 (7th Cir. 1994)* (denial of motion to dismiss reviewed under highly deferential standard).

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure 20.syn

§ 20.syn Synopsis to Chapter 20: TRIAL PRACTICE IN GENERAL

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[a] Diversity Actions

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[6] Requirement of Objection to Improper Subpoena for Production or Inspection

[7] Motion to Quash or Modify Subpoena

[a] Purpose and Use of Motion to Quash

[b] Grounds Requiring Court to Quash or Modify Subpoena

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[a] Statement of Jury First Rule

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[1] Requirement That Party Inform Court of Objection

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[b] Party Must Clearly State Grounds for Objection

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§ 20.08 Trial by Implied Consent

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.01

§ 20.01 Assignment of Cases for Trialn*

[1] District Court Rules May Control Trial Calendar

[a] Discretion for Each District Court to Set Calendar Rules

Each district court has authority to promulgate its own local rules for the placement of cases on its trial calendar. n1 Local rules governing practice before each district court must be enacted by a majority vote of the judges in the district. The local rules must be consistent with, but not duplicative of, the Federal Rules of Civil procedure. n2 The local rules that are promulgated under Rule 40 control several procedural mechanisms for the maintenance of district court trial calendars. For example the local rules may control the order in which civil actions are to be heard. n3 Another consideration affecting local rules is the "civil justice expense and delay reduction plan" that each United States district court was required to implement under the Civil Justice Reform Act. Each district's plan was required to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes. n4

Otherwise, the broad discretion granted the district courts by Rule 40 allows the courts to take into consideration local litigation patterns and conditions in drafting the local calendar rules. n5

Local rules on trial settings may not conflict with Rule 40 or any other of the Federal Rules of Civil Procedure. n6 Furthermore, when a judge enacts a standing order, which may also be known as an internal rule, and that standing order conflicts with a local rule, the order may be stricken. The enactment of a standing order that conflicts with a local rule also violates Rule 83. n7

[b] Examples of Local Calendar Rules

Most local rules of the district courts do not specify the precise manner in which a trial date should be scheduled but leave scheduling to the discretion of the court to accomplish in compliance with Rules 16 and 40. n8 However, district courts that have adopted local rules governing the scheduling of a trial date have chosen various procedures for the placement of actions on the trial calendar. Some courts, following Rule 40 closely, provide that cases must be placed on the trial calendar either by motion of a party or on the court's own initiative. n9 Some district courts provide that a case must be set on the trial calendar at the discretion of the judge before whom the action is pending. n10 Some district

courts provide for assignment of cases to different tracks, each subject to a different schedule. n11 Finally, many district courts have enacted local rules that correspond with Rule 16, n12 providing for the scheduling of a trial date at the pretrial conference or in the scheduling order. n13

[c] Appellate Review of District Court Trial Calendar Decisions

When a district court makes a trial scheduling decision, a reviewing court may review that decision only for abuse of discretion. n14 A district court abuses its discretion in making a trial scheduling decision only when no reasonable person could agree with the district court; thus, if reasonable persons could differ with respect to the propriety of the court's action the challenging party has not established an abuse of discretion. n15 Thus, a district court has considerable integral authority to control and to manage its own docket; however this authority is limited by a requirement that the court must balance the needs of judicial efficiency with the rights of parties to have the merits of their arguments heard. n16

Due to the wide deference given the district courts in this regard, it is a rare occurrence that a court of appeals will overturn a district court's scheduling decision as an abuse of discretion. n17 For example, in one case the trial occurred in a piecemeal fashion because of the district court's attempts to accommodate the parties' needs. The appellate court found that the sporadic flow of the trial did not render the trial unfair, and rejected on appeal the defendant's objection to the district court's decision to schedule a trial on a date that its lead counsel could not be present. The appellate court upheld the trial court's decision because the district court had done its best to accommodate the competing interests of the parties and had managed the trial dates as efficiently as possible. n18

On the other hand, the court of appeals will overturn a district court's scheduling decision as an abuse of discretion if it is arbitrary or categorical and takes no account of the opposition's interest in the trial schedule. For example, a trial court's ordering a stay of trial without considering whether the delay would increase the danger of prejudice resulting from the loss of evidence, the inability of witnesses to recall specific facts, or the possible death of a party, would constitute an abuse of discretion. n19

[2] Continuances Controlled by Discretion of District Court

[a] District Court Has Discretion to Grant or Deny Continuance

The Federal Rules of Civil Procedure do not explicitly regulate continuances, and this silence means that the individual district courts have authority to enact local continuance rules pursuant to Rule 83. n1 Alternatively, the district courts may utilize their general powers over scheduling, as specified in Rule 16, n2 and Rule 40, n3 in determining whether or not to allow continuances. Ultimately, the district courts have broad authority to control their docket by granting or denying motions to continue. n4

[b] Examples of Local Continuance Rules

Most of the local rules adopted to regulate a grant or denial of continuances provide simply that the court may grant a motion for continuance for good cause only. n5 Some local rules, however, provide that continuances will be granted onlyin exceptional circumstances. n6 One district court rule provides that a case may not be continued unless justice requires. n7

A local rule will typically impose conditions on the grant of a continuance. For example, the local rule may require that notice be given to all other parties before application for a continuance may be made. n8 Several local rules state specific requirements for the granting of a continuance because of the unavailability of a witness or missing evidence. In these courts, for example, the motion must be made on an affidavit showing the nature and materiality of the expected testimony or evidence and that a diligent effort has been made to secure the witness or evidence. n9

[c] Appellate Review of District Court Continuance Decisions

A court of appeals will not reverse a district court's decision on a motion for a continuance unless there has been an abuse of discretion. n10 The reviewing court will not generally overturn a decision by the trial court because district courts have wide discretion to control their dockets by granting or denying motions to continue. n11 Furthermore, unless the moving party shows that denial of the motion had a prejudicial impact, the trial court's decision will be affirmed. n12

In reviewing a denial of a continuance request by the district court, the appellate court should consider four factors: (1) the moving party's diligence in its efforts to prepare its case prior to the date set for the trial or hearing; (2) the likelihood that the need for a continuance would have been remedied had the continuance been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the moving party might have suffered harm as a result of the district court's denial. n13

Based on such factors, or similar considerations, a district court's denial of a motion for a continuance would likely be affirmed in the following cases: when the movant had a history of delaying the case or using dilatory tactics in the case; n14 if the evidence or witness that the moving party seeks to obtain during the continuance would not likely change the outcome of the case; n15 or if granting the continuance would unduly prevent the court in keeping to its trial schedule. n16

On the other hand, a district court's denial of a motion for a continuance would more likely be reversed for an abuse of discretion in the following cases: when the moving party was innocent of blame and would have been put at an unfair disadvantage by denial of the motion; n17 and if the trial court itself did something that caused the need for the continuance. n18

[3] Precedence or Preference for Particular Actions

[a] Priority Based on Court Rules

The criminal and procedural rules give priority to several types of cases that control over any local rules. First, a district court must give preference to criminal proceedings to the extent practicable. n1 The preference for criminal cases is a necessity for the federal judiciary because of the requirements of the Speedy Trial Act. n2 Next, Rule 40 provides that a court must give precedence to actions entitled by any statute of the United States. n3 Third, Rule 57 provides that the court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. n4 Fourth, Rule 65(b) requires that in cases when a court grants a temporary restraining order without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time and takes precedence over all other matters, except older matters involving a temporary restraining order granted without notice. n5

Finally, after the required rule and statutory preferences have been satisfied, the district courts may enact local rules giving priority to certain types of actions under the district courts' general rulemaking authority pursuant to Rule 83. n6

[b] Priority Based on Statute

One statute generally governs calendar priority in federal civil actions. The statute requires that each district court decide the order in which civil actions should be heard and determined on their calendars, with the proviso that the court must give precedence to the following specific types of actions: n7

1. Habeas corpus actions brought under Chapter 153 of Title 28. n8

2. Any action for temporary or preliminary injunctive relief.

3. Any other action in which a party shows good cause for calendar priority. For purposes of this statute, "good cause" is shown if a federal constitutional right or a federal statutory right would benefit from expedited treatment. n9

4. Actions involving recalcitrant grand jury witnesses. n10

It has been held that this statute clearly intends to give preference to actions raising federal questions, thus justifying a district court in enacting a local rule that gives diversity actions the lowest priority. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 8 *Moore's Federal Practice,* § 40.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 40.*

(n3)Footnote 2. *Fed. R. Civ. P. 83*; *see 28 U.S.C. §§ 2072, 2075.*

(n4)Footnote 3. *28 U.S.C. § 1657* (general rule that priority of civil actions and order in which civil actions are heard determined by each court of United States); *see* [b], *below.*

(n5)Footnote 4. *See 28 U.S.C. §§ 471, 476*; *see also* 8 *Moore's Federal Practice, § 40.03[2][b].* (Matthew Bender 3d ed.).

(n6)Footnote 5. *Zukowski v. Howard, Needles, Tammen, & Bergendoff, 115 F.R.D. 53, 54 (D. Colo. 1987)* (because local rule 200 gave lowest priority to diversity actions, court denied expedited treatment to current case); *Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100, 1103-1104 (10th Cir. 1972)* (rules of court are prescribed by district judges or by judicial council and are applicable and effective until modified or rescinded; division of court's business in multijudge district is responsibility of all judges and not responsibility of chief judge acting unilaterally).

(n7)Footnote 6. *Fed. R. Civ. P. 83*; *see Wilson v. City of Zanesville, 954 F.2d 349, 352-352 (6th Cir. 1992)* (affidavit requirement imposed by local rules conflicted with federal rules on discovery).

(n8)Footnote 7. *Martel v. County of Los Angeles, 21 F.3d 940, 946 (9th Cir. 1994) , cert. denied, 516 U.S. 944 (1995)* (when judge's standing order violates local rules, it violates *Fed. R. Civ. P. 83*).

(n9)Footnote 8. *See Fed. R. Civ. P. 16(b)(3)(B)(v).*

(n10)Footnote 9. District of Alaska, Local Rule 40.3.

(n11)Footnote 10. *See* Eastern District of Michigan, Local Rule 40.1.

(n12)Footnote 11. District of New Hampshire, Local Rule 40.1 (expedited track for cases that must be tried within six months of the preliminary pretrial conference; standard track for cases that must be tried within 12 months of the preliminary pretrial conference; and complex track for cases that are scheduled for trial within two years of the preliminary pretrial conference).

(n13)Footnote 12. *See Fed. R. Civ. P. 16(b)(3)(B)(v)* (except in categories of actions exempted by district court

rule, district judge, or magistrate judge when authorized by district court rule, may enter scheduling order that may include date for trial).

(n14)Footnote 13. *See, e.g.*, Eastern District of Virginia, Local Rule 16(B).

(n15)Footnote 14. *Ganther v. Ingle, 75 F.3d 207, 212 (5th Cir. 1996)* (district court's decision to address defendants' motion for summary judgment before addressing plaintiff's motion for default judgment was not abuse of court's discretion over scheduling).

(n16)Footnote 15. *Smith v. Widman Trucking & Excavating, 627 F.2d 792, 796 (7th Cir. 1980)* .

(n17)Footnote 16. *Arthur Pierson & Co. v. Provimi Veal Corp., 887 F.2d 837, 839 (7th Cir. 1989)* .

(n18)Footnote 17. *In re Strandell, 838 F.2d 884, 886 (7th Cir. 1987)* .

(n19)Footnote 18. *Arthur Pierson & Co. v. Provimi Veal Corp., 887 F.2d 837, 838-839 (7th Cir. 1989)* .

(n20)Footnote 19. *Clinton v. Jones, 520 U.S. 681, 706-707, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)* .

(n21)Footnote 1. *Fed. R. Civ. P. 83.*

(n22)Footnote 2. *Fed. R. Civ. P. 16.*

(n23)Footnote 3. *Fed. R. Civ. P. 40.*

(n24)Footnote 4. *See Brooks v. United States, 64 F.3d 251, 256 (7th Cir. 1995)* (no abuse of discretion in denying continuance as evidence movant sought to obtain would not have likely changed outcome of case).

(n25)Footnote 5. *See, e.g.*, District of Massachusetts, Local Rule 40.3(a).

(n26)Footnote 6. *See, e.g.*, Northern District of Georgia, Local Rule 39.5.

(n27)Footnote 7. *See* District of Arizona, Local Rule 40.2(b).

(n28)Footnote 8. *See, e.g.*, District of District of Columbia, Local Rule 16.1(b).

(n29)Footnote 9. *See, e.g.,* Southern District of Indiana, Local Rule 16.3.

(n30)Footnote 10. *Jennings v. BIC Corp., 181 F.3d 1250, 1259 (11th Cir. 1999)* (district court did not abuse its discretion in refusing to grant a continuance to allow testimony of plaintiffs' expert when expert's testimony would be duplicative of that of plaintiffs' other available experts and in view of alternative means of providing expert's testimony through deposition).

(n31)Footnote 11. *Command-Aire Corp. v. Ontario Mechanical Sales & Serv., Inc., 963 F.2d 90, 96 (5th Cir. 1992)* .

(n32)Footnote 12. *Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265, 275 (2d Cir. 1996)* (district court's failure to grant continuance to allow replacement counsel to prepare case was prejudicial to movant's right to fair trial).

(n33)Footnote 13. *Rink v. Cheminova, Inc., 400 F.3d 1286, 1296 (11th Cir. 2006)* .

(n34)Footnote 14. *Amarin Plastics, Inc. v. Maryland Cup Corp., 946 F.2d 147, 151 (1st Cir. 1991)* .

(n35)Footnote 15. *Marti v. City of Maplewood, Mo., 57 F.3d 680, 684 (8th Cir. 1995)* (continuance of trial to

allow appellees to depose witness was not justified, given relative unimportance of testimony sought to be introduced).

(n36)Footnote 16. *Mraovic v. Elgin, Joliet & E. Ry. Co., 897 F.2d 268, 271 (7th Cir. 1990)* (denial of continuance due to unavailability of expert witnesses was not abuse of discretion when case was more than two years old and plaintiff did not try to arrange for testimony until one week before trial).

(n37)Footnote 17. *Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265, 273 (2d Cir. 1996)* (district court's antagonism toward merits of case and plaintiff's trial counsel, as well as court's refusal to grant continuance to allow replacement counsel to prepare case, cited by appellate court as reason to vacate judgment and remand for new trial to be held by different judge).

(n38)Footnote 18. *Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983)* (trial court caused need for continuance by its promise that witness schedules would be arranged; then court failed to allocate time for material rebuttal witness to present testimony to controvert plaintiff's damaging newly discovered testimony).

(n39)Footnote 1. *Fed. R. Crim. P. 50(a).*

(n40)Footnote 2. *Zukowski v. Howard, Needles, Tammen, & Bergendoff, 115 F.R.D. 53, 55 (D. Colo. 1987) .*

(n41)Footnote 3. *Fed. R. Civ. P. 40*; *see* [b], *below* (number of federal statutes which require that court give priority to certain types of actions has been significantly reduced by enactment of *28 U.S.C. § 1657*).

(n42)Footnote 4. *Fed. R. Civ. P. 57.*

(n43)Footnote 5. *Fed. R. Civ. P. 65(b).*

(n44)Footnote 6. *Fed. R. Civ. P. 83(a)(1)* (requirement that local rules are consistent with federal law); *see Zukowski v. Howard, Needles, Tammen, & Bergendoff, 115 F.R.D. 53, 55 (D. Colo. 1987)* (upholding local rule giving lowest priority to diversity actions).

(n45)Footnote 7. *28 U.S.C. § 1657(a).*

(n46)Footnote 8. *See 28 U.S.C. § 2241 et seq.*

(n47)Footnote 9. *28 U.S.C. § 1657(a).*

(n48)Footnote 10. *See 28 U.S.C. § 1826.*

(n49)Footnote 11. *Zukowski v. Howard, Needles, Tammen, & Bergendoff, 115 F.R.D. 53, 54-55 (D. Colo. 1987) .*

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.02

§ 20.02 Consolidation of Cases for Trialn*

[1] Nature and Purpose of Consolidation

The district court may order a joint hearing or trial and consolidation of any or all the matters in issue pending before the court in more than one case, provided that the cases involve a common question of law or fact, and provided that the consolidation would avoid unnecessary costs or delay. n1 Thus, the purpose of consolidation is to provide a valuable and important tool of judicial administration, to be invoked by the court to expedite trial, eliminate unnecessary repetition and confusion, and promote judicial economy. n2

Other purposes of consolidation are to enhance efficiency and avoid the substantial danger of inconsistent adjudications; consolidation is designed to promote a saving of time and effort, and to minimize inconvenience, delay, and expense. n3 Provided there is a common question of law or fact in the cases involved, the tool of consolidation may be used by several types of courts, such as bankruptcy courts, n4 the Admiralty Court, n5 and the Court of Claims. n6 Consolidation is also common in cases filed in the district court of a specialized nature, such as patent cases. n7

[2] Requirement of Common Question of Law or Fact

Any two or more cases pending before a court are appropriate for consolidation provided that they involve common questions of law or fact. n1 The party seekingconsolidation has the burden of proving a common question of law or fact shared by all of the cases that the party wants consolidated. n2 However, The determination of whether common questions of law and fact exist is made under a very liberal standard. For example, a common factual issue, such as a common factual issue in two lawsuits pending in the same court and brought by the same plaintiff, is a sufficient basis for consolidation, if combining the two cases will simplify the litigation process. Consolidation is especially preferred if the alternative would be a complicated exercise of form over substance, when, for example, the court would have to dismiss the second lawsuit and require the plaintiff to amend its first complaint to add the dismissed allegations. n3 Furthermore, common issues of law and fact do not have to predominate over other issues in the cases. All that is required is that the district court find they exist and that consolidation will prove beneficial. n4

However, a finding of common issues of law, common issues of fact, or both, is a necessary prerequisite for exercise of judicial discretion. Even when it appears there are common questions, their presence may be insufficient to justify consolidation. For example, in one case it was held that it was an abuse of discretion for the court to consolidate age

discrimination cases brought by two groups of employees because of the different allegations made by the two groups and because of the different time periods of alleged discrimination. n5 Thus it is an abuse of discretion for the court to consolidate two actions which contain no common issues of law or fact, for example, if the only common factual question is the fact that the same person is the defendant in both actions. n6

[3] Discretion of Court to Order Consolidation

Once it has been established that a case pending before a court involves common questions of law or fact, n1 the trial court has broad discretion to determine whether consolidation is appropriate. In the exercise of discretion, courts have taken the view that, as a general rule, considerations of judicial economy favor consolidation. n2 The discretion allowed is very broad, and a decision to grant or deny consolidation will be upheld on appeal unless the court has committed an abuse of discretion. n3 However, discretion is not unlimited and courts must carefully examine the facts underlying the proposed consolidation. n4

After a court has made a threshold finding of commonality of factual or legal questions and of convenience, there are several other factors that are influential in determining whether or not consolidation is appropriate. n5

A court may order consolidation on its own initiative, under the broad managerial power of the district court to control its cases. Thus, the authority to consolidate extends to the consolidation of cases even when no party has brought a motion for consolidation, n6 and a trial court has the power sua sponte to hold a hearing to determine whether actions then pending before it should be consolidated. n7 A court, also sua sponte, may deem cases consolidated on an informal basis by referring to them in the record as consolidated or by issuing a single opinion resolving the merits of the cases. n8

A trial court's discretion extends with respect to consolidation not only to whether it should occur but also to the form that any ordered consolidation must take. Thus, a court may limit consolidation to particular issues and order a joint trial of those issues only. n9 Similarly, consolidation may be expressly limited to pretrial proceedings, including pleadings and discovery. n10

[4] Balancing Test for Consolidation

[a] Statement of Balancing Test

After it has found that cases pending before it involve common questions of law or fact, n1 a court must apply a balancing test. The court must balance the burden on the parties, the risk of inconsistent judgments, and the waste of resources that separate proceedings could engender against the prejudice and confusion that consolidation might entail. n2 For a discussion of the factors on each side of this balancing equation that the court will consider, see [b] and [c], *below*.

[b] Factors Balancing in Favor of Consolidation

The following factors have all been held to balance in favor of a court ordering consolidation:

1. Interests of justice. The primary factor that will influence a court in granting consolidation is the interests of justice. Thus, even though all courts agree that considerations of judicial economy favor consolidation, efficiency may not be permitted to prevail at the expense of justice, and consolidation should be considered only when savings of expense and gains of efficiency may be accomplished without sacrifice of justice. n3 In other words the benefits of efficiency may never be purchased at the cost of fairness. n4 Thus, in the balancing test to determine whether consolidation is appropriate in a given case, courts have found that fairness must be paramount. n5

2. Efficiency. When courts find that consolidation will achieve significant savings of time or avoid serious duplication of effort, they are much more likely to order the consolidation. Avoiding delay and expediting the trial process are two factors frequently cited by courts in ordering consolidation. n6

3. Savings of expenses. Saving of expense and conservation of resources is a frequently cited justification for consolidation because consolidation commonly saves the resources of both the parties and the court. The more significant the savings, the more attractive consolidation will be to the court. n7

4. Avoidance of inconsistent or conflicting results. n8 The danger of inconsistent results and the inequitable treatment inconsistent results bring about when parties are actually similarly situated have led courts to consolidate proceedings in many types of cases. n9

[c] Factors Balancing Against of Consolidation

The following factors have all been held to be against the court's ordering consolidation:

1. Prejudice. Consolidation is inappropriate when the mere act of consolidating cases will adversely affect the rights of the parties. n10 For example, a party may be prejudiced when the claims or defenses particular to that party are substantially different from the other consolidated claims, and management of the consolidated case would be placed in a lead party whose efforts are likely to focus on the interests of the lead party and deprive the other parties of representation. n11 On the other hand, the court will order consolidation when the lead parties and lead counsel would provide complete representation of all parties. n12 Consolidation may be prejudicial to parties in other ways. For example, prejudice may be caused by the disclosure of proprietary information, such as the extent of insurance coverage, n13 the existence of other lawsuits, n14 or offers of settlement. n15

2. Confusion of Jurors. When multiple lawsuits are tried together, there is usually some risk of juror confusion, n16 and this factor balances against an order of consolidation. n17 The risk of confusion has been held to begreatest when consolidation produces a great amount of evidence, n18 when the parties' situations are excessively diverse, n19 or when the legal positions of the parties are significantly but subtly different. n20 On the other hand, the court may permit consolidation if the court takes steps to minimize the potential for confusion in the consolidated cases by closely drafted, cautionary jury instructions, and special verdict forms outlining the claims of each plaintiff and advising the jury to consider each claim individually. n21

3. Delay. Consolidation is disfavored if it will actually cause rather than reduce delay. When separate trials of two actions will not involve a substantial duplication of effort, their consolidation will often delay rather than expedite resolution of the parties' claims. n22 One of the matters courts examine when assessing delay is the state of case preparation and discovery in each action. The courts tend to deny consolidation when there is a considerable difference in trial readiness, n23 or when the individual lawsuits have progressed to the point where organization of a consolidated trial would only increase the delay. n24

4. Administrative burdens. Consolidation is not appropriate when it results in administrative burdens to the extent that it impairs the potential for a fair and impartial trial. One case exemplifying the concern about administrative difficulties involved proposed consolidation of 44 products liability cases involving claimants with varying types of injuries and against various defendants. The court in that case found consolidation was unnecessarily likely to create administrative difficulties and increase the parties' expenses by forcing them to participate in discovery and other proceedings irrelevant to their individual claims. n25

[5] Consolidation Procedure

[a] Consolidation of Cases Pending Before Court

Rule 42(a) provides for consolidation when two or more actions are pending before the court. Matters are "pending before the court" for consolidation purposes whenever they are subject to the managerial power of a single district judge. A judge may acquire such power through routine assignment or transfer. n1

[b] Transfer to Accomplish Consolidation

Even though Rule 42(a) does not contain express language allowing transfer, actions pending in different district courts may be transferred by statute to other districts and then consolidated by the transferee court for the convenience of parties and witnesses in the interest of justice. n2 The statute also permits courts to make such transfers to different divisions within the same district. n3 In order to transfer cases under Section 1404(a), a court must determine that the action could have been brought in the transferee district or court, that it will be in the interests of justice to effect transfer, and that it will be a convenience to the parties and witnesses if the transfer is completed. n4 The benefits of consolidation may be considered as part of the grounds for transfer. n5

In addition to interdistrict transfers, a district court may transfer to itself and consolidate cases pending in another forum or type of court. For example, a case pending in bankruptcy court may be transferred to the district court and consolidated with a case pending there, without the prior determination of the bankruptcy court. n6 In the same way, a case pending in admiralty may be transferred to the district court and consolidated with a case in the district court. n7

[c] Cases Not Merged

The United States Supreme Court has held that consolidation does not merge the consolidated suits into one lawsuit, change the rights of the parties, or make those who were parties in one suit parties in another. n8 Furthermore, courts havetailored consolidation orders to protect against mergers that could extinguish the individual rights of the parties. For example, one court limited consolidation to pretrial proceedings and a consolidated complaint, commenting that its goal was to avoid impermissibly merging the rights or defenses of the various parties. The trial judge in that case stressed the possibility of reviving individual complaints for trial, while reiterating the principle that consolidation may not bring about any physical merger of the actions or the defenses of the separate parties. n9 Another effect of this doctrine is that, while a consolidation order may result in a single unit of litigation, such a consolidation order does not create a single case for jurisdiction purposes. n10

[d] Jurisdiction

Because consolidated cases are not merged with one another, it has been held that consolidation does not relieve parties to separate actions from the need to independently satisfy the requisite subject matter jurisdiction requirements for the commencement of actions in the federal courts or their removal to federal courts. n11 However, the doctrine of pendent jurisdiction has been applied to allow a court to hear state law tort claims that share a common nucleus of operative fact with claims made under federal law. n12

Under these same principles, consolidation may not be used to defeat jurisdiction of a case with the requisite diversity jurisdiction. Thus, when a court had diversity jurisdiction over one case, that case could not be dismissed for lack of subject matter jurisdiction after the case was consolidated with a second case over which diversity jurisdiction was lacking, because consolidation did not merge the two actions into one case, but, rather, each action retained its own separate identity, and therefore the jurisdictional basis for each action had to be analyzed independently. n13

[e] Representation in Consolidated Cases

The district court may designate attorneys in consolidated cases to perform particular functions to facilitate the litigation and cooperation among all counsel and parties. n14 For example, attorneys may be designated as "lead counsel," "general counsel," "liaison counsel," or "trial counsel." n15 The courts in multidistrict consolidated litigation consult the Manual for Complex Litigation n16 for suggestions on specific functions for lead, liaison, and trial counsel, as well as committees of counsel. n17 The courts exercise authority to appoint lead counsel as part of their general power to order consolidation of cases. n18 Pursuant to that authority, the court may appoint counsel for both plaintiffs or defendants in complex actions to perform a number of substantive and administrative tasks, such as drafting and filing a consolidated complaint. n19

The following is a brief description of counsel in consolidated cases:

> 1. Lead counsel, also known as "general counsel," has broad power to control consolidated litigation. n20 Powers granted to lead counsel have included directing pretrial proceedings on behalf of the consolidated parties, participating in and organizing a discovery plan, deposing witnesses and parties, and overseeing litigation deadlines and schedules and trying the lawsuit. n21 In large, complex, mass tort cases, lead counsel may consist of a committee of attorneys. n22
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> 2. Liaison Counsel. The court may appoint liaison counsel to act on behalf of other counsel and parties in addition to those they initially represent. Liaison counsel's main function is to perform administrative tasks on behalf of plaintiffs, defendants, or both, according to the court's order. n23 For example, liaison counsel for the defendants may be ordered to perform court-designated functions such as responding to plaintiff's lead counsel's consolidated pleadings and to participate in discovery organization withplaintiffs. n24 In other cases, liaison counsel has facilitated the litigation by receiving or distributing documents on behalf of the represented party (plaintiff or defendant), giving notice of meetings, maintaining a document depository, and undertaking other administrative functions. n25
>
> 3. Trial Counsel. Trial counsel is the role assumed by the attorney or attorneys who actually conduct the court trial of the case. The court may appoint counsel to serve as principal attorney for a plaintiff or defendant group at trial in complex cases. The inherent power of the court to control its own docket, implied in the broad managerial powers described in Rule 42(a), has been cited as authority for ordering that a trial be conducted by particular counsel to the exclusion of other counsel. n26

Two issues typically arise in litigation involving representation in complex cases. The first issue concerns the appointment of lead counsel. Lead counsel is required to maintain a fiduciary relationship with individual parties, while acting on behalf of the group. Therefore, the goal of the court is to find competent and experienced counsel to represent the group. In determining the lead counsel, the court should consider who has specific experience in particular litigation, the highest professional talent, and a high degree of integrity. However, in its decision the court may also consider the issue of cost of counsel. n27 In this regard, some courts now prefer appointment of lead counsel based on a process of a sealed-bid auction, since this process ensures representation at a fair price, provided that the court also insures that the parties receive high quality representation. n28

Another issue that commonly arises in consolidated cases is that of allocation of an award of attorney's fees. Courts typically consider two methods of allocating fees in complex cases: the "lodestar" method, which determines the number of productive hours and multiplies them by a reasonable hourly rate and the "common fund" method, in which a reasonable fee is based on a percentage of the fund available for fees for the group. n29

The actual award may depend on the type of case. Courts have noted that in mass tort litigation, unlike securities cases, plaintiff's individual attorneys play a significant role by their constant interaction with plaintiffs; because a particular court may personally observe only direct trial-related work, the parties and judges must be made aware of the potential for allocating too large a percentage of fees to lead counsel, and take measures to prevent such unfairness by

documenting precisely all non trial related work performed by other counsel. n30

[f] Jury Rights in Consolidated Cases

The consolidation of cases may bring about several issues regarding jury rights. A party may properly demand the right to trial by jury in a consolidated lawsuit, although it was waived in one or more of the component cases. It has been held that when two cases are consolidated for all purposes including trial, the right to jury trial attaches to all claims, even those in a case in which a jury trial was waived. n31 Furthermore, when a jury has become the trier of a common question of fact, the jury should be the sole decider of that question. n32

Another issue that commonly arises is the impact of consolidation on the number of peremptory challenges available to a party. The general rule is that parties are allowed the same number of peremptory challenges they would have had if there had been no consolidation. What this means in practice is that the number of different pre-consolidation lawsuits involving any party fixes the number by which peremptories may be increased to produce the total number of strikes for that party in a consolidation. It should be noted, however, that this number is limited by a statute that allows each side in an individual lawsuit only three peremptory challenges, n33 unless the court allows a larger number. n34

[g] Appeal

A court's order granting or denying a motion for consolidation is generally characterized as interlocutory and may not be appealed unless certified for appeal under Rule 54. n35 Similarly, courts have held that bankruptcy orders of consolidation are not appealable because they are also interlocutory. n36 However, a significant exception to this rule is the collateral order doctrine, which allows immediate review of a consolidation order or a denial of consolidation. Underthe exception, a party may take an immediate appeal if the consolidation order or denial that may have significant impact on the rights of the parties apart from the consolidation itself.

Thus, parties may petition for immediate review of a collateral order that finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. For example, in one case in which relatively minor fraud claims against one defendant were consolidated with a broad fraudulent scheme alleged against other defendants, the court held that the consolidated complaint severely prejudiced the defendant in the minor case, and also that the minor defendant could be precluded from fully litigating its defense; therefore, the court held that the consolidation order was a collateral order that was subject to immediate review. n37

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 8 *Moore's Federal Practice,* § 42.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 42(a).*

(n3)Footnote 2. *Devlin v. Transportation Communications International Union, 175 F.3d 121, 130 (2nd Cir. 1999) .*

(n4)Footnote 3. *Bristol-Myers Squibb Co. v. Safety National Casualty Corp. 43 F. Supp. 2d 734, 745 (E.D. Tex. 1999) .*

(n5)Footnote 4. *In re Passodelis, 234 B.R. 52, 62 (W.D. Pa. 1999)* ; *Eastgroup Properties v. Southern Motel Assoc. Ltd., 935 F.2d 245, 248 (11th Cir. 1991)* ; *In re Fleming, 8 B.R. 746, 750 (N.D. Georgia 1980)* .

(n6)Footnote 5. *In re Dearborn Marine Serv., Inc., 499 F.2d 263, 270-271 (5th Cir. 1974)* ; *Parsons Mills, Inc. v. Companhia, Etc., 82 F.R.D. 331, 332-333 (S.D.N.Y. 1978)* .

(n7)Footnote 6. *United States v. Mitchell, 445 U.S. 535, 537, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980)* .

(n8)Footnote 7. *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 31-34 (D. Del. 1986)* (two patent infringement cases consolidated to protect patent holder's right to have single jury decide common factual questions).

(n9)Footnote 1. *Devlin v. Transportation Communications International Union, 175 F.3d 121, 130 (2nd Cir. 1999)* (court could have considered consolidat ing Age Discrimination in Employment Act claims regarding medical benefits with Employee Retirement Income Security Act claims when actions were before same district court judge and judge knew that they were related); *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495-1497 (11th Cir. 1985)* (consolidation of asbestosis cases with similar allegations regarding extent of disease and identical theories of liability).

(n10)Footnote 2. *In re Repetitive Stress Injury Litig., 11 F.3d 368, 373-374 (2d Cir. 1993)* ; *In re Consolidated Parlodel Litig., 182 F.R.D. 441, 444 (D.N.J. 1998)* .

(n11)Footnote 3. *Hanes Cos. v. Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988)* .

(n12)Footnote 4. *Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1211 (S.D.N.Y. 1992)* (consolidating securities actions that involved § 10b-5 claims that posed numerous common questions of law and fact despite variations in identity of parties and in some allegations); *Hanes Cos. v. Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988)* (court found consolidation of two cases filed by same plaintiff enhanced efficiency and economy for all concerned).

(n13)Footnote 5. *King v. General Elec. Co. 960 F.2d 617, 626 (7th Cir. 1992)* .

(n14)Footnote 6. *Enterprise Bank v. Saettele, 21 F.3d 233, 236 (8th Cir. 1994)* .

(n15)Footnote 1. *See* [2], *above*.

(n16)Footnote 2. *Friedlander v. Roberts, 51 F. Supp. 2d 385, 388-389 (S.D.N.Y. 1999)* .

(n17)Footnote 3. *E.E.O.C. v. HBE Corp., 135 F.3d 543, 550-551 (8th Cir. 1998)* (consolidation is appropriate whenever cases have common questions of law and fact, and court did not abuse discretion in permitting consolidation even when consolidation resulted in state law claims being tried before jury along with federal claims).

(n18)Footnote 4. *In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993)* (before exercising discretion, courts must examine special underlying facts with close attention); *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 248 (E.D. Va. 1999)* (court must conduct careful inquiry to make decision on consolidation).

(n19)Footnote 5. *See* [4], *below*.

(n20)Footnote 6. *Devlin v. Transportation Communications International Union, 175 F.3d 121, 130 (2d Cir. 1999)* .

(n21)Footnote 7. *Katz v. Realty Equities Corp. of N.Y., 521 F.2d 1354, 1356 (2d Cir. 1975)* .

(n22)Footnote 8. *In re Adams Apple, Inc., 829 F.2d 1484, 1487 (9th Cir. 1987)* .

(n23)Footnote 9. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 393-395 (E.D. Mich. 1989)* (consolidation of more than 150 cases arising out of airplane crash for purpose of trial on issue of liability only).

(n24)Footnote 10. *Katz v. Realty Equities Corp., 521 F.2d 1354, 1358-1359 (2d Cir. 1975)* (court ordered consolidation of complaint).

(n25)Footnote 1. *See* [2], *above*.

(n26)Footnote 2. *Bristol-Myers Squibb Co. v. Safety National Casualty Corp. 43 F. Supp. 2d 734, 745 (E.D. Tex. 1999)* .

(n27)Footnote 3. *Devlin v. Transportation Communications International Union, 175 F.3d 121, 130 (2nd Cir. 1999)* .

(n28)Footnote 4. *Malcolm v. National Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993)* .

(n29)Footnote 5. *Malcolm v. National Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993)* .

(n30)Footnote 6. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495-1497 (11th Cir. 1985)* ; *Bristol-Myers Squibb Co. v. Safety National Casualty Corp. 43 F. Supp. 2d 734, 745 (E.D. Tex. 1999)* .

(n31)Footnote 7. *Katz v. Realty Equities Corp. of N.Y., 521 F.2d 1354, 1358 (2d Cir. 1975)* (use of a consolidated complaint held to promote desired objective of judicial economy).

(n32)Footnote 8. *Bristol-Myers Squibb Co. v. Safety National Casualty Corp. 43 F. Supp. 2d 734, 745 (E.D. Tex. 1999)* .

(n33)Footnote 9. *Waste Distillation Technology, Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991)* (court found consolidation would eliminate risk of inconsistent results between two lawsuits alleging various business torts which shared same plaintiff, identity of facts, and same witnesses and evidence.).

(n34)Footnote 10. *Johnson v. Manhattan R. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (consolidation does not merge actions, and must not substantially and adversely affect rights of parties).

(n35)Footnote 11. *Garber v. Randell 477 F.2d 711, 714-716 (2d Cir. 1973)* (court found claim too distinctive to consolidate when only one of 15 plaintiffs brought a cause of action against a law firm, and claim was distinct from other plaintiffs' claims).

(n36)Footnote 12. *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 248 (E.D. Va. 1999)* .

(n37)Footnote 13. *Arnold v. Eastern Air Lines Inc., 712 F.2d 899, 906 (4th Cir. 1983)* , *cert. denied, 464 U.S. 1040 (1984)* .

(n38)Footnote 14. *Bradley v. Soo L. R. Co., 88 F.R.D. 307, 310 (E.D. Wis. 1980)* (court denied consolidation of two cases by plaintiff against his employer because jury would be prejudiced by learning of second claim).

(n39)Footnote 15. *American Employers' Ins. Co. v. King Resources Co., 545 F.2d 1265, 1269 (10th Cir. 1976)* .

(n40)Footnote 16. *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* , *cert. denied, 498 U.S. 920 (1990)* (asbestosis cases with multiple claims and allegations of different types of asbestos-related injuries).

(n41)Footnote 17. *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 248 (E.D. Va. 1999)* .

(n42)Footnote 18. *Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976)* , *cert. denied, 429 U.S. 1024 (1976)*

(if consolidated, complex cases would be too much for jury to digest when 4500 pages were involved for transcript in 15-day jury trial).

(n43)Footnote 19. *In re Repetitive Stress Injury Litig., 11 F.3d 368, 371 (2d Cir. 1993)* (plaintiffs repetitive stress injuries included so many diverse medical conditions that commonality of facts was negated).

(n44)Footnote 20. *Seguro de Servicio de Salud v. McAuto Sys. Group, Inc., 878 F.2d 5, 9 (1st Cir. 1989)* (consolidation of two separate arbitration proceedings constituted abuse of discretion when contracts requiring arbitration were governed by law of different states and when, on close analysis, contractual arbitration clauses were very different).

(n45)Footnote 21. *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) , cert. denied, 498 U.S. 920 (1990) .*

(n46)Footnote 22. *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc., 720 F. Supp. 805, 807 (N.D. Cal. 1989)* (two complex actions involving different government contracts should not be consolidated).

(n47)Footnote 23. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* (one party ready for trial and one not).

(n48)Footnote 24. *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 248 (E.D. Va. 1999) .*

(n49)Footnote 25. *In re Repetitive Stress Injury Litig., 11 F.3d 368, 371-372 (2d Cir. 1993) .*

(n50)Footnote 1. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392-393 (E.D. Mich. 1989)* (actions filed in another forum may be transferred to court that may then consolidate such actions); *see also* [b], *below*.

(n51)Footnote 2. *In re Storage Technology Corp. Sec. Litig., 630 F. Supp. 1072, 1074 (D. Colo. 1986)* (three civil actions pending before Northern District of California transferred to the District Colorado for consolidation with twelve civil actions pending there); *see 28 U.S.C. § 1404(a)* (transfer statute).

(n52)Footnote 3. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 (5th Cir. 1989) .*

(n53)Footnote 4. *In re Joint E. & S. Dist. Asbestos Litig., 769 F. Supp. 85, 87-88 (E.D.N.Y. 1991) .*

(n54)Footnote 5. *Waste Distillation Technology, Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991) .*

(n55)Footnote 6. *In re Macon Uplands Venture, 624 F.2d 26, 27 (5th Cir. 1980) .*

(n56)Footnote 7. *Blake v. Farrell Lines, Inc., 417 F.2d 264, 265 (3d. Cir. 1969)* (personal injury case consolidated with shipowner's suit in admiralty for indemnity).

(n57)Footnote 8. *Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933) .*

(n58)Footnote 9. *Katz v. Realty Equities Corp. of N.Y., 521 F.2d 1354, 1358-1359 (2d Cir. 1975) .*

(n59)Footnote 10. *Cella, 173 F.3d 909, 912 (3rd Cir. 1999)* ; *see* [d], *below*.

(n60)Footnote 11. *International Soc. for Krishna Consciousness, Inc. v. Los Angeles, 611 F. Supp. 315, 316-320 (C.D. Cal. 1984)* (consolidation of two lawsuits did not cure lack of federal question jurisdiction in second lawsuit because it was not an actual controversy but merely requested advisory opinion, even though other suit properly alleged federal constitutional violation).

(n61)Footnote 12. *Dooley v. United Technologies Corp., 786 F. Supp. 65, 81 (D.D.C. 1992)* (suit alleging state law claims of retaliatory discharge and tortious interference with contract consolidated with federal RICO and obstruction of justice claims, when plaintiff alleged a scheme to sell armed helicopters to Saudi Arabia without United States government approval).

(n62)Footnote 13. *Cella, 173 F.3d 909, 912 (3rd Cir. 1999)* ; *see* [d], *below*.

(n63)Footnote 14. *See Sherleigh Associates LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 693-694 (S.D. Fla. 1999)* .

(n64)Footnote 15. *Vincent v. Hughes Air W., Inc., 557 F.2d 759, 773-775 (9th Cir. 1977)* (appellate court description of different attorney roles and their interaction in complex airline crash litigation).

(n65)Footnote 16. *See, e.g.*, Manual for Complex Litigation § 20.22 (3d ed.1995)..

(n66)Footnote 17. *In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1364-1365 (2d Cir. 1991)* .

(n67)Footnote 18. *MacAlister v. Guterma, 263 F.2d 65, 68 (2d. Cir. 1958)* .

(n68)Footnote 19. *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 256, 258-260 (D. Minn. 1989)* (duties of lead and liaison counsel were listed in detail in court's order).

(n69)Footnote 20. *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 252 (E.D. Va. 1999)* (decision to appoint lead counsel carries considerable importance because lead counsel must represent not only the interests of a lead plaintiff, but all members of the putative class; as such, lead counsel should have specific experience in particular litigation as well as the highest professional talent, accompanied by similarly high degree of integrity).

(n70)Footnote 21. *In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1364-1365 (2d Cir. 1991)* .

(n71)Footnote 22. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 395-396 (E.D. Mich. 1989)* .

(n72)Footnote 23. *Vincent v. Hughes Air West, Inc., 557 F.2d 759, 773-775 (9th Cir. 1977)* (role of liaison counsel considered in consolidated air crash case).

(n73)Footnote 24. *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 256, 258-260 (D. Minn. 1989)* .

(n74)Footnote 25. *In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1364-1365 (2d Cir. 1991)* .

(n75)Footnote 26. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 396 n.4 (E.D. Mich. 1989)* (court stated that trial would become chaotic and unmanageable if counsel for each plaintiff were permitted to present his or her position or theory of case individually to jury).

(n76)Footnote 27. *Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 252 (E.D. Va. 1999)* (court considered specific proffer that firm's contingent fees were below what courts typically award).

(n77)Footnote 28. *See Sherleigh Associates LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 693-694 (S.D. Fla. 1999)* .

(n78)Footnote 29. In re Thirteen Appeals Arising out of the *San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 304-308 (1st Cir. 1995)* .

(n79)Footnote 30. In re Thirteen Appeals Arising out of the *San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d*

295, 311-312 (1st Cir. 1995) .

(n80)Footnote 31. *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 31-32 (D. Del. 1986)* .

(n81)Footnote 32. *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 32 (D. Del. 1986)* .

(n82)Footnote 33. *28 U.S.C. § 1870.*

(n83)Footnote 34. *Fedorchick v. Massey-Ferguson, Inc., 577 F.2d 856, 858 (3d Cir. 1978)* ; *see* Manual on Complex Litigation, 3d Ed., 1995, § 22.41 (guidelines to courts for use in complex cases provide that court may allow additional challenges, based on whether parties' interests conflict or diverge significantly and provides that additional challenges must be granted sparingly as they will lengthen jury selection process).

(n84)Footnote 35. *Garber v. Randell, 477 F.2d 711, 714-715 (2d Cir. 1973)* (citing **Moore's Federal Practice**).

(n85)Footnote 36. *In re M. Ibrahim Khan P.S.C., 31 B.R.W. 313, 314 (Bankr. W.D. Ky. 1983)* (bankruptcy court order of transfer and consolidation not appealable due to interlocutory nature).

(n86)Footnote 37. *Garber v. Randell, 477 F.2d 711, 715 (2d Cir. 1973)* .

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.03

§ 20.03 Separation of Cases for Trialn*

[1] Nature and Purpose of Order for Separate Trials

[a] Function of Order for Separate Trials

The trial court may order a separate trial of any type or number of claims, or of any separate issue or issues, when it would be convenient to do so to avoid prejudice or when separate trials would be expeditious or economical, provided the court preserves the parties' right to trial by jury. n1 *Rule 42(b) of the Federal Rules of Civil Procedure* allowing separation has been promulgated to deal with the problems caused by single cases that concern more than one very different element; these problems include confusion, prejudice, and delay. It is essential that trial judges have the authority to separately process such various elements when cases of this kind come before the court. Under Rule 42(b), the court may select specified claims or issues and decide them before proceeding to other matters in the same case. n2

[b] Distinction Between Order for Separate Trials and Order of Severance

Technically, there is a distinction between an order of separate trials under Rule 42(b), also known as an order of bifurcation, n3 and an order of severance under Rule 21. n4 Although many courts generally use the terms "separate" and "sever" interchangeably, they are analytically distinct, and the procedure authorized by Rule 42(b) should be distinguished from severance under Rule 21.

Separate trials result in one judgment, but severed claims become entirely independent actions that must be tried separately, and the judgment entered on each action is independent of the other one. Technically, when only one judgment will result, the court should use Rule 42(b), and when two judgments are necessary, the court should use an order of severance under Rule 21. n5 However, many courts use the terms interchangeably, n6 and this confusion is compounded by the fact that the court's determination as to whether it should order separate trials requires the same considerations as for a determination of whether it should sever claims of a party. n7

[2] Requirements for Order of Separate Trial

Rule 42(b) allows a court to separate claims or issues for trial only when the court ascertains that certain conditions are met. n1 First, the trial judge must determine whether separate trials would either avoid prejudice to a party or promote

judicial economy. n2 Only one and not both of these criteria--avoidance of prejudice or judicial economy--need be met. n3 Next, the court must be satisfied that the decision to bifurcate does not unfairly prejudice the non-moving party. n4 Finally, separate trials must not be granted if doing so would violate a party's *Seventh Amendment* right to a jury trial. n5

[3] Discretion of Court to Order Separate Trials

The trial court has broad discretion to determine whether consolidation is appropriate. Thus, the ultimate decision to bifurcate a trial is generally in the court's discretion and will be overturned only on a clear showing of abuse. n1 Although some courts have described separation as a procedural device to be employed only in exceptional circumstances, n2 most courts hold that it is a purelydiscretionary act to be used whenever the trial court finds that it would further convenience, avoid prejudice, or be conducive to expedition and economy. n3 In exercising its discretion, the court may act on the motion of any party or on its own initiative. n4

After a court has made a threshold finding of the existence of convenience, avoidance of prejudice, or expedition and economy, n5 there are several other factors that are influential in determining whether or not separation for trial is appropriate in the particular case. n6 The party seeking bifurcation has the burden of proving that bifurcation will satisfy the expressed requirements of Rule 42(b), including furtherance of convenience, avoidance of prejudice, or enhancement of expedition and economy. n7

[4] Balancing Test for Separation

[a] Statement of Balancing Test

In ruling on a motion to order separate trials, a court must take into account the overall equities of the case and must not focus on only one factor such as whether there will be overlap in testimony and evidence between the two proceedings, whether the issues to be decided at trial are complex and the factfinder is likely to become confused, whether separation will promote settlement, or whether a single trial will cause unnecessary delay. Thus, the court must balance the reduction in complexity and delay against the fact that a bifurcated trial could result in duplicative testimony and evidence. n1 For a discussion of the factors on each side of this balancing equation that the court will consider, see [b] and [c], *below*.

[b] Factors Balancing in Favor of Ordering Separate Trials

The following factors have all been held to balance in favor of a court ordering separate trials:

1. Determinative issue. When the resolution of a key issue in the case may determine the outcome of an entire proceeding, the court may be more likely to order that issue separated for trial. In such a case, separation is likely to be conducive to judicial economy and expedition. For example, in an insurer's action for a declaratory judgment that its denial of coverage was proper, the court held that the interests of judicial economy justified trial of the insured homeowners' counterclaim against the insurer for breach of contract and a violation of state consumer protection statutes separately from the declaratory judgment action, because resolution of declaratory judgment action could determine the entire outcome and, thus, obviate the need for the court to consider evidence relevant only to the contract counterclaim. n2 In mass tort litigation, for example, the issue of causation is often determinative of the plaintiffs' ability to recover, and courts in such cases have favored separation of the causation issue for separate trial. n3

2. Issues of liability. To prevent undue delay in the administration of justice in personal injury and other civil litigation in which the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, courts commonly order a separate trial on the issue of liability on a motion of any of the parties or at the court's own direction. For example, the circuit court in a civil rights case held

that the trial court did not abuse its discretion by ordering a separate trial of an arrestee's claims against police officers who allegedly used excessive force against the arrestee, because if the jury found no liability on that decision, trial on the arrestee's claims against the city and the police department would be unnecessary. n4 Bifurcation of liability issues is a decision that must be made on a case-by-case basis. n5 Bifurcation of liability issues is more likely to be granted when issues are complex and when there would be no significant overlap of issues that would result in duplication of effort. n6

3. Issues of damages. Courts tend to favor bifurcation of damages issues, especially punitive damages issues because the presentation of evidence relating to punitive damages to the jury after the jury's determination of other issues insulates the jury from consideration of improper evidence while determining liability and compensatory damages. n7 Bifurcation ofdamages issues is more likely to be granted when the issues are complex, if there would be no significant overlap of issues that would result in a duplication of effort, and if the bifurcation would encourage judicial economy and efficiency because it would narrow the claims for which damages are recoverable. n8

[c] Factors Balancing Against Ordering Separate Trials

The following factors have all been held to be against the court's ordering separate trials:

1. Prejudice. Bifurcation is improper when separate trials would result in prejudice to a party, for example, by triggering delay in the proceedings or increasing expense. n9

2. Exclusion of admissible evidence. Bifurcation is improper if the separation of trials would effectively exclude important evidence from the jury that is otherwise relevant and admissible. n10

3. Overlapping of issues. Bifurcation is improper where the issues are so closely interwoven that the plaintiff would have to present the same evidence twice in separate trials. In such circumstances, judicial economy is fostered by a single trial. n11

4. Simple issues. Cases that can stand alone and that will not confuse the jury or cause delay by a single trial of all the issues should not be bifurcated. n12

[5] Procedural Considerations

[a] Diversity Actions

A court's authority to order separate trials is a procedural matter, n1 and, in diversity actions the court may order separate trials even if such a procedure would be unavailable under state court rules. n2 For example, in a personal injury diversity action brought by a passenger against a pilot alleging negligence the issue of separate trials was governed by Rule 42(b), even though the issue of the burden of proof on causation in a negligence diversity action was determined by Wisconsin law. n3

[b] Timing of Separate Trial Order

The question of whether to order separate trials for specific claims, affirmative defenses, or issues for hearing or trial should be raised and considered early in the pretrial stages of litigation, preferably before discovery is commenced. n4 As a potential cost-saving procedural management device, separate trials are often considered at the initial case management conference under Rule 16. Included within the listed subjects for consideration at case management conferences is an order for separate trials pursuant to Rule 42(b) with respect to a claim, counterclaim, cross claim, or third party claim, or with respect to any particular issue in the case. n5 By considering bifurcation early on the case management agenda, the parties can formulate an efficient discovery plan and possibly save considerable costs, one of

the primary goals of separate trials. n6

[c] Stay of Discovery

If it orders separate trials, the trial court has authority to stay discovery with respect to the second claim or issue if the stay would further the purposes of separate trials. n7 Thus, one of the primary purposes of bifurcation is to defer costly discovery pending resolution of preliminary issues such as liability. n8 It is important to note that a separate trial order will not automatically stay discovery until the claims on the other part of the action are resolved. On the contrary,discovery continues, and claims continue to proceed to trial just as they otherwise would, unless the court specifically orders a stay. n9

[d] Appeal

If the court grants or denies a motion to hold separate trials on any issues or claims for trial, the order is an interlocutory orders that is ordinarily not appealable absent certification. n10 However, an order for a separate trial may be appealed as a "collateral order" when the issue is too important to be denied immediate review. Under this doctrine, a party may take an immediate appeal if the separation order or denial may have a significant impact on the rights of the parties apart from the separation itself. Thus, parties may petition for immediate review of a "collateral order" that finally determines claims of right separable from, and collateral to, rights asserted in the action which are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. n11

If a party is dissatisfied with a separation order, the party must object to the order at the trial court level. A party may not raise an objection to a separate trial order for the first time on appeal, except to further the interest of substantial justice. n12 When an appeal is properly taken, the decision of the trial court regarding separate trials is at the court's discretion and will be overturned only on a clear showing of abuse. n13

[6] Preservation of Right to Jury Trial

[a] Separate Trials May not Subvert Right Jury Trial

In order to preserve the right to a jury trial under the *Seventh Amendment*, courts commonly separate legal issues from equitable issues and try the two separately, with the legal issues tried to the jury, and the equitable issues tried to the court. n1 However, it is improper for the court to use the procedural device of separation of trials in any manner that has the effect of preventing the exercise of the constitutional right to a jury trial guaranteed by the *Seventh Amendment*. n2 Rule 42(b) specifically requires that separate trial orders preserve intact the right of trial by jury as declared by the *Seventh Amendment*, or as provided by any statute of the United States. Once an equitable claim has been separated for trial from any legal claims, and there are common issues between the claims, the legal claims must be tried to the jury before the equitable claims, to avoid any possibility of infringement on the right to jury trial by the collateral estoppel or res judicata effect of a court determination of the equitable claims. When there are no common issues between the equitable and legal claims, the order of trial does not affect the right to a jury trial. n3

[b] Separate Trials Involving Two Juries

When a court grants a separate trial, for example with respect to issues such as liability and damages, there is no constitutional prohibition against the impediment to the same jury deciding both issues one after the other. n4 However, jury trial rights issues typically arise when the result of a separation order of issues for trial is that the issues in a case will be tried by two different juries. It has been suggested that the use of two juries in such situations may interfere with the constitutionally mandated right to a jury trial. n5 The basis for this argument is a Supreme Court decision in which the Court held that a separation of the issues for trial by two juries may be granted only when it clearly appears that the issues are so distinct and separate from the others that the separate trial may be had without injustice. n6

Recent case law has made it clear that despite the Supreme Court ruling, courts have very broad discretion to employ two juries rather than one. n7 One court of appeals has stated that a district court may not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The key point is that, while both juries can examine overlapping evidence, they may not decide factual issues that are common to both trials and essential to the outcome. In other words, the constitutional prohibition set forth by the Supreme Court is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 8 *Moore's Federal Practice,* § 42.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 42(b).*

(n3)Footnote 2. *See, e.g., In re Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986)* (court ordered separate trials for patent claims and antitrust counterclaims).

(n4)Footnote 3. *Lisa v. Fournier Marine Corp., 866 F.2d 530, 531 (1st Cir. 1989) , cert. denied, 493 U.S. 819 (1989) .*

(n5)Footnote 4. *Fed. R. Civ. P. 21.*

(n6)Footnote 5. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121-1122 (7th Cir. 1999) .*

(n7)Footnote 6. *McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298, 304 (5th Cir. 1993) ; Phillips v. Unijax, Inc., 625 F.2d 54, 56 (5th Cir. 1980) .*

(n8)Footnote 7. *Morris v. Northrop Grumman Corporation, 37 F. Supp. 2d 556, 580 (E.D.N.Y. 1999) .*

(n9)Footnote 1. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121-1122 (7th Cir. 1999) .*

(n10)Footnote 2. *DeWitt, Porter, Huggett, Schumacher & Morgan v. Kovalic, 991 F.2d 1243, 1245 (7th Cir. 1993) .*

(n11)Footnote 3. *See MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1166 (7th Cir. 1983) .*

(n12)Footnote 4. *See Angelo v. Armstrong World Industries, 11 F.3d 957, 964 (10th Cir. 1993) .*

(n13)Footnote 5. *See Hydrite Chemical Company v. Calumet Lubricants Co., 47 F.3d 887, 890 (7th Cir.1995) .*

(n14)Footnote 1. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999) .*

(n15)Footnote 2. United States v. 43. *47 Acres of Land, 45 F. Supp. 2d 187, 191-192 (D. Conn. 1999) .*

(n16)Footnote 3. *Faerber v. City of Newport, 51 F. Supp. 2d 115, 124-125 (D.R.I. 1999) .*

(n17)Footnote 4. *Fidelity & Cas. Co. of N.Y. v. Mills, 319 F.2d 63, 63-64 (5th Cir. 1963)* (in personal injury automobile accident case, court sua sponte ordered separate trials of actions involving third party and insurance

company).

(n18)Footnote 5. *In re Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982)* .

(n19)Footnote 6. *See* [4], *below*.

(n20)Footnote 7. *Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998)* (party seeking bifurcation has burden of proving judicial economy would be served and that no party would be prejudiced by separate trials).

(n21)Footnote 1. *Rodin Properties-Shore Mall v. Cushman & Wakefield of Pennsylvania, Inc., 49 F. Supp. 2d 709, 721-723 (D.N.J. 1999)* .

(n22)Footnote 2. *Preferred Mutual Insurance Co. v. Meggison, 53 F. Supp. 2d 139, 144-145 (D. Mass. 1999)* .

(n23)Footnote 3. *In re Bendectin Litig., 857 F.2d 290, 317 (6th Cir. 1988)* (whether drug caused plaintiffs' birth defects would determine case); *see also In re Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982)* (finding on issue concerning whether faulty wiring caused fire could render litigation of remaining issues unnecessary).

(n24)Footnote 4. *Amato v. City of Saratoga Springs, New York, 170 F.3d 311, 316 (2nd Cir. 1999)* .

(n25)Footnote 5. *Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3d. Cir. 1980)* , *cert. denied, 439 U.S. 955 (1978)* (decision to bifurcate affirmed because no prejudice was shown).

(n26)Footnote 6. *Princeton Biochemicals, Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 257-259 (D.N.J. 1998)* (bifurcation of liability issues in patent infringement case).

(n27)Footnote 7. *Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991)* (bifurcation proper where punitive damages evidence would be prejudicial to jury's consideration of liability or compensatory damages).

(n28)Footnote 8. *Princeton Biochemicals, Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 257-259 (D.N.J. 1998)* (bifurcation of liability and damages issues in patent infringement case).

(n29)Footnote 9. *FDIC v. Refco Group, Ltd., 989 F. Supp. 1052, 1090 (D. Colo. 1997)* (court denied bifurcation of alter ego issue where discovery was complete and case was ready for trial, and bifurcation might simply cause further delay).

(n30)Footnote 10. *In re Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1988)* (separate trials on liability and causation separately would improperly prevent introduction of evidence of multiple possible causes of birth defects).

(n31)Footnote 11. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1126-1127 (7th Cir. 1999)* (district court must not divide issues between separate trials in manner that the same issue is reexamined by different juries); *Hilleby v. FMC Corp., 25 U.S.P.Q.2d 1413, 1416 (N.D. Cal. 1992)* (judicial efficiency would be impaired by bifurcation when complaint and counterclaim primarily involved same parties, same technology, same expert witnesses, and same issues of patent validity and infringement).

(n32)Footnote 12. *Willemijn Houdstermaatschaapij BV v. Apollo Computer, 707 F. Supp. 1429, 1434-1435 (D. Del. 1989)* .

(n33)Footnote 1. United States v. 43. *47 Acres of Land, 45 F. Supp. 2d 187, 191-192 (D. Conn. 1999)* .

(n34)Footnote 2. *Sanford v. Johns-Manville Sales Corp, 923 F.2d 1142, 1146 n.7 (5th Cir. 1991)* .

(n35)Footnote 3. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1123 (7th Cir. 1999)* .

(n36)Footnote 4. *See* [c], *below*.

(n37)Footnote 5. *Fed. R. Civ. P. 16(c)(13)*.

(n38)Footnote 6. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999)* (goal to promote judicial economy).

(n39)Footnote 7. *In re Master Key Antitrust Litig., 528 F.2d 5, 14 (2d Cir. 1975)* (decision to stay discovery is within discretion of court in same manner as is decision to order separate trials).

(n40)Footnote 8. *Novopharm, Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998)* (court stayed discovery as to damages and willfulness after court severed those issues from trial of liability issues in patent infringement action).

(n41)Footnote 9. *Rodin Properties-Shore Mall v. Cushman & Wakefield of Pennsylvania, Inc., 49 F. Supp. 2d 709, 721, n.4 (D.N.J. 1999)* .

(n42)Footnote 10. *Garber v. Randell, 477 F.2d 711, 715 (2d Cir. 1973)* (citing **Moore's Federal Practice**).

(n43)Footnote 11. *Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 551, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* ; *In re Master Key Antitrust Litigation, 528 F.2d 5, 13 (2nd Cir. 1975)* .

(n44)Footnote 12. *Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1146 (5th Cir. 1991)* .

(n45)Footnote 13. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999)* ; *Dardar v. LaFourche Realty Co., 985 F.2d 824, 828 (5th Cir. 1993)* (plaintiffs not prejudiced by separate trials).

(n46)Footnote 1. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 170 (9th Cir. 1989)* ; *see* Ch. 22, *Trial by Jury*.

(n47)Footnote 2. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999)* ; *Hydrite Chemical Company v. Calumet Lubricants Co., 47 F.3d 887, 890 (7th Cir. 1995)* .

(n48)Footnote 3. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 170 (9th Cir. 1989)* ; *see* Ch. 22, Trial to Jury.

(n49)Footnote 4. *Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1174 (5th Cir. 1981)* .

(n50)Footnote 5. *United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961)* , *cert. denied, 366 U.S. 924 (1961)* .

(n51)Footnote 6. *Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931)* .

(n52)Footnote 7. *See Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1145 (5th Cir. 1991)* (one jury determined compensatory damages and other determined liability and punitive damages).

(n53)Footnote 8. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1128 (7th Cir. 1999)* (bifurcation did not violate plaintiff's constitutional right to jury trial in action based on crash of small airplane, when court ordered separate trials for issues against pilot alleging negligence and subsequently added issues against manufacturer of part of aircraft, because juries would not be deciding same issues.

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.04

§ 20.04 Subpoena Power of Courtn*

[1] Purpose and Scope of Civil Subpoena Power

A "subpoena" is a document issued by, or on behalf of, a court to command persons to appear and give testimony at a trial or other proceeding, n1 to appear and give testimony at a deposition, n2 to have persons produce designated documents, electronically stored information, or tangible things for inspection, copying, testing, or sampling, n3 or to compel persons to permit inspection of certain real property premises. n4

Although they are both governed by the same procedure under rule 45, there is a distinction between a trial subpoena and a pretrial discovery subpoena. A trial subpoena is used to compel nonparties to attend and testify at a trial or hearing, or it may be used in narrow circumstances to secure documents at trial, such as to refresh memory or for trial-preparation. On the other hand, a discovery subpoena is used to require a nonparty to produce a broad range of items, such as documents, electronically stored information, and tangible items, during the discovery period. The important distinction is that discovery subpoenas may not be used after the discovery deadline. Furthermore, it is improper to use a trial subpoena to request materials that should have been obtained during the discovery period. n5

For the deposition of a party that is a corporation, partnership, association, or governmental agency, Rule 30(b) provides that these parties may designate one or more officers, directors, managing agents or other persons who consent to testify on their behalf, and such witnesses need not be subpoenaed. n6-7 n8 However, a corporate employee or agent who does not qualify as an officer, director or managing agent is not subject to deposition by notice, and such persons must be subpoenaed pursuant to Rule 45. n9

Generally, a subpoena may be issued only during pending litigation, and every subpoena must state the title of the action and the name of the court in which the litigation is pending. n10 However, Rule 27 provides for the issuance of a subpoena to perpetuate testimony prior to the time litigation has commenced n11 and while a case is on appeal. n12

Rule 81 provides that the federal civil rules apply to proceedings to compel testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under a federal statute except as otherwise provided by statute, rules of the district court, or order in the proceedings. n13 This makes Rule 45 generally applicable to proceedings for enforcement of administrative subpoenas to the extent Rule 45 neither conflicts with, nor

is preempted by, the statute authorizing issuance of the subpoena. n14

[2] Form of Subpoena

A subpoena must state all of the following: the name of the court from which it is issued, the title of the action, the name of the court in which it is pending, and its civil action number. n1 A subpoena must also include a command to each person to whom it is directed to attend and give testimony or to produce designated books, documents, electronically stored information, or tangible things for inspection, copying, testing, or sampling, or to permit inspection of premises. n1.1 If a subpoena is for production of electronically stored information, it may specify the form or forms in which the information is to be produced. n1.1.1 "Electronically stored information" includes all information recorded by electronic means, such as computer data files, program files, backup and archival tapes, temporary files, web site information files, e-mail messages and files, backup e-mail files, deleted e-mails, cache files, cookies, voice mail messages, and backup voice mail files. n1.1.2 Finally, if the subpoena is for deposition testimony, it must state the method for recording the testimony. n1.2 Subdivisions (c) and (d) of Rule 45 detail the rights and duties of subpoena recipients. n2 The different types of subpoenas, whether commanding testimony, document production, or inspection, may be issued separately or may be joined together. n3

[3] Issuance of Subpoena

[a] Court of Issuance

While a subpoena is "issued from" a certain court, it may be "issued by" either the court clerk or by an attorney as an officer of the court, as discussed in [b], *below*. The proper court of issuance depends on the type of subpoena, as follows:

- For attendance at a trial or judicial hearing, from the court for the district where the trial or hearing is to be held. n1

- For attendance at a deposition, from the court for the district where the deposition is to be taken. n2

- For production and inspection, separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection must be made. n3 This means that the court of issuance is not necessarily the court of the district in which the documents or items are stored; rather, the court of issuance is the court of the district where the subpoenaed party is required to turn the documents over. n3.1

The purpose of designating the court of issuance is to ensure the accountability of the issuer and the enforcement of the subpoena. n3.2 Also, the court that issues the subpoena is the court where a person must go to file a motion to quash the subpoena n3.3

The purposes of the issuance provisions of Rule 45 are to assure the accountability of the issuer and the enforcement of the subpoena. The subpoena issues from the court where a person would go to file a motion to quash the subpoena n4 or where a person would go to enforce the subpoena, for example, with a motion to compel. Thus, if a party desires to compel an inspection of premises, for example, the court of the district in which the premises exist is the logical court to seek enforcement; consequently, the subpoena must be issued from that court. n5

[b] Persons Allowed to Issue Subpoena

Subpoenas may be issued either by the clerk of the applicable court n6 or by an attorney as an officer of the court. n7 In addition to the provisions of Rule 45(a)(3), local rules of court may give magistrate judges authority to issue subpoenas. n8

When a subpoena is issued by the clerk, the clerk of the court issues a subpoena document that is blank except for the clerk's signature to any party requesting the subpoena. The party then fills out the subpoena before serving it. n9

Rule 45 was amended in 1991 to allow the practice of attorneys, as officers of the court, to issue and sign subpoenas on behalf of the court. Attorneys may issue subpoenas for courts in which they are authorized to practice. n10 In addition, attorneys may issue subpoenas for courts in the district where the subpoena is compelling a deposition or production, if that deposition pertains to an action pending in a court where the attorney is authorized to practice. n11 In other words, any attorney permitted to represent a client in federal court has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. n12

By authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. n13 This change was intended to ease the administrative burdens of inter-district subpoena practice. n14 The expanded role of attorneys as officers of the court which allows them to issue and sign subpoenas carries with it a parallel responsibility and potential liability, including sanctions, for an attorney's misuse of the subpoena power. n15

[4] Service of Subpoena

[a] Delivery Required

Any person who is not a party to an action and who is at least 18 years old may serve a subpoena. n1 Service of a subpoena is effected pursuant to Rule 45(b)(1) by delivering a copy of the subpoena to the person named within the subpoena. n2 A majority of courts have held that Rule 45 requires personalservice, n3 although a growing number of courts have held that subpoenas may be served using the substitute forms of service specified in Rule 4, such as by certified mail. n4 These latter courts have advanced several effective arguments in opposition to requiring personal service. First, nothing in the language of Rule 45(b) suggests that in-hand, personal service is required to effectuate "delivery," n5 n6 and if delivery by the hand of one human being into the hand of another was desired, the drafters should have used language such as that in Rule 4(e), where personal service is expressly described as "delivering a copy of the summons and of the complaint to the individual *personally*." n7

If proof of service of a subpoena is necessary, a statement of the date of service, the manner of service, and the names of those served, certified by the person who served the subpoena, must be filed with the court from which the subpoena was issued. n8

[b] Fee Required

If the subpoena requires the person's attendance at a trial, hearing, or deposition, the issuing party must give the subpoena recipient fees for one day's attendance and the mileage allowed by law. n9 Fees must be tendered even when the party is proceeding in forma pauperis. n10 Under the statute, fact witnesses attending a deposition receive $40 per day, including the time taken to travel to and return from the place of attendance. n11 In addition witnesses are paid actual expenses of the trip if they travel by common carrier, or are given a mileage allowance and toll and parking charge reimbursement if traveling by privately owned vehicle. n12 A subsistence allowance must also be paid to witnesses. n13 The court may not award fees in excess of those provided for by statute. n14 It has also been held that witness fees and mileage may not be required when an individual is subpoenaed only to produce documents at the place where they work. n15

[c] Notice

When a subpoena commands production of documents and things, or inspection of premises before trial, prior notice must be served in accordance with the notice provisions of Rule 5(b), n16 so that other parties may object to the

subpoena or serve a demand for additional documents or things. n17 One court has held that the requirement that "prior notice" of any commanded production be served on each party requires counsel to provide the notice to other parties prior to service of the subpoena. It had been argued that prior notice simply means notice prior to the date set for compliance with the subpoenas. However, the court noted that the purpose of the notice requirement is to provide opposing parties an opportunity to object to the subpoena, if desired, which requires notice and sufficient time to object before the date of compliance. n18 Counsel may be sanctioned for failure to comply with the prior notice requirement. n19

[d] Territorial Limitations on Service

There are territorial limits for the service of a subpoena, which are designed to prevent "undue inconvenience" to witnesses. n20 Under the limitations, all subpoenas under Rule 45 may be served: n21 anywhere in the district of the court from which it is issued; n22 or at any place within 100 miles of the place of the trial, hearing, deposition, production, inspection, copying, testing, or sampling noted in the subpoena; or anywhere in the state where a state statute or rule would permit service of a subpoena issued by a state court sitting in the place of the trial, hearing, deposition, production, inspection, copying, testing, or sampling. n23

The rule uses a state court's subpoena reach as a benchmark for the reach of a subpoena issuing from a district court in that state so that the district court subpoena will be at least as extensive as that of a state court. n23.1 If state court rules would allow service of a subpoena for a greater distance than the "100 mile" or "within the district" distance of the federal rule, the state promulgated distance should be followed, as it is "likely to reflect the varying degrees of difficulty and expenses required for local travel. n24

In addition, a subpoena may be served at any other place when authorized by a United States statute. For example, in suits by the United States under the antitrust laws, a writ of subpoena may be issued for a distance greater than 100 miles with permission of the court after proper application and cause shown. n25 The circumstances and procedure for serving a subpoena on a United States national or resident who is in a foreign country are also governed by statute. n26

[e] Immunity from Service

Nonresident parties, witnesses, attorneys, and others are immune from service of process while in the jurisdiction to participate in judicial proceedings. n27 Courts have held that this immunity doctrine, which is most frequently invoked with respect to service of summons, is equally applicable to the service of subpoenas on nonresidents. n28 The immunity is based on the convenience of the court the person is attending at the time of service and is not an individual privilege to the person.

Immunity may be denied when it is not necessary to foster the convenience of the court, for example, when a second action is related to the first, and judicial necessity requires denial of immunity. n29 Immunity will also be denied when the nonresident's presence in the local forum is extended beyond the time needed for the unrelated action, n30 or when the nonresident is pursuing unrelated business activities while in the forum jurisdiction. n31

[5] Permissible Scope of Subpoena

[a] Obligation of Issuer to Avoid Undue Burden

A subpoena may not subject a person who must respond to the subpoena to undue burden or expense. Therefore, the party who issues the subpoena, or the party's attorney, has the obligation to take reasonable steps to avoid imposing an undue burden or expense on the subpoena recipient. n1 Additionally, if a subpoena commands a person to produce and permit inspection copying, testing, or sampling of designated books, documents, electronically stored information or tangible things, or inspection of premises, that person need not appear in person at the place of production or inspection unless the person has been commanded to appear for deposition, hearing or trial. n1.1 The court has the duty to enforce

these rules prohibiting imposition of an undue burden on the subpoena recipient; n2 however, the obligation of making a specific showing of an undue burden will be on the recipient of the subpoena. n2.1

[b] Enforcement of Undue Burden Limitation

The court from which the subpoena was issued must enforce the obligation on the issuer of a subpoena to take reasonable steps to avoid imposing an undue burden or expense on the subpoena recipient. Thus, the court may quash a subpoena that imposes an undue burden, or the court may protect the burdened party with an order of less absolute character, if possible, for example, by reducing the subpoena demand to a reasonable level, considering the parties' concerns. n2.2 The court may also impose sanctions on the party or attorney responsible for imposing an undue burden by issuing a overbroad subpoena. n3 Appropriate sanctions may include the subpoena recipient's lost earnings and reasonable attorney's fees. n4

On the other hand, if the party seeking discovery makes a good faith effort to "negotiate reasonable parameters" for a subpoena that was originally overly burdensome, sanctions should not be awarded. n5

[6] Requirement of Objection to Improper Subpoena for Production or Inspection

If a subpoena for inspection or production has been validly served, the person who is the object of the subpoena may not simply ignore it. If the subpoena is improper, the person must object to it, n1 and failure to serve written objections to the subpoena within the time specified ordinarily constitutes a waiver of the objections. n2 However, failure to timely serve written objections may not constitute a waiver if the court finds there are unusual circumstances and good cause for the failure. n3

Courts may find such unusual circumstances when: (1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery, (2) the subpoenaed witness is a nonparty acting in good faith, and (3) counsel for the witness and counsel for the subpoenaing party were in contact concerning the witness' compliance before the witness challenged the legal basis for the subpoena. n4

A person subject to a subpoena to produce and permit inspection and copying may serve a written objection to the subpoena regarding any or all of the requests for production or premises inspection. A person served with a subpoena for the production of electronically stored information in a particular form or forms may object to the form or forms requested. The written objection must be served within 14 days of the service of the subpoena, or before the time specified in the subpoena for compliance, if that is less than 14 days. The written objection must be served on the party or attorney specified in the subpoena. n5 The 14-day time limit for objections applies only to subpoenas for production and inspection. It does not apply to subpoenas for attendance and testimony, n6 which may be challenged only by a motion to quash. n7

Once a written objection has been served, the party that served the subpoena may not inspect or copy the materials or inspect the premises without an order from the court from which the subpoena was issued. n8 The issuer of the subpoena may move at any time for a motion to compel the production, provided that notice is given to the person subject to the subpoena and all parties. n9 Any subsequent order to compel production must protect a nonparty from significant expense resulting from the inspection and copying commanded. n10 Under this rule, the questions before the district court are whether the subpoena imposes expenses on a nonparty and whether those expenses are "significant." If the expenses are significant, it is mandatory that the court protect the nonparty by requiring the party seeking discovery to bear at least enough of the expense to render the remainder of the expense "non-significant." In making its determination regarding the allocation of expenses to protect a nonparty, the court should consider whether the nonparty actually has an interest in the outcome of the case, whether the nonparty can more readily bear its costs than the requesting party, and whether the litigation is of public importance. n11

[7] Motion to Quash or Modify Subpoena

[a] Purpose and Use of Motion to Quash

Rule 45 provides that a court has the authority to quash or modify a subpoena to protect a witness from misuse of the subpoena power. n1 A motion to quash a subpoena duces tecum may be made only by the person to whom the subpoena is directed or by a person who has a personal right or privilege with respect to the subject matter requested in the subpoena. n1.1 The rights of a witness to move to quash a subpoena are part of the text that must be printed on every federal subpoena to inform witnesses of their rights and duties. n2 The burden of proof lies with the person seeking to have the subpoena quashed or modified, n3 and the motion must be filed in a timely fashion. n4 Like other motions, a motion to quash is subject to Rule 7, which incorporates Rule 11's sanctions provisionsby reference. Counsel should also consult local rules of court, which may add additional requirements for the content of a motion to quash, such as formatting of the motion. n5

Rule 45 does not specify what happens after a motion to quash is denied, in particular, whether the person subject to the subpoena must then comply, or whether the proponent of the subpoena must obtain an order to compel compliance as is required after a written objection to a subpoena to produce under Rule 45(c)(2)(B) has been served. In any event, the best practice would seem to be that a party opposing a motion to quash a subpoena file a countermotion to compel in order to obtain an order compelling production should the court deny the motion to quash. n6

[b] Grounds Requiring Court to Quash or Modify Subpoena

Under the following specific circumstances, the court from which a subpoena was issued *must* quash or modify the subpoena on timely motion: n7

1. If the subpoena fails to allow a reasonable time for compliance. n8

2. If a subpoena requires a nonparty to travel more 100 miles for a deposition or trial. n9 The 100-mile travel rule is measured from that person's residence, workplace, or place in which the person regularly conducts business. n10 In the case of attendance at trial, however, when the subpoena-issuing party demonstrates a substantial need for the testimony or material that cannot be otherwise met without undue hardship, the nonparty subject to the subpoena may be ordered to attend trial from any place within the state in which the trial is held, traveling even further than 100 miles. n11 In this case, the court may require assurances from the subpoena-issuing party that the person subject to the subpoena will be reasonably compensated for any substantial expense incurred in traveling more than 100 miles to attend trial. n12

3. If the subpoena requires disclosure of privileged or other protected material, and no exception applies to the material. n13 This requirement applies to subpoenas for the production of documents or for testimony of a witness. Courts may examine the material in question to determine whether in fact a privilege applies. n14 *Federal Rule of Evidence 501* governs privileges in the federal courts. n15 For further discussion of privilege in the context of evidence and trial, see 3 *Weinstein's Federal Evidence,* Ch. 501, *General Rule* (Matthew Bender 2d ed.).

4. If the subpoena subjects any person to an "undue burden." n16 The determination of what constitutes an undue burden is a matter of discretion on the part of the trial court. n17 As an example of "undue burden," the Advisory Committee described a situation of compelling an adversary to attend trial and incur substantial travel expenses, even though it is known that the adversary has no personal knowledge of the dispute. n18 Other examples of undue burden include failure to properly identify items requested, n19 or issuing a subpoena that is overbroad on its face. n20 A subpoena duces tecum is facially

overbroad when the subpoena is not limited by reasonable time restrictions or by documentary descriptions. n21 The burden of proving that a subpoena is unduly burdensome is on the party requesting relief from the subpoena. n22

[c] Grounds Permitting Court to Quash or Modify Subpoena

If the proponent of a subpoena shows that there is a substantial need for the testimony or material that cannot otherwise be met without undue hardship and ensures that the subpoena recipient will be reasonably compensated, the court may fashion an order that will compel the appearance or production and, concurrently, protect the witness. Furthermore, under the following specific circumstances, the court from which a subpoena was issued *may* quash, modify, or condition the subpoena on timely motion: n23

1. Under Rule 45(c)(3)(B)(i), if the subpoena requires the disclosure of trade secrets or confidential research, development, or commercial information. n24 *Confidential commercial information* is information that would cause substantial economic harm to the competitive position of the entity from whom the information was obtained. n25 For example, in a case in which a party subpoenaed a nonparty corporation to provide testimony, the subpoena to testify was quashed because it sought confidential business information. n26

2. If a subpoena requires disclosure of an unretained expert's opinion that does not describe events in dispute and is a result of the expert's own study, not the result of a request of a party. n27 This category of protection was designed to guard the intellectual property rights of experts against compulsion to testify without reasonable compensation, if at all. Compelling an unretained expert to render expertise without a showing of substantial need and reasonable compensation may be regarded as a taking of intellectual property. n28 In making a determination whether to quash or modify a subpoena calling for testimony by an unretained expert, the court should consider several factors, including: (1) the degree to which the expert is being called because of knowledge of facts relevant to the case, rather than to give opinion testimony; (2) the difference between testifying to a previously formed opinion and forming a new one; (3) the possibility that the witness is a sui generis expert, (4) the extent to which the calling party is able to show an unlikelihood that any comparable witness will testify, and (5) the degree to which the witness is able to show that he or she has been oppressed by having to testify. n29

3. If a subpoena requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial. If, however, the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and ensures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance only on specified conditions. n30

[d] Court Has Discretion Whether to Modify or to Quash

The court has discretion to determine the method it may use to remedy a burdensome subpoena: it may quash it in its entirety or it may modify the subpoena to correct overly broad language, to correct ambiguity, and to prevent undue burden. Modifying an overly broad subpoena generally entails putting some kind of scope or date limitation on the request. For example, in one case the court modified a production request from "all agreements" between one of the parties and a third party, to "any and all written agreements relating to the agency relationship" between the party and the third party. n31

However, even though modification may be preferable to quashing, courts are not required to use the lesser remedy of modification first. For example, in one case, rather than entirely quashing what might be necessary discovery, the trial court exercised its discretion by combining its decision to quash the overbroad subpoena with a willingness to later

entertain a more narrowly drawn subpoena. The court of appeals held that the district court's decision to quash the subpoena but to allow the subpoena issuer to draft an entirely new subpoena, instead of the court itself modifying the subpoena, was within the court's sound discretion. n32

Thus, reviewing courts generally encourage the trial court to modify a subpoena to accommodate the needs and interests of those affected, and failure to at least consider modification may be found to be an abuse of discretion. n33 Furthermore, quashing a subpoena seems to have no res judicata effect on an issuer submitting a narrower subpoena at a later date. n34

[8] Obligations of Person Who is Object of Subpoena

[a] Duty to Produce Documents in Organized Manner

When a person responds to a subpoena to produce documents or other information, the person must produce them as they are kept in the usual course of business or must organize and label them to correspond with the categories in the subpoena. n1

Special rules apply to subpoenas that request production of "electronically stored information," which includes all information recorded by electronic means, such as computer data files, program files, backup and archival tapes, temporary files, system history files, web site information files, e-mail messages and files, backup e-mail files, deleted e-mails, cache files, cookies, voice mail messages and files, and backup voice mail files. n2 When a person responds to a subpoena to produce electronically stored information, and the subpoena does not specify the form or forms for producing the electronically stored information, the responding person must produce the information in a form or forms in which the person ordinarily maintains the information, or in a form or forms that are reasonably usable. n3 The responding person need not produce the same electronically stored information in more than one form. n3.1

Additionally, a person responding to a subpoena to produce electronically stored information need not provide discovery of the information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash the subpoena, the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering whether the discovery request is cumulative or duplicative or obtainable from some other source, the requesting party has had other opportunities to obtain the information sought, or if answering the request would be unduly burdensome or expensive. n3.2 Furthermore, the court may specify conditions for the discovery. n3.3

[b] Duty to Assert Any Claim of Privilege in Writing

If a subpoena requests information or material that is either privileged or protected as trial preparation material, the party subject to the subpoena may withhold the material but must assert the claim expressly and support the claim with a description of the nature of the documents, communications, or things not produced that is sufficient to enable the requesting party to contest the claim of privilege or protection. n4 The burden of establishing that the privilege applies for each document claimed is on the person asserting privilege or confidentiality. n5 Rule 45(d)(2) is generally satisfied by the submission of a privilege log detailing each document withheld and the reason. Rule 45(d)(2) serves two purposes. First, it prevents courts from addressing often difficult privilege questions in the abstract. Second, it requires a timely and detailed explanation of the grounds of the privilege in order to protect the right of the party that issued the subpoena to contest the claims of privilege. n6 Some subpoenas demanding production of documents and information may be so broad that to assert a claim of privilege, complete with an adequate description of the nature of the documents to support the claim, would be an undue burden. In such circumstances, a person may object to the subpoena and seek protection under Rule 45(c)(2). n7

If a person subject to a subpoena has already inadvertently produced material in discovery that is subject to a claim of privilege or trial-preparation, the party may nevertheless obtain protection for that material by following the procedure specified in the rules. The party making the claim for privilege or work product must first notify any party that received the information of the claim and the basis for it. After being notified of the claim, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. Alternatively, a receiving party may promptly present the information to the court under seal for a resolution of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. While that claim is being resolved, the person who produced the information must preserve it. n8

[c] Duty to Comply With Subpoena

A person subject to a subpoena is obliged to obey the subpoena unless the person has an adequate excuse. Thus, Rule 45(c)(2)(B) and Rule 45(d)(2) together require that a party objecting to a subpoena on the basis of privilege must both (1) object to the subpoena and (2) state any claim of privilege within the stipulated period of service. n9-11 n12 Failure to comply with the subpoena, or to object, n13 maycause the person to become in contempt of the court from which the subpoena issued. n14 Furthermore, by federal statute a court may punish contempt of its authority by a person's disobedience or resisting lawful process. n15

Although Rule 45(e) does not define "adequate excuse," n16 it does provide that an adequate cause for failure to obey exists when a subpoena requires a non-party to appear or produce documents at a place beyond the travel limits set by Rule 45(c)(3)(A)(ii). n17 The Advisory Committee has noted that contempt of court for failure to obey a subpoena should be used sparingly, because the command of the subpoena is not in fact one uttered by a judicial officer but, rather, issued by an attorney. n18 At least one circuit has held that to find a person in contempt of court for failure to comply with a subpoena duces tecum, the party seeking discovery must have obtained an order directing compliance. n19

Under Rule 45(e), a party moving to hold another party in contempt must demonstrate by clear and convincing evidence that the alleged contemnor violated the court's prior order. However, a finding of bad faith on the part of the contemnor is not required. In fact, the contemnor's failure to comply with the court decree need not be intentional. Intent of the recalcitrant party is irrelevant in a civil contempt proceeding, because, unlike a criminal contempt proceeding, a civil contempt action is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance. n20

If a party or witness refuses to answer designated questions at a deposition, or a party fails to produce documents in compliance with a subpoena duces tecum, either the court in which the action is pending or the court in the district in which the deposition is taken, or in the case of an order to a non-party witness, the latter court, may issue an order pursuant to Rule 37(a) requiring that the questions be answered or the documents to be produced. Noncompliance can result in imposition of Rule 37(b)(2) sanctions. n21

If the person subject to a subpoena neither obeys nor objects to the subpoena, the issuing party must file a motion for enforcement of the subpoena or a motion to compel production under the subpoena, and the court may then enter an order for the person to respond to the subpoena or to show cause in writing by a particular date why the person should not be held in contempt. n21.1 Failure to obtain an order compelling compliance with a subpoena may render a sanction of contempt of court unavailable. n22

[9] Appeal of Subpoena Orders

An order denying or granting a motion to quash a subpoena is ordinarily not considered final and appealable. However, if a motion to quash a subpoena served on a non-party is granted by a court in a district other than the district in which

the underlying action is pending, that order is final and appealable, because it is the final disposition of the issues before it, and it would be unreviewable on appeal of the final judgment in the principal action. n1

When there is a denial of a motion to quash a subpoena in a district other than that in which the action is pending, the order is not final and appealable without an adjudication of contempt. The standard of review for granting or denying a motion to quash is whether the order was an abuse of discretion on the part of the court. n2

A motion to compel production under a subpoena is treated similarly. Thus, when a party in a court in one district moves in another district to compel non parties to honor subpoenas duces tecum and the court agrees with the objections and denies the motion to compel, the order is immediately appealable. This is true even if the district court retains jurisdiction to hear particularized claims of need because it is settled law that a court's retention of jurisdiction in order to facilitate the consideration of possible future relief does not undermine the finality of an otherwise appealable order. Consequently, the circuit court of thedistrict in which the motion to compel was presented has jurisdiction to hear and determine the appeal. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenas

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 8 *Moore's Federal Practice,* § 45.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 45(a)(1)(C), (2)(A).*

(n3)Footnote 2. *See Fed. R. Civ. P. 45(a)(2)(B).*

(n4)Footnote 3. *See Fed. R. Civ. P. 45(a)(1)(C), (2)(C).*

(n5)Footnote 4. *See Fed. R. Civ. P. 45(a)(1)(C), (2)(C).*

(n6)Footnote 5. *Colon v. Cole Bros. Circus, 2007 U.S. Dist. LEXIS 1403, at *4 (E.D.N.Y. 2007)* .

(n7)Footnote 6-7. [Reserved]

(n8)Footnote 8. *Fed. R. Civ. P. 30(b)(6)*; *see Wauchop v. Domino's Pizza, Inc., 143 F.R.D. 199, 205 (N.D. Ind. 1992)* .

(n9)Footnote 9. *Cummings v. GMC, 365 F.3d 944, 953 (10th Cir. 2004)* .

(n10)Footnote 10. *See Fed. R. Civ. P. 45(a)(1)(B).*

(n11)Footnote 11. *See Fed. R. Civ. P. 27(a).*

(n12)Footnote 12. *See Fed. R. Civ. P. 27(b).*

(n13)Footnote 13. *Fed. R. Civ. P. 81(a)(3).*

(n14)Footnote 14. *See NLRB v. Cable Car Advertisers, Inc., 319 F. Supp. 2d 991, 999-1000 (N.D. Cal. 2004)* .

(n15)Footnote 1. *Fed. R. Civ. P. 45(a)(1)(A), (B).*

(n16)Footnote 1.1. *Fed. R. Civ. P. 45(a)(1)(C).*

(n17)Footnote 1.1.1. *Fed. R. Civ. P. 45(a)(1).*

(n18)Footnote 1.1.2. *Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n19)Footnote 1.2. *Fed. R. Civ. P. 45(a)(2), (B).*

(n20)Footnote 2. *See Fed. R. Civ. P. 45(c), (d).*

(n21)Footnote 3. *Fed. R. Civ. P. 45(a)(1)*, Committee Note to 1991 Amendments.

(n22)Footnote 1. *See Fed. R. Civ. P. 45(a)(2)(A).*

(n23)Footnote 2. *See Fed. R. Civ. P. 45(a)(2)(B).*

(n24)Footnote 3. *See Fed. R. Civ. P. 45(a)(2)(C).*

(n25)Footnote 3.1. *Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 412-413 (3d Cir. 2004)* (person subject to subpoena is required to produce materials in that person's control, whether or not the materials are located in district within which subpoena may be served).

(n26)Footnote 3.2. *See Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 381 n.10 (W.D. Pa. 2005)* .

(n27)Footnote 3.3. *Fed. R. Civ. P. 45(a)(2)*, Committee Note to 1991 Amendments (if subpoena goes beyond limits of subpoena power, person commanded to appear at proceeding must present motion to quash such subpoena to court for district in which proceeding would occur).

(n28)Footnote 4. *Fed. R. Civ. P. 45(a)(2)*, Committee Note to 1991 Amendments (if subpoena goes beyond limits of subpoena power, person commanded to appear at proceeding must present motion to quash such subpoena to court for district in which proceeding would occur).

(n29)Footnote 5. *National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 981 n.1 (4th Cir. 1992)* (southern district court of West Virginia properly issued subpoena duces tecum in connection with deposition to be taken in West Virginia in action pending in southern district of New York, and southern district court of West Virginia was also proper court to hear ensuing motion to compel production).

(n30)Footnote 6. *Fed. R. Civ. P. 45(a)(3)*; *see McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991)* , *cert. denied, 503 U.S. 907 (1992)* (subpoena is issued by clerk of district court, and not by district judge).

(n31)Footnote 7. *Fed. R. Civ. P. 45(a)(3)*; *Kupritz v. Savannah College of Art & Design, 155 F.R.D. 84, 86-87 (E.D. Pa. 1994)* (attorney permitted to sign subpoena on behalf of court).

(n32)Footnote 8. *28 U.S.C. § 636(b)(3).*

(n33)Footnote 9. *Fed. R. Civ. P. 45(a)(3).*

(n34)Footnote 10. *Fed. R. Civ. P. 45(a)(3)*; *see In re Interbank Funding Corp., 310 B.R. 238, 255 n.22 (S.D.N.Y. 2004)* .

(n35)Footnote 11. *Fed. R. Civ. P. 45(a)(3)*, Committee Note to 1991 Amendments.

(n36)Footnote 12. *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865, 869 (8th Cir. 2000)* .

(n37)Footnote 13. *Tomkins v. Schmid Sys., 2005 U.S. Dist. LEXIS 23646, at *7 (D. Ariz. 2004)* .

(n38)Footnote 14. *Fed. R. Civ. P. 45(a)(3)*, Committee Note to 1991 Amendments.

(n39)Footnote 15. *Fed. R. Civ. P. 45(a)(3)*, Committee Note to 1991 Amendments; *see* [5][b], *below*.

(n40)Footnote 1. *Fed. R. Civ. P. 45(b)(1)*.

(n41)Footnote 2. In re Motorsports Merchandise Antitrust Liti gation, *186 F.R.D. 344, 348 (W.D. Va. 1999)* (under Rule 45, party properly may serve subpoena on nonparty corporation by personal service on officer or agent, or pursuant to law of state in which district court is located).

(n42)Footnote 3. *Smith v. Midland Brake, Inc., 162 F.R.D. 683, 686 (D. Kan. 1995)* (service of subpoena duces tecum by certified mail improper).

(n43)Footnote 4. *See Soto v. ECC Indus., 2006 U.S. Dist. LEXIS 85634, at *2-*3 (E.D.N.Y. 2006)* .

(n44)Footnote 5. [Reserved]

(n45)Footnote 6. *In re Shur, 184 B.R. 640, 643 (Bankr. E.D.N.Y. 1995)* .

(n46)Footnote 7. *Compare Fed. R. Civ. P. 45(b)(1) with Fed. R. Civ. P. 4(e)*.

(n47)Footnote 8. *Fed. R. Civ. P. 45(b)(3)*.

(n48)Footnote 9. *28 U.S.C. § 1821*; *CF & I Steel Corp. v. Mitsui & Co., 713 F.2d 494, 496 (9th Cir. 1983)* (service of subpoena requires simultaneous tender of witness fees and reasonable estimated mileage).

(n49)Footnote 10. *CF & I Steel Corp. v. Mitsui & Co., 713 F.2d 494, 496 (9th Cir. 1983)* (simultaneous tendering of witness fees and reasonable estimated mileage allowed by law are required with service of subpoena).

(n50)Footnote 11. *28 U.S.C. § 1821(b)*.

(n51)Footnote 12. *28 U.S.C. § 1821(c)*.

(n52)Footnote 13. *28 U.S.C. § 1821(d)*.

(n53)Footnote 14. *Irons v. Karceski, 74 F.3d 1262, 1263 (D.C. Cir. 1995)* , *cert. denied, 517 U.S. 1189 (1996)* .

(n54)Footnote 15. *Windsor v. Martindale, 175 F.R.D. 665, 670 (D. Colo. 1997)* (subpoenas duces tecum not quashed for failure to provide witness fees or mileage because subpoenaed individuals were not requested to appear, but were merely required to produce documents at correctional facility at which they worked).

(n55)Footnote 16. *Fed. R. Civ. P. 45(b)(1)*.

(n56)Footnote 17. *Fed. R. Civ. P. 45(b)(1)*, Committee Note to 1991 Amendments.

(n57)Footnote 18. *Biocore Med. Techs., Inc. v. Khosrowshahi, 181 F.R.D. 660, 666-667 (D. Kan. 1998)* (notice prior to service of subpoena must provide opposition counsel sufficient time to attempt to stop enforcement of subpoena when subpoena is improper).

(n58)Footnote 19. *Spencer v. Steinman, 179 F.R.D. 484, 487-489 (E.D. Pa. 1998)* (plaintiff's attorney was ordered to pay attorney's fees incurred by defendant in calling attention to court of violation of prior notice requirement).

(n59)Footnote 20. *Fed. R. Civ. P. 45(b)(2)*, Committee Note to 1980 Amendments.

(n60)Footnote 21. *Fed. R. Civ. P. 45(b)(2)*.

(n61)Footnote 22. *See In re Jee, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989)* (when nonparty named in discovery subpoena duces tecum is corporation as opposed to individual, that corporation is amenable to service in any forum within which corporation has sufficient minimum contacts).

(n62)Footnote 23. *See In re Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 344, 348 (W.D. Va. 1999)* (subpoena duces tecum was properly served on corporate defendant, in accordance with law of Virginia as state in which district court sat; under Federal Rules of Civil Proce dure, party may serve subpoena on corporation pursuant to law of state in which district court is located).

(n63)Footnote 23.1. *Dynegy Midstream Servs. v. Trammochem, 451 F.3d 89, 95 (2d Cir. 2006)* .

(n64)Footnote 24. *Chung v. Chrysler Corp., 903 F. Supp. 160, 164 (D.D.C. 1995)* .

(n65)Footnote 25. *15 U.S.C. § 23*.

(n66)Footnote 26. *See 28 U.S.C. § 1783*.

(n67)Footnote 27. *ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995)* ; *Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1193-1194 (S.D.N.Y. 1996)* .

(n68)Footnote 28. *Celanese Corp. v. Duplan Corp., 502 F.2d 188, 189-190 (4th Cir. 1974)* , *cert. denied, 420 U.S. 929 (1975)* .

(n69)Footnote 29. *LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 998-999 (N.D. Ohio 1994)* (immunity not extended to attorney when service of process is in a case related to case in which attorney is appearing).

(n70)Footnote 30. *Atkinson v. Jory, 292 F.2d 169, 171 (10th Cir. 1961)* .

(n71)Footnote 31. *Uniroyal, Inc. v. Sperberg, 63 F.R.D. 55, 58-60 (S.D.N.Y. 1973)* .

(n72)Footnote 1. *Fed. R. Civ. P. 45(c)(1)*.

(n73)Footnote 1.1. *Fed. R. Civ. P. 45(c)(2)(A)*.

(n74)Footnote 2. *Fed. R. Civ. P. 45(c)(1)*; *see* [b], *below*.

(n75)Footnote 2.1. *Flatow v. Islamic Republic of Iran, 196 F.R.D. 203, 207 (D. D.C. 2000)* (Treasury Department's claims that compliance with subpoena would require thousands of personnel hours were too general to comply with specificity requirement for establishing undue burden); *see* [7], *below*.

(n76)Footnote 2.2. *Flanagan v. Wyndham Int'l, 231 F.R.D. 98, 102 (D.D.C. 2005)* .

(n77)Footnote 3. *Dravo Corp. v. Liberty Mutual Ins. Co., 160 F.R.D. 123, 128 (D. Neb. 1995)* .

(n78)Footnote 4. *Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* .

(n79)Footnote 5. *Scherer v. Ge Capital Corporation, 185 F.R.D. 351, 352 (D. Kan. 1999)* (award to defendant of attorney's fees and costs incurred in bringing motion to quash subpoenas duces tecum that was served by plaintiff after close of discovery was not warranted, given that defendant failed to make good faith effort to resolve dispute without judicial intervention).

(n80)Footnote 1. *Fed. R. Civ. P. 45(c)(2)(B).*

(n81)Footnote 2. *See Judicial Watch, Inc. v. United States Dept. of Commerce, 196 F.R.D. 1, 2 (D.D.C. 2000)* (witness waived objection on grounds of lack of service when witness made voluntary appearance at deposition but failed to file timely written objections); *In re Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 344, 349 (W.D. Va. 1999)* ; *United States v. International Bus. Mach. Corp., 70 F.R.D. 700, 701-702 (S.D.N.Y. 1976)* .

(n82)Footnote 3. *See In re Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 344, 350 (W.D. Va. 1999)* .

(n83)Footnote 4. *Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48-51 (S.D.N.Y. 1996)* (nonparty who attempted to informally negotiate scope of overbroad document request permitted to raise objections despite failure to strictly comply with time limits).

(n84)Footnote 5. *Fed. R. Civ. P. 45(c)(2)(B)*; *see Tuite v. Henry, 98 F.3d 1411, 1416-1417 (D.C. 1996)* (objection and claim of privilege required within 14 days, but not full description of objection material, which may be submitted within reasonable time).

(n85)Footnote 6. *National Paint & Coatings Ass'n v. City of Chicago, 147 F.R.D. 184, 185 (N.D. Ill. 1993)* ; *see Fed. R. Civ. P. 34(c)(2)(B).*

(n86)Footnote 7. *See Fed. R. Civ. P. 34(c)(3).*

(n87)Footnote 8. *Fed. R. Civ. P. 45(c)(2)(B).*

(n88)Footnote 9. *Gould Inc. v. Mitsui Mining & Smelting Co, 825 F.2d 676, 679 (2d Cir. 1987)* .

(n89)Footnote 10. *Fed. R. Civ. P. 45(c)(2)(B).*

(n90)Footnote 11. *Linder v. Adolfo Calero-Portocarrero, 251 F.3d 178, 182-183 (D.C. Cir. 2001)* (finding that when expenses of compliance with subpoena amounted to $200,000, they were "significant," and court could protect nonparty governmental agencies by ordering that agencies need not comply with plaintiffs' subpoenas when plaintiff would bear no part of expense).

(n91)Footnote 1. *Fed. R. Civ. P. 45(c)(3).*

(n92)Footnote 1.1. *Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 635 (D. Kan. 1999)* (court denied motion to quash subpoena served on nonparty because motion to quash was made by plaintiff, and plaintiff did not establish any personal right or privilege with respect to subpoenaed documents).

(n93)Footnote 2. *Smith v. Midland Brake, Inc., 162 F.R.D. 683, 685 (D. Kan. 1995)* .

(n94)Footnote 3. *Doster v. Schenk, A.G., 141 F.R.D. 50, 51 (M.D.N.C. 1991)* .

(n95)Footnote 4. *See In re Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 344, 350 (W.D. Va. 1999)* (motion to quash not timely when filed 36 days after the date on which court found that proper corporate representatives were aware of subpoena).

(n96)Footnote 5. *See* Ch. 9, *Pleadings and Motions in General.*

(n97)Footnote 6. *Diamond State Ins. Co. v. Rebel Oil Co., 157 F.R.D. 691, 695 (D. Nev. 1994)* (countermotion to compel filed with opposition to motion to quash subpoena).

(n98)Footnote 7. *Fed. R. Civ. P. 45(c)(3)(A).*

(n99)Footnote 8. *Fed. R. Civ. P. 45(c)(3)(A)(i)*; *Mann v. University of Cincinnati, 824 F. Supp. 1190, 1202 (S.D. Ohio 1993)* , *aff'd on other grounds, 114 F.3d 1188 (6th Cir. 1997)* (one week notice requesting disclosure of medical file was unreasonable and violated Rule 45, when there was no urgency justifying such short notice).

(n100)Footnote 9. *Fed. R. Civ. P. 45(c)(3)(A)(ii)*; *In re Byrd, Inc., 927 F.2d 1135, 1136 (10th Cir. 1991)* (subpoena duces tecum to attend deposition and produce documents quashed as invalid because it required deponent to travel more than 100 miles).

(n101)Footnote 10. *Cook v. Atchison, T. & S. F. Ry., 816 F. Supp. 667, 669 (D. Kan. 1993)* .

(n102)Footnote 11. *Fed. R. Civ. P. 45(c)(3)(B)(iii)*; *see Chung v. Chrysler Corp., 903 F. Supp. 160, 164-165 (D.D.C. 1995)* .

(n103)Footnote 12. *Fed. R. Civ. P. 45(c)(3)(B)(iii)*.

(n104)Footnote 13. *Fed. R. Civ. P. 45(c)(3)(A)(iii)*; *see Nagy v. Baltimore Life Insurance Co., 49 F. Supp. 2d 822, 825 (D. Md. 1999)* (nondisclosure because of state statutory privilege for material related to state insurance administration's investigation of insurer).

(n105)Footnote 14. *Resolution Trust Corp. v. Castellett, 156 F.R.D. 89, 92-96 (D.N.J. 1994)* .

(n106)Footnote 15. *Fed. R. Evid. 501*.

(n107)Footnote 16. *Fed. R. Civ. P. 45(c)(3)(A)(iv)*; *Irons v. Karceski, 74 F.3d 1262, 1264 (D.C. Cir. 1995)* , *cert. denied, 517 U.S. 1189 (1996)* .

(n108)Footnote 17. *Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* .

(n109)Footnote 18. *Fed. R. Civ. P. 45(c)(3)(A)(iv)*), Committee Note to 1991 Amendments.

(n110)Footnote 19. *Sony Corp. v. S.W.I. Trading, Inc., 104 F.R.D. 535, 544 (S.D.N.Y. 1985)* (documents must be identified and there must be basis for concluding that they exist).

(n111)Footnote 20. *Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49-51 (S.D.N.Y. 1996)* (many requests in subpoena asked for information about multinational company defendant's financial condition without limiting inquiry to particular division, segment, or location, even though antitrust action only related to particular segment of defendant's business).

(n112)Footnote 21. *Williams v. City of Dallas, 178 F.R.D. 103, 109-110, 115-116 (N.D. Tex. 1998)* (subpoena requiring production of any and all documents related to three individuals was overbroad on its face because it did not provide particular documentary descriptions or reasonable restrictions on time); *see First American Corp. v. Price Waterhouse LLP, 154 F.3d 16, 23* (district court did not abuse its discretion in determining that the subpoena at issue is not overbroad when burden imposed on accounting partnership by nonparty witness subpoena in action arising out of collapse of bank was not undue, in that extensive discovery was warranted by breadth of alleged fraud).

(n113)Footnote 22. *Linder v. Department of Defense, 133 F.3d 17, 24 (D.C. Cir. 1998)* ; *Plant Genetic Sys., N.V. v. Northrup King Co., 6 F. Supp. 2d 859, 861 (E.D. Mo. 1998)* .

(n114)Footnote 23. *Fed. R. Civ. P. 45(c)(3)(B)*.

(n115)Footnote 24. *Fed. R. Civ. P. 45(c)(3)(B)(i)*.

(n116)Footnote 25. *Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co. of Pa., 148 F.R.D. 552, 557 (S.D.*

W.Va. 1993) (because reinsurer sought primarily factual information from expert, material sought was not "intellectual property").

(n117)Footnote 26. *Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322 (Fed. Cir. 1990)* .

(n118)Footnote 27. *Fed. R. Civ. P. 45(c)(3)(B)(ii).*

(n119)Footnote 28. *Fed. R. Civ. P. 45(c)(3)(B)(ii)*, Committee Note to 1991 Amendments.

(n120)Footnote 29. *Young v. United States, 181 F.R.D. 344, 348 (W.D. Tex. 1997)* .

(n121)Footnote 30. *Fed. R. Civ. P. 45(c)(3)(B)(ii)*; *see Cook v. Atchison, Topeka & Santa Fe Ry., 816 F. Supp. 667, 669 (D. Kan. 1993)* (straight line on map must be used in measuring distance between place of trial and place of service).

(n122)Footnote 31. *Diamond State Ins. Co. v. Rebel Oil Co., 157 F.R.D. 691, 697 (D. Nev. 1994)* .

(n123)Footnote 32. *Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* .

(n124)Footnote 33. *Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 407 (D.C. Cir. 1984)* .

(n125)Footnote 34. *Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* .

(n126)Footnote 1. *Fed. R. Civ. P. 45(d)(1)(A).*

(n127)Footnote 2. *Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 657 (D. Kan. 2006)* .

(n128)Footnote 3. *Fed. R. Civ. P. 45(d)(1)(B).*

(n129)Footnote 3.1. *Fed. R. Civ. P. 45(d)(1)(C).*

(n130)Footnote 3.2. *Fed. R. Civ. P. 45(d)(1)(C)*; *see Fed. R. Civ. P. 26(b)(2)(C).*

(n131)Footnote 3.3. *Fed. R. Civ. P. 45(d)(1)(C).*

(n132)Footnote 4. *Fed. R. Civ. P. 45(d)(2)(A).*

(n133)Footnote 5. *Kai USA Ltd. v. Camillus Cutlery Co. (In re Kroll), 224 F.R.D. 326, 328 (E.D.N.Y. 2004)* .

(n134)Footnote 6. *In re Subpoena Duces Tecum, 439 F.3d 740, 751 (D.C. Cir. 2006)* .

(n135)Footnote 7. *Fed. R. Civ. P. 45(d)(2)*, Committee Note to 1991 Amendments; *see Fed. R. Civ. P. 45(c)(2).*

(n136)Footnote 8. *Fed. R. Civ. P. 45(d)(2)(B).*

(n137)Footnote 9-11. [Reserved]

(n138)Footnote 12. *In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997)* (in grand jury investigation of former Secretary of Agriculture, grand jury issued subpoena duces tecum seeking documents pertaining to White House Counsel's investigation of former secretary; White House response to subpoena, informing grand jury that it believed withheld documents were privileged, satisfied Rule 45(d)(2)).

(n139)Footnote 13. *Broussard v. Lemons, 186 F.R.D. 396, 397 (W.D. La. 1999)* (contempt is not available as sanction for party's failure to comply with document subpoena, where the subpoenaed party has timely objected to

subpoena).

(n140)Footnote 14. *Fed. R. Civ. P. 45(e)*; *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* (striking of a pleading as contempt sanction for failure to comply with subpoena duces tecum).

(n141)Footnote 15. *18 U.S.C. § 401(3)*.

(n142)Footnote 16. *Kupritz v. Savannah College of Art & Design, 155 F.R.D. 84, 88 (E.D. Pa. 1994)* (when subpoena served was served for deposition to commence on that same day, nonparty witness had adequate excuse for not appearing at deposition on that day).

(n143)Footnote 17. *Fed. R. Civ. P. 45(e)*; *see Fed. R. Civ. P. 45(c)(3)(A)(ii)*, discussed in [7][b], *above*.

(n144)Footnote 18. *Fed. R. Civ. P. 45(e)*, Committee Note to 1991 Amendments.

(n145)Footnote 19. *Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 (9th Cir. 1983)* (denial of motion to quash subpoena alone does not compel subpoenaed person to comply; once any objection is made to subpoena, court order to compel must be obtained).

(n146)Footnote 20. *Food Lion, Inc. v. United Food and Commercial Workers International Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997)* .

(n147)Footnote 21. *See Fed. R. Civ. P. 37*; *cf. Alexander v. Federal Bureau of Investigation, 186 F.R.D. 188, (D.D.C. 1999)* (sanctions not awarded in this case because attorneys for non-party subject of subpoena did not "unreasonably and vexatiously" multiply proceedings in case).

(n148)Footnote 21.1. *Hairston v. Alert Safety Light Prods., 307 F.3d 717, 721 (8th Cir. 2006)* .

(n149)Footnote 22. *Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 (9th Cir. 1983)* .

(n150)Footnote 1. *Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 n.5 (D.C. Cir. 1984)* (appeal was proper of grant of motion to quash production subpoena issued from D.C. district court to Department of State for litigation pending in district court in California, because grant of motion to quash was an appealable final judgment).

(n151)Footnote 2. *Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* (grant of motion to quash overly broad subpoena duces tecum was not abuse of discretion).

(n152)Footnote 3. *Cusumano v. Microsoft Corp., 162 F.3d 708, 712 (1st Cir. 1998)* .

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.05

§ 20.05 Right of Party to be Present at Civil Trial

[1] Constitutional Nature of Right

The *due process clause of the Fifth Amendment of the United States Constitution* does not guarantee an absolute right to a civil litigant to be present personally at a trial, n1 and neither does the *Seventh Amendment's* guarantee of a jury trial. n2 Thus, courts have held that these rights are generally protected when a party is represented by counsel. However, a court may not exclude arbitrarily a party who desires to be present merely because the party is represented by counsel. n3

[2] Exclusion of Civil Litigant From Trial

There are four types of cases that have considered the issue of whether a civil litigant is entitled to be present at trial. The first type of case states the general rule that a party is entitled to be present either in person or by counsel at all phases of the trial. However, representation by counsel does not justify arbitrary exclusion of a party who wishes to be personally present in the courtroom. n1 In the second type of case, one party desires to exclude the other party because the physical presence of the other party before the jury is prejudicial. For example, if an injured plaintiff is disfigured, the defendant may want to exclude the plaintiff because his or her presence may be inflammatory. Courts have rejected this contention, holding that mere physical appearance does not justify exclusion of a party despite his or her desire to be present. n2

In the third type of case, the court confronts the issue of whether to exclude a party whose appearance and conduct was alleged to have resulted in prejudice. This third type of case holds that a party may be excluded based on a balancing test if the party's mental condition, which is the result of the defendant's conduct, renders him or her unable to comprehend the proceedings or aid counsel in furthering the case, and if the party's presence is so disruptive as to have an adverse effect on the fairness of the trial.

In summary, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver. Thus, a plaintiff with a solely physical abnormality generally may not be excluded involuntarily, absent disruptive behavior, even when the abnormality is due allegedly to the defendant's wrongful conduct. On the other hand, on those occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability, and the presence of the party would

not aid the fair administration of justice, the trial court may exclude the plaintiff or limit his or her presence. A party's involuntary exclusion under these circumstances does not constitute a denial of due process. n3

To determine exclusion, a hearing on this issue must be held before trial, and a defendant who asserts that a plaintiff's mere presence will prejudice the jury must bear the burden of persuasion on this issue. The issue which the district court must resolve at the hearing is whether the party's presence would prevent or substantially impair the jury from performing its duties in accordance with its instructions and its oath. The requisite showing of prejudice may not be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty. n4

Finally, in the fourth type of case, it has been held that a prisoner does not have an absolute constitutional right to be present at a civil trial to which he or she is a party. However, a court has the discretion to order that a prisoner be permitted to attend a civil trial. In exercising that discretion, a court should consider several factors, including security, the substantiality of the issues, the possibility of delaying the trial until the prisoner is released, and the extent of the prisoner's interest in presenting his or her testimony in person rather than by deposition. Thus, in appropriate cases, a federal court may direct that a prisoner who has filed a civil suit be permitted to attend the trial. n5

[3] Waiver of Right to be Present

A party or a party's attorney may waive by express consent the party's or the attorney's right to be present at a particular proceeding, including trial. However, an express waiver is strictly construed, and generally does not authorize proceedings other than those subject to the express waiver to be conducted in the absence of a party or attorney. n1 A party or the party's attorney may also waive the right to be present at trial by implication, such as by their voluntary absence from the courtroom at a time when they know that proceedings are being conducted or are about to take place. In such circumstances, the trial may proceed without them. If the jury has retired, it may be recalled for additional instructions, provided the instructions are given in open court. n2 However, absent express consent, it is reversible error for additional instructions to be given elsewhere than in open court without notice to counsel and an opportunity to object. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Helminski v. Ayerst Lab., 766 F.2d 208, 213 (6th Cir. 1985) , cert. denied, 474 U.S. 981, 106 S. Ct. 386, 88 L. Ed. 2d 339 (1985) .*

(n2)Footnote 2. *Manning v. Tefft, 839 F. Supp. 126, 129-130 (D.R.I. 1994) .*

(n3)Footnote 3. *Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81, 39 S. Ct. 435, 436, 63 L. Ed. 853 (1919)* (if party is represented by counsel, party's rights are protected under due process, even if party is personally absent); *Helminski v. Ayerst Lab., 766 F.2d 208, 213 (6th Cir. 1985) , cert. denied, 474 U.S. 981 (1985) .*

(n4)Footnote 1. *Helminski v. Ayerst Lab., 766 F.2d 208, 213 (6th Cir. 1985) , cert. denied, 474 U.S. 981, 106 S. Ct. 386, 88 L. Ed. 2d 339 (1985) .*

(n5)Footnote 2. *Helminski v. Ayerst Lab., 766 F.2d 208, 215 (6th Cir. 1985) , cert. denied, 474 U.S. 981 (1985) .*

(n6)Footnote 3. *Helminski v. Ayerst Lab., 766 F.2d 208, 217 (6th Cir. 1985) , cert. denied, 474 U.S. 981 (1985) .*

(n7)Footnote 4. *Helminski v. Ayerst Labs., 766 F.2d 208, 214-216 (6th Cir. 1985) , cert. denied, 474 U.S. 981*

(1985) ; *see Gonzalez-Marin v. Equitable Life Assurance Soc., 845 F.2d 1140, 1146-1147 (1st Cir. 1988)* (trial court may decide to bar from courtroom disabled plaintiff incapable of comprehending judicial proceedings during liability phase of trial in order to prevent prejudice that causes substantial impairment to jury).

(n8)Footnote 5. *Manning v. Tefft, 839 F. Supp. 126, 129-130 (D.R.I. 1994)* .

(n9)Footnote 1. *Arrington v. Robertson, 114 F.2d 821, 823 (3rd Cir. 1940)* ; *see Helminski v. Ayerst Lab., 766 F.2d 208, 217 (6th Cir. 1985)* , *cert. denied, 474 U.S. 981 (1985)* (plaintiff who can comprehend proceedings and assist counsel may not be excluded from any portion of proceedings absent disruptive behavior or knowing and voluntary waiver).

(n10)Footnote 2. *Stewart v. Wyoming Ranche Co., 128 U.S. 383, 390, 9 S. Ct. 101, 32 L. Ed. 439 (1888)* .

(n11)Footnote 3. *Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81, 39 S. Ct. 435, 63 L. Ed. 853 (1919)* .

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.06

§ 20.06 Sequence of Proceeding When Legal and Equitable Actions are Involved in Jury Trial

[1] Court Determines Equitable Issues When Joined With Legal Issues

The Federal Rules of Civil Procedure provides that all legal, equitable, and maritime issues related to a claim should be joined in a single action. n1 Furthermore, the right to a jury trial under Rule 38 extends to individual issues in a case rather than to entire actions. n2 Consequently, litigation frequently involves combined trials in which the court must submit legal claims to a jury, while reserving equitable or maritime claims for determination by the court itself. n3 Thus, even when the plaintiff has a right to a jury trial on the plaintiff's legal claims, the district court must make an independent judgment on any equitable issues. That principle is true even though the jury's determination of factual issues common to both the legal and equitable claims would bind the court. n4

The language of Rule 39 anticipates combined actions. When there is a jury demand, the rule provides for a case to be put on the jury docket for the trial of all such issues, n5 and simultaneously recognizes that issues not demanded for trial by jury must be tried by the court. n6 The court has discretion to determine the sequence in which equitable and legal issues must be tried when the equitable and legal issues are not factually related. However, when the factual questions are related to both equitable and legal issues the jury must determine the legal issues first. n7

[2] Jury Must Determine Legal Issues First When Facts Relate to both legal and Equitable Issues

[a] Statement of Jury First Rule

The right to a jury trial may not be impaired through prior determination of factual issues by the court. n1 This means that when the legal and equitable claims in a case are factually interrelated, and the resolution of issues involved in the legal claims will be relevant to the equitable claims, the court must submit legal claims to the jury first, and then the court must decide the equitable claims. In other words, the Federal Rules of Civil Procedure requirement that legal and equitable claims be joined in one action may not undercut the right to a jury trial. When the legal and equitable issues are interrelated, the jury decides the factual issues and legal issues, and the court decides the equitable issues, which may require reliance on the factual determinations already made by the jury. n1.1

In cases involving both legal and equitable claims, a party with a right to trial by jury has the right to have issues involving any legal claims decided by the jury first, including those claims that contain both legal and equitable aspects.

n2 The court then decides the equitable claims based on the findings of the jury. n3 This sequence is important because the collateral estoppel or res judicata effect of determining the equitable issues first might infringe on the right to have the legal claims tried by the jury. n4

However, it is important to note that the "jury first" rule means that the jury's decisions on the common factual questions are binding on the court, but that the court is not always bound by the jury's *verdict*. Thus, if the court determines that a jury determination of a factual issue is infirm to the extent that it is without legally sufficient evidentiary support such that a judgment as a matter of law would be justified, n5 or if the court determines that there are grounds for ordering a new trial, n6 the court may make contrary factual decisions without violating the jury first rule or otherwise impinging on a party's right to a jury trial. n7

The jury first rule applies regardless of whether the issues triable by jury may be characterized as "incidental" to the issues not triable by jury. n8 Although a court is entitled to examine the pleadings and strike a jury demand when there is no genuine issue entitling a party to a jury trial, a court may not characterize a genuine legal claim triable by jury as "merely incidental" to nonjury claims for equitable relief, such as claims for an accounting, and strike a jury demand based on that type of characterization. n9

[b] Jury First Rule Inapplicable When Jury Would Not be Affected by Prior Court Decision

The "jury first" applies only in cases when the legal and equitable issues are truly interrelated. When they are entirely independent, the court may proceed to try the equitable action first. In one case, for example, the equitable action was filed long before the legal action and the overlap of factual matter was not extensive. The court held that it was not error for the district court to resolve factual issues related to the equitable action first. n10 Thus, when a single case combines jury and nonjury claims but the factual issues do not overlap, the determination of the nonjury claims will not have a preemptive effect on the jury's determination of the jury claims; because the right to a jury trial would not be prejudiced by the order of determination of the factually unrelated claims or issues, the sequence of trial is in the court's discretion and the sequence may be set by the court using considerations such as administrative convenience. n11 Similarly, it has been held that when disposition of an equitable claim would make consideration of the a claim unnecessary, common sense requires that the equitable claim be determined first. n12

The "jury first" rule also applies only when the equitable and legal claims are brought simultaneously. Primacy of the right to a jury trial does not enable a party to relitigate issues before a jury if those issues have already been properly determined by a court in an earlier, separate action. n13 The determination of issuesof fact by the court in an nonjury action may properly have collateral estoppel effect on a subsequent, separate jury action involving the same issues. n14

[3] Appeal of Order Setting Sequence of Trial

An order making a determination as to whether a case will be tried to a jury or to the bench is an interlocutory order. Similarly, if the case involves both legal and equitable issues, the court's decision as to the sequence of the trial of those issues is also interlocutory. Therefore, neither of these determinations is generally reviewable as an interlocutory order. n1 However, the court may certify the determination for immediate appeal under the certification statute. n2 Furthermore,if warranted by the circumstances of a particular case, an appellate court may issue a prerogative writ to review a lower court's determination of the method of trial. n3 Additionally, either of these decisions relating to the sequence of trial is subsequently reviewable on appeal from the final judgment in the case by any party prejudiced by the determination. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury

TrialsProvince of Court & Jury

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 2, 18.*

(n2)Footnote 2. *Fed. R. Civ. P. 38*; *see* Ch. 22, *Trial by Jury.*

(n3)Footnote 3. *Newfound Management Corp. v. Lewis, 131 F.3d 108, 114-117 (3rd Cir. 1997)* (district court in real estate case determined issue of proper boundary of plaintiff's land in quiet tile suit, and jury resolved issue in trespass suit); *Kunkel v. Topmaster Intern., Inc., 906 F.2d 693, 696 (Fed. Cir. 1990)* (plaintiff in patent infringement case requested damages, injunction, and declaratory relief all in single action); *Blake v. Hall, 668 F.2d 52, 54 (1st Cir. 1981)* , *cert. denied, 456 U.S. 983 (1982)* (in prisoners' rights case, jury determined damages claim and court determined request for injunction).

(n4)Footnote 4. *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 735 (7th Cir. 2004)* .

(n5)Footnote 5. *Fed. R. Civ. P. 39(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 39(b).*

(n7)Footnote 7. *Provident Life & Accident Ins. Co. v. Adie, 982 F. Supp. 1269, 1271-1272 (E.D. Mich. 1997)* ; *see* [2], *below.*

(n8)Footnote 1. *Beacon Theatres v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n9)Footnote 1.1. *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 735-737 (7th Cir. 2004)* .

(n10)Footnote 2. *Provident Life & Accident Ins. Co. v. Adie, 982 F. Supp. 1269, 1271-1272 (E.D. Mich. 1997)* .

(n11)Footnote 3. *Dairy Queen Inc. v. Wood, 369 U.S. 469, 470-472, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n12)Footnote 4. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 170 (9th Cir. 1989)* (bifurcated trial where defendant asserted equitable counterclaim for rescission to plaintiff's legal action for breach of contract; if legal and equitable claims involved common questions of law or fact, legal issues would have to be tried first).

(n13)Footnote 5. *See Fed. R. Civ. P. 50(a).*

(n14)Footnote 6. *See Fed. R. Civ. P. 59.*

(n15)Footnote 7. *Swentek v. US Air, Inc., 830 F.2d 552, 559 (4th Cir. 1987)* .

(n16)Footnote 8. *Curtis v. Loether, 415 U.S. 189, 196, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* (right to jury trial of legal issues may not be abridged by characterizing legal claim as "incidental" to equitable claim).

(n17)Footnote 9. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476-478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n18)Footnote 10. *Newfound Management Corp. v. Lewis, 131 F.3d 108, 116-118 (3d Cir. 1997)* .

(n19)Footnote 11. *Giant Eagle, Inc. v. Federal Ins. Co., 884 F. Supp. 979, 985-986 (W.D. Pa. 1995)* , *aff'd, 1996 U.S. App. LEXIS 20080 (3d Cir. 1996)* .

(n20)Footnote 12. *Holiday Inns of Am., Inc. v. Lussi, 42 F.R.D. 27, 30 (N.D.N.Y. 1967)* .

(n21)Footnote 13. *Newfound Management Corp. v. Lewis, 131 F.3d 108, 116-117 (3rd Cir. 1997)* (jury first rule does not apply in consolidated cases where the equitable action was filed long before the legal one, the trial was a continuation of the equity matter, the overlap of factual matters was not extensive, and inordinate delay had prevented timely completion of the equity case).

(n22)Footnote 14. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (defendants who lost on factual issues in injunction action brought by the Securities and Exchange Commission could not in a subsequent suit by investors relitigate those same factual issues, even though the defendants were entitled to a jury in the second action and not in the first).

(n23)Footnote 1. *Western Geophysical Co. v. Bolt Assoc., Inc., 440 F.2d 765, 769 (2nd Cir. 1971)* (order striking jury demand subject to appeal only by writ of mandamus; in appropriate case, court may treat filing appeal as request for leave to file petition for mandamus).

(n24)Footnote 2. *28 U.S.C. § 1292(b).*

(n25)Footnote 3. *Dairy Queen v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n26)Footnote 4. *National Union Elec. Corp. v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970)* .

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.07

§ 20.07 n* Objections Required at Trial

[1] Requirement That Party Inform Court of Objection

[a] Purpose of Objection Requirement

The current Federal Rules of Civil Procedure dispense with any requirement that a party take a formal "exception" to a ruling or order of the court. n1 The essence of the rule is to do away with the formal ritual of objecting for the record every time the court enters an adverse ruling. n2 However, Rule 46 still requires that a party must make any objections to a ruling or order of the court known to the court at the time the action is taken. n3 The purpose of Rule 46 is one of notice for the court. An attorney is required to object to allow the court an immediate opportunity to reconsider its action and correct any error. n4

For example, an attorney must not only make clear to the judge what evidence he or she wants to present but also the grounds for believing that the evidence should be admitted, unless the grounds are obvious. n5 The courts will not allow a party to silently await a favorable outcome, and then assert objections to previous trial court actions only when the outcome is unfavorable. n6 Circuit courts enforce this rule by providing that a failure to object to a ruling or other action by the court will generally preclude appellate review of that ruling or action. n7 The secondary purpose of the mandatory contemporaneous objection requirement is to permit an opponent to obviate any defect when it is possible to do so. n8

[b] Party Must Clearly State Grounds for Objection

In order to preserve an objection for appeal, a party must inform the trial court of the action which the party desires the court to take or the party's objection to the action of the court and the grounds for the objection, n9 unless the grounds for the objection is obvious from the context. n10 An objection that fails to clearly state its grounds is not sufficient. n11 However, an objection satisfies Rule 46 if it provides the court with notice of the basis of the objection. n12 Furthermore, the Supreme Court has ruled that a party preserves the party's objection if the attorney puts the trial court on notice with respect to his or her concerns about an issue, even though the attorney might have been more articulate when stating the grounds for objection. n13

[c] Failure to Make Objection Known to Court May Waive Objection

If a party fails to object to an action by the court, appellate review of the trial court conduct at issue is generally precluded. n14 Review was precluded, for example, the district court submitted an issue to the jury that was clearly a question of law, the party failed to object, and the error did not result in fundamental unfairness or a miscarriage of justice. n15 On the other hand, an appellate court may review an action for plain error or a miscarriage of justice when a party has failed to object, but such error is rarely found. n16 In an example of the rare reversal, one court of appeals reversed a judgment for malicious prosecution when the plaintiff, as a matter of law, could not show evidence supporting an essential element of that claim. Although the defendant failed toproperly raise this issue in the district court and would ordinarily be barred from raising it on appeal under Rule 46, the court of appeals ruled that the judgment was plain error when the district court instructed the jury that the plaintiff had established that element of the claim. n17 In any event, when a specific objection is made in the district court, appeal will be limited to the particular grounds on which the party objected at trial. n18

[2] Exceptions to Objection Requirement

[a] No Further Objection is Required When Court is Actually Aware of Party's Position

Formal notice to the trial court is not necessary to preserve an issue for appeal if the trial court has been made aware of the objecting party's position. Thus, an objection is not necessary and the right of appeal will be preserved, if the party otherwise has made its argument clear to the court about a ruling or action of the court. n1 For example, in a case in which the plaintiff repeatedly argued that an insurance appraisal was not an arbitration, the district court finally issued a sua sponte ruling that the appraisal constituted an arbitration award within the scope of the Federal Arbitration Act. The court of appeals held that the plaintiff had preserved that issue for appeal because the plaintiff had filed briefs clearly making its position known to the district court, even though the plaintiff failed to seek reconsideration of the ruling. n2

[b] Party May be Able to Preserve Appeal by Motion in Limine

Courts have not agreed about whether an objection must be repeated during trial if the matter has already been ruled on in a pretrial motion, known as a motion in limine. Some courts have advanced the liberal policy underlying Rule 46 by holding that it is not necessary to renew such an objection at trial in order to preserve the issue for appeal, n3 because the motion in limine puts the court on notice of the party's objection. n4

These courts take the view that a motion in limine preserves for appellate review any issues to which the trial court gives full consideration and makes a definitive ruling. For example, it has been argued that motions in limine should be allowed to preserve an objection on appeal when the attorney is sensibly relying on a definitive, well considered pretrial ruling on a subject that will not be affected by the evidence that comes in at trial, and that in some circumstances requiring the renewal of objections after a clear, definitive ruling may be a needless provocation to the trial judge, and possibly a distracting interruption during the trial. n5 This viewpoint may be more in keeping with Rule 46, because requiring an objection after a matter has been definitively disposed of in limine is tantamount to demanding a formal exception. n6

Another reason advanced by courts of appeals for rejecting the contemporaneous objection rule is that the purpose of a motion in limine is to resolve evidentiary questions prior to the start of the trial. This is advantageous, because the trial may then proceed without numerous interruptions for sidebar conferences. Requiring a contemporaneous objection deprives the motion of its potential for avoiding such lengthy and disruptive colloquies. n7

These courts apply a three-part test to determine whether it is necessary for an objecting party to renew an objection at trial after the objection was made by motion in limine. First, was the objection adequately presented to the district court and fully explored by the court during the hearing on the motion in limine. The answer would be in the affirmative, for example, if the motion in limine set forth reasons, including case citations, to support the exclusion of the evidence, and

when counsel diligently advanced the contentions supporting the motion that fully apprized the trial judge of the issue at the hearing. Second, was the issue of the type that could be finally decided in the pretrial hearing; that is, was the decision of whether to admit the evidence a question of law which was not dependent on the character of the other evidence that would be admitted at trial. Third, was the district court's ruling on the motion in limine definitive. Thus, a motion in limine may not preserve an objection on appeal if the district court's denial of the motion was made conditionally or with the suggestion that the matter would be reconsidered. n8

On the other hand, some courts have argued with some persuasion that a motion in limine ought not to preserve an issue for appeal, because the motion does not object to the actual introduction of the evidence at the trial; instead, it seeksto bar prospectively the introduction of the evidence. Hence, the motion is to a large degree speculative, because the evidence sought to be excluded may never be introduced at all. For this reason, some courts of appeals have described a motion in limine as "hypothetical," and have noted that the district court's consideration of the motion is often made in the abstract, that is, without the benefit of the actual progression of the case and the circumstances present at the trial. Accordingly, these courts have concluded that a party whose motion has been overruled must object when the error the party sought to prevent with the motion is about to occur at the trial. n9 This contemporaneous objection requirement allows the court to reconsider its prior determination in light of the development of the evidence at the trial. n10

No matter which rule is applied, however, a motion in limine does not preserve error in favor of the movant unless the motion is denied. If the court reserves judgment on the motion, a contemporaneous objection is always required. n11 Additionally, even if the motion is denied, the movant may rely on the denial only as a ground to challenge the introduction of evidence which the motion sought to exclude. The movant must still object to any objectionable evidence that was not covered by the motion. n12

[c] Lack of Objection Will Not Preclude Appeal When Party Had No Opportunity to Make Timely Objection

An objection is not required to preserve an appeal if the party has no opportunity to object to a ruling or order at the time the court makes the ruling or order. n13 Rule 46 is predicated on a policy of notice to enable a court to cure erroneous rulings, and therefore the rule has no applicability when there is no chance for a party to notify the court at the time of the ruling. Whether an opportunity to object was available is determined by the facts of the particular case. For example, when a district court issued a ruling on damages without any indication that it would not hold oral hearing, and the plaintiff had no opportunity to object to the lack of a hearing before or at the time of the ruling, the plaintiff did not waive the right to appeal that issue. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsOpening StatementsObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 8 *Moore's Federal Practice,* § 46.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 46.*

(n3)Footnote 2. *Cf. Heckman v. Federal Press Co., 587 F.2d 612, 618 (3d Cir. 1979)* (defendant's objections were adequate to preserve issue for appeal).

(n4)Footnote 3. *Fed. R. Civ. P. 46.*

(n5)Footnote 4. *Ginett v. Computer Task Group, Inc., 11 F.3d 359, 361 (2d Cir. 1993)* (citing **Moore's Federal Practice,** court observed that Rule 46 is intended to inform court of party's position and permit it to correct any error).

(n6)Footnote 5. *Kasper v. Saint Mary of Nazareth Hospital, 135 F.3d 1170, 1175-1176 (7th Cir. 1998)* .

(n7)Footnote 6. *Cooper v. Dyke, 814 F.2d 941, 949 (4th Cir. 1987)* (party may not silently wait and take chance of favorable verdict and then complain when it is unfavorable).

(n8)Footnote 7. *Shultz v. Rice, 809 F.2d 643, 646 (10th Cir. 1986)* (plaintiff's failure to timely object to various evidentiary rulings of district court waived appellate review); *see* [c], *below*.

(n9)Footnote 8. *Cooper v. Dyke, 814 F.2d 941, 948 (4th Cir. 1987)* .

(n10)Footnote 9. *Fed. R. Civ. P. 46*.

(n11)Footnote 10. *Kasper v. Saint Mary of Nazareth Hospital, 135 F.3d 1170, 1175-1176 (7th Cir. 1998)* .

(n12)Footnote 11. *Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 960 (10th Cir. 1993)* (when objection stated only that cross examination was beyond scope of direct examination, district court could not reasonably infer that party also objected to violation of standing order; therefore, that issue was not preserved for appeal).

(n13)Footnote 12. *Sailor v. Hubbell, Inc., 4 F.3d 323, 325 (4th Cir. 1993)* (when district court dismissed jury on its own initiative, plaintiff satisfied Rule 46 by making court aware of objection to action and stating numerous grounds on which objection was based).

(n14)Footnote 13. *Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)* (plaintiff preserved objection to exclusion of evidence despite fact attorney did not explain evidentiary basis of argument as thoroughly as might be desired).

(n15)Footnote 14. *Kasper v. Saint Mary of Nazareth Hospital, 135 F.3d 1170, 1175-1176 (7th Cir. 1998)* (party could not appeal erroneous exclusion of evidence when attorney by his silence failed to make clear to judge what evidence he wanted to present and also his ground for believing that evidence should be admitted); *Gonzalez v. Volvo of Am. Corp., 752 F.2d 295, 298 (7th Cir. 1985)* (when defendant failed to object to alleged misconduct in plaintiff's closing argument, appeal on issue was barred).

(n16)Footnote 15. *Porterco, Inc. v. Igloo Products Corp., 955 F.2d 1164, 1173 (8th Cir. 1992)* .

(n17)Footnote 16. *Kafka v. Truck Ins. Exch., 19 F.3d 383, 385-386 (7th Cir. 1994)* (plain error doctrine inapplicable when plaintiff failed to demonstrate that miscarriage of justice would result); *Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 960 (10th Cir. 1993)* (plaintiff's failure to object to evidentiary rulings barred appellate review when there was no plain error).

(n18)Footnote 17. *Hygh v. Jacobs, 961 F.2d 359, 367 (2d Cir. 1992)* .

(n19)Footnote 18. *Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co., 676 F.2d 516, 523 (11th Cir. 1982)* .

(n20)Footnote 1. *Curreri v. International Brotherhood of Teamsters, 722 F.2d 6, 13 (1st Cir. 1983)* (when plaintiff attempted repeatedly to introduce certain testimony until trial court stated it was not admissible, record was clear that plaintiff disagreed with ruling, and there was no need to object further to preserve appeal).

(n21)Footnote 2. *Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1060 (5th Cir. 1990)* .

(n22)Footnote 3. *Rice v. Community Health Ass'n, 40 F. Supp. 2d 788, 792 (S.D. W.Va. 1999)* (motion in limine will preserve issues raise in motion without any need for repeated objections at trial, provided that movant has clearly identified ruling sought in motion and trial court has in fact ruled on it).

(n23)Footnote 4. *Ginett v. Computer Task Group, Inc., 11 F.3d 359, 361 (2d Cir. 1993)* ; *Sherrod v. Berry, 827 F.2d 195, 203 (7th Cir. 1987)* (when evidentiary rulings were raised by defendant's motion in limine and fully argued and determined prior to trial, Rule 46 did not require defendant to repeat objection at trial in order to preserve appeal).

(n24)Footnote 5. *United States v. Mejia-Alarcon, 995 F.2d 982, 988 (10th Cir. 1993)* .

(n25)Footnote 6. *American Home Assurance Co. v. Sunshine Supermarket, 753 F.2d 321, 324-325 (3d Cir. 1985)* .

(n26)Footnote 7. *Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986)* ; *American Home Assurance Co. v. Sunshine Supermarket, 753 F.2d 321 (3d Cir. 1985)* .

(n27)Footnote 8. *United States v. Mejia-Alarcon, 995 F.2d 982, 986-987 (10th Cir. 1993)* .

(n28)Footnote 9. *Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980)* (court stated flatly that overruling of motion in limine is not reversible error; only proper objection at trial can preserve error for appellate review).

(n29)Footnote 10. *Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980)* .

(n30)Footnote 11. *United States v. Vest, 842 F.2d 1319 (1st Cir. 1988)* (when district court stated its intention not to rule on motion in limine until evidence was offered at trial, movant was required to request a ruling on motion when evidence was offered).

(n31)Footnote 12. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1503-1504 (11th Cir. 1985)* (failure to object at trial to introduction of expert testimony barred appeal of that issue despite denial of similar motion in limine).

(n32)Footnote 13. *Fed. R. Civ. P. 46.*

(n33)Footnote 14. *See Insurance Servs. of Beaufort, Inc. v. Aetna Casualty & Sur. Co., 966 F.2d 847, 852 (4th Cir. 1992)* ; *see also Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262 (7th Cir. 1990)* (when court at last minute made change in previously agreed on jury instructions and plaintiff's counsel failed to notice omission of portion of charge, plaintiff had no reasonable opportunity to object and Rule 46 did not preclude appeal).

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PART VI Trial and Judgment
CHAPTER 20 TRIAL PRACTICE IN GENERAL

2-20 Moore's Manual--Federal Practice and Procedure § 20.08

§ 20.08 Trial by Implied Consentn*

The Federal Rules of Civil Procedure permit the parties to try issues by implied consent. n1 This occurs when during trial the parties raise by the introduction of evidence issues that were not adequately determined by the pleadings and discovery undertaken by the parties. When this occurs, Rule 15(b) commands the court to treat the issues as if they had been raised by the pleadings. n2 This rule applies to defenses as well as to claims. n3 Furthermore, an amendment to conform to the evidence may be made at any time on motion of any party, n4 even in the appellate court. n5

However, it has been held that the appellate court will not allow such amendments by a losing party to cause the reversal of an otherwise correct judgment. n6 In any event, the lack of an amendment does not affect the judgment in any way. In effect, therefore, the parties may, by express consent, or by the introduction of evidence without objection, amend the pleadings at will. n7

Whether there has been a "trial by implied consent" turns on whether the parties recognized that the unpleaded issue entered the case at trial and they actually tried the issue, whether the evidence that supported the unpleaded issue was introduced at trial without objection, and whether the finding of trial by consent prejudiced the opposing party's opportunity to respond. n8

The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues on which the case was tried. Therefore, an amendment after judgment is not allowed if it would bring in some entirely extrinsic issue or change the theory on which the case was actually tried. Anamendment is also not allowed when the issue has not been tried fully by the parties, for example, when the parties have tried the issue inadvertently. n9

Similarly, an amendment pursuant to Rule 15(b) is not permitted when the opposition objects at trial to the matter that was not contained in the pleadings, because in that case it is obvious that the parties could not have tried the issue by express or implied consent. n10 An amendment is not allowed if the issue has not been tried completely by the parties even if there is evidence in the record which could possibly support the amendment, but which was introduced as relevant to some other issue. n11 This principle is sound, because there is no implied consent to try an issue when the parties do not precisely recognize it as an issue in the trial. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedureTrialsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 3 *Moore's Federal Practice,* § 15.18 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 15(b).*

(n3)Footnote 2. *Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 646 (2d Cir. 1989)* ; *see Fed. R. Civ. P. 15(b).*

(n4)Footnote 3. *Emmons v. Southern Pac. Transp. Co., 701 F.2d 1112, 1118 (5th Cir. 1983)* (statute of limitation defense allowed when tried by express consent of parties).

(n5)Footnote 4. *Galindo v. Stoody Co, 793 F.2d 1502, 1513 (9th Cir. 1986)* (liberal policy of allowing amendments at any time).

(n6)Footnote 5. *Brandon v. Holt, 471, 469 U.S. 464, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985) .*

(n7)Footnote 6. *Worley v. Columbia Gas, Inc., 491 F.2d 256 (6th Cir.) , cert. denied, 417 U.S. 970 (1974) .*

(n8)Footnote 7. *See Fed. R. Civ. P. 15(b).*

(n9)Footnote 8. *Portis v. First National Bank of New Albany, Miss., 34 F.3d 325, 332 (5th Cir. 1994)* ; *see Insure One Independent Ins. Agency, Inc. v. Koestner, 198 B.R. 709, 713 (N.D. Ill. 1996)* (court will not imply consent to try claim merely because evidence relevant to properly pleaded issue incidentally tends to establish unpleaded claim).

(n10)Footnote 9. *Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356 (6th Cir. 1992)* ; *see Laffey v. Independent School Dist. No. 625, 806 F. Supp. 1390 (D. Minn. 1992) , aff'd, 994 F.2d 843 (8th Cir. 1993)* (discovery inquiries do not amount to implied consent to amendment of pleading and issue is not tried by consent merely because party serves discovery request on that issue).

(n11)Footnote 10. *Pleming v. Universal-Rundle Corporation, 142 F.3d 1354, 1359 (11th Cir. 1998) .*

(n12)Footnote 11. *Pariser v. Christian Health Care Sys., 816 F.2d 1248 (8th Cir. 1987)* (district court properly denied motion to amend to add claim for tortious interference with contract where evidence introduced had bearing on other issues already in pleadings).

(n13)Footnote 12. *Consolidated Data Terminals v. Applied Digital Data Sys., 708 F.2d 385, 396 (9th Cir. 1983)* (district court erred in permitting Rule 15(b) amendment adding new claims, when defendant was not aware that these issues were part of case at time evidence relating to them was introduced; because defendant would have elicited additional testimony had it been so aware, there was no implied consent).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES

2-21 Moore's Manual--Federal Practice and Procedure 21.syn

§ 21.syn Synopsis to Chapter 21: MASTERS AND MAGISTRATE JUDGES

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure § 21.01

§ 21.01 Scope of Reference to Master in District Courtn*

[1] Function of Master

When a trial court judge requires assistance to perform a certain project necessary to litigation, the court may refer the task to be performed to a master. n1 This referral is known as a "reference" or "appointment," and the jurisdiction of a master is dependent on the order of appointment, which contains the directions to the master. n2 Thus, a "master" is defined as an individual who is appointed by the court to perform specific functions in pending litigation. In essence, the master is performing the functions specified in his or her appointment in a representative capacity, as a substitute or surrogate for the court itself. n3

The Federal Rules of Civil Procedure specifically provide for the appointment of masters in specified situations, with the allowable tasks for the master depending on whether the action will be tried to a jury, whether the parties consent to the appointment, the complexity of the case, and whether an exceptional condition exists requiring the appointment. n4 For example, the district courts frequently appoint masters to organize and control discovery and other procedural matters. n5

[2] Master Distinguished From Magistrate Judge

[a] Nature of Positions Held by Master and Magistrate Judge

A magistrate judge is a judicial officer who is subordinate to an Article III judge. A magistrate judge, whether full-time or part-time, has an ongoing position in the federal judiciary for a specific period of time. n6 Full-time magistrate judges generally serve for a term of eight years and part-time magistrate judges generally serve for a term of four years. n7 In contrast, a master is an individual who is appointed by a court to perform specific tasks or duties in particular pending litigation. Thus, a master performs only the functions specified in the order that appoints the master, known as the "order of appointment," n8 or traditionally, the "order of reference"; the master serves in a representative capacity, as a substitute or surrogate for the court itself, for the limited period of time specified in the order of appointment. n9

[b] Sitting Magistrate Judge May Be Appointed as Master in Particular Case

A district court may refer a magistrate judge currently sitting on the judiciary as a master in a particular case for a particular matter. However, a magistrate judge appointed as a master is subject to the Rule 53 provisions governing masters only if the order of appointment expressly states that the reference is made under Rule 53. n10 Such references may be made, with or without the consent of the parties, pursuant to either Rule 53 or under statute. n11

There are a number of distinctions between references made under the statute and under Rule 53. For example, under the statute nondispositive pretrial matters may be referred to a magistrate judge, without consent, for final determination with reconsideration by the district judge if the magistrate judge's order is clearly erroneous or contrary to law. Under Rule 53, however, the appointment of a master, without consent of the parties, to supervise discovery would require some "exceptional condition" n12 and would subject the proceedings to certain report procedures. n13 If an order of appointment does not clearly articulate the source of the court's authority, the resulting proceedings may be subject to attack on grounds of the magistrate judge's noncompliance with the provisions of Rule 53. Rule 53(i) therefore creates a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53. n14

[3] Master Distinguished From Expert Witness

A district court has the discretion to appoint expert witnesses, including the appointment of panels of experts, to testify at trial for the purpose of assisting the court to understand complex matters, usually of a technical nature. n1 A master is also appointed by the court, to assist the court in the completion of its duties but does not testify; however, the master gives recommendations to the court regarding the master's findings, typically through its report to the court. n2 Thus, while a master serves as a representative of the court, a court-appointed expert under Evidence Rule 706 is essentially functioning as a witness. Therefore, a court may appoint an expert under Evidence Rule 706 without regard to the exceptional circumstance restrictions imposed by Rule 53. n3 In addition, a court-appointed expert is subject to cross examination by all the parties, including the party calling the witness. In contrast, the parties have access only to a master's report. n4

[4] Master Distinguished From Technical Advisor

The court has the authority in cases in which outside technical expertise would be helpful to appoint a "technical advisor," who is a confidential neutral advisor assigned to assist in evaluating technical issues. n1 The most important distinction between technical advisor and master is that a technical advisor is not subject to the Rule 53 regulations that apply to a master. n2 A technical advisor is also not subject to Evidence Rule 706, which applies to an expert witness. n3 The advisor need not be called as an expert witness and is not subject to cross-examination nor required to furnish an expert's report under *Rule 706 of the Federal Rules of Evidence*. n4

Thus, a technical advisor plays an informal role that is not specifically regulated by the courts, and a court should appoint a technical advisor with caution. It has been argued that the role of a technical advisor should be specifically stated and limited to reduce the risk that the advisor will improperly assume the role of the factfinder. Additionally, while the district court should have wide latitude when choosing a technical advisor, the parties should be given an opportunity to object to any proposed appointment based on bias, partiality, or lack of qualification. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedureJudicial OfficersReferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 53(a)(1)*; § 21.02 (permissible purposes for appointment of master).

(n3)Footnote 2. *See Fed. R. Civ. P. 53(b)(2)*; *United States v. Krizek, 111 F.3d 934, 943 (D.C. Cir. 1997)* .

(n4)Footnote 3. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 995 (9th Cir. 2003)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 53(a)(1)*.

(n6)Footnote 5. *Aird v. Ford Motor Co., 86 F.3d 216, 218-219 (D.C. Cir. 1996)* (master recommended that plaintiffs' attorneys should each be sanction and ordered to pay defendant reasonable expenses, including attorney's fees, caused by plaintiffs' failure to comply with master's discovery order); *see Fed. R. Civ. P. 53(a)(1)(C)* (master may be appointed to address pretrial and post-trial matters that cannot be addressed effectively and timely by available district judge).

(n7)Footnote 6. *See § 21.80* et seq. (complete discussion of rights and responsibilities of magistrate judges).

(n8)Footnote 7. *28 U.S.C. § 631(e)*.

(n9)Footnote 8. *Fed. R. Civ. P. 53(b)*.

(n10)Footnote 9. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 995 (9th Cir. 2003)* .

(n11)Footnote 10. *Fed. R. Civ. P. 53(h)*.

(n12)Footnote 11. *28 U.S.C. § 636(b)(1)*.

(n13)Footnote 12. *See Fed. R. Civ. P. 53(a)(1)(B)*.

(n14)Footnote 13. *See Fed. R. Civ. P. 53(e)*.

(n15)Footnote 14. *Fed. R. Civ. P. 53(e)*, Committee Note.

(n16)Footnote 1. *See Fed. R. Evid. 706*; *Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983)* .

(n17)Footnote 2. *See Fed. R. Civ. P. 53(e), (f)*.

(n18)Footnote 3. *See Fed. R. Evid. 706(a)*; *Students of Cal. Sch. for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984)* , *vacated on other grounds, 471 U.S. 148 (1985)* (appointments of masters under Rule 53 are subject to stricter standards of review than appointments of neutral experts under Evidence Rule 706).

(n19)Footnote 4. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 995 (9th Cir. 2003)* (discussion of roles of master and expert).

(n20)Footnote 1. *See Reilly v. United States, 863 F.2d 149, 154-161 (1st Cir. 1988)* (court appointed economist to advise on calculation of damages).

(n21)Footnote 2. *Reilly v. U.S., 863 F.2d 149, 154-161 (1st Cir. 1988)* .

(n22)Footnote 3. *See A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1097 (9th Cir. 2002)* .

(n23)Footnote 4. *Association of Mexican-American Educators v. California, 231 F.3d 572, 590 (9th Cir. 2000)* (Rule 706 applies to court-appointed expert witnesses but not to technical advisors).

(n24)Footnote 5. *TechSearch L.L.C. v. Intel Corp., 286 F.3d 1360, 1378-1379 (Fed. Cir. 2002)* (listing suggested

procedural mechanisms to safeguard use of technical advisor and to generate a record for review on appeal).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure § 21.02

§ 21.02 Permissible Purposes for Court to Appoint Mastern*

[1] Considerations of Court When Making Determination Whether to Appoint

[a] List of Situations In Which Court Has Power to Appoint Master

A court may appoint a master only for the following purposes:

- To perform as specified by a United States statute. n1
- To perform duties consented to by the parties. n2
- To hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by some exceptional condition n3 or by the need to perform an accounting or resolve a difficult computation of damages. n4
- To address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district. n5

[b] Appointment of Master in Jury Trial

Under the 2003 Amendments to Rule 53, it is now clear that a district court may not, without consent of the parties, refer jury trial proceedings to a master. n6 Thus, the district court may appoint a trial master in a jury trial with consent of the parties and concurrence of the court only if either: (1) the parties waive jury trial with respect to the issues submitted to the master, or (2) the master's findings are to be submitted to the jury only as evidence. n7

[c] Fairness and Expense of Appointment

In its determination of whether to appoint a master, and the scope of any appointment, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. n8

While it is generally true that the appointment of a master is an important opportunity for the court to conserve judicial resources, n9 Rule 53(a)(3) recognizes that, depending on the circumstances, a reference of a case to a master may actually increase, rather than shorten, both the time needed to bring litigation to a completion and the expenses resulting from delay. n10 The question of whether to appoint a master may also increase the number of steps necessary to reach a certain stage of litigation. n11 Finally, if a party objects or moves to modify a master's order, report, or recommendation, the appointing court must take the time to review the master's findings of fact de novo, unless the parties have stipulated to a lesser standard of review. n12 The court must also review the master's conclusions or recommendations for conclusions of law de novo whenever there is an objection or a motion to adopt or modify the master's order, report, or recommendation. n13

[2] Appointment of Master as Provided by Statute

A court may appoint a master as provided by a United States statute. n14 For example, a district court judge may appoint a master to conduct a trial under Title VII of Civil Rights Act when the case has not been scheduled for trial within 120 days after the issue is joined. n15 This type of reference may be made without the consent of the parties and without the existence of any exceptional conditions but is subject to the parties' right to a jury trial. n16

[3] Appointment of Master by Consent of All Parties

A court may appoint a master to perform any duties consented to by all of the parties. n17 The rule itself contains no express limitation on the authority of the parties to designate the duties they wish a master by consent to perform. n18 However, the Committee Note indicates that a master may be appointed as a trial master when the parties have a right to a jury trial only if all of the parties waive their right to a jury trial. n19 The Committee Note also states that even if the parties consent to reference to a master that consent does not require that the court make the appointment; the court retains unfettered discretion to determine whether to make the appointment. n20

[4] Appointment of Trial Master Based on Exceptional Condition

The court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if the appointment is based on some exceptional condition. n21 The "exceptional condition" requirement in the 2003-amended Rule 53(b) will continue to have the same force as it developed under the previous versions of the rule. n22 The existence of an exceptional condition is determined by the circumstances of each case; because the prerequisite is applicable only to trial masters, and not to consensual or to pretrial or posttrial masters, the exceptional condition requirement is difficult to meet. n23 For example, a party's refusal or failing to comply with a court decree may constitute an "exceptional condition" under Rule 53 that would justify a court in appointing a master to enforce the decree. It should also be noted that a combination of factors that individually may not constitute an exceptional condition, may qualify as such when taken in combination. n24

On the other hand, the Supreme Court has stated that mere court congestion, delay, or complexity of issues does not individually constitute an exceptional condition sufficient to justify a comprehensive trial reference on the merits to a master. n25 Similarly, the following factors individually have been held not to constitute an exceptional condition warranting the appointment of a trial master: problems of docket control; deficiency in the number of judges to handle a cases; n26 and the probable lengthy duration of the trial. n27

However, it should also be noted that even though these factors alone do not constitute exceptional conditions sufficient to support a comprehensive trial reference on the merits of liability, n28 they may support the more limited and particular category of references, such as a reference concerning the resolution of pretrial or nondispositive matters, n29 including the mediation of settlement negotiations, n30 or the post-trial implementation of negotiated decrees. n31

[5] Appointment of Trial Master To Perform Accounting or Make Difficult Computation of Damages

[a] No Requirement of Exceptional Conditions

The court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury, if necessary for n32 the master to perform an accounting n33 or to compute damages when the computation is difficult. n34 This provision of Rule 53 allows a trial reference for an accounting or difficult computation of damages even if no "exceptional condition" exists. n35 Under the provision, the trial master may preside over an evidentiary hearing on the merits of any claims or defenses regarding the accounting or computation of damages. n36

Appointment of a trial master for an accounting or to make a difficult computation of damages is warranted only for essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Therefore, when evaluations of witness credibility are involved, the case should be assigned to a trial master only when justified by an exceptional condition. n37

[b] Matters of Accounting

A court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if a complex accounting is involved n38 that does not require extensive determinations of credibility. n39 If a matter of account is not complex, a simple accounting rather than a reference to a master is appropriate. n40 Furthermore, the existence of one or more complicated issues requiring an accounting does not justify a trial reference of all issues to a master. The Supreme Court has indicated that a court's referral to a master is appropriate when the circumstances indicate that the value of the court's time would not warrant receiving the proof and making the tabulation of the accounting. n41 A district court has considerable discretion, however, whether to refer difficult accounting matters to masters. n42 Provided the evidence demonstrates the need for an accounting, a judge may make reference to a master in a matter of account even over the objection of the parties and without providing a further rationale for the appointment. n43

[c] Difficult Computation of Damages

The district court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury, when the appointment is necessary for the master to resolve a difficult computation of damages. n44 This type of reference probably originated in admiralty practice, in which difficult computations were typically referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. n45 The reference to a master of a difficult computation of damages is now also typical in patent, copyright, and trademark infringement cases. n46 This type of reference is limited to computations that are complex and time-consuming. n47 Within this limitation, and under appropriate circumstances, the trial judge has discretion to reopen a case and sua sponte refer it to a master to hear further evidence regarding the computations. n48

[6] Appointment of Master To Perform Pretrial and Post-Trial Tasks

[a] Nature of Appointment of Master Other Than Trial Master

A court may appoint a master to address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district. n49 Neither consent of the parties nor exceptional conditions are required for the appointment of a pretrial or post-trial master. n50 The court may appoint such masters only for matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be handled by a judge, such as reviewing discovery documents for privilege, or duties that might not be appropriate for a judge in particular cases, such as some types of settlement negotiations, investigations, or administration of a business entity. n51

The primary function of pretrial and post-trial masters that distinguishes such masters from trial masters is that the

pretrial and postrial masters generally do not preside over an evidentiary hearing on the merits of the claims or defenses in the action. However, this is not a clear line, and a pretrial master may conduct an evidentiary hearing on a discovery dispute; and a post-trial master may conduct an evidentiary hearing on questions of compliance with a court decree. n52

[b] Appointment of Master for Pretrial Matters

One of the most common types of reference to a master at the pretrial phase is a reference to control and schedule discovery matters and to exercise all authority necessary to effectuate rules of civil procedure pertaining to discovery. n53 Another typical reference is for the master to assume control of management of the case schedule and meetings and conferences. Some courts may make a blanket reference for all pretrial matters. n54 However, it has been suggested that a pretrial master should be appointed only when the need is clear with respect to particular tasks. Furthermore, direct judicial performance of judicial functions is particularly important in cases that involve important public issues or many parties. It has also been argued that a blanket delegation of pretrial responsibility may be a violation of constitutional duties under Article III. n55

[c] Appointment of Master for Post-Trial Matters

Most courts have used masters at the post-trial stage to assist in formulating and enforcing complex decrees. n56 However Rule 53 limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district. n57 A court may make a reference to a master when a complex decree requires complex policing, particularly when a party has proved that an opposing party has violated the decree or will resist the decree. n58 The master's role in enforcement may even extend to an investigatory role. In this regard, it may be a permissible or even necessary function of a master to conduct various types of investigations in order to ensure that a party is complying with judicial directives. n59

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(a)(1)*; *see* [2], *below*.

(n3)Footnote 2. *Fed. R. Civ. P. 53(a)(1)(A)*; *see* [3], *below*.

(n4)Footnote 3. *Fed. R. Civ. P. 53(a)(1)(B)(i)*; *see* [4], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 53(a)(1)(B)(ii)*; *see* [5], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 53(a)(1)(C)*; *see* [6], *below*.

(n7)Footnote 6. *Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments (use of trial master without party consent is abolished with respect to matters to be decided by a jury, unless a statute provides for that practice).

(n8)Footnote 7. *See Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments (in no event may court appoint master to preside at jury trial).

(n9)Footnote 8. *Fed. R. Civ. P. 53(a)(3)*.

(n10)Footnote 9. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 999 (9th Cir. 2003)* .

(n11)Footnote 10. *La Buy v. Howes Leather Co., 352 U.S. 249, 253 n.5, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* .

(n12)Footnote 11. *Stauble v. Warrob, Inc., 977 F.2d 690, 697 n.10 (1st Cir. 1992)* (after case was set for trial, parties spent approximately 18 months disputing whether master should be appointed).

(n13)Footnote 12. *Fed. R. Civ. P. 53(f)(3)*.

(n14)Footnote 13. *Fed. R. Civ. P. 53(f)(4)*.

(n15)Footnote 14. *Fed. R. Civ. P. 53(a)(1)*.

(n16)Footnote 15. *See 42 U.S.C. § 2000e-5(f)(5)*.

(n17)Footnote 16. *See Fed. R. Civ. P. 53(a)(1)*; *see also Gonzalez v. Carlin, 907 F.2d 573, 577 (5th Cir. 1990)* (neither consent of parties nor exceptional conditions were required for district judge to appoint master in Title VII case when case had not been set for trial within 120 days after issue was joined).

(n18)Footnote 17. *Fed. R. Civ. P. 53(a)(1)(A)*.

(n19)Footnote 18. Fed. F. Civ. P. 53(a)(1)(A).

(n20)Footnote 19. *Fed. R. Civ. P. 53(a)(1)(A)*, Committee Note to 2003 Amendments.

(n21)Footnote 20. *Fed. R. Civ. P. 53(a)(1)(A)*, Committee Note to 2003 Amendments; *see John B. v. Menke, 176 F. Supp. 2d 786, 808 (E.D. Tenn. 2001)* (court has inherent power to decide whether to appoint master with or without consent of parties).

(n22)Footnote 21. *Fed. R. Civ. P. 53(a)(1)(B)(i)*; *see Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments (central function of trial master is to preside over an evidentiary hearing on merits of claims or defenses).

(n23)Footnote 22. *Fed. R. Civ. P. 53(a)(1)(B)(i)*, Committee Note to 2003 Amendments.

(n24)Footnote 23. *Sierra Club v. Browner, 257 F.3d 444, 446 (5th Cir. 2001)* (district court abused its discretion by appointing master to report and make recommendations concerning summary judgment because fact that case had been pending for two years and filings were voluminous and contained highly technical documents and declarations did not amount to exceptional condition for purposes of Rule 53).

(n25)Footnote 24. *Cobell v. Norton, 283 F. Supp. 2d 66, 215-217 (D.D.C. 2003)* .

(n26)Footnote 25. *La Buy v. Howes Leather Co., 352 U.S. 249, 259, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* ; *see United States v. Microsoft Corp., 147 F.3d 935, 954-955 (D.C. Cir. 1998)* (interpretation of consent decree regarding development of integrated software products did not present issues of such technological complexity that it justified trial reference).

(n27)Footnote 26. *McCormick v. W. Ky. Navigation Inc., 993 F.2d 568, 569 (6th Cir. 1993)* .

(n28)Footnote 27. *In re United States, 816 F.2d 1083, 1089 (6th Cir. 1987)* .

(n29)Footnote 28. *In re Armco Inc., 770 F.2d 103, 105 (8th Cir. 1985)* .

(n30)Footnote 29. *In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165, 1169 (D.C. Cir. 1991)* ; *Fed. R. Civ. P. 53(a)(1)(C)*.

(n31)Footnote 30. *McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989)* , *aff'd on other*

grounds, 908 F.2d 1171 (3d Cir. 1990) .

(n32)Footnote 31. *See, e.g., Cronin v. Browner, 90 F. Supp. 2d 364, 377-378 (S.D.N.Y. 2000)* (need for monitoring of consent judgment justified appointment of master to monitor Environmental Protection Agency's production of complex, technical regulation).

(n33)Footnote 32. *Fed. R. Civ. P. 53(a)(1)(B)(i).*

(n34)Footnote 33. *See* [b], *below.*

(n35)Footnote 34. *See* [c], *below.*

(n36)Footnote 35. *Gon v. First State Ins. Co., 871 F.2d 863, 869 (9th Cir. 1989) ; see* [4], *above.*

(n37)Footnote 36. *Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments.

(n38)Footnote 37. *Fed. R. Civ. P. 53(a)(1)(B)(ii)*, Committee Note to 2003 Amendments.

(n39)Footnote 38. *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1333 n.95 (11th Cir. 1998)* ; *Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039, 1045 (S.D.N.Y. 1977) , aff'd on other grounds, 563 F.2d 567 (2d Cir. 1977)* .

(n40)Footnote 39. *Fed. R. Civ. P. 53(a)(1)(B)(ii)*, Committee Note to 2003 Amendments.

(n41)Footnote 40. *Borden v. Sinskey, 530 F.2d 478, 479 (3d Cir. 1976)* (court properly refused to refer case to master to merely determine proper amount of credits and set offs).

(n42)Footnote 41. *LaBuy v. Howes Leather Co., 352 U.S. 249, 256-259, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* .

(n43)Footnote 42. *S. Agency Co. v. LaSalle Cas. Co., 393 F.2d 907, 914 (8th Cir. 1968)* .

(n44)Footnote 43. *Stauble v. Warrob, Inc., 977 F.2d 690, 691, 694 (1st Cir. 1992)* (reference of fundamental issues of liability over objection would be improper but referring complex accounting would be permitted).

(n45)Footnote 44. *Fed. R. Civ. P. 53(a)(1)(B)(ii).*

(n46)Footnote 45. *Fed. R. Civ. P. 53*, Committee Note to 1966 Amendments.

(n47)Footnote 46. *Minnesota Mining and Manufacturing Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 1563 (Fed. Cir. 1992)* (evidence supported master's findings that defendant willfully infringed plaintiff's patents and plaintiff was entitled to award of damages in amount specified before doubling).

(n48)Footnote 47. *Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania de Vapores, S.A., 388 F.2d 434, 440 (2d Cir. 1968)* (when parties stipulated to price of lost cargo, freight, and insurance, reference to master was improper).

(n49)Footnote 48. *See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-332, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* .

(n50)Footnote 49. *Fed. R. Civ. P. 53(a)(1)(C).*

(n51)Footnote 50. *See Fed. R. Civ. P. 53(a)(1)(C).*

(n52)Footnote 51. *Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments.

(n53)Footnote 52. *Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments.

(n54)Footnote 53. Omnium Lyonnais D'Etanchiete et *Revetement Asphalte v. Dow Chem. Co., 73 F.R.D. 114, 119 (C.D. Cal. 1977)* .

(n55)Footnote 54. *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 967 (9th Cir. 1999)* .

(n56)Footnote 55. *Fed. R. Civ. P. 53(a)(1)*, Committee Note to 2003 Amendments.

(n57)Footnote 56. *Harris v. Philadelphia, 137 F.3d 209, 214 (3d Cir. 1998)* (trial court appointed master to monitor defendant's compliance with consent decree).

(n58)Footnote 57. *Fed. R. Civ. P. 53(a)(1)(C).*

(n59)Footnote 58. *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC, 478 U.S. 421, 481-482 (1986)* ; *Cobell v. Norton, 283 F. Supp. 2d 66, 215-217 (D.D.C. 2003)* .

(n60)Footnote 59. *Cobell v. Norton, 237 F. Supp. 2d 71, 80 (D.D.C. 2003)* .

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure § 21.03

§ 21.03 Qualifications of Person to Serve As Mastern*

[1] Qualifications Are Based On Case Precedent

Although Rule 53 states grounds for disqualification, n1 the rule does not explicitly specify any positive qualifications or requirements for a person to serve as a master. n2 However, case precedent has stated that masters have a unique role in the federal judiciary. A master serves as a surrogate or representative of the court and, consequently, is required to perform service that is an important public duty of a high order similar to actually serving in the judiciary. Furthermore, in the modern era of complex litigation, masters perform a broad range of judicial functions such as supervising discovery, issuing stipulations of fact, and hearing and making recommendations with regard to motions to dismiss and for summary judgment, all subject to judicial review. n3 Other cases have indicated that any person with experience and education in the law and in the particular subject matter of the reference order may serve as a master, provided that he or she is qualified to perform the duties required while sitting as the representative of the court. n4

Courts typically appoint attorneys as masters, n5 especially attorneys with expertise in particular areas of the law, n6 or in non-legal fields of expertise, such as, commerce, finance, or business organization. n7 Courts also may appoint analytically proficient legal scholars, such as retired judges n8 and law professors. n9 However, a master need not be an attorney, n10 because there are many areas of expertise in subject matters outside the legal field where legal proficiency is not required, especially in fields such as business, n11 construction and building, n12 and medicine. n13

[2] Persons Disqualified to Serve as Masters

Unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification, a person is not qualified to serve as master if the person has a relationship to the parties, counsel, action, or court that would require disqualification of a judge under federal statute. n14 Consequently, absent waiver, a person is disqualified as a master in the following circumstances: n15

- When the person's impartiality might reasonably be questioned. n16
- If the person has a personal bias or prejudice concerning a party, or personal knowledge of disputed

evidentiary facts concerning the proceeding. n17

- If in private practice, the person served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the person or such lawyer has been a material witness concerning the matter. n18

- If the person has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy. n19

- When the person knows that he or she as an individual or as a fiduciary, or a spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. n20

- If the person or his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is any of the following: n21 (1) a party to the proceeding, or an officer, director, or trustee of a party; (2) is acting as a lawyer in the proceeding; (3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (4) is known by the person to be a material witness in the proceeding.

A court may also not appoint as master a person related to a judge by consanguinity or affinity within the degree of first cousin. n22 The court may not appoint as master clerks of district courts and deputy clerks in any case unless special reasons require the appointment and those reasons are recited in the order of appointment. n23 Additionally, clerks and assistant clerks of the Court of Customs and Patent Appeals may not be appointed as masters in any case. n24

[3] Court's Method of Selection of Person to Serve As Master

Rule 53 does not specify the manner in which the district court should select persons to serve as masters; however, it does specify that before making an appointment, the court must give the parties notice and an opportunity to be heard on their position on whether there should be an appointment. n1 To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. n2 Before appointment, any party may also suggest candidates for appointment. n3 Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. After considering the suggestions, the court has discretion whether to appoint as master one or more of the persons a party has suggested. n4

One option is for the court to notify the parties that the appointment of a particular individual is being considered, and then proceed with the appointment if the parties do not object. n29 An additional option for the court is to provide a list of potential candidates from which the parties may attempt to agree on a candidate. n30 The court may also ask each party to provide an agreed list of nominees, from which the court will select the master. n31

After hearing the parties, the court has discretion in the manner of selection. n32 Courts frequently select a master despite the parties' choice of another person because a working relationship of trust is essential between the judge and the master, while a relationship between the parties and the master is not important and may even be detrimental; in fact, the court must appoint a master in a manner that avoids potential conflicts of interest in the master. n33 Many judges rely on a personal contact network to identify and select qualified candidates for reference; judges also typically seek recommendations from other judges. The court itself will usually initiate the selection of a master; alternatively, the parties may initiate the selection of a master by making a recommendation to the court. However, the court is not required to appoint the parties unanimous choice and even may appoint a master without any input from the parties in the case. n34

[4] Court's Appointment of More than One Master

Courts may appoint more than one master in the same case. n35 Multiple masters may be appointed in extraordinary cases that are too large or complex for one master to successfully manage, n36 or when expertise in a variety of subjects is needed. n37 Additionally, in its order of appointment, the court may permit the master to hire a support staff to carry out the master's assigned tasks properly. For example, in one case the master hired legal, technical, stenographic, and clerical assistants. n38 Also, some courts permit masters to hire additional experts and specialists to function as assistant masters without express prior court approval. n39 This procedure, however, violates Rule 53 if the appointment of the additional staff has not been specified in the order of appointment, n40 and some courts permit masters to hire experts only after first obtaining approval from the appointing court. n41

[5] Challenge to Appointment of Master

Before making an appointment, the court must give the parties notice and an opportunity to be heard on whether there should be an appointment and on the appointment of a particular person master. In addition, the parties may suggest persons for appointment. n1 The hearing requirement of Rule 53(b)(1) may be satisfied by an opportunity to make written submissions unless the circumstances require live testimony. n2 After receiving the notice, any party that has objections should bring them to the attention of the court. Thus, a person proposed as master may be challenged on the grounds of partiality, bias, or conflict of interest. n3 Thus, for example, a party may have a proposed person disqualified by demonstrating actual bias. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.11 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See* [2], *below*.

(n3)Footnote 2. *See Fed. R. Civ. P. 53(a).*

(n4)Footnote 3. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 995 (9th Cir. 2003)* (citing **Moore's Federal Practice**.

(n5)Footnote 4. *Cruz v. Hauck, 515 F.2d 322, 327 (5th Cir. 1975) .*

(n6)Footnote 5. *Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988)* (masters are often practicing attorneys).

(n7)Footnote 6. *See, e.g., Blackman v. District of Columbia, 185 F.R.D. 4, 8 (D.D.C. 1999)* (court noted that appointee as master had significant experience in law of Individuals with Disabilities Education Act, as court learned in some detail when it interviewed her at length and checked her references before appointing her); *United States v. Conservation Chem. Co., 106 F.R.D. 210, 224 n. 5 (W.D. Mo. 1985)* (attorney appointed master in toxic waste case was expert in land use and environmental law).

(n8)Footnote 7. *McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989) , aff'd on other grounds, 908 F.2d 1171 (3d Cir. 1990)* (attorney with economics expertise appointed master in complicated ERISA case).

(n9)Footnote 8. *Mullinax v. Willett Lincoln--Mercury, Inc., 381 F. Supp. 422, 423 (N.D. Ga. 1974)* (bankruptcy

judges qualified as masters in Truth-in-Lending cases).

(n10)Footnote 9. *United States v. Am. Tel. & Tel. Co., 461 F. Supp. 1314, 1348 (D.C. Cir. 1978)* .

(n11)Footnote 10. *Morgan v. Kerrigan, 530 F.2d 401, 425-427 (1st Cir. 1976)* .

(n12)Footnote 11. *Arthur Murray, Inc. v. Reserve Plan, Inc., 364 F.2d 28, 30 (8th Cir. 1966)* (accountant appointed master to calculate complex damage award).

(n13)Footnote 12. *United States v. Cline, 388 F.2d 294, 295 (4th Cir. 1968)* (surveyor serving as master).

(n14)Footnote 13. *Fox v. Bowen, 656 F. Supp. 1236, 1253-1254 (D. Conn. 1987)* (medical experts used as masters in Medicare case); *N.Y. Assn. for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165, 1192-1194 (E.D.N.Y. 1982)* , *rev'd on other grounds, 706 F.2d 956 (2d Cir. 1983)* (mental disability expert appointed master to monitor compliance with judgment).

(n15)Footnote 14. *Fed. R. Civ. P. 53(a)(2)*; *see 28 U.S.C. § 455*.

(n16)Footnote 15. *See Fed. R. Civ. P. 53(a)(2)*.

(n17)Footnote 16. *28 U.S.C. § 455(a)*.

(n18)Footnote 17. *28 U.S.C. § 455(b)(1)*.

(n19)Footnote 18. *28 U.S.C. § 455(b)(2)*.

(n20)Footnote 19. *28 U.S.C. § 455(b)(3)*.

(n21)Footnote 20. *28 U.S.C. § 455(b)(4)*.

(n22)Footnote 21. *28 U.S.C. § 455(b)(5)*.

(n23)Footnote 22. *28 U.S.C. § 458(a)(1)*.

(n24)Footnote 23. *28 U.S.C. § 957*; *Toussaint v. McCarthy, 597 F. Supp. 1388, 1421-1422 (N.D. Cal. 1984)* , *rev'd on other grounds, 801 F.2d 1080 (9th Cir. 1986)* (judge properly appointed law clerk as monitor in prison reform case because of clerk's familiarity with case).

(n25)Footnote 24. *28 U.S.C. § 957*.

(n26)Footnote 1. *Fed. R. Civ. P. 53(b)(1)*; *see* [5], *below*.

(n27)Footnote 2. *Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments.

(n28)Footnote 3. *Fed. R. Civ. P. 53(b)(1)*.

(n29)Footnote 4. *Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments.

(n30)Footnote 29. *United States v. Yonkers Bd. of Educ., 108 F.R.D. 199, 200 (S.D.N.Y. 1985)* (court proposed person as potential master, parties approved, and person was appointed as master).

(n31)Footnote 30. *Gary W. v. Louisiana, 601 F.2d 240, 242-243 (5th Cir. 1979)* .

(n32)Footnote 31. *BIEC Int'l, Inc. v. Global Steel Services, Ltd., 791 F. Supp. 489, 492-493 (E.D. Pa. 1992)* (each

party proposed 10 candidates in trademark and tradename case and court appointed from list).

(n33)Footnote 32. *In re Hanford Nuclear Reservation Litig. v. E. I. Dupont, 292 F.3d 1124, 1138 (9th Cir. 2002)* .

(n34)Footnote 33. *Belfiore v. N.Y. Times Co., 826 F.2d 177, 185 (2d Cir. 1987)* (master's potential for conflict based on relationship with party); *see* [2], *above*.

(n35)Footnote 34. *Stauble v. Warrob, Inc., 977 F.2d 690, 694 (1st Cir. 1992)* (court may appoint a master even over objection of one or more of the parties).

(n36)Footnote 35. *Morgan v. Kerrigan, 530 F.2d 401, 425-427 (1st Cir. 1976)* (appointment of panel of masters).

(n37)Footnote 36. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1143 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (3d Cir. 1981)* (three-person panel in class action sex discrimination suit with more than 10,000 potential claims).

(n38)Footnote 37. *Cronin v. Browner, 90 F. Supp. 2d 364, 378 (S.D.N.Y. 2000)* (need for masters with scientific and technical expertise).

(n39)Footnote 38. *Kansas v. Colorado, 484 U.S. 910, 910, 108 S. Ct. 254, 98 L. Ed. 2d 212 (1987)* ; *see Ruiz v. Estelle, 679 F.2d 1115, 1159 (5th Cir. 1982) , amended, 688 F.2d 266 (5th Cir. 1982)* (appointment of clerical and support staff to help master).

(n40)Footnote 39. *Thompson v. Enomoto, 815 F.2d 1323, 1326 n.7 (9th Cir. 1987)* (master allowed to hire experts, specialists, or other persons whose advice master considered necessary).

(n41)Footnote 40. *Fed. R. Civ. P. 53(c)* (order of appointment gives master powers to perform specific acts).

(n42)Footnote 41. *National Org. for Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 540 (9th Cir. 1987)* (reference order required court approval before master could hire experts, specialists, or other persons).

(n43)Footnote 1. *Fed. R. Civ. P. 53(b)(1)*; *see Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments.

(n44)Footnote 2. *Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments.

(n45)Footnote 3. *Fed. R. Civ. P. 53(a)(2)*; *see 28 U.S.C. § 455*; [2], *above*.

(n46)Footnote 4. *Rios v. Enterprise Asso. Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173-1175 (2d Cir. 1988)* .

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure § 21.04

§ 21.04 Order of Appointment of Mastern*

[1] Notice Required Prior to Order of Appointment

Prior to entering an order appointing a master, the court must give the parties notice and an opportunity to be heard on whether the appointment is appropriate, n1 and whether the person selected is proper. n2 To facilitate the opportunity to be heard, the court should state in the notice, to the extent possible, a description of the master's proposed duties, time to complete the duties, standards of review, and compensation. The hearing requirement of Rule 53(b)(1) may be satisfied by giving the parties an opportunity to make written submissions unless the circumstances require live testimony. n3

[2] Contents of Order of Appointment

[a] Required Contents

An order of appointment must be entered to effect the appointment of a master. n1 The order of appointment a master must contain all of the following: n2

- A direction to the master to proceed with all reasonable diligence. n3

- A statement of the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c). n4 Thus, the order must specify any limitations on the master's authority to regulate proceedings, the measures the master may take to perform assigned duties, and the actions the master may take to impose sanctions on a party. In the absence of a statement of the limits on the master's authority, the master has broad authority for all of these matters. n5 The order must also specify whether the master may preside at proceedings and take evidence. n6

- A specification of any circumstances in which the master may communicate ex parte with the court or a party. n7

- A statement of the nature of the materials to be preserved and filed as the record of the master's

activities. n8

- A statement of the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations. n9

- A specification of the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). n10 Thus, the basis and terms stated in the order of appointment controls the final compensation due the master. n11

[b] Particular Contents Depend on Type or Stage of Case

The specific contents of an order of reference will vary depending on the stage of the litigation that the master will control, for example, when the court refers pretrial matters to the master, the order of reference should specify the authority of the master, such as the authority to do the following: schedule and monitor depositions and other types of initial disclosure and discovery; resolve discovery disputes, including ruling on claims of privilege; provide tentative rulings on objections and admissibility of evidence; organize and regulate pretrial hearings and require attendance of parties; and promote settlement negotiations. n12

In the case of a post-trial master, the master may be ordered, for example, to calculate complex damages after trial in an employment discrimination class action. In such a case, the order of reference may direct the master to determine how many additional hours class members would have worked in the absence of discrimination and award back pay by multiplying the expected hours worked by the average wage rate in effect during the year that the class member would have worked. n13

[3] Requirements for Entry of Order of Appointment

Before entering an order of appointment, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. n1 Also, the court may not enter a completed order of appointment until the proposed master files an affidavit disclosing whether there is any ground for disqualification of the master under the applicable statute. n2 If a ground for disqualification is disclosed, the court may not enter the order appointing the proposed master unless the parties have consented, with the court's approval, to waive the disqualification. n3 The requirement of this affidavit is an important source of information about possible grounds for disqualification of a proposed master, but the court should make independent inquiry before making the appointment. However, because a master is not a public judicial officer, it may be appropriate for the court to permit the parties to consent to the appointment of a particular person as master in circumstances that would require disqualification of a judge. The appointing judge must be sure that no party is pressured to consent. However, after such assurances and the parties' consent, and with the appointing judge's own determination that there is no improper conflict of interests or appearance of impropriety, the court may appoint an otherwise disqualified master. n4

[4] Amendment of Order of Appointment After Notice to Parties

The court may amend the order appointing a master at any time after providing notice to the parties and an opportunity to be heard. n1 The hearing requirement may be satisfied by an opportunity to make written submissions, unless the circumstances require live testimony. Amendment of an order of appointment is as important as the initial order, because any provisions that may be placed in the initial order may be accomplished by amendment. n2 Consequently, if the proposed amendment is to change the appointed master, the court should also provide the parties with an opportunity to suggest candidates for appointment. n3

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersMastersAppointments

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* §§ 53.20 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(b)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 53(b)(1)* (court must give parties opportunity to suggest candidates for appointment); *Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments; *see § 21.03[5].*

(n4)Footnote 3. *Fed. R. Civ. P. 53(b)(1)*, Committee Note to 2003 Amendments.

(n5)Footnote 1. *Fed. R. Civ. P. 53(b)*; *see* [1], *above*.

(n6)Footnote 2. *Fed. R. Civ. P. 53(b)(2).*

(n7)Footnote 3. *Fed. R. Civ. P. 53(b)(2).*

(n8)Footnote 4. *Fed. R. Civ. P. 53(b)(2)(A).*

(n9)Footnote 5. *See Fed. R. Civ. P. 53(c).*

(n10)Footnote 6. *See Fed. R. Civ. P. 53(c)(1)(C).*

(n11)Footnote 7. *Fed. R. Civ. P. 53(b)(2)(B).*

(n12)Footnote 8. *Fed. R. Civ. P. 53(b)(2)(C).*

(n13)Footnote 9. *Fed. R. Civ. P. 53(b)(2)(D).*

(n14)Footnote 10. *Fed. R. Civ. P. 53(b)(2)(E)*; *see Fed. R. Civ. P. 53(g)*, discussed in *§ 21.05*.

(n15)Footnote 11. *Fed. R. Civ. P. 53(g).*

(n16)Footnote 12. Omnium Lyonnais D'Etanchiete et *Revetement Asphalte v. Dow Chem. Co., 73 F.R.D. 114, 119 (C.D. Cal. 1977)* (master given powers to control and schedule discovery matters and to exercise all powers necessary to effectuate rules of civil procedure pertaining to discovery).

(n17)Footnote 13. *Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1119 (D.C. Cir. 1999)* .

(n18)Footnote 1. *Fed. R. Civ. P. 53(a)(3)*; *see § 21.02[1][c].*

(n19)Footnote 2. *Fed. R. Civ. P. 53(b)(3)*; *see 28 U.S.C. § 455.*

(n20)Footnote 3. *Fed. R. Civ. P. 53(b)(3).*

(n21)Footnote 4. *Fed. R. Civ. P. 53(a)(2)*, Committee Note to 2003 Amendments.

(n22)Footnote 1. *Fed. R. Civ. P. 53(b)(4)*; *see Cobell v. Norton, 283 F. Supp. 2d 66, 217 (D.D.C. 2003)* .

(n23)Footnote 2. *Fed. R. Civ. P. 53(b)(4)*, Committee Note to 2003 Amendments.

(n24)Footnote 3. *See Fed. R. Civ. P. 53(a)(1).*

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure § 21.05

§ 21.05 Compensation of Mastern*

[1] Court Specifies Master's Compensation in Order of Appointment

In every order appointing a master, the court must state the basis, terms, and procedure for setting the master's compensation. n1 The court must ultimately fix the master's compensation on the basis and terms stated in the order of appointment. Depending on the terms and basis for the compensation, the court may fix the amount either before or after judgment. The court also may set a new basis and terms after providing the parties with notice and an opportunity to be heard, in order to protect the parties against unfair surprise. n2

[2] Court Has Discretion to Specify Amount of Master's Compensation

[a] Discretion of Appointing Court to Set Amount

A district court that appoints a master must establish the master's compensation, n1 both with respect to the amount n2 and the allocation of responsibility for payment of the compensation. n3 The appointing court may consider advice and consent from the parties concerning proposed terms of the master's compensation. However, the court is not bound by a recommendation of the parties nor even by an agreement of the parties regarding the master's compensation. n4

When a master performs his or her duties in federal court pursuant to an order of reference by the federal court, the federal court alone must set the master's compensation; even if a state court has relied on the master's federal court performance in a related state court proceeding, it is improper for the state court to set the master's compensation for federal court performance. n5 However, there are exceptions to the discretion of the appointing court to specify the master's compensation. When the appointed master is a United States magistrate judge, the provisions for compensation of Rule 53 are inapplicable, and the magistrate judge acting as master receives his or her ordinary compensation. n6 Additionally, other federal statutes may specify or affect the amount of compensation of a master. For example, in civil rights cases involving alleged unconstitutional conditions of confinement in prisons, the Prison Litigation Reform Act of 1996 restricts the compensation to be paid to a master to the hourly rates established for payment of court-appointed attorneys in criminal cases. n7

[b] Standards Used to Determine Compensation

Under the federal rules, there is no precise mathematical method for determining masters' fees, and the matter is generally left to the discretion of the appointing court. n8 The courts have used a variety of standards to determine the amount or rate. The United States Supreme Court established a flexible, liberal standard as a benchmark, in which the compensation of master should be based on the services performed, the time employed, and the responsibility assumed. n9 The Supreme Court suggested that salaries of judicial officers performing similar functions may be a possible guide. The Court noted that because taking the position of master may interrupt the master's other undertakings, a higher rate of compensation was necessary to attract able and experienced people to temporary employment as a master. n10 To follow the Supreme Court's lead, other courts have established tangible guidelines to determine a dollar rate in each case. Standards used by courts include the following:

- The fair market value of services provided. n11
- The prescribed salaries of judges, n12 or salaries of other public servants. n13
- A percentage of the amount earned by private attorneys in commercial matters. n14
- An amount based on what the master would receive in his or her private business or practice. n15
- A lodestar calculation, which is the number of hours reasonably worked or performed multiplied by a reasonable hourly rate. n16 This amount then may be adjusted upward or downward based on specific factors, such as the quality of service, delay in service, or delay in receipt of fee. n17

[c] Factors Used To Determine Reasonableness

The appointing court must limit a master's compensation to an amount that is reasonable, irrespective of the standard they use to determine compensation. n18 Many factors may contribute to a determination of reasonableness, and no one factor is controlling. For example, a court may consider the following factors:

- The amount of time necessarily spent on assigned duties. n19
- The proficiency of the master and the degree of success of the master in discharging his or her assigned duties. n20 On the other hand, a master's fee may be reduced if assigned tasks are not performed competently, n21 or if the master engages in misconduct. A master that has engaged in misconduct may also be required to return any compensation already paid. n22
- The importance or magnitude of the matter involved. n23
- The public and professional standing of the master, including the master's perceived ability and experience. n24
- The number and complexity of claims, the difficulty of the services provided, and the special expertise required of the master to perform them. n25
- The standard rates in the locality for compensation of masters. n26
- The short or long term nature of the assignment. n27
- The dollar amount involved in the case or the amount of damages awarded. n28

- Whether compensation is paid by a private party or from public revenues, n29 and if there is any public service component of the master's service. n30

- The presence or absence of objections by parties to the amount of compensation. n31

- The likelihood that the master's acceptance of the assignment will preclude his or her other employment or reduce present or future income for the master. n32

[d] Challenge to Compensation Fixed by Court

A dissatisfied party has the right to seek review of the appointing court's fixing the amount of compensation. In this regard, the master himself or herself is considered a "party" entitled to appeal because he or she is bound by the court's order fixing compensation. n33 However, the master or other party may directly appeal the compensation order only if it constitutes a "final judgment," which completely disposes of a claim, n34 or fits within the narrow collateral order exception. n35 If a direct appeal is prohibited, the compensation order may be challenged by a writ of mandamus. However, while the standard of review on direct appeal is abuse of discretion, for a writ of mandamus the district court will not be reversed unless it has made a clear error. n36

[3] Court Has Discretion to Specify Basis and Terms of Master's Compensation

[a] Basis of Compensation

The appointing court must specify in the order of appointment the basis for the master's compensation n1 and has wide discretion in doing so. The court typically specifies compensation as an hourly rate. n2 The court may specify more than one hourly rate when a master performs different types of services. n3 Some courts have applied per diem rates, both as the sole amount of compensation, n4 and in addition to an hourly rate. n5 Other bases for payment of long term appointments include monthly rates, n6 full-time annual salaries, and lump-sum compensation. n7

[b] Other Terms of Compensation

In addition to specifying the basis of compensation of the master, such as periodic fees, n8 the appointing court must also specify in the order of appointment any other terms for the master's compensation. n9 The appointing court has wide discretion to specify such terms, including compensation reimbursement for the master's overhead costs and miscellaneous expenses incurred during the master's service. Reimbursable costs include costs of hiring assistants and staff and miscellaneous expenses. n10 On the other hand, courts typically do not provide for the payment of items or activities that are not directly related to services performed under the order of appointment. n11

[4] Obligation to Pay Compensation to Master

[a] Party or Entity Ordered to Make Payment

The appointing court must direct that the compensation of the master, which is fixed by the court under the order of appointment, n1 be paid by either a party or parties n2 or from a fund or the subject matter of the action that is within the court's control. n3 The court has several options under the rule:

- The court may order that one party pay the entire cost of the master's compensation, n4 even if that party was the prevailing party in the lawsuit. n5

- The court may order the parties to pay equal amounts. n6

- The court may order the parties to pay in differing amounts. n7

- The court may order more than one party on the same side of the litigation to pay the compensation. n8

- The court may order the compensation paid from a fund that is the subject matter of the litigation, n9 or may order payment from the interest from the investment of such a fund. n10

Before a court makes an order of payment for the compensation of a master, the court must give the party liable for the compensation an opportunity to object, and an order of appointment may be remanded to the district court if it refuses a party's request for an opportunity to object to the master's fees. n11 In its discretion to order payment of the master's compensation, a court may initially provide for payment of master's compensation by one or both parties, but later revise its order specifying the obligation to pay the compensation. n12

[b] Allocation of Obligation for Payment

The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits. n13 Because responsibility of the parties is an element the court should consider, whether a party ultimately prevails in a case is an important factor that the courts have always considered in allocating the obligation. n14

In addition to whether a party prevails in the litigation, courts consider a variety of other factors in making the determination of the allocation for payment of the master's compensation, including the following:

- The nature and amount of the controversy. n15 Parties pursuing matters of public interest, for example, may deserve special protection. n16

- The degree to which each party's actions necessitated the suit or reference to the master. n17

- Whether either party engaged in wrongdoing. n18

- The relative disparity in economic strength between the parties. n19

- Whether there is an agreement of the parties to allocate the compensation expense, or one party's stipulation to assume all of the expenses related to the master. n20

[5] Obligation to Pay of Compensation to Master

In every order appointing a master, the court must specify the procedure for setting the master's compensation. n1 The court that appoints the master has discretion to specify the method for payment of a master, and, depending on the circumstances, the court may use one of a variety of methods. One option the court has is to order a party or parties to make payments directly to the master. n2 Another option is for the court to require the parties to make payments to a separate payment fund or escrow account independent of the court. After court approval of the amounts, the master is then paid from the fund or account. n3 In another procedure, the court may direct the parties to make payments directly to the court; the court clerk then administers the fund and makes payment to the master through the court registry after court approval of the amount. n4 Finally, the court may order payment of the master's compensation from a fund that is the subject matter of the litigation and that is in the custody and control of the court, n5 or from the interest from the investment of that fund. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersCompensation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.50 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(b)(2)(E)*; *see § 21.04[2][a]*; *see also Baltimore Neighborhoods, Inc. v. LOB, Inc., 92 F. Supp. 2d 456, 473 (D. Md. 2000)* .

(n3)Footnote 2. *Fed. R. Civ. P. 53(g)(1).*

(n4)Footnote 1. *Fed. R. Civ. P. 53(g)(1).*

(n5)Footnote 2. *Halderman v. Pennhurst State Sch. & Hosp., 855 F. Supp. 747, 748-749 (E.D. Pa. 1994)* .

(n6)Footnote 3. *Atlantic Richfield Co. v. American Airlines, 98 F.3d 564, 572 (10th Cir. 2003)* ; *see* [4], *below.*

(n7)Footnote 4. *Roxana Petroleum Corp. v. Colquitt, 34 F.2d 470, 479 (D. Tex. 1929)* .

(n8)Footnote 5. *Smith v. Alleghany Corp., 394 F.2d 381, 390 (2d Cir. 1968)* .

(n9)Footnote 6. *28 U.S.C. § 634.*

(n10)Footnote 7. *18 U.S.C. § 3626(f)*; *see 18 U.S.C. § 3006A* (compensation for appointed counsel).

(n11)Footnote 8. *Halderman v. Pennhurst State Sch. & Hosp., 855 F. Supp. 747, 748-749 (E.D. Pa. 1994)* ; *see* [a], *above.*

(n12)Footnote 9. *Newton v. Consol. Gas Co., 259 U.S. 101, 105, 42 S. Ct. 438, 66 L. Ed. 844 (1922)* .

(n13)Footnote 10. *Newton v. Consol. Gas Co., 259 U.S. 101, 105, 42 S. Ct. 438, 66 L. Ed. 844 (1922)* (salaries prescribed for judicial officers performing similar duties may be considered; however, higher rate of compensation is generally necessary in order to secure ability and experience).

(n14)Footnote 11. *Northcross v. Board of Educ. of Memphis City Schools, 611 F.2d 624, 638 (6th Cir. 1979)* .

(n15)Footnote 12. *Newton v. Consol. Gas Co., 259 U.S. 101, 106, 42 S. Ct. 438, 66 L. Ed. 844 (1922)* .

(n16)Footnote 13. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1147-1148 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (3d Cir. 1981)* (compensation should be based on consideration of other public salaries).

(n17)Footnote 14. *Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979)* (one half of amount earned by attorneys in commercial matters or two thirds of amount earned by experienced trial attorneys); *Hart v. Community Sch. Bd., 383 F. Supp. 699, 767 (E.D.N.Y. 1974)* , *aff'd on other grounds, 512 F.2d 37 (2d Cir. 1975)* (fee about half that charged by attorneys in private practice plus overhead costs.

(n18)Footnote 15. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1147-1148 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (1981)* (masters compensated in manner comparable to what they would earn in private law practice).

(n19)Footnote 16. *Jackson v. Nassau County Bd. of Supervisors, 157 F.R.D. 612, 617 (E.D.N.Y. 1994)* .

(n20)Footnote 17. *Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)* (amount of compensation inquiry based on lodestar approach).

(n21)Footnote 18. *Blackman v. District of Columbia, 185 F.R.D. 4, 10 (D.D.C. 1999)* (order specified that defendants must pay reasonable fees and expenses incurred by master in carrying out her duties and responsibilities under order of reference; master was required on monthly basis to account for her activities and submit invoice for reasonable fees and expenses incurred in performance of duties under order).

(n22)Footnote 19. *In re Revenue Properties Co., 61 F.R.D. 613, 615 (D. Mass. 1974)* (in class action in which master had administered fund awarded to class members, compensation was fair considering time and effort master expended in examining and ruling on complex claims of 6100 members of class).

(n23)Footnote 20. *United States v. Yonkers Bd. of Educ., 108 F.R.D. 199, 202 (S.D.N.Y. 1985)* (master's skill justified fee).

(n24)Footnote 21. *Glidden Co. v. Hellenic Lines, Ltd., 315 F.2d 162, 165 (2d Cir. 1963)* (court reduced commissioner's fee because of numerous errors in report).

(n25)Footnote 22. *See, e.g., Universal Oil Prods. Co. v. Hall, 76 F.2d 258, 265 (8th Cir. 1935)* .

(n26)Footnote 23. *Jackson v. Nassau County Bd. of Supervisors, 157 F.R.D. 612, 617 (E.D.N.Y. 1994)* (when duty of master to create districting plan for new county legislature was of utmost importance, this factor affected compensation).

(n27)Footnote 24. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1147-1148 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (1981)* (master compensated in manner comparable to what they would earn in private law practice).

(n28)Footnote 25. *Am. Safety Table Co. v. Schreiber, 415 F.2d 373, 379-380 (2d Cir. 1969)* (citing **Moore's Federal Practice**); *United States v. Yonkers Bd. of Educ., 108 F.R.D. 199, 202 (S.D.N.Y. 1985)* (master's great skill justified fee).

(n29)Footnote 26. *Jackson v. Nassau County Bd. of Supervisors, 157 F.R.D. 612, 617 (E.D.N.Y. 1994)* .

(n30)Footnote 27. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1147-1148 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (1981)* .

(n31)Footnote 28. *American Safety Table Co. v. Schreiber, 415 F.2d 373, 379-380 (2d Cir. 1969)* .

(n32)Footnote 29. *Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 748 (6th Cir. 1979)* (courts should take into consideration if fees are to be paid from public funds).

(n33)Footnote 30. *Jackson v. Nassau County Bd. of Supervisors, 157 F.R.D. 612, 623-624 (E.D.N.Y. 1994)* (25 percent reduction in fees appropriate because case involved public institutional relief and service to public).

(n34)Footnote 31. *Milwaukee Town Corp. v. Loew's, Inc., 139 F. Supp. 809, 818-819 (N.D. Ill. 1956)* (fee reduced on account of parties' agreement).

(n35)Footnote 32. *Kyriazi v. W. Elec. Co., 465 F. Supp. 1141, 1147 (D.N.J. 1979)* , *aff'd on other grounds, 647 F.2d. 388 (3d Cir. 1981)* (reduce present or future income).

(n36)Footnote 33. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 996 (9th Cir. 2003)* .

(n37)Footnote 34. *See 28 U.S.C. § 1291*; *see* Ch. 27, *General Principles of Appeal*.

(n38)Footnote 35. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 996 (9th Cir. 2003)* ; *see* Ch. 27, *General Principles of Appeal*.

(n39)Footnote 36. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 998 (9th Cir. 2003)* .

(n40)Footnote 1. *Fed. R. Civ. P. 53(g)(1)*.

(n41)Footnote 2. *Mercer v. Gerry Baby Prods. Co., 160 F.R.D. 576, 579 (S.D. Iowa 1995)* ($200 per hour for supervising discovery and assisting in settlement negotiations in complicated case with numerous pleadings and third parties).

(n42)Footnote 3. *Halderman v. Pennhurst State Sch. & Hosp., 855 F. Supp. 747, 749 (E.D. Pa. 1994)* ($100 per hour for professional services, and $15 per hour for clerical work).

(n43)Footnote 4. *Morgan v. Kerrigan, 530 F.2d 401, 425-427 (1st Cir. 1976)* ($200 per day for masters).

(n44)Footnote 5. *Sheldon v. Metro-Goldwyn Pictures Corp., 26 F. Supp. 134, 136, 145 (S.D.N.Y. 1938)* , *aff'd on other grounds, 309 U.S. 390, 60 S. Ct. 681, 84 L. Ed. 825 (1940)* (in addition to $11,305 fee, court awarded $250/day per diem for 16 days of travel from New York to California).

(n45)Footnote 6. *Grubbs v. Bradley, 552 F. Supp. 1052, 1132 (M.D. Tenn. 1982)* (master compensated by defendants at monthly rate set by court).

(n46)Footnote 7. *Ellipse Corp. v. Ford Motor Co., 461 F. Supp. 1354, 1380-1381 (N.D. Ill. 1978)* , *aff'd on other grounds, 614 F.2d. 775 (7th Cir. 1979)* (special master compensated $150,000 for work over six-year period).

(n47)Footnote 8. *See* [a], *above*.

(n48)Footnote 9. *Fed. R. Civ. P. 53(g)(1)*.

(n49)Footnote 10. *Kansas v. Colorado, 484 U.S. 910, 910, 108 S. Ct. 254, 98 L. Ed. 2d 212 (1987)* (court ordered compensation for master for costs of hiring legal, technical, recording, and clerical assistants); *Ruiz v. Estelle, 679 F.2d 1115, 1172 (5th Cir. 1982) , amended, 688 F.2d 266 (5th Cir. 1982)* (permitting compensation for independent specialists and experts, and clerical and support staff).

(n50)Footnote 11. *Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 744 (6th Cir. 1979)* .

(n51)Footnote 1. *See Fed. R. Civ. P. 53(g)(1)*; *Fed. R. Civ. P. 53(b)(2)(E)*.

(n52)Footnote 2. *Fed. R. Civ. P. 53(g)(2)(A)*.

(n53)Footnote 3. *Fed. R. Civ. P. 53(g)(2)(B)*.

(n54)Footnote 4. *Blackman v. District of Columbia, 185 F.R.D. 4, 10 (D.D.C. 1999)* (court ordered defendants to pay reasonable fees and expenses incurred by master in carrying out her duties and responsibilities under order of reference).

(n55)Footnote 5. *Apponi v. Sunshine Biscuits Inc., 809 F.2d 1210, 1220 (6th Cir. 1987)* (within court's discretion to assess costs to prevailing party).

(n56)Footnote 6. *Turner Constr. Co. v. First Indem. of Am. Ins., 829 F. Supp. 752, 765 (E.D. Pa. 1993*), *aff'd on other grounds, 22 F.3d 303 (1994)* (court charged parties equally because master benefitted both parties by materially advancing resolution of case).

(n57)Footnote 7. *Kansas v. Colorado, 516 U.S. 1025, 1026, 116 S. Ct. 669, 133 L. Ed. 2d 519 (1995)* (special master awarded fees and expenses to be paid 40 percent by Kansas, 40 percent by Colorado and 20 percent by the United States); *Teradyne Inc. v. Teledyne Indus., Inc., 676 F.2d 865, 871 (1st Cir. 1982)* (costs may be allocated by reference to ratio of amount by which party finally recovers to amount originally sought in complaint or amount sought when case submitted to master).

(n58)Footnote 8. *Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir. 1976).*

(n59)Footnote 9. *Fed. R. Civ. P. 53(g)(2)(B).*

(n60)Footnote 10. *In re Revenue Properties Co., Ltd. Litig. Cases, 61 F.R.D. 613, 614 (D. Mass. 1974) .*

(n61)Footnote 11. *Casey v. Lewis, 43 F.3d 1261, 1266 (9th Cir. 1994) .*

(n62)Footnote 12. *Fed. R. Civ. P. 53(g)(3).*

(n63)Footnote 13. *Fed. R. Civ. P. 53(g)(3).*

(n64)Footnote 14. *Sea Coast Foods, Inc., v. Lu-Mar Lobster & Shrimp, Inc., 260 F.3d 1054, 1061 (9th Cir. 2001)* (trial court has discretion to tax master's compensation in favor of prevailing party as cost).

(n65)Footnote 15. *Fed. R. Civ. P. 53(g)(3).*

(n66)Footnote 16. *Fed. R. Civ. P. 53(g)(3)*, Committee Note to 2003 Amendments.

(n67)Footnote 17. *Fed. R. Civ. P. 53(g)(3)*; *see Adventures in Good Eating, Inc. v. Best Places to Eat, 131 F.2d 809, 814-815 (7th Cir. 1942)* (court ordered plaintiff to pay compensation because defendant had objected to reference and reference proved to be unnecessary).

(n68)Footnote 18. Omnium Lyonnais D'Etanchiete et *Revetement Asphalte v. Dow Chem. Co., 73 F.R.D. 114, 120 (C.D. Cal. 1977) .*

(n69)Footnote 19. *Fed. R. Civ. P. 53(g)(3)* Committee Note to 2003 Amendments.

(n70)Footnote 20. *Allen-Myland, Inc. v. Intl. Business Machines Corp., 770 F. Supp. 1014, 1030 (E.D. Pa. 1991)* (parties should agree to compensation).

(n71)Footnote 1. *Fed. R. Civ. P. 53(b)(2)(E).*

(n72)Footnote 2. *Blackman v. District of Columbia, 185 F.R.D. 4, 10 (D.D.C. 1999)* (court order specified that defendants had to pay reasonable fees and expenses incurred by master in carrying out her duties and responsibilities under order of reference); *In re Sunrise Secs. Litig., 130 F.R.D. 560, 593 (E.D. Pa. 1989)* (compensation paid directly to master by parties).

(n73)Footnote 3. *In re Revenue Properties Co., Ltd. Litig. Cases, 61 F.R.D. 613, 614 (D. Mass. 1974) .*

(n74)Footnote 4. *Gary W. v. Louisiana, 601 F.2d 240, 245 (5th Cir. 1979)* (state required to deposit master's compensation with clerk of court); *Mallonee v. Fahey, 122 F. Supp. 472, 474 (S.D. Cal. 1954)* (parties required to deposit money with court).

(n75)Footnote 5. *Fed. R. Civ. P. 53(g)(2)(B).*

(n76)Footnote 6. *Drascovich v. Equitable Trust Co., 3 F.2d 724, 725 (9th Cir. 1925)* (master's compensation paid from funds that were subject of reference).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
A. APPOINTMENT OF MASTERS AND ADMINISTRATIVE MATTERS

2-21 Moore's Manual--Federal Practice and Procedure §§ 21.06through 21.19

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
B. MASTER'S AUTHORITY AND PERFORMANCE OF DUTIES

2-21 Moore's Manual--Federal Practice and Procedure § 21.20

§ 21.20 Master's Obligation to Perform Diligentlyn*

Every order appointing a master must direct the master to proceed with all reasonable diligence. n1 The master's duty of diligence applies not only to all of the specific duties that the master must perform under the order of appointment but also applies to general duties, n2 such as the duty to complete reports. n3 If the master fails to perform with diligence, and a party shows it was prejudiced, the master's report may be rejected. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.21[2] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(b)(2).*

(n3)Footnote 2. *Trico Prods. Corp. v. E.A. Laboratories, Inc., 54 F. Supp. 782, 784 (E.D.N.Y. 1944)* (master's duty at every stage of reference to proceed with all reasonable diligence).

(n4)Footnote 3. *See Fed. R. Civ. P. 53(e).*

(n5)Footnote 4. *In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 381 (D.D.C. 1978) .*

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PART VI Trial and Judgment
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2-21 Moore's Manual--Federal Practice and Procedure § 21.21

§ 21.21 Master's Professional and Ethical Obligations

[1] Standards of Conduct

Although there are no express provisions in the federal statutes or rules making federal judges' judicial standards of conduct and ethical rules applicable to masters, there is considerable case precedent that indicates such rules are applicable. Therefore, because masters perform duties functionally equivalent to those performed by a judge, masters should be held to the same standards as judges, including the Code of Judicial Conduct for United States Judges. n1 Also, a district judge may disqualify a master in a proceeding in which the master's impartiality might reasonably be questioned or if a conflict of interest arises. n2 Similarly, if a conflict of interest arises during the course of the litigation, and the master or a party becomes aware of it, the master or party should notify the appointing court as soon as practicable, because the rules regarding conflict of interest and bias apply equally during the periods of the master's service as they apply to the initial selection of a master. n3

[2] Ex Parte Communications

The order appointing a master must contain a specification of any circumstances in which the master may communicate ex parte with the court or a party. n1 Otherwise, the master may generally not engage in such ex parte communications, n2 unless such a communication is required, such as when the order of appointment requires the master to act as a mediator or settlement negotiator. n3 But some courts have cautioned that a finding of fact based on an ex parte communication might violate a party's due process rights. n4 Consequently, some orders of appointment provide that before reporting to the court, the master's findings of fact based on ex parte communication or other informal fact-finding proceedings must be provided to the parties for their comment and objection, and the parties must be given an opportunity to submit additional evidence or request an evidentiary hearing on the issue before the master. n5

Most orders of appointment should contain some provision allowing for ex parte communications between the court and master n6 because communication is essential to the speedy and efficient management of the case, particularly when the master is assisting the court in pretrial case management. However, a judge may decide that prohibiting these communications will facilitate the chances for settlement because the parties know that confidential disclosures to the master could not be disclosed to the court. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Jenkins v. Sterlacci, 856 F.2d 274, 274-275 (D.C. Cir. 1988)* ; *see Belfiore v. N.Y. Times Co., 826 F.2d 177, 184-185 (2d Cir. 1987)* (Code of Judicial Conduct for United States Judges applies to masters); *In re Joint E. & S. Dist. Asbestos Litig., 737 F. Supp. 735, 739 (E.D.N.Y. 1990)* (special master is considered judge for purposes of judicial ethics rules).

(n2)Footnote 2. *Fed. R. Civ. P. 53(a)(2)*; *see 28 U.S.C. § 455*; *see also § 21.03[2].*

(n3)Footnote 3. *United States v. Certain Parcels of Land Located in Fairfax and Loudoun Counties, Com. of Va., 384 F.2d 677, 681-682 (4th Cir. 1967)* (disqualification of master appointed in proceeding for bias or conflict of interest is matter left to sound discretion of district court).

(n4)Footnote 1. *Fed. R. Civ. P. 53(b)(2)(B).*

(n5)Footnote 2. *Cobell v. Norton, 334 F.3d 1128, 1143-1144 (D.C. Cir. 2003)* .

(n6)Footnote 3. *McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989)* , *aff'd on other grounds, 908 F.2d 1171 (1990)* (master appointed for specific purpose of assisting parties with settlement).

(n7)Footnote 4. *Alberti v. Klevenhagen, 660 F. Supp. 605, 610 (S.D. Tex. 1987)* (ex parte communications permissible if authorized by reference order).

(n8)Footnote 5. *Ruiz v. Estelle, 679 F.2d 1115, 1162-1163 (5th Cir. 1982)* (overly broad reference order denied parties due process).

(n9)Footnote 6. *See Fed. R. Civ. P. 53(b)(2)(B).*

(n10)Footnote 7. *Cf. Blackman v. District of Columbia, 185 F.R.D. 4, 8 (D.D.C. 1999)* ; *Derdiarian v. Futterman Corp., 38 F.R.D. 178, 181 (S.D.N.Y. 1965)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.22

§ 21.22 Regulation of Proceedingsn*

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the duties assigned. n1 This provision is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities and reflects that intent by essentially stating that the most important delineation of a master's authority and duties is provided by the order of appointment. n2 To facilitate the master's exercise of his or her duties, Rule 53 also provides that the master may impose noncontempt sanctions on a party as specified in Rule 37 or 45 and may recommend that the court impose a contempt sanction against a party and other sanctions against a nonparty. n3 Before imposing sanctions, a master must give the party notice and an opportunity to be heard on the matter that is the subject of sanctions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.30 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(c)(1)(A) see Fed. R. Civ. P. 53(b)(2)(A)* (order of appointment must specify any limitations on master's authority).

(n3)Footnote 2. *Fed. R. Civ. P. 53(c)*, Committee Note to 2003 Amendments.

(n4)Footnote 3. *Fed. R. Civ. P. 53(c)(2) see Fed. R. Civ. P. 37, 45.*

(n5)Footnote 4. *Navellier v. Sletten, 262 F.3d 923, 943 (9th Cir. 2001)* (master abused its discretion by failing to give party and attorney notice and opportunity to be heard before imposing discovery sanctions.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.23

§ 21.23 Master's Authority to Take Evidencen*

Unless the appointing order expressly directs otherwise, a master authorized by the order of appointment to conduct evidentiary hearings may exercise the power of the appointing court to compel, take, and record evidence. n1 Furthermore, Rule 53 gives parties the authority to subpoena witnesses for proceedings before the master. n2

The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. n3 If a witness fails to appear or give evidence before the master without adequate excuse, the master may impose on a party any noncontempt sanction provided by Rule 37 or 45 and may recommend a contempt sanction against a party and sanctions against a nonparty. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* §§ 53.31, 53.32 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(c)(1)(C)*; *see also Yascavage v. Weinberger, 379 F. Supp. 1297, 1301 (M.D. Pa. 1974)* (master may take testimony when credibility based on demeanor of witnesses may be important).

(n3)Footnote 2. *Yascavage v. Weinberger, 379 F. Supp. 1297, 1301 (M.D. Pa. 1974)* (master may employ all methods used in non-jury trials, including taking of testimony when credibility based on demeanor of witnesses may be important; master may also rule on admissibility of testimony and make findings of fact and conclusions of law regarding testimony); *see Fed. R. Civ. P. 53(c)*; *Fed. R. Civ. P. 45*.

(n4)Footnote 3. *Fed. R. Civ. P. 53(c)(1)*; *see Fed. R. Civ. P. 45*.

(n5)Footnote 4. *Fed. R. Civ. P. 53(c)(1)*; *see Fed. R. Civ. P. 37, 45*.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.24

§ 21.24 Master's Authority to Enter Ordersn*

A master's authority to enter orders is dependent on the duties he or she is assigned to perform and on any limitations on the masters authority that are specified in the order of appointment. n1 If there are no such limitations in the order of appointment, the master has broad authority to enter all orders necessary to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. n2 For example, a pretrial master supervising discovery has authority to impose sanctions on a party under Rule 37 for failure to perform the party's discovery obligations. n3

When a master makes an order, he or she must file it with the court and serve it promptly on each party, and the clerk must enter it on the docket. n4 Service on the parties may ordinarily be accomplished by mailing or other means as permitted by Rule 5(b), and in appropriate circumstances, the court may have the clerk's office assist the master in mailing the order to the parties. n5 As in the case of a report or recommendation, an order is subject to review by the appointing court, as discussed in *§ 21.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(c)*; *see Fed. R. Civ. P. 53(b)(2)(A)*.

(n3)Footnote 2. *Fed. R. Civ. P. 53(c)(1)*.

(n4)Footnote 3. *Fed. R. Civ. P. 53(c)(2)*.

(n5)Footnote 4. *Fed. R. Civ. P. 53(f)*.

(n6)Footnote 5. *Fed. R. Civ. P. 53(f)*, Committee Note to 2003 Amendments.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.25

§ 21.25 Master's Submission of Reportn*

[1] Contents of Report

A master must report to the court as required by the order of appointment. n1 Unless otherwise specified in the order of appointment, the report constitutes a written communication to the appointing court of the master's findings or recommendations on the referred matter and is prepared by the master for delivery directly to the appointing court. n2 The order of reference generally controls the requirements for the report. n3 The materials that a master must provide to support review of the report will also depend on the nature of the report. n4 The master should also provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. n5

The parties may designate additional materials from the record and may seek permission to supplement the record with evidence, and the appointing court may direct the master to provided and file additional materials from the record. Given the wide variety of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record from public access, for example, a report on settlement efforts. A post-trial master may be assigned duties in formulating a decree that could warrant similar protection. n6

[2] Filing and Service of Report

The master must file a report and promptly serve a copy of the report on each party, unless the appointing court directs otherwise. n1 Before formally making a report, a master may find it beneficial to circulate a draft to the parties for review and comment. n2 The master also may submit these draft reports in the form of periodic progress reports. In either case, the reports are given to the parties so that the parties may notify the master of any errors. n3 After the master has submitted the draft report to the parties to give them the opportunity to correct the proposed findings, the master must prepare a final report on the matters submitted by the order of appointment. If required to make findings of fact and conclusions of law, the master must state them in the report. n4

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(e).*

(n3)Footnote 2. *Collins v. Foreman, 729 F.2d 108, 118 (2d Cir. 1984)* .

(n4)Footnote 3. *Fed. R. Civ. P. 53(e).*

(n5)Footnote 4. *Fed. R. Civ. P. 53(e)*, Committee Note to 2003 Amendments.

(n6)Footnote 5. *See Fed. R. Civ. P. 53(b)(2)(C).*

(n7)Footnote 6. *Fed. R. Civ. P. 53(e)*, Committee Note to 2003 Amendments.

(n8)Footnote 1. *Fed. R. Civ. P. 53(e) see Fed. R. Civ. P. 53(b)(2)(D).*

(n9)Footnote 2. *Fed. R. Civ. P. 53(e)*, Committee Note to 2003 Amendments.

(n10)Footnote 3. *See Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992)* .

(n11)Footnote 4. *Fed. R. Civ. P. 53(e)*; *see Fed. R. Civ. P. 53(f).*

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2-21 Moore's Manual--Federal Practice and Procedure § 21.26

§ 21.26 Appointing Court's Review of Master's Order, Report, or Recommendationsn*

[1] Appointing Court Must Allow Input From Parties

Before taking action on a master's order, report, or recommendations, the appointing court must afford an opportunity for the parties to be heard. The court has discretion whether to hold a hearing and to take evidence, n1 or alternatively to take written submissions from the parties when the court decides to act without taking live testimony. n2 A party's written response may take the form of an objection, a motion to adopt, or a motion to modify the order, report, or recommendations. n3

[2] Time Limit for Party to Object or Move for Modification

Unless the appointing court sets a different time, n1 a party must file an objection, motion to adopt, or motion to modify the master's order, report, or recommendations no later than 21 days after the time the master's order, report, or recommendations are served. n2 Because of the considerable discretion the court has regarding this deadline, it is not jurisdictional; this means that, although a court may properly refuse to entertain untimely review proceedings, the court also has the option to excuse a party's failure to seek review within the 21 day period. The time period of 21 days is considered sufficient to permit thorough review and response to a complex report dealing with complex claims and legal issues. n3

[3] Action of Appointing Court After Permitting Input From Parties

After receiving and reviewing the order, report, or recommendations, and considering input from the parties, including and holding a hearing if appropriate, n1 the court may take any of the following actions on the order, report, or recommendations: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions. n2 The court may take any of these actions for orders, reports, and recommendations of consensual masters, trial masters, pretrial masters, and post-trial masters. n3 If the appointing court adopts the findings of fact specified in a master's order or report, those findings are considered to be the findings of the appointing court under Rule 52. n4 If no party asks the court to act on a master's order, report, or recommendations within the 21 day time limit, n5 the court has discretion to either adopt the master's action or to disregard it at any relevant point in the

proceedings. n6

[4] Standards of Review

[a] Findings of Fact

The order of appointment may set the standards for review of a masters findings of fact. n1 Otherwise, when a party objects in a timely manner to findings of fact made or recommended by a master, the appointing court must generally review the masters findings of fact on a de novo basis. n2 However, if the parties stipulate, and the court consents, the appointing court may review under one of the following standards: n3

- The court may review the master's findings under the more differential clear error standard. n4 The clear error standard of review is more appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. n5

- If the master was appointed by consent of the parties n6 or if the master is a pretrial or post-trial master, n7 the court may deem the findings of the master as final. n8 When parties stipulate that the master's findings of fact will be final, only questions of law arising from the report may be considered by the court. n9

Even if no party makes an objection to a master's findings of fact, the court is free to decide the facts de novo; n9.1 to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it also has the option to reopen the opportunity for the parties to object. n10

A finding is "clearly erroneous" if it is without substantial evidentiary support or was induced by an erroneous application of the law. The appointing court may set aside a master's finding under this standard only if, based on the entire record and with due regard for the master's opportunity to judge credibility, the court is convinced that there is no substantial evidence to support the finding. n11

[b] Conclusions of Law

When a party objects to conclusions of law made or recommended by a master, the court must review the conclusions under the de novo standard. n12 The court also may decide conclusions of law de novo when no objection is made. n13 There is no provision for a consensual lesser standard of review for conclusions of law that the master makes or recommends; the appointing court must always decide de novo all objections to the master's legal conclusions. n14

Under the de novo standard, the appointing court is not required to defer to a master's conclusions of law and recommendations of legal analysis; on the contrary, the appointing court should ordinarily give the master's recommendations and conclusions of law careful scrutiny. However, a district court has discretion to give some deference to a master's legal conclusions or recommendations when the master has "direct and extensive" knowledge about the particular circumstances of the matter. n15

[c] Procedural and Other Matters

Unless the order of appointment establishes a different standard of review, n16 the court may set aside a master's ruling on a procedural matter only for an abuse of discretion. n17 A procedural matter is one that is not a factual or legal determination but rather a determination made by a master that, if made by a trial court, would be treated as a matter of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. n18 If a master makes a recommendation on any matter that does not

constitute a finding of fact, a conclusion of law, or a procedural ruling, n19 the court may act on the recommendation in any of the following ways: n20 adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersRefereesJudicial Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.40 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(f)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 53(f)(1)*, Committee Note to 2003 Amendments.

(n4)Footnote 3. *See Fed. R. Civ. P. 53(f)(2)*; [2], *below.*

(n5)Footnote 1. *See Fed. R. Civ. P. 53(b)(2)(D).*

(n6)Footnote 2. *Fed. R. Civ. P. 53(f)(2).*

(n7)Footnote 3. *Fed. R. Civ. P. 53(f)(2)*, Committee Note to 2003 Amendments.

(n8)Footnote 1. *See* [1], *above.*

(n9)Footnote 2. *Fed. R. Civ. P. 53(f)(1)*; *see Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1375 (11th Cir. 1999)* .

(n10)Footnote 3. *Fed. R. Civ. P. 53(f)*, Committee Note to 2003 Amendments.

(n11)Footnote 4. *Sick v. City of Buffalo, 574 F.2d 689, 690-693 (2d Cir. 1978)* (no final judgment exists that may be appealed until after court considers master's determinations and enters its own order); *see Fed. R. Civ. P. 52.*

(n12)Footnote 5. *See* [2], *above.*

(n13)Footnote 6. *Fed. R. Civ. P. 53(f)(2)*, Committee Note to 2003 Amendments.

(n14)Footnote 1. *See Fed. R. Civ. P. 53(b)(2)(D).*

(n15)Footnote 2. *See* In re § 639 *Patent Litig., 154 F. Supp. 2d 157, 170-171 (D. Mass. 2001)* (de novo review essentially means appointing court makes findings of fact anew, on its own initiative, without giving deference to master's finding).

(n16)Footnote 3. *Fed. R. Civ. P. 53(f)(3).*

(n17)Footnote 4. *Fed. R. Civ. P. 53(f)(3)(A).*

(n18)Footnote 5. *Fed. R. Civ. P. 53(f)(3)*, Committee Note to 2003 Amendments.

(n19)Footnote 6. *See Fed. R. Civ. P. 53(a)(1)(A).*

(n20)Footnote 7. *See Fed. R. Civ. P. 53(a)(1)(C).*

(n21)Footnote 8. *Fed. R. Civ. P. 53(f)(3)(B).*

(n22)Footnote 9. *Burlington N. R.R. v. Dept. of Rev. of Wash., 934 F.2d 1064, 1072 (9th Cir. 1991)* , *aff'd on other grounds, 23 F.3d 239 (1994)* ; *see* [b], *below.*

(n23)Footnote 9.1. *See Fed. R. Civ. P. 53(f)(3).*

(n24)Footnote 10. *Fed. R. Civ. P. 53(f)(3)*, Committee Note to 2003 Amendments.

(n25)Footnote 11. *Hartman v. Duffey, 973 F. Supp. 189, 192 (D.D.C. 1997)* (district court adopted report of master in class-action, gender-based, employment discrimination claim, finding that claimants failed to sustain substantial burden of showing that master's factual findings were clearly erroneous).

(n26)Footnote 12. *Fed. R. Civ. P. 53(f)(4).*

(n27)Footnote 13. *Fed. R. Civ. P. 53(f)(4)* Committee Note to 2003 Amendments.

(n28)Footnote 14. *Fed. R. Civ. P. 53(f)(4).*

(n29)Footnote 15. *Goodrich Corp. v. Town of Middlesbury, 311 F.3d 154, 171 (2d Cir. 2002)* .

(n30)Footnote 16. *See Fed. R. Civ. P. 53(b)(2)(D).*

(n31)Footnote 17. *Fed. R. Civ. P. 53(f)(5).*

(n32)Footnote 18. *Fed. R. Civ. P. 53(f)(5)*, Committee Note to 2003 Amendments.

(n33)Footnote 19. *Fed. R. Civ. P. 53(f)(3), (4), (5).*

(n34)Footnote 20. *Fed. R. Civ. P. 53(f)(5)*, Committee Note to 2003 Amendments.

(n35)Footnote 21. *Fed. R. Civ. P. 53(f)(1).*

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2-21 Moore's Manual--Federal Practice and Procedure § 21.27

§ 21.27 Termination of Reference

[1] Authority of Court to Terminate Reference

The duration of the master's reference is governed by the order of appointment; n1 however, the order of appointment need not state in express terms when or how the reference terminates. Additionally, Rule 53 does not specify a procedure for termination. Therefore, when the order of appointment does not provide for termination, the appointing court has the power to order the date and manner of the termination. n2 Essentially, the court may terminate the reference by making an amendment to the order of appointment which specifies the time and manner it will terminate. n3 A termination may also be initiated by the master in the master's report or recommendation to the court. n4

The underlying principle of termination is that the appointing court has inherent power to utilize the services of a master for administration of justice for only as long as deemed essential by the court. n5 A reference to a master to prepare an order, report, or recommendation on particular issues does not deprive the district court of the essential attributes of judicial power, based on a carefully defined delegation of authority, including the power of the court to terminate the master's authority. n6

[2] Termination of Reference on Death or Disability of Master

Rule 53 does not expressly provide for the situation in which the master dies or becomes disabled before the completion of the master's duties and the preparation of the master's order, report, or recommendation. n1 Consequently, the effect of death or disability is controlled by the terms, if any, that are specified in the order of appointment. n2 If the order of appointment does not specify the effect of death or disability, the court has the power to terminate or to amend the terms of the order of appointment to specify how the reference will continue. n3 How the appointing court will handle the effect of the master's death or disability on the action typically depends on three factors: the types of powers and obligations given to the master under the order of reference; the stage of the interrupted proceedings before the master; and whether witness credibility was a significant factor in the reference. For example, if the master's duty was merely to take and report evidence, and testimonial evidence has been taken but no formal report has been made at the time of death, the court may adopt procedures to obtain a record of the evidence, such as, having the stenographic reporter certify the transcript to the court. Alternatively, when the master dies or becomes disabled before all the evidence is

taken the court may appoint a substitute master to complete the task of taking and reporting the evidence. n4

If the order of appointment provides that the master is ordered to make findings for use as evidence in a jury action or when the master is required to make findings of fact and conclusions of law in a bench trial, and the master dies or is disabled after completing the hearings but before making those findings, the court may grant a new trial if the case involves disputed questions of fact that depend on credibility determinations. n5 If a case does not involve controverted evidence, however, the judge may adopt a substitute master's report even when the order appointing a substitute master is objected to by a party--the report is merely advisory, the court is not bound by legal conclusions, and the parties should not be required to bear the increased expense of resubmitting the evidence. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesRemovals

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 53(b)(2)(A)* (order of appointment must state limitations on authority of master).

(n2)Footnote 2. *See Connecticut Importing Co. v. Frankfort Distilleries, 42 F. Supp. 225, 228 (D. Conn. 1940)* (power of district court to appoint and withdraw appointment of master to report to the court exists independent of Rule 53, which has purpose of outlining procedure to be followed when power is exercised).

(n3)Footnote 3. *See Fed. R. Civ. P. 53(b)(4)* (order of appointment may be amended at any time after notice to the parties, and an opportunity to be heard); *Palmigiano v. Di Prete, 700 F. Supp. 1180, 1188-1189 (D.R.I. 1988)* (termination by order of court after parties had opportunity to be heard); *see also* 21.04[4].

(n4)Footnote 4. *Celestineo v. Singletary, 1992 U.S. Dist. LEXIS 21408, *46, *288 (M.D. Fla. 1992)* (termination by recommendation of master and order of appointing court).

(n5)Footnote 5. *United States v. Connecticut, 931 F. Supp. 974, 976 (D. Conn. 1996)* .

(n6)Footnote 6. *U.S. v. Conservation Chemical Co., 106 F.R.D. 210, 213 (W.D. Mo. 1985)* .

(n7)Footnote 1. *Trico Products Corp. v. E. A. Laboratories, Inc., 54 F. Supp. 782, 784 (E.D.N.Y. 1944)* .

(n8)Footnote 2. *See Fed. R. Civ. P. 53(b)(2), (c).*

(n9)Footnote 3. *See Fed. R. Civ. P. 53(b)(4).*

(n10)Footnote 4. *D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946)* (when master died after taking testimony and before making findings, appointing court did not err in directing successor auditor to base his findings and report on evidence taken by predecessor).

(n11)Footnote 5. *Phillips Petroleum Co. v. Williams, 159 F.2d 1011, 1013 (5th Cir. 1947)* (because master's findings are given weight by jury, only master who hears evidence should make findings unless parties consent).

(n12)Footnote 6. *O'Grady v. Chautauqua Builders' Supply, 33 F.2d 957, 958 (W.D.N.Y. 1929)* (court heard case on record made before initial master).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART I. MASTERS
B. MASTER'S AUTHORITY AND PERFORMANCE OF DUTIES

2-21 Moore's Manual--Federal Practice and Procedure §§ 21.28through 21.39

[Reserved]

§§ 21.28[Reserved]

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C. APPEAL FROM DISTRICT COURT DECISION REGARDING MASTER OR REFERENCE

2-21 Moore's Manual--Federal Practice and Procedure § 21.40

§ 21.40 Appeal of Order of Appointment of Mastern*

[1] Appealability of Order of Appointment

In general, a district court's order appointing a special master is considered to be interlocutory and not subject to immediate appellate review. n1 The primary reason that appointment orders are deemed to be interlocutory is that when a district court reviews the report in a non-jury action, that review must be substantive and may render any error in the appointment order harmless. n2 Because an appointment of a special master is not an order that is immediately appealable, it may be reviewed in two ways: on appeal after final judgment, as discussed in this section, or through the extraordinary writ of mandamus filed in the appropriate court of appeals immediately after the appointment is made. n3 Because of the special standards affecting review by way of mandamus, n4 the general rule is that even if there has been a previous denial of a writ of mandamus, the denial does not preclude a successful appeal of the appointment, n5 provided that a timely objection was made in the district court. n6

[2] Timely Objection Required to Preserve Right to Appeal

An appointment of a special master may be reviewed on appeal after final judgment provided that the party raised an objection to the appointment in the district court in a timely manner. Thus, an objection to an order of appointment may not be made for the first time on appeal, and if a party fails to make a timely objection to the appointing court, either at or before the time of the appointment or promptly thereafter, or fails to move to have the appointment revoked, the objection is waived. n1 Absent some form of timely objection to the appointment of a special master or to a particular person's appointment as special master, a party's participation in a proceeding before the master constitutes a waiver of the objection. n2 When the court on its own initiative makes an order of appointment and does not give notice to a party, however, the party who considers that he or she has been aggrieved by the appointment is given considerable latitude as to the form and timeliness of a subsequent objection. n3

[3] Standard of Review

After judgment, courts deem the issue of the appropriateness of an appointment to a special master as a question of law subject to plenary review, otherwise known as de novo review. n1 Most appellate courts, nonetheless, review the

propriety of an order of appointment to a particular special master for abuse of discretion. n2 Note, however, that a court of appeals reviews findings of fact by district court under the clearly erroneous standard, including factual findings of a special master, to the extent they were adopted by the district court. n3

[4] District Court's Erroneous Reference to Master Rarely Results in Reversal

Generally, if an appellate court makes an erroneous determination that the district court erred when it determined that an "exceptional condition" required the appointment under Rule 53, the error will not result in a reversal of a final judgment. An erroneous finding of the exceptional condition will not result in a reversible error because the district court's exercise of discretion in appointing a special master is given substantial deference n1 and because any error made by the master may be cured by the district court judge's rigorous substantive review of the master's findings. n2 If an erroneous determination is found to have resulted in an inadequately reviewed and therefore final adjudication by a master, however, the resulting judgment must be reversed because the master is not a Article III adjudicator. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersRefereesJudicial Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.53[1] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 996 (9th Cir. 2003)* (master may appeal order of appointing court regarding compensation only if order constitutes a "final judgment," which completely disposes of claim); *see 28 U.S.C. § 1291*; *see also* Ch. 27, *General Principles of Appeal*.

(n3)Footnote 2. *Stauble v. Warrob, Inc., 977 F.2d 690, 696 (1st Cir. 1992)* (improper reference harmless); *Sick v. City of Buffalo, N.Y., 574 F.2d 689, 693-694 (2d Cir. 1978)* (no judgment to be appealed until after court considers magistrate judge's determinations and enters its own order).

(n4)Footnote 3. *See § 21.43*.

(n5)Footnote 4. *See § 21.43*.

(n6)Footnote 5. *United States v. Shirley, 884 F.2d 1130, 1135 (9th Cir. 1989)* (because different bases and standards of review apply, denial of mandamus does not preclude appeal); *Key v. Wise, 629 F.2d 1049, 1055 (5th Cir. 1980)* (because different standards of review apply, denial of mandamus does not preclude appeal).

(n7)Footnote 6. *See* [2], *below*.

(n8)Footnote 1. *See Fajardo Shopping Ctr. of P.R., Inc. v. Sun Alliance Ins. Co., 167 F.3d 1, 5-6 (1st Cir. 1999)* (to contest propriety of reference to master under Rule 53, party must move trial court for revocation of reference, and inaction in this regard is tantamount to acquiescence and reference may not be challenged later on appeal).

(n9)Footnote 2. *Stauble v. Warrob, Inc., 977 F.2d 690, 695-696 (1st Cir. 1992)* (waiver of objection to reference to master for discovery not waiver of subsequent reference of entire case to same master); *Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566-1567 (Fed. Cir. 1988)* (waiver of objection when it was untimely).

(n10)Footnote 3. *Burlington N. R.R. Co. v. Dept. of Revenue of Wash., 934 F.2d 1064, 1069-1071 (9th Cir. 1991)* , *aff'd on other grounds, 23 F.3d 239 (1994)* (objection filed 13 days after court's sua sponte reference was not untimely when reference was entered without prior notice.

(n11)Footnote 1. *Gottlieb v. Barry, 43 F.3d 474, 486 (10th Cir. 1994)* .

(n12)Footnote 2. *McCormick v. W. Ky. Navigation, Inc., 993 F.2d 568, 569-570 (6th Cir. 1993)* (decision to refer matter to master is reviewed under abuse of discretion standard).

(n13)Footnote 3. *Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1119 (D.C. Cir. 1999)* ; *see § 21.42*.

(n14)Footnote 1. *Rios v. Enterprise Asso. Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173-1174 (2d Cir. 1988)* .

(n15)Footnote 2. *Stauble v. Warrob, Inc., 977 F.2d 690, 696 (1st Cir. 1992)* (master's error rendered harmless by district court's review).

(n16)Footnote 3. *See Stauble v. Warrob, Inc., 977 F.2d 690, 696 (1st Cir. 1992)* (reference made in violation of U.S. Constitution, Article III and Rule 53 was not harmless).

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2-21 Moore's Manual--Federal Practice and Procedure § 21.41

§ 21.41 Appeal of Trial Court Decisions Regarding Master's Order, Report, or Recommendationn*

Once the appointing court has entered judgment after reviewing the master's order, report, or recommendation, n1 a party may appeal the action that the appointing court took on the master's order, report, or recommendation, provided that the party objected in the trial court. n2 Generally, the appellate court reviews that action for abuse of the trial court's discretion. n3 A court of appeals may reverse the appointing court's decision as an abuse of discretion if the appointing court's record shows that the trial court applied the incorrect standard for its own review of the master's order, report, or recommendation. n4 If the appointing court completely adopts or rejects the master's findings of fact, the findings become those of the trial court and are subject to appellate review under the clearly erroneous standard. n5 However, if the trial court is erroneous in accepting, rejecting, or modifying the master's order, report, or recommendation, the error is not subject to reversal if it is harmless. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesJudicial Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.53[5] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 53(f)*; *see* 21.26[3], [4] (standard of review used by appointing court to review master's order, report, or recommendation).

(n3)Footnote 2. *Schaefer Fan Co. v. J & D Mfg., Inc., 265 F.3d 1282, 1287-1289 (Fed. Cir. 2001)* .

(n4)Footnote 3. *Charter Oak Fire Ins. Co. v. Hedeen & Cos., 280 F.3d 730, 738 (7th Cir. 2002)* .

(n5)Footnote 4. *Shafer v. Army & Air Force Exch. Serv., 277 F.3d 788, 790-791 (5th Cir. 2002)* (when master submits report or recommendation, trial court must review factual record on which recommendation is based under standard prescribed by Rule 53(g)).

(n6)Footnote 5. *Fed. R. Civ. P. 52(a)*; *see Accusoft Corp. v. Palo, 237 F.3d 31, 39-40 (1st Cir. 2001)* (complete adoption); *Cook v. Niedert, 142 F.3d 1004, 1011 (7th Cir. 1998)* (rejection).

(n7)Footnote 6. *Fed. R. Civ. P. 61*; *see Castillo v. Frank, 70 F.3d 382, 386 (5th Cir. 1995)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.42

§ 21.42 Appeal of District Court's Denial of Motion to Make Reference to Mastern*

If the district court refuses to appoint a special master, that denial is not a final order and is, therefore, not subject to appeal until after the entry of final judgment. n1 Because the parties do not have a right to a special master, n2 a refusal does not necessarily constitute error, and the court of appeals will review the denial for abuse of discretion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersReferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.53[6] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Kearns v. Shillinger, 823 F.2d 399, 400-401 (10th Cir. 1987)* (refusal to appoint master is not final judgment or collateral order permitting immediate review).

(n3)Footnote 2. *Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993)* (court not required to appoint master to investigate propriety of settlement in securities class action before approval).

(n4)Footnote 3. *Yeseta v. Baima, 837 F.2d 380, 387 (9th Cir. 1988)* (district court did not abuse its discretion by denying motion to appoint master to determine extent of employee's interests as participant in pension plan).

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2-21 Moore's Manual--Federal Practice and Procedure § 21.43

§ 21.43 Writ of Mandamus to Appeal Matter Regarding Mastern*

A petition for writ of mandamus is an accepted method to challenge a district court's order referring matters to a special master. n1 Mandamus is considered by the courts as an extraordinary remedy, however, and may be used to overturn a district court's appointment of a master only if the appointment is shown to be an improper exercise of judicial power. Therefore, mandamus jurisdiction requires that (1) the court abused its discretion or clearly usurped its power in making the reference, and (2) a challenge following judgment will not adequately protect the interests at issue. n2 In other words, a petitioner is entitlement to a writ of mandamus only on a showing of two elements regarding the district court's order: (1) the order presents a special risk of significant irreparable harm and (2) the order is palpably erroneous. n3 It should be noted that in appropriate circumstances the circuit court may deem a premature or defective direct appeal as a petition for mandamus. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersRefereesJudicial ReviewCivil ProcedureJudicial OfficersReferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 53.53[3] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Sierra Club v. Browner, 257 F.3d 444, 448 (5th Cir. 2001)* (party may seek review of order of appointment to master by interlocutory appeal or writ of mandamus but is not required to do so; party may wait to have such order reviewed on direct appeal); *United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C. Cir. 1998)* (mandamus was proper mode of challenge to trial court's reference to master to determine merits of permanent injunction).

(n3)Footnote 2. *In re Fibreboard Corp., 893 F.2d 706, 707-708 (5th Cir. 1990)* (mandamus will issue to remedy clear usurpation of power or abuse of discretion when no other adequate means of securing relief is available); *see, e.g., McCullough v. Cosgrave, 309 U.S. 634, 634, 60 S. Ct. 703, 84 L. Ed. 992 (1940)* (mandamus granted).

(n4)Footnote 3. *In re Pearson, 990 F.2d 653, 657 (1st Cir. 1993)* (palpably erroneous refers to situation in which claimed error is plain as matter of law and is also substantially prejudicial as matter of fact).

(n5)Footnote 4. *Hartland v. Alaska Airlines, 544 F.2d 992, 1001 (9th Cir. 1976)* (rather than decide if a reference order was appealable, court treated it as writ of mandamus).

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2-21 Moore's Manual--Federal Practice and Procedure §§ 21.44through 21.59

[Reserved]

§§ 21.44[Reserved]

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PART II. MAGISTRATE JUDGES
A. STRUCTURE OF MAGISTRATE JUDGE SYSTEM

2-21 Moore's Manual--Federal Practice and Procedure § 21.60

§ 21.60 Magistrate Judge Systemn*

[1] Functions of Magistrate Judges

Under the Federal Magistrates Act, the jurisdiction of magistrate judges falls into four broad categories of proceedings:

1. Initial proceedings in criminal cases. n1

2. Trial of criminal misdemeanors. n2

3. References by judges of pretrial matters and other civil proceedings, including references as a special master. n3

4. Trial of civil cases. n4 In addition to handling these four specific categories of judicial duties, a magistrate judge may be delegated by the district court any additional duties as are not inconsistent with the Constitution and laws of the United States. n5

Thus, the Act contemplates that all magistrate judges may perform the duties which had formerly been exercised by United States commissioners but that the assignment of all other duties is left to the discretion of each district court to determine based on local court needs and preferences. n6

The specific duties assigned to a magistrate judge are generally set forth in the local rules of each district court and in court orders. The local rules are also extremely important in the control of the procedures of operation for magistrate judge proceedings and trials. For example, in some circuits, local rules guide litigants in the filing of Rule 72(b) objections n7 and require parties to specify the basis of their objections. n8

[2] Purpose of Referral to Magistrate Judge

A magistrate judge is a subordinate judicial officer of the district court. The judges of each district court appoint that district's magistrate judges n1 and may remove a magistrate judge for specified cause. n2 The court also determines by

local rule the duties to be assigned to magistrate judges and the manner of allocating work among magistrate judges. n3 The number and location of magistrate judges to be appointed in each district is determined by the Judicial Conference of the United States. n4

The primary purpose of references to magistrate judges is to relieve the district courts' increasing burden in the number of civil cases and thus improve access to the courts for all persons. However, while Congress wanted to increase judicial efficiency, it also wanted to keep intact a litigant's right to a trial by an Article III district Judge. That is why a magistrate judge is not given the jurisdiction to hear and decide an entire trial unless consent is obtained from all parties. n5 Similarly, when a reference is made to a magistrate judge to determine civil pretrial matters or act as a special master, the district court judge retains supervision over the magistrate judge, and the rules give the parties the opportunity to obtain de novo review of the magistrate judge's recommended decision, provided they file objections within the specified time limit. n5.1 Magistrate judges thus perform a crucial function within the district courts, and it has been said that the jurisdiction that a magistrate judge exercises is that of the district court itself, delegated to the magistrate judge by the judges of the court under governing statutory authority and local rules of court. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.20 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(a)(1), (b)(1)(A).*

(n3)Footnote 2. *28 U.S.C. § 636(a)(3)*; *see 18 U.S.C. §§ 3401, 3402.*

(n4)Footnote 3. *28 U.S.C. § 636(b)(1), (2).*

(n5)Footnote 4. *28 U.S.C. § 636(c).*

(n6)Footnote 5. *28 U.S.C. § 636(b)(3).*

(n7)Footnote 6. *See 28 U.S.C. § 636(b)(4)*; *see 28 U.S.C. § 636(b), (c)* (magistrate must be "designated" by district court to perform judicial duties).

(n8)Footnote 7. *Fed. R. Civ. P. 72(b).*

(n9)Footnote 8. *See, e.g., Miller v. Currie, 50 F.3d 373, 380 (6th Cir. 1995)* (local rule required that objection identify the portions of the magistrate judge's recommendation to which objection is made and basis for objection); *Sackall v. Heckler, 104 F.R.D. 401 (D.R.I. 1984)* (local rule provided that party must file with clerk of court and serve on all parties, written objections specifically identifying portions of magistrate judge's proposed findings, recommendations or report to which objection is made and basis for such objection).

(n10)Footnote 1. *28 U.S.C. § 631(b)(5).*

(n11)Footnote 2. *28 U.S.C. § 631(i).*

(n12)Footnote 3. *28 U.S.C. §§ 636(b)(4), 636(c)(2).*

(n13)Footnote 4. *See 28 U.S.C. §§ 631(a), 633.*

(n14)Footnote 5. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 785 (2003) .*

(n15)Footnote 5.1. *McCarthy v. Manson, 554 F. Supp. 1275, 1285 (D. Conn. 1982)* , *aff'd on other grounds, 714 F.2d 234 (2d Cir. 1983)* ; *see Raccoon Recovery, LLC v. Navoi Mining & Metallurgical Kombinat, 244 F. Supp. 2d 1130, 1143-1144 (D. Colo. 2002)* .

(n16)Footnote 6. *Collins v. Foreman, 729 F.2d 108, 115-119 (2d Cir. 1984)* (*28 U.S.C. § 636(c)* does not violate Constitution Article III because consent requirement prevents wholesale delegation of judicial power to individuals who are not Article III judges).

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A. STRUCTURE OF MAGISTRATE JUDGE SYSTEM

2-21 Moore's Manual--Federal Practice and Procedure § 21.61

§ 21.61 Qualification of Magistrate Judgen*

The Federal Magistrates Act provides for both full and part-time magistrate judges, with a preference for full-time magistrate judges whenever possible. If there is insufficient judicial activity to make a full-time magistrate judge position "feasible or desirable," the Act permits the Judicial conference to establish part-time magistrate judge positions. n1 To receive an appointment as a full-time magistrate judge under the Act, a person must have been a member in good standing for at least five years of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States; however, the person need not be a member of the bar of the jurisdiction in which the magistrate judge will serve. n2 The candidate must also be competent to perform the duties of a magistrate judge, n3 be unrelated to any of the judges of the district, n4 and be selected pursuant to the standards of the Judicial Conference. n5 In general, a candidate for a part-time magistracy must meet the same qualification standards as those for full-time magistrate judges. An individual who does not meet the bar membership requirements, however, may be appointed and serve as a part-time magistrate judge if the appointing court and the conference find that no qualified individual who is a member of the bar is available to serve at a specific location. n6 The part-time magistrate judge who does not meet the bar membership requirements may not conduct a trial by consent of the parties. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 631(a).*

(n3)Footnote 2. *28 U.S.C. § 631(b)(1).*

(n4)Footnote 3. *28 U.S.C. § 631(b)(2).*

(n5)Footnote 4. *28 U.S.C. § 631(b)(4)*.

(n6)Footnote 5. *28 U.S.C. § 631(b)(5)*.

(n7)Footnote 6. *28 U.S.C. § 631(b)(1)*.

(n8)Footnote 7. *28 U.S.C. § 636(c)(1)*.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.62

§ 21.62 Controlling Statutes and Rulesn*

The same statutes and rules that govern district court judges also govern the United States magistrate judges. Thus, in civil cases, the practice and procedure for the trial of cases before magistrate judges n1 must conform to the Federal Rules of Civil Procedure, n1.1 as promulgated by the United States Supreme Court under the Rules Enabling Act. n1.2 Similarly, the Federal Rules of Criminal Procedure are applicable generally to criminal proceedings before both magistrate judges and district court judges because the terms "magistrate judge" and "federal magistrate judge," as used in the criminal rules, include a judge. n1.3 The Federal Rules of Evidence, which are formally entitled the "Rules of Evidence for United States Courts and Magistrates," also apply with equal force to proceedings before magistrate judges and judges. n2 The evidence rules, however, do not apply to certain types of proceedings that are conducted primarily by magistrate judges, including preliminary examinations, bail hearings, and the issuance of warrants. n3 Finally, the federal rules governing habeas corpus cases and those governing proceedings attacking federal sentences n4 also apply to both judges and magistrate judges. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 631 et seq.*

(n3)Footnote 1.1. *28 U.S.C. § 636(d).*

(n4)Footnote 1.2. *See 28 U.S.C. § 2072* (Supreme Court prescribes rules of practice, procedure, and evidence for lower federal courts through Federal Rules of Civil Procedure).

(n5)Footnote 1.3. *See Fed. R. Crim. P. 54(c).*

(n6)Footnote 2. *See Fed. R. Evid. 1101(a)* (terms "court" and "judge" include magistrate judges).

(n7)Footnote 3. *See Fed. R. Evid. 1101(d)(3)*.

(n8)Footnote 4. *See 28 U.S.C. §§ 2254, 2255*.

(n9)Footnote 5. *Fed. R. Civ. P. 72(b)*, Committee Note to 1983 Amendments (when master is hearing prisoner petitions, Rule 72(b) does not apply; rather, specific rules relating to proceedings under Sections 2254 and 2255 of Title 28 are applicable); *see also* R. Gov. Sec. 2254 Cases in U.S. Dist. Cts. 10.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.63

§ 21.63 Magistrate Judge Distinguished from Special Mastern*

A magistrate judge is distinguished from a special master in that a magistrate judge is a full or part time judicial officer of the court who has duties specified by statute and rules, n1 while a special master is generally appointed by the court pursuant to *Rule 53 of the Federal Rules of Civil Procedure* to perform specific duties requiring specific expertise based on the subject of the case. n2 The roles are not mutually exclusive, and a district court may appoint a federal magistrate judge to serve as a special master, with or without the consent of the parties. n3

When serving as a special master, a magistrate judge may exercise those powers provided for in Rule 53, as well as any relevant powers set out in the Magistrate's Act. With the consent of the parties, the requirement of unusual complexity as a prerequisite for appointment of a special master may be waived when a magistrate judge is appointed. n4 Furthermore, on consent of the parties, a magistrate judge acting as a master may enter binding findings of fact. n5

Review and objections to a report rendered by a magistrate judge acting as a special master are determined by Rule 53. n6 Generally, factual findings will be disturbed only if clearly erroneous. n7 Legal conclusions are subject to de novo review. n8 For a complete discussion of special masters, see Part I, Masters.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMastersGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.24 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 636*; *see also Fed. R. Civ. P. 72, 73.*

(n3)Footnote 2. *Fed. R. Civ. P. 53(c)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 53(a), (b), (e)*; *see 28 U.S.C. § 636(b)(2)*.

(n5)Footnote 4. *28 U.S.C. § 636(b)(2)* states in part: A judge may designate a magistrate judge to serve as a special master in any civil case, on consent of the parties, without regard to the provisions of *rule 53(b) of the Federal Rules of Civil Procedure* for the United States district courts.

(n6)Footnote 5. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 546 (9th Cir. 1984)* (magistrate judges may conduct civil trials and enter final judgments if parties consent).

(n7)Footnote 6. *See Fed. R. Civ. P. 53(f)*.

(n8)Footnote 7. *Fed. R. Civ. P. 53(f)(3)(A)*; *Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1375 (11th Cir. 1999)* (when district court determines that master's factual findings are inadequate or clearly erroneous, court may use its informed discretion to "modify" report on basis of record made before master, or it may reject it in whole or in part or may receive further evidence or may recommit it with instructions).

(n9)Footnote 8. *Burlington N. R.R. v. Dept. of Rev. of Wash., 934 F.2d 1064, 1072 (9th Cir. 1991)* .

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART II. MAGISTRATE JUDGES
A. STRUCTURE OF MAGISTRATE JUDGE SYSTEM

2-21 Moore's Manual--Federal Practice and Procedure §§ 21.64through 21.79

[Reserved]

§§ 21.64[Reserved]

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PART VI Trial and Judgment
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2-21 Moore's Manual--Federal Practice and Procedure § 21.80

§ 21.80 Authority to Hear Pretrial Mattersn*

[1] Origination of Authority

Rule 72 governs the civil pretrial functions of United States magistrate judges. It sets forth the procedure for a magistrate judge to carry out the Magistrates Act's grant of authority, n1 and, like the statute, it gives a considerable amount of discretion to the individual districts in formulating rules of local practice. n2 Rule 72 is divided into two subsections. Subdivision (a) concerns "nondispositive matters," which include discovery motions and other requests for relief that will not result in the grant of relief or dismissal of a claim or defense in the action. n3 Subdivision (b) concerns "dispositive" matters, which include certain prisoner petitions challenging the conditions of confinement. n4 Rule 72 provides procedural instructions in matters before a magistrate judge to whom a pretrial matter is referred. n5 This phrase emphasizes the fact that there is no inherent civil pretrial jurisdiction of the magistrate judges. The Magistrates Act simply provides for the delegation of duties in the discretion of the district judge, which is known as a referral; local rules in almost all districts now exist to govern referral procedures. n6

[2] Nature of Pretrial Matters

The Magistrates Act authorizes a district judge to designate a magistrate judge to hear pretrial matters "pending before the court"; n1 therefore, even though they are referred to as "pretrial" matters, for purposes of Rule 72, such matters are not limited to proceedings that take place temporally before trial. n2 Thus, matters that arose in the preliminary stages of a case may be referred to a magistrate judge during trial or even after judgment. n3 In addition to matters arising early in the case, magistrate judges may be assigned to hear proceedings, such as, those involving execution of judgments, n4 that may include matters previously heard and decided by a district judge. n5

A magistrate judge's determination of pretrial matters must be distinguished from a magistrate judge's "trial by consent" under Section 636(c)(1) and Rule 73. n6 The Federal Magistrate Act of 1979 expanded the power of full-time magistrate judges and certain part-time magistrate judges by authorizing them to conduct any or all of the proceedings in a jury or nonjury civil matter and even to order the entry of judgment in the case, provided that such magistrate judges have been specially designated to do so by the district court, and provided they are acting with the consent of the parties. n7 While the nonconsensual determination of a dispositive pretrial motion is merely a recommendation subject

to district court review, a determination by a magistrate judge in a trial by consent is treated as a final judgment of the district court itself and is appealable in the same manner as an appeal from any other judgment of a district court. n8 For a discussion of referral of an entire trial to a magistrate judge, see Subpart C, Magistrate Judge's Trial of Civil Case by Consent of Parties. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(b)(1).*

(n3)Footnote 2. *Fed. R. Civ. P. 72*, Advisory Committee Note.

(n4)Footnote 3. *See § 21.82.*

(n5)Footnote 4. *See § 21.83.*

(n6)Footnote 5. *Fed. R. Civ. P. 72(a).*

(n7)Footnote 6. *R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir. 1997) .*

(n8)Footnote 1. *28 U.S.C. § 636(b)(1)(A).*

(n9)Footnote 2. *Bergeson v. Dilworth, 749 F. Supp. 1555, 1562 n.3 (D. Kan. 1990)* ("pretrial" is not defined with respect to time of trial); *Robinson v. Eng, 148 F.R.D. 635, 641 n.13 (D. Neb. 1993)* (magistrate judge has power to hear and determine any pretrial matter pending before court at any stage of litigation).

(n10)Footnote 3. *Merritt v. International Bhd. of Boilermakers, 649 F.2d 1013, 1016 (5th Cir. 1981)* (question of discovery expenses was still pending after entry of judgment); *Robinson v. Eng, 148 F.R.D. 635, 641 (D. Neb. 1993)* (fact that determination of motions took place following dismissal of action did not transform them into posttrial matters).

(n11)Footnote 4. *Fed. R. Civ. P. 69(a).*

(n12)Footnote 5. *28 U.S.C. § 636(b)(3).*

(n13)Footnote 6. *28 U.S.C. § 636(c)(1).*

(n14)Footnote 7. *28 U.S.C. § 636(c)(1)*; *see Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 781 (2003) .*

(n15)Footnote 8. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783 (2003) .*

(n16)Footnote 9. *See § 21.100* et seq.

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PART VI Trial and Judgment
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PART II. MAGISTRATE JUDGES
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2-21 Moore's Manual--Federal Practice and Procedure § 21.81

§ 21.81 Distinction Between Nondispositive and Dispositive Mattersn*

Rule 72 controls the procedure for a magistrate judge to hear two types of pretrial matters: nondispositive n1 and dispositive. n2 A *nondispositive* matter is one that does not dispose of a claim or defense of a party. n3 Nondispositive matters may be determined by a magistrate judge with review by the district judge on timely objection by a party. n4 A *dispositive* matter is one that terminates a claim or defense. A magistrate judge assigned to hear a pretrial dispositive matter must enter a recommended disposition, which may include proposed findings of fact. n5

Thus, when Congress gave the Magistrates Act its current format, it intended two broad categories of disputes for magistrate judge authority: dispositive disputes that have supervening importance for the entirety of the lawsuit and those disputes that involve an issue that will not affect the ultimate result of the litigation. When a magistrate judge determines a dispositive issue, the magistrate judge must submit for the district judge's approval proposed findings of fact and law. On the other hand, the magistrate judge may rule directly on nondispositive pretrial matters, and, on such matters, the district judge may reconsider the magistrate judge's decision only where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. n6 In the category of dispositive matters are all motions which may directly terminate the action, or a claim or defense in an action, affect the issuance of an injunction, or have another conclusive consequence. Congress undertook to list the dispositive motions and authorized a final decision by a magistrate judge of anything else, deemed for magistrate judge adjudication purposes, as non-dispositive. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.02[2] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 72(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 72(a).*

(n4)Footnote 3. *Delta Dental v. Blue Cross & Blue Shield, 942 F. Supp. 740, 743-746 (D.R.I. 1996)* (order remanding action to state court is nondispositive because it merely answers question whether there is basis for removal of action to federal court; parties are left to litigate merits of case in state court); *DeCastro v. AWACS, Inc., 940 F. Supp. 692, 694-695 (D.N.J. 1996)* (remand order is nondispositive because it merely transfers action to different forum but does not reach merits or resolve parties' substantive rights).

(n5)Footnote 4. *Fed. R. Civ. P. 72(a).*

(n6)Footnote 5. *Fed. R. Civ. P. 72(b).*

(n7)Footnote 6. *United States v. Brown, 79 F.3d 1499, 1503-1504 (7th Cir. 1996)* .

(n8)Footnote 7. *28 U.S.C. § 636(b)(1)(A)*; *see § 21.83[1][a].*

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2-21 Moore's Manual--Federal Practice and Procedure § 21.82

§ 21.82 Adjudication By Magistrate Judge of Nondispositive Pretrial Mattersn*

[1] Matters Deemed Nondispositive

[a] In General

A nondispositive matter is one that does not entirely dispose of a claim or defense of a party. n1 Nondispositive matters are stated in the Magistrates Act in exclusionary terms. n2 The Act provides that a magistrate judge has authority to hear and determine any pretrial motion except for the following nonexclusive list of motions in civil actions, which are dispositive in nature: motions for injunctive relief; motions for judgment on the pleadings; motions for summary judgment; motions to dismiss or permit maintenance of a class action; motions to dismiss for failure to state a claim on which relief can be granted; and motions to involuntarily dismiss an action. n3 Courts have held that the list is not exhaustive. Therefore, other motions are deemed by the courts as dispositive when, under the circumstances, the motion is analogous to any of the dispositive motions listed in the statute. n4 The significance of a nondispositive matter is that the magistrate judge may make a final, determination regarding the matter. Unless a party makes a formal objection to the order within the statutory time period, n4.1 the objection is waived and the matter may not be raised on appeal. n4.2

[b] Particular Nondispositive Matters

The following types of motions have been considered nondispositive:

1. A motion to disqualify a magistrate judge is a nondispositive pretrial matter that may be determined by the magistrate judge who is the subject of the motion. n5 Standards for disqualification of magistrate judges are the same as those for disqualifying other federal judges, including district judges, circuit judges, or justices of the Supreme Court. n6

2. Motions regarding pretrial conferences. Under Rule 16(a), n7 the "court" may control and preside over pretrial conferences; that term includes magistrate judges, and they are frequently assigned this responsibility by local rule, standing order, order in a case, or local practice. n8 Similarly, magistrate judges may be assigned to conduct settlement or status conferences, which in most cases are held in connection with a pretrial conference. n9

3. Discovery is a nondispositive pretrial matter that the district court may refer for disposition to a magistrate judge. n10 Postjudgment discovery, such as, discovery in collection proceedings, may also be referred to a magistrate judge as nondispositive. n11 However, if there is a motion for imposition of a sanction that would terminate a party's claim or defense, it is dispositive and may not be heard by the magistrate judge.

4. Motions to amend. A motion for leave to amend the pleadings is a nondispositive matter that may be determined by a magistrate judge, n12 even if the amendment would destroy federal removal jurisdiction and require remand to state court. n13 If denial of a motion to amend would preclude a claim, however, the decision is deemed dispositive in nature. n14

5. Motions involving parties and claims. Actions of magistrate judges to change the number of parties or alter the claims in a case have often been held nondispositive; for example, appointment of a receiver under Rule 69, n15 impleader of a third party defendant under Rule 14, n16 and intervention under Rule 24, when granted, n17 have all been held nondispositive. An order compelling arbitration has also been held to be a nondispositive order, n18 as has been a motion to disqualify counsel. n19 On the other hand, a denial of intervention is a dispositive motion. n20

[2] Magistrate Judge's Decision on Nondispositive Matters

When a district court refers to a magistrate judge a pretrial matter that is not dispositive of a claim or defense of a party, the magistrate judge must hear and determine the matter promptly. The magistrate judge may conduct such proceedings as are required to determine the matter and, when appropriate, may enter into the record a written order setting forth the disposition of the matter. n1 A party may serve and file objections to the order within 14 days after being served with a copy; n2 otherwise, the party is considered to have waived the objection. n3 The district judge to whom the case is assigned must consider such objections and modify or set aside any portion of the magistrate judge's order that the district court finds to be clearly erroneous or contrary to law. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.02[2] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Delta Dental v. Blue Cross & Blue Shield, 942 F. Supp. 740, 743-746 (D.R.I. 1996)* .

(n3)Footnote 2. *Maisonville v. F2 Am., Inc., 902 F.2d 746, 747-748 (9th Cir. 1990)* (any motion not listed nor analogous to motions listed in Act § 636(b)(1)(A) falls within nondispositive group of matters that may be determined by magistrate judge; therefore Rule 11 sanction imposed by magistrate judge for frivolous motion was nondispositive under circumstances).

(n4)Footnote 3. *28 U.S.C. § 636(b)(1)(A)*; *see § 21.83*.

(n5)Footnote 4. *Massey v. City of Ferndale, 7 F.3d 506, 509-510 (6th Cir. 1993)* (analogous circumstances make motions dispositive; post-dismissal motion for sanctions, fees, and costs is dispositive of claim and therefore not to be determined by magistrate judge).

(n6)Footnote 4.1. *See § 21.89*.

(n7)Footnote 4.2. *Maynard v. Bd. of Regents, 342 F.3d 1281, 1286 (11th Cir. 2003)* (construing former time periods).

(n8)Footnote 5. *Laxalt v. McClatchy, 602 F. Supp. 214, 217 (D. Nev. 1985)* (nondispositive motion to disqualify magistrate judge was properly denied by same magistrate judge).

(n9)Footnote 6. *28 U.S.C. § 455*.

(n10)Footnote 7. *Fed. R. Civ. P. 16(a)*.

(n11)Footnote 8. *See, e.g., Flaherty v. Dayton Elec. Mfg. Co., 109 F.R.D. 617, 618-619 (D. Mass. 1986)* (magistrate judge ordered plaintiff's counsel to pay opposing counsel's expenses and attorneys' fees for being unprepared to participate at pretrial conference).

(n12)Footnote 9. *See, e.g., Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 161 F.R.D. 426, 427 (D. Haw. 1995)* (at scheduling conference, magistrate judge set deadline for filing all motions).

(n13)Footnote 10. *Maynard v. Bd. of Regents, 342 F.3d 1281, 1286 (11th Cir. 2003)* (discovery orders at issue that were entered by magistrate judge were nondispositive orders); *Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990)* (citing **Moore's Federal Practice**).

(n14)Footnote 11. *FDIC v. LeGrand, 43 F.3d 163, 167 (5th Cir. 1995)* ; *Merritt v. International Brotherhood of Boilermakers, 649 F.2d 1013, 1018 (5th Cir. 1981)* (discovery issues are by definition pretrial matters; magistrate judge therefore had authority to assess attorney's fees under Rule 37).

(n15)Footnote 12. *United States Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1102 (9th Cir. 1985)* .

(n16)Footnote 13. *Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 594 F. Supp. 583, 586 (D. Me. 1984)* (motion to remand is not excepted under Magistrates Act § 636(b)(1)(A)); *see Vogel v. U.S. Office Prods. Co., 56 F. Supp. 2d 859, 863-864 (W.D. Mich. 1999)* (district court held that motion to remand case to state court from which it was removed was not dispositive in nature because it did not address substance of party's claims or defenses).

(n17)Footnote 14. *Hunt Energy Corp. v. Crosby-Miss. Resources, Ltd., 732 F. Supp. 1378, 1389 (S.D. Miss. 1989) , aff'd on other grounds, 979 F.2d 1533 (5th Cir. 1992)* (if denial of generally nondispositive motion to amend to assert counterclaim would forever bar recovery on counterclaim, motion is dispositive); *HCC, Inc. v. R H & M Mach. Co., 39 F. Supp. 2d 317, 321 (S.D.N.Y. 1999)* .

(n18)Footnote 15. *Bache Halsey Stuart Shields Inc. v. Killop, 589 F. Supp. 390, 393 (E.D. Mich. 1984)* ("additional duties" provision under *28 U.S.C. § 636* authorizes magistrate judge to appoint receiver).

(n19)Footnote 16. *In re American Export Lines, Inc., 76 F.R.D. 210, 212 (S.D.N.Y. 1977)* .

(n20)Footnote 17. *Granito v. Sunn, 594 F. Supp. 410, 412-413 (D. Haw. 1984)* .

(n21)Footnote 18. *Herko v. Metropolitan Life Ins. Co., 978 F. Supp. 141, 142 n.1 (W.D.N.Y. 1997)* (order compelling arbitration is neither listed in, nor analogous to, matter listed in § 636(b)(1)(A)).

(n22)Footnote 19. *Weeks Stevedoring Co., v. Raymond Int'l Builders, Inc., 174 F.R.D. 301, 303-304 (S.D.N.Y. 1997)* (court found magistrate judge's order denying plaintiff's motion to disqualify defendant's counsel nondispositive).

(n23)Footnote 20. *United States v. New England Tel. Co., 530 F. Supp. 274, 275 (D.N.H. 1981)* .

(n24)Footnote 1. *Fed. R. Civ. P. 72(a)*; *see § 21.87*.

(n25)Footnote 2. *28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(a)*.

(n26)Footnote 3. *Maynard v. Bd. of Regents, 342 F.3d 1281, 1286 (11th Cir. 2003)* (construing former time periods); *see § 21.89*.

(n27)Footnote 4. *Fed. R. Civ. P. 72(a)*; *see § 21.90[1]*.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.83

§ 21.83 n* Adjudication By Magistrate Judge of Dispositive Pretrial Matters

[1] Matters Deemed Dispositive

[a] Matters Dispositive Under Magistrates Act

The Magistrates Act states that the following motions are dispositive in nature: n1

1. Motions for injunctive relief. A motion for injunctive relief may not be determined with finality by a magistrate judge n2 but may be referred to a magistrate judge for hearing and proposed findings of fact and recommendations. n3

2. Motions for judgment on the pleadings. A magistrate judge may not enter a judgment on the pleadings, n4 but may submit proposed findings of fact and recommendations to the district judge. n5

3. Motions for summary judgment. A motion for summary judgment may be referred to a magistrate judge only for proposed findings and a recommendation for disposition. n6 A referral authorizing a magistrate judge to conduct discovery and pretrial proceedings has been construed to include authority to issue a recommendation on a motion for summary judgment. n7

4. Motions to dismiss or permit maintenance of a class action. Although class action motions may not be referred to a magistrate judge for final determination, such motions may be referred for a recommended disposition. n8

5. Motions to dismiss for failure to state a claim on which relief may be granted. n9 A magistrate judge may not dismiss for failure to state a claim but may hear a motion and submit proposed findings of fact and recommendations to the district judge. n10

6. Motions to involuntarily dismiss an action. A magistrate judge may not order involuntary dismissal of a case but may hear the motion and submit proposed findings of fact and recommendations to the district judge. n11

Courts have held that the above list is not exhaustive of dispositive motions, and other motions may be dispositive under

the circumstances. n12

[b] Other Matters Dispositive Based on Circumstances

Courts have held that the list of six civil motions in the Magistrates Act is not an exhaustive list of all possible dispositive motions; other motions may be dispositive under the circumstances, n13 and a magistrate judge may not enter a dispositive order in circumstances analogous to those specified in the statute. n14 The following are some of the matters that may be deemed dispositive depending on the circumstances:

1. Jurisdictional matters. Motions to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), n15 for lack of jurisdiction over the person of a defendant under Rule 12(b)(2), n16 and for insufficiency of service of process or service of process under Rule 12(b)(4), n17 all are considered dispositive motions. They are deemed dispositive because, if granted, they are the practical end of a claim, even though they are not listed in the Magistrates Act. n18 A motion for realignment has also been held to be a dispositive motion if it would destroy diversity jurisdiction when granted. n19

2. Discovery sanctions that terminate claim. If imposition of a sanction would terminate a claim or the litigation, the sanction is considered dispositive and the magistrate judge may only recommend that it be imposed by the district court. n20 Furthermore, if monetary sanctions imposed by a magistrate judge are extremely high, they may be treated by the district court as recommendations only. n21

3. Grants of motions to amend pleading that would terminate a claim. If denial of a motion to amend would preclude a compulsory counterclaim, the decision is dispositive in nature, and the district judge could consider the denial as only a recommendation by the magistrate judge. n22

4. Motions to strike. Although a motion to strike is generally considered a non dispositive matter within the pretrial authority of a magistrate judge to determine, n23 it may be deemed dispositive under the circumstances if it has a dispositive effect on a claim or defense. n24

5. Voir dire. A magistrate judge may not conduct voir dire in a civil trial without the consent of all parties to the proceeding. n25 However, a magistrate judge may assist a district judge in conducting voir dire, provided that the district judge actually conducts the proceeding. n26

6. Matters of default. The court may conduct hearings, and a trial by jury if required by a statute of the United States, before entering judgment by default. n27 Some cases have classified the entry of a judgment by default as a dispositive motion, n28 for which the magistrate judge may only make recommendations for disposition under Rule 72(b). Judgments by default are final for purposes of Rule 60(b) set-aside motions, n29 for example, and could be considered as dispositive of a case as a successful Rule 56 summary judgment motion (cited in the Magistrates Act as a dispositive motion). n30

7. Motions for relief from judgment under Rule 60(b) n31 are dispositive, and magistrate judges may be referred these matters for proposed findings of fact and recommendations. n32 Because a Rule 60(b) motion may be referred to a magistrate judge for proposed findings of fact and recommendations, arguably a magistrate judge may also be referred a Rule 60(a) motion for findings and recommendations for correction of mistakes in a judgment, order, or other part of the record. n33

[2] Magistrate Judge's Decision on Dispositive Matters

When, without the consent of the parties, a district court assigns a magistrate judge to hear a pretrial matter dispositive of a claim or defense of a party, the magistrate judge must promptly conduct any proceedings necessary to determine

the matter. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of any other proceedings as the magistrate judge deems necessary. n1 After he or she makes a determination, the magistrate judge must enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate, and the clerk must then mail copies to all parties. n2 A party may serve and file specific written objections to the proposed findings and recommendations within 14 days after being served with a copy of the recommended disposition. Any other party may respond to those objections within 14 days after being served with a copy of the objections. n3 Then, the district court judge will determine de novo any part of the magistrate judge's disposition that is subject to the objections. n4

A magistrate judge's determination of a nonconsensual case-dispositive matter under Section 636(b)(1) n5 must be distinguished from a magistrate judge's trial by consent under Section 636(c)(1) n6 because the nonconsensual determination of a dispositive pretrial motion is merely a recommendation subject to district court review, and the district court is free to do as it sees fit with the magistrate judge's recommendations; on the other hand, a decision by a magistrate judge in a trial by consent referral is treated as a final judgment of the district court itself and is appealable in the same manner as an appeal from any other judgment of a district court. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesPretrial OrdersCivil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(b)(1)(A)*; *see United States v. Schultz, 565 F.3d 1353, 1357 (11th Cir. 2009)* (all pretrial matters other than on list are *nondispositive*).

(n3)Footnote 2. *Eddins v. Excelsior Indep. Sch. Dist., 88 F. Supp. 2d 683, 685* (E.D. Tex. 2000 (court referred matter only for recommendation of master); *but see Touton, S.A. v. M.V. Rizcun Trader, 30 F. Supp. 2d 508, 510 (E.D. Pa. 1998)* (district court found that order granting stay in judicial proceedings was not "injunctive relief" for purposes of Magistrates Act, and magistrate judge who granted a stay of proceedings pending arbitration was not granting relief in excess of a magistrate judge's statutory authority).

(n4)Footnote 3. *See 28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b).*

(n5)Footnote 4. *See 28 U.S.C. § 636(b)(1)(A)*; *Grant v. Astrue, 574 F. Supp. 2d 559, 561 (E.D.N.C. 2008)* .

(n6)Footnote 5. *28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)*; *see, e.g., McPherson v. Astrue, 605 F. Supp. 2d 744, 747 (S.D. W. Va. 2008)* .

(n7)Footnote 6. *28 U.S.C. § 636(b)(1)(B)*; *see also Wesolek v. Canadair, Ltd., 838 F.2d 55, 56-57 (2d Cir. 1988)* (motion to dismiss treated by magistrate judge as one for summary judgment).

(n8)Footnote 7. *Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 381 (D.D.C. 1985)* (authority of magistrate judge to hear and make recommendations on dispositive summary judgment motions is element of pretrial proceedings).

(n9)Footnote 8. *28 U.S.C. § 636(b)(1)(B)*; *see also Nelson v. Nationwide Mortgage Corp., 659 F. Supp. 611, 619-620 (D.D.C. 1987)* (magistrate judge had authority to recommend disposition on motion for class certification even though such authority was not expressly stated in referral).

(n10)Footnote 9. *See, e.g., United States v. Crisp, 190 F.R.D. 546, 549 (E.D. Cal. 1999)* .

(n11)Footnote 10. *See 28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)*.

(n12)Footnote 11. *See 28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)*.

(n13)Footnote 12. *Woods v. Dahlberg, 894 F.2d 187, 187 (6th Cir. 1990)* (denial of motion to proceed in forma pauperis is functional equivalent of involuntary dismissal and is beyond scope of magistrate judge's power to determine with finality); *see* [b], *below*.

(n14)Footnote 13. *See United States v. Rivera Guerrero, 377 F.3d 1064, 1067-1068 (9th Cir. 2004)* ; *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 996 F.2d 21 (2d Cir. 1993)* .

(n15)Footnote 14. *Maisonville v. F2 Am., Inc., 902 F.2d 746, 747-748 (9th Cir. 1990)* (circumstances make motions dispositive if circumstances are analogous to those actually listed).

(n16)Footnote 15. *See Fed. R. Civ. P. 12(b)(1)*.

(n17)Footnote 16. *See Fed. R. Civ. P. 12(b)(2)*.

(n18)Footnote 17. *See Fed. R. Civ. P. 12(b)(2)*.

(n19)Footnote 18. *See In re U.S. Healthcare, 159 F.3d 142, 146 (3d Cir. 1998)* (Third Circuit found that motion to remand to state court was dispositive because action would terminate in federal courts).

(n20)Footnote 19. *United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992)* (motion would have been determinative on diversity issue and therefore was considered dispositive).

(n21)Footnote 20. *North Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1450-1451 (9th Cir. 1986)* (district court adopted magistrate judge's report and recommendation to dismiss counterclaim as sanction for failure to comply with discovery order).

(n22)Footnote 21. *Litton Sys. Inc. v. American Tel. & Tel. Co., 90 F.R.D. 410, 420-421 (S.D.N.Y. 1981)* .

(n23)Footnote 22. *Hunt Energy Corp. v. Crosby-Miss. Resources, Ltd., 732 F. Supp. 1378, 1389 (S.D. Miss. 1989) , aff'd on other grounds, 979 F.2d 1533 (5th Cir. 1992)* (denial of generally nondispositive motion to amend to assert counterclaim would forever bar recovery on counterclaim, and court could treat as dispositive matter).

(n24)Footnote 23. *Brace v. IBM, 953 F. Supp. 561, 563 (D. Vt. 1997)* .

(n25)Footnote 24. *United States v. Davis, 794 F. Supp. 67, 68 (D.R.I. 1992)* (when magistrate judge issued order striking defenses, district court treated matter as dispositive, and conducted de novo review).

(n26)Footnote 25. *Stockler v. Garratt, 974 F.2d 730, 733 (6th Cir. 1992)* (allowing magistrate judge to conduct voir dire over plaintiff's objection was reversible error); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1368-1369 (7th Cir. 1990)* (parties may not be compelled without consent to allow magistrate judge to conduct vital stages of trial, including jury voir dire).

(n27)Footnote 26. *United States v. Lee, 943 F.2d 366, 369 (4th Cir. 1991)* .

(n28)Footnote 27. *See Fed. R. Civ. P. 55*.

(n29)Footnote 28. *Conetta v. National Hair Care Ctrs., Inc., 182 F.R.D. 403, 405-406 (D.R.I. 1998)* (magistrate judge's decision to vacate default judgment is dispositive and district court must conduct de novo review of decision).

(n30)Footnote 29. *See Fed. R. Civ. P. 60(b).*

(n31)Footnote 30. *Cf. Pauley v. United Operating Co., 606 F. Supp. 520, 524 (E.D. Mich. 1985)* (magistrate judge made report and recommendation that district court grant default judgments against defendants).

(n32)Footnote 31. *Fed. R. Civ. P. 60(b).*

(n33)Footnote 32. *LeGear v. Thalacker, 46 F.3d 36, 37 (8th Cir. 1995)* (district court may refer Rule 60(b) motion to magistrate judge); *McLeod, Alexander, Powel & Apffel v. Quarles, 925 F.2d 853, 854 (5th Cir. 1991)* (district court may refer Rule 60(b) motion to magistrate judge for evidentiary hearing and proposed findings of fact and recommendations).

(n34)Footnote 33. *See Fed. R. Civ. P. 60(a).*

(n35)Footnote 1. *Fed. R. Civ. P. 72(b)*; *see § 21.86[3].*

(n36)Footnote 2. *Fed. R. Civ. P. 72(b)(1) see § 21.88.*

(n37)Footnote 3. *28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(b)(2)*; *see § 21.89.*

(n38)Footnote 4. *Fed. R. Civ. P. 72(b)(3) see § 21.90[2].*

(n39)Footnote 5. *28 U.S.C. § 636(b)(1).*

(n40)Footnote 6. *28 U.S.C. § 636(c)(1).*

(n41)Footnote 7. *Roell v. Withrow, 538 U.S. 580, 585-586, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783 (2003) .*

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PART VI Trial and Judgment
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2-21 Moore's Manual--Federal Practice and Procedure § 21.84

§ 21.84 Adjudication By Magistrate Judge of Prisoner Petitionsn*

[1] Applicability of Prisoner Provision

Under Rule 72(b) and the Magistrates Act, a court may order referral of a petition by a prisoner that challenges conditions of confinement under Section 636(b) of the Federal Magistrates Act. n1 When the court makes such a referral, the magistrate judge's decision is not a final disposition. The magistrate judge must enter a recommended disposition, which may include proposed findings of fact. n2 The magistrate judge's disposition is subject to de novo review by the district court. n3

As used in Rule 72(b) and Section 636(b) of the Magistrates Act, n4 the term "prisoner" is not limited to inmates actually in prison or jail. Parolees are also considered prisoners for purposes of the Act. n5 However, a plaintiff's status as a prisoner when a claim is filed does not, standing alone, authorize referral of the matter to a magistrate judge. The claim must also be related to conditions of confinement. n6 The term "conditions of confinement" for purposes of the Magistrates Act includes challenges to continuing prison conditions and to specific episodes of allegedly unconstitutional conduct. n7 The "conditions" must relate to the type of confinement and health, safety, or punishment matters. n8 It has been held that the term "confinement" includes pretrial detention, as well as sentence to penitentiary. n9

[2] Habeas Corpus Claims Not Covered by Act

Rule 72 does not apply to habeas corpus petitions. n1 These cases, and proceedings to vacate sentences imposed in the federal courts, are governed by special legislation and rules of procedure. n2 These statutes and rules allow a magistrate judge to hold hearings and submit proposed findings of fact and recommendations for disposition, n3 if permitted by local rule or court order. The result is that magistrate judges, if so permitted, may submit proposed findings and recommendations for all aspects of prisoner litigation, a primary aspect of cases filed in the district courts. n4

[3] In Forma Pauperis Petitions

A prisoner will typically file a "conditions of confinement" petition pro se and accompany the petition with another

petition to proceed in forma pauperis. A district judge may refer an in forma pauperis petition to a magistrate judge. n1 A magistrate judge may enter an order granting a petition to proceed in forma pauperis, n2 but may not enter an order denying the petition unless the parties have consented to the referral. n3 Thus, if the parties did not consent to the referral and the magistrate judge decides that the petition should be denied, the magistrate judge must make a recommendation to the district judge for a final decision. n4 Furthermore, if a party files timely objections to the magistrate judge's report, de novo review of proposed findings and recommendations is required. n5 A magistrate judge does not have authority to conduct ex parte investigations when considering a petition to proceed in forma pauperis. n6

[4] Jury Trial Rights

If a party to a case challenging conditions of prisoner confinement demands a jury trial, the case may not be heard by a magistrate judge unless the parties consent. n1 However, if a prisoner petition contains conclusory allegations rather than discernible questions of fact, a magistrate judge may hold a hearing to investigate beyond the conclusory allegations and ascertain the legal basis for the claim despite a jury trial demand. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)(1)*.

(n3)Footnote 2. *Fed. R. Civ. P. 72(b)(1)*; *see § 21.88*.

(n4)Footnote 3. *See Fed. R. Civ. P. 72(b)(3)*; *United States v. Rivera Guerrero, 377 F.3d 1064, 1067-1068 (9th Cir. 2004)]* .

(n5)Footnote 4. *28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)(1)*.

(n6)Footnote 5. *Clark v. Poulton, 963 F.2d 1361, 1364-1365 (10th Cir. 1992)* (parolee alleging that parole officer used excessive force).

(n7)Footnote 6. *Roberts v. Manson, 876 F.2d 670, 672 (8th Cir. 1989)* (claim not related to conditions of confinement and not proper referral for magistrate judge where prisoner filed claim against public officials alleging wrongful discharge from employment).

(n8)Footnote 7. *McCarthy v. Bronson, 500 U.S. 136, 139, 111 S. Ct. 1737, 114 L. Ed. 2d 194 (1991)* (definition of conditions of confinement included cases alleging isolated episodes of unconstitutional conduct as well as ongoing situations).

(n9)Footnote 8. *Houghton v. Osborne, 834 F.2d 745, 749-750 (9th Cir. 1987)* .

(n10)Footnote 9. *Clark v. Poulton, 963 F.2d 1361, 1365 (10th Cir. 1992)* .

(n11)Footnote 1. *Cavanaugh v. Kincheloe, 877 F.2d 1443, 1449 (9th Cir. 1989)* (Rule 72(b) not applicable to habeas corpus petitions filed under *28 U.S.C. §§ 2254, 2255* because such claims are governed by specific statutory rules).

(n12)Footnote 2. *Fed. R. Civ. P. 72(b)*, Advisory Committee Note to 1983 Amendments (when magistrate judge is hearing prisoner petitions, Rule 72(b) does not apply but, rather, specific rules relating to proceedings under Sections

2254 and 2255 of Title 28); *see also* R. Gov. Sec. 2254 Cases in U.S. Dist. Cts. 10; R. Gov. Sec. 2255 Proc. in U.S. Dist Cts. 10.

(n13)Footnote 3. *See* R. Gov. Sec. 2254 Cases in U.S. Dist. Cts. 10; R. Gov. Sec. 2255 Proc. in U.S. Dist Cts. 10; *see also 28 U.S.C. § 636(b)(1)(B)* (judge may designate magistrate judge to conduct hearings, including evidentiary hearings and to submit to judge proposed findings of fact and recommendations for disposition by judge of court).

(n14)Footnote 4. *McCarthy v. Bronson, 500 U.S. 136, 139-140, 111 S. Ct. 1737, 114 L. Ed. 2d 194 (1991)* .

(n15)Footnote 1. *Spears v. McCotter, 766 F.2d 179, 180-181 (5th Cir. 1985)* (magistrate judge may be asked to investigate whether prisoner's motion to proceed in forma pauperis should be denied as frivolous where legal contentions lack arguable merit).

(n16)Footnote 2. *Woods v. Dahlberg, 894 F.2d 187, 188 (6th Cir. 1990)* (district judge may refer motion for pauper status to magistrate judge, and magistrate judge may enter order granting such motion).

(n17)Footnote 3. *Tripati v. Rison, 847 F.2d 548, 548 (9th Cir. 1988)* (because denial of motion to proceed in forma pauperis is essentially final judgment, magistrate judge may not enter judgment unless parties consent).

(n18)Footnote 4. *Woods v. Dahlberg, 894 F.2d 187, 188 (6th Cir. 1990)* (denial of motion to proceed in forma pauperis is equivalent of involuntary dismissal and outside of magistrate judge's authority; district judge may refer motion for pauper status to magistrate judge, who may grant status, but denial may only be recommended to district judge).

(n19)Footnote 5. *Woods v. Dahlberg, 894 F.2d 187, 188 (6th Cir. 1990)* .

(n20)Footnote 6. *Gentile v. Missouri Dept. of Corrections & Human Resources, 986 F.2d 214, 217 (8th Cir. 1993)* (personal investigation of case is beyond scope of magistrate judge's function, including conducting interviews with witnesses).

(n21)Footnote 1. *Lovelace v. Dall, 820 F.2d 223, 225-226 (7th Cir. 1987)* (consent must be clear and unambiguous; consent form can constitute necessary consent); *In re Wickline, 796 F.2d 1055, 1058 (8th Cir. 1986)* (to allow jury trial before magistrate judge without consent is clearly inconsistent with Magistrates Act).

(n22)Footnote 2. *Spears v. McCotter, 766 F.2d 179, 180 (5th Cir. 1985)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.85

§ 21.85 Referral of Matter By District Court to Magistrate Judgen*

[1] Discretion of Trial Court to Make Referral

Referral of a case to a magistrate judge is discretionary for the district court, and parties do not have a right to proceed before a magistrate judge. n1 A district court may make referrals to a magistrate judge as a matter of course, for example, by a district court general order, provided that the final authority to decide the matter referred is retained by the district court judge. n2 Unlike trials by consent conducted by a magistrate judge pursuant to Rule 73, n3 referral of pretrial matters to a magistrate judge under Rule 72 does not require the parties' consent. n4 If the parties have executed and filed a consent to a referral to a magistrate judge, Rule 72 does not apply, and the proceedings are governed by Rule 73. n5

[2] Form and Contents of Referral

The district court does not have to make a referral order in writing. n1 However, some courts have stated that written referrals are preferred. n2 The contents of the district judge's referral order may determine the scope of the magistrate judge's authority and the standard of review. n3

Referrals need not be strictly construed by the magistrate judge. For example, if a matter is referred to a magistrate judge for hearing and determination, the magistrate judge may instead decide to issue merely a report and recommendation if it appears that a dispositive order is called for. n4 However, the converse is not true: if a dispositive matter is referred for recommendation, the magistrate judge may not enter an order. n5

Procedural defects in a referral to a magistrate judge may be waived by failure to object; however, jurisdictional defects may not be waived. For example, when the district court made an ambiguous referral, it was procedurally defective and could be waived. n6 For further discussion of waiver of objections, see *§ 21.89[4]*.

[3] Effect of Referral

When the district court makes a referral of a nondispositive pretrial matter, the magistrate judge is authorized to enter a

final order on that matter. n1 However, if the district court makes a referral of a dispositive pretrial matter, the magistrate judge is authorized only to enter proposed findings and a recommendation for disposition. n2 Unlike orders issued pursuant to Rule 72(a), a magistrate judge's decision entered under Rule 72(b) is not final but is merely a recommendation that assists the district judge in making a final decision. n3 For a discussion of the distinction between dispositive and nondispositive matters, see *§ 21.81*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersReferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Good v. Allain, 823 F.2d 64, 66 (5th Cir. 1987)* (failure to assign magistrate judge to case did not infringe on party's right to equal protection).

(n3)Footnote 2. *Mathews v. Weber, 423 U.S. 261, 270-271, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976)* (district court general order required referral of all social security benefit cases for preliminary review by magistrate judge, but district judge retained ultimate decisionmaking authority over matters referred).

(n4)Footnote 3. *Fed. R. Civ. P. 73*.

(n5)Footnote 4. *Jeffrey S. v. State Bd. of Educ., 896 F.2d 507, 511-512 (11th Cir. 1990)* ; *see Fed. R. Civ. P. 72(b)*; *see also Collins v. Foreman, 729 F.2d 108, 116 (2d Cir. 1984)* (parties' consent not necessary condition for references of prison conditions cases for proposed findings of fact and recommendation for disposition).

(n6)Footnote 5. *Fed. R. Civ. P. 73(a)*.

(n7)Footnote 1. *Parker v. Mississippi State Dep't of Pub. Welfare, 811 F.2d 925, 927 n.4 (5th Cir. 1987)* (cases were assigned to magistrate judge without orders of reference pursuant to controlling calendar implemented to reduce backlog of cases).

(n8)Footnote 2. *Parker v. Mississippi State Dep't of Public Welfare, 811 F.2d 925, 928 n.7 (5th Cir. 1987)* (best practice to have court orders of designation or reference in writing); *Archie v. Christian, 808 F.2d 1132, 1137 (5th Cir. 1987)* (order should specify statutory basis of referral).

(n9)Footnote 3. *Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680, 685 (E.D. Pa. 1986)* (if referral so provides, district judge may refer nondispositive motions to magistrate judge for report and recommendation rather than final determination).

(n10)Footnote 4. *Pauley v. United Operating Co., 606 F. Supp. 520, 522-523 (E.D. Mich. 1985)* (after referral of party's violations of discovery orders, magistrate judge to recommend dismissal sanction rather than impose sanctions).

(n11)Footnote 5. *Bennett v. General Caster Serv. of N. Gordon Co., 976 F.2d 995, 997 n.4 (6th Cir. 1992)* (magistrate judge may not enter order dispositive of claim or defense unless parties consented).

(n12)Footnote 6. *Gonzalez v. Rakkas, 846 F. Supp. 229, 233 n.9 (E.D.N.Y. 1994)* (citing **Moore's Federal Practice**).

(n13)Footnote 1. *Fed. R. Civ. P. 72(a)*; *see Unauthorized Practice of Law Comm. v. Gordon, 979 F.2d 11, 13-14 (1st Cir. 1992)* .

(n14)Footnote 2. *Fed. R. Civ. P. 72(b).*

(n15)Footnote 3. *Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 954 (6th Cir. 1985)* (magistrate judge may not rule directly on dispositive pretrial motions).

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2-21 Moore's Manual--Federal Practice and Procedure § 21.86

§ 21.86 Proceedings Held by Magistrate Judge to Determine Referred Mattern*

[1] Motion Required for Disposition by Magistrate Judge

A magistrate judge may not enter an order disposing of an issue on its own initiative. Generally, the magistrate judge may not dispose of an issue that has not been presented by motion, either to the district court or to the magistrate judge, because sua sponte orders are prohibited, n1 and, ultimately, any order or recommendation by the magistrate judge is subject to the objection of the parties and some level of review by the district court. n2 The magistrate judge may set deadlines for filing pretrial motions, n3 in the same way that the district court sets pretrial deadlines under Rule 16. n4 A magistrate judge is not, however, required to hear oral argument on motions. Motions may be decided by the magistrate judge based on briefs alone. n5

[2] Authority for Subpoena

When the district court has made a referral to a magistrate judge to perform pretrial functions, the magistrate judge has the authority to enforce subpoenas, to the same extent that the district judge who ordered the referral has subpoena authority, n1 except that the magistrate judge does not have the power to enforce pretrial orders with the use of civil contempt. A magistrate judge has such power only in cases of trial by consent of the parties. However, a magistrate judge may resort to the enforcement mechanism of sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure. n2 If the magistrate judge's decision is to deny enforcement of an agency subpoena, however, that decision is a dispositive matter which is subject to de novo review by the district court. n3

[3] Conduct of Proceedings

A magistrate judge may hold proceedings to receive evidence and take the testimony of witnesses, and the Federal Rules of Evidence apply to the proceedings before the magistrate judge. n1 If a magistrate judge holds an evidentiary hearing on a pretrial dispositive matter or on a prisoner petition challenging conditions of confinement, a record must be made of the proceedings. n2 A magistrate judge may also hold hearings in habeas corpus proceedings, and a record must be made of those proceedings as well. n3 For a nonevidentiary proceeding, a magistrate judge has discretion to

decide whether a record will be made of nonevidentiary pretrial dispositive matters and on prisoner petitions challenging conditions of confinement. If a party objects to a recommended disposition, the magistrate judge may also determine how much of the record will be transcribed, "unless the district judge otherwise directs." n4 A magistrate judge has discretion to determine whether the proceedings will be recorded by sound recording or by a court reporter. n5

A party objecting to a magistrate judge's recommendations for pretrial disposition or recommendations concerning a prisoner petition challenging conditions of confinement must arrange for a transcription of the record. n6 Although it is not absolutely necessary, it is extremely important for the objecting party to refer to the transcript when making objections; such references are helpful to the district court when reviewing the magistrate judge's order or recommendation, because the objecting party's argument is pinpointed by citation to the record and to case law. It is also helpful for the objection to contain an analysis as to why the magistrate judge's order or recommendation was in error. n7

[4] Contempt

If a person commits an act or conduct that constitutes contempt in a magistrate judge's proceedings regarding a pretrial matter, the magistrate judge has statutory authority to punish the act or conduct through criminal contempt. n1 A magistrate judge has summary criminal contempt authority to punish, by fine or imprisonment, the misbehavior of any person in the magistrate judge's presence that amounts to obstruction of the administration of justice. n2 Penalties that may be imposed by a magistrate judge for criminal contempt are limited by statute to those equivalent to a misdemeanor matter. n3 However, if the magistrate judge believes that a serious contempt has occurred that justifies more serious penalties, the magistrate judge may certify the matter to the district court for the imposition of punishment in the same manner and to the same extent as for a contempt committed before a district judge. n4

In a pretrial matter, the magistrate judge generally does not have the power to enforce orders with the use of civil contempt. A magistrate judge has civil contempt power only in cases of trial by consent of the parties. n5 In pretrial matters, the magistrate judge must certify the matter to the district court for consideration of whether to order civil contempt. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *United States v. Bonanno Org. Crime Family, 119 F.R.D. 625, 626 (E.D.N.Y. 1988)* (magistrate judge's sua sponte order disposing of discovery matter was prematurely issued).

(n3)Footnote 2. *See Vega v. State University of New York Board of Trustees, 67 F. Supp. 2d 324, 339-340* (S.D.N.Y. 1999.

(n4)Footnote 3. *United States v. Bogard, 846 F.2d 563, 567 (9th Cir. 1988)* (magistrate judge properly refused to hear motion made after original and extended deadlines had expired).

(n5)Footnote 4. *Fed. R. Civ. P. 16(b)(2)*; *see* Ch. 18, *Pretrial Conferences; Scheduling; Management.*

(n6)Footnote 5. *Laitram Mach., Inc. v. Carnitech A/S, 878 F. Supp. 65, 67-68 (E.D. La. 1995)* (failure of magistrate judge to conduct oral argument was not denial of due process).

(n7)Footnote 1. *In re San Juan DuPont Plaza Hotel Fire Litig., 117 F.R.D. 30, 32-33 (D.P.R. 1987)* (magistrate judge had authority to enforce subpoena duces tecum issued by another court in multidistrict litigation).

(n8)Footnote 2. *See 28 U.S.C. § 636(e)(4)*; *see also* [4], *below*.

(n9)Footnote 3. *NLRB v. Frazier, 966 F.2d 812, 815-818 (3d Cir. 1992)* (magistrate judge's decision to quash agency subpoena that compelled production of evidence and attendance of witnesses was dispositive).

(n10)Footnote 1. *Fed. R. Evid. 1101*.

(n11)Footnote 2. *Fed. R. Civ. P. 72(b)(1)*.

(n12)Footnote 3. *See* R. Gov. Sec. 2254 Cases in U.S. Dist. Cts. 8(b); R. Gov. Sec. 2255 Proc. in U.S. Dist Cts. 8(b); *see also 28 U.S.C. § 636(b)(1)(B)* (judge may designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to judge proposed findings of fact and recommendations for disposition by judge).

(n13)Footnote 4. *Fed. R. Civ. P. 72(b)(2)*.

(n14)Footnote 5. *Nettles v. Wainwright, 677 F.2d 404, 409 n.5 (5th Cir. 1982)* (sound equipment may be used in all proceedings before magistrate judges).

(n15)Footnote 6. *Fed. R. Civ. P. 72(b)(2)*.

(n16)Footnote 7. *Johnson v. Zema Systems Corp., 170 F.3d 734, 739-740 (7th Cir. 1999)* .

(n17)Footnote 1. *See 28 U.S.C. § 636(e)(1)*.

(n18)Footnote 2. *28 U.S.C. § 636(e)(2)*.

(n19)Footnote 3. *28 U.S.C. § 636(e)(5)*.

(n20)Footnote 4. *28 U.S.C. § 636(e)(6)*.

(n21)Footnote 5. *See 28 U.S.C. § 636(e)(4)*.

(n22)Footnote 6. *See Proctor v. State Government of North Carolina, 830 F.2d 514, 516-522 (4th Cir. 1987)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.87

§ 21.87 Order Issued by Magistrate Judgen*

[1] Authority

A magistrate judge has authority to enter a final order with respect to any nondispositive pretrial matter. n1 Nondipositive matters in a civil case generally are pretrial motions other than motions for: injunctive relief, judgment on the pleadings, summary judgment, certification of class action, dismissal for failure to state a claim upon which relief can be granted, and involuntarily dismissal of action. n1.1 Such an order is effective unless overturned by the district court. n2 If a local rule provides that a magistrate judge's ruling must be reviewed by a district judge, a magistrate judge's order does not become final until the district judge conducts the review. n3 A magistrate judge's order determining a pretrial nondispositive matter must be in writing. n4 An oral order read into the record meets this requirement. n5

[2] Orders of Remand

When a state court action has been removed to federal district court, case precedent is not uniform on the issue of whether a magistrate judge has authority to enter an order remanding the action. Some district courts have held that remand is a "nondispositive matter" that may be determined by a magistrate judge. n1 Other courts have ruled that remand is a dispositive matter and that remand may not be ordered by a magistrate judge, who is restricted to entering proposed findings and recommendations on a motion to remand. n2 Some circuit courts of appeals have declined to express an opinion on the issue. n3

[3] Orders Regarding Attorney's Fees and Costs

A magistrate judge may not enter an order awarding attorney's fees and costs for the entire action--motions for fees and costs are neither pretrial nor nondispositive. n1 A magistrate judge may award fees and costs in a nondispositve pretrial matter, for example, as a sanction for failure to comply with its discovery orders. n2 If a timely objection is filed to the magistrate judge's determination, the district court must review the matter de novo, because a motion for attorney's fees under Rule 72(b) is treated as if it were a dispositive pretrial matter. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesPretrial Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.07 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 72(a)*; *see Unauthorized Practice of Law Comm. v. Gordon, 979 F.2d 11, 13 (1st Cir. 1992)* (magistrate judge had power to remand case for lack of jurisdiction and failure to object to order waived right to appellate review of issue on remand).

(n3)Footnote 1.1. *Boskoff v. Yano, 217 F. Supp. 2d 1077, 1084 (D. Haw. 2001)* .

(n4)Footnote 2. *See 28 U.S.C. § 636(b)(1)(A)*; *see also U.S.W. v. New Jersey Zinc Co., 828 F.2d 1001, 1005 (3d Cir. 1987)* (pursuant to Magistrate's Act, order of magistrate judge is dispositive unless district court takes action to overturn it).

(n5)Footnote 3. *Kimbrell v. Adia, S.A., 834 F. Supp. 1313, 1317 (D. Kan. 1993)* (orders of magistrate judge should not be considered ineffective, advisory, or nonfinal simply because they may be reviewed by district court).

(n6)Footnote 4. *Fed. R. Civ. P. 72(a).*

(n7)Footnote 5. *Fed. R. Civ. P. 72(a)*, Committee Note to 1982 Amendments.

(n8)Footnote 1. *Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 594 F. Supp. 583, 586 (D. Me. 1984)* (magistrate judge's remand order could be overturned by district court under "non dispositive matter" standard as clearly erroneous or contrary to law); *McDonough v. Blue Cross, 131 F.R.D. 467, 472 (W.D. Pa. 1990)* (magistrate judge's final order remanding matter to state court was not clearly erroneous; standard of review proper because remand is nondispositive).

(n9)Footnote 2. *Long v. Lockheed Missiles & Space Co., 783 F. Supp. 249, 250-251 (D.S.C. 1992)* (magistrate judge's order to remand case to state court is equivalent to dispositive dismissal and beyond power of magistrate judge); *Giangola v. Walt Disney World Co., 753 F. Supp. 148, 152 (D.N.J. 1990)* (remand order is dispositive and equivalent to dismissal).

(n10)Footnote 3. *See, e.g., Unauthorized Practice of Law Comm. v. Gordon, 979 F.2d 11, 13 (1st Cir. 1992)* (court noted conflicting case law on validity of remand orders by magistrate judges, but dismissed appeal for lack of jurisdiction).

(n11)Footnote 1. *See Fed. R. Civ. P. 54(d)(2)(D)* (motion for attorney's fees may be referred to magistrate judge for recommended disposition); *see also Rajaratnam v. Moyer, 47 F.3d 922, 923-924 (7th Cir. 1995)* (magistrate judge lacks authority to enter orders for Rule 11 sanctions, and application for attorney's fees may not be characterized as nondispositive); *Massey v. City of Ferndale, 7 F.3d 506, 509-510 (6th Cir. 1993)* (magistrate judge did not have authority to rule on post-dismissal motions for fees and costs).

(n12)Footnote 2. *Grimes v. City and County of San Francisco, 951 F.2d 236, 239-242 (9th Cir. 1991)* (magistrate judge's authority to impose discovery sanctions extended even to proscriptive sanctions designed to compel compliance with discovery order); *Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1465 (10th Cir. 1988)* (magistrate judges have authority to impose attorney's fees as nondispositive discovery sanction; citing **Moore's Federal Practice**).

(n13)Footnote 3. *O'Rourke v. City of Providence, 77 F. Supp. 2d 258, (D.R.I. 1999)* (if timely objection is filed to magistrate judge's determination, district court reviews matter de novo because Federal Rules of Civil Procedure require that motion for attorneys' fees be treated under Rule 72(b) as if it were dispositive pretrial matter); *R.A. v. Department of Children, Youth and Families, 18 F. Supp. 2d 157, 159 (D.R.I. 1998)* (motion for attorney's fees under Rule 72(b) is treated as dispositive pretrial matter); *see Fed. R. Civ. P. 54(d)(2)(D)*.

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART II. MAGISTRATE JUDGES
B. MAGISTRATE JUDGE'S DISPOSITION OF PRETRIAL MATTERS AND PRISONER PETITIONS

2-21 Moore's Manual--Federal Practice and Procedure § 21.88

§ 21.88 Disposition Recommended by Magistrate Judgen*

[1] Content and Form of Recommendation

When, without the consent of the parties, a district court assigns a pretrial matter that is dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement, the magistrate judge must determine the matter and enter into the record a recommendation for disposition, including proposed findings of fact when appropriate. The recommended disposition must be in writing because the clerk is required to mail copies to all parties. n1 If a magistrate judge erroneously enters an order purporting to determine a dispositive matter, a district judge reviewing the order may ignore the form of the decision and treat it as a recommendation. n2 If the district judge does not review the decision and enter a final order, an appellate court must dismiss any subsequent appeal for lack of jurisdiction but may remand the case to the district court for further proceedings. n3

Neither Rule 72 nor the Magistrates Act sets forth specific requirements for the form of a magistrate judge's recommendation on a nondispositive pretrial matter or prisoner petition challenging conditions of confinement. n4 At least one case has held that detailed findings and conclusions are not required, provided that the magistrate judge sets forth sufficient information that the basic requirements of Rule 52(a) are met. n5 Further, local rules may require proposed findings of fact and conclusions of law in strict accordance with Rule 52(a) standards. In jurisdictions that have adopted a waiver rule prohibiting consideration of untimely objections, a magistrate judge's proposed recommendation must notify the parties that objections must be filed within 14 days and that failure to object may bar review. n6

[2] Effect of Recommendation

Rule 72(b) and the Magistrates Act authorize a magistrate judge to enter a recommendation and proposed findings on a pretrial dispositive matter or on a prisoner petition challenging conditions of confinement. n1 Unlike orders issued pursuant to Rule 72(a) regarding nondispositive matters, a magistrate judge's decision on a dispositive matter is not final but is instead a recommendation that assists the district judge in making a final decision. n2 Thus, a magistrate judge's recommendation and proposed findings are not self-operative, even if the parties do not object to the recommendation. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.08 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 72(b)(1).*

(n3)Footnote 2. *Lancer Arabians, Inc. v. Beech Aircraft Corp., 723 F. Supp. 1444, 1445-1446 (M.D. Fla. 1989)* (decision granting motion to strike claim for punitive damages construed as recommendation subject to de novo review).

(n4)Footnote 3. *Bennett v. General Caster Serv. of N. Gordon Co., 976 F.2d 995, 997 (6th Cir. 1992) .*

(n5)Footnote 4. *See 28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(b)(1).*

(n6)Footnote 5. *See EEOC v. K-Mart Corp., 526 F. Supp. 121, 124 (E.D. Mich. 1981) , vacated on other grounds, 694 F.2d 1055 (6th Cir. 1982)* (magistrate judge followed letter and spirit of Rule 52(a) by issuing well reasoned report and recommendation stating exactly why he allowed defendants limited opportunity to depose certain individuals in employment discrimination suit); *see also Fed. R. Civ. P. 52(a).*

(n7)Footnote 6. *Fed. R. Civ. P. 72(a).*

(n8)Footnote 1. *28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(b)(1).*

(n9)Footnote 2. *U.S.W. v. New Jersey Zinc Co., 828 F.2d 1001, 1005 (3d Cir. 1987)* (only when district court adopts and enters order does magistrate judge's proposed recommendation go into effect); *Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 954 (6th Cir. 1985)* (magistrate judge may not rule directly and finally on dispositive pretrial motions).

(n10)Footnote 3. *United States v. Rembert, 694 F. Supp. 163, 167 (W.D.N.C. 1988)* (rulings by magistrate judge on dispositive matters are not self-operating, and are not considered valid until entered by district court on appropriate consideration, regardless of fact that parties did not object to order).

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PART VI Trial and Judgment
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2-21 Moore's Manual--Federal Practice and Procedure § 21.89

§ 21.89 Objection of Party to Order or Recommended Dispositionn*

[1] Contents of Objection

Within 14 days after being served with a copy of the magistrate judge's order or recommended disposition, n1 a party may serve and file objections to the order or recommended disposition. n2 In the objection, the party must specify the issue in the magistrate judge's order or report and recommendation to which the party is making the objection. n3 Provided that the party's objections identify with specificity each of the conclusions to which he or she objects, it is not necessary for the party to identify how the magistrate judge erred. From objections that specify issues, the district court judge knows which issues he or she is to review, and such objections are sufficiently specific to satisfy Rule 72(b). n4 Thus, "specific" objection, as used in Rule 72, requires a party only to specify each issue for which review is sought and not the factual or legal basis of the objection. This interpretation is supported by the section of the Magistrates Act which defines the powers and jurisdiction of the magistrate judges. The relevant provision reads: "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." n5

[2] Time Limit for Making Objection

A party that wants to object to a magistrate judge's pretrial order or recommended disposition must file an objection within 14 days after being served with a copy of the order or recommendation. n1 To meet the timeliness requirement, strict compliance with formalities is not required in every case. For example, when a pro se party sent a letter expressing disapproval of a magistrate judge's decision, it was treated as an objection when it was submitted within the requisite time and reasonably informed the district judge that the decision was being contested. n2

The 14-day time limit for filing an objection to a magistrate judge's pretrial order or recommendation is governed by the Rule 6 provisions for computation of time periods. n3 Thus, the three day additional time period authorized by Rule 6(d) applies when service is performed in any manner other than by hand delivery, n4 which is applicable to nondispositive orders entered under Rule 72(a), n5 as well as to findings and recommendations on dispositive matters entered under Rule 72(b). n6 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

[3] Effect of Timely Objection

When a party files a timely objection to a magistrate judge's pretrial recommendation or order, the objection must be considered by a district judge on its review of the recommendation or order. n1 However, the filing of an objection does not automatically stay operation of the order. n2 Decisions by a magistrate judge on nondispositive matters are effective unless overturned by a district judge. n3 If a party files an objection to a magistrate judge's recommended disposition of a pretrial dispositive matter or prisoner petition challenging conditions of confinement, the district judge must make a de novo review of the recommended disposition. n4

[4] Failure to File Timely Objection

[a] Failure to Object Generally Constitutes Waiver

A party that fails to file a timely objection to a magistrate judge's order regarding a nondispositive matter, n1 or to a recommended disposition regarding a dispositive matter, n2 may be deemed to have waived the right to review of the magistrate judge's decision. n3 Rule 72(b) was initially drafted with a clear waiver rule: failure to make timely objection to the magistrate judge's report prior to its adoption by the district judge may constitute a waiver of the right to appellate review of the district judge's order. n4 Rule 72(a) was amended in 1991 to provide that a party may not assign as error a defect in the magistrate judge's order to which objection was not timely made. n5 The purpose of this amendment was to assure that objections to magistrate judge's orders that are not timely made will not be considered by the district court. n6 The language of the 1991 amendment has been construed to deprive an appellate court of jurisdiction over challenges to a magistrate judge's order if an objection is not timely filed. n7

[b] Exception to Waiver Rule for Exceptional Circumstances

The Supreme Court has approved the adoption by the lower courts of a waiver rule conditioning review of a recommendation on the filing of an objection. A court of appeals may exercise its supervisory powers to establish a rule that failure to file objections to the magistrate judge's report waives the right to appeal the district court's judgment. n8 Courts are not required to adopt such a rule. n9 Thus, even in the absence of a timely objection, some courts nevertheless permit appellate review in exceptional circumstances. n10 "Exceptional circumstances" are narrowly defined to include the following elements: (1) when public interest requires review of the unraised issue; (2) when manifest injustice would result from the failure to consider the new issue; or (3) when the alleged error was fundamental and resulted in a highly prejudicial error. n11 Some courts have also held that the court may, in its discretion, consider untimely objections to a magistrate judge's recommended disposition. n12 A court may also excuse a default "in the interests of justice." n13 Finally, issues concerning a magistrate judge's jurisdiction are not waived by a party's failure to file a timely objection. n14

[c] Exception to Waiver Rule for Lack of Notice

When it upheld the constitutionality of a waiver rule, the Supreme Court incorporated a requirement of notice of the consequences of failure to file objections and an opportunity to seek an extension of time for filing objections. n15 Some courts have ruled that if a party has not been informed of the time period for filing objections, and that failure to file objections may preclude review, the waiver rule will not be applied. n16 One circuit has held that notice of the consequences of failure to object is not required if the party who failed to object is represented by an attorney. While the circuit court recognized that pro se litigants may be entitled to notice from the court, it concluded that the court has no obligation to advise lawyers of the deadline for filing objections. n17 Acceptable methods of providing the required notice vary; they may include sending a letter with a copy of Rule 72, or giving notice in a magistrate judge's report and recommendation. n18

As noted above, some circuits have adopted specific requirements for notifying a pro se litigant of the consequences of failure to object. n19 For example, one circuit has held that a pro se litigant's failure to object to a magistrate judge's

report may not operate as a waiver of appellate review unless the document informs the litigant of the consequences of failure to object. n20 In another circuit, the court held that waiver did not apply, because even though the magistrate judge's recommendation advised the pro se litigant of the time limit for filing objections and the consequences of failure to object, the notice was nevertheless inadequate in that the notice did not inform the pro se litigant of the proper place for filing objections and also failed to cite the applicable statute or rule. n21

[d] Application of Waiver Rule

The waiver rule has not been applied uniformly in all circuits. Some circuits apply a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions. n22 Other circuits have held that the waiver precludes only review of factual determinations. n23 In some circuits, failure to raise objections waives the party's right to review both in the district court and on appeal. n24 Furthermore, in some circuits, only those issues that the parties raised in their objections will be reviewed by the district court and on appeal; a litigant may not present new issues to the district judge or seek de novo review on appeal of an argument never raised in the objections. n25

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See* [2] *below*.

(n3)Footnote 2. *See 28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(b)(2)*.

(n4)Footnote 3. *Willis v. Caterpillar Incorporated, 199 F.3d 902, 904 (7th Cir. 2000)* (plaintiff waived right to appeal denial of her motion to transfer action due to improper venue when plaintiff failed to raise that issue in her objections to magistrate judge's report and recommendation).

(n5)Footnote 4. *Johnson v. Zema Systems Corp., 170 F.3d 734, 739-740 (7th Cir. 1999)* .

(n6)Footnote 5. *28 U.S.C. § 636(b)(1)(C)*.

(n7)Footnote 1. *28 U.S.C. § 636(b)(1)(C)*; *Fed. R. Civ. P. 72(b)(2)*.

(n8)Footnote 2. *Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1175-1176 (9th Cir. 1996)* (document filed by pro se party treated as objection even though it failed to explicitly request review of magistrate judge's decision).

(n9)Footnote 3. *See IUE AFL CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)* (construing former time periods).

(n10)Footnote 4. *See Fed. R. Civ. P. 6(d)*.

(n11)Footnote 5. *Mullins v. Hinkle, 953 F. Supp. 744, 747-748 (S.D. W. Va. 1997)* (3 days added for service by mail; construing former time periods).

(n12)Footnote 6. CNPq Conselho Nacional de Desenvolvimento Cientifico e *CNPQ Conselho Nacional De Desenvolvimento Cientifico E Technologico v. Inter Trade, Inc., 50 F.3d 56, 57 (D.C. Cir. 1995)* (3 days added for service by mail).

(n13)Footnote 1. *Fed. R. Civ. P. 72(a), (b)(3)*; *In re Application & Affidavit for a Search Warrant, 923 F.2d 324, 326 n.2 (4th Cir. 1991)* (magistrate judge's denial of motion to unseal search warrant affidavit properly reconsidered by district court).

(n14)Footnote 2. *Fed. R. Civ. P. 72(a)*; *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 124 F.R.D. 75, 79 (S.D.N.Y. 1989)* (automatic stay would encourage frivolous appeals and stifle magistrate judge system).

(n15)Footnote 3. *Kimbrell v. Adia, S.A., 834 F. Supp. 1313, 1317 (D. Kan. 1993)* (decisions by magistrate judges should not be considered ineffective, advisory, or nonfinal merely because they may be reviewed by district court).

(n16)Footnote 4. *Fed. R. Civ. P. 72(b)(3)*.

(n17)Footnote 1. *Fed. R. Civ. P. 72(a)*.

(n18)Footnote 2. *Fed. R. Civ. P. 72(a)*.

(n19)Footnote 3. *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 706 (10th Cir. 1998)* .

(n20)Footnote 4. *Fed. R. Civ. P. 72(b)*, Advisory Committee Note to 1982 Amendments.

(n21)Footnote 5. *See Fed. R. Civ. P. 72(a)*.

(n22)Footnote 6. *Fed. R. Civ. P. 72(a)*, Advisory Committee Note to 1991 Amendments.

(n23)Footnote 7. *Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160, 1171 (D.C. Cir. 1995)* (failure to object to discovery rulings below precluded raising objections on appeal; untimely objections deprive court of jurisdiction).

(n24)Footnote 8. *Thomas v. Arn, 474 U.S. 140, 141, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* .

(n25)Footnote 9. *Henderson v. Carlson, 812 F.2d 874, 877 (3d Cir. 1987)* (Magistrates Act neither precludes nor mandates rule that failure to object is waiver of appellate review).

(n26)Footnote 10. *Wirsching v. Colorado, 360 F.3d 1191, 1198 (10th Cir. 2004)* (interests of justice required review despite waiver rule).

(n27)Footnote 11. *Continental Casualty Co. v. Dominick D'Andrea, Inc., 150 F.3d 245, 253 (3d Cir. 1998)* .

(n28)Footnote 12. *Rodriguez v. Bowen, 857 F.2d 275, 276-277 (5th Cir. 1988)* (district court conducted de novo review because it had discretion to allow late filing of objection to magistrate judge's report).

(n29)Footnote 13. *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* (appellate court may excuse failure to file objections in interest of justice; waiver rule is not jurisdictional).

(n30)Footnote 14. *Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)* (waiver rule applies to factual and legal questions, but not to issues regarding magistrate judge's jurisdiction).

(n31)Footnote 15. *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* (magistrate judge's recommendation contained notice of waiver rule).

(n32)Footnote 16. *Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990)* (notice should be included in magistrate judge's report and recommendation).

(n33)Footnote 17. *Wells v. Shriners Hosp., 109 F.3d 198, 200 (4th Cir. 1997)* (construing former time periods).

(n34)Footnote 18. *Snyder v. Ridenour, 889 F.2d 1363, 1365-1366 (4th Cir. 1989)* (notice was adequate when contained in letter with copy of Rule 72 attached).

(n35)Footnote 19. *Wells v. Shriners Hosp., 109 F.3d 198, 200 (4th Cir. 1997)* (while pro se litigants may be entitled to notice on need to file timely objections, rule is different for counseled parties).

(n36)Footnote 20. *Moore v. United States, 950 F.2d 656, 659 n.7 (10th Cir. 1991)* (notice of time period for filing objections and consequences of failure to object required to be given to pro se litigants via magistrate judge's order, or else waiver rule applicable).

(n37)Footnote 21. *Haney v. Addison, 175 F.3d 1217, 1219-1220 (10th Cir. 1999)* .

(n38)Footnote 22. *Herd v. Tapia, 2009 U.S. App. LEXIS 27117, at *5-*6 (10th Cir. 2009)* ; *Jones v. Salt Lake County, 503 F.3d 1147, 1152 (10th Cir. 2007)* ; *United States v. Hernandez Rivas, 348 F.3d 595, 598 (7th Cir. 2003)* .

(n39)Footnote 23. *See Douglass v. United Servs. Auto. Ass'n, 65 F.3d 452, 456 (5th Cir. 1995)* ; *Lorin Corp. v. Goto & Co., Ltd., 700 F.2d 1202, 1207 (8th Cir. 1983)* .

(n40)Footnote 24. *Wells v. Shriners Hosp., 109 F.3d 198, 199 (4th Cir. 1997)* (failure to file timely objections cuts off all further consideration).

(n41)Footnote 25. *Aikens v. Shalala, 956 F. Supp. 14, 19 (D.D.C. 1997)* (litigant is not permitted to present new initiatives to district judge).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
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2-21 Moore's Manual--Federal Practice and Procedure § 21.90

§ 21.90 Review of Magistrate Judge's Decision by District Courtn*

[1] Review of Orders Regarding Nondispositive Matters

[a] Authority of District Court to Review

A district judge that has referred a matter to a magistrate judge has inherent power to review the magistrate judge's decision unless a statute or court rule authorizes the magistrate judge to make a final decision. n1 Therefore, because Rule 72(a) authorizes a magistrate judge to enter a final order on a nondispositive pretrial matter, a district judge does not have inherent authority to review such an order unless an objection is filed. If a timely objection is filed, review is required. n2

If a party fails to present timely arguments or evidentiary materials to a magistrate judge prior to the magistrate judge's ruling and deprives the magistrate judge of the opportunity to rectify any alleged errors, the party waives the right to present those arguments or materials to the district court on appeal from the magistrate judge's nondispositive order. n3 In addition to its authority to undertake a de novo review, a district court has the option of recommitting a matter to the magistrate judge. n4

[b] Standard of Review

When reviewing a magistrate judge's order regarding a nondispositive matter to which objections are made by a party, the district court must modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. n5 Conversely, if the magistrate judge's order is neither clearly erroneous nor contrary to law, it must be affirmed. n6 For example, motions for disqualification of counsel have been found to be nondispositive and are therefore subject to the more deferential "clearly erroneous" standard of review. n7 Orders on discovery matters are generally considered to be nondispositive and subject to the clearly erroneous standard. n8 Similarly, the imposition of sanctions is reviewable under the clearly erroneous standard unless the sanction itself may be considered dispositive of a claim. n9 The district court applies the clearly erroneous or contrary to law standard to evidentiary rulings. n10 A magistrate judge's finding is contrary to law if the magistrate judge has misinterpreted or misapplied applicable law. n11

There is a split among the circuits as to whether a district court, in its de novo review of the magistrate judge's report and recommendation, must consider evidence or arguments that were not submitted to the magistrate judge. Several circuits have concluded that a district court has discretion to consider such additional evidence. n12 On the other hand, the Fourth Circuit has ruled that a district court is required to consider all new arguments directed to any issue to which proper objection was made, regardless of whether those arguments were raised before the magistrate judge. n13

[2] Review of Recommended Disposition of Dispositive Matter

[a] Review When Party Has Filed Objection

A district judge must make a de novo review of any portion of a magistrate judge's recommended disposition to which a party has filed a timely objection. n1 De novo determination means that the district court starts over to make the determination made by the magistrate judge, n2 independent of the magistrate judge's conclusions. This means that the district court gives no presumption of validity to the magistrate judge's findings or recommendations. The district judge is free to substitute his or her own view for that of the magistrate judge without making any initial finding. n3 The district court may make its determination based on the record of the proceeding before the magistrate judge n4 or may make the determination after taking additional evidence. n5

Even though a party has 14 days within which to object to a magistrate judge's recommendation, n6 entry of an order adopting a recommendation before expiration of the 14 day period does not require automatic reversal, even though the best practice would be for the court to wait until the expiration of the objection period before entering an order. n7 Computation of the 14 day requirement of Rule 72(b) is governed by Rule 6. n8 Thus, when service is by mail, there is a three day additional period allotted for objections to recommendations made by the magistrate judge under Rule 72. n9 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

The time period for timely objections under Rule 72(b) is subject to the provisions of Rule 6, n10 which controls the computation of time in federal litigation, including the extension of time for good cause or excusable neglect under Rule 6(b)(1), and to the provision of Rule 6(d) for the addition of 3 days to the period prescribed or allowed in the rules when service is accomplished by any means other than by hand delivery. n11 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

[b] Review When No Objections Are Filed

If no objections to a magistrate judge's recommended disposition are filed, the district judge need not give a de novo review to the disposition. n13 In these circumstances, the district court may adopt the recommendation without conducting any review n14 or the district court may review the recommendation under any standard it deems appropriate. n15

Not all circuits follow the same rule. In the Ninth Circuit, conclusions of law must be reviewed de novo, even if no objection is made. n16 In the Eighth Circuit, a district court has discretion to decide for itself whether a magistrate judge's recommendation is correct, regardless of whether an objection is filed. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.11 (Matthew Bender 3d ed.)

(n2)Footnote 1. *In re Application & Affidavit for a Search Warrant, 923 F.2d 324, 326 n.2 (4th Cir. 1991)* (magistrate judge's denial of motion to unseal search warrant affidavit properly reconsidered by district court).

(n3)Footnote 2. *U.S.W. v. New Jersey Zinc Co., 828 F.2d 1001, 1008 (3d Cir. 1987)* (although district court is obligated to review pretrial ruling of magistrate judge on objection, such review will not automatically occur absent objection).

(n4)Footnote 3. *Tenen v. Winter, 15 F. Supp. 2d 270, 272 (W.D.N.Y. 1998)* (on review of magistrate judge's report and recommendation, district court normally will not consider legal arguments or evidentiary materials that could have been but were not presented to magistrate judge).

(n5)Footnote 4. *Paper Systems Inc. v. Mitsubishi Corp., 181 F.R.D. 611, 614 (E.D. Wis. 1998)* (when parties submitted legal arguments to district court based on evidence that did not exist when magistrate judge made its recommendation, district court recommitted motion to magistrate judge with instructions to consider new evidence submitted to district court).

(n6)Footnote 5. *Fed. R. Civ. P. 72(a)*; *see Vega v. State University of New York Board of Trustees, 67 F. Supp. 2d 324, 339-340* (S.D.N.Y. 1999. In contrast, dispositive rulings are reviewed by the district court de novo. *See Fed. R. Civ. P. 72(b)*; *see also* [2][a], *below*.

(n7)Footnote 6. *Grimes v. San Francisco, 951 F.2d 236, 241 (9th Cir. 1991)* .

(n8)Footnote 7. *Weeks Stevedoring Co. v. Raymond Int'l Builders, Inc., 174 F.R.D. 301, 303 (S.D.N.Y. 1997)* (magistrate judge's order was not clearly erroneous).

(n9)Footnote 8. *Federal Election Comm. v. Christian Coalition, 178 F.R.D. 456, 459-460 (E.D. Va. 1998)* (finding no evidence that discovery order at issue was dispositive, district court reviewed magistrate judge's decision under deferential clearly erroneous or contrary to law standard).

(n10)Footnote 9. *Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462-1463 (10th Cir. 1988)* (Rule 37 sanction striking pleading with prejudice constitutes dispositive ruling reviewed de novo).

(n11)Footnote 10. *See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1276 (11th Cir. 2008)* .

(n12)Footnote 11. *Gunter v. Ridgewood Energy Corp., 32 F. Supp. 2d 162, 164 (D.N.J. 1998)* .

(n13)Footnote 12. *Freeman v. County of Bexar, 142 F.3d 848, 852 (5th Cir. 1998)* (district court had discretion to consider new evidence when it reviewed magistrate judge's decision granting summary judgment, and court's mistaken belief that it was precluded from considering additional evidence justified reversal of judgment).

(n14)Footnote 13. *United States v. George, 971 F.2d 1113, 1118 (4th Cir. 1992)* .

(n15)Footnote 1. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(a)*; *Maldonado-Maldonado v. Pantasia Mfg. Corp., 956 F. Supp. 73, 75 (D.P.R. 1997)* (since plaintiff objected in detail to magistrate judge's recommendation, district court was required to review de novo entire controversy).

(n16)Footnote 2. *Cespedes v. Coughlin, 956 F. Supp. 454, 463 (S.D.N.Y. 1997)* (de novo review means reconsideration afresh by the district judge); *see Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 152 (D.R.I. 1999)* (in reviewing magistrate judge's recommendations, district court must actually review and weigh evidence presented to magistrate judge and not merely rely on magistrate judge's report and recommendation; district court may accept, reject, or modify recommended decision, receive further evidence, or recommit matter to magistrate judge with instructions).

(n17)Footnote 3. *Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 904 (3d Cir. 1992)* (district judge owes

no deference to magistrate judge's findings and conclusions).

(n18)Footnote 4. *Rajaratnam v. Moyer, 47 F.3d 922, 924 n.8 (7th Cir. 1995)* (de novo determination does not require new hearing before district judge).

(n19)Footnote 5. *Fed. R. Civ. P. 72(b)*; *Crown Heights Jewish Community Council v. Fischer, 63 F. Supp. 2d 231, 235 (E.D.N.Y. 1999)* (when making reviewing magistrate judge's report and recommendation de novo, district court has discretion to accept or decline to accept supplemental evidence, but party is not permitted to wait until report and recommendation have been issued to submit evidence that party had in its possession but chose not to submit).

(n20)Footnote 6. *Fed. R. Civ. P. 72(a), (b)(2).*

(n21)Footnote 7. *See McGill v. Goff, 17 F.3d 729, 731 (5th Cir. 1994)* (construing former time periods).

(n22)Footnote 8. *Huff v. Cruz Contr. Corp., 643 F. Supp. 2d 344, 346 (S.D.N.Y. 2009)* (construing former time periods).

(n23)Footnote 9. *See Fed. R. Civ. P. 5(b)(2)(C)-(F)*; *Fed. R. Civ. P. 6(d).*

(n24)Footnote 10. *See Fed. R. Civ. P. 6*; *Huff v. Cruz Contr. Corp., 643 F. Supp. 2d 344, 346 (S.D.N.Y. 2009)* .

(n25)Footnote 11. *See Fed. R. Civ. P. 6(d)*; *see also Fed. R. Civ. P. 5(b)(2)(B) (F).*

(n26)Footnote 13. *Thomas v. Arn, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)* (1986) (Magistrate's Act does not require review when no objections are filed).

(n27)Footnote 14. *Cespedes v. Coughlin, 956 F. Supp. 454, 463 (S.D.N.Y. 1997)* (district court may adopt those portions of magistrate judge's recommendations to which no specific objection is made, as long as those sections are not clearly erroneous).

(n28)Footnote 15. *Palmer v. Apfel, 995 F. Supp. 549, 552 n.4 (E.D. Pa. 1998)* (district court is not required to conduct de novo review of magistrate judge's report and recommendation on dispositive matter because plaintiff failed to submit "specific objections" as required by Rule 72(b)).

(n29)Footnote 16. *Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989)* (failure to object relieves trial court only of obligation to review factual findings).

(n30)Footnote 17. *Lorin Corp. v. Goto & Co., Ltd., 700 F.2d 1202, 1206 (8th Cir. 1983)* .

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
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B. MAGISTRATE JUDGE'S DISPOSITION OF PRETRIAL MATTERS AND PRISONER PETITIONS

2-21 Moore's Manual--Federal Practice and Procedure § 21.91

§ 21.91 Review of Magistrate Judge's Decision by Appellate Courtn*

A magistrate judge does not have authority to issue a dispositive ruling on a motion to certify an order for interlocutory appeal if the parties did not consent to referral of the motion to the magistrate judge. n1 When a magistrate judge's order vacates a judgment, leaving the case pending for further determination, the order is interlocutory and not immediately appealable. n2 A party may not seek review of a magistrate judge's pretrial recommendations and findings, because such decisions are not final judgments; before such an appeal may be taken, the district court must review the recommendations and either adopt or reject them. n3 Furthermore, objection to the recommendations in the district court is a prerequisite to an appeal to the circuit court because failure to file a timely objection to a magistrate judge's order or recommendation may waive appellate review of the decision. n4 For further discussion of waiver, see *§ 21.89[4].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 72.12 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Vitols v. Citizens Banking Co., 984 F.2d 168, 169-170 (6th Cir. 1993)* (referral did not give magistrate judge plenary jurisdiction when parties did not consent to certify matter for appeal).

(n3)Footnote 2. *Parks v. Collins, 761 F.2d 1101, 1104 (5th Cir. 1985)* (order of magistrate judge granting motion to set aside default judgment was not final decision).

(n4)Footnote 3. *United States v. Flaherty, 668 F.2d 566, 585 (1st Cir. 1981)* (only Article III court may enter final judgment, not magistrate judge); *see Massey v. City of Ferndale, 7 F.3d 506, 510 (6th Cir. 1993)* (magistrate judge did not have authority to rule on postdismissal motions for sanctions, fees, and costs).

(n5)Footnote 4. *Garita Hotel v. Ponce Federal Bank, F.S.B., 954 F. Supp. 438, 447 (D.P.R. 1996)* (party's right to review is waived both in district court and on appeal).

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2-21 Moore's Manual--Federal Practice and Procedure §§ 21.92through 21.99

[Reserved]

§§ 21.92[Reserved]

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2-21 Moore's Manual--Federal Practice and Procedure § 21.100

§ 21.100 Magistrate Judge's Authority to Try Case by Consentn*

The Federal Magistrate Act of 1979 expanded the power of full-time magistrate judges and part-time magistrate judges who serve as full-time judicial officers by authorizing them to conduct any or all of the proceedings in a jury or nonjury civil matter and even to order the entry of judgment in the case, provided that such magistrate judges have been specially designated to do so by the district court, and provided they are acting with the consent of the parties. n1 The Act also gives the same powers to part-time magistrate judges who are not serving as full-time judicial officers, if additional requirements are met: n2 the consent of the parties is given pursuant to the parties' specific written request, the magistrate judge meets specified bar membership requirements, n3 and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. n4

If the requirements of Section 636(c)(1) are met, the magistrate judge has jurisdiction to hear and determine the case. Once the magistrate judge has jurisdiction under Section 636(c)(1), jurisdiction continues according to the procedures specified in Section 636(c)(2) and Rule 73. n4.1 The intent of Congress in giving magistrate judges case dispositive civil authority was to relieve the district courts' caseload, and thus improve access to the courts for all groups, while still preserving every litigant's right to insist on trial before an Article III district judge. n4.2 The constitutionality of the procedure has been upheld for all of the following reasons: consent of the parties is required; magistrate judges are appointed by the district court; the district court that referred the matter to the magistrate judge may vacate the reference despite the parties' consent; and the parties have a right of appeal. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 73.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(c)(1)*; *see Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775,*

781 (2003) .

(n3)Footnote 2. *28 U.S.C. § 636(c)(1)*.

(n4)Footnote 3. *See 28 U.S.C. § 636(b)(1)*.

(n5)Footnote 4. *28 U.S.C. § 636(c)(1)*.

(n6)Footnote 4.1. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783-784 (2003)* ; *see 28 U.S.C. § 636(c)*; *Fed. R. Civ. P. 73(a), (b)*; *see also § 21.101[4]*.

(n7)Footnote 4.2. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 785 (2003)* .

(n8)Footnote 5. *Wharton-Thomas v. United States, 721 F.2d 922, 929-930 (3d Cir. 1983)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.101

§ 21.101 Consent Requiredn*

[1] Type of Proceeding That Requires Consent

Parties may consent to complete trial of a case by a magistrate judge in any and all civil cases, whether the claims arise under a specific statute or common law, n1 and whether the case is a diversity or a federal question case. n2 A magistrate judge may conduct a civil trial and enter a final judgment whether a case is a jury or nonjury case, provided that the magistrate judge has the consent of all parties and has been designated by the district court or courts where he or she serves. n2.1

If a party demands a jury trial, a magistrate judge may not preside over the trial unless consent has been obtained from all parties; the request for a jury does not constitute consent. n3 Furthermore, the presence of an Article III judge at a trial conducted by a magistrate judge does not obviate the need for consent. n4 Pretrial matters, however, may be referred to a magistrate judge without the parties' consent. n5 For discussion of referral of pretrial matters, see Subpart B, Magistrate Judge's Disposition of Pretrial Matters and Prisoner Petitions. n5.1

[2] Consent Required of Parties

[a] Unanimous Consent Required

A magistrate judge may hold a trial and enter a final judgment in a case only if consent to the trial is unanimous. n1 Unless each party consents, the case may not be tried by a magistrate judge. n2 Each party's consent need not be in the same form, however. Provided that the consent is unanimous, some party's consent may be in writing, and the remaining parties' consent may be by implication. n2.1 Thus, consent of the parties need not take any particular form, so long as it is explicit and on the record. n2.2

Consent by all parties is significant because a party to a civil action in the district court has a right to have the case heard by an Article III judge; n3 because magistrate judges are not Article III judges, consent to reference of a case to a magistrate judge in effect waives the constitutional right to have an Article III judge conduct the trial and enter judgment. n4 The existence of these constitutional rights means that consent to trial before a magistrate judge must be

voluntary n5 and may be withheld without any adverse consequences, n6 other than delay of trial. n7 If not all of the parties consent to have the case tried by a magistrate judge, neither the magistrate judge nor the district judge may be informed of a particular party's refusal. n8

[b] Effect of New Parties to Action

If a new party is substituted for an original party, the new party is bound by the consent of the original party. n9 In a similar way, a client is bound by his or her attorney's consent to trial before a magistrate judge pursuant to *28 U.S.C. § 636(c)*, and a subsequent substitution for the original attorney may not withdraw the original attorney's consent. n10 On the other hand, if a party is added to the case after the original parties to the action have consented to trial before a magistrate judge, consent of the newly added party is also required. n10.1 If the new parties do not consent, their claims either may be severed, n11 or the reference to the magistrate judge may be vacated. n12

If a motion to intervene is filed in a case that has been referred to a magistrate judge, the intervenor must consent to referral of the motion to the magistrate judge, even though the original parties consented to the referral. n13 If the intervenor's consent is not obtained, the magistrate judge's decision on the motion to intervene is considered as a recommendation subject to de novo review by the district court, n14 rather than as a final judgment directly appealable to the circuit court of appeals. n15 If intervenor status is granted, the intervenor must also consent to have the case tried by a magistrate judge. n16

[3] Form of Consent

[a] Consent Sufficient to Give Jurisdiction to Magistrate Judge

The United States Supreme Court has held that there are two aspects to the statutory scheme set up by Congress for magistrate judge trials by consent of the parties. n1 The first is jurisdictional and requires that the magistrate judge be designated by the district court to conduct the trial and order the entry of judgment in the matter n2 and that the parties consent to the trial by the magistrate judge. The second aspect requires that the court record the consent of the parties following the procedure specified in the Magistrate Act and federal rules; n3 the form of consent for the second aspect is covered in [b], *below*.

The Supreme Court held that there are two distinct types of jurisdictional consent for trial by a magistrate judge. First, when the magistrate judge is a full-time magistrate judge or a part-time magistrate judge who serves as a full-time judicial officer, the consent of the parties may either be express or implied by the parties' conduct. Thus, if all the parties make general appearances before the magistrate judge at the trial of the matter, after they have been told of their right to be tried by a district judge, their conduct supplies the consent necessary for the civil jurisdiction under Section 636(c)(1) for trial heard by a full time magistrate judge or part-time United States magistrate judge who serves as a full-time judicial officer. n4 In this regard, a general appearance means an overt act by which a person submits himself or herself to a court's jurisdiction, rather than for the sole purpose of objecting to the court's jurisdiction. n5

However, the required consent is more strict for the second type of jurisdictional consent: if the trial is to be held by a part-time magistrate judge who does not serve as a full-time judicial officer, the parties consent is not valid unless the consent is made by specific written request. n6

[b] Consent Procedure

28 U.S.C. Section 636(c)(2) and *Rule 73 of the Federal Rules of Civil Procedure* establish the procedures the district court must follow once a magistrate judge is designated and has received consent under Section 636(c)(1) to exercise civil jurisdiction and preside over an entire trial. n7 The clerk of the court must notify the parties at the time the action is filed of the availability of a magistrate judge to exercise jurisdiction and preside over the entire trial. n8 Within the time required by local rule, the decision of the parties must be communicated to the clerk of court. n9 Rule 73(b) specifies

that the parties' election of a magistrate judge must be memorialized in a joint form of consent or separate forms of consent setting forth their election. n10 Neither the magistrate judge nor the district judge may be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge. n11 The Supreme Court has noted that this procedure envisions advance, written consent communicated to the clerk alone in order to preserve the confidentiality of a party's choice, in the interest of protecting an objecting party against any possible prejudice at the magistrate judge's hands later in the proceeding. n12

If one or more parties withholds consent, the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge but must also advise the parties that they are free to withhold consent without adverse substantive consequences. n13 The court may advise the parties of procedural consequences, however, such as the possibility that withholding consent may delay the trial. n14

Although these consent procedures under Section 636(c)(2) and Rule 73 are by no means just advisory, and district courts are bound to adhere strictly to the procedures, the text and structure of the statutory language as a whole means that a defect in the procedures is not jurisdictional, provided that the parties have in fact voluntarily consented, and despite a procedural defect, the express or implied consent of the parties n15 allows a magistrate judge to enter a final appealable judgment of the district court. n16

[4] Effect of Failure to Obtain Consent

As discussed in [3], *above*, the Supreme Court has held that there are two types of parties' consent required to give a magistrate judge the power to conduct a complete trial and enter a final order in a case: jurisdictional and procedural. If the parties' consent is not in the appropriate form sufficient for jurisdictional consent, any judgment entered by the magistrate judge is void. n1 On the other hand, if the district court does not strictly adhere to the procedures, the defect in the procedures is not jurisdictional and the magistrate judge may enter a final appealable judgment of the district court if the magistrate judge has the requisite express or implied jurisdictional consent of the parties. n2 If parties have given consent to proceed before a magistrate judge, and the case is consolidated with a case in which consent has not been given, the judgment is effective only with respect to parties who have consented. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 73.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 508 (1st Cir. 1975)* (magistrate judge could constitutionally and statutorily try case with consent of parties regarding claims for willful and intentional infringement of common-law trademark and unfair competition).

(n3)Footnote 2. *See, e.g., Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037* .

(n4)Footnote 2.1. *28 U.S.C. § 636(c)(1)*; *see Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 781 (2003)* .

(n5)Footnote 3. *Wimmer v. Cook, 774 F.2d 68, 73-74 (4th Cir. 1985)* .

(n6)Footnote 4. *Fowler v. Jones, 899 F.2d 1088, 1093 (11th Cir. 1990)* (consent of parties required even though magistrate judge conducted trial and was speaking for district judge because district judge had lost his voice).

(n7)Footnote 5. *See Fed. R. Civ. P. 72(a).*

(n8)Footnote 5.1. *See § 21.80* et seq.

(n9)Footnote 1. *Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995)* (because each litigant has a constitutional right to district judge, consent to magistrate judge must be unanimous).

(n10)Footnote 2. *Mark I, Inc. v. Gruber, 38 F.3d 369, 370-371 (7th Cir. 1994)* (consent not valid when party was not provided with consent form pursuant to local rule); *Hajek v. Burlington N. R.R. Co., 186 F.3d 1105, 1108 (9th Cir. 1999)* (no clear and unambiguous consent by "all" parties to magistrate judge to enter judgment in former railroad employee's suit against two employer railroads when employee and one railroad expressly stated that they had no objection to referring case to magistrate judge but second railroad stated only that "at this time, the Defendant does not believe any special procedures are required or are appropriate").

(n11)Footnote 2.1. *Roell v. Withrow, 538 U.S. 580, 590, 123 S. Ct. 1696, 155 L. Ed. 2d 775 (2003)* ; *see* [3], *below* (discussion of consent by implication).

(n12)Footnote 2.2. *Hatcher v. Consolidated City of Indianapolis, 323 F.3d 513, 516 (7th Cir. 2003)* .

(n13)Footnote 3. *Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993)* ; *see U.S. Const. Art. III, § 2, Cl. 1.*

(n14)Footnote 4. *Carter v. Sea Land Servs. Inc., 816 F.2d. 1018, 1021 (5th Cir. 1987)* (constitutional rights, such as, right to trial before Article III judge may be waived).

(n15)Footnote 5. *Adams v. Heckler, 794 F.2d 303, 307 (7th Cir. 1986)* (under facts of this case consent given was explicit, not coercive, and valid even though magistrate judge had expectation that party would sign consent form during hearing on pending motions).

(n16)Footnote 6. *Fed. R. Civ. P. 72(b)(2)*; *see 28 U.S.C. § 636(c)(2).*

(n17)Footnote 7. *Fed. R. Civ. P. 73(b)*, Advisory Committee Note to 1993 Amendments.

(n18)Footnote 8. *Fed. R. Civ. P. 73(b)*, Advisory Committee Note to 1982 Amendments.

(n19)Footnote 9. *Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995)* (successor takes case as he or she finds it, without any change of status of case).

(n20)Footnote 10. *See Frank v. County of Hudson, 962 F. Supp. 41, 43-44 (D.N.J. 1997)* .

(n21)Footnote 10.1. *Mark I, Inc. v. Gruber, 38 F.3d 369, 370 (7th Cir. 1994)* (unless new party also consents, entire proceeding before magistrate judge may be set aside).

(n22)Footnote 11. *Guess v. Chenault, 108 F.R.D. 446, 448-449 (N.D. Ind. 1985)* (claim severed where newly added party did not consent to jurisdiction of magistrate judge).

(n23)Footnote 12. *Murret v. Kenner, 894 F.2d 693, 694-695 (5th Cir. 1990)* (district court correctly vacated grant of trial to magistrate judge because failure of all parties to consent was extraordinary circumstance).

(n24)Footnote 13. *New York Chinese TV Programs, Inc. v. U.E. Enters., 996 F.2d 21, 25 (2d Cir. 1993)* .

(n25)Footnote 14. *See Fed. R. Civ. P. 72(b)(3).*

(n26)Footnote 15. *New York Chinese TV Programs, Inc. v. U.E. Enters., 996 F.2d 21, 25 (2d Cir. 1993)* , *aff'd on other grounds, 43 F.3d 1458 (2d Cir. 1994)* (magistrate judge's decision treated as recommendation).

(n27)Footnote 16. *Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 24 F.3d 958, 960 (7th Cir. 1994)* .

(n28)Footnote 1. *Roell v. Withrow, 538 U.S. 580, 590, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 786 (2003)* .

(n29)Footnote 2. *See 28 U.S.C. § 636(c)(1)*; § 21.102.

(n30)Footnote 3. *See 28 U.S.C. § 636(c)(2)*; *Fed. R. Civ. P. 73(a)*.

(n31)Footnote 4. *Roell v. Withrow, 538 U.S. 580, 591, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 787, 2003 U.S. LEXIS 3427 (2003)* (implied consent is sufficient for magistrate judge's jurisdiction when litigant or counsel was made aware of need for consent and right to refuse it and still voluntarily appeared to try case before magistrate judge); *see 28 U.S.C. § 636(c)(1)*.

(n32)Footnote 5. *Roell v. Withrow, 538 U.S. 580, 587 n.3, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 784 n.3 (2003)* .

(n33)Footnote 6. *28 U.S.C. § 636(c)(1)*; *see Roell v. Withrow, 538 U.S. 580, 587, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 784 (2003)* .

(n34)Footnote 7. *Roell v. Withrow, 538 U.S. 580, 589, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 784 (2003)* .

(n35)Footnote 8. *28 U.S.C. § 636(c)(2)*.

(n36)Footnote 9. *28 U.S.C. § 636(c)(2)*.

(n37)Footnote 10. *Fed. R. Civ. P. 73(b)(1)*; *see* Fed. R. Civ. P. Appendix Form 81.

(n38)Footnote 11. *Fed. R. Civ. P. 73(b)(1)*.

(n39)Footnote 12. *See Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783-784 (2003)* ; *see also 28 U.S.C. § 636(c)(2)* (rules of court for the reference of civil matters to magistrate judges must include procedures to protect the voluntariness of parties' consent).

(n40)Footnote 13. *28 U.S.C. § 636(c)(2)*.

(n41)Footnote 14. *Fed. R. Civ. P. 73(b)*, Committee Note to 1993 Amendments.

(n42)Footnote 15. *See* [a], *above*.

(n43)Footnote 16. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 786-787 (2003)* .

(n44)Footnote 1. *Aldrich v. Bowen, 130 F.3d 1364, 1365 (9th Cir. 1997)* (magistrate judge had no jurisdiction to hear case, and judgment was nullity because record contained no written consent of parties).

(n45)Footnote 2. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 786-787 (2003)* .

(n46)Footnote 3. *EEOC v. West La. Health Servs., Inc., 959 F.2d 1277, 1279-1280 (5th Cir. 1992)* .

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2-21 Moore's Manual--Federal Practice and Procedure § 21.102

§ 21.102 District Court's Referral to Magistrate Judgen*

[1] Order of Referral Required

In addition to requiring the consent of the parties, n1 the magistrate judge must be specially designated to exercise such jurisdiction by the district court or courts the magistrate judge serves. n1.1 A part-time magistrate judge who is not a full-time judicial officer may obtain such jurisdiction only if such magistrate judge has been a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands for at least five years, n1.2 and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available. n1.3 This means that a magistrate judge may not enter a final judgment in a civil action unless an order of referral has been signed by an Article III judge. n2 The Appendix to the Federal Rules of Civil Procedure contains a recommended order of reference form. n3 The district court may use the form, provided that the parties have consented to magistrate-judge jurisdiction. n4 Once a valid referral has been made by the district court, the magistrate judge has full authority over all dispositive motions, conduct of the trial, and entry of final judgment for the claims covered by the referral, all without district court review. n4.1 However, a referral to a magistrate judge does not authorize the magistrate judge to issue rulings in subsequent actions between the parties. n5

[2] District Court's Order Vacating Referral to Magistrate Judge

After an effective referral has been made to a magistrate judge to conduct a trial and enter final judgment for the claims covered by the referral, a party does not have an absolute right to withdraw consent that was the basis of the referral to the magistrate judge. n1 However, the district court may vacate a referral of a civil matter to a magistrate judge, either for good cause on its own motion, or for extraordinary circumstances shown by any party. n2 Factors the court should consider include the following: whether the consent was voluntary and uncoerced; presence of delay; the movant's good faith; any bias or prejudice of magistrate judge; prejudice to the parties; any inconvenience to the court and witnesses; whether the movant is acting pro se; and whether requiring the party to maintain consent would serve the interests of justice. n3 The burden of establishing extraordinary circumstances to justify vacating the referral is on the party asserting the extraordinary circumstances. n3.1

Failure to comply with the requirements for obtaining a valid consent also constitutes sufficient grounds for vacating an order of reference, for example, when all of the parties did not consent to the reference. n4 When consent by parties to trial to a magistrate judge has been vacated, the magistrate judge lacks authority to try the case and enter judgment, n5 but may nevertheless hear evidence and submit recommended findings to the district judge. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & AppealCivil ProcedureJudicial OfficersReferences

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 73.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See § 21.101.*

(n3)Footnote 1.1. *28 U.S.C. § 636(c)(1).*

(n4)Footnote 1.2. *See 28 U.S.C. § 631(b)(1).*

(n5)Footnote 1.3. *28 U.S.C. § 636(c)(1).*

(n6)Footnote 2. *Hajek v. Burlington N. R.R. Co., 186 F.3d 1105, 1108 (9th Cir. 1999)* ; *Silberstein v. Silberstein, 859 F.2d 40, 42 (7th Cir. 1988)* .

(n7)Footnote 3. Fed. R. Civ. P. App. Form 34A.

(n8)Footnote 4. *King v. Ionization Intl., Inc., 825 F.2d 1180, 1185-1186 (7th Cir. 1987)* .

(n9)Footnote 4.1. *Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783 (2003)* .

(n10)Footnote 5. *Parks v. Collins, 761 F.2d 1101, 1102 (5th Cir. 1985)* (magistrate judge's jurisdiction over original action did not extend to subsequent garnishment action and absence of order referring motion to magistrate judge precluded jurisdiction by magistrate judge in that subsequent action).

(n11)Footnote 1. *Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993)* (magistrate judge properly proceeded with trial when party did not provide grounds for withdrawal).

(n12)Footnote 2. *See 28 U.S.C. § 631(c)(4).*

(n13)Footnote 3. *Carter v. Sea Land Servs. Inc., 816 F.2d. 1018, 1021 (5th Cir. 1987)* .

(n14)Footnote 3.1. *Manion v. American Airlines, Inc., 251 F. Supp. 2d 171, 173 (D.D.C. 2003)* .

(n15)Footnote 4. *Murret v. Kenner, 894 F.2d 693, 695 n.4 (5th Cir. 1990)* .

(n16)Footnote 5. *Sockwell v. Phelps, 906 F.2d 1096, 1099 (5th Cir. 1990)* .

(n17)Footnote 6. *McCarthy v. Bronson, 906 F.2d 835, 839 (2d Cir. 1990)* , *aff'd on other grounds, 500 U.S. 136 (1991)* (consent of parties was not required for magistrate judge to hear evidence and recommend findings to district judge).

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PART VI Trial and Judgment
CHAPTER 21 MASTERS AND MAGISTRATE JUDGES
PART II. MAGISTRATE JUDGES
C. MAGISTRATE JUDGE'S TRIAL OF CIVIL CASE BY CONSENT OF PARTIES

2-21 Moore's Manual--Federal Practice and Procedure § 21.103

§ 21.103 Magistrate Judge's Conduct of Trial By Consentn*

[1] Proceedings Before Magistrate Judge

Because magistrate judges are not Article III judges, the jurisdiction of a magistrate judge is limited to that specifically created by statute. n1 When all parties consent, the Magistrates Act authorizes a specially designated magistrate judge to exercise the jurisdiction of the district court in a civil matter. n2 However, even though the parties must consent to a magistrate judge's exercise of district court jurisdiction, the consent itself does not confer jurisdiction on the court. n3 In other words, the limitations placed on the district court's subject matter jurisdiction, as set by the Constitution or by statute, may not be waived by agreement of the parties. n4 When the parties give valid consent to trial before a magistrate judge, the consent includes authority for the magistrate judge to conduct any or all proceedings in a jury or non-jury civil matter. The magistrate judge has full power over all dispositive motions, conduct of any trial, and entry of final judgment, all without district court review. n5 Thus, the magistrate judge sits in lieu of a district judge. n6 This includes the authority to conduct the following proceedings: (1) presiding over pretrial matters, such as, pretrial conferences and discovery, (2) motion practice, including dispositive motions, such as, motions for summary judgment, and (3) trial of the case itself. n7

The Federal Rules of Civil Procedure apply to the case. n7.1 The Federal Rules of Evidence also apply to proceedings before magistrate judges. n8 The magistrate judge must ensure that a record is made of the trial by consent. n9 The magistrate judge has discretion to determine whether the proceedings will be recorded by a court reporter, electronic sound equipment, or other means specified in Judicial Conference guidelines. n10

[2] Contempt

By statute, United States magistrate judges have specified authority to order contempt within the territorial jurisdiction prescribed by their appointment. n1 In any civil case in which a United States magistrate judge presides with the consent of the parties under Section 636(c), the magistrate judge may exercise the same civil contempt authority as if a district court judge were conducting the proceeding. n2 In such cases, the party seeking civil contempt has the initial burden of proving, by clear and convincing evidence, that the alleged contemnor has violated an order of the magistrate judge. The burden then shifts to the alleged contemnor to establish that the violation occurred because of the

contemnor's inability to comply with the order. However, a mere assertion of present inability to comply is insufficient to avoid a civil contempt finding. Rather, an alleged contemnor must establish: (1) why the alleged contemnor was unable to comply, with a categorical and detailed explanation; (2) that the inability to comply was not self-induced; and (3) the alleged contemnor's good faith reasonable efforts to comply. n3

In addition to civil contempt authority, a magistrate judge presiding with the consent of the parties has the authority to punish, by fine, imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. n4 The magistrate judge also has the power to punish summarily by fine or imprisonment, or both, any contempt of the authority of the magistrate judge that constitutes misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. n5 Finally, if the magistrate judge believes the conduct of a person constitutes serious criminal contempt, the magistrate judge may certify the matter to the district court for the imposition of punishment in the same manner, and to the same extent, as for a contempt committed before a district judge. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 73.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Roberts v. Manson, 876 F.2d 670, 671 (8th Cir. 1989)* .

(n3)Footnote 2. *28 U.S.C. § 636(c)(1).*

(n4)Footnote 3. *Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1040 (7th Cir. 1984)* (consent allows magistrate judge to exercise jurisdiction granted by statute).

(n5)Footnote 4. *American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S. Ct. 534, 95 L. Ed. 702 (1951)* .

(n6)Footnote 5. *28 U.S.C. § 636(c)(1)*; *see Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783 (2003)* .

(n7)Footnote 6. *Fed. R. Civ. P. 73(a)*, Advisory Committee Note to 1982 Amendments.

(n8)Footnote 7. *See, e.g., DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 508 (1st Cir. 1975)* .

(n9)Footnote 7.1. *28 U.S.C. § 636(d)*; *see 28 U.S.C. § 2072* (Rules Enabling Act).

(n10)Footnote 8. *Fed. R. Evid. 1101(a).*

(n11)Footnote 9. *Fed. R. Civ. P. 73(a).*

(n12)Footnote 10. *28 U.S.C. § 636(c)(5).*

(n13)Footnote 1. *28 U.S.C. § 636(e)(1).*

(n14)Footnote 2. *28 U.S.C. § 636(e)(4).*

(n15)Footnote 3. *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing, 230 F. Supp. 2d 963, 969 (E.D. Mo. 2002)* .

(n16)Footnote 4. *28 U.S.C. § 636(e)(3)*.

(n17)Footnote 5. *28 U.S.C. § 636(e)(2)*.

(n18)Footnote 6. *28 U.S.C. § 636(e)(6)*.

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2-21 Moore's Manual--Federal Practice and Procedure § 21.104

§ 21.104 Appeal of Magistrate Judge's Judgmentn*

A judgment entered by a magistrate judge who has exercised civil jurisdiction by consent of the parties is treated as a final judgment of the district court and is appealable in the same manner as an appeal from any other judgment of a district court. n1 Furthermore, in the circuit court of appeal, the appeal from a trial to the magistrate judge is subject to the same procedures and standards governing appeals from district court judgments. n2 This rule differs from nonconsensual referrals of pretrial matters under Section 636(b)(1), n2.1 in which case the district court is free to do as it sees fit with the magistrate judge's recommendations. The Magistrates Act also preserves a party's right to seek review in the Supreme Court. n3

Prior to abrogation of the provision by the Supreme Court effective December 1, 1997, parties were permitted, at the time a case was referred for trial to a magistrate judge, to consent to appeal on the record to a district judge. n4 This appellate option was eliminated by the Federal Courts Improvement Act of 1996. Appeals from judgments of magistrate judges may now be taken only to the appropriate circuit court of appeals, and any parties' designation of the district court as the appellate forum was superseded retroactively by the statute repealing the right to make such a designation. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 14 *Moore's Federal Practice,* § 73.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 636(c)(3)*; *see Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775, 783 (2003)* .

(n3)Footnote 2. *Fed. R. Civ. P. 73(c)*, Committee Note to 1982 Amendments.

(n4)Footnote 2.1. See *28 U.S.C. § 636(b)(1)*.

(n5)Footnote 3. *28 U.S.C. § 636(c)(3)*.

(n6)Footnote 4. *See* former *Fed. R. Civ. P. 73(d)*.

(n7)Footnote 5. *Williams v. General Elec. Capital Auto Lease, Inc., 159 F.3d 266, 270 (7th Cir. 1998)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury

3-22 Moore's Manual--Federal Practice and Procedure 22.syn

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CHAPTER 22 Trial by Jury
PART I. RIGHT TO JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.01

§ 22.01 Seventh Amendment Right to Jury Trialn*

[1] Nature and Purpose of Seventh Amendment Right

Amendment VII of the United States Constitution preserves the right of a party to have claims at common law decided by a jury trial. n1 It provides that no fact decided by a jury may be reexamined in any federal court except according to the rules of the common law. n2 The *Seventh Amendment* itself did not create a right to jury trial, but preserved that right in the federal courts as it existed prior to ratification of the Amendment. n3 The right to a jury trial that was preserved by the *Seventh Amendment* is a fundamental constitutional right, n4 and the right is held in the highest legal regard as are all of the *Bill of Rights*. n5 The Supreme Court has stated that the continuation of the jury as a fact finding entity is of such importance and occupies such an established tool in our jurisprudence that any attempt at curtailment of the right to a jury trial should be scrutinized with the utmost care. n6

The strong federal policy in favor of jury trials requires that in questionable cases a court should decide in favor of the right to a jury trial. Thus, the right to a jury trial must be liberally construed. n7 The court's discretion regarding the right is very limited and must be exercised to preserve a jury trial whenever possible. n8 The right to a jury trial may not be curtailed merely because of time constraints, concerns over the congestion of the federal docket, n9 or increases in the expense of litigation. n10

[2] Seventh Amendment Right Restricted to Common-Law Suits

The *Seventh Amendment* applies only to suits at common law. n1 The common law referred to in the Amendment is the common law as of 1791, when the Amendment was adopted. Thus, the *Seventh Amendment* applies to all common-law forms of action recognized in 1791. n2 There is a three-pronged test for determining whether a suit is one "at common law" within this amendment: whether (1) the issue is legal rather than equitable under the custom of courts of law at the time; (2) the remedy is legal; and (3) the issue is triable to a jury, given the jurors' practical abilities and limitations. n3 An action for a tort such as personal injury or fraud is an action at law in which a party is entitled to a jury trial. An action at law is one in which the parties are litigating the questions of liability and the extent of the injury by an assessment of damages, and a party is entitled to have a jury properly determine the questions. n4 Another typical case at law contesting liability and damages issues required to be decided by a jury is an action for breach of contract. n5

The fact that the *Seventh Amendment* applies to common-law forms of action that were recognized in 1791 does not mean that the Amendment applies only to such forms of action. Thus, the *Seventh Amendment* right to a jury trial is also applicable to newly created rights of a legal nature, if the new right is of the type that could have been enforced in a common-law suit under the common-law principles of 1791. n6 In this regard, to determine whether the *Seventh Amendment* right to a jury trial applies to a particular claim created after 1791, the court considers what is known as the "historical test." n7 Under this test, there is a right to jury trial if: (1) the claim for relief at issue is analogous to a claim that was a legal (as opposed to equitable) matter in 1791, and (2) a jury decision at trial is necessary to preserve the substance of the common-law right as it existed in 1791. n8

[3] Exclusion of Certain Claims from Right to Jury Trial

[a] Equitable Claims n*

Prior to the adoption of the *Seventh Amendment*, a jury trial was available in suits brought in the English law courts, but not in the English equitable courts. Under the current federal rules, a jury trial is required in suits that are analogous to English suits at common law but not in suits that are analogous to English equity cases. n1 In general, legal remedies traditionally involve money damages while equitable remedies are typically coercive and enforceable directly against the person or thing to which they are directed. n2 Usually, monetary claims for relief, such as claims for actual or punitive damages are legal in nature, rather than equitable. n3 However, when a monetary claim is made in a context historically allowed in equity rather than at law, there is no right to a jury trial. n4 For example, a claim for restitution is equitable in nature, although a party making it may be requesting monetary relief. In this regard, a party does not have a right to a jury trial for a claim for disgorgement of improper profits. n5 In diversity cases, even though the substantive rights asserted in a claim arise under state law, n6 the characterization of that state-created claim as either legal or equitable for purposes of whether a right to jury trial exists is determined by federal law. n7

Examples of claims that are traditionally considered equitable and, therefore, triable to a court without a jury include claims such as the following: a claim for rescission or reformation of a contract or other instrument; n8 a claim for specific performance; n9 a claim for injunctive relief; n10 and a claim to pierce the corporate veil to allow for liability on an individual basis. n11

If a party or parties has made both legal and equitable claims in the same action, the court must preserve the *Seventh Amendment* right to jury trial by first trying the legal claims to the jury, or by simultaneously trying the legal claims with the equitable claims. Then, if there are any common questions of fact, the court must apply the jury's common factual findings to the court's decision on the equitable claims. n12

[b] Admiralty Claims n*

If a case or claim is within the admiralty jurisdiction of the federal courts, there is no constitutional right of trial by jury, n13 even if the claim is of a type typically tried to a jury, such as an action for personal injury. n14 Historically, actions for personal injury brought in the federal admiralty jurisdiction under general maritime law have not entitled the injured plaintiff to a jury trial, unless the claimant establishes an independent jurisdictional basis for such a trial. n15 Furthermore, *Federal Rule of Civil Procedure 38(e)* expressly states that the rules are not to be construed to create a right to a jury trial of issues in an admiralty or maritime claim within the meaning of *Federal Rule of Civil Procedure 9(h)*. n16 Consequently, when a claimant designates a claim as one in admiralty under Rule 9(h)(1), or when the claim is only cognizable in admiralty, whether so designated by the plaintiff or not, there is no constitutional jury trial right as to that claim. n17

Even though there is generally no constitutional right to a jury trial in admiralty cases, the plaintiff has a right to a jury trial when expressly provided by statute. Thus, for example, the Jones Act gives an injured seaman or the personal representative of a deceased seaman the right to maintain an action for damages at law with a right of trial by jury. n18

However, the Jones Act does not confer the right to demand a jury trial on the defendant, n19 and the plaintiff may withdraw a previous jury demand without the defendant's consent. n20

In another example, the "saving to suitors" clause of the admiralty and maritime jurisdiction statute n21 allows a claimant to bring an action at law rather than under admiralty or maritime, provided that the requisite diversity and jurisdictional amount are present. n22 Suits that would otherwise be entitled to jury trials, but that arise in a maritime context may, therefore, be brought in state court or in federal court under the court's diversity jurisdiction. n23 Also, a defendant in an admiralty case is entitled under the *Seventh Amendment* and the "saving to suitors" clause to a jury trial of its compulsory counterclaims, when such a counterclaim is based on the non-admiralty jurisdictional ground of diversity of citizenship. n24

If a party properly joins a legal claim with an admiralty claim, the party may be entitled to a jury trial of all claims. Thus, for example, if a claim at law and a claim in admiralty arise out of a single accident, they may be combined in a single complaint for damages, and the plaintiff is entitled to a jury trial. n25

[c] Administrative Cases n*

Generally, the *Seventh Amendment* does not apply to administrative proceedings, because as noted by the Supreme Court, jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with an administrative agency's efficient enforcement of regulations. n26 The Supreme Court has also held that when Congress creates new statutory public rights (as opposed to private rights), n27 it may assign their adjudication to an administrative agency, and that jury trials would be incompatible with administrative enforcement. n28 Furthermore, the fact that a monetary award may be made by the administrative agency does not make the case a suit at common law for jury trial purposes, or the equivalent of such a suit. Thus, an award of back pay made by the National Labor Relations Board, as authorized under the Act, was not a violation of the defendant employer's *Seventh Amendment* rights. n29

[4] Courts Subject to Seventh Amendment n*

The *Seventh Amendment* applies only to United States federal courts located in the United States, the District of Columbia, and in the United States Territories. n1 Although it does not apply in state court proceedings, n2 it does apply when federal courts determine state claims, n3 even if the same claim would not entitle the party to a jury trial in state court. n4

While the *Seventh Amendment* applies to proceedings in federal court, it does not apply to all federal court proceedings. Thus, for purposes of the Amendment, courts of the United States do not include military adjudicatory proceedings, n5 or tax court. n6 On the other hand jury trials are available under limited circumstances in bankruptcy courts. Thus, under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress placed a number of types of proceedings under the jurisdiction of the bankruptcy court, n7 but did not specifically authorize bankruptcy courts to preside over jury trials. Consequently, the courts of appeal have split on whether jury trials may be held in bankruptcy courts. n8 The 1984 Act does provide that if the right to a jury trial applies in a proceeding that may be heard by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties. n9

[5] Seventh Amendment Procedural Considerations n*

[a] Judge's Authority Over Questions of Law

The *Seventh Amendment* right to a jury trial generally does not mean that the jury is allowed to decide matters related to procedure or practice. n1 Therefore, even though many procedural mechanisms in litigation may have the effect of limiting or even diminishing the jury's choices, they are constitutionally permissible, provided that the court adheres to

the standards specified in the Federal Rules of Civil Procedure and formed by court decisions that limit the authority of the court to encroach on the province of the jury. Thus, the substance of the right of trial by jury, as guaranteed by the *Seventh Amendment*, means a trial to a jury presided over by a judge with authority to rule on questions of law. n2 The province of the jury is to determine disputed questions of fact, and the jury trial right does not extend to issues of law. n3 However, if an issue of procedure is intertwined with the substantive rights of a party on the merits of the case, the right to jury is applicable to the issue. n4

[b] Subject Matter Jurisdiction

[i] Diversity Cases

A defendant may present the defense of a lack of subject matter or personal jurisdiction in the answer or by motion before trial. n5 Consequently, the issue may arise whether the jury should decide facts related to jurisdiction. For example, the question of whether there is diversity jurisdiction may depend on contested facts such as the location of a party's domicile n6 or principal place of business. n7 Since in diversity cases the type of factual jurisdictional issues that may arise are clearly separate from the factual issues that may arise on the merits of the case, the jurisdictional fact issues concern exclusively the limits of the judicial power of the federal courts under Article III of the Constitution. For this reason, courts have consistently held that the court must decide the factual question of diversity jurisdiction; the court may not refer the question to a jury. n8

Courts have also generally held that the trial court should not dismiss before trial a case in which jurisdiction is predicated on a minimum amount in controversy n9 for lack of the required jurisdictional amount if the claim is for an unliquidated sum. n10 Furthermore, the court should not dismiss an issue regarding the amount in controversy when it is inseparable from the merits of the case. n11 The test for the amount in controversy is not the amount ultimately recovered, but the amount claimed by the plaintiff in good faith. n12

[ii] Federal Question Cases

Although the factual issue of whether diversity jurisdiction exists is a question for the court, n13 for cases arising under the Constitution, laws and treaties of the United States, n14 the determination of federal question jurisdiction is complicated by the interaction between jurisdictional facts and facts that go to the merits of the case. Thus, when the determination of federal question jurisdiction depends on a determination of the merits, a district court may not dismiss the case for lack of jurisdiction without first trying the merits. In such circumstances, the court must retain jurisdiction and proceed to trial. n15 A summary dismissal in such a case is a violation of the parties' *Seventh Amendment* rights. n16

In actions under the antitrust laws when there must be a showing of conspiracy, effect on commerce, and damages, courts have noted that a safe practice is not to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue. n17 In another antitrust case, the Fifth Circuit held that while the trial court could, under appropriate circumstances, decide the jurisdictional question in advance of trial under Rule 12(d), the court could not do so when the factual and jurisdictional issues are intermeshed. n18 However, dismissal for lack of subject matter jurisdiction has in other antitrust cases been held to be a proper exercise of the court's authority, and not a violation of the *Seventh Amendment*. n19

Under the Jones Act, the plaintiff's qualification as a "seaman" is a question for the jury, even though a finding that the plaintiff lacked seaman status would go to the court's jurisdiction to hear the case. n20 In a civil rights actions under section 1983, however, the court may determine, on a motion to dismiss for lack of subject matter jurisdiction, whether there has been sufficient involvement by state officials under color of state law. n21

[c] Personal Jurisdiction

Personal jurisdiction issues may also involve jury right issues, because the question of whether service has been properly made pursuant to a state's long arm statute may decide an ultimate issue in the merits of the case. For example, if jurisdiction over the person of the defendant is predicated on the commission of a tort within the state, or the commission of a tort outside the state having impact within the state, the court in deciding the jurisdictional issue, should not determine that the acts alleged in the complaint were not tortious, because that would resolving the question of negligence, which probably would be the central disputed issue in the case in chief. n22 One court has noted the conflict between the possible prejudice of denying the defendants a determination on the service issue before they were put to the expense of a complete trial, on one hand, and the prejudice to the plaintiff in foreclosing contested issues on the merits without a jury, on the other hand. As a compromise, the court ordered the parties to submit affidavits on the issue of the alleged tortious acts, and required the plaintiff to identify the persons and acts alleged. After considering the affidavits, the court stated that it would decide after a hearing whether the issue would be held for the trial on the merits. n23

[d] Venue

The issue of where proper venue is located is generally separate from the merits, and may be disposed of as a preliminary matter by the court on motion under Rule 12. The court's determination generally does not implicate *Seventh Amendment* rights. However, in the unlikely event that the issue of venue is intermeshed with the merits of the case, the court may be required to submit the matter to the jury. n24

[e] Choice of Law

If the case involves an issue of the choice of law to be applied, it may be necessary to decide where the situs of defendant's alleged acts occurred. For example, choice of law may determine whether the plaintiff has a cause of action, n25 or whether the court should grant dismissal on the grounds of forum non conveniens. n26 If the facts regarding choice of law are not intermeshed with the merits, the court may determine the issue. n27 On the other hand, if the issue is factually intermeshed with the merits of the case, and its resolution by the court would deprive a party of trial on the merits, it has been held that the question should be tried to the jury. n28

[f] Default

Under Rule 55, the clerk may enter judgment by default against a defendant (other than an infant or incompetent) who has failed to appear, when the plaintiff's claim is for a sum certain, or for a sum which by computation may be made certain. n29 In all other cases, the plaintiff may obtain a default by application to the court. If it is necessary to take an account, determine the amount of damages, establish the truth of any allegation by evidence, or make an investigation of any other matter, the court may conduct hearings or order references as it deems proper. In so doing, the court must accord a right of trial by jury to the parties when and as required by the statutes of the United States. n30 Thus, Rule 55 requires a jury trial on the amount of damages after default when there is a statutory jury trial right. However, the rule does not preserve the right to a jury trial after default based on the *Seventh Amendment*, and the courts have held that there is no constitutional jury trial right on the assessment of damages after a default. Even if a jury demand was duly made prior to a default, in a proper case in which legal issues were present, neither party has a constitutional right to a jury trial of the damages issue after the default. n31 While there is no constitutional right to a jury trial, several courts have held that it is nevertheless within the discretion of the trial court to grant a jury trial as to damages after a default judgment has been entered. n32

[g] Joined Parties

[i] Interpleader

Before the Federal Rules of Civil Procedure merged law and equity, interpleader actions lay only in equity, and therefore parties had no right to a jury even on issues that otherwise would have been tried to a jury. n33 This position

continued until after the merger; then cases adopted the position that while there is no jury trial right in the first stage of interpleader in which the stakeholder shows entitlement to discharge; in the second stage, in which claims are made against the stake, the courts held that parties are entitled to a jury trial of legal issues, but not equitable issues. n34 Thus, interpleader should be viewed primarily as a device for the joinder of parties and claims which justice and judicial economy demand be tried together, and the device should not work to sacrifice a jury right available if the causes were tried separately. n35

[ii] Intervention

Once a party has qualified for the right to intervene under the provisions of Rule 24, n36 the intervenor has a right to a jury trial on any legal claim the intervenor makes. In a common example, an insurer that is permitted to intervene in a tort action against its insured after the insured entered into an agreement with the plaintiff, is entitled to demand a jury trial. n37 For purposes of determining the timeliness of a jury demand, the answer to an intervenor's complaint is considered the last pleading directed to the triable issues under Rule 38(b)(1). If an intervenor makes a demand within 14 days of service of that answer, the intervenor is entitled to a jury trial, n38 even though the right may previously have been waived by the original parties with respect to their original pleadings in the litigation, because they failed to make a timely demand after service of those pleadings. n38.1

[iii] Class Actions

Generally, class action plaintiffs have a *Seventh Amendment* right to obtain a jury trial on any legal issues they present. n39 Before the Federal Rules of Civil Procedure merged law and equity, class actions were generally considered a device of equity, and there was no right to a jury even on issues that might otherwise have been triable to a jury. n40 However, with the adoption of the Federal Rules of Civil Procedure and the merger of law and equity, there is no longer any procedural obstacle to a jury trial of legal rights, regardless of how a party may have acquired standing to assert those rights. n41 Furthermore, Rule 23 n42 was expressly intended by the drafters to be applicable to all civil actions whether formerly designated as legal or equitable. n43 Therefore, if a claim in a class action is legal, there is a right to a jury trial; n44 and when a claim is equitable, there is no jury trial right. n45

[iv] Shareholder Derivative Actions

Shareholder derivative suits were previously tried to the court, because shareholders had no legal right to bring suit, and the threshold question of standing was under the equitable jurisdiction of the court. After the merger of law and equity, a court may rule on the standing issue and then permit the underlying cause of action to be tried to a jury, if the underlying cause of action would be afforded that right. n46 Rule 23.1 provides that a derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. n47 The issue of standing to sue continues to be considered equitable in nature, and a stockholder is not entitled to a jury trial of that issue. n48

[h] Summary Judgment n*

A party is entitled to a jury trial only when there are triable issues of fact. n49 Consequently, if no genuine issue of material fact exists, the court may grant summary judgment, n50 and in doing so does not infringe on the parties' right to a jury trial. n51 However if the court grants partial summary judgment, specifying facts deemed not to be in dispute, the right to a jury trial remains with respect to facts that remain in issue, and is unaffected by the summary judgment order. n52

[i] Court's Instructions to Jury and Commentary on Evidence n*

The court's instructions to the jury, either before or after argument, n53 do not constitute a usurpation of the jury's function. n54 Furthermore, the fact that a trial court has had to correct an erroneous instruction, and has allowed the jury

to deliberate a second time on the plaintiff's claim for compensatory damages, was not a violation of the defendants' *Seventh Amendment* right to a jury trial. n55

While Rule 51 does not expressly provide that the federal judge may comment on the evidence, that right was recognized by the common law and has been preserved to the present. n56 Thus, the trial judge is not limited to instructions of an abstract sort, but may assist the jury to arrive at a just conclusion by explaining and commenting on the evidence, by drawing their attention to the parts of it the judge thinks important, and by expressing an opinion on the facts, provided that the judge makes it clear to the jury that all matters of fact are submitted for their determination. n57 However, to preserve the right to a jury trial, this privilege has its inherent limitations. The judge's discretion is not arbitrary and uncontrolled but must be exercised in conformity with the standards governing the judicial office. In commenting on testimony, the judge may not assume the role of a witness. The judge may analyze and dissect the evidence but may not either distort it or add to it. n58 Thus, comments on the evidence may not remove from the jury its critical task of assigning weight to the evidence presented. n59

[j] Special Verdicts or Interrogatories Permitted

The court may require a jury to return a special verdict, in the form of special written findings on each issue of fact, as authorized under Rule 49(a), n60 or to require answers to interrogatories together with a general verdict, as authorized under Rule 49(b), n61 and courts have held that both procedures are permissible under the *Seventh Amendment*. n62 However, once the court uses a special verdict or interrogatories under Rule 49, it is a violation of the *Seventh Amendment* right to a jury trial for the court to disregard the jury's findings. n63 If a jury's special verdict appears to be in conflict, the court has a duty under the *Seventh Amendment* to attempt to harmonize the answers, n63.1 if at all possible under a fair reading. n64 Similarly, the *Seventh Amendment* requires that if there is view of case that makes the jury's answers to special interrogatories consistent, the court must adopt that view and enter judgment accordingly. n65

[k] Court's Grant of Judgment as Matter of Law

A party has a right to a jury trial in an action at law but not to a jury verdict. n66 Thus, a party need not obtain a verdict, and a court may set a verdict aside under common-law principles incorporated into the Constitution when there is no fact issue for the jury to decide. If the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party; n67 and grant a motion for judgment as a matter of law against the party on any claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. n68

If the court does not grant a motion for judgment as a matter of law made prior to submission of the case to the jury, n68.1 the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The moving party may file a renewed motion for judgment as a matter of law no later than 28 days after the entry of judgment, or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged. n68.2 The moving party also has the option to move for a new trial under Rule 59. n68.3 In ruling on the renewed motion, the court may choose one of three options: allow judgment on the verdict, if the jury returned a verdict; n68.4 order a new trial; n68.5 or direct the entry of judgment as a matter of law. n68.6

Arguably, a court's setting aside of a verdict and entry of judgment under Rule 50(b)(1)(C) could be considered to raise a *Seventh Amendment* jury right problem because a court is not permitted to reexamine the facts tried by a jury, other than according to common-law rules. n69 However, the federal rules have been structured to avoid the jury right question, because when it decides a renewal motion for judgment as a matter of law, the trial court is not technically setting aside the jury's verdict but is, in effect, withdrawing the case from the jury's consideration on permissible common-law grounds. n70

To avoid a constitutional challenge related to Rule 50, the trial court must view the evidence most favorably towards the

non-moving party and must find that there is only one reasonable conclusion as to the proper verdict. When the trial court usurps the jury's function by weighing the credibility of witnesses or considering the evidence in a light favorable to the movant, the entry of judgment under Rule 50(a) or (b) constitutes an improper denial of the non-moving party's right to a jury trial under the *Seventh Amendment*. n71

[l] Court's Grant of New Trial

Under Rule 59, the court may grant a motion for new trial on the grounds that the verdict is against the weight of the evidence. The grant of the motion is based on the sound discretion of the court, which may set aside the verdict and direct a new trial. The granting of a new trial under Rule 59 has withstood constitutional challenge because the *Seventh Amendment* only prohibits re-examination of facts tried by a jury that is in derogation of the common law, and it has been held that the grant of a new trial is permissible when made according to common-law principles. n72

A court may also adjust an award of damages using a conditional grant of a new trial. Thus, if excessive damages have been awarded to a party, the court may order remittitur or a new trial, at the option of the party that has been awarded damages by the jury. Remittitur is permissible under the *Seventh Amendment* only when the verdict cannot be justified on the evidence, n73 and a remittitur may only be granted if the option of a new trial is offered by the court. If the court reduces a jury's damage award through remittitur without offering plaintiff the option of new trial on damages, the court has effectively denied the plaintiff his or her constitutional right to a jury trial. n74 However, if the court deems punitive damages excessive and that the amount set by the jury is in violation of due process clause as a matter of law, the *Seventh Amendment's* prohibition on reexamination of jury verdict does not prevent the court from entering a judgment in a reduced amount, even if the court does not afford the plaintiff the plaintiffs opportunity for new trial. n75

An order of additur, which increases a damage award when the court deems it is insufficient, is a violation of the *Seventh Amendment*, and is impermissible. n76

[m] Attorney's Fees

[i] Generally No Right to Jury on Issue of Fees

Whether to grant attorney's fees is generally for the court, because the granting of attorney's fees was an equitable issue at common law, and therefore the *Seventh Amendment* is not implicated. n77 Thus, courts have held that the threshold question of whether to grant attorney's fees is not necessarily a question for the jury. For example, it has been held that the *Seventh Amendment* is not implicated by *28 U.S.C. section 1927*, n78 which allows the shifting of attorney's fees for unreasonably and vexatiously multiplying of proceedings in any federal court, n79 or for improper conduct under Rule 11, n80 which permits shifting of attorney's fees, among other sanctions, for frivolous and dilatory pleading designed to harass and delay. n81 The Supreme Court has also held that the district court judge must determine whether the plaintiffs are the "prevailing parties" such that plaintiffs may recover attorney's fees under *42 U.S.C. section 1988*, n82 commenting that a request for attorney's fees should not result in a second major litigation. n83 It should also be noted that while there is generally no constitutional right to a jury trial as to the granting of attorney's fees, there is no requirement of a bench trial on the issue, and the court has discretion to allow the jury, as a trier of fact, to determine the issue. n84

[ii] Contractual Attorney's Fees May Create Right to Jury Trial

While there generally is no right to a jury trial to determine issues regarding attorney's fees, n85 when a contract calls for an award of attorney's fees, the issue as to whether such fees are recoverable is a traditional common-law contract issue and must be tried to a jury. n86 If the jury determines that the party may recover attorney's fees, and if the determination of the amount presents equitable issues, then a determination of the amount is for the judge. n87 Equitable issues include assessment of reasonableness, time and labor reasonably required by the case, skill demanded by novelty and complexity of the issues, burdensomeness of fees, incentive effects on future cases, and fairness to

parties. These are all collateral issues that do not present the kind of common-law questions for which the *Seventh Amendment* preserves jury trials. n88

[6] Number of Jurors for Verdict n*

The constitutional jury trial right does not require a particular number of members to constitute a jury. Therefore, although 12 jurors are common for most juries, the Supreme Court held that a local court rule, providing for a six-person jury in the trial of civil cases, was valid and not a violation of the *Seventh Amendment*. n1 Recognizing the generality of juries of less than 12 members, Rule 48 provides that the court must seat a jury of not fewer than six and not more than 12 members, absent stipulation by the parties. n2 All jurors must participate in the verdict unless excused from service by the court, n3 unless the parties stipulate otherwise the verdict must be unanimous, n4 and the court may not take a verdict from a jury that has fewer than six members. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.10* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *U.S. Const. Amend. VII*; *see Osborn v. Haley, 549 U.S. 225, 252, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007)* (no constitutional right for claims based on statute; jury trial right for such claims must be created by Congress).

(n3)Footnote 2. *U.S. Const. Amend. VII.*

(n4)Footnote 3. *Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* ; *United States v. Pelullo, 14 F.3d 881, 895 (3d Cir. 1994)* .

(n5)Footnote 4. *Bellmore v. Mobil Oil Corp., 783 F.2d 300, 306 (2d Cir. 1986)* .

(n6)Footnote 5. *Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635, 638 (N.D. Ala. 1989)* .

(n7)Footnote 6. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n8)Footnote 7. *See Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916, 936 (M.D. Tenn. 2003)* (federal policy in favor of jury trial stronger than federal policy in favor of arbitration).

(n9)Footnote 8. *Danjaq LLC v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001)* ; *Breedlove v. Cabou, 296 F. Supp. 2d 253, 277 (N.D.N.Y. 2003)* .

(n10)Footnote 9. *Reiner v. New Jersey, 732 F. Supp. 530, 533 (D. N.J. 1990)* .

(n11)Footnote 10. *Armster v. United States Dist. Court, 792 F.2d 1423, 1430 (9th Cir. 1986)* .

(n12)Footnote 1. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 550, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)* .

(n13)Footnote 2. *Washington Int'l Ins. Co. v. United States, 863 F.2d 877, 878-879 (Fed Cir. 1988)* ; *Goar v. Compania Peruana de Vapores, 688 F.2d 417, 427 (5th Cir. 1982)* .

(n14)Footnote 3. *Ross v. Bernhard, 396 U.S. 531, 538 n.10, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* ; *Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977)* , *aff'd, 434 U.S. 575 (1978)* .

(n15)Footnote 4. *Haynes Trane Serv. Agency v. Am. Std., Inc., 2009 U.S. App. LEXIS 14924, at *44-*45 (10th Cir. July 6, 2009)* (citing **Moore's Federal Practice**).

(n16)Footnote 5. *Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1115 (10th Cir. 2009)* .

(n17)Footnote 6. *See Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 969 (8th Cir. 2005)* .

(n18)Footnote 7. *See Snider v. Commercial Fin. Servs. (In re Commercial Fin. Servs.), 252 B.R. 516, 522 fn 3 (D. Okla. 2002)* .

(n19)Footnote 8. *City of Monterey v. Del Monte Dunes, 526 U.S. 687, 708-709, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)* ; *Central States, Southeast & Southwest Areas Pension Fund v. Brumm, 264 F. Supp. 2d 697, 699 (N.D. Ill. 2003)* .

(n20)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.31* (Matthew Bender 3d ed.).

(n21)Footnote 1. *Tull v. United States, 481 U.S. 412, 417, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* ; *see* [2], *above*.

(n22)Footnote 2. *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 736 (7th Cir. 2004)* .

(n23)Footnote 3. *Haynes Trane Serv. Agency v. Am. Std., Inc., 2009 U.S. App. LEXIS 14924, at *44-*45 (10th Cir. July 6, 2009)* (actions that determine liability and money damages).

(n24)Footnote 4. *AstenJohnson, Inc. v. Columbia Cas. Co., 562 F.3d 213, 223 (3d Cir. 2009)* (citing **Moore's Federal Practice**; action for specific performance in conveyance of particular realty, without a claim for damages, is purely equitable and historically has always been tried to court).

(n25)Footnote 5. *Waldrop v. Southern Co. Servs., Inc., 24 F.3d 152, 157 (11th Cir. 1994)* .

(n26)Footnote 6. *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004)* .

(n27)Footnote 7. *Mile High Indus. v. Cohen, No., 222 F.3d 845, 856 (10th Cir. 2000)* .

(n28)Footnote 8. *Scheurenbrand v. Wood Gundy Corp., 8 F.3d 1547, 1551 (11th Cir. 1993)* .

(n29)Footnote 9. *See Leary v. Daeschner, 349 F.3d 888, 911 (6th Cir. 2004)* .

(n30)Footnote 10. *Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 969 (8th Cir. 2005)* .

(n31)Footnote 11. *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004)* .

(n32)Footnote 12. *Colorado Visionary Acad. v. Medtronic, Inc., 397 F.3d 867, 875 (10th Cir. 2005)* .

(n33)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice,* § 38.32 (Matthew Bender 3d ed.).

(n34)Footnote 13. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* ; *Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* .

(n35)Footnote 14. *Insurance Co. of N. Am. v. Virgilio, 574 F. Supp. 48, 50 (S.D. Cal. 1983)* .

(n36)Footnote 15. *See Mayer v. Cornell Univ., 909 F. Supp. 81, 85 (N.D.N.Y. 1995)* .

(n37)Footnote 16. *Fed. R. Civ. P. 38(e).*

(n38)Footnote 17. *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181, 1187-1189 (11th Cir. 2009)* ; *see Fed. R. Civ. P. 9(h)(1).*

(n39)Footnote 18. *46 U.S.C. § 30104*; *see Stewart v. Dutra Constr. Co., 543 U.S. 481, 487-488, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005)* .

(n40)Footnote 19. *Craig v. Atlantic Richfield Co., 19 F.3d 472, 475-476 (9th Cir. 1994)* .

(n41)Footnote 20. *Rachal v. Ingram Corp., 795 F.2d 1210, 1217 (5th Cir. 1986)* .

(n42)Footnote 21. *See 28 U.S.C. § 1333.*

(n43)Footnote 22. *Blancq v. Hapag-Lloyd A.G., 986 F. Supp. 376, 384 (E.D. La. 1997)* .

(n44)Footnote 23. *Penton v. Pompano Constr. Co., 976 F.2d 636, 638-639 (11th Cir. 1992)* .

(n45)Footnote 24. *Sphere Drake Ins. PLC v. J. Shree Corp, 184 F.R.D. 258 (S.D.N.Y. 1999)* .

(n46)Footnote 25. *Fitzgerald v. United States Lines, 374 U.S. 16, 21, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* ; *Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 153 (4th Cir. 1995)* .

(n47)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.10[3][c]* (Matthew Bender 3d ed.).

(n48)Footnote 26. *Curtis v. Loether, 415 U.S. 189, 194, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* ; *Losey v. Roberts, 677 F. Supp. 101, 106 (N.D.N.Y. 1986)* .

(n49)Footnote 27. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-52, 109 S. Ct. 2782, 2795, 106 L. Ed. 2d 26 (1989)* .

(n50)Footnote 28. *Connors v. Ryan's Coal Co., 923 F.2d 1461, 1465 (11th Cir. 1991)* (authority to adjudicate claims based on congressionally created statutory public rights may be relegated to nonjudicial adjudication).

(n51)Footnote 29. *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49, 57 S. Ct. 615, 81 L. Ed. 893 (1937)* .

(n52)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.11* (Matthew Bender 3d ed.).

(n53)Footnote 1. *Vera-Lozano v. International Broadcasting, 50 F.3d 67, 71 (1st Cir. 1995)* (parties in Puerto Rico federal courts afforded jury trial rights, although Puerto Rican Constitution does not allow jury trials in civil cases).

(n54)Footnote 2. *Elliott v. City of Wheat Ridge, 49 F.3d 1458, 1459-1460 (10th Cir. 1995)* .

(n55)Footnote 3. *Byrd v. Blue Ridge Rural Electric Coop, 356 U.S. 525, 537-538, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* .

(n56)Footnote 4. *Fahy v. Nationwide Mut. Fire Ins. Co., 885 F. Supp. 678, 680 (M.D. Pa.1995)* ; *Welcker v. Smithkline Beckman, 746 F. Supp. 576, 582 (E.D. Pa. 1990)* .

(n57)Footnote 5. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* .

(n58)Footnote 6. *Coleman v. C.I.R., 791 F.2d 68, 71 (7th Cir. 1986)* .

(n59)Footnote 7. *28 U.S.C. § 157(b).*

(n60)Footnote 8. *In re Grabill Corp., 967 F.2d 1152, 1159-1160 (7th Cir. 1992)* .

(n61)Footnote 9. *28 U.S.C. § 157(e).*

(n62)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.34* (Matthew Bender 3d ed.).

(n63)Footnote 1. *Galloway v. United States, 319 U.S. 372, 390-392, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)* (purpose of *Seventh Amendment* is not to preserve jury decision for matters of form and procedure but for matters of substance).

(n64)Footnote 2. *Winslow v. Lehr, 646 F. Supp. 242, 243-244 (D. Colo. 1986)* .

(n65)Footnote 3. *Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268-269 (6th Cir. 1985)* .

(n66)Footnote 4. *Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1116 (10th Cir. 2009)* (although ordinarily a procedural determination of court, party has right to jury determination of attorney fees as element of damages when fees are based on contract).

(n67)Footnote 5. *Fed. R. Civ. P. 12(d).*

(n68)Footnote 6. *See 28 U.S.C. § 1332(a).*

(n69)Footnote 7. *See 28 U.S.C. § 1332(c).*

(n70)Footnote 8. *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.)* , *cert. denied, 454 U.S. 897 (1981)* ; *Munro v. Doherr, 156 F. Supp. 723, 724 (D. Mass. 1957)* .

(n71)Footnote 9. *See 28 U.S.C. § 1332.*

(n72)Footnote 10. *Deutsch v. Hewes Street Realty Corp., 359 F.2d 96, 100 (2d Cir. 1966)* .

(n73)Footnote 11. *Jones v. Landry, 387 F.2d 102, 106 (5th Cir. 1967)* .

(n74)Footnote 12. *Deutsch v. Hewes Street Realty Corp., 359 F.2d 96, 100 (2d Cir. 1966)* .

(n75)Footnote 13. *See* [i], *above.*

(n76)Footnote 14. *See 28 U.S.C. § 1331(a).*

(n77)Footnote 15. *Land v. Dollar, 330 U.S. 731, 735-739, 67 S. Ct. 1009, 1010-1012, 91 L. Ed. 1209 (1947)* .

(n78)Footnote 16. *Marks Food Corp. v. Barbara Ann Baking Co., 274 F.2d 934, 936 (9th Cir. 1960)* (trial court reversed when it decided on jurisdictional grounds that defendants' business was not shown to affect interstate

commerce, because court invaded jury's province to determine basic issue in case).

(n79)Footnote 17. *Marks Food Corp. v. Barbara Ann Baking Co., 274 F.2d 934, 936 (9th Cir. 1960)* .

(n80)Footnote 18. *McBeath v. Inter-American Citizens for Decency, 374 F.2d 359, 363 (5th Cir. 1967)* , *cert. denied, 389 U.S. 896 (1967)* .

(n81)Footnote 19. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5th Cir. 1972)* .

(n82)Footnote 20. *Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 253, 78 S. Ct. 687, 688, 2 L. Ed. 2d 737 (1958)* .

(n83)Footnote 21. *Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 512 (5th Cir. 1980)* , *cert. denied, 449 U.S. 953 (1980)* .

(n84)Footnote 22. *Andreas v. Imperial Airlines, Inc., 211 F. Supp. 311, 313 (E.D. Pa. 1962)* .

(n85)Footnote 23. *Unicon Mgmt. Corp. v. Koppers Co., 38 F.R.D. 474, 475-477 (S.D.N.Y. 1965)* .

(n86)Footnote 24. *Kierulff Assocs. v. Luria Bros. & Co., 240 F. Supp. 640, 642 (S.D.N.Y. 1965)* (when venue and merits of action are intermeshed, issue should wait until trial, when full presentation of issue can be made, rather than rule preliminarily on a motion to dismiss for lack of proper venue).

(n87)Footnote 25. *Marra v. Bushee, 447 F.2d 1282, 1284 (2d Cir. 1971)* .

(n88)Footnote 26. *Vaz Borralho v. Keydril Co., 696 F.2d 379, 386 (5th Cir. 1983)* .

(n89)Footnote 27. *Vaz Borralho v. Keydril Co., 696 F.2d 379, 387 (5th Cir. 1983)* .

(n90)Footnote 28. *Marra v. Bushee, 447 F.2d 1282, 1284 (2d Cir. 1971)* (because plaintiff made a general demand for jury trial, defendant was entitled to the jury's consideration of every issue properly triable to jury, which included of the situs of defendant's conduct, a factual determination which would determine choice of law).

(n91)Footnote 29. *Fed. R. Civ. P. 55(b)(1).*

(n92)Footnote 30. *Fed. R. Civ. P. 55(b)(2).*

(n93)Footnote 31. *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990)* , *cert. denied, 498 U.S. 1109 (1991)* ; *Frankart Distributors, Inc. v. Levitz, 796 F. Supp. 75, 76 (E.D.N.Y. 1992)* .

(n94)Footnote 32. *Kormes v. Weis, Voisin & Co., 61 F.R.D. 608, 610 (E.D. Pa. 1974)* (court granted jury trial on issue of damages).

(n95)Footnote 33. *Ross v. Bernhard, 396 U.S. 531, 541 n.15, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n96)Footnote 34. *Hyde Properties v. McCoy, 507 F.2d 301, 305-306 (6th Cir. 1974)* ; *Jefferson Standard Ins. Co. v. Craven, 365 F. Supp. 861, 863-864 (M.D. Pa. 1973)* .

(n97)Footnote 35. *Jefferson Standard Ins. Co. v. Craven, 365 F. Supp. 861, 864 (M.D. Pa. 1973)* .

(n98)Footnote 36. *Fed. R. Civ. P. 24.*

(n99)Footnote 37. *Ross v. Bernhard, 396 U.S. 531, 541 n.15, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n100)Footnote 38. *See Fed. R. Civ. P. 38(b)(1)*; *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc., 156 F. Supp. 2d 1170, 1173 (D. Nev. 2001)* .

(n101)Footnote 38.1. *United States v. Country Club Garden Owners Ass'n, 159 F.R.D. 400, 405-406 (E.D.N.Y. 1995)* ; *see Fed. R. Civ. P. 38(d)* (waiver of jury right).

(n102)Footnote 39. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 846, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* .

(n103)Footnote 40. *Ross v. Bernhard, 396 U.S. 531, 540, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n104)Footnote 41. *Ross v. Bernhard, 396 U.S. 531, 540, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n105)Footnote 42. *See Fed. R. Civ. P. 23*.

(n106)Footnote 43. *Fed. R. Civ. P. 23*, 1937 Committee Note.

(n107)Footnote 44. *Syres v. Oil Workers International Union, 257 F.2d 479, 481 (5th Cir. 1958)* (class action against union for damages for racial discrimination).

(n108)Footnote 45. *Williams v. Travenol Labs., Inc., 344 F. Supp. 163, 165 (N.D. Miss. 1972)* (class action seeking injunction against unlawful employment practices as well as back pay, promotions and compensatory seniority).

(n109)Footnote 46. *Ross v. Bernhard, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n110)Footnote 47. *See Fed. R. Civ. P. 23*.

(n111)Footnote 48. *Lewis v. Anderson, 615 F.2d 778, 784 (9th Cir. 1979)* , *cert. denied, 449 U.S. 869 (1980)* .

(n112)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.12[3][a]* (Matthew Bender 3d ed.).

(n113)Footnote 49. *Matter of Texas Gen. Petroleum Corp., 52 F.3d 1330, 1339 (5th Cir. 1995)* .

(n114)Footnote 50. *Fed. R. Civ. P. 56(c)(2)*.

(n115)Footnote 51. *In re Slatkin, 525 F.3d 805, 811 (9th Cir. 2008)* .

(n116)Footnote 52. *Leasing Serv. Corp. v. Graham, 646 F. Supp. 1410, 1414 (S.D.N.Y. 1986)* .

(n117)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.12[2][b]* (Matthew Bender 3d ed.).

(n118)Footnote 53. *Fed. R. Civ. P. 51*.

(n119)Footnote 54. *Dagnello v. Long Island R.R. Co., 289 F.2d 797, 799 (2d Cir. 1961)* .

(n120)Footnote 55. *Bonner v. Guccione, 178 F.3d 581, 587 (2d Cir. 1998)* (resubmitting employment discrimination plaintiff's claim for compensatory damages to the jury, after discovering that jury had been improperly instructed, did not violate defendants' *Seventh Amendment* right to a jury trial because there is no constitutional impediment to resubmission of civil case for purposes of correcting erroneous legal instruction).

(n121)Footnote 56. *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc., 830 F.2d 1332, 1345 (5th Cir. 1987)* .

(n122)Footnote 57. *Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933)* .

(n123)Footnote 58. *Quercia v. United States, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321 (1933)* .

(n124)Footnote 59. *Hardin v. Ski Venture, Inc., 50 F.3d 1291, 1294 (4th Cir. 1995)* .

(n125)Footnote 60. *Fed. R. Civ. P. 49(a).*

(n126)Footnote 61. *Fed. R. Civ. P. 49(b).*

(n127)Footnote 62. *MCI Telecommunications Corp. v. Wanzer, 897 F.2d 703, 707 (4th Cir. 1990)* ; *Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 92 (5th Cir. 1985)* .

(n128)Footnote 63. *Floyd v. Laws, 929 F.2d 1390, 1397 (9th Cir. 1991)* .

(n129)Footnote 63.1. *See L & W, Inc. v. Shertech, Inc., 471 F.3d 1311, 1319 (Fed. Cir. 2006)* (whether special verdict containing written factual findings pursuant to Rule 49(a) or general verdict accompanied by responses to factual interrogatories pursuant to Rule 49(b), trial court must give original jury opportunity to resolve any inconsistency in its responses).

(n130)Footnote 64. *MCI Telecommunications Corp. v. Wanzer, 897 F.2d 703, 707-708 (4th Cir. 1990)* .

(n131)Footnote 65. *Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 92 (5th Cir. 1985)* .

(n132)Footnote 66. *Newell Cos., Inc. v. Kenney Mfg. Co., 864 F.2d 757, 763 (Fed. Cir. 1988)* , *cert. denied, 493 U.S. 814 (1989)* .

(n133)Footnote 67. *Fed. R. Civ. P. 50(a)(1)(A).*

(n134)Footnote 68. *Fed. R. Civ. P. 50(a)(1)(B).*

(n135)Footnote 68.1. *Fed. R. Civ. P. 50(a)(2).*

(n136)Footnote 68.2. *See Fed. R. Civ. P. 50(b)*; *Fed. R. Civ. P. 59(b).*

(n137)Footnote 68.3. *Fed. R. Civ. P. 50(b).*

(n138)Footnote 68.4. *Fed. R. Civ. P. 50(b)(1).*

(n139)Footnote 68.5. *Fed. R. Civ. P. 50(b)(2).*

(n140)Footnote 68.6. *Fed. R. Civ. P. 50(b)(3).*

(n141)Footnote 69. *See Nelson v. Production Credit Association, 930 F.2d 599, 602 (8th Cir. 1991)* .

(n142)Footnote 70. *See Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394* ,; *126 S. Ct. 980, 163 L. Ed. 2d 974, 984 (2006)* .

(n143)Footnote 71. *Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994)* .

(n144)Footnote 72. *Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215-216, 67 S. Ct. 752, 91 L. Ed. 849 (1947)* .

(n145)Footnote 73. *Boyd v. Bulala, 672 F. Supp. 915, 921 (W.D. Va. 1987)* , *rev'd in part on other grounds, 877 F.2d 1191 (4th Cir. 1989)* .

(n146)Footnote 74. *Lightfoot v. Union Carbide Corp., 110 F.3d 898, 902 (2d Cir. 1997)* .

(n147)Footnote 75. *Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1328 (11th Cir. 1999)* .

(n148)Footnote 76. *Waldorf v. Shuta, 916 F. Supp. 423, 427 (D. N.J. 1996)* , *aff'd on other grounds, 142 F.3d 601 (3d Cir. 1998)* (in order to avoid constitutional impediment to additur, personal injury plaintiff could not waive *Seventh Amendment* right to a jury trial, which he originally exercised when he filed his complaint, because defendants did not consent to such waiver, and permitting additur would negate defendants' right to jury trial).

(n149)Footnote 77. *Columbus Mills, Inc. v. Freeland, 918 F.2d 1575, 1578 (11th Cir. 1990)* .

(n150)Footnote 78. *28 U.S.C. § 1927.*

(n151)Footnote 79. *In re Itel Sec. Litig., 791 F.2d 672, 675-676 (9th Cir. 1986)* , *cert. denied, sub nom., Bader v. Itel Corp., 479 U.S. 1033 (1987)* .

(n152)Footnote 80. *Fed. R. Civ. P. 11.*

(n153)Footnote 81. *Donaldson v. Clark, 819 F.2d 1551, 1560-1561 (11th Cir. 1987)* .

(n154)Footnote 82. *42 U.S.C. § 1988.*

(n155)Footnote 83. *Hensley v. Eckerhart, 461 U.S. 424, 433-437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n156)Footnote 84. *Resolution Trust Corp. v. Marshall, 939 F.2d 274, 279 (5th Cir. 1991)* .

(n157)Footnote 85. *See* [i], *above.*

(n158)Footnote 86. *F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563, 1564 (2d Cir. 1985)* .

(n159)Footnote 87. *McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1314-1316 (2d Cir. 1993)* .

(n160)Footnote 88. *McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1315 (2d Cir. 1993)* .

(n161)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.12[4]* (Matthew Bender 3d ed.).

(n162)Footnote 1. *Colgrove v. Battin, 413 U.S. 149, 158-159, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973)* .

(n163)Footnote 2. *Fed. R. Civ. P. 48.*

(n164)Footnote 3. *Mason v. Texaco, Inc., 741 F. Supp. 1472, 1476, (D. Kan. 1990)* , *aff'd on other grounds, 948 F.2d 1546 (10th Cir. 1990)* , *cert. denied, 504 U.S. 910 (1992)* .

(n165)Footnote 4. *Johnson v. Louisiana, 406 U.S. 356, 369-370, 370 n.5, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)* ; *Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1451 (9th Cir. 1995)* , *cert. denied, 517 U.S. 1219 (1996)* .

(n166)Footnote 5. *Fed. R. Civ. P. 48.*

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Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART I. RIGHT TO JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.02

§ 22.02 Right to Jury Trial in Actions Created by Federal Statutesn*

[1] Intellectual Property

[a] General Considerations

Certain general principles with respect to the right to a jury trial apply to all suits seeking relief from infringement of an intellectual property right, whether the right being protected is by patent, copyright, or trademark. If a party seeks injunctive relief alone, the remedy is clearly deemed equitable, and there is no right to a jury trial. n1 If the party is praying for damages only, the remedy is legal and there is a jury trial right. n2 The rules for the right to a jury question become more complicated when both legal and equitable issues are involved. The Supreme Court has established the principles to guide courts with regard to infringement litigation generally:

> 1. If a party is claiming damages, characterizing the claim as one for an equitable accounting will not deprive the parties of a right to a jury trial. It is the nature and substance of the relief sought and not the language used in the pleading that is controlling. n3 Similarly, if the plaintiff seeks damages for infringement, the legal claim is not defeated by characterizing it as incidental to equitable claims in the case. Thus, a damage claim entitles the party to a jury trial, even though the party is also requesting an accounting for lost profits and an injunction to prevent further infringement. n4
>
> 2. The court must arrange the sequence of the trial so that questions of fact that are common to both the legal and equitable claims will be tried first to the jury and then the equitable claims decided by the court on the basis of the jury's determinations. It would violate the parties' jury trial right to have the court decide the common questions, because the jury would then be estopped from reconsidering those questions. n5
>
> 3. A plaintiff may maintain a suit for an equitable accounting only when the plaintiff can show that the accounts between the parties are of such a complex nature that only a court of equity can satisfactorily unravel them. In view of the court's power to appoint a special master to aid the jury in such circumstances, it is rare that a plaintiff will be able to meet such a burden. n6

[b] Patent Infringement

In a claim for patent infringement, the Patent Act provides for a single action n7 in which the plaintiff may seek an injunction, n8 recovery of damages, n9 or both. n10 When an injunction alone is sought, there is no jury trial right; when damages are sought, the parties are entitled to a jury trial on demand; and if both are sought, any common issues are triable to the jury. n11

If a potential infringer brings an action for a declaratory judgment challenging the validity of a patent, it appears that the patentee is entitled to a jury trial of the validity issue because the Supreme Court has held that a party may not be deprived of its jury trial right simply because its adversary took advantage of the availability of declaratory relief and sued first. Thus, if the defendant in the declaratory judgment action would have had a right to a jury trial had it brought the action as plaintiff, then it is entitled to demand a jury trial in the "inverted" lawsuit. n12 An infringement action contains two parts, the first to determine the meaning and scope of the patent claims alleged to have been infringed and the second to compare the properly construed claims to the device that is alleged to be an infringement.

The Supreme Court has held that the first part--interpretation and construction of patent claims, which define the scope of the patentee's rights under the patent--is a matter of law exclusively for the court. In making its determination, the Court consulted existing precedent and considered both the relative interpretive skills of judge and jury, and the statutory policies to be furthered by the allocation between judge and jury. Modern authority clearly indicated that construction of the patent is a question of law for the court. n13

If the defendant in an action for patent infringement asserts the defense that the patentee failed to make full disclosure to the Patent and Trademark Office in the patent application process, and therefore the patent is invalid and unenforceable, the issue is equitable, and is not triable of right by a jury. n14 The issue of inequitable conduct may properly be tried by the court separately from, and prior to, the jury trial of the issues of invalidity and infringement, when there are no common questions of fact and the claims are not intertwined. n15 In cases in which there are common questions between an invalidity claim and a claim of inequitable conduct, the court need not submit both claims to the jury, but the common questions must be tried first to the jury before the court decides the equitable issues. n16

[c] Copyright Infringement

The statutory remedies for copyright infringement permit a copyright owner to seek an injunction to restrain the infringement, n17 to sue for damages and profits, n18 or to join both remedies in a single action. n19 When actual damages and profits are sought, the parties are entitled to a jury trial on that issue. n20 However, the copyright statute provides the copyright owner with an election between two forms of monetary recovery from a copyright infringer. As in ordinary tort cases, the copyright owner is entitled to prove and recover its actual damages and profits. n21 In addition, the statute grants an alternative form of recovery available to the copyright owner: the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action.

Statutory damages, with respect to any one work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, permit recovery of a sum of not less than $500 or more than $20,000 as the court considers just. This amount may be increased to a sum of not more than $100,000, if the copyright owner proves and the court finds, that infringement was committed willfully. n22

In cases in which statutory damages are sought under section 504(c), rather than actual damages, the Supreme Court has held that although the statute is silent concerning the statutory right to a jury trial, the *Seventh Amendment* provides a right to a jury trial on all issues pertinent to an award of copyright statutory damages, including the amount of damages to be awarded to the copyright owner. n23

[d] Trademark Infringement

A trademark infringement case will be deemed equitable in nature with no right to a jury trial, if only an injunction is sought, and legal in nature with the right to a jury on demand, if damages are sought. n24 In *Dairy Queen,* the Supreme Court held that merely characterizing the relief sought as an accounting did not deprive the parties of the right to a jury trial, when the true nature of the relief was a suit for damages. n25 However, subsequent cases have held that this rule is limited to circumstances where there is a contractual relationship between the parties. Absent such a relationship in an action to enjoin trademark infringement and for an equitable accounting, it has been held that a request for an accounting is an equitable remedy, and that the parties were not entitled to a jury trial. n26

[2] Condemnation

There is no *Seventh Amendment* right to a jury trial in a condemnation action. n1 However, the Federal Rules provide that any party may demand a jury trial in a condemnation case to determine the issue of just compensation, unless a tribunal has been specially constituted for that purpose by statute, n2 or unless the court, in its discretion, appoints a three-person commission to determine the compensation issue. n3 Thus, subject to the exceptions to the special tribunal or the commission, the general method of trial of that issue must be by jury if a party demands it within the time set to answer or set by the court; n4 otherwise, the issue of just compensation, as well as all other issues, must be tried by the court. n4.1

The requirement of a jury trial under Rule 71.1(h) is limited to traditional condemnation proceedings, initiated by government, and not to inverse condemnation actions, which are actions initiated by a private party to obtain compensation for a government taking. It has been held that although the concept of just compensation is the same in both traditional and inverse condemnation proceedings, the actions are sufficiently different that procedures applicable to one do not necessarily apply to the other. If it were Congress' intent to provide for jury trial in this context, the right should have been clearly expressed in the relevant legislation. n5

[3] Antitrust and Trade Regulation

There are two types of federal civil antitrust litigation: actions by the United States and actions by persons injured in their business or property by antitrust violations. The sole civil relief available to the United States is an action for injunction, to prevent and restrain violations of the antitrust laws. Such an action is expressly designated in the statute as an "equity" action, n1 and consequently there is no right to a jury trial. n2

When a person has been injured in business or property on account of a violation of the antitrust laws, the person may sue for treble damages under Section 4 of the Clayton Act, n3 and the courts have recognized that an action for treble damages under the antitrust laws is an action at law and therefore the parties are entitled to a jury trial of right. n4 The Clayton Act also provides that a person threatened with loss or damage by reason of an antitrust violation may sue for injunctive relief. n5

If an action is brought seeking injunctive relief alone, there is no right to a jury trial, because such relief is equitable in nature. However, if a complaint seeks damages as well as injunctive relief, the claims may be joined under Rule 18, with the issues pertaining to the equitable claim tried to the court and the legal issues tried to the jury. n6 Similarly, if damages are sought in a counterclaim in an action for injunctive or declaratory relief, the damages claim is triable to a jury. n7 If legal and equitable claims are raised in an antitrust action, common questions must be tried first to the jury, because the parties will be collaterally estopped from relitigating those issues once a fact finder has determined them. n8

[4] Declaratory Judgments

The Declaratory Judgment Act provides that in all cases of actual controversy when there is federal jurisdiction, the district courts may entertain actions for the declaration of rights and other legal relations between parties. n1 The right to a jury trial in declaratory judgment actions is made subject to the provisions of Rules 38 and 39 by Rule 57. n2 Therefore, any right of jury trial is waived by failure to make timely demand, and if waived, the action must be tried to the court. n3 Because declaratory relief actions are subject to the federal rules regarding jury trials, the right to a jury trial is preserved only when it exists, depending on the basic nature of the underlying issues, whether legal or equitable. n4 A party may not convert an equity action into a legal action or vice versa by merely including a claim for a declaratory judgment. n5

[5] Employment Discrimination

[a] Racial and Sexual Discrimination

The Civil Rights Act of 1991 n1 expressly created a right to trial by jury and also provided for the award of compensatory and punitive damages, n2 in addition to the back pay remedy that was formerly available under the Act. The Act does not apply retroactively, however, to conduct occurring before it was enacted. n3 On the other hand, in cases in which some of the conduct complained of occurred after the enactment of the Act, the right to a jury trial has been permitted as to both pre-enactment and post-enactment conduct, on a theory of continuing violation. n4

The courts have held that section 1981 and section 1983 claims are to be treated as equitable claims to be tried by the bench when only back pay and reinstatement are sought, because these are equitable remedies. n5 When both back pay and compensatory damages are sought, the courts have held that the issue of back pay should also be determined by the jury. n6

[b] Age Discrimination

The Age Discrimination in Employment Act (ADEA) n7 provides that a person is entitled to a trial by jury of any issue of fact in any action for recovery of amounts owing as a result of a violation of the ADEA, regardless of whether any party to the action is seeking equitable relief. n8 This section has been interpreted to mean that parties have a right to a jury trial on the legal claims but not on the equitable claims. n9

It has been held that if a party seeks an award of back pay under the ADEA, the party is seeking a legal remedy, n10 because the ADEA incorporates provisions of the Fair Labor Standards Act into its enforcement section, and claims for back pay under FLSA are clearly legal in nature and uniformly accorded the right to a jury trial. n11 Similarly, a party asking for liquidated damages in an ADEA case is seeking legal relief, entitling the party to a jury trial. n12

On the other hand, requests for an injunction and reinstatement have been deemed requests for equitable relief under the ADEA, and claimants seeking such relief are not entitled to a jury trial as of right. n13 Furthermore, a request for an award of "front pay" in an ADEA suit is considered equitable relief, because it is in lieu of the equitable remedy of reinstatement, and therefore there is no right to a jury trial on the issue of front pay. n14

A party does not have a right to a jury trial in an ADEA age discrimination suit when the defendant is the federal government. It has been held that the language in the ADEA authorizing legal relief does not create a jury trial right against the government, but only implies applicability of the *Seventh Amendment* in suits between private parties, because any waiver of sovereign immunity, including the method of trial, is strictly construed. n15

[c] Discrimination on Account of Disability

A person who sues for a violation of the employment discrimination provisions (Title I) of the Americans With Disabilities Act is entitled to the remedies available to employees under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. n16 The 1991 Act provides that employees who prevail on their claims may

recover compensatory and punitive damages, and a party who prays for compensatory and punitive damages may demand and receive a trial by jury. n17 Therefore, plaintiffs who initiate employment discrimination claims under the ADA n18 are entitled to jury trials when they have sought something more than the traditionally equitable remedies of back pay and reinstatement. If a claim is made for compensatory or punitive damages, a jury trial demand will be granted. n19 However, equitable remedies under the ADA, such as reinstatement, back pay, and front pay, must be determined by the court. n20 If a complaint contains both legal and equitable claims, the underlying issue of liability for disability discrimination is decided by the jury. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCopyright LawCivil Infringement ActionsGeneral OverviewPatent LawInfringement ActionsGeneral OverviewReal Property LawEminent Domain ProceedingsProcedureTrademark LawInfringement ActionsFederal Jury Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.33* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Chappell & Co., Inc. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 531 (D. Conn. 1977)* .

(n3)Footnote 2. *Oiness v. Walgreen Co., 838 F. Supp. 1420, 1421 (D. Colo. 1993)* .

(n4)Footnote 3. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-479, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n5)Footnote 4. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n6)Footnote 5. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-473, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n7)Footnote 6. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n8)Footnote 7. *35 U.S.C. § 281.*

(n9)Footnote 8. *35 U.S.C. § 283.*

(n10)Footnote 9. *35 U.S.C. § 284.*

(n11)Footnote 10. *Activated Sludge v. City of Fort Worth, 89 F.2d 278, 279 (5th Cir. 1937)* , *cert. denied, 302 U.S. 701 (1937)* .

(n12)Footnote 11. *In re Lockwood, 50 F.3d 966, 975 (Fed. Cir.)* , *vacated on other grounds, 115 S. Ct. 2274, 132 L. Ed. 2d 279 (1995)* .

(n13)Footnote 12. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n14)Footnote 13. *Markman v. Westview Instruments, Inc., 517 U.S. 370, 384-386, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)* .

(n15)Footnote 14. *Paragon Podiatry Lab, Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1190 (Fed. Cir. 1993)* .

(n16)Footnote 15. *Gardco Mfg., Inc. v. Herst Lighting Co., 820 F.2d 1209, 1213 (Fed. Cir. 1987)* .

(n17)Footnote 16. *Avco Corp. v. PPG Indus., Inc., 867 F. Supp. 84, 98 (D. Mass. 1994)* .

(n18)Footnote 17. *17 U.S.C. § 502(a).*

(n19)Footnote 18. *17 U.S.C. § 504(b).*

(n20)Footnote 19. *Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 433-434, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)* .

(n21)Footnote 20. *McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296, 1299 (E.D. Mo. 1980)* .

(n22)Footnote 21. *17 U.S.C. § 504(b).*

(n23)Footnote 22. *17 U.S.C. § 504(c).*

(n24)Footnote 23. *Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S. Ct. 1279, 1284, 140 L. Ed. 2d 438 (1998)* .

(n25)Footnote 24. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* ; *see Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 465 (4th Cir. 1999)* (on claim of trademark dilution under Lanham Act, plaintiff has right to a jury trial only on issue of willfulness of violation and damages; if violation is not willful, only remedy available is injunction).

(n26)Footnote 25. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-479, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n27)Footnote 26. *Ferrari S.P.A. Esercizio v. Roberts, 944 F.2d 1235, 1248 (6th Cir. 1991)* , *cert. denied, 505 U.S. 1219 (1992)* ; *Coca-Cola Co. v. Wright, 55 F.R.D. 11, 12 (W.D. Tenn. 1971)* .

(n28)Footnote 1. United States v. 4. *0 Acres of Land, 175 F.3d 1133, 1139-1140 (9th Cir. 1999)* .

(n29)Footnote 2. *Fed. R. Civ. P. 71.1(h)(1)(A).*

(n30)Footnote 3. *Fed. R. Civ. P. 71.1(h)(1)(B)*; *see Fed. R. Civ. P. 71.1(h)(2)(A).*

(n31)Footnote 4. *See Fed. R. Civ. P. 71.1(h)(1)(B).*

(n32)Footnote 4.1. *Fed. R. Civ. P. 71.1(h)(1).*

(n33)Footnote 5. *KLK, Inc. v. United States Dep't of the Interior, 35 F.3d 454, 456-457 (9th Cir. 1994)* .

(n34)Footnote 1. *15 U.S.C. § 4.*

(n35)Footnote 2. *United States v. Lima News, 244 F. Supp. 592, 593-594 (N.D. Ohio 1965)* .

(n36)Footnote 3. *15 U.S.C. § 15.*

(n37)Footnote 4. *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 690 (9th Cir. 1976)* , *cert. denied, 429 U.S. 940 (1976)* .

(n38)Footnote 5. *15 U.S.C. § 26.*

(n39)Footnote 6. *Ring v. Spina, 166 F.2d 546, 550 (2d Cir. 1948)* , *cert. denied, 335 U.S. 813 (1948)* .

(n40)Footnote 7. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n41)Footnote 8. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-511, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n42)Footnote 1. *28 U.S.C. §§ 2201, 2202.*

(n43)Footnote 2. *Fed. R. Civ. P. 57.*

(n44)Footnote 3. *Firemen's Ins. Co. of Newark v. Smith, 180 F.2d 371, 374 (8th Cir. 1950)* , *cert. denied, 339 U.S. 980 (1950)* .

(n45)Footnote 4. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 661 (6th Cir. 1996)* (when plaintiffs claimed breach of collective bargaining agreement, sought declaration of their rights under Declaratory Judgment Act, and also sought injunction and incidental damages, court held that relief sought was equitable and that damages were intertwined with and part of equitable relief).

(n46)Footnote 5. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 662 (6th Cir. 1996)* (could not convert equity action into legal action); *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* (could not convert legal action into equity action).

(n47)Footnote 1. *42 U.S.C. §§ 1981, 1981a* and *2000e-17.*

(n48)Footnote 2. *42 U.S.C. § 1981a(c).*

(n49)Footnote 3. *Landgraf v. USI Film Prods., 511 U.S. 244, 285-286, 114 S. Ct. 1483, 1508, 128 L. Ed. 2d 229 (1994)* ; *Waterson v. Plank Road Motel Corp., 43 F. Supp. 2d 284, 286* (N.D.N.Y. 1999).

(n50)Footnote 4. *Mills v. Amoco Performance Prods., Inc., 872 F. Supp. 975, 986 (S.D. Ga. 1994)* (fact that plaintiffs may recover only equitable relief for pre-enactment conduct does not bar jury trial of their claims based on pre-enactment conduct).

(n51)Footnote 5. *Sullivan v. School Bd. of Pinellas Co., 773 F.2d 1182, 1187 (11th Cir. 1985)* (reinstatement, back pay and reimbursement for lost professional benefits are all equitable).

(n52)Footnote 6. *Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989)* .

(n53)Footnote 7. *See 29 U.S.C. §§ 621-634.*

(n54)Footnote 8. *29 U.S.C. § 626(c)(2).*

(n55)Footnote 9. *Duke v. Uniroyal, Inc., 928 F.2d 1413, 1422 (4th Cir.)* , *cert. denied, 502 U.S. 963 (1991)* (when party seeks both legal and equitable remedies, appropriate procedure requires court to submit case first to the jury to resolve liability and all legal damages, and then court conducts trial in equity to resolve all issues of equitable relief); *Tomasello v. Rubin, 167 F.3d 612, 619 (D.C. Cir. 1999)* (however, federal employee is not entitled to a jury trial on ADEA claims, and there is no *Seventh Amendment* issue in such cases under ADEA; Congress did not provide right to trial by jury when it waived sovereign immunity of United States).

(n56)Footnote 10. *Sailor v. Hubbell, Inc., 4 F.3d 323, 325-326 (4th Cir. 1993)* .

(n57)Footnote 11. *Lorillard v. Pons, 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)* .

(n58)Footnote 12. *Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1097 n.3 (11th Cir. 1987)* .

(n59)Footnote 13. *Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.)* , *cert. denied, 502 U.S. 963 (1991)* .

(n60)Footnote 14. *Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991)* .

(n61)Footnote 15. *Lehman v. Nakshian, 453 U.S. 156, 161, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981)* .

(n62)Footnote 16. *See 42 U.S.C. § 12117.*

(n63)Footnote 17. *42 U.S.C. § 1981a(c)(1)*; *see* [a], *above*.

(n64)Footnote 18. *42 U.S.C. § 12101.*

(n65)Footnote 19. *Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1494 (M.D. Ala. 1994)* ; *Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 605-606 (D. Me. 1994)* .

(n66)Footnote 20. *Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 606 (D. Me. 1994)* .

(n67)Footnote 21. *Curtis v. Loether, 415 U.S. 189, 196 n.11, 94 S. Ct. 1005, 1009, 39 L. Ed. 2d 260 (1974)* (jury trial right remains on common-law issues in joined claim).

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART I. RIGHT TO JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.03

§ 22.03 Federal Law Determines Right to Jury Trial in Federal Courtn*

The right to a jury trial in the federal courts must be determined as a matter of federal law in diversity actions as well as other actions, n1 because the Supreme Court has stated that only by application of the federal law may the uniformity required by the *Seventh Amendment* be achieved. n2 In diversity cases, although the substantive aspect of the claim is governed by state law, n3 the characterization of that state-created claim as legal or equitable for purposes of determining whether a right to a jury trial is indicated, must be made by recourse to federal law. n4 Thus, even when the source of the substantive claim is in state law, federal law will determine the right to a jury trial. n5

As noted above, when state law does not provide for a jury trial of right, but federal law requires one, the federal policy controls. n6 It is important to realize that even when the situation is reversed, and the state would grant a jury trial but the federal law would not, the courts have also held that federal law applies, and the demand for jury trial must be denied. n7

Federal law also governs with respect to the unanimity requirement of the right to a jury trial. Thus, *Federal Rule of Civil Procedure 48* requires a unanimous verdict unless the parties stipulate otherwise. This is not the rule in all states, and therefore conflicts have sometimes arisen in diversity actions when a party has argued that a less than unanimous majority verdict should suffice in federal court because it is permissible under state law. The courts have disagreed, and held that the federal rule applies, because while the interest in a unanimous verdict does not rise to constitutional dimensions, it is cloaked in a strong tradition, and trial management of the federal courts is an important concern of the federal judiciary. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.14* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1328 (11th Cir. 1999)* .

(n3)Footnote 2. *Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963)* (holding that federal law should apply because of the strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts); *see also Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994)* (federal law governs validity of jury waiver).

(n4)Footnote 3. *Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n5)Footnote 4. *Amoco Oil Co. v. Torcomian, 722 F.2d 1099, 1103 (3d Cir. 1983)* .

(n6)Footnote 5. *Fahy v. Nationwide Mut. Fire Ins. Co., 885 F. Supp. 678, 680 (M.D. Pa. 1995)* (right to jury trial in federal court on state statutory claim is determined as matter of federal law).

(n7)Footnote 6. *Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963)* ; *Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* .

(n8)Footnote 7. *Goar v. Compania Peruana de Vapores, 688 F.2d 417, 423-424 (5th Cir. 1982)* .

(n9)Footnote 8. *Masino v. Outboard Marine Corp., 652 F.2d 330, 331-332 (3d Cir. 1981)* , *cert. denied, 454 U.S. 1055 (1981)* .

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PART VI Trial and Judgment
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3-22 Moore's Manual--Federal Practice and Procedure § 22.04

§ 22.04 Effect of Federal Rules on Right to Jury Trialn*

Rule 38(a) preserves the right of jury trial in those cases in which the right is protected by the *Seventh Amendment to the Constitution* or is provided by federal statute. n1 The rule does not change the substantive principles regarding the right to a jury trial. The rule contains no affirmative grant and neither enlarges nor restricts the right to a jury trial that existed before the federal rules were adopted. n2 This means that issues that have been historically triable by jury as of right are still triable by jury as of right, while actions historically triable by the court, because a right of trial by jury did not exist under the Constitution or statutes of the United States, are still triable by the court. n3

The purpose of the language of Rule 38(a) is to ensure that the unification of law and equity does not intend to alter the fundamental right to a jury trial. n4 In other words, while Rule 2 creates one form of action, known as a civil action, which took the place of the former separate suits at law and in equity, the drafters wanted to maintain the historical distinction for purposes of the *Seventh Amendment*. Thus, even though claims and defenses formerly cognizable either at law or equity have been merged into one action, Rule 38(a) makes it clear that the federal rules in their entirety have neither enlarged nor diminished the right to either a jury or court trial. n5 However, while it is clear that the federal rules created no new jury trial rights, the simplification of procedures provided by the rules has had a net effect of broadening the class of cases triable by a jury as of right. n6 Liberal joinder provisions permit legal and equitable causes to be brought and resolved in one civil action, thereby eliminating the need for the former practice of equity courts trying legal issues as incidental to equitable causes. Similarly, the role of injunction and other equitable remedies has been affected by the availability of declaratory relief. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.03* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 40-41 n.3, 109 S. Ct. 2782, 106 L. Ed. 2d 26*

(1989) ; *see Fed. R. Civ. P. 12(d).*

(n3)Footnote 2. *Rachal v. Ingram Corp., 795 F.2d 1210, 1214 (5th Cir. 1986)* ; *In re Zweibon, 565 F.2d 742, 748 (D.C. Cir. 1977)* .

(n4)Footnote 3. *Fitzpatrick v. Sun Life Assur. Co. of Canada, 1 F.R.D. 713, 715 (D.C. N.J. 1941)* ; *see Bynum v. Prudential Life Ins. Co. of Am., 7 F.R.D. 585, 586 (E.D. S.C. 1947)* .

(n5)Footnote 4. *See Fed. R. Civ. P. 38(a).*

(n6)Footnote 5. *Dixon v. Northwestern Nat'l Bank of Minneapolis, 297 F. Supp. 485, 488 (D. Minn. 1969)* ; *Dewey Electronics Corp. v. Montage, Inc., 117 F.R.D. 73, 74 (M.D. Pa. 1987)* .

(n7)Footnote 6. *See Bruckman v. Hollzer, 152 F.2d 730, 733 (9th Cir. 1946)* .

(n8)Footnote 7. *See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.05

§ 22.05 Right to Jury Trial and Collateral Estoppeln*

The doctrine of offensive collateral estoppel generally provides that once a court has decided an issue that has been completely and fairly litigated that determination may be relied on in subsequent proceedings. Because of the collateral estoppel effect, when legal and equitable claims are raised in a single action, common questions must be tried first to a jury, because the jury trial right must not be impaired through prior determination of equitable claims. n1 This rule applies whether the legal issues are characterized as incidental to the equitable issues or not. n2

If a court determines issues of fact in an equitable action, that determination may have a collateral estoppel effect on a subsequent law action involving the same issues. Furthermore, a plaintiff who did not participate in the earlier action may be permitted to offensively use the determination under appropriate circumstances, and the fact that there was not an identity of the parties does not violate the *Seventh Amendment* right to a jury trial of the defendant in the second action. n3

However, there are limitations on the offensive use of collateral estoppel. It is not permitted in cases in which a private plaintiff could have joined in the original action but elected not to do so in order to benefit from rulings adverse to the defendant; cases in which the defendant did not have an incentive to vigorously defend the original suit; cases in which the prior judgment against the defendant was inconsistent with other previous judgments; and cases in which the second action gave the defendant procedural opportunities not present in the prior action. n4 Offensive use of collateral estoppel is also prohibited in any case in which plaintiff's legal claims were erroneously dismissed in the prior action, and the court proceeded to resolve the common issues without a jury. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.13* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n3)Footnote 2. *Curtis v. Loether, 415 U.S. 189, 196, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* .

(n4)Footnote 3. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n5)Footnote 4. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-331, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n6)Footnote 5. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 551-553, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)*
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3-22 Moore's Manual--Federal Practice and Procedure § 22.06

§ 22.06 Jury Right When Federal Government is Partyn*

[1] United States Claimant

When an action is brought by or on behalf of the United States, the right to a jury trial is protected by the *Seventh Amendment* and is governed by the same rules that apply to actions by any other plaintiff, n1 provided that the action is to adjudicate a private right by the government against a private party. This means that there is a right to a jury trial if the suit might give rise to liability on the part of individual to pay the government. n2 Thus, when the United States or its agency is the initiator of a suit, legal issues are triable to a jury, n3 but equitable issues are triable without a jury. n4

The question of sovereign immunity is not implicated because the government is the party bringing the suit, except with respect to counterclaims or cross-claims against the United States. n5 The right to a jury trial for private actions applies to any party who is defending a claim instituted by the government, including a third-party defendant; for example, a third-party defendant impleaded by the government for contribution or indemnity, may obtain a jury trial of legal issues in the suit. n6

[2] United States Defendant

[a] No General Right to Jury in Action Against Government

In contrast to cases when the federal government has initiated a suit, n1 the *Seventh Amendment* right to a jury trial does not apply in actions when the federal government is the defendant, n2 because there was no right to sue the sovereign at common law, and therefore the *Seventh Amendment's* preservation of the jury trial right in suits at common law does not apply. n3 Under the Federal Tort Claims Act, the district courts have exclusive jurisdiction over civil actions against the United States for money damages for injury to or loss of property, personal injury, or wrongful death, n4 and any suit under the Act must be tried by the court without a jury. n5

The United States as sovereign is immune from suit, except to the extent that it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. n6 Therefore, once the government waives immunity from suit, the plaintiff has a right to a trial by jury against the government only if that right is one of the express terms of the government's consent to be sued. n7 If the government does not expressly give up its right to a

trial by the court, a party's right to a jury trial against the government will not be implied. n8

[b] Statutory Right to Jury in Action Against Government in Tax Case

The district courts have original jurisdiction, concurrent with the Court of Federal Claims, over any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum that is excessive or has in any manner wrongfully been collected under the internal-revenue laws. n9 When a party brings an action against the United States under this tax provision, either party may request that the case be tried by the jury. n10 If the taxpayer brings suit in the tax court, the taxpayer has no right, statutory or constitutional, to a jury trial. n11 In order to obtain a jury trial, the taxpayer must pay the tax allegedly owed and then sue for a refund in the district court. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.40* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Damsky v. Zavatt, 289 F.2d 46, 51 (2d Cir. 1961)* .

(n3)Footnote 2. *Austin v. Shalala, 994 F.2d 1170, 1175 (5th Cir. 1993)* (right to jury trial when suit might give rise to liability of individual for overpayment by government of social security widow's benefits).

(n4)Footnote 3. *United States v. J.B. Williams Co., 498 F.2d 414, 430 (2d Cir. 1974)* .

(n5)Footnote 4. *Wirtz v. National Maritime Union, 399 F.2d 544, 547 (2d Cir. 1968)* (action by Secretary of Labor for court order setting aside union election and ordering new election).

(n6)Footnote 5. *Cf. In re Young, 869 F.2d 158, 160 (2d Cir. 1989)* .

(n7)Footnote 6. *Barron v. United States, 654 F.2d 644, 650 (9th Cir. 1981)* .

(n8)Footnote 1. *See* [1], *above*.

(n9)Footnote 2. *Lehman v. Nakshian, 453 U.S. 156, 160, 101 S. Ct. 2698, 2701, 69 L. Ed. 2d 548 (1981)* .

(n10)Footnote 3. *Glidden Co. v. Zdanok, 370 U.S. 530, 572, 82 S. Ct. 1459, 1484, 8 L. Ed. 2d 671 (1962)* ; *Washington Int'l Ins. Co. v. United States, 863 F.2d 877, 878-879 (Fed. Cir.)* , *cert. denied, 490 U.S. 1106 (1988)* ; *Austin v. Shalala, 994 F.2d 1170, 1175 (5th Cir. 1993)* .

(n11)Footnote 4. *28 U.S.C. § 1346(b)*.

(n12)Footnote 5. *28 U.S.C. § 2402*.

(n13)Footnote 6. *United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953, 47 L. Ed. 2d 114 (1976)* .

(n14)Footnote 7. *In re Young, 869 F.2d 158, 159 (2d Cir. 1989)* .

(n15)Footnote 8. *Berman v. American Nat'l Red Cross, 834 F. Supp. 286, 288-292 (N.D. Ind. 1993)* .

(n16)Footnote 9. *28 U.S.C. § 1346(a)(1)*.

(n17)Footnote 10. *28 U.S.C. § 2402*.

(n18)Footnote 11. *Parker v. Commissioner, 724 F.2d 469, 472 (5th Cir. 1984)* .

(n19)Footnote 12. *Thomas v. United States, 695 F. Supp. 1021, 1022-1023 (E.D. Mo. 1988)* (deposit of funds with IRS in an amount equal to the disputed increase in tax liability pending determination of the dispute was deemed insufficient to entitle taxpayer to jury trial under statute).

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3-22 Moore's Manual--Federal Practice and Procedure § 22.07

§ 22.07 Jury Right When Foreign Nation is Partyn*

[1] Foreign Nation Claimant

There is no statutory authority granting a right to jury trial in actions by a foreign state, nor is there any such authority denying the right. Therefore, the availability of a jury trial in these cases is dependent on whether there is a constitutional right under the *Seventh Amendment*. n1 The federal district courts have diversity jurisdiction over suits meeting the monetary threshold in which a foreign state is plaintiff, and citizens of a state, or of different states, are defendants. n2 A "foreign state" is defined in the statute as including a political subdivision of a foreign state, or an agency or instrumentality of a foreign state. n3 An "agency or instrumentality of a foreign state" is defined as including a corporation or similar entity, a majority of whose shares are owned by a foreign state. n4

As discussed above in *§ 22.06[1]*, when an action is brought by, or on behalf of, the United States to adjudicate private rights, the right to a jury trial is protected by the *Seventh Amendment*, and is governed by the same rules that apply to actions by other plaintiffs. This same rule applies also to actions by foreign states. n5 Sovereign immunity extends only to actions against the sovereign. When an action is brought by the sovereign, the defendant is clothed in the protection of the *Seventh Amendment*. n6

[2] Foreign Nation Defendant

Congress has established a uniform statutory system for federal suits against foreign states which prohibits the use of the jury trial. Under the Foreign Sovereign Immunities Act (FSIA), Congress has affirmatively provided for trial without a jury grant in its grant of original jurisdiction to the district courts n1 and in the provision for actions removed from state courts. n2 Under the Act a "foreign state" is defined in the statute as including a political subdivision of a foreign state, or an agency or instrumentality of a foreign state. An "agency or instrumentality of a foreign state" is defined as (1) an entity which is a separate legal person, whether corporate or other type of entity, that is (2) an organ of a foreign state or its political subdivisions, or a majority of whose shares are owned by a foreign state or its political subdivisions, and that is (3) neither a citizen of one of the United States nor created under the laws of a third country. n3

When Congress granted original jurisdiction to the district courts under the FSIA it referred to the FSIA as applying to any nonjury civil action against a foreign state. n4 The courts have interpreted this language as Congress' intention to

preclude jury trial in all cases against foreign states n5 and have uniformly denied the right to a jury trial in such cases. n6 Furthermore, the jurisdiction provided by FSIA is the sole source of federal jurisdiction in suits against foreign states. n7 That exclusive jurisdiction, and its accompanying trial without a jury, may not be circumvented by bringing a case within diversity or federal question jurisdiction. n8

In addition to actions initiated against a foreign state, the Foreign Sovereign Immunities Act provides that any counterclaims that may be brought against a foreign sovereign are not triable to a jury. n9 This position, which restricts federal court jurisdiction to non-jury counterclaims, reflects the strong policy expressed by Congress and recognized by the courts that favors uniformity of decision in cases involving foreign sovereigns, and that policy is best served by trial without a jury. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.41* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Goar v. Compania Peruana de Vapores, 688 F.2d 417, 423-424 (5th Cir. 1982)* .

(n3)Footnote 2. *28 U.S.C. § 1332(4)*.

(n4)Footnote 3. *28 U.S.C. § 1603(a)*.

(n5)Footnote 4. *28 U.S.C. § 1603(b)*.

(n6)Footnote 5. *National Iranian Oil Co. v. Ashland Oil, Inc., 716 F. Supp. 268, 270 (S.D. Miss. 1989)* .

(n7)Footnote 6. *See In re Aircrash Disaster Near Roselawn, Indiana, 909 F. Supp. 1083, 1086 (N.D. Ill. 1995)* .

(n8)Footnote 1. *28 U.S.C. § 1330(a)*.

(n9)Footnote 2. *28 U.S.C. § 1441(d)*; *see Eichler v. Lufthansa German Airlines, 794 F. Supp. 127, 130 (S.D.N.Y. 1992)* (airline passenger was found to have no right to a jury trial in action under Warsaw Convention for injuries sustained while boarding airplane, after airline, which was instrumentality of foreign state, removed action to federal court).

(n10)Footnote 3. *28 U.S.C. § 1603(b)*.

(n11)Footnote 4. *28 U.S.C. § 1330(a)*.

(n12)Footnote 5. *Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1154 (4th Cir. 1982)* .

(n13)Footnote 6. *Universal Consol. Cos. v. Bank of China, 35 F.3d 243, 246 (6th Cir. 1994)* ; *Burke v. Compagnie Nationale Air France, 699 F. Supp. 1016, 1019 (D. P.R. 1988)* .

(n14)Footnote 7. *Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1532-1533 (11th Cir.)* , *cert. denied, 474 U.S. 995 (1985)* .

(n15)Footnote 8. *Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1532-1533 (11th Cir.)* , *cert. denied, 474 U.S. 995 (1985)* ; *Rex v. Cia. Pervana de Vapores, S. A., 660 F.2d 61, 64-65 (3d Cir. 1981)* , *cert. denied, 456 U.S. 926 (1982)* .

(n16)Footnote 9. *National Iranian Oil Co. v. Ashland Oil, Inc., 716 F. Supp. 268, 272 (D. Miss. 1989)* .

(n17)Footnote 10. *Goar v. Compania Peruana de Vapores, 688 F.2d 417, 428 (5th Cir. 1982)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART I. RIGHT TO JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.08

§ 22.08 Jury Trial Right Determined by Claimant's Choice of Remediesn*

The right to a jury trial is dependant on the remedy requested, as determined from the pleadings in the case. A claimant has a right to pray for a particular remedy or remedies from all of those that may be available, and the jury trial right will flow from the claims asserted and the remedies sought. Consequently, in a case in which a plaintiff elects to demand damages, the choice will give rise to a right to a jury trial, even though the plaintiff may also have elected to obtain an injunction, which does not give the right to a jury. n1 Similarly, when a legal claim, such as a claim for damages, is combined with an equitable claim, the parties have a right to a jury trial on the damages claim. n2

In making its determination regarding the jury trial right, a court must consider all of the pleadings, including claims, defenses, counterclaims and third-party pleadings. n3 However, while the right to a jury trial is determined from the pleadings, the form or designation of the plaintiff's complaint does not control the characterization of the action as either equitable or legal. n4 It is the nature and substance of the relief sought, and not the language used in the pleading that is controlling. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.42* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Robine v. Ryan, 310 F.2d 797, 798-799 (2d Cir. 1962)* .

(n3)Footnote 2. *In re Jensen, 946 F.2d 369, 371-373 (5th Cir. 1991)* (plaintiffs asserted claims for breach of fiduciary duty, fraud and conspiracy, and sought actual and exemplary damages, as well as a constructive trust and an accounting).

(n4)Footnote 3. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508, 79 S. Ct. 948, 955, 3 L. Ed. 2d 988 (1959)* .

(n5)Footnote 4. *Bugher v. Feightner, 722 F.2d 1356, 1357 (7th Cir. 1983)* , *cert. denied, 469 U.S. 822 (1984)* (even though complaint requested only equitable remedies of accounting and grant of specific performance, it alleged in essence breach of contract, traditionally action at law, and thus there was a jury right).

(n6)Footnote 5. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 900, 8 L. Ed. 2d 44 (1962)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.09

§ 22.09 Effect of Joinder or Separation of Legal and Equitable Claimsn*

[1] Joinder Does Not Affect Jury Trial Right Under Liberal Joinder Rules

The fact that the Federal Rules of Civil Procedure permit the presentation of all issues, legal, equitable and maritime, that pertain to a single claim within a single action, n1 and compel joinder with regard to counterclaims, n2 does not affect a party's *Seventh Amendment* right to a jury trial. n3 Likewise, a jury trial is not waived by the fact that the rules permit joinder of wholly unrelated legal, equitable, and maritime claims that may be asserted against opposing parties. n4 Thus, a party does not waive a jury trial as the result of the joinder of legal and equitable claims or issues, n5 whether the issues relate to one cause of action, or to two or more separate and distinct causes of action. n6 Furthermore, joinder of legal and admiralty claims in a single action does not bar the parties' right to a jury trial of the legal claims. n7

[2] Trial and Jury Decision When Legal and Equitable Claims Have Common Factual Issues

In order to preserve the right to a jury trial in cases in which there is overlap in the factual questions relating to legal and equitable claims, the jury must not only decide the legal claims but must also decide all questions common to both claims, and the court, in a later ruling on the equitable claims, will be bound by the findings of fact of the jury with respect to those common issues. n1 The Supreme Court has held that if legal and equitable claims containing common issues are bifurcated for trial, absent extraordinary circumstances, the legal claims must be tried first, in order to avoid depriving the parties of their jury trial right with respect to the common questions. n2 The Supreme Court has also held that this rule applies regardless of whether the legal issues are characterized as incidental to the equitable issues. n3

When legal and equitable issues do not arise from a common question, and the determination of the equitable issues by the court will not have a preemptive effect on the jury's determination of legal issues, the trial court has discretion to establish the sequence of trial, and may do so on considerations of administrative convenience. n4 Furthermore, it has been held that when disposition of an equitable claim would make consideration of a legal claim unnecessary, the equitable claim may be determined first. n5

When a jury verdict has been set aside or vacated, the issue may arise as to the effect the setting aside has on the determinations of the jury. It has been held that in such cases the trial judge continues to be bound by a jury's findings

even after the verdict is vacated, provided that the reason it was set aside was not because the underlying factfinding was faulty. n6 However, when the reason for vacating the verdict calls into question the accuracy of the findings, the ex-verdict may not govern determination of issues tried to the court. n7

[3] Incidental Damages in Equity Actions

The Supreme Court has consistently held that a district court may not deny a party a jury trial on legal issues by characterizing those issues as merely "incidental to" or "insignificant" in comparison with equitable issues. Courts have stated that, once a court determines that a case involves legal issues, the parties have a right to a jury trial on those issues, regardless of how insignificant they may appear in relation to equitable issues. n1

On the other hand, while it is widely accepted that a monetary award is generally an indication of "legal" relief, it is not true that any award of monetary relief is necessarily legal relief. n2 Entirely equitable relief may include monetary relief when required to afford complete relief. Trust law remedies, for example, are equitable in nature yet include provisions for monetary damages, n3 and monetary restitution may be awarded in connection with injunctive relief. n4 Thus, it was proper for a court to deny a jury trial when the monetary award was intertwined with equitable relief; the court would err, however, if it denied a jury trial because of its determination that legal issues in the case are merely incidental to equitable ones. n5

[4] Pleadings Subsequent to Complaint

If a civil action as specified in the complaint is essentially equitable, and a defendant interposes a legal counterclaim, whether compulsory or permissive, there is a right to jury trial on the counterclaim. n1 Similarly, the court must also order a jury trial when demanded for a counterclaim that seeks both legal and equitable relief. n2

When a counterclaim raises legal issues that are intertwined with the equitable issues raised in a main action, common questions must be tried to the jury, so that the jury trial right will be preserved. n3 Additionally, the issues may be so intertwined that the entire case may need to be tried to the jury. Thus, in an injunction action with a counterclaim for damages, the trial court ordered a jury trial on all issues raised in complaint and the answer and counterclaim because all of the issues arose from the same factual circumstances. n4

Similarly, in an insurance case, the court held that the insured was entitled to a jury trial on all questions of fact common to an insurance company's action seeking a declaration that an insurance policy issued by the company to the insured was void, and also on the insured's counterclaim seeking damages and a declaration that the company was obligated to pay under the policy. n5

[5] Bifurcation

In a manner similar to joinder of claims, the court is allowed to separate or bifurcate claims into separate trials without violating the *Seventh Amendment*, provided that the bifurcation does not prejudice a party. When a court bifurcates a case, the *Seventh Amendment* requires that the court must divide issues between separate trials in such a way that the same issue is not reexamined by different juries. n1 While both juries may examine overlapping evidence, they may not decide factual issues that are common to both trials and essential to the outcome. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureJoinder of Claims & RemediesLiberal JoinderCivil ProcedureJoinder of Claims & RemediesRemediesCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.43* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 18(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 13(a).*

(n4)Footnote 3. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962)* (in action seeking injunctive relief and damages, defendant could not be deprived of its right to a jury trial on damages issue).

(n5)Footnote 4. *Fed. R. Civ. P. 18(a).*

(n6)Footnote 5. *Tull v. United States, 481 U.S. 412, 418, 107 S. Ct. 1831, 1835-1836, 95 L. Ed. 2d 365 (1987)* .

(n7)Footnote 6. *Brownlee v. Yellow Freight System, Inc., 921 F.2d 745, 749 (8th Cir. 1990)* .

(n8)Footnote 7. *Wilmington Trust v. United States Dist. Court, 934 F.2d 1026, 1030-1032 (9th Cir. 1991)* .

(n9)Footnote 1. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 551-553, 110 S. Ct. 1331, 1336, 108 L. Ed. 2d 504 (1990)* ; *see Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1174-1175 (6th Cir. 1995)* (when claims at law and in equity are joined and legal claims are tried separately by jury, jury's verdict operates as finding of fact binding on trial court in its determination of equitable claims); *Abbott v. Bragdon, 882 F. Supp. 181, 183 (D. Me. 1995)* (when court determined claim for civil penalties under state human rights law was for legal relief, while ADA claims were equitable, jury would determine liability as to all claims, and then court would award penalty and determine whether to grant any equitable relief).

(n10)Footnote 2. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479, 82 S. Ct. 894, 900, 8 L. Ed. 2d 44 (1962)* ; *Wade v. Orange Co. Sheriff's Office, 844 F.2d 951, 954 (2d Cir. 1988)* .

(n11)Footnote 3. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962)* .

(n12)Footnote 4. *West v. Devitt, 311 F.2d 787, 788 (8th Cir. 1963)* (mandamus proceeding on question of laches).

(n13)Footnote 5. *Holiday Inns of America, Inc. v. Lussi, 42 F.R.D. 27, 32 (N.D.N.Y. 1967)* .

(n14)Footnote 6. *Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1138 (7th Cir. 1992)* .

(n15)Footnote 7. *Dranchak v. Akzo Nobel, Inc., 88 F.3d 457, 458-459 (7th Cir. 1996)* (when events during trial and improper omissions from jury instructions contributed to reasons for setting aside verdict, verdict's factual accuracy was impugned, and it was rendered unreliable; consequently, verdict could have no implications for court's analysis of non-jury issues).

(n16)Footnote 1. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, n.8, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962)* ; *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 660 (6th Cir. 1996)* .

(n17)Footnote 2. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 661 (6th Cir. 1996)* .

(n18)Footnote 3. *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 154 n.10, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985)* .

(n19)Footnote 4. *Tull v. United States, 481 U.S. 412, 424, 107 S. Ct. 1831, 1838-1839, 95 L. Ed. 2d 365 (1987)* .

(n20)Footnote 5. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 661 (6th Cir. 1996)* .

(n21)Footnote 1. *Progressive Northern Ins. Co. v. Bachmann, 314 F. Supp. 2d 820, 833 (W.D. Wis. 2004)* .

(n22)Footnote 2. *Amoco Oil Co. v. Torcomian, 722 F.2d 1099, 1102-1104 (3d Cir. 1983)* .

(n23)Footnote 3. *Shenandoah Life Ins. Co. v. Hawes, 256 F. Supp. 366, 369 (E.D.N.C. 1966)* .

(n24)Footnote 4. *Lee Pharmaceuticals v. Mishler, 526 F.2d 1115, 1117 (2d Cir. 1975)* .

(n25)Footnote 5. *Provident Life & Accident Ins. Co. v. Adie, 982 F. Supp. 1269, 1271-1272 (E.D. Mich. 1997)* .

(n26)Footnote 1. *Olden v. Lafarge Corp., 383 F.3d 495, 509 fn 6 (6th Cir. 2004)* .

(n27)Footnote 2. *Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1126-1127 (7th Cir. 1999)* (in personal injury suit arising from airplane crash, trial court's bifurcation of passenger's claims against airplane pilot and manufacturer of air filter did not violate *Seventh Amendment's* jury guarantee because, although both juries would be examining cause of crash, juries would be asked to decide distinct questions, and second jury would not reexamine conclusions of first).

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PART VI Trial and Judgment
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3-22 Moore's Manual--Federal Practice and Procedure §§ 22.10through 22.19

[Reserved]

§§ 22.10[Reserved]

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A. DEMAND FOR JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.20

§ 22.20 Requirement of Demandn*

Courts do not assume that a party will exercise its right to a jury trial. Consequently, a party must demand a jury trial pursuant to the provisions of Rule 38. n1 A party that fails to make a timely demand waives the right. n2

Any party may demand a jury trial of any issue triable by a jury. The party must serve a written demand on the other parties at any time after commencement of the action, but not later than 14 days after service of the last pleading directed to the issue. n3 The party making the demand must also file the demand with the court within a reasonable time after service, and include a certificate of service with the filing. n4 A demand may be included in a pleading of the party. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 38.50* (Matthew Bender 3d ed.).

(n2)Footnote 1. *DeWitt v. Hutchins, 309 F. Supp. 2d 743, 754 (M.D.N.C. 2004)* ; *see Fed. R. Civ. P. 38(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 38(d)*; *Thompson v. Mahre, 110 F.3d 716, 719 (9th Cir. 1997)* , *cert. denied*, *522 U.S. 967 (1998)* ; *see also § 22.40* et seq. for a complete discussion of waiver.

(n4)Footnote 3. *Fed. R. Civ. P. 38(b)(1)*; *Unidev, L.L.C. v. Housing Auth. of New Orleans, 250 F.R.D. 268, 271 (E.D. La. 2008)* (last pleading directed to issue is not pleading that raises issue, but pleading that contests issue, which is usually answer or reply; construing former time periods).

(n5)Footnote 4. *Fed. R. Civ. P. 38(b)(2)*; *see Fed. R. Civ. P. 5(d).*

(n6)Footnote 5. *Fed. R. Civ. P. 38(b)(1).*

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A. DEMAND FOR JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.21

§ 22.21 Specification of Issues in Demand

[1] Effect of Specification of Issues

In its demand for jury trial, a party may specify those issues it wishes to have tried by a jury. Absent specification, the party will be deemed to have demanded a jury trial on all issues triable by a jury. n1 If a party specifies only some issues in the demand, any other party may demand a trial by jury of any other or all issues triable by a jury in the action. A party may do so by serving a demand within 14 days after service of the original demand on it, or within any lesser time that the court may order. n2 If issues are specified in a demand, other parties may rely on that demand as to those specified issues, and need not make their own demands for jury trial of those issues, n3 but a party desiring jury trial of an issue not specified must make its own demand with regard to that particular issue. n4 If a party does make a demand, the opposition may rely on the demand for the issues covered by the demand, n5 and the demanding party may not withdraw the demand. n6

The practical effect of these provisions is that if the attorney determines the party would benefit from a jury trial, the party should make a general demand, which makes all of the issues triable to a jury. n7 If the party wants to avoid a jury trial for particular issues, the party should, instead, demand a jury trial only for those issues. n8

[2] Failure to Specify Constitutes Demand as to All Issues

When a general demand for jury trial is made without specifying particular issues, the demand is deemed to be a demand for jury trial of all issues in the case that are triable by a jury. n1 A general demand for jury trial also covers all issues raised in subsequent pleadings which affect the party that made the general demand. n2 Consequently, the advantage of a general demand is that when issues are added, or initially not recognized as triable to a jury, they are automatically included in the demand. n3 The disadvantage is that once a general demand is made, the party may not withdraw any issues included in the demand, even is it becomes apparent that a jury trial on that issue is not advisable for the party. n4

If a party makes a timely general demand, the clerk will designate the case on the docket as a jury case; n5 however, if the court on motion or its own initiative finds that some of the issues are not triable as of right to a jury, it will limit jury

trial to the other issues that are properly triable to a jury. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(c)*; *see Fed. R. Civ. P. 39(a)(2)* (party's demand effective only for those issues to which there is federal right to jury); *Lutz v. Glendale Union High Sch., Dist. No. 205, 403 F.3d 1061, 1064 (9th Cir. 2005)* (citing **Moore's Federal Practice**); *see also* [2], *below*.

(n2)Footnote 2. *Fed. R. Civ. P. 38(c)*.

(n3)Footnote 3. *Southland Reship, Inc. v. Flegel, 534 F.2d 639, 643 (5th Cir. 1976)* (opposing party may rely on demand).

(n4)Footnote 4. *Rosen v. Dick, 639 F.2d 82, 91-92 (2d Cir. 1980)* (if first demand does not cover issues pertinent to second party, second party may not rely reasonably on first demand).

(n5)Footnote 5. *Collins v. Government of V.I., 366 F.2d 279, 284 (3d Cir. 1966) , cert. denied, 386 U.S. 958 (1967)* (defendant may rely on demand of co-defendant to extent of issues embraced by demand).

(n6)Footnote 6. *Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 675 (4th Cir. 1967)* .

(n7)Footnote 7. *Lutz v. Glendale Union High Sch., Dist. No. 205, 403 F.3d 1061, 1064 (9th Cir. 2005)* (citing **Moore's Federal Practice**).

(n8)Footnote 8. *See YJR Enters., Inc. v. Twin County Grocers, Inc., 709 F. Supp. 499, 501 (S.D.N.Y. 1989)* (reliance is limited to the issues embraced by the demand); *Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 675 (4th Cir. 1967)* (once a demand has been made, demanding party may not withdraw issues encompassed by demand without consent of other parties).

(n9)Footnote 1. *Fed. R. Civ. P. 38(c)*; *see Horwitz v. Alloy Automotive Co., 677 F. Supp. 564, 566 (N.D. Ill. 1988)* (once general demand is timely asserted, second demand need not be made as to counterclaim).

(n10)Footnote 2. *Lutz v. Glendale Union High Sch., Dist. No. 205, 403 F.3d 1061, 1064 (9th Cir. 2005)* (citing **Moore's Federal Practice**); *see* [2], *below*.

(n11)Footnote 3. *YJR Enters., Inc. v. Twin County Grocers, Inc., 709 F. Supp. 499, 501 (S.D.N.Y. 1989)* .

(n12)Footnote 4. *Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 675 (4th Cir. 1967)* (once a demand has been made, demanding party may not withdraw issues encompassed by demand without consent of other parties).

(n13)Footnote 5. *Fed. R. Civ. P. 39(a)*.

(n14)Footnote 6. *Fed. R. Civ. P. 39(a)(2)*; *see Fed. R. Civ. P. 38(a)*; *see also § 22.01* et seq. (issues triable to jury in federal litigation).

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A. DEMAND FOR JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.22

§ 22.22 Procedural Requirements for Demand

[1] Persons Entitled to Make Demand

Any party to an action may make a demand for a jury trial with respect to any issue triable to a jury. n1 Thus, if a party files a cross-claim, the third-party defendant may make a demand with respect to the issues related to the cross-claim. n2 Similarly, when a court grants permission for a party to intervene in an action, the intervenor may be entitled to demand a jury trial for issues related to its claim. n3 Parties to interpleader actions are also entitled to demand a jury trial when the interpleader claim is one that is subject to a right to jury trial. For example, in an interpleader action to adjudicate the competing interests to proceeds from the sale of a partnership, the alleged fraudulent nature of a transfer of a partnership interest is a legal issue triable to a jury trial. n4

A person who has been added as a party plaintiff or defendant also has the right to demand a jury trial when it is otherwise appropriate. For example, when a prison employee was added as a party defendant in a civil rights action by the plaintiff inmates, after dismissal of the employee originally named in the complaint, the new defendant could demand a jury trial, notwithstanding that a jury trial had been waived by the original defendant. n5

A party may rely on another party's demand for a jury trial, which essentially means that the party that made the demand may not withdraw the demand for the issues encompassed by it. n6 Thus, a party may rely on another party's general demand for all issues triable to a jury that may arise in the action but may rely on an itemized demand only for those issues encompassed by the demand. n7

[2] Time for Demand

[a] Time Limits

A party may make a demand for a jury at any time after the commencement of the action, provided that the demand is made not later than 14 days after the service of the last pleading related to the issue that is the subject of the demand for jury. n1 This 14-day time period for a timely jury demand is controlled by the provisions of Rule 6, n2 which specifies the manner of computing time periods in federal civil litigation, including the extension of time for good cause or

excusable neglect under Rule 6(b)(1) n3 and to the provision of Rule 6(d) for the addition of 3 days to the period prescribed or allowed in the rules when service is accomplished by any means other than by hand delivery. n4 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

The jury demand may be included in a pleading. n5 For example, a plaintiff may make a demand for jury trial immediately on the commencement of the action by including the demand in the original complaint. n6

If a party fails to properly serve and file a jury trial demand within the 14-day time limit, the party generally waives the right to have the issue tried by a jury, n7 and it will be tried to the court. However, on proper motion of the party, n8 the court has discretion to order a jury trial of any or all issues even if the demand time limit has not been met. n9 Furthermore, the court may give special consideration in cases when the party who failed to file a timely jury demand has been hailed into federal court against the party's will, or when the party is proceeding pro se. However, the court's discretion is not unlimited, and a court may not grant relief without any justification nor when the failure to make a timely demand results merely from an oversight or inadvertence. n10 In this regard, a good faith mistake of law is no different than inadvertence or oversight, and an untimely jury demand due to legal mistake by the attorney does not broaden the district court's narrow discretion to grant the demand. n11 It is also important to note that although a general demand may be made, a demand made with respect to a specific issue, or a demand made with respect to particular parties, may be timely only in regard to those issues or parties, and the court may bifurcate a trial to hold a jury trial only for those issues for which the moving party made a timely Rule 38(b) demand. n12

[b] Service of Last Pleading Directed to Issue

The jury demand must be made not later than 14 days after service of the last pleading directed to the issue for which a jury trial is demanded. n13 The question of what constitutes a "pleading" for purposes of Rule 38 is governed by the express text of Rule 7(a). n14 Thus, when the defendant in response to a claim filed "special reports" pursuant to a court order, the reports were not "pleadings" under Rule 38 and did not begin the running of the 14-day period. n15 Similarly, neither a motion to dismiss n16 nor a motion for summary judgment constitutes a pleading within the meaning of Rule 38, causing the 14-day limit to begin to run. n17 It also has been held that a memorandum in opposition to a summary judgment motion is not a pleading for Rule 38(b) purposes, n18 nor is a notice giving names and addresses of prior users in a patent suit. n19

The 14-day period begins to run with service of the last pleading directed to the issue. Until such a pleading is served, the 14 days does not begin to run. n20 If a responsive pleading does not address the issue for which the demand is made, the pleading does not start the period. n21 Furthermore, a delay in filing the last pleading responsive to the issue delays the commencement of the 14-day period. n22

[c] Period Runs From Last Responsive Pleading

The "last pleading directed to the issue" within the meaning of the Rule 38(b)(1) is a responsive pleading which contests the issue, rather than raises the issue. Consequently, the last pleading is usually the answer to the complaint filed in the federal court that contests the particular issue under consideration. n23 However, the "last pleading" need not always be the answer to a complaint; it may be any responsive pleading that contests the issue, n24 such as an answer to a crossclaim or a third party complaint, n25 or a reply to an answer. n26 If there are multiple defendants, the fact that one defendant has served its answer does not begin the running of the 14 day period as against the plaintiff with respect to any issues that are also alleged against a second defendant, if the second defendant has not yet served its answer. A jury demand is timely if served within 14 days after the last defendant has served its answer. n27 However, if the defendants are jointly liable with respect to a claim containing an issue on which there is a right to a jury trial, the "last pleading directed at the issue" is the last pleading required to be filed as between the plaintiff and any of the jointly liable defendants. n28

When the trial court authorizes intervention in a case, the answer to the intervenor complaint, rather than the answer to the original complaint, is considered the last pleading directed to the triable issues under Rule 38(b). Demand made within 14 days of service of such an answer entitles the party to a jury trial, even though the right may previously have been waived by the original parties with respect to the original complaint. n29

[3] Format Requirements of Demand

[a] Requirement of Writing

A demand for jury trial must be in writing. n1 A demand may be general, such as "plaintiff demands trial by jury in this action," or may be more specific, for example, stating that "the defendant demands trial by jury of the issues raised by the defendant's counterclaim and plaintiff's reply to defendant's counterclaim." n2 If the demand is made in a separate paper, it should be properly captioned n3 and must clearly indicate the substance and extent of the demand. n4 However, it is not necessary to make the demand on a separate paper; the demand may be included in a pleading of the party, n5 such as by an indorsement on the pleading. n6

[b] Indorsement on Pleading

A jury demand may be included in a party's pleading itself. n7 Courts have held that a simple notation such as "Jury Demanded" placed beneath the docket number on a complaint has been deemed sufficient to place the opposing party on notice that the party was demanding a jury trial. n8 Similarly, a demand made on the last page of the defendant's answer, although not in the preferred style on the outside of the pleading, was deemed to be in compliance with the requirements of Rule 38(b). n9 Another court has honored a demand for jury contained in the body of a pleading. n10

A notation or indorsement on a pleading constitutes a sufficient demand for jury only if it is contained in the actual pleading itself and not on an attachment or paper incorporated by reference to the pleading. n11 Consequently, some courts have held that merely checking a "Yes" box on a civil cover sheet next to "Jury Demand" does not necessarily constitute an indorsement on the pleadings, and is insufficient for a valid demand for jury trial because it does not give notice to the opposition of the demand. n12 However, it is sufficient demand if the cover sheet actually accompanies pleadings served on parties, gives opposing parties notice of the jury trial request, and is deemed to constitute a part of the pleading. n13

[c] Federal Rules Prevail Over Local Rules

The Federal Rules of Civil Procedure prevail over local rules with regard to the adequacy of a demand for a jury trial. n14 Furthermore, a local rule is invalid if inconsistent with a federal rule. n15 Thus, when a party failed to list the demand in the caption of a pleading, as required by a local procedural rule, the failure did not invalidate the demand that otherwise met the requirements of Rule 38. n16 Similarly, a court has held that although the federal bankruptcy rules do not specifically incorporate the provision of Rule 38 requiring jury demand within 10 days (now 14 days) of the last pleading, the courts should borrow the provisions of the rule to determine when a valid jury demand has been made in a bankruptcy case. n17 Furthermore, when a party failed to fulfill an additional requirement of a local rule to place a notation to that effect in the title, the failure did not constitute a waiver of a trial by jury; the court held that the right to a jury trial is fundamental, and courts should indulge every reasonable presumption against waiver. n18

However, counsel may not ignore local rules with respect to the demand. Counsel should always check for any local rules that specify the method required for endorsement of a jury demand because the method specified by the local rule will control whether an effective demand has been made, unless the local rule imposes requirements additional to, or in conflict with, those required by Rule 38(b). n19

[4] Service of Demand

If a party fails to serve the other parties with a jury trial demand, the party waives the right to a jury trial. n1 The rationale behind this rule is that if a party files a jury demand but fails to serve it on the other parties, it would be manifestly unfair to say that the party was entitled to a jury trial without providing notice. n2 Rule 38(b) requires that the demand be served on the other parties, n3 which means all the other parties to the action that are not making the demand. n4 If a demand is endorsed on a pleading, service of the pleading necessarily embraces the demand. The original complaint, and therefore the demand if indorsed on the complaint, is served with the summons. Other pleadings and a demand for jury when made in a separate paper must be served in accordance with Rule 5(b). n5

Attorneys should be aware that the time of the completion of service may be crucial to the timeliness of the demand. n6 For example, when a case is removed to federal court Rule 81(c) provides that if at the time of removal all necessary pleadings have been served, a party entitled to trial by jury must serve the party's demand for jury trial within 14 days after service on the party of the notice of removal. n7 Thus, service, rather than filing, must be complete within the 14-day period. n8 Also note that serving an otherwise ineffective demand may be a contributing factor in its acceptance as a valid demand. Thus, courts will not usually consider merely checking the "Yes" box on the civil cover sheet next to "Jury Demand" as a valid demand for jury trial. However, the checking of the box may deemed sufficient if coupled with service on the adversaries. n9

[5] Filing of Demand

When a party has a right to a jury, the party must file a demand for the jury trial by filing the demand in court with proof of service, in accordance with Rule 5(d). n1 Failure to properly file may constitute a waiver of the right to a jury trial. n2 Prompt filing of the demand is important so that the clerk may properly docket the case and place the case on the trial calendar as either a jury or a court action. n3 Prudent practice indicates that both service and filing of the demand should be made within the applicable 14-day time period. However, it suffices if service of the demand alone occurs within that time period, provided that filing occurs within a reasonable time after service. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:
(n1)Footnote 1. *Lutz v. Glendale Union High Sch., Dist. No. 205, 403 F.3d 1061, 1064 (9th Cir. 2005)* ; *see Fed. R. Civ. P. 38(b).*

(n2)Footnote 2. *Blommer Chocolate Co. v. Bongards Creameries, Inc., 635 F. Supp. 919, 926 (N.D. Ill. 1986)* .

(n3)Footnote 3. *Campbell v. Plank, 133 F.R.D. 175, 176 (D. Kan. 1990)* .

(n4)Footnote 4. *In re Larsen, 172 B.R. 988, 991 (Bankr. D. Utah 1993)* .

(n5)Footnote 5. *Butterfield v. Crist, 52 F.R.D. 489, 490 (E.D. Wis. 1971)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 38(d).*

(n7)Footnote 7. *California Scents v. Surco Prods., 406 F.3d 1102, 1107 (9th Cir. 2005)* ; *see § 22.21.*

(n8)Footnote 1. *Fed. R. Civ. P. 38(b)(1)*; *see Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 632-633 (6th Cir. 2008)* (party waives jury trial unless jury demand is properly served and filed within period specified in rule); *see also* [b] *below.*

(n9)Footnote 2. *See Fed. R. Civ. P. 6*; *Seabrook v. City of New York, 236 F.R.D. 123, 127 (E.D.N.Y. 2006)* .

(n10)Footnote 3. *See Fed. R. Civ. P. 6(b)*.

(n11)Footnote 4. *See Fed. R. Civ. P. 6(d)*; *see also Fed. R. Civ. P. 5(b)(2)(B)-(F)*.

(n12)Footnote 5. *Fed. R. Civ. P. 38(b)(1)*.

(n13)Footnote 6. *Solis v. Los Angeles, 514 F.3d 946, 954 (9th Cir. 2008)* .

(n14)Footnote 7. *Fed. R. Civ. P. 38(d)*.

(n15)Footnote 8. *Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 62-63 (1st Cir. 2003)* .

(n16)Footnote 9. *See Fed. R. Civ. P. 39(b)*.

(n17)Footnote 10. *Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 632-633 (6th Cir. 2008)* .

(n18)Footnote 11. *Pacific Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd, 239 F.3d 1000, 1002-1003 (9th Cir. 2001)* , *cert. denied, 534 U.S. 944 (2001)* (party not entitled to jury trial under Rule 39(b) after it failed to make timely demand under Rule 38(b), merely because counsel misinterpreted local rules); *see also § 22.48* (discussion of factors court should consider in granting relief from untimely filing of jury trial demand).

(n19)Footnote 12. *Dill v. City of Edmond, Oklahoma, 155 F.3d 1193, 1200 (10th Cir. 1998)* .

(n20)Footnote 13. *Fed. R. Civ. P. 38(b)(1)*; *see Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 632-633 (6th Cir. 2008)* (construing former time periods).

(n21)Footnote 14. *Fed. R. Civ. P. 7(a)* (complete list of "pleadings").

(n22)Footnote 15. *See Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995)* (construing former time periods).

(n23)Footnote 16. *See United States v. Anderson, 584 F.2d 369, 372 (10th Cir. 1978)* (construing former time periods).

(n24)Footnote 17. *See Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995)* (construing former time periods).

(n25)Footnote 18. *Molinaro v. Watkins--Johnson CEI Div., 359 F. Supp. 467, 474 (D. Md. 1973)* .

(n26)Footnote 19. *General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 195-196 (4th Cir. 1964)* , *cert. denied, 377 U.S. 952 (1964)* .

(n27)Footnote 20. *See Stewart v. RCA Corp., 790 F.2d 624, 629 (7th Cir. 1986)* (construing former time periods).

(n28)Footnote 21. *Vanguard Military Equip. Corp. v. David B. Finestone Co., Inc., 6 F. Supp. 2d 488, 494-495 (E.D. Va. 1997)* (jury demand was timely with respect to fraud claim when amended complaint containing jury demand was filed before defendant filed pleading that responded to allegations of fraud count; construing former time periods).

(n29)Footnote 22. *See In re Texas Gen. Petroleum Corp., 52 F.3d 1330, 1339 (5th Cir. 1995)* (construing former time periods).

(n30)Footnote 23. *Unidev, L.L.C. v. Housing Auth. of New Orleans, 250 F.R.D. 268, 271 (E.D. La. 2008)* .

(n31)Footnote 24. *In re Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990)* .

(n32)Footnote 25. *See Fed. R. Civ. P. 7(a)(3), (4).*

(n33)Footnote 26. *See Fed. R. Civ. P. 7(a)(7).*

(n34)Footnote 27. *See In re Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990)* (construing former time periods).

(n35)Footnote 28. *Frost v. Agnos, 152 F.3d 1124, 1131 (9th Cir. 1998)* ; *Bentler v. Bank of Am. Nat'l Trust, 959 F.2d 138, 140 (9th Cir. 1992)* .

(n36)Footnote 29. *See United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1378-1379 (9th Cir. 1997)* (construing former time periods); *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc., 156 F. Supp. 2d 1170, 1173 (D. Nev. 2001)* (construing former time periods).

(n37)Footnote 1. *Fed. R. Civ. P. 38(b)(1)*; *see Solis v. Los Angeles, 514 F.3d 946, 954, n.11 (9th Cir. 2008)* .

(n38)Footnote 2. *See Fed. R. Civ. P. 38(c).*

(n39)Footnote 3. *Fed. R. Civ. P. 7(b)(2).*

(n40)Footnote 4. *Spear v. Dayton's, 771 F.2d 1140, 1144 (8th Cir. 1985)* (despite pro se plaintiff's contention that he requested jury trial in his claim to Equal Employment Opportunity Commission and that EEOC claim was attached to and incorporated in his complaint, trial court found no jury demand in plaintiff's pleadings).

(n41)Footnote 5. *Fed. R. Civ. P. 38(b)(1).*

(n42)Footnote 6. *see Solis v. Los Angeles, 514 F.3d 946, 954 (9th Cir. 2008)* .

(n43)Footnote 7. *Fed. R. Civ. P. 38(b)(1).*

(n44)Footnote 8. *Hupp v. Siroflex of Am., Inc., 159 F.R.D. 29, 30 (S.D. Tex. 1994)* ; *Kahn v. Head, 114 F.R.D. 20, 21 (D. Md. 1987)* .

(n45)Footnote 9. *Gargiulo v. Delsole, 769 F.2d 77, 78-79 (2d Cir. 1985)* (although obscure placement caused clerk to overlook it, court deemed demand on last page sufficient).

(n46)Footnote 10. *Allstate Ins. Co. v. Cross, 2 F.R.D. 120, 123 (E.D. Pa. 1941)* .

(n47)Footnote 11. *See Ruiz v. Rodriguez, 206 F.R.D. 501, 505 n.4 (E.D. Cal. 2002)* (noting cases holding that notation on civil cover sheet may not substitute for proper service of jury demand under Rule 38(b), because cover sheet is not part of pleading).

(n48)Footnote 12. *Favors v. Coughlin, 877 F.2d 219, 220 (2d Cir. 1989)* (because cover sheet was merely administrative aid to clerk, it was not part of pleadings, and demand was ineffective when not served on adversary).

(n49)Footnote 13. *Winant v. Carefree Pools, 118 F.R.D. 28, 29 (E.D.N.Y. 1988)* ; *see* [4], below.

(n50)Footnote 14. *Solis v. Los Angeles, 514 F.3d 946, 955 (9th Cir. 2008)* (if demand for jury trial has been properly made under Rule 38(b), failure to fulfill additional requirement of any local rule does not constitute waiver of trial by jury); *see Fed. R. Civ. P. 83(a)(2)* (local rule is invalid if it imposes requirement of form that is enforced in way that causes any party to lose any right because of nonwillful failure to comply).

(n51)Footnote 15. *Fed. R. Civ. P. 83(a)(1).*

(n52)Footnote 16. *Partee v. Buch, 28 F.3d 636, 638 (7th Cir. 1994)* .

(n53)Footnote 17. *In re Andrews, 189 B.R. 380, 381 (Bankr. E.D. Va. 1995)* (construing former time periods).

(n54)Footnote 18. *Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* .

(n55)Footnote 19. *Partee v. Buch, 28 F.3d 636, 637-638 (7th Cir. 1994)* (court erred in denying demand for jury trial, despite fact that demand did not use precise language in caption of pleading as required by local rule, when demand was in compliance with Rule 38(b)).

(n56)Footnote 1. *Omawale v. WBZ, 610 F.2d 20, 21-22 (1st Cir. 1979)* .

(n57)Footnote 2. *Rosen v. Dick, 639 F.2d 82, 90 (2d Cir. 1980)* .

(n58)Footnote 3. *Fed. R. Civ. P. 38(b)(1)*; *see Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 356 (2d Cir. 2007)* (failure to serve demand for jury constitutes waiver of right to jury).

(n59)Footnote 4. *Rosen v. Dick, 639 F.2d 82, 90 (2d Cir. 1980)* .

(n60)Footnote 5. *See Fed. R. Civ. P. 5(b).*

(n61)Footnote 6. *Golden Nugget, Inc. v. Chesapeake Bay Fishing Co., L.L.C., 232 F. Supp. 2d 631, 632-634 (E.D. Va. 2002)* .

(n62)Footnote 7. *Fed. R. Civ. P. 81(c).*

(n63)Footnote 8. *See Golden Nugget, Inc. v. Chesapeake Bay Fishing Co., L.L.C., 232 F. Supp. 2d 631, 632 (E.D. Va. 2002)* (construing former time periods); *Fed. R. Civ. P. 38(b)(1), (2).*

(n64)Footnote 9. *Winant v. Carefree Pools, 118 F.R.D. 28, 29 (E.D.N.Y. 1988)* ; *see* [3][b], *above*.

(n65)Footnote 1. *Fed. R. Civ. P. 38(b)(2)*; *see Fed. R. Civ. P. 5(d).*

(n66)Footnote 2. *Early v. Bankers Life & Casualty Co., 853 F. Supp. 268, 271 (N.D. Ill. 1994)* .

(n67)Footnote 3. *Cf. Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980)* .

(n68)Footnote 4. *Compare Fed. R. Civ. P. 38(b)(1) with Fed. R. Civ. P. 38(b)(2).* Rule 38(d) provides the failure of a party to serve a demand as required by Rule 38, and to file it as required by Rule 5(d), constitutes a waiver by the party of trial by jury; *Fed. R. Civ. P. 5(d)* provides that all papers after the complaint required to be served on a party must be filed with the court either before service or within a reasonable time after service.

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART II. DEMAND FOR JURY TRIAL AND WAIVER OF RIGHT TO JURY
A. DEMAND FOR JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.23

§ 22.23 Effect of Amended or Supplemental Pleadings

[1] Amendment Raising New Issue

When an amended pleading raises new issues by asserting new facts, a jury trial may be demanded with regard to those new issues, even if the right had been waived with regard to issues raised in the original pleading. n1 If a pleading is amended by the addition of new parties, the amendment may or may not revive a waived right to jury trial, depending on the circumstances of the change. When the addition of parties alters the claims or nature of relief sought, the right to demand a jury trial will revive. n2 On the other hand, when the addition does not alter the claims or add new issues to the case, the right will not revive. n3 However, even if a party is entitled to the right to a jury trial with regard to new issues raised in an amended pleading, the new issues do not affect a waiver of issues raised in the original pleading. n4 A party must make a demand for a jury trial with regard to issues raised in an amended pleading within 14 days of service of the last pleading directed at those issues. n5

[2] Amendment That Only Changes Theory

If a party amends a complaint to merely assert a new theory of recovery, but the amendment is based on the same facts as the original complaint, the amendment does not revive the party's right to demand a jury trial when the right had been waived as to the original complaint. n1 Only new issues asserted in the amended pleading will generate a new right to make the demand. The term *issue* means something more than the evidence offered and the legal theories pursued. One must ask whether the ultimate issue for decision is different. n2 New facts that merely clarify the same general issues raised in the original complaint do not create new issues of fact on which to assert a jury demand, n3 and the mere submission of more detailed statements of previously submitted claims does not revive the right to a jury trial. Amendments to pleadings thus may contain new facts which do not create new issues triable by a jury. n4

[3] Amendment That Requests Only Different Relief

If an amended pleading does not raise any new issues, n1 but merely seeks additional relief, it is insufficient to revive the right to demand a jury trial. For example, when a defendant originally sought an injunction and a declaratory judgment in its counterclaim, but later amended to seek damages, the court denied the defendant's jury trial demand on

its damage claim, holding that defendant waived its jury trial right when it failed to seek damages in its original counterclaim. n2 However, if new factual issues arise that allow additional relief in the form of money damages, a jury demand made at the time of the amended complaint will revive a waived right to jury. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *LaMarca v. Turner, 995 F.2d 1526, 1545 (11th Cir. 1993) , cert. denied, 510 U.S. 1164 (1994)* (waiver does not apply to amended complaints); *First Wis. Nat'l Bank v. Klapmeier, 526 F.2d 77, 80 (8th Cir. 1975)* (amendment to answer for the first time asserted fraud in the inducement of personal guarantee on corporate indebtedness).

(n2)Footnote 2. *LaMarca v. Turner, 995 F.2d 1526, 1545-1546 (11th Cir. 1993) , cert. denied, 510 U.S. 1164 (1994)* (amended complaint added new plaintiffs who alleged new incidents of civil rights violations).

(n3)Footnote 3. *Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063-1064 (5th Cir. 1990)* ; *Pennsylvania ex rel. Feiling v. Sincavage, 439 F.2d 1133, 1134 (3d Cir. 1971)* .

(n4)Footnote 4. *Walton v. Eaton Corp., 563 F.2d 66, 71 (3d Cir. 1977)* (if original pleadings in action waive trial by jury, right to jury trial of all matters contained in those pleadings may not be revived by amending the original pleadings).

(n5)Footnote 5. *See United States v. Jones, 158 F.R.D. 309, 312 (D.N.J. 1994)* (construing former time periods).

(n6)Footnote 1. *Richardson v. Henry, 902 F.2d 414, 416 (5th Cir. 1990) , cert. denied, 498 U.S. 1069 (1991)* (additional theories of recovery pose no new issues of fact); *Irvin v. Airco Carbide, 837 F.2d 724, 727 (6th Cir. 1987)* (no new issues of fact introduced).

(n7)Footnote 2. *Rosen v. Dick, 639 F.2d 82, 94 (2d Cir. 1980)* .

(n8)Footnote 3. *LaMarca v. Turner, 995 F.2d 1526, 1545 (11th Cir. 1993) , cert. denied, 510 U.S. 1164 (1994)* .

(n9)Footnote 4. *Clement v. American Greetings Corp., 636 F. Supp. 1326, 1334 (S.D. Cal. 1986)* .

(n10)Footnote 1. *See* [1], *above*.

(n11)Footnote 2. *American Home Prods. Corp. v. Johnson & Johnson, 111 F.R.D. 448, 453 (S.D.N.Y. 1986)* .

(n12)Footnote 3. *Local 783, Allied Indus. Workers of America, AFL-CIO v. General Elec. Co., 471 F.2d 751, 756 (6th Cir. 1973) , cert. denied, 414 U.S. 822 (1973)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART II. DEMAND FOR JURY TRIAL AND WAIVER OF RIGHT TO JURY
A. DEMAND FOR JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.24

§ 22.24 Effect of Counterclaim

[1] New Demand May Need to Be Made as to New Issues Raised in Counterclaim

If a jury trial has already been demanded with respect to issues raised in the complaint, that demand will be effective with respect to any claims raised as counterclaims that are directed to the same issues in the complaint. n1 With respect to issues raised for the first time in a counterclaim, a new demand may need to be made. It has been held that the failure to demand a jury trial on new issues raised in the counterclaim waives the right as to those issues, even if a general demand was made with regard to the issues in the complaint. n2 Other courts have held that a general demand made with respect to the issues in the complaint will cover all issues raised in the counterclaim, even if they are unrelated. n3

If a counterclaim raises the same issues as those raised in the answer, a jury demand within 14 days of the reply to the counterclaim will be effective for all issues raised by both the answer and counterclaim; however, if the issues raised in the counterclaim are new issues, not those raised in the answer, a demand within 14 days of the reply will only be effective as to those new issues, and not as to issues addressed in the complaint and the answer. n4

[2] Jury Demand on Compulsory Counterclaim

The rule on compulsory counterclaims generally requires that a pleading state, as a counterclaim, any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require the presence of inaccessible third parties. n1 The test for determining whether a demand for a jury on a counterclaim entitles a party to a jury trial on the complaint is whether the counterclaim is compulsory, that is, whether it arises out of the subject matter of the plaintiff's legal claim. Because a compulsory counterclaim by definition relates to the issues raised in the complaint, the demand brings those issues before the jury. By contrast, a counterclaim which is not compulsory but permissive, under Rule 13(b), brings new issues before the court. A jury trial demand on such a counterclaim would therefore not relieve a party of its waiver regarding the issues raised in the complaint. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:
(n1)Footnote 1. *Marvel Entertainment Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86, 89-90 (S.D.N.Y. 1987)* (with respect to issues already in action that are raised again by counterclaim, jury demand in amended answer merely replaced timely demand in original answer).

(n2)Footnote 2. *Mount Everest Ski Shops, Inc. v. Ski Barn, Inc., 736 F. Supp. 531, 532-533 (D. Vt. 1989)* (plaintiff's request for jury trial on each and every count of complaint in contract case did not extend to provide jury trial right with respect to counterclaim for attorney's fees, which court considered different issue); *Sound Video Unlimited, Inc. v. Video Shack Inc., 700 F. Supp. 127, 145 (S.D.N.Y. 1988)* (new issues not related to primary lawsuit and outside scope of original demand require new demand).

(n3)Footnote 3. *Horwitz v. Alloy Automotive Co., 677 F. Supp. 564, 566 (N.D. Ill. 1988)* (once party asserts general demand in timely manner, second demand need not be made with respect to counterclaim).

(n4)Footnote 4. *See Whirlpool Financial Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* (construing former time periods).

(n5)Footnote 1. *Fed. R. Civ. P. 13(a).*

(n6)Footnote 2. *See Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053, 1057 (5th Cir. 1992)* (demand by plaintiffs not timely as to complaint, but timely as to counterclaim and both complaint and counterclaim tried to jury so that jury would hear essentially same facts with respect to claims and counterclaim.

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3-22 Moore's Manual--Federal Practice and Procedure § 22.25

§ 22.25 Effect of Removal

[1] Demand Not Made in State Court

Rule 81(c) governs a demand for jury trial when a case is removed from state to federal court and all of the necessary pleadings have already been filed in state court as of the date of removal; if all pleadings have not been filed, the time in which to demand a jury is governed by Rule 38(b), rather than Rule 81(c)(3). n1

Rule 81(c) provides that if a party expressly demanded a jury trial in accordance with state law, the party need not renew the demand after removal. n2 When an action is removed from state to federal court and a jury trial demand has not already been made in a state court that requires a demand, a jury trial must be requested within 14 days after filing the removal petition, if the party making the demand is the petitioner. n3 If the party making the demand is not the petitioner, the demand must be made within 14 days after the party is served a notice of removal petition. n4 If no demand is required in the state court, the requirement is also excused in federal court, unless the court orders otherwise. A failure by a party to make a demand when one is required constitutes a waiver of the jury trial right. n5

[2] When Demand Has Been Made in State Court

If a demand is duly made in state court, it will be honored in federal court, even if it would not have satisfied the federal timing requirements if the action had initially been brought in federal court. n1 As is the case with a demand under the federal rules, once a demand has been made under state law, other parties may rely on the demand, and need not make their own demand on removal. For example, when a patient sued health care workers in a medical malpractice action, the patient did not waive her right to jury trial although her state complaint requested a non-jury trial, because the defendants had demanded a jury trial in state court, and the plaintiff was entitled to rely on that demand after removal. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:

(n1)Footnote 1. *Ajnoha v. JC Penney Life Ins. Co., 480 F. Supp. 2d 663 (E.D.N.Y. 2007)* .

(n2)Footnote 2. *Fed. R. Civ. P. 81(c)(3)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 81(c)(3)(B)(i).*

(n4)Footnote 4. *Fed. R. Civ. P. 81(c)(3)(B)(ii).*

(n5)Footnote 5. *Fed. R. Civ. P. 81(c)(3)(A).*

(n6)Footnote 1. *Aligheri v. Long Island R.R., 156 F.R.D. 55, 57 (S.D.N.Y. 1994)* (jury request was made before action was removed, and state law did not impose any time requirements).

(n7)Footnote 2. *Marcella v. Brandywine Hosp., 47 F.3d 618, 625 (3d Cir. 1995)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.26

§ 22.26 Withdrawal of Demand

[1] Withdrawal Generally Permitted Only With Consent

A party may generally not withdraw a demand for jury trial made under the provisions of Rule 38 without the consent of the parties. n1 Thus, if a demand is made by a party who later attempts to withdraw it, the adverse party has the opportunity to either consent or object to the withdrawal. Consent to withdraw may be made by a written stipulation filed with the court or an oral stipulation entered on the record. n2 Exceptions are discussed in [2], *below*.

[2] Exceptions to Requirement of Consent

[a] No Consent Required From Party that Opposed or Waived Jury Trial

A party that has in the past opposed a jury trial demand has, in effect, not relied on the demand, and therefore the consent of such a party is not needed for a valid withdrawal of the demand. n1 However, this exception ceases to apply once trial has begun, because in that situation a defendant is relying on the jury trial, even if it initially opposed the demand. Thus, a party may not allow a jury trial to proceed and then unilaterally withdraw its jury demand, merely because the other party initially opposed the demand. n2

A party may also waive its right to consent to withdrawal of a jury demand. Thus, consent is only required to the extent that a particular party would have been entitled to rely on the demand, that is, to the extent the demand covered that party's jury issues. If a party is unaffected by a demand as to certain issues, or if the party has already waived its jury trial right as to those issues, its consent to withdrawal is not required. n3

[b] Maritime Suits

Although withdrawal of a jury demand without the consent of all parties affected by the demand is impermissible, n4 the same effect may be accomplished indirectly in a maritime suit if a party that has made a jury demand later elects to pursue a non-jury remedy only under the admiralty jurisdiction of the court. In one case, the court of appeals held that a defendant that had originally labeled its third-party claim as one in admiralty and at law was permitted at a pretrial

conference to elect to pursue only a claim in admiralty. This had the effect of withdrawing defendant's jury demand without the consent of the third-party defendant. The court stated that when a claim is cognizable either at law or in admiralty, the pleader may elect to proceed in admiralty without a jury by filing an identifying statement under Rule 9(h), and that such an election need not be made in the original pleading. Furthermore, Rule 9(h) allows a party to amend a pleading to add or withdraw the identifying statement in accordance with Rule 15. n5 Other courts have held that an amendment under Rule 9(h) may not be used as a device to unilaterally withdraw a jury demand, n6 unless the adverse parties had no right to rely on the demand or had indirectly given consent to the withdrawal. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(d)*; *see, e.g.,* In *Re Passodelis, 234 B.R. 52, 66 (Bankr. W.D. Pa. 1999)* ; *Fuller v. City of Oakland, 47 F.3d 1522, 1532 (9th Cir. 1995)* ; *Gargiulo v. Delsole, 769 F.2d 77, 79 (2d Cir. 1985)* ; *Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 675 (4th Cir. 1967)* .

(n2)Footnote 2. *Fed. R. Civ. P. 39(a).*

(n3)Footnote 1. *Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1304 (9th Cir. 1983)* , *cert. denied, 464 U.S. 916 (1984)* (defendant that attempted repeatedly to defeat plaintiff's jury demand demonstrated that it was not relying on that demand).

(n4)Footnote 2. *Fuller v. City of Oakland, 47 F.3d 1522, 1531-1532 (9th Cir. 1995)* .

(n5)Footnote 3. *Rosen v. Dick, 639 F.2d 82, 92 (2d Cir. 1980)* (if party has already waived jury trial right with respect to particular issues, party will not be relieved of that waiver by withholding consent to withdrawal of jury demand concerning issues with which party is not related).

(n6)Footnote 4. *See* [1], *above*

(n7)Footnote 5. *Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1471 (9th Cir. 1984)* .

(n8)Footnote 6. *Johnson v. Penrod Drilling Co., 469 F.2d 897, 902-903 (5th Cir. 1972)* .

(n9)Footnote 7. *Moser v. Texas Trailer Corp., 623 F.2d 1006, 1011 (5th Cir. 1980)* (when defendants gave their consent to amendment for admiralty election, they could not later complain that their jury trial rights were abrogated).

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[Reserved]

§§ 22.27[Reserved]

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3-22 Moore's Manual--Federal Practice and Procedure § 22.40

§ 22.40 Waiver of Jury Right Despite Presumption Against Waiver

The *Seventh Amendment* right to a jury is fundamental, n1 and there is a strong presumption against waiver of that right. n2 However, despite the presumption, the right to a jury trial may be waived in several ways. n3 The right to jury trial may be waived by failure to assert the right in a timely manner, n4 by agreement or stipulation of the parties, n5 or by a party's conduct. n6 Although an express waiver will be upheld, n7 a waiver need not be express but may be implied. n8 For example, a waiver will be implied when a contract provision calls for alternative dispute resolution, n9 or under an arbitration agreement. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Morgan Guar. Trust Co. of New York v. Crane, 36 F. Supp. 2d 602, 603-604* (S.D.N.Y. 1999.

(n2)Footnote 2. *Collins v. Government of Virgin Islands, 366 F.2d 279, 284 (3d Cir. 1966)* , *cert. denied, 386 U.S. 958 (1967)* (courts indulge every reasonable presumption against waiver); *Christenson v. Diversified Builders, Inc., 331 F.2d 992, 994 (10th Cir. 1964)* (every reasonable presumption against waiver).

(n3)Footnote 3. *Preferred RX, Inc. v. American Prescription Plan, Inc., 46 F.3d 535, 548 (6th Cir. 1995)* (although based in constitution, jury trial right may be waived); *Bonfield v. Aamco Transmissions, Inc., 717 F. Supp. 589, 594 (N.D. Ill. 1989)* (although *Seventh Amendment* guarantees right to jury trial in civil cases, that right is waiveable like most other constitutional rights).

(n4)Footnote 4. *See § 22.42*.

(n5)Footnote 5. *See § 22.43*.

(n6)Footnote 6. *See § 22.44*.

(n7)Footnote 7. *Charpentier v. Fluor Ocean Servs., 613 F.2d 81, 86 (5th Cir. 1980)* (plaintiff and his attorney at beginning of trial expressly stated that they would waive jury and permit court to be trier of fact regarding issue in question).

(n8)Footnote 8. *Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990) , cert. denied, 499 U.S. 919 (1991) .*

(n9)Footnote 9. *Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 373 F.2d 136, 142 (8th Cir.) , cert. denied, 389 U.S. 827 (1967)* (disputes settled by private board).

(n10)Footnote 10. *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230, 1232 (10th Cir. 1999) .*

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3-22 Moore's Manual--Federal Practice and Procedure § 22.41

§ 22.41 Test for Waiver is Not Stringent

Although there is no clear test to determine whether a party has waived the right to jury, the courts have indicated that the test is not as stringent as the "intentional relinquishment or abandonment of known right or privilege" test applicable to other constitutional rights n1 because the right to jury may be waived by a mere failure to act. n2 Furthermore, there has been no definitive statement as to who bears the burden of proving waiver. It has been held that the party seeking to enforce the waiver has the burden. n3 Other courts have held that the burden is on the party seeking to avoid the waiver. n4 Some courts have expressly avoided the issue of which party has the burden. n5

Some courts have held that in the interest of fairness and judicial economy, the waiver rule should be applied to pro se parties in the same manner that it is applied to parties who are represented by counsel. n6 In several cases, however, courts have held that a stricter standard applies to pro se parties and have found no waiver. n7 In one recent case, the court of appeals stated that the right to a jury trial is too important for the courts to find a knowing and voluntary relinquishment of that right in a doubtful situation where a pro se party is involved. When a trial court disregards a demand for a jury trial and conducts a bench trial instead, the mere participation without objection of a pro se party does not constitute an unquestionable knowing and voluntary waiver of the right to a jury trial. The court acknowledged that had the plaintiff been represented by counsel, the circumstances of the case may have constituted a knowing and voluntary waiver. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Barber v. Page, 390 U.S. 719, 725, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255 (1968)* (test for waiver of right to cross-examine witnesses).

(n2)Footnote 2. *Early v. Bankers Life & Casualty Co., 853 F. Supp. 268, 271 (N.D. Ill. 1994)* .

(n3)Footnote 3. *Sullivan v. Ajax Navigation Corp., 881 F. Supp. 906, 910 (S.D.N.Y. 1995)* .

(n4)Footnote 4. *K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755-758 (6th Cir. 1985)* .

(n5)Footnote 5. *Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* ; *Connecticut Nat'l Bank v. Smith, 826 F. Supp. 57, 59-60 (D.R.I. 1993)* .

(n6)Footnote 6. *See, e.g., Lovelace v. Dall, 820 F.2d 223, 228 (7th Cir. 1987)* (pro se plaintiff waived jury right when he participated without objection in bench trial after agreeing at pretrial conference that demand for jury would be withdrawn).

(n7)Footnote 7. *See, e.g., Chapman v. Kleindienst, 507 F.2d 1246, 1253 (7th Cir. 1974)* .

(n8)Footnote 8. *Jennings v. McCormick, 154 F.3d 542, 545 (5th Cir. 1998)* (pro se prisoner did not waive right to jury trial by signing form indicating consent to determination by a United States magistrate judge, which included waiver of right to jury trial, because language of form did not unquestionably demonstrate knowing and voluntary relinquishment).

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3-22 Moore's Manual--Federal Practice and Procedure § 22.42

§ 22.42 Failure to Timely Serve and File Demand

[1] Failure Generally Constitutes Waiver of Jury Right

If a party fails to serve and file a demand as required by Rule 38, the failure generally constitutes a waiver of the right to a jury trial. n1 A plaintiff may not defeat its previous waiver by voluntarily dismissing the action without prejudice and then refiling and making the demand. n2 One court of appeals cited a number of district court decisions denying leave to dismiss in these circumstances, and concluded that such decisions denying leave to dismiss for the sole purpose of overcoming inadvertent failure to make a timely jury demand are in accord with the policies of Rule 38(a) insisting on promptness, and of Rule 41(a) limiting the former freedom of dismissal of plaintiffs in actions at law. Furthermore, to allow leave to discontinue without prejudice solely for this purpose would work a discrimination in favor of plaintiffs whose attorneys had been guilty of inadvertent neglect in demanding a jury trial, as against defendants who were similarly situated. n3

[2] Effect of Demand Filed by Other Party

If one party files a timely demand for jury, there is no waiver when another party fails to make a demand for jury trial, with respect to the issues covered by the filed demand. This rule is the result of the doctrine that once one party files a jury demand, other parties are entitled to rely on that demand for the issues it covers, n1 and need not file their own demands. n2 The demand may be made by any other party, provided that it is directed to the issue in question. Therefore, for example, a defendant may rely on a demand by a cross-claim defendant, or by another defendant who later obtains a dismissal of the claim against it. n3

Whether reliance on another party's jury demand is effective depends on whether issues have been raised that are beyond the scope of those encompassed in the demand. If so, a party may not rely on the previous demand as to those additional issues. n4 Thus, a third-party plaintiff whose claim raises new issues not addressed in the original complaint may not rely on the demand of the plaintiff with regard to the third-party claim. n5 Similarly, a plaintiff may not rely on the jury demand of a first defendant to preserve its jury trial right with respect to its claims against a second defendant if the claim against the second deals with factual issues not implicated in the claims against the first defendant. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Demands

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(d)*; *see Reich v. Tiller Helicopter Servs., Inc., 8 F.3d 1018, 1032 (5th Cir. 1993)* (jury trial right is neither exclusive nor mandatory and may be waived if not demanded); *Noddings Inv. Group, Inc. v. Kelley, 881 F. Supp. 335, 336-337 (N.D. Ill. 1995)* (waiver due to untimely jury demand by defendants).

(n2)Footnote 2. *Paturzo v. Home Life Ins. Co., 503 F.2d 333, 336 (4th Cir. 1974)* ; *McNeilab, Inc. v. American Home Prods. Corp., 683 F. Supp. 332, 337 (S.D.N.Y. 1987)* .

(n3)Footnote 3. *Noonan v. Cunard S.S. Co., 375 F.2d 69, 71-72 (2d Cir. 1967)* .

(n4)Footnote 1. *Dell'Orfano v. Romano, 962 F.2d 199, 202 (2d Cir. 1998)* .

(n5)Footnote 2. *Fuller v. City of Oakland, 47 F.3d 1522, 1531 (9th Cir. 1995)* .

(n6)Footnote 3. *Mid Kan. Fed. Savings & Loan Ass'n v. Orpheum Theater Co., 810 F. Supp. 1184, 1190 (D. Kan. 1992)* .

(n7)Footnote 4. *Davidson Pipe Co. v. Laventhol & Horwath, 125 F.R.D. 363, 367 (S.D.N.Y. 1989)* .

(n8)Footnote 5. *Espinosa v. Van Dorn Plastic Mach. Co., 813 F. Supp. 252, 253-254 (S.D.N.Y. 1993)* (jury demand made by plaintiff in products liability action did not encompass defendant's third-party complaint for contribution and indemnification because third-party claim raised issues not addressed in complaint).

(n9)Footnote 6. *Indeca v. Continental Ill. Nat'l Bank, 675 F. Supp. 1515, 1517-1518 (N.D. Ill. 1987)* , *aff'd on other grounds, 858 F.2d 1264 (7th Cir. 1988)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.43

§ 22.43 Waiver by Agreement

[1] Waiver by Agreement Permissible

A person may waive the right to a jury trial by an agreement, including by the terms and provisions of a contract, n1 provided that the person has entered into the contractual arrangement knowingly and voluntarily. n2 Such an agreement is neither illegal nor contrary to public policy. n3 However, even though a contractual waiver of the right to a jury trial is permitted, because the jury trial right is a fundamental one, there is a presumption against its waiver. n4 Therefore, contract provisions waiving the right are strictly and narrowly construed, n5 and the requirement of knowing, voluntary, intentional waiver strictly applied. n6 Jury trial waivers are common in loan agreements and loan guarantees, and these are regularly enforced provided that they meet the "knowing and voluntary" test. n7

[2] Factors to Determine Whether Waiver is Knowing and Voluntary

Courts consider all of the following in determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily: n1

1. Negotiability of contract terms and negotiations between the parties concerning the waiver provision.

2. Conspicuousness of the provision in the contract.

3. The relative bargaining power of the parties.

4. Business acumen of the party opposing waiver.

5. Whether counsel for the party opposing waiver had an opportunity to review the agreement.

Thus, a contractual waiver of jury trial right was upheld in a case when (1) there was no indication that the terms of the note were actually not negotiable; (2) the jury waiver provision was quite conspicuous, in that it was written in all capital letters in the sole paragraph on the signature page itself; (3) although there was clearly a difference in bargaining

power between the sides, the plaintiffs were not financial neophytes, and they had established relationships with a number of defendant officials over approximately one year, and had previously negotiated changes to agreements made with the defendant; (4) the plaintiffs were experienced business people; and (5) it was arguable that the plaintiffs had an opportunity to review the document and have their counsel review it. n2

On the other hand, a contractual jury waiver in a promissory note was not enforced because the waiver was not made knowingly and voluntarily by the promisor when (1) the provision was never discussed; (2) the terms were drafted by promisee's counsel and mailed to the promisor; (3) the provision was not conspicuous; and (4) the promisor was not represented by counsel. n3

A party seeking to enforce a contractual waiver of the right to a jury trial may prepare to meet that burden by carefully drafting the provision waiving the right, presenting the provision conspicuously in the contract, and preparing a record to show that the provision was explained and reviewed, for example by requiring that the provision be initialed. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Herman Miller, Inc. v. Thom Rock Realty Co., 46 F.3d 183, 189 (2d Cir. 1995)* (court enforced jury waiver provision in commercial lease).

(n2)Footnote 2. *Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986)* ; *see* [b], *below*.

(n3)Footnote 3. *Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994)* .

(n4)Footnote 4. *Morgan Guar. Trust Co. of New York v. Crane, 36 F. Supp. 2d 602, 603-604* (S.D.N.Y. 1999; *Wauhop v. Allied Humble Bank, 926 F.2d 454, 455 (5th Cir. 1991)* .

(n5)Footnote 5. *Hulsey v. West, 966 F.2d 579, 581-582 (10th Cir. 1992)* (guarantor of loan agreement was not bound by jury waiver provision in amendment to agreement, even though he had executed agreement as president of borrower, because he did not sign in his individual capacity, and amendment was made four years after his personal guaranty was executed).

(n6)Footnote 6. *K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755-758 (6th Cir. 1985)* (when defendant's representatives had assured plaintiff that waiver provisions would not be enforced absent fraud, waiver was neither knowing nor voluntary).

(n7)Footnote 7. *Cooperative Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995)* ; *see* [2], *below*.

(n8)Footnote 1. *Morgan Guar. Trust Co. of New York v. Crane, 36 F. Supp. 2d 602, 603-604* (S.D.N.Y. 1999; *Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* .

(n9)Footnote 2. *Morgan Guar. Trust Co. of New York v. Crane, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999)* ; *see Cooperative Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172-1173 (N.D. Iowa 1995)* (waiver enforceable against borrower when terms were clear and comprehensive, provision was set off in its own paragraph just above signatures with warning to read the entire document, there was no inequality in bargaining power, in that borrower was experienced and could have sought financing elsewhere).

(n10)Footnote 3. *Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* ; *see National Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977)* (waiver provision set forth deeply and inconspicuously in body of

contract; defendant had no choice but to accept the conditions to obtain badly needed funds; inequality in bargaining power suggested waiver was neither intentional nor knowing).

(n11)Footnote 4. *Cooperative Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172, n.2 (N.D. Iowa 1995)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.44

§ 22.44 Waiver by Conduct

There are several ways that a party may waive the right to a jury trial by conduct, including the following:

1. Failure to appear at trial. In an action in federal district court by a plaintiff to recover wages, for example, the defendant waived his right to trial by jury by failing to appear at the time set for trial, even though he had made a demand for jury trial under Rule 38. n1

2. Participation in a bench trial. If a party knowingly participates in a bench trial without objection, the party waives the right to a jury trial despite a previous timely jury demand. Particularly, a party's vigorous participation in a bench trial without making any reference to a jury is an indication that the waiver has not been the result of mere inadvertence but may only be presumed to be a knowing relinquishment of the prior jury demand. n2

3. Failure to object to an order specifying a bench trial. A party may waive its right to jury trial, even after making a timely demand, by failing to object to a district court's pretrial order providing for a bench trial. n3 However, the failure to object to a withdrawal of a jury trial demand or to an informal direction that the trial is to be held without a jury will not constitute a waiver if circumstances are such that the intent to waive the jury trial is not clear. n4

4. Acceptance of discharge of jury. If the attorney for a party accepts without objection the discharge of the jury, it will constitute a waiver of the jury trial right. For example, when counsel for a plaintiff made a statement that he was finished with the jury and expressed agreement that the jury could be discharged, combined with counsel's knowledge that the jury was being discharged and a continued discussion with the court after discharge, it was deemed consent sufficient to constitute a waiver. n5

5. Failure to submit issue to jury or to object to failure to submit issue. When a party has requested a special verdict, a party waives its right to have a jury trial of any issue if it neglects to request that the issue be submitted to the jury, n6 or fails to object when the issue is not presented. n7 This principle has

also been applied to the failure to submit an issue in interrogatories presented to the jury, n8 and to the failure to object when interrogatories are submitted that do not contain the particular issue. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Olsen v. International Supply Co, 22 F.R.D. 221, 223 (D.C. Alaska 1958)* .

(n2)Footnote 2. *Cooper v. Loper, 923 F.2d 1045, 1049 (3d Cir. 1991)* ; *Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (2d Cir. 1989)* .

(n3)Footnote 3. *See Lovelace v. Dall, 820 F.2d 223, 228 (7th Cir. 1987)* .

(n4)Footnote 4. *Heyman v. Kline, 456 F.2d 123, 129-130 (2d Cir.)* , *cert. denied, 409 U.S. 847 (1972)* (absent party's consent or consent of counsel, there may be no effective waiver; failure to object to casual remark by trial judge that trial would be non-jury which was made before time to answer had expired was not waiver); *Hupp v. Siroflex of Am., Inc., 159 F.R.D. 29, 30-31 (S.D. Tex. 1994)* (even though plaintiff withdrew demand in open court and defendant failed to object, ambiguity raised reasonable presumption against waiver when defendant demanded jury in its answer, trial had not yet taken place, and defendant reserved right to object).

(n5)Footnote 5. *Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1355 (9th Cir. 1988)* (counsel's confusion regarding discharge was unreasonable).

(n6)Footnote 6. *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 389 (8th Cir. 1987)* (failure to request district court to submit question on competitive injury in special verdict).

(n7)Footnote 7. *Kavanaugh v. Greenlee Tool Co., 944 F.2d 7, 11-12 (1st Cir. 1991)* (jury trial right waived as to issues omitted from special verdict form when party delayed until after jury was discharged before objecting to omissions).

(n8)Footnote 8. *Bruno v. Western Elec. Co., 829 F.2d 957, 961-962 (10th Cir. 1987)* (jury trial right was waived on issue of employer's continuing violation in ADEA suit when both parties failed to submit the question as part of special interrogatories given to jury).

(n9)Footnote 9. *Eastern Mt. Platform Tennis v. Sherwin-Williams Co., 40 F.3d 492, 501 (1st Cir. 1994)* , *cert. denied, 515 U.S. 1103 (1995)* (party failed to request in interrogatories a determination of portion of damages flowing from consumer protection claim; by failing to object to damages interrogatory, parties permitted the court to determine this issue).

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PART VI Trial and Judgment
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3-22 Moore's Manual--Federal Practice and Procedure § 22.45

§ 22.45 Waiver Made by Filing Claim Against Debtor in Bankruptcy

If a creditor files a claim in bankruptcy against a debtor, the general rule is that the creditor waives trial by jury of that claim. Determination of the claim is part of the process of allowance and disallowance of claims integral to restructuring of the debtor-creditor relationship, which is a public right, and therefore is triable without a jury by the bankruptcy court. n1 One court has concluded that neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed. For a waiver to occur, the dispute must be part of the claims-allowance process or must affect the hierarchical reordering of creditors' claims. In that case, the right to a jury trial is lost not so much because it is waived, but because the legal dispute has been transformed into an equitable issue. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57-59, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* .

(n2)Footnote 2. *Germain v. Connecticut Nat'l Bank, 988 F.2d 1323, 1330 (2d Cir. 1993)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.46

§ 22.46 Effect of Subsequent Trial

[1] Effect of Subsequent Trial on Waiver

When a party waives the right to a jury trial in the original case by a failure to make a timely demand, or by an affirmative withdrawal of a demand, the right is not revived if the court orders a new trial. n1 For example, when the plaintiff in an action for wrongful discharge withdrew a jury demand based on an assertion that the court erroneously excluded evidence, and the evidentiary ruling was reversed on post-trial motion, the plaintiff's demand for a jury in the new trial was denied because the plaintiff's earlier unequivocal withdrawal precluded a new demand. n2 However, a party who wishes to obtain a jury trial on remand after waiver may move under Rule 39 for relief in the court's discretion. n3

[2] Effect of Subsequent Trial on Proper Demand

As is the case with waiver, a valid demand is not affected by the necessity for a subsequent trial. Thus, If a demand for jury trial has been properly made in one action, that demand will be preserved with respect to the scope of the issues cover by the demand, if the case is remanded after appeal or consolidated with another case. n1 When an action is remanded for new trial and an issue not raised in the original action is newly introduced, it has been held that this has the effect of amending the pleadings, and therefore the parties have an opportunity to demand a jury trial on the newly introduced issue. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Roth v. Hyer, 142 F.2d 227, 228 (5th Cir.) , cert. denied, 323 U.S. 712 (1944)* (right to make demand is not revived after waiver; however, either party may move under Rule 39 for the court to grant a jury trial in its discretion).

(n2)Footnote 2. *Hanlon v. Providence College, 615 F.2d 535, 539 (1st Cir. 1980)* .

(n3)Footnote 3. *McGowan v. United States, 296 F.2d 252, 256 (5th Cir. 1961)* ; *see § 22.48* (motion for relief from waiver).

(n4)Footnote 1. *United States v. Nordbrock, 941 F.2d 947, 949-950 (9th Cir. 1991)* .

(n5)Footnote 2. *In re Zweibon, 565 F.2d 742, 746-748 (D.C. Cir. 1977)* .

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3-22 Moore's Manual--Federal Practice and Procedure § 22.47

§ 22.47 Practical Effect of Waiver

If there is a waiver of the right to jury for an issue, the issue will generally be tried by the court n1 because Rule 38 states that a failure to make a timely demand results in the waiver of a the right to a jury trial. n2 However, there are several exceptions to this general rule: n3

1. If the party seeking a jury trial makes a motion, the court may relieve the party of its waiver and order a jury trial, provided that the party would otherwise have been entitled to a jury. n4

2. Except in cases against the United States when a statute provides for a nonjury trial, a jury trial may be ordered if all parties consent and the court agrees. n5

3. On motion of a party or on its own initiative, the court may try any issue with an advisory jury. n6

These exceptions recognize that there is no such thing as a constitutional right to be free of a jury trial (or to have trial by the court), and there is no general prohibition against a court submitting issues to a jury for which there is no constitutional or statutory jury trial right. n7 However, a court does not have unlimited discretion to order a jury trial. A court may not order a jury trial when there is no statutory or constitutional right to jury trial, and there are no special circumstances, such as intermeshing of jury and nonjury claims based on the same facts that require the exercise of the court's discretion. n8 Furthermore, the trial court may not order a jury trial on its own initiative if none of the parties have demanded a jury trial, n9 except that a court may order an advisory jury sua sponte. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 39(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 38(d).*

(n3)Footnote 3. *Fed. R. Civ. P. 39(b), (c).*

(n4)Footnote 4. *See § 22.48.*

(n5)Footnote 5. *See § 22.62.*

(n6)Footnote 6. *See § 22.63.*

(n7)Footnote 7. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n8)Footnote 8. *New Hampshire Fire Ins. Co. v. Perkins, 28 F.R.D. 588, 592 (D. Del. 1961)* .

(n9)Footnote 9. *Moores v. Greenberg, 834 F.2d 1105, 1108-1109 (1st Cir. 1987)* (Rule 39(b) intent is to prevent judge from acting sua sponte).

(n10)Footnote 10. *Fed. R. Civ. P. 39(c).*

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3-22 Moore's Manual--Federal Practice and Procedure § 22.48

§ 22.48 Relief From Waiver of Right to Jury Trial

[1] Motion by Party For Relief from Waiver

If a party makes a motion requesting relief, a court has discretion to order a jury trial of any or all issues in any action in which a demand for trial by jury could have been made of right, notwithstanding the fact that the party failed to make a timely jury demand. n1 However, the court may not order a jury trial on its own initiative, even if there is a constitutional or statutory right to a jury trial of the issues. n2 This rule often raises the question as to what action by a party qualifies as a "motion for relief." The language of Rule 39(b) indicates that the filing of a formal, written motion for a jury trial is the best procedure to follow to obtain relief from a waiver of a jury trial right. However, case precedents make it clear that a formal, written motion is not always required. Courts have deemed a variety of other actions and informal applications to satisfy the requirement of a "motion" within the meaning of Rule 39(b). These actions have included the following examples:

1. Late filing of a jury demand. Several courts have held that an untimely filing of a jury demand qualifies as a motion for relief from jury waiver and as a motion for a jury trial. n3

2. Amendment of a pleading. If a party attempts to amend a complaint to include a demand for a jury trial, the court may construe it as a motion for relief from waiver. n4

3. Nunc pro tunc filing of demand. A motion for leave to file a jury demand nunc pro tunc has been treated as a motion for relief from waiver. n5

4. Request for jury in memorandum. It has been held that a request appearing in a pre-trial memorandum satisfied the requirements for a motion for relief from waiver. n6

5. Informal discussion. A party's discussion of the need for a jury trial has been found to satisfy the motion for relief requirement. n7

6. Letter from counsel. A mere letter from a party's counsel requesting that the case be set on the jury docket has been construed as a Rule 39(b) "motion for relief from waiver." n8

Although reliance on this type of informal conduct to satisfy the motion requirement of Rule 39(b) is generally not good practice, and these motions may not be recognized in the discretion of the court, n9 a party opposing a jury trial will have a difficult time convincing a court that such informal conduct does not satisfy the motion requirement of Rule 39(b). This is because there are no precise formalities for a Rule 39(b) motion. The language and history of the rule indicate that the requirement was inserted by the draftsmen simply as a means of preventing the district court from acting sua sponte when the parties were unanimous in their preference for a bench trial, and almost any cognizable affirmation of a party's intent to avail itself of a jury trial may qualify. n10

[2] Court Has Broad Discretion to Decide Motion For Relief from Waiver

The court has broad discretion under Rule 39(b) in making its determination whether to relieve a party from the waiver of jury trial. n1 Thus, courts have used several standards for the exercise of discretion on these motions. As a practical matter, however, regardless of what standard for the exercise of discretion is expressed, appellate courts tend to affirm the decisions of trial courts on motions for a jury trial. Appellate courts are very reluctant to interfere with the rulings that are committed to the discretion of the trial judge, who is in the best position to understand the facts of the case. n2 In other words, even courts that follow a standard that relief should not be granted without a clear showing of good cause, in actuality rarely reverse a grant of a jury trial. n3

Similarly, those courts using the standard that a Rule 39(b) motion for relief should be granted unless there is a good reason shown for not granting the motion, also rarely reverse trial court rulings denying a jury trial. n4

However, all courts agree that a district court considering a Rule 39(b) relief from waiver motion will be reversed if the court acts arbitrarily or capriciously. n5 This typically means that the district court may not totally ignore the types of evidentiary factors that the court should consider in making a Rule 39(b) motion, as discussed in [3], *below*. It also refers to the fact that a court may not grant a jury trial for claims that are not triable by a jury. For example, a court does not have discretion to grant a Rule 39(b) motion for relief with respect to claims in equity. n6

[3] Factors Court Should Consider In Exercise of Discretion to Grant Relief from Waiver

[a] No Particular Factors Controlling

There are many factors that the trial court should consider in the exercise of discretion in deciding a motion for jury trial. It is the totality of these factors that must be considered in evaluating the court's exercise of discretion. n1 Thus, courts should be concerned with the cumulative effect of the various facts and circumstances established by the parties in making and opposing Rule 39(b) motions for jury trials. n2 Although there are almost an infinite number of facts and circumstances that a court could consider on Rule 39(b) motions, the cases establish that motions usually turn on the factors discussed in detail in [b]-[j], *below*. n3

[b] Suitability of Issues for Jury Trial

Courts have ruled that it is proper to deny a motion for a jury trial on grounds that the issues in the case are highly technical or complex, or otherwise not well suited for consideration by a jury. Many types of cases have been found unsuitable for trial by jury, including: patent litigation; n4 actions regarding audits and accountings; n5 antitrust actions; n6

Typically, claims or issues in a case in which the law is reasonably clear and straightforward, and that are likely to turn on questions of fact, are considered more suitably tried to a jury than to the court. n7 Cases that will turn on questions of the credibility of witnesses are also most suitable for trial by jury, because what to believe and whom to believe are at

the very heart of what might be considered the province of the jury and are questions that lend themselves to the collective judgment of individuals with appropriate guidance from the court. n8 On the other hand, if the issues presented in a case are predominantly questions of law, rather than questions of fact, the court is more likely to refuse to exercise its discretion and grant a motion for a jury trial under Rule 39(b). Questions of law are for the court, and if legal questions predominate, it may be more convenient and efficient for the court to try the case. n9

[c] Prejudice to Other Parties

The degree of prejudice to nonmoving parties is a very important factor in granting or denying a motion for a jury trial under Rule 39(b). n10 Thus, a court will almost always deny relief from waiver when prejudice is shown. When, for example, the adverse party had developed its case on the assumption that the issue would be tried to the bench, and had refrained from hiring an expert on the basis of that assumption, a jury trial was properly denied. n11 A party objecting to a motion for a jury trial on grounds of prejudice should show specific instances of the ways in which granting a jury trial would be prejudicial. n12 This showing will usually take the form of an affidavit. n13

A court also has the alternative to grant a motion for a jury trial on conditions that lessen or eliminate prejudice to the nonmoving parties. Whenever a court has available conditions or affirmative steps it may take to alleviate any prejudice from the granting of a late demand for jury trial, such as continuing the trial or granting additional time for discovery, the availability of such remedial actions may be considered by the court in weighing whether to grant the motion for a jury trial. n14

[d] Administrative Time and Expense

Several courts have cited the additional time and expense of a jury trial in denying a motion for jury trial. n15 Courts have also noted the overcrowded condition of the jury trial dockets. n16 Whenever granting a motion for a jury trial will disrupt the court's planning in this way, the court may properly deny the motion. n17 The timing of the motion for a jury trial will determine how much of an adverse effect the granting of the motion will have. The earlier the motion is made, the less likely it will affect the court's docket or other caseload management plans. If a motion for a jury trial is made early enough so that it does not affect the court's plans, add to the cost of the trial, or create other adverse effects to the system, and there is no prejudice to the adverse party, the court may grant a jury trial. n18

Not all courts agree that jury trials will involve more expense and take more time, at least not in all situations. Thus, one court has held that an action for recovery of death benefits, for example, is likely to consume more judicial resources as a trial to the court than as a jury trial. The preparation of the detailed findings of fact and conclusions of law required by Rule 52 typically requires more time and attention than the preparation of jury instructions. Also, probably most trial lawyers would agree that preparation of proposed findings of fact and conclusions of law generally consumes more lawyer time than drafting proposed jury instructions for the same case. The court further noted that in short cases, the choice between jury and nonjury trial does not significantly affect or delay the trial date. Furthermore, the parties are more likely to receive a very prompt final disposition on a jury's verdict than in a case tried to the court. n19

[e] Delay in Seeking Relief from Waiver

The length of any delay that a party takes in applying to the court for relief under Rule 39(b) is an important factor in the court's determination of whether to grant a jury trial. Courts generally will not excuse long delays. n20 The court will be more willing to excuse a brief delay, n21 especially if a satisfactory reason for the delay is shown beyond mere inadvertence. n22

The length of delay becomes more significant as the trial date approaches. Motions for relief from a jury trial waiver that are made on the eve of trial are viewed with disfavor because they disrupt the court's docket, delay trial, and prejudice the opposing party, who has invariably prepared for a bench trial. n23 Thus, it would be proper to deny a

motion that was made only a few days before the final docket call, when plaintiff had prepared its case to be tried to the bench rather than a jury trial. To grant a jury trial motion at such a late date would force the plaintiff to change its trial strategy on such short notice that it would have worked a substantial hardship. n24

On the other hand, when there is sufficient time for the parties to prepare for trial, the court may be more tolerant of a delay in making a jury trial motion. However, the fact that the trial is still a number of months away will not necessarily result in a grant of relief if no other justification for the tardy demand is given. n25

[f] Excuse for Failure of Counsel to Make Valid Demand

The reason that counsel failed to make a proper demand is an important factor in the decision of whether to grant relief. Mere inadvertence, oversight, or lack of diligence by counsel will not persuade a court to relieve a party of its failure to timely demand a jury trial. n26 Furthermore, counsel's inexperience, unfamiliarity with particular rules or with federal procedure in general, or an erroneous reading of the legal requirements will not generally justify relief. n27 On the other hand, inadvertence combined with other factors may well justify relief from the waiver of a jury trial. Most commonly, inadvertence combined with a showing that a jury trial would not prejudice the rights of other parties to the suit has sometimes justified granting the motion. n28

There are two reasons for failure that courts have held to be excusable. First, counsel's illness may be a valid excuse for a failure to timely file a jury trial demand, depending on the circumstances of each particular case. A serious injury leading to disability and a resulting case backlog may constitute a sufficient excuse justifying a motion for a jury trial if the motion is promptly filed once counsel recovers, and there is no prejudice to opposing parties. n29 Second, substitution of counsel may be grounds for relief if combined with other factors. Thus, if other persuasive elements are present in combination with substitution, such as, appropriateness of a jury trial, lack of opposition by the other party, and prompt action by replacement counsel, the court may grant relief. n30 In any event, if original counsel did not timely file a jury demand, it is imperative for substitute counsel to seek relief as promptly as possible. Courts will not be impressed by a substitution of counsel if the substituted counsel does not act promptly. n31

[g] Amendment of Pleading

A plaintiff who has failed to make a timely demand for a jury trial under Rule 38(b) may not, by amendment of the complaint, become entitled to make a jury demand of right. The mere assertion of additional theories of recovery based on the same facts presented in the original complaint does not re-open the period during which a jury demand may be filed. Only an amendment that raises a truly new issue will create a new period for filing a jury demand as to the newly raised issue. n32 Similarly, an amendment that does not present new issues will not ordinarily serve as a basis for a discretionary grant of a jury trial pursuant to a Rule 39(b) motion after the right to a jury has been waived. n33 However, when an amendment to a complaint does raise a new issue and when a jury trial is duly demanded as to the newly-raised issue, the court in its discretion may order a jury trial of the original issues also. n34

[h] Preference for Single Trier of Fact

If a party has made a timely jury trial demand with respect to some claims, but not as to others, the court may consider that fact in deciding whether to grant a motion for a jury trial as to all claims in the interest of justice, convenience, and economy. n35 This rule is particularly appropriate when the claims are factually and legally intertwined. n36 This rule is based in the principle that, when possible, only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. n37

[i] Pro Se Plaintiff

Courts have shown greater leniency towards pro se parties in granting relief from waiver of a jury trial under Rule 39(b). For example, in a prisoner's civil rights action brought pro se, one circuit court of appeals found that the district

court had abused its discretion in denying the plaintiff's request for a jury trial. Although untimely, the request for a jury had been made four months before trial. The court of appeals stated that, absent strong and compelling reasons to the contrary, relief should be granted. The court of appeals then established a rule for pro se parties that when a Rule 39(b) motion is denied, the district court should articulate on the record the strong and compelling reasons that prompted the court to deny the motion. n38

Another circuit similarly held that strong and compelling reasons had to exist to justify denial of a jury trial. In particular, the court found that the convenience of the district court did not constitute the kind of strong and compelling reason required to warrant a denial of relief. n39

[j] Objection of Opposition Party

One of the most crucial factors in deciding the Rule 39(b) motion for a jury trial is whether the nonmoving party opposes the motion or not. The opposition's failure to object to the motion has been cited as an important factor to be considered in granting relief. n40 Conversely, if a motion for relief from waiver is met with strong opposition, it is an important factor militating against the granting of a jury trial. n41

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 39(b).*

(n2)Footnote 2. *Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1028-1029 (5th Cir. 1980)* .

(n3)Footnote 3. *See, e.g., Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir. 1983)* , *cert. denied, 464 U.S. 986 (1983)* ; *Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir. 1964)* .

(n4)Footnote 4. *Davis v. Elkins, 69 F.R.D. 705, 706 (E.D. Tenn. 1975)* .

(n5)Footnote 5. *Buggeln & Smith, Inc. v. Standard Brands, Inc., 27 F. Supp. 399, 399 (S.D.N.Y. 1939)* .

(n6)Footnote 6. *Federal Deposit Ins. Corp. v. Palermo, 815 F.2d 1329, 1333-1334 (10th Cir. 1987)* .

(n7)Footnote 7. *Jackson v. Airways Parking Co., 297 F. Supp. 1366, 1384 (N.D. Ga. 1969)* .

(n8)Footnote 8. *Moores v. Greenberg, 834 F.2d 1105, 1108-1109 (1st Cir. 1987)* .

(n9)Footnote 9. *Pyramid Co. of Holyoke v. Homeplace Stores Two, Inc. 175 F.R.D. 415, 421 (D. Mass. 1997)* (district court declined to consider request for relief from waiver of jury trial as "motion," when it was raised in reply brief in support of motion to amend answer to add counterclaims and jury demand).

(n10)Footnote 10. *Moore's v. Greenberg, 834 F.2d 1105, 1108 (1st Cir. 1987)* .

(n11)Footnote 1. *Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir.)* , *cert. denied, 379 U.S. 962 (1964)* .

(n12)Footnote 2. *Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 675 (9th Cir. 1975)* (quoting **Moore's Federal Practice,** absent abuse of judicial discretion, denial of a Rule 39(b) motion should be sustained).

(n13)Footnote 3. *See Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013 (6th Cir. 1987)* .

(n14)Footnote 4. *Nissan Motor Corp. v. Burciaga, 982 F.2d 408, 409 (10th Cir. 1992)* .

(n15)Footnote 5. *Block v. Fishman, 610 F. Supp. 282, 284 (E.D. Wis. 1985)* .

(n16)Footnote 6. *Coates v. Union Oil Co., 176 F. Supp. 713, 715 (D. Colo. 1959)* (when all issues are equitable, jury trial may not be ordered under Rule 39(b)).

(n17)Footnote 1. *Federal Deposit Ins. Corp. v. Palermo, 815 F.2d 1329, 1334 (10th Cir. 1987)* .

(n18)Footnote 2. *Rodriguez v. Schweiger, 534 F. Supp. 229, 231-232 (N.D. Ill. 1982)* .

(n19)Footnote 3. *See Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir.)* , *cert. denied, 464 U.S. 936 (1983)* .

(n20)Footnote 4. *General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197-198 (4th Cir.)* , *cert. denied, 377 U.S. 952 (1964)* (courts have generally considered issues arising in patent litigation to be too complex for juries to easily understand, and have shown a preference for bench trials in this specialty).

(n21)Footnote 5. *Paramount Pictures Corp. v. Thompson Theatres, Inc., 621 F.2d 1088, 1090-1091 (10th Cir. 1980)* (audits and accountings are considered tedious and technical, requiring more attention to intricate details than jury is qualified to consider).

(n22)Footnote 6. *Davis-Watkins Co. v. Service Merch. Co., 500 F. Supp. 1244, 1251-1252 (M.D. Tenn. 1980)* (long trials, as well as need to review massive quantities of documents, to hear and understand expert testimony on technical issues, and to absorb and comprehend lengthy jury instructions dealing with complex questions have all been cited as reasons for denying motions for jury trials in antitrust cases).

(n23)Footnote 7. *Washington County Ins. Co. v. Wilkinson, 19 F.R.D. 177, 178 (D. Md. 1956)* .

(n24)Footnote 8. *Tavoulareas v. Piro, 93 F.R.D. 11, 15 (D.D.C. 1981)* .

(n25)Footnote 9. *See Hawkinson v. Blandin Paper Co., 54 F.R.D. 517, 519 (D. Minn. 1972)* .

(n26)Footnote 10. *United States v. Unum, Inc., 658 F.2d 300, 303 (5th Cir. 1981)* (motion for jury made on eve of trial is too prejudicial to those who have prepared for bench trial).

(n27)Footnote 11. *Espinosa v. Van Dorn Plastic Machinery Co., 813 F. Supp. 252, 254 (S.D.N.Y. 1993)* .

(n28)Footnote 12. *Unger v. Cunard Line, Inc., 100 F.R.D. 472, 473-474 (S.D.N.Y. 1984)* .

(n29)Footnote 13. *Credit Bureau of Council Bluffs, Inc. v. Credit Bureau Data Centers Inc., 143 F.R.D. 206, 213 (S.D. Iowa 1992)* .

(n30)Footnote 14. *Wysowski v. Sitmar Cruises, 127 F.R.D. 446, 449 (D. Conn. 1989)* .

(n31)Footnote 15. *Wilson v. Corning Glass Works, 195 F.2d 825, 827 (9th Cir. 1952)* .

(n32)Footnote 16. *Segal v. American Casualty Co. of Reading, Pa., 250 F. Supp. 936, 940 (D. Md. 1966)* (citing large number of similar cases waiting to be tried and additional expense of a jury trial).

(n33)Footnote 17. *New Creation Contact Lenses, Inc. v. Continuous Curve Contact Lens, Inc., 100 F.R.D. 75, 78 (W.D. Ark. 1983)* .

(n34)Footnote 18. *Rodriguez v. Schweiger, 534 F. Supp. 229, 232 (N.D. Ill. 1982)* .

(n35)Footnote 19. *Pawlak v. Metropolitan Life Ins. Co., 87 F.R.D. 717, 720 (D. Mass. 1980)* .

(n36)Footnote 20. *Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir.)* , *cert. denied, 464 U.S. 936 (1983)* .

(n37)Footnote 21. *C. Albert Sauter Co. v. Richard S. Sauter Co., 57 F.R.D. 537, 538 (E.D. Pa. 1972)* .

(n38)Footnote 22. *Board of Educ. v. Aetna Cas. & Sur. Co., 48 F.R.D. 402, 402-403 (S.D.N.Y. 1969)* .

(n39)Footnote 23. *Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1029 (5th Cir. 1980)* .

(n40)Footnote 24. *United States v. Unum, Inc., 658 F.2d 300, 303 (5th Cir. 1981)* .

(n41)Footnote 25. *Scaramucci v. Dresser Indus., Inc., 427 F.2d 1309, 1318 (10th Cir. 1970)* .

(n42)Footnote 26. *Rhodes v. Amarillo Hospital Dist., 654 F.2d 1148, 1154 (5th Cir. 1981)* ; *Pyramid Co. of Holyoke v. Homeplace Stores Two, Inc. 175 F.R.D. 415, 421 (D. Mass. 1997)* .

(n43)Footnote 27. *Noonan v. Cunard S.S. Co., 375 F.2d 69, 70 (2d Cir. 1967)* .

(n44)Footnote 28. *See Rodriguez v. Schweiger, 534 F. Supp. 229, 231-232 (N.D. Ill. 1982)* .

(n45)Footnote 29. *Board of Educ. v. Aetna Casualty & Sur. Co., 48 F.R.D. 402, 403 (S.D.N.Y. 1969)* .

(n46)Footnote 30. *Ford v. Breier, 71 F.R.D. 195, 197 (E.D. Wis. 1976)* .

(n47)Footnote 31. *Ma v. Community Bank, 686 F.2d 459, 470 (7th Cir. 1982)* , *cert. denied, 459 U.S. 962 (1982)* .

(n48)Footnote 32. *Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063-1064 (5th Cir. 1990)* .

(n49)Footnote 33. *Lanza v. Drexel & Co., 479 F.2d 1277, 1310 (2d Cir. 1973)* .

(n50)Footnote 34. *Cataldo v. E.I. Du Pont de Nemours & Co., 39 F.R.D. 305, 308 (S.D.N.Y. 1966)* .

(n51)Footnote 35. *Horwitz v. Alloy Automotive Co., 677 F. Supp. 564, 567 (N.D. Ill. 1988)* .

(n52)Footnote 36. *Federal Deposit Ins. Corp. v. Cafritz, 770 F. Supp. 28, 30 (D.D.C. 1991)* (allowing jury to hear evidence on all counts would avoid confusion as issues were legally and factually intermeshed).

(n53)Footnote 37. *Fitzgerald v. United States Lines Co., 374 U.S. 16, 21, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* .

(n54)Footnote 38. *Lewis v. Thigpen, 767 F.2d 252, 259 (5th Cir. 1985)* .

(n55)Footnote 39. *Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir. 1983)* , *cert. denied, 464 U.S. 986 (1984)* (mere convenience of bench trial not strong and compelling reason).

(n56)Footnote 40. *Ford v. Breier, 71 F.R.D. 195, 197 (E.D. Wis. 1976)* .

(n57)Footnote 41. *Molinaro v. Watkins--Johnson CEI Div., 60 F.R.D. 410, 413 (D. Md. 1973)* ; *Hawkinson v. Blandin Paper Co., 54 F.R.D. 517, 519 (D. Minn. 1972)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART II. DEMAND FOR JURY TRIAL AND WAIVER OF RIGHT TO JURY
B. WAIVER OF RIGHT TO DEMAND JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure §§ 22.49through 22.59

[Reserved]

§§ 22.49[Reserved]

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.60

§ 22.60 Docketing of Case as Jury Trialn*

[1] Effect of Docketing by Clerk

When a party properly demands a jury trial under Rule 38, n1 the clerk must designate the action on the court's docket as a jury action. n2 This requirement is part of the clerk's duty to keep a "civil docket book" for the docketing of all civil actions before the court. n3 and part of the clerk's duty to establish calendars of all actions ready for trial that distinguish between actions triable by jury or triable by the court. n4

These requirements that the clerk docket a matter as a jury trial when a proper and timely jury demand has been made have the practical effect of scheduling the case for a jury trial. n5 Consequently, if the clerk makes an error in docketing a jury case as a nonjury case, or docketing a nonjury case as a jury case, the error does not control the right of a party to a jury trial. In other words, a party has no right to a jury trial when the party has not made a timely demand, even if there is an indication on the docket setting the matter for jury trial. n6

Conversely, a right to a jury may not be lost merely because the clerk fails to properly mark the docket book when a party has made a timely demand. n7 In this regard, the federal rules require that if a timely demand for a jury trial has been made, all issues within the demand must be tried by a jury. The rules provide for only two situations in which the court may order a court trial after a timely jury demand has been made: when the parties stipulate to trial of the action or specified issues by the court; or when the court determines that the parties have no right to a jury trial. n8 In all other situations, the action must be tried to a jury. n9

[2] Reliance on Demand and Docketing of Case for Trial by Jury

After a party has made a timely demand for a jury and after the case is designated by the clerk as a jury case on the court's docket, n1 other parties to the action may rely on the demand. n2 In other words, once one party has made a jury demand, there would be no purpose for the court to require that other parties make a jury demand because the first demand remains effective unless removed by stipulation of the parties or by order of the court. n3 The usual situation occurs when a defendant relies on a demand made by a plaintiff. n4 However, plaintiffs who fail to make a jury demand may rely on later jury demands made by defendants. n5 Furthermore, a party may rely on a co-party's demand. For example, in multiple defendant cases, one defendant may rely on the demand of a co-defendant. n6 However, reliance

on a demand is limited to the issues embraced by the original demand. n7

A party's right to rely on the jury demand of another party is limited to the issues embraced by that demand, and if new issues are raised in subsequent pleadings, a new jury demand must be made with regard to those issues. n8 Furthermore, if a party has waived a jury trial by not making a timely demand for one with respect to an issue, n9 the filing of additional pleadings does not automatically revive the opportunity for demanding a jury.

A party may have a new opportunity to demand a jury when additional pleadings are filed, but only as to genuinely new issues raised by the additional pleadings. Additional pleadings that contain merely "artful rephrasings" of existing issues do not affect a previously-filed demand for a jury or any prior waiver of a jury that resulted from the failure to file a timely jury demand. n10 The principle of reliance on a previously-filed jury demand is limited to those instances when reliance is reasonable. n11 This means that a party is not entitled to rely on a jury trial demand of another party if the other party who made the demand had no right to a jury trial. n12 For further discussion of a party's reliance on a demand made by another party, *see §§ 22.21*, *22.22*, *22.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, §§ 39.10*-39.13 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 22.20* et seq.

(n3)Footnote 2. *Fed. R. Civ. P. 39(a)*.

(n4)Footnote 3. *See Fed. R. Civ. P. 79(a)*.

(n5)Footnote 4. *See Fed. R. Civ. P. 79(c)*.

(n6)Footnote 5. *See Fed. R. Civ. P. 39(a)*.

(n7)Footnote 6. *O'Malley v. United States Fid. & Guar. Co., 776 F.2d 494, 502 (5th Cir. 1985)* (no jury right for party who made late demand, even though magistrate incorrectly honored late demand for jury made orally at status conference).

(n8)Footnote 7. *Rosen v. Dick, 639 F.2d 82, 88-89 (2d Cir. 1980)* (even though clerk failed to mark docket sheet for jury trial, that failure was not enough of defect to enforce waiver against party who had otherwise complied with Rule 38).

(n9)Footnote 8. *See Fed. R. Civ. P. 39(a)*.

(n10)Footnote 9. *Mihara v. Dean Witter & Co., 619 F.2d 814, 823 (9th Cir. 1980)* .

(n11)Footnote 1. *See* [1], *above*.

(n12)Footnote 2. *Taylor v. Gulf States Utilities Co., 375 F.2d 949, 950 (5th Cir. 1967)* ; In *Re Passodelis, 234 B.R. 52, 65 (W.D. Pa. 1999)* .

(n13)Footnote 3. *See* [1], *above*.

(n14)Footnote 4. *Patterson v. Coughlin, 905 F.2d 564, 570 (2d Cir. 1990)* (defendants entitled to rely on plaintiff's request to preserve their own jury trial right.

(n15)Footnote 5. *Dell'Orfano v. Romano, 962 F.2d 199, 202 (2d Cir. 1992)* (prisoner who brought pro se civil rights action against prison officials was entitled to jury trial, even though he neglected to make a jury demand, when defendants made one in their answer).

(n16)Footnote 6. *Mid Kansas Federal Savings & Loan v. Orpheum Theatre Co., 810 F. Supp. 1184, 1190 (D. Kan. 1992)* .

(n17)Footnote 7. *YJR Enters., Inc. v. Twin County Grocers, Inc., 709 F. Supp. 499, 501 (S.D.N.Y. 1989)* .

(n18)Footnote 8. *Rosen v. Dick, 639 F.2d 82, 93-96 (2d Cir. 1980)* .

(n19)Footnote 9. *Fed. R. Civ. P. 38(d).*

(n20)Footnote 10. *Rosen v. Dick, 639 F.2d 82, 93-96 (2d Cir. 1980)* .

(n21)Footnote 11. In re N-500L *Cases, 691 F.2d 15, 22 (1st Cir. 1982)* .

(n22)Footnote 12. *Craig v. Atlantic Richfield Co., 19 F.3d 472, 477 (9th Cir. 1994)* , *cert. denied, 513 U.S. 875 (1994)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.61

§ 22.61 n* Single Trial of Both Jury and Nonjury Claims

[1] General Procedure for Trial With Both Legal and Equitable Claims

The Federal Rules of Civil Procedure allow legal, equitable, and maritime claims to be liberally joined in a single action. n1 Also, the right to a jury trial under Rule 38 extends to individual claims in a case rather than to entire actions. n2 Consequently, it is commonplace for the court to combine jury and nonjury claims in a single trial in which the legal claims are submitted to a jury, while the equitable or maritime claims are submitted to the court. n3 The federal rules provide for such combined actions by providing that when there is a jury demand, the court may put on the jury docket for jury trial all issues so demanded, while providing that issues not demanded for trial by jury will be tried by the court. n4 The original Committee Note to Rule 39 stated that when certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. n5 Due to constitutional considerations, the sequence of trial is now governed by case law. n6

[2] Sequence of Trial When There Is Combination of Jury and Nonjury Claims

When the parties present jury and nonjury claims in the same action, any common questions of fact must be tried to the jury first, unless imperative circumstances require otherwise. This rule was decided on the grounds that the right to a jury trial may not be impaired through a prior determination of factual issues by a court. n1 In combined jury and nonjury trials, this "jury first" rule means that the jury's decisions on the common factual questions are binding on the court. n2 However, the court is not bound by the jury's verdict in two situations. If the court (1) decides that a jury determination of factual issues is defective because it is without legally sufficient evidentiary support to the extent that a judgment as a matter of law would be justified, n3 or (2) determines that there are grounds for ordering a new trial, n4 the court may make contrary factual decisions without violating the jury first rule or otherwise denying a party's right to a jury trial. n5

The jury first rule applies regardless of whether the issues triable by jury may be characterized as merely "incidental" to the issues not triable by jury. n6 Even though a court is entitled to examine further than the pleadings to strike a jury demand when there is no genuine issue on which the parties may be entitled to a jury trial, a court may not characterize a genuine legal claim (which is triable by jury) as "incidental" to nonjury claims for equitable relief, such as claims for an accounting, and strike a jury demand based on that manner of characterization. n7

However, the "jury first" rule applies only to claims brought simultaneously. The constitutional right to a jury trial does not allow a party to relitigate issues before a jury if those issues have already been properly determined by a court in an earlier, separate action. Thus, the determination of issues of fact by the court in a nonjury action may have collateral estoppel effect on a subsequent jury action involving the same issues. For example, when defendants lost on the factual issues in an injunction action brought by the Securities and Exchange Commission, the defendants could not in a subsequent suit by investors relitigate those same factual issues. The defendants were not entitled to a second trial on those factual issues, even though the defendants would have otherwise been entitled to a jury in the second action, and not in the first. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in Equity

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 39.14* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 2, 18.*

(n3)Footnote 2. *Fed. R. Civ. P. 38.*

(n4)Footnote 3. *Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693, 696 (Fed. Cir. 1990)* ; *Blake v. Hall, 668 F.2d 52, 54 (1st Cir. 1981)* , *cert. denied, 456 U.S. 983 (1982)* .

(n5)Footnote 4. *Fed. R. Civ. P. 39(b).*

(n6)Footnote 5. *Fed. R. Civ. P. 39*, Advisory Committee Note.

(n7)Footnote 6. *See* [2], *below.*

(n8)Footnote 1. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* (common questions must be tried first to jury and that to do otherwise would impermissibly impair constitutional right to jury trial).

(n9)Footnote 2. *Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988)* (court is bound by jury's determination of factual issues common to both legal and equitable claims).

(n10)Footnote 3. *See Fed. R. Civ. P. 50(a).*

(n11)Footnote 4. *See Fed. R. Civ. P. 59(a).*

(n12)Footnote 5. *Swentek v. USAIR, Inc., 830 F.2d 552, 559 (4th Cir. 1987)* ; *see Johns Hopkins Univ. v. Datascope Corp., 543 F.3d 1342, 1344-1345 (Fed. Cir. 2008)* .

(n13)Footnote 6. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* (jury first rule applies even if trial judge characterizes legal issues as "incidental" to equitable claim).

(n14)Footnote 7. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476-478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* .

(n15)Footnote 8. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.62

§ 22.62 Jury Trial by Stipulation or Consent of Partiesn*

[1] Discretion of Court to Hold Jury Trial on Nonjury Issues When Parties Consent

[a] Discretion of Trial Court

If all of the parties to an action consent, the court may order a jury trial even on those issues that are not triable of right by a jury. n1 However, the court's decision is discretionary, and is not required merely because the parties consent to a jury trial. n1.1 Once the parties consent to a jury trial and a court orders one, the court does not have unlimited discretion to change its decision. n2 It has generally been held that the court's authority to change its decision about a jury trial is limited to circumstances in which the court makes a decision before trial and gives the parties notice of its final decision in time that the decision does not negatively affect their trial preparation.

One appellate court observed that the parties are entitled to know at the outset of the trial whether the decision will be made by the judge or the jury. n3 Another decided that it was an abuse of discretion for the trial court to change its mind on the eve of trial. n4 However, this rule is not absolute, and other courts have stated that, while advance notice is preferred, it is not expressly required by Rule 39(c) and, absent some demonstrable prejudice to the complaining party, it is not an abuse of discretion for the trial judge to originally agree with the parties and order a jury trial, and then to declare that the jury will be advisory only. n5 Similarly, the Fifth Circuit has held that when circumstances change to the extent that the parties are no longer entitled to a jury trial, the court may deem an already empaneled jury as merely advisory. n6

The only absolute rule in this regard is that once the court submits the case to the jury and the jury renders a verdict, the jury's verdict is binding, and the court has no power to change its mind regarding a jury trial, even though the parties may not have been legally entitled to a jury but for their consent and the court's order. n7 When a court orders a jury trial pursuant to the consent of the parties, its verdict has the same effect as if trial by jury had been a matter of right. n8

[b] Jury by Consent Rule Not Applicable in Actions Against United States

The federal rule allowing jury trial by consent of the parties does not apply in actions against the United States when there is a federal statute that provides for a bench trial only. n9 Most actions allowed against the United States are the

subject of a statute that forbids a jury trial, such as the Federal Tort Claims Act. n10 Furthermore, as a sovereign the United States is immune from suit unless it expressly waives immunity, and it may waive its immunity and consent to be sued on any conditions that it wishes to impose, n11 including the condition that the court hold a bench trial rather than a jury trial.

Congress usually conditions waiver of sovereign immunity on a plaintiff's relinquishing the right to a jury trial. n12 Consequently, if a party files an action against the United States in which the party has no right to a jury trial, the verdict is only advisory, even if the United States fails to object to submission of issues to the jury. n13

[2] Consent Required

Consent to a jury trial under Rule 39(c) may be sufficient even if it is not an express consent. Thus, a party may agree to a jury trial by implied consent. n1 For example, if a party fails to object to the submission of any issues to a jury, the court may consider the failure as a consent to the trial by jury of those issues. n2 Thus, the fact that there is no constitutional or statutory right to a jury trial of a particular issue, such as an equitable issue, does not prevent the court from holding a jury trial for that issue if there is no objection from any party. n3

[3] Effect of Consent Is That Jury Not Merely Advisory

When a case is tried to a jury because the parties have consented to a jury trial, the court must treat the jury's verdict with the same effect as if the trial by jury had been a matter of right. n1 The court may not use the verdict as merely an advisory jury verdict. n1.1 Even in cases when the jury is present only because of the consent of the parties, and no party has a constitutional or statutory right to a jury trial, it is reversible error for a court to treat the jury verdict as if were merely advisory. n2 Thus, the district court may not without proper grounds set the verdict aside n3 or rule that the verdict is advisory after the jury has already returned the verdict. n4 The only grounds for setting aside or ignoring verdicts of nonadvisory juries are those grounds specified in Rule 50 regarding judgment as matter of law, n5 and Rule 59, regarding a grant of a new trial or an amendment of judgment. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in Equity

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 39.15* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 39(c)(2).*

(n3)Footnote 1.1. *Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961, 968 (7th Cir. 2004)* (district court is not obligated to hold jury trial when one is not required even if both parties agree to use a jury; court has discretion to use jury when one is not required but parties consent).

(n4)Footnote 2. *Hildebrand v. Board of Trustees, 607 F.2d 705, 710 (6th Cir. 1979)* (district court does not have to go along with agreement of parties to have jury trial).

(n5)Footnote 3. *Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* .

(n6)Footnote 4. *AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150, 155 (10th Cir. 1965)* .

(n7)Footnote 5. *Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 826-827 (2d Cir. 1994)* , *cert. denied, 513 U.S. 1084 (1995)* (citing **Moore's Federal Practice,** court upheld district court's decision that jury would be advisory only after plaintiff had rested).

(n8)Footnote 6. *Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982)* .

(n9)Footnote 7. *Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 795-796 (5th Cir. 1999)* (once parties have consented to nonadvisory jury, court must provide them advance notice if it intends to regard verdict as advisory, and if it fails to do so must be bound by jury's verdict).

(n10)Footnote 8. *Fed. R. Civ. P. 39(c)(2)*; *see § 22.70* (jury verdicts).

(n11)Footnote 9. *Fed. R. Civ. P. 39(c)(2)*; *see Hamm v. Nasatka Barriers, 166 F.R.D. 1, 2 (D.D.C. 1996)* (prohibition against regular jury trials, even when other party and United States consent, in actions against United States when statute provides for trial without jury).

(n12)Footnote 10. *See 28 U.S.C. §§ 1346, 2402*.

(n13)Footnote 11. *United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)* .

(n14)Footnote 12. *Lehman v. Nakshian, 453 U.S. 156, 161, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981)* .

(n15)Footnote 13. *Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 94-95 (1st Cir. 1975)* (provisions of statute waiving sovereign immunity are jurisdictional, government may not by consent confer jurisdiction on court to treat jury verdict against United States as other than advisory).

(n16)Footnote 1. *Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 795, 796 fn. 101 (5th Cir. 1999)* (for example, if one party demands jury and other parties do not object, and court orders jury trial, this will be regarded as jury trial by implied consent).

(n17)Footnote 2. *Whiting v. Jackson State Univ., 616 F.2d 116, 123 (5th Cir. 1980)* (plaintiff requested jury trial and did not object to court's submission of equitable issues to jury).

(n18)Footnote 3. *U.S. Philips Corp. v. Ferro Corp., 522 F.2d 1100, 1102 (6th Cir. 1975)* .

(n19)Footnote 1. *Fed. R. Civ. P. 39(c)(2)*.

(n20)Footnote 1.1. *See Marra v. Phila. Hous. Auth., 497 F.3d 286, 313-314 (3d Cir. 2007)* .

(n21)Footnote 2. *Hildebrand v. Board of Trustees of Mich. S. Univ., 607 F.2d 705, 711 (6th Cir. 1979)* (court erred in, on its own initiative, converting jury trial to bench trial part way through trial); *Stockton v. Altman, 432 F.2d 946, 949-950 (5th Cir. 1970)* , *cert. denied, 401 U.S. 994 (1971)* (complexity of case not grounds for denying binding effect of jury's verdict when both parties consented to jury trial).

(n22)Footnote 3. *Thompson v. Parkes, 963 F.2d 885, 888-889 (6th Cir. 1992)* .

(n23)Footnote 4. *Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49, 52-53 (3d Cir. 1989)* .

(n24)Footnote 5. *See Fed. R. Civ. P. 50*.

(n25)Footnote 6. *See Fed. R. Civ. P. 59*.

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.63

§ 22.63 n* Use of Advisory Jury

[1] Discretion of Court to Utilize Advisory Jury

The court has discretion to try any issue with an advisory jury, either on its own initiative or on motion of a party. The court has the option to use advisory juries in any action not triable of right by a jury. n1 Although Rule 39(c) does not state whether a court has the power to order an advisory jury in the situation in which a party has waived a jury trial right, case law indicates that the court may use an advisory jury under such circumstances.

One circuit court of appeals has held that the use of an advisory jury was allowable despite the waiver by the parties of their jury trial rights, at least where the parties had agreed to submit a special question to the advisory jury. n2 The rationale behind such a rule is that there is at least as much justification for a trial court's use of an advisory jury for the trial of legal issues for which a jury trial has been waived as there is for a trial of equitable issues for which no jury right exists. n3 Furthermore, the use of a jury in an advisory capacity does not deprive the parties of what is in effect a court trial, because the jury acts merely as an aid to the court, and the court has the ultimate responsibility to make findings of fact. n4

A court's authority to use an advisory jury is discretionary. n5 Therefore, no party has a right to an advisory jury without the approval of the court, n6 and because the court's decision to use an advisory jury is discretionary, that decision has been held to be unreviewable on appeal. n7

[2] Factors Considered in Decision to Use Advisory Jury

As noted in [1], *above*, the court has discretion to use an advisory jury whenever its deems it appropriate. The courts have indicated several factors that tend to indicate that an advisory jury may be appropriate. Among the factors cited by the courts have been the following:

1. Whether the issues in the case are complex. The complexity of the issues to be resolved in a case may be a key factor in the court's decision regarding use of an advisory jury. If the issues in a case are too complex for the layperson, the court may decline to exercise its discretion to impanel an advisory jury. n1 Conversely, the lack of complex issues has been cited as a factor in deciding to use an advisory jury.

n2

2. Whether the case involves extraordinary or unique circumstances. Thus, a court will be considerably more likely to exercise its discretion to order a trial with an advisory jury when a case is extraordinary, peculiar, or unique, n3 or in exceptional cases with unique circumstances. n4

3. Whether the claims or issues have been traditionally considered particularly appropriate for jury resolution, such as claims of negligence, personal injury, or wrongful death, or actions that depend on the credibility of witnesses; courts have indicated that these types of claims may also be particularly suitable for the use of an advisory jury. n5

4. Whether the advisory jury would save judicial resources and expense. That a court trial could result in a saving of judicial resources and could eliminate the additional time and expense involved in presenting the case to a jury, have been cited as reasons for refraining from using an advisory jury. n6 On the other hand, at least one court has noted that use of an advisory jury itself could contribute to judicial economy, in that an advisory jury may foster settlement of the case. n7

[3] Use of Advisory Jury Does Not Satisfy Party's Seventh Amendment Right to Jury

A court's use of an advisory jury does not satisfy a party's constitutional right to a jury trial, n1 because the use of an advisory jury is essentially a court trial because the court is free to accept or reject the advice of the jury. n2 If a party is entitled to, and the court erroneously denies the right to, a jury trial, the use of an advisory jury does not cure the error; the judgment will be reversed on appeal, and the case remanded for a new jury trial even if the court accepted the advisory verdict. Trial before a jury that the parties assume will have only an advisory role does not give the parties an actual jury trial secured by the constitution or a statute. n3

[4] Effect of Verdict Given By Advisory Jury

[a] Purpose is Merely to Assist Court

The purpose of the advisory jury is only to provide guidance or give information to the trial court. n1 Consequently, an advisory jury does not replace the court as trier of fact of the advisory jury issues in the case. The responsibility for rendering a decision as the trier of fact remains with the trial court, even though an advisory jury is used. n2 This principle is reflected by the requirement of Rule 52(a) that the court must set forth factual findings and conclusions of law in all cases with an advisory jury, exactly in the same manner as for those cases tried to the court only. n3

[b] Verdict of Advisory Jury is Not Binding on Court

The verdict of an advisory jury has no binding effect on the court. n4 The court may accept the advisory verdict and make findings in accordance with it; or the court may reject the advisory verdict in whole or in part. n5 However, the rule that the court may reject the verdict of an advisory jury is subject to the qualification that when a jury is "advisory" only with respect to certain issues, the court's determination of claims is bound by the jury's determination of the factual issues common to the claims that the jury decides as of right and the claims that the court decides based on the jury's verdict in its advisory capacity. n6 On the other hand, this requirement does not necessarily mean that the court's conclusions on the claims tried by the jury only in an advisory capacity must conform precisely with the jury's verdict on the claims tried by the jury in a nonadvisory capacity. Provided that a party is granted a jury trial on the claims properly tried by a jury as of right, that party may not complain that the nonjury claims were disposed of by the court contrary to the nonbinding advice of the jury.

[c] Decision and Findings Required by Court

Whether it accepts or rejects the advisory verdict, Rule 52(a) requires the court as the true trier of fact, to make its own, independent findings of fact and conclusions of law. n7 The court may not simply enter judgment on the jury's verdict, as is the case when a nonadvisory jury is used. n8 On the other hand, findings of fact and conclusions of law need not be written but may instead be stated orally and recorded in open court. Furthermore, they need not include exhaustive detail or trace the claims issue by issue and witness by witness. The findings and conclusions need only be sufficient to permit meaningful appellate review, and when they do not, the appellate court may vacate and remand. n9 For a further discussion of the requirements and procedures governing findings of fact and conclusions of law, see Ch. 23, *Trial to Court; Inability of Judge to Proceed*.

Once a trial court has made its required findings and conclusions, n10 any motion challenging the judgment is not properly a motion to set aside the jury's verdict or the jury's answer to special interrogatories. Even if the court's findings are the same as the verdict of the advisory jury, it is not appropriate for a party to challenge the court's findings by a Rule 50 motion n11 for judgment as a matter of law. To test the accuracy or sufficiency of the court's findings, the challenging party must make a Rule 52(b) motion to amend the findings of the court, or to make additional findings. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 8 *Moore's Federal Practice, § 39.15* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 39(c)(1).*

(n3)Footnote 2. *Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc., 108 F.2d 497, 500 (2d Cir. 1939)* .

(n4)Footnote 3. *Computer Sys. Eng'g, Inc. v. Qantel Corp., 571 F. Supp. 1365, 1373 (D. Mass. 1983)* , *aff'd on other grounds, 740 F.2d 59 (1st Cir. 1984)* (quoting **Moore's Federal Practice** to effect that advisory jury is likely more helpful on legal than equitable issues).

(n5)Footnote 4. *Cudmore v. Smith, 260 F. Supp. 760, 760 (D. Conn. 1966)* (advisory jury used by court after waiver of jury trial in personal injury action).

(n6)Footnote 5. *McKinney v. Gannett Co., 817 F.2d 659, 674 (10th Cir. 1987)* (advisory jury limited to cases not triable to jury as right); *Delman v. Federal Prods. Corp., 251 F.2d 123, 126 n. 2 (1st Cir. 1958)* (use of advisory jury on question of successor liability under mere continuation theory was matter reserved to trial court's discretion).

(n7)Footnote 6. *United States v. Ellis Research Labs., Inc., 300 F.2d 550, 554 (7th Cir. 1962)* .

(n8)Footnote 7. *Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972)* .

(n9)Footnote 1. *Rosen v. Dick, 83 F.R.D. 540, 544 (S.D.N.Y. 1979)* , *rev'd on other grounds, 639 F.2d 82 (2d Cir. 1980)* (involved complex issues of accounting practice).

(n10)Footnote 2. *Coleman v. Kroger Co., 399 F. Supp. 724, 732 (W.D. Va. 1975)* .

(n11)Footnote 3. *Dixon v. Universal Atlas Cement Div., 437 F. Supp. 1071, 1074 (W.D. Pa. 1977)* .

(n12)Footnote 4. *Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973)* .

(n13)Footnote 5. *Gragg v. City of Omaha, 20 F.3d 357, 358 (8th Cir. 1994)* (personal injury case where right to

jury trial was barred by law).

(n14)Footnote 6. *Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* .

(n15)Footnote 7. *Bozeman v. Sloss Indus. Corp., 138 F.R.D. 590, 592 (N.D. Ala. 1991)* .

(n16)Footnote 1. *Fischer Imaging Corp. v. General Electric Co., 187 F.3d 1165 (10th Cir. 1999)* (citing **Moore's Federal Practice**); *Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* ; *see Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 n.24, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (advisory jury would not in any event have been *Seventh Amendment* jury).

(n17)Footnote 2. *Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982)* .

(n18)Footnote 3. *Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* .

(n19)Footnote 1. *Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* (whether to use advisory jury largely depends in part on whether there are special factors such that jury composed of members of community would provide court with valuable guidance).

(n20)Footnote 2. *Wilson v. Prasse, 463 F.2d 109, 116 (3d Cir. 1972)* (failure of advisory jury to complete interrogatories not reversible error, because trial court had ultimate responsibility for findings of fact); *Frostie Co. v. Dr. Pepper Co., 361 F.2d 124, 126 (5th Cir. 1966)* (rejecting appellant's claim that inadmissible evidence was presented to advisory jury, because appeal was from court's judgment only, as if no jury were present).

(n21)Footnote 3. *Fed. R. Civ. P. 52(a)*; *see Ellis v. Diffie, 177 F.3d 503, 505-506 (6th Cir. 1999)* ; *see also* [b], *below*.

(n22)Footnote 4. *Greenwood v. Greenwood, 234 F.2d 276, 278 (3d Cir. 1956)* .

(n23)Footnote 5. *Tomasello v. Rubin, 167 F.3d 612, 617 (D.C. Cir. 1999)* (some findings may be adopted and others rejected but all are as merely advisory).

(n24)Footnote 6. *Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 627 (D. Minn. 1988)* .

(n25)Footnote 7. *Fed. R. Civ. P. 52(a)*; *Mazzeo v. Lenhart, 167 F.3d 139, 142 (2d Cir. 1999)* ; *Gragg v. City of Omaha, 20 F.3d 357, 358-359 (8th Cir. 1994)* .

(n26)Footnote 8. *Aetna Ins. Co. v. Stanford, 273 F.2d 150, 153 (5th Cir. 1959)* .

(n27)Footnote 9. *Mazzeo v. Lenhart, 167 F.3d 139, 142 (2d Cir. 1999)* .

(n28)Footnote 10. *See Fed. R. Civ. P. 52(a).*

(n29)Footnote 11. *Fed. R. Civ. P. 50.*

(n30)Footnote 12. *Aetna Ins. Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962)* (when court adopts findings of advisory jury, challenge to such findings is appeal from findings of court).

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.64

§ 22.64 Number of Jurors Requiredn*

[1] Minimum Number of Jurors

Federal civil juries must consist of no more than 12 and no fewer than six jurors. n1 Within these limits, the number of jurors in a case may be set by the court. n2 The court must provide for the specified minimum number of jurors in a case because that minimum has been held to preserve the right to a trial by jury, n3 which is one of the foremost guarantees in the American legal system. In civil matters, jury trials are guaranteed by the *Seventh Amendment to the Constitution* which provides that "[i]n suits at common law, the right of trial by jury is preserved in any case when the value in controversy shall exceed 20 dollars," n4 and by Rule 38 which provides that the right of trial by jury as declared by the *Seventh Amendment to the Constitution* or as given by a statute of the United States shall be preserved to the parties. n5 The right to jury trial is discussed further is § 22.01 et seq.

Although scientific study shows that jury results are statistically more reliable when reached by a larger group, n6 federal trials have employed fewer than the traditional 12 jurors for many years. In 1970, the United States Supreme Court held that a 12-person jury was not constitutionally needed in criminal cases. n7 In 1973, the Court upheld a Montana federal court local rule that required a civil jury of six persons, and noted that proper juror functioning was not compromised by the six person jury. n8

In 1991, Rule 48 was amended to reflect the adoption of local rules by numerous federal districts that had set the standard civil jury size at six persons. The 1991 amendment to Rule 48 thus replaced the anachronistic reference to a 12-member jury with the recognition that jury size will vary depending on local rule. However, while six is a permissible number of jurors, the seating of more than six is preferable in light of Rule 47(c), providing for the excuse of jurors from service by the court, and the abolition of alternate jurors. If at least six jurors remain following the dismissal of a juror or jurors for good cause, they can render a valid verdict.

Only the parties may agree to a jury of less than six. Furthermore, parties should be discouraged from waiving their right to a jury of six only in exceptional circumstances, not only because of the constitutional stature of the jury right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power. n9

[2] Agreement of Parties on Jury Size or Verdict Requirements

The parties may stipulate to a jury size of less than six members, n1 and also to a less than unanimous verdict. n2 Agreements as to unanimity or jury size may even be made after the jury has commenced deliberations. For example, in one case the parties agreed, and the court instructed, that six of the eight jurors would suffice for a verdict. n3

However, because disputes often occur as to whether such a stipulation has been made, counsel should ensure that any agreement to change the jury size or verdict requirement should be written or clearly expressed on the record. n4 Disputes regarding requirements for jury size have arisen in situations where alternate jurors have been permitted to deliberate with the jury. Allowing alternates to deliberate has been held to be prejudicial. n5 Nevertheless, failure to timely object may constitute a waiver n6 or express agreement to allow alternates to deliberate. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 48.02* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 48.*

(n3)Footnote 2. *Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993)* (rejecting argument that court's decision to seat 12 jurors was prejudicial because it required larger unanimous verdict than would be the case with smaller jury).

(n4)Footnote 3. *Krumwiede v. Mercer County Ambulance Service, Inc., 116 F.3d 361, 363 (8th Cir. 1997) .*

(n5)Footnote 4. *U.S. Const., Amend. VII.*

(n6)Footnote 5. *Fed. R. Civ. P. 38(a).*

(n7)Footnote 6. *Fed. R. Civ. P. 48*, Advisory Committee Note to 1991 Amendment.

(n8)Footnote 7. *Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970) .*

(n9)Footnote 8. *Colgrove v. Battin, 413 U.S. 149, 163, 93 S. Ct. 2448, 2456, 37 L. Ed. 2d 522, 532 (1973) .*

(n10)Footnote 9. *Fed. R. Civ. P. 48*, Advisory Committee Note to 1991 Amendment.

(n11)Footnote 1. *Fed. R. Civ. P. 48*; *Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1420-1421 (7th Cir. 1986)* (parties stipulated to five-member jury under Rule 48); *see Fletcher v. McCreary Tire & Rubber Co., 773 F.2d 666, 668-669 (5th Cir. 1985)* (when parties agreed not to select alternates and one juror was later excused, deliberation and verdict by remaining 11 was upheld); *SCFC ILC, Inc. v. Visa U.S.A., Inc., 819 F. Supp. 956, 966 n.7 (D. Utah 1993) , rev'd in part on other grounds, 36 F.3d 958 (10th Cir. 1994)* (verdict by 11-member jury upheld pursuant to agreement of parties when one juror failed to appear).

(n12)Footnote 2. *Fed. R. Civ. P. 48.*

(n13)Footnote 3. *Reynolds v. Green, 184 F.3d 589 (6th Cir. 1999) .*

(n14)Footnote 4. *Rideau v. Parkem Indus. Serv., Inc., 917 F.2d 892, 896 (5th Cir. 1990)* (plaintiff waived any

objection to district court's empanelling of two alternate jurors who participated in verdict).

(n15)Footnote 5. *Cabral v. Sullivan, 961 F.2d 998, 1002 (1st Cir. 1992)* (allowing alternates to deliberate over plaintiff's objection and in contravention of mandatory language in local district rule and former Rule 47 was clearly erroneous).

(n16)Footnote 6. *Rideau v. Parkem Indus. Servs., Inc., 917 F.2d 892, 896 (5th Cir. 1990)* .

(n17)Footnote 7. *E.E.O.C. v. State of Delaware, DHSS, 865 F.2d 1408, 1420-1421 (3d Cir. 1989)* (agreement to allow alternate juror to deliberate with six-member jury did not mean alternate would become part of jury).

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.65

§ 22.65 Selection of Jurorsn*

[1] Qualification of Person for Jury Service

[a] Minimum Requirements for Jury Service

The Jury Selection and Service Act declares that it is the policy of the United States that all parties in federal courts entitled to trial by jury must have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. n1 The Act specifically prohibits exclusion from service as a juror on account of race, color, religion, sex, national origin, or economic status. n2 Furthermore, the Act provides for broad qualifications for jury service, stating that all persons are qualified except for those in five categories. Thus, any person is qualified to serve as a juror unless the person has any of the following characteristics: n3

1. The person is not a citizen of the United States 18 years old who has resided for a period of one year within the judicial district.

2. The person is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form.

3. The person is unable to speak the English language.

4. The person is incapable, by reason of mental or physical infirmity, to render satisfactory jury service.

5. The person has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his or her civil rights have not been restored.

The chief judge of the district court, or such other district court judge as the plan may provide, must determine on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for jury service. n4

[b] Exemption and Excuse From Jury Service

Under the Jury Selection and Service Act, n5 the district court's juror selection plan must mandatorily exempt three classes of persons: (1) active members of the United States Armed Forces, (2) members of fire or police departments, (3) and public officers in the executive, legislative, or judicial branches of federal, state or local government, who are actively engaged in the performance of official duties. n6 The jury selection plan must also provide that on individual request voluntary safety personnel must be excused, n7 and must also specify any other groups or occupational classes whose members are to be excused on individual request. For any such designated group or class of persons, however, the district court must find, and the plan must state, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members of the class or group, and excuse of such members would not be inconsistent with the provisions of the Act. n8

The court has discretion to exclude persons summoned for jury service under certain other circumstances: n9 (1) if they are unable to serve impartially or if their service would be likely to disrupt the trial, (2) on peremptory challenge or challenge for cause, n10 or (3) if their service "would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations." Prospective jurors may be temporarily excused from service on a showing of undue hardship or extreme inconvenience. n11

The clear intent of this provision is that such excuses should be given only in unusual cases and only for a limited period of time, after which an excused juror is to be recalled. Before a juror is excused, the court should inquire into the nature of the hardship or inconvenience claimed and satisfy itself that the excuse is warranted. n12 The decision to exempt or excuse a person from jury service must be made by the chief judge of the district court or by his or her designate solely on the basis of information provided on the juror qualification form. n13

[2] Challenge to Selection of Jury Panels

[a] Required Method of Selection

The Jury Selection and Service Act requires that each United States district court must have a plan for random selection of jurors that is consistent with the objectives of the Act n1 and provides the courts with guidance with respect to procedures for drawing names of prospective jurors from a master jury wheel n2 and for the selection and summoning of jury panels. n3 Under the Act, the district court must provide for a jury commission or must delegate to the clerk the task of preparing the list of names to be placed in the master jury wheel. n4

The primary source for names must be voter lists. Other sources may be used to foster the policy and secure the rights of fairness secured by the Act; in the case of the District of Columbia, the primary source may be the city directory. n5 In all districts, the plan must be made up under procedures designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. Furthermore, it must reflect substantial proportional representation of the political subdivisions located in the district or division. n6 The number of names placed in the master jury wheel must be at least one-half of one percent of the total number of names on the lists used in its preparation unless such a number is believed to be cumbersome and unnecessary, but in no event less than 1,000. n7

The manner of drawing jurors is also governed by the Act. From the master jury wheel, the clerk or the judge must publicly draw at random the number of names necessary for jury service. The clerk or commission will mail to each a jury qualification form. n8 On the receipt of the completed forms, the chief judge or another judge, as the plan may provide, will determine which prospective jurors are not qualified, exempt, or excused. n9

The names of those qualified and not exempt or excused are then placed in a qualified jury wheel from which the jury commission or clerk must publicly draw at random the names of those needed for grand and petit jury panels. n10 In

case of an unexpected shortage of names in the qualified jury wheel, provision is made for summoning petit jurors selected at random from the voter lists from which the master jury wheel was originally composed. n11

The Act requires that all records of these procedures be maintained for at least four years, and that they be made available for public inspection. n12

[b] Challenge to Method of Selection

Section 1867 provides the exclusive means by which the party may challenge a jury on the ground that the members were not selected in conformity with the provisions of the Act. n13 Any statutory challenge to the jury panel must be made before the voir dire examination begins, or within seven days after the party discovered, or could have discovered by the exercise of diligence, the grounds for the challenge, whichever is earlier. n14

[3] Voir Dire

[a] Purpose of Voir Dire

The Jury Selection and Service Act of 1968 confers on all federal parties entitled to a jury trial the broad right to a jury selected from a fair cross section of the community or district where the court convenes. n1 Rule 47(a) is designed to ensure that the jury selected to deliberate in a federal case is impartial and free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. n2 Therefore, one of the primary purposes of the examination on voir dire is to discover bias on the part of potential jurors. n3 Additionally, the voir dire examination must provide essential information so as to allow the intelligent exercise of jury challenges. n4

[b] Discretion of District to Conduct of Voir Dire

The trial court has wide discretion both as to the manner in which the voir dire is conducted and the scope of the questions asked. n5 The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. n6 However, the ultimate obligation to impanel an impartial jury lies with the trial judge, n7 who also has the duty to determine the question of actual bias on the part of the potential jurors. n8

Each federal judge has his or her own procedure for the selection of jurors. Rule 47(a) grants the court discretion to permit the parties or their attorneys to conduct directly the examination of prospective jurors. Few federal judges follow this procedure. The rule also provides that the court may conduct the examination, and most federal judges prefer to examine the prospective jurors themselves. When the judge conducts the voir dire examination, the parties are entitled to request to supplementation of the court's examination. Counsel should prepare to do this, and any written supplementation should be submitted to the court in advance of trial. n9

In view of the considerable discretion vested in the trial court, it is necessary for attorneys to lay a foundation for proposed questions by showing that the inquiry is reasonably calculated to discover a likely source of prejudice, n10 or to furnish the trial court with a list of questions that delineates the nature and scope of the requested examination. n11 However, when counsel requests supplementation, there is no requirement that the trial court put questions in any particular form, or ask any particular number of questions merely because a party requests it, n12 or allow counsel a particular amount of time for questions, n13 or give any opportunity at all to question prospective jurors. n14 Furthermore, the trial court need not pursue any specific line of inquiry, and any method of questioning is sufficient provided it is probative on the issue of impartiality. n15

Given the broad discretion allowed the court on voir dire, the district court's determination of issues concerning the scope of voir dire will be overturned only for an abuse of discretion. n16 Thus, a trial court's determination of the scope of voir dire will not be disturbed on appeal unless the voir dire was insufficient to elicit bias n17 or enable parties to intelligently exercise their right to challenge prospective jurors, n18 or if the trial court itself injected irrelevant and

prejudicial material into the voir dire procedure. n19 In the absence of voir dire limitations that effectively preclude a party's ability to assess prospective jurors for partiality, bias, or prejudice, the trial court's determinations with respect to the conduct and scope of the voir dire will not be grounds for reversal on appeal. n20

[c] Court's Duty to Question for Prejudice or Bias

To provide a fair and impartial jury for the parties, the trial court has an affirmative obligation to pose questions designed to elicit information beyond merely that which would disqualify a juror for cause. Thus, voir dire must go beyond "stock questions" such as name, address, occupation, spouse's occupation, level of education, and acquaintance with parties and attorneys. n21 A court's questions on voir dire must be probing enough to reveal a prospective juror's prejudices to the extent that counsel can exercise challenges in a meaningful manner. The trial court should also attempt to propound questions that will assist counsel in the exercise of peremptory challenges and challenges for cause. n22 The inquiry must be designed to ensure that any bias or prejudice present will be discovered. n23 When relevant, the trial court must inquire as to possible racial bias of prospective jurors. n24 There is, however, no requirement that the court put questions in any particular form, or that a particular question be asked if the substance of the inquiry is covered by another question. n25 Indeed, the wide latitude afforded the trial court on voir dire demands only that the voir dire not be so general that it fails to probe adequately the possibility of bias and prejudice. n26

[d] Effect of Lie or Failure to Disclose in Prospective Juror's Answer

If prospective jurors fail to answer truthfully a material question posed on voir dire, the purpose of the voir dire examination to discern potential bias and prejudice in prospective jurors, and to enable parties to intelligently exercise peremptory challenges and challenges for cause would be defeated. Consequently, the trial judge should admonish the prospective jurors of the necessity that they be truthful in their responses to questions asked them; because a deliberately untruthful response on voir dire might indicate an attempt to conceal bias, it could also provide the basis for a cause challenge, n27 or lead to the exercise of a peremptory challenge. n28 In other words, the right of challenge to a juror includes the incidental right that information elicited on voir dire must be true. n29

Similarly, if a party presents a prima facie case that the right to challenge was impaired by a prospective juror's failure to disclose material information on voir dire, the trial court must hold an evidentiary hearing to determine the circumstances surrounding the nondisclosure. n30 The challenging party has the burden to show that the voir dire questions or the responses of other jurors, put the juror on notice that a particular answer was required, because jurors cannot be expected to disclose information that they were never asked to reveal. n31 Furthermore, if the basis for challenge might have been discovered earlier on voir dire, failure to exercise the challenge at the time the jury is empaneled constitutes waiver of the right to challenge nondisclosure. n32 Similarly, a party who has actual knowledge of undisclosed facts but fails to challenge a juror waives the right to relief. n33

Once the trial court determines that a party is entitled to an evidentiary hearing on a claim of nondisclosure, a case decided by the Supreme Court sets forth the standard for the inquiry and determination of whether to grant a new trial on the basis of an incorrect voir dire response. The Supreme Court held that a new trial should be granted only if the juror failed to answer honestly a material question and if a correct response would have provided a valid basis for a challenge for cause. Because the potential prejudice resulting from nondisclosure of material information exists regardless of whether the nondisclosure was deliberate or simply inadvertent, n34 the Supreme Court holding, which restricts relief only to cases of deliberate nondisclosure, reflects the importance placed on the concept of finality in a trial and recognizes that to invalidate a trial simply because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to provide. n35

[4] Challenge for Cause

[a] Nature of Challenge for Cause

The purpose of a challenge for cause of a juror is to allow a party to reject jurors on a narrowly specified, provable, and legally cognizable basis of partiality. n1 A challenge for cause is restricted to circumstances in which the likelihood of partiality of the prospective juror are admitted or presumed from the relationships, n2 pecuniary interests, n3 or clear biases of the prospective juror. n4 The party making the challenge for cause has the burden of persuading the court of partiality and excusableness of the juror, n5 and the courts disfavor per se rules of disqualification. n6

[b] Court's Grant of Challenge for Cause When Actual Bias is Shown

The trial court must grant a challenge for cause if a prospective juror shows actual bias or prejudice. n7 Furthermore, once the challenging party shows evidence of bias, the trial court should resolve doubts about the existence of actual bias against permitting the juror to serve. n8 However, the trial court's determination of impartiality is essentially one of credibility and is therefore largely one of demeanor and entitled to special deference; n9 thus, a trial court has broad discretion on rulings on challenges for cause, n10 and a trial court's determination will be reversed only for an abuse of discretion. n11

The central inquiry for a court's determination of a challenge for cause is whether the prospective juror holds a particular position, belief, or opinion that prevents or substantially impairs the impartial performance of the duties of a juror. n12 It should be noted, however, that when a juror falls into one of the narrowly confined circumstances in which partiality is presumed, such as a relationship with a party or pecuniary interest in the outcome of the trial, the prospective juror's assertion of impartiality is irrelevant. n13

On the other hand, in the absence of facts pointing to presumptive bias, a prospective juror is presumed to be impartial; neither the existence of a preconception n14 nor the juror's having a particular occupational background is sufficient to rebut the presumption of impartiality, provided it is shown that the prospective juror can render a verdict based solely on the evidence presented at trial. n15

[5] Peremptory Challenge

[a] Purpose and Scope of Use of Peremptory Challenge

Peremptory challenges are designed to remove jurors who, in the opinion of a party or counsel, have unacknowledged or unconscious biases. n1 Thus, the scope of a peremptory challenge is considerably more extensive than a challenge for cause, which must be based on actual bias of the prospective juror, rather than an opinion of counsel. n2 Subdivision (b) of Rule 47 provides that the court must allow the number of peremptory challenges provided by the Jury Selection and Service Act. n3 This text of Rule 47(b) reminds parties that the basis of the right to peremptory challenge is purely statutory, and not constitutional, a distinction that has a significant impact on the remedy to which a party is entitled if the right to peremptory is impaired or denied. n4

[b] Discretion of Trial Court Regarding Peremptory Challenges

[i] Discretion to Set Number

The Jury Selection and Service Act provides basically that each party is entitled to three peremptory challenges. However, it also provides that the court may consider several defendants or several plaintiffs as a single party for the purpose of making challenges, or that the court may allow additional peremptory challenges and permit them to be exercised either separately or jointly. n5 Courts have interpreted this statute to vest the trial court with considerable discretion in the number and assignment of peremptory challenges in cases of multiple parties. For example, in one case the court of appeals held that the district court properly exercised its discretion when it decided to treat multiple defendants as one party and to grant five peremptory challenges to the defendants to exercise jointly. n6

However, the trial court's "considerable" discretion is not unlimited; one court of appeals held that a trial court abused

its discretion when it granted six peremptory challenges to two defendants who were represented by the same attorney and with identical interests, and only three peremptory challenges to the plaintiff. The appellate court found that the trial court should have limited the defendants' peremptories to three or increased plaintiff's peremptories. n7

Counsel should also remember that while the number of challenges allowed is specified by statute and rule, the actual procedure of exercising peremptory challenges is determined by local court rule n8 or is left to the discretion of the court. n9

[ii] Discretion to Establish Peremptory Challenge Procedure

Neither Rule 47(b) nor the Jury Selection and Service Act n10 describes the method that the parties must utilize in exercising peremptory challenges. Therefore, the district court has wide latitude in its management of peremptory challenges, which will only be reversed on appeal if the court's procedure prevents a party from using the statutorily mandated number of peremptory challenges against a person who becomes a member of the jury. n11 However, trial counsel should note that a party may not claim error with respect to the district court's denial of any number of peremptory challenges unless and until the party has exercise all of its available peremptories. n12

[c] Prohibition Against Discriminatory Peremptory Challenges

[i] Substance of Prohibition

In 1986, the Supreme Court held that a state prosecutor's systematic use of peremptory challenges to exclude members of the defendant's race from a criminal jury violated the *Fourteenth Amendment's Equal Protection Clause*. The Court articulated a three-part test for considering such claims: (1) The defendant must first make a prima facie showing that the prosecutor exercised the challenges on the basis of race; (2) the burden then shifts to the prosecutor to come forward with a race-neutral explanation for the challenges; and (3) the district court then evaluates whether the defendant has fulfilled the burden of proof in establishing purposeful discrimination. n13

In a subsequent case the Supreme Court extended the applicability of *Batson* to civil trials. Describing the statutory scheme responsible for the establishment of the jury trial system in general, and the peremptory challenge procedure in particular, the Supreme Court observed that without overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. The Court's finding of state action then led it to apply the *Batson* prohibition against the discriminatory exercise of peremptory challenges to civil, as well as criminal trials. n14 The Court also held that a private civil party may raise the third-party equal protection claim of an excluded juror. n15

Finally, in a paternity suit in which the defendant challenged the state's use of peremptory challenges to exclude men from the jury, the Supreme Court extended the reach of *Batson* to claims of gender discrimination in the exercise of peremptory challenges, holding that gender, like race, is an unconstitutional proxy for jury competence and impartiality. n16

[ii] Procedure to Contest Discriminatory Use of Peremptory Challenge

A party must object when it perceives that a peremptory challenge is exercised on a discriminatory basis, n17 because although *Batson* requires a trial court to determine whether a party's exercise of peremptory challenges is discriminatory, in the absence of an objection, the trial court does not have a duty sua sponte to prevent the discriminatory exclusion of jurors. n18 If a prima facie showing of a discriminatory use of a peremptory challenge has been made, the burden shifts to the party who has exercised the challenge to come forward with a neutral explanation for challenging the juror. n19 The objecting party then has an opportunity to present rebuttal evidence. n20 The objecting party must set forth, on the record and before the trial judge, why the proffered reasons are merely pretextual, in order to preserve the *Batson* issue for appellate review. n21

The burden of persuasion remains on the objector; because of the great deference accorded a trial court's determination of a *Batson* objection appellate courts are reluctant to disturb a *Batson* ruling on appeal, at least in cases where a party claiming discriminatory exercise of peremptory challenges has failed to argue at trial that the striking party's allegedly neutral reasons were merely pretextual. n22

[iii] Court's Determination of Discrimination Claim

When a party makes a timely objection that the opposition party's exercise of peremptory challenges is discriminatory, the trial court must inquire as to the reasons for the opposition's peremptory challenges and determine whether, under the circumstances of the case, the proffered reason is neutral or merely pretextual. There is no requirement that the trial court articulate for the record the reasons underlying the *Batson* ruling, n23 or that the trial court's reasons proffered for the peremptory challenge be based on record evidence, although it is better practice for the trial court to follow these procedures. n24

Because the *Batson* issue arises in the context of the exercise of the peremptory challenge, which permits rejection of a prospective juror for a real or imagined partiality, n25 the determination of whether a proffered reason for a challenged peremptory strike is pretextual or neutral rests on many factors and is highly fact-sensitive. Consequently, the court must make its decision case-by-case in light of the totality of the circumstances, and a district court's ruling on a *Batson* objection is accorded great deference on appeal n26 and will be disturbed only on a showing of clear error. n27

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 47.03* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1861*.

(n3)Footnote 2. *28 U.S.C. § 1862*.

(n4)Footnote 3. *28 U.S.C. § 1865(b)*.

(n5)Footnote 4. *28 U.S.C. § 1865(a)*.

(n6)Footnote 5. *See 28 U.S.C. §§ 1861-1871*.

(n7)Footnote 6. *28 U.S.C. § 1863(b)(6)*.

(n8)Footnote 7. *28 U.S.C. § 1863(b)(5)(B)*.

(n9)Footnote 8. *28 U.S.C. § 1863(b)(5)(B)*. Section 1862 expressly bars the exclusion of jurors on the basis of racial, religious or other discrimination, *28 U.S.C. § 1862*; and *28 U.S.C. § 1861* also states that all citizens must have the opportunity to be considered for service on grand and petit juries in the district courts of the United States.

(n10)Footnote 9. *28 U.S.C. § 1866(c)*.

(n11)Footnote 10. *See* [4], [5], *below*.

(n12)Footnote 11. *28 U.S.C. § 1866(c).*

(n13)Footnote 12. *United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986) , cert. denied, 480 U.S. 935 (1987) .*

(n14)Footnote 13. *28 U.S.C. § 1865(a).*

(n15)Footnote 1. *28 U.S.C. § 1863(a).*

(n16)Footnote 2. *28 U.S.C. § 1864.*

(n17)Footnote 3. *28 U.S.C. § 1866.*

(n18)Footnote 4. *28 U.S.C. § 1863(b)(1).*

(n19)Footnote 5. *28 U.S.C. § 1863(b)(2).*

(n20)Footnote 6. *28 U.S.C. § 1863(b)(3).*

(n21)Footnote 7. *28 U.S.C. § 1863(b)(4).*

(n22)Footnote 8. *28 U.S.C. § 1864(a).*

(n23)Footnote 9. *28 U.S.C. § 1865(a).*

(n24)Footnote 10. *28 U.S.C. § 1866(a).*

(n25)Footnote 11. *28 U.S.C. § 1866(f).*

(n26)Footnote 12. *28 U.S.C. § 1868.*

(n27)Footnote 13. *28 U.S.C. § 1867(e).*

(n28)Footnote 14. *28 U.S.C. § 1867(c)*; *see, e.g., Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 209 (5th Cir. 1992)* (statutory challenge to jury make up must be presented prior to voir dire).

(n29)Footnote 1. *28 U.S.C. § 1861.*

(n30)Footnote 2. *Waldorf v. Shuta, 3 F.3d 705, 709 (3d Cir. 1993) .*

(n31)Footnote 3. *Swink v. City of Pagedale, 810 F.2d 791, 793-794 (8th Cir.) , cert. denied, 483 U.S. 1025 (1987)* ; *Art Press, Ltd. v. Western Printing Mach. Co., 791 F.2d 616, 618 (7th Cir. 1986) , rev'd in part on other grounds, 852 F.2d 276 (7th Cir. 1988) .*

(n32)Footnote 4. *Rainey v. Conerly, 973 F.2d 321, 325 (4th Cir. 1992) .*

(n33)Footnote 5. *Rosales-Lopez v. United States, 451 U.S. 182, 187, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) .*

(n34)Footnote 6. *Fed. R. Civ. P. 47(a).*

(n35)Footnote 7. *Rosales-Lopez v. United States, 451 U.S. 182, 187, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) .*

(n36)Footnote 8. *Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964) .*

(n37)Footnote 9. *Fed. R. Civ. P. 47(a)*; *see Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981)* (although trial court need not subscribe to exact form of voir dire question requested by counsel or ask particular question if its substance is

covered in another question or in inquiry as a whole, trial court abused its discretion by failing to probe bias of prospective jurors as requested by plaintiff).

(n38)Footnote 10. *United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973)* .

(n39)Footnote 11. *James v. Continental Ins. Co., 424 F.2d 1064, 1065 (3d Cir. 1970)* .

(n40)Footnote 12. *Swink v. City of Pagedale, 810 F.2d 791, 793 (8th Cir.)* , *cert. denied, 483 U.S. 1025 (1987)* .

(n41)Footnote 13. *Hicks v. Mickelson, 835 F.2d 721, 725 (8th Cir. 1987)* (within court's discretion to limit counsel's voir dire to 15 minutes).

(n42)Footnote 14. *James v. Continental Ins. Co., 424 F.2d 1064, 1065 (3d Cir. 1970)* (within court's discretion to deny counsel's written request to interrogate jurors).

(n43)Footnote 15. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n44)Footnote 16. *Kanekoa v. City of Honolulu, 879 F.2d 607, 614 (9th Cir. 1989)* , *cert. denied, 500 U.S. 933 (1991)* ; *Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252, 257 (5th Cir. 1985)* .

(n45)Footnote 17. *Rainey v. Conerly, 973 F.2d 321, 325 (4th Cir. 1992)* (in inmate's civil rights suit brought against prison guard in which primary jury issue consisted of credibility determination, court abused its discretion by refusing to question prospective jurors as to whether they would tend to credit testimony of law enforcement official over that of prisoner simply because of their respective positions).

(n46)Footnote 18. *Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1980)* .

(n47)Footnote 19. *Scott v. Lawrence, 36 F.3d 871, 874 (9th Cir. 1994)* .

(n48)Footnote 20. *Lewis v. Holden, 821 F.2d 291, 294 (5th Cir. 1987)* .

(n49)Footnote 21. *Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1980)* .

(n50)Footnote 22. *Harold v. Corwin, 846 F.2d 1148, 1150 (8th Cir. 1988)* .

(n51)Footnote 23. *Art Press, Ltd. v. Western Printing Mach. Co., 791 F.2d 616, 618-619 (7th Cir. 1986)* , *rev'd in part on other grounds, 852 F.2d 276 (7th Cir. 1988)* .

(n52)Footnote 24. *Swink v. City of Pagedale, 810 F.2d 791, 793 (8th Cir.)* , *cert. denied, 483 U.S. 1025 (1987)* (because plaintiff was permitted to ask whether presence of black plaintiff and white defendants would cause prospective jurors to be biased, denial of inquiry into jurors' definition of racism and extent of socializing with blacks was proper exercise of court's discretion).

(n53)Footnote 25. *Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)* .

(n54)Footnote 26. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n55)Footnote 27. *Hard v. Burlington N. R. Co., 870 F.2d 1454, 1459 (9th Cir. 1989)* .

(n56)Footnote 28. *McCoy v. Goldston, 652 F.2d 654, 659 (6th Cir. 1981)* (deliberate concealment or purposefully incorrect response during voir dire sufficient to show prejudicial impairment of right to exercise peremptory challenge).

(n57)Footnote 29. *Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964)* (primary purpose of voir dire examination is to develop entire truth concerning prospective juror's state of mind).

(n58)Footnote 30. *McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981)* .

(n59)Footnote 31. *Hard v. Burlington N. R. Co., 870 F.2d 1454, 1459 (9th Cir. 1989)* (no deliberate failure to disclose former employment of juror by predecessor company to defendant company because jurors were not asked about employment by predecessor railroad).

(n60)Footnote 32. *Robinson v. Monsanto Co., 758 F.2d 331, 335 (8th Cir. 1985)* .

(n61)Footnote 33. *Cunningham v. Sears, Roebuck & Co., 854 F.2d 914, 915 (6th Cir. 1988)* .

(n62)Footnote 34. *Photostat Corp. v. Ball, 338 F.2d 783, 787 (10th Cir. 1964)* .

(n63)Footnote 35. *McDonough Power Equip., Inc., v. Greenwood, 464 U.S. 548, 555, 104 S. Ct. 845, 849-850, 78 L. Ed. 2d 663 (1984)* .

(n64)Footnote 1. *Swain v. Alabama, 380 U.S. 202, 220, 85 S. Ct. 824, 836, 13 L. Ed. 2d 759, 772 (1965)* (challenge based on race in rape conviction).

(n65)Footnote 2. *Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1128 (11th Cir.)* , *cert. denied, 506 U.S. 832 (1992)* .

(n66)Footnote 3. *Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1122 (10th Cir.)* , *cert. denied, 516 U.S. 1146 (1995)* (court should have excused for cause juror who owned stock in defendant corporation and whose wife was employed by defendant); *Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1468 (10th Cir. 1994)* (bias presumed if prospective juror has direct financial interest in trial's outcome).

(n67)Footnote 4. *Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)* (bias in favor of law enforcement officers in suit by prisoner).

(n68)Footnote 5. *Marks v. Shell Oil Co., 895 F.2d 1128, 1129 (6th Cir. 1990)* .

(n69)Footnote 6. *Depree v. Thomas, 946 F.2d 784, 787-788 (11th Cir. 1991)* (no per se rule that court should disqualify jurors with law enforcement connections).

(n70)Footnote 7. *Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1466 (10th Cir. 1994)* (consultant for defendant company).

(n71)Footnote 8. *Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1128 (11th Cir.)* , *cert. denied, 506 U.S. 832 (1992)* (doubts about impartiality should be resolved against allowing juror to serve).

(n72)Footnote 9. *Patton v. Yount, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 2892, 81 L. Ed. 2d 847 (1984)* .

(n73)Footnote 10. *Poynter v. Ratcliff, 874 F.2d 219, 222 (4th Cir. 1989)* .

(n74)Footnote 11. *Kirk v. Raymark Indus., Inc. 61 F.3d 147, 154-155 (3d Cir.)* , *cert. denied, 516 U.S. 1145 (1996)* .

(n75)Footnote 12. *Bell v. Lynbaugh, 663 F. Supp. 405, 414 (E.D. Tex.)* , *aff'd on other grounds, 828 F.2d 1085 (5th Cir.)* , *cert. denied, 484 U.S. 933 (1987)* .

(n76)Footnote 13. *Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1122 (10th Cir.)* , *cert. denied, 516 U.S. 1146 (1995)* .

(n77)Footnote 14. *Poynter v. Ratcliff, 874 F.2d 219, 221 (4th Cir. 1989)* .

(n78)Footnote 15. *See, e.g., Marks v. Shell Oil Co., 895 F.2d 1128, 1130 n.1 (6th Cir. 1990)* (prospective juror not subject to challenge for cause merely because he had previously worked for oil company).

(n79)Footnote 1. *Swain v. Alabama, 380 U.S. 202, 220, 13 L. Ed. 2d 759 (1965)* (peremptory challenge permits rejection for real or imagined partiality).

(n80)Footnote 2. *Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)* (scope of peremptory challenges is broader than challenge for cause).

(n81)Footnote 3. *Fed. R. Civ. P. 47(b)*; *see 28 U.S.C. § 1870*.

(n82)Footnote 4. *See Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 2278, 101 L. Ed. 2d 80 (1988)* (peremptory challenges are not of constitutional dimension).

(n83)Footnote 5. *28 U.S.C. § 1870*.

(n84)Footnote 6. *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1219 (2d Cir. 1995) , modified on other grounds, 85 F.3d 49 (2d Cir. 1996) .*

(n85)Footnote 7. *Goldstein v. Kelleher, 728 F.2d 32, 37 (1st Cir. 1984) , cert. denied, 469 U.S. 852 (1984)* (however, in absence of showing that prejudice resulted from abuse of discretion, error was not reversible).

(n86)Footnote 8. *See* Local Rule 245(2) for the Northern District of California.

(n87)Footnote 9. *Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1369 (9th Cir. 1987)* (even though local rule of court provided that each acceptance of jury panel represented waiver by accepting party of one peremptory challenge, rule could not be applied to replacement juror who was not member of last panel accepted by plaintiff, and it was not error for court to grant parties one additional challenge).

(n88)Footnote 10. *28 U.S.C. § 1870*.

(n89)Footnote 11. *Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992) , cert. denied, 508 U.S. 940 (1993)* (district court procedure erroneously denied party right of peremptory challenge against newly seated prospective juror required automatic reversal); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1369 (7th Cir. 1990)* (reversible error to deny peremptory challenges to which party is entitled).

(n90)Footnote 12. *Mills v. GAF Corp., 20 F.3d 678, 680 (6th Cir. 1994)* (because defendant had two unexercised peremptory strikes at time jury was seated, court rejected claim that district court's procedure with respect to exercise of peremptory challenges inhibited defendant's right to challenge).

(n91)Footnote 13. *Batson v. Kentucky, 476 U.S. 79, 96-97 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) .*

(n92)Footnote 14. *Edmonson v. Leesville Concrete Co., Inc. 500 U.S. 614, 622, 111 S. Ct. 2077, 2084, 114 L. Ed. 2d 660, 674 (1991) .*

(n93)Footnote 15. *Edmonson v. Leesville Concrete Co., Inc. 500 U.S. 614, 622, 111 S. Ct. 2077, 2088, 114 L. Ed. 2d 660, 674 (1991)* (courts must entertain challenge to private party's racially discriminatory use of peremptory challenges in civil trial).

(n94)Footnote 16. *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 1429, 128 L. Ed. 2d 89, 97 (1994) ' see, e.g., Montanez v. Puerto Rico Police Dep't, 33 F. Supp. 2d 106, (D. P.R. 1999)* (police department improperly discriminated in jury selection process on basis of gender).

(n95)Footnote 17. *Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 210 (5th Cir. 1992)* (post-trial *Batson* challenge untimely and barred); *see, e.g., Montanez v. Puerto Rico Police Dep't, 33 F. Supp. 2d 106, (D. P.R. 1999)* (department illegally discriminated in jury selection process on basis of gender, and plaintiff's objection was timely).

(n96)Footnote 18. *Soler v. Waite, 989 F.2d 251, 254 (7th Cir. 1993)* .

(n97)Footnote 19. *Batson v. Kentucky, 476 U.S. 79, 97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)* .

(n98)Footnote 20. *United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.)* , *cert. denied, 490 U.S. 1028 (1989)* .

(n99)Footnote 21. *Davis v. Baltimore Gas & Elec. Co., 160 F.3d 1023, 1027-1028 (4th Cir. 1998)* (objecting party who fails to present arguments as to why opposing party's proffered reasons are merely pretextual has failed to preserve *Batson* issue for appeal).

(n100)Footnote 22. *Great Plains Equip. v. Koch Gathering Sys., 45 F.3d 962, 965 (5th Cir. 1995)* .

(n101)Footnote 23. *Hopson v. Fredericksen, 961 F.2d 1374, 1377 (8th Cir. 1992)* (because Supreme Court did not formulate particular procedures to be followed on timely *Batson* objection, court of appeals declined to find error in trial court's failure to articulate on record reasons for overruling plaintiff's *Batson* challenge).

(n102)Footnote 24. *Great Plains Equip. v. Koch Gathering Sys., 45 F.3d 962, 965 (5th Cir. 1995)* (court properly accepted neutral reason even though it was not based on record evidence).

(n103)Footnote 25. *Swain v. Alabama, 380 U.S. 202, 220, 13 L. Ed. 2d 759, 772 (1965)* .

(n104)Footnote 26. *Palmer v. Lares, 42 F.3d 975, 979 (5th Cir. 1995)* (appeals court will interfere only if decision is clearly erroneous).

(n105)Footnote 27. *Great Plains Equip. v. Koch Gathering Sys., 45 F.3d 962, 964 (5th Cir. 1995)* .

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.66

§ 22.66 Dismissal of Jurorsn*

[1] Discretion of Court to Dismiss Juror for Cause

The Federal Rules of Civil Procedure recognize that circumstances may arise after a jury has been selected that may require the dismissal of a juror or jurors. Rule 47 gives the district court authority to dismiss a juror from service for good cause, either during trial or during deliberation by the jury. n1 Furthermore, dismissal of a juror under appropriate circumstances is not grounds for a mistrial, because the right of all parties to the judgment of the jury is only a qualified one. n2 The demands of due process are met provided that at least six jurors, or a smaller number if the parties have so stipulated, remain to render a verdict. n3

The decision whether to dismiss a juror on application of a party is left to the court's discretion, which will be reversed by an appellate court only for abuse of discretion. n4 For example, in one case the court of appeals affirmed the trial court's refusal to excuse a juror who referred to the plaintiff's counsel as a "bastard," because the appellate court found that the juror's comment was not indicative of bias, but rather of dissatisfaction with the lawyer's courtroom demeanor. n5

In another case, it was not an abuse of discretion for the trial court to refuse to dismiss a juror when the juror commented to court personnel during the recess that the juror's service on an unrelated criminal case led the juror to believe that the accused might be involved in celebrated murder of six-year-old beauty contest winner, despite the claim that the juror's statement was so bizarre that it made manifest the juror's incompetency to sit in judgment of any case. The court of appeals held that the juror's remark, though peculiar, did not in and of itself evince an inability to form rational judgments, and the remark did not indicate any prejudice against the defendants; furthermore, as the trial court observed, the comment had no bearing whatever on the case at hand. n6

[2] Grounds for Dismissal of Juror for Cause

The text of Rule 47(c) does not reveal what constitutes "good cause" sufficient for removal. However, the committee note states that good cause means occurrences such as sickness and family emergencies. n1 As with subdivisions (a) and (b), subdivision (c) of Rule 47 confers wide discretion on the trial court. n2 Accordingly, it has been held that the court has broad authority to dismiss a juror whenever necessary to preserve the integrity of the judicial process. n3 For

example, the court may exercise its discretion to excuse a juror so that the juror can take an important business trip, n4 or because of extreme stress threatening a juror's health during deliberations, n5 On the other hand, a court may not remove a juror simply because the juror refuses to join with the other jurors to reach a unanimous verdict. n6

[3] Hearing Required to Dismiss Juror for Misconduct

[a] Requirement of Hearing

Even though courts have broad discretion to remove jurors for good cause during trial or deliberation, n1 the United states Supreme Court has held that, with respect to dismissal based on allegations of juror misconduct, a trial court should not decide and take final action ex parte. Rather, the trial court should determine the circumstances and their impact on jurors, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. n2 In the case, the Court vacated a judgment of conviction against the defendant when the district judge conducted an ex parte investigation of a juror regarding allegations of jury tampering; after being notified by a juror that an unknown person had communicated with the juror about the trial, the judge ordered the FBI to investigate and report. The Court vacated the judgment because the record did not show what transpired or whether the incidents were harmful or harmless, and the petitioner could not know this information in an ex parte proceeding. n3

This issue typically arises in disputes involving proceedings investigating the potential dismissal of a sitting juror who is the lone holdout. n4 Absent exigent circumstances, such proceedings must be conducted in the presence of the parties, and a record of the hearing must be made for the benefit of the parties and the reviewing court. n5 Failure to satisfy these requirements warrants reversal even without a showing of prejudice. n6

Although the trial judge ordinarily should not conduct any portion of the hearing ex parte, an ex parte dismissal may be upheld when the parties waive the hearing, the circumstances warrant, and fundamental fairness is not sacrificed. In one case, the Eighth Circuit found no plain error in conducting a hearing outside the parties' presence to investigate allegations of jury tampering when both parties knew about the hearing in advance, declined to participate, and raised no objection; under these circumstances, the court of appeals held that the trial court substantially complied with the *Remmer* requirements. n7

[b] Suggested Procedure for Hearing

Good cause for dismissal of a juror may encompass juror misconduct that could be grounds for a mistrial; therefore, a mistrial case may demonstrate the proper method of investigation of juror misconduct. In one such case, the court stated that when a trial court becomes aware that a member of the jury may have learned extrajudicial information that could adversely affect the jury's ability to decide the case impartially on the record evidence alone, the court must determine whether the impartiality of the juror has been compromised. The appropriate method for inquiry into possible prejudice of a juror is voir dire of the juror. n8 The method of conducting the voir dire is in the discretion of the court; any method is sufficient provided it is probative of the issue of impartiality. n9 However, the court's voir dire must be sufficiently thorough to ascertain whether there is a substantial likelihood of partiality. n10 When the exposure to extrajudicial information has been substantial, the court's determination of partiality should be made based on objective criteria rather than on the juror's own subjective assessment of continued impartiality, since the effect of extrajudicial information may be prejudicial even if not so perceived by the juror. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsRemovals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 47.40* et seq. (Matthew Bender 3d

ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 47(c).*

(n3)Footnote 2. *Fed. R. Civ. P. 47*, Advisory Committee Note to 1991 Amendments.

(n4)Footnote 3. *Fed. R. Civ. P. 48*; *see § 22.64[1].*

(n5)Footnote 4. *Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1451 (9th Cir. 1995) , cert. denied, 517 U.S. 1219 (1996)* (court of appeals not entitled to second guess trial court).

(n6)Footnote 5. *King v. Emerson Elec. Co., 837 F. Supp. 1096, 1100 (D. Kan. 1993) , aff'd without op., 69 F.3d 548 (10th Cir. 1995) .*

(n7)Footnote 6. *Williams v. Drake, 146 F.3d 44, 49-50 (1st Cir. 1998) .*

(n8)Footnote 1. *Fed. R. Civ. P. 39*, Advisory Committee Note.

(n9)Footnote 2. *Williams v. Drake, 146 F.3d 44, 49-50 (1st Cir. 1998) .*

(n10)Footnote 3. *Bondie v. Bic Corp., 947 F.2d 1531, 1535 (6th Cir. 1991) .*

(n11)Footnote 4. *Interpool Ltd. v. Patterson, 874 F. Supp. 616, 618 (S.D.N.Y. 1995)* (juror was excused on seventh day of trial; juror had disclosed prior commitment during voir dire but was not removed for cause or by peremptory challenge because parties thought trial would end before date of trip).

(n12)Footnote 5. *Mason v. Texaco, Inc., 948 F.2d 1546, 1558 (10th Cir.) , cert. denied, 504 U.S. 910 (1991)* (juror with acute nervous reaction excused after six days of deliberations).

(n13)Footnote 6. *Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1451-1452 (9th Cir. 1995) , cert. denied, 517 U.S. 1219 (1996) .*

(n14)Footnote 1. *See* [1] and [2], *above.*

(n15)Footnote 2. *Remmer v. United States, 347 U.S. 227, 228-229, 74 S. Ct. 450, 98 L. Ed. 654 (1954)* (proceeding should not have been ex parte); *Harris v. Folk Constr. Co., 138 F.3d 365, 371-372 (8th Cir. 1998)* (magistrate judge may not, without hearing, dismiss lone holdout who sent note to court indicating fear for her safety in jury room).

(n16)Footnote 3. *Remmer v. United States, 347 U.S. 227, 228-229, 74 S. Ct. 450, 98 L. Ed. 654 (1954)* (judgment vacated due to absence of hearing and inadequate record).

(n17)Footnote 4. *See Harris v. Folk Constr. Co., 138 F.3d 365, 371-372 (8th Cir. 1998)* (lone holdout who sent note to court indicating fear for her safety was impermissibly dismissed without notice and hearing; parties had no notice of hearing, hearing was not conducted on record or with witnesses, and juror was never placed under oath).

(n18)Footnote 5. *Remmer v. United States, 347 U.S. 227, 228, 74 S. Ct. 450, 98 L. Ed. 654 (1954)* (judgment vacated due to absence of hearing and inadequate record).

(n19)Footnote 6. *See Harris v. Folk Constr. Co., 138 F.3d 365, 371-372 (8th Cir. 1998)* (hearing is important for dismissal determination, because, just like for voir dire selection of jurors, dismissal of juror pursuant to Rule 47(c) calls for scrutiny of not only spoken words, but also gestures and attitudes to ensure jury's impartiality and competence).

(n20)Footnote 7. *United States v. Behler, 14 F.3d 1264, 1267-1268 (8th Cir. 1994) , cert. denied, 513 U.S. 960*

(1994) .

(n21)Footnote 8. *Waldorf v. Shuta, 3 F.3d 705, 709-710 (3d Cir. 1993)* ; *see Harris v. Folk Constr. Co., 138 F.3d 365, 371 (8th Cir. 1998)* .

(n22)Footnote 9. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n23)Footnote 10. *Waldorf v. Shuta, 3 F.3d 705, 711, 713 (3d Cir. 1993)* .

(n24)Footnote 11. *Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968)* , *cert. denied, 400 U.S. 1022 (1971)* (absent examination designed to elicit answers providing objective basis for evaluation, merely obtaining jurors' assurances of impartiality is insufficient).

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.67

§ 22.67 Statutory Juror Daily Attendance Fees

The Jury Selection and Service Act provides that the district courts pay jurors a daily attendance fee for actual attendance at the place of hearing or trial. n1 The statute also provides that the court pay an additional fee not in excess of $10 more than the attendance fee, for each day "in excess of thirty days" on which the petit juror is required to hear a case. n2 The Act also provides for reimbursement of a juror's travel expenses and for a subsistence allowance, when applicable. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1871(a), (b)(1).*

(n2)Footnote 2. *28 U.S.C. § 1871(b)(2).*

(n3)Footnote 3. *28 U.S.C. § 1871(c), (d).*

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.68

§ 22.68 Court's Instructions to Juryn*

[1] Purpose and Scope of Jury Instructions

[a] Function of Jury Instructions

There are several purposes for jury instructions. One of the primary purposes is for the court to provide the jury with specific information on the law necessary to decide the factual issues of the case presented to the jury. n1 Jury instructions also provide proper guidance and assistance to the jury so that it may reach a verdict. n2 In that regard, jury instructions must clarify issues for the jury and educate the jury about what factors are probative of only those issues. n3 Additionally, jury instructions are used by the court to prevent the jury from engaging in prohibited conduct or considering impermissible issues. For example, carefully constructed instructions can effectively thwart the potential for bias by jury members. n4

[b] Procedural Rule Governs Final Jury Instructions

Federal Rule of Civil Procedure 51 n5 governs the procedure that the trial court must follow to explain to the jury the substantive law related to the issues in the case that the jury must decide, and also how the jury must arrive at its verdict. Many courts refer to these jury instructions as the "jury charge." n6 The requirements of Rule 51 apply not only to the trial court's explanation of the law and the verdict procedure themselves but also to special verdicts n7 and to written interrogatories submitted to the jury on one or more issues of fact. n8

However, it should be noted that Rule 51 does not govern all directives that the court may give to the jury. For example, Rule 51 requirements do not apply to an "instruction" by the court which directs the jury that particular evidence is admitted only for a limited purpose, or against only one party and that the jury is to consider the evidence only for that limited purpose. n9 Also, Rule 51 does not apply when the court directs the jury not to consider evidence that has been improperly admitted; n10 such an "instruction" is used only to cure the improper admission of evidence. n11

[c] Jury Instruction Purposes Promoted by Procedural Rule

As noted in the previous subsection, n12 jury instructions are governed by *Rule 51 of the Federal Rules of Civil*

Procedure. n13 The primary purpose of Rule 51 is to ensure that the jury receives proper instructions by providing that each party may inform the trial court of any inaccuracies or deficiencies in proposed jury instructions before they are actually given. n14 This procedure gives the court an opportunity to correct errors in the jury instructions before the jurors retire to consider their verdict. n15 However, the rule requires a party to make a distinct and timely objection to an instruction or failure to give an instruction to preserve the party's right to appeal the trial court's decision regarding a jury instruction. n16 This provision requiring a specific objection is designed to preserve scarce judicial resources n17 and to reduce the burden on appellate courts by diminishing the number of trial rulings that have to be reviewed. n18

Other purposes of Rule 51 are:

1. To promote orderliness and finality in litigation, n19 by preventing a party from remaining silent in the face of an incorrect instruction, planning to obtain a favorable verdict despite the error, and planning to use the error to seek a new trial in the event of an unfavorable verdict. n20

2. To ensure that the trial court correctly instructs the jury on the relevant law and applicable theories of recovery or defenses n21 by allowing the parties to request that specified jury instructions be given by the trial court. n22

3. To allow the trial attorneys to prepare for closing arguments by requiring the district court to inform them of the proposed instructions and its decisions on requested instructions before arguments are made to the jury. n23 Thus, the attorneys can present arguments to the jury that anticipate the court's instructions and direct the jury's attention to evidence that will be explained by the court's instructions. n24

[2] Parties May Request Particular Jury Instructions

[a] Right of Each Party to Request Jury Instructions

Each party has a right to file and furnish to every other party written requests that the court instruct the jury on the law as specified in the requests. n25 The attorney representing each party should always request jury instructions tailored to that party's theory of the case, n26 provided that the issue has reasonably been raised by the evidence. n27 A request is required under the federal rules because, unless it would constitute a plain error, the trial court is not required without a request to include an instruction related to every item of evidence introduced at trial, n28 and a failure to request specific jury instructions precludes review of the trial court's decision not to include such an instruction. n29

[b] Time for Completion of Request

A party must generally file requests and furnish them to every other party at the close of the evidence or at an earlier reasonable time that the court directs, n30 such as before or during the trial. n31 However, a party may file requests after the close of the evidence with respect to those issues that could not reasonably have been anticipated at the close of evidence or earlier time for requests set by the court. n32

Also, the court has discretion to give a party permission to file untimely requests for instructions on any issue. n33 In its decision whether to allow an untimely request, the primary consideration is the importance of the issue to the case. Therefore, the more likely the court's decision to not allow an instruction would be plain error, the more compelling is the reason to allow an instruction. Another factor the court should consider is the degree of the requesting party's fault in failing to make a timely request. n34 In any event, the court will not consider requests for instruction after the jury has retired to deliberate. n35

[c] Content and Form of Request

[i] Requirement of Writing

All requests for jury instructions must be in writing and must specify the requested instructions on the law. n36 No particular format is required for requested instructions, except that they should be designated in some way, such as "plaintiff's proposed instruction number 1," so that the court can refer to each instruction in its analysis and disposition of the requests. n37 As expressly required in Rule 51, attorneys should always make requests for instructions in writing. However, because the purpose of this requirement is to ensure that trial courts have adequate and timely notice of instruction requests, several courts have indicated that they do not hold parties to that strict requirement, provided that the trial court was precisely notified of the request. n38

[ii] Request for Statement of Law

A party's request for jury instructions must ask that the court instruct the jury on the law as specified in the request. n39 This requirement means that the request must correctly state the law relevant to the issue, must fairly and adequately cover the legal issue presented, and must not be misleading. n40 Additionally, the request should cite legal authority that supports each legal statement. n41 However, even though a jury instruction may not be given by the court if it is incorrect, a technically incorrect request is sufficient to require that the court correctly instruct on that issue, when the issue is necessary for determination of the case. n42 Furthermore, even if an erroneous instruction is given to a civil jury, the instruction does not require reversal if the error is more probably than not harmless. n43 Because, the purpose of jury instructions is to give the jury a clear and concise statement of the law that is necessary for the jury to decide the case, a party may request an instruction only if the instruction is based on evidence admitted at trial. n44 However, a party need not present a compelling amount of evidence to support a request for a particular instruction. n45 All that is necessary is that the party present some evidence on the issue that supports the party's theory of case. n46

[iii] Language of Request

Provided that a request for jury instructions states the substance of the law, a party need not use particular language or a particular format. Additionally, although they are useful as tools in making requests, a party need not adopt the language of pattern jury instructions in its request. In this regard, pattern instructions should not be automatically followed verbatim; when necessary, pattern jury instructions should be modified carefully for use in particular cases to address the precise issues presented to the jury. n47

Another important consideration about the language of a request is that a party is not entitled to have the court instruct the jury in the precise language the party has proposed, provided that the jury charge covers the substance of the requested instructions. n48 This axiom is based of the principle that the trial court has considerable discretion to formulate instructions to meet the requirements of each particular case. n49

[d] Procedure for Making Request

To complete requests for jury instructions, the party must file the requests with the court and must furnish a copy to every other party. n50 Although not specified in Rule 51, the requests should be formally served on the other parties, n51 in the same manner as other papers are served under Rule 5. n52

In addition to the requirements for the submission of requests for jury instructions specified in Rule 51, local court rules may impose additional requirements, provided that the local rules are consistent with federal statutes and rules. n53 For example, local rules may specify that the requested instructions must be filed with a particular pretrial document such as a joint pretrial report. n54 Similarly, a district court judge or magistrate judge may issue a standing or general order which specifies a requirement for requesting jury instructions, provided that the order is consistent with federal statutes and rules, and local rules. n55

[3] Court's Obligations Regarding Instruction of Jury

[a] Court Must Instruct Jury to Decide Facts Pursuant to Relevant Law

With its instructions to the jury, the court must provide the jury with information on the law that is necessary for the jury to decide the factual issues of the case. Thus, jury instructions must provide enough guidance and assistance for the jury to reach a verdict n56 and must inform the jury of all of the permissible ways to resolve the issues in the case. n57 Additionally, jury instructions must clarify factual issues and inform the jury about what factors are probative of only those issues, because the jury may decide the case based only on evidence presented at trial. n58

[b] District Court Has Considerable Discretion in Formulating Instructions

The district court trial judge has considerable discretion in drafting a jury instruction for each issue in the case, n59 subject to the requirement that the instructions taken as a whole must provide the jury with information on the law necessary to decide the factual issues of the case and guide the jury's deliberations in a proper and meaningful manner. n60 Therefore, the district court is not required to use the exact words used in a party's requested instructions, n61 nor is it necessary for the court to give every instruction submitted by parties merely because the instruction is correct. n62 Furthermore, a court need not give a redundant instruction, n63 nor is it necessary for the court to adhere to the forum state's pattern instructions. n64

A court's considerable discretion regarding instructions allows the court during instructions to comment on evidence presented at trial, provided that the comments help clarify the issues in the case. n65 However, if it comments on the evidence, the court has a duty to do so impartially, n67 and the trial court must exercise caution when commenting on the evidence so that the court does not to mislead or improperly influence the jury. n68

[c] State Law Controls Content in Diversity Cases

In diversity cases, the court must instruct the jury on the substantive state law applicable to an issue, and the instructions when read as a whole must fairly and adequately present the state law relevant to the state law issues that the jury must decide. n69 On the other hand, the form of the instructions is governed by federal law. Federal law also governs the procedure for the determination of which instructions to give the jury, n70 including whether the federal trial court properly exercised discretion in granting or denying use of requested state law instructions. n71 For example, federal law governs the standard of review for determining whether a particular state law jury instruction is prejudicial in the particular case. n72

If an issue is based on federal law, federal law governs both substantive and procedural aspects of jury instructions for that federal issue, even if the court has jurisdiction based on diversity of the parties, and thus other issues in the case are substantively controlled by state law. n73

[d] Procedure and Time for Instructing Jury

The court may give the jury its final instructions at any time after trial begins and before the jury is discharged. n74 However, final instructions may be given only after the following steps have occurred:

1. The court has given the parties a deadline to submit any requests they have for jury instructions; n75

2. The court informs the parties of rulings on such requests, and gives the parties a statement of the court's own proposed instructions; n76

3. The parties have an opportunity to object to rulings on requests and the court's own proposed instructions. n77

After consideration of any such objections, the court will give final instructions to the jury. n78 Ultimately, if a party loses on a jury instruction issue after it has objected, the party may raise the issue on appeal. n79

[e] Method of Instructing Jury

The court must set out its instructions in writing; however, the court must actually give the instructions by reading them to the jury. After the reading, the court should give the jury a written version of the instructions as read, so that the jury may refer to them during their deliberations. Most courts have found that the juries comprehend better when they initially hear material verbally and then have the opportunity to review a written version. It appears that juries will follow the law if they are properly instructed and afforded the opportunity to read those instructions during their deliberations; alternatively, the court may give the jury a tape recorded version. n80 Some courts also find that it is helpful for each juror to have his or her own set of the instructions, so that during deliberations the jurors can review the instructions at the same time together. n81

[f] Duty to Inform Parties of Substance of Instructions Before Giving Charge

Before it actually instructs the jury and the parties deliver their closing arguments, the district court must inform the parties of its proposed instructions and proposed action on any requests for instructions made by the parties. n82 The court must also give the parties an opportunity to object to the proposed instructions and actions on requests for instructions. n83 In the context of jury instructions, closing arguments on a particular issue may occur before the close of the entire trial, as in a bifurcated trial or other sequenced trial. In such situations, the court must inform the parties of its proposed instructions and action on requests for each segment of the trial before final closing arguments on the issues involved in that segment. n84

Although not specified by the rule, the trial court typically discusses extensively the proposed instructions and objections to the court's rulings at what is known as the "jury charge conference." During the conference, the court and the parties attempt to resolve any disputes regarding jury instructions. n85 However, a failure of the district court to meet with parties to discuss instructions prior to closing argument does not constitute error; n86 the trial court complies with Rule 51 when the parties have the opportunity to communicate their jury instruction positions through requests and objections, n87 and the trial court notifies the parties of its proposed instructions before actually giving the instructions and before closing argument. n88 Furthermore, the rule does not require that the district court furnish parties with the precise language of the proposed instructions; this part of Rule 51 is satisfied provided that the parties have advance notice of the substance of the court's charge. n89

[g] Duty to Allow Parties to Object to Rulings on Request and Proposed Charge

The court must give the parties an opportunity before the instructions and closing arguments are delivered to object on the record and out of the presence of the jury to both the court's actions on requests and the court's proposed instructions. n90 The court must allow objection out of the hearing of the jury so that the jury is not improperly influenced by argument of the attorneys regarding the matters of asserted instructional error. n91 Therefore, if the court requires a party to state its objection in the presence of the jury, a new trial may result if the wronged party demonstrates that it is reasonable to conclude that objecting in the presence of the jury was prejudicial. n92

[4] Party's Objection to Jury Instructions Necessary to Preserve Appellate Review

[a] Preservation of Appeal by Objection Related to Instructions

In the absence of a timely objection, a party is precluded from obtaining the complete scope of appellate review of any error asserted regarding jury instructions. n93 Thus, if a party fails to object to the court's decision on requested jury instructions or to the court's proposed jury instructions, an appellate court may review only for plain error. n94 The appellate court will reverse under the plain error standard only if the error prejudices the party's substantial rights and would result in a miscarriage of justice if left uncorrected. n95 If a party has made a proper request for a jury instruction, n96 the party may preserve error on the trial court's refusal of the request only by objecting to the refusal, unless the trial court has previously made a definitive ruling on the record that rejected the request. n97

The objection requirement for jury instructions is strictly enforced, n98 and a party that has failed to object to jury instructions or failure to give jury instructions has waived the right to contest those jury instruction rulings except for plain error. n99 The requirement is binding on all parties and the district court, and except in certain limited circumstances, n100 a party's failure to object to an error related to the jury charge results in forfeiture of the claim on appeal. n101 Each party has the obligation to objection to the jury instruction errors asserted by that party. Therefore, a party in a multi-party suit may not rely on an objection made by a co-party unless the party expressly adopts the co-party's objection. n102

[b] Contents of Objection

A party must make an objection to a jury instruction or the court's failure to give an instruction on the record, and must state distinctly the matter objected to and the grounds of the objection. n103 This means that objections to jury instructions must be sufficiently specific to bring into focus the precise nature of the alleged error. A vague or general objection to the propriety of a given instruction is not sufficient to preserve the issue for appeal. n104

The purpose of Rule 51 and the requirement of a distinct objection is to expose potential errors while there is still time to correct them without incurring the expense and delay and expenditure of judicial resources occasioned by retrials. n105 Therefore, to satisfy Rule 51, a party must object on grounds that are sufficiently precise to alert the district court not only that the instruction is defective, n106 but that it is defective based on a particular provision of the United States or a state constitution or a particular federal or state statute. n107 The objection also must be sufficiently specific to enable the court to correct the claimed error. n108 However, to comply with the objection requirement it is not necessary that a party use the words "object" or "objection." It is sufficient that the party specify to the district court the instruction that is the subject of the objection, and the reason that the party asserts the instruction is erroneous. n109

On the other hand, a party does not sufficiently object merely by submitting a proposed instruction that is different from the instruction actually given. The party must state the grounds why the given instruction is erroneous. n110 An attorney objecting to the court's charge also must take care that the court is aware that the attorney is stating an objection to the charge, and not merely a preference for a different instruction, which is insufficient. n111 A global objection on unspecified grounds to everything in the jury charge other than what had been proposed by the objecting party is also not sufficiently distinct. n112 Similarly, a party's general reference to cases that might support an objection to a jury instruction is not sufficiently specific to give the district court notice of potential errors in the instruction. n113

[c] Timing of Objection

Rule 51 requires that a party must make an objection only to instructions that the court intends to give or to instructions that are requested but refused by the court. Consequently, the rule does not require a party to make an objection to another party's requested instruction unless and until the court decides to give that instruction. n114 Therefore, whether a particular party makes a timely objection depends on whether the party making the objection has been previously informed by the court of an instruction or action on a request. n115 Thus, an objection is timely only in either of the following situations:

1. If the party has been informed by the court of a proposed instruction or action on a request before the jury is instructed and before final jury arguments, n116 the party makes the objection at the opportunity for objection provided by the court under Rule 51(b)(2). n117

2. If the party has not been informed by the court of a proposed instruction or action on a request before the opportunity for objection provided by the court under Rule 51(b)(2), the party makes the objection promptly after learning that the proposed instruction or request will be, or has been, given or refused. n118

When taken together, these time limits mean that an objection made on the record at the time provided by the court need not be repeated after the jury is instructed. n119 An objection is required after the court has actually instructed the jury only if the court has not informed the objecting party or provided an opportunity to object before actually giving the instruction. n120 However, in any event, objections should be made before the jury begins deliberation. n121

[d] Exceptions to Requirement of Objection

A party is excused from complying with the strict objection requirement of Rule 51 in either of the following two situations:

1. If there has been an intervening change in the controlling law during the pendency of an appeal, the appellate court may review a faulty jury instruction despite a party's failure to object at trial. On direct review, an appellate court must apply the law in effect at the time it renders its decision. n122 Because the purpose of the Rule 51 objection is to alert the trial court to instruction errors, a party is not required to anticipate a change in the law and object to an instruction that was correct when given but was rendered incorrect by a subsequent change in the controlling law. n123 Therefore, any change in the controlling law during the pendency of an appeal excuses strict compliance with the objection requirement, n124 and permits a challenge to the instruction, despite the absence of objection at the trial court level. n125 However, this exception to the objection requirement applies only to intervening decisions that provide for a substantial departure from a previous rule of law, and intervening decisions that merely clarify the law as it existed at trial do not excuse a failure to object at trial. n126

2. A failure to object to a jury instruction on a particular issue precludes review only of jury instructions regarding that issue and does not prevent review of the issue for all purposes. n127 Thus, while unobjected to jury instructions generally become the law of the case, the Supreme Court has held that the failure to object to an instruction does not render the instruction the law of the case for purpose of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict. n128 Consequently, a party's failure to object to an erroneous instruction on a particular issue does not preclude review of unsuccessful motions with respect to that issue for summary judgment, directed verdict, or for judgment as a matter of law, which must be reviewed under the correct legal standard for such motions. n129

[5] Appellate Review of Jury Instruction Rulings

[a] Prior Objection Determines Scope of Review

A party qualifies for the complete scope of appellate review n130 for an asserted error related to jury instructions only if the party makes a timely objection to the asserted error n131 and therefore "preserves" the error. n132

To preserve for appeal an asserted error in a jury instruction that the court has actually given, a party must have made a proper and timely objection to the instruction. n133

To preserve for appeal an asserted error in the court's failure to give an instruction, a party must have completed two steps: n134 the party must have made a proper request for the instruction, n135 and must have made a proper objection to the court's failure to give the instruction, n136 unless the court made a definitive ruling on the record rejecting the request. n137

In the absence of a properly preserved error, appellate review is limited to a determination of whether the trial court has made a plain error. n138

[b] Standard of Review for Preserved Error

[i] Statement of Standard of Review

If a party has by timely objection preserved an error asserted to have been made regarding jury instructions, the party is entitled to appellate review. n139

If the party asserts that the court has committed error by stating incorrect substantive law or misleading the jury in a jury instruction, the claimed error is a question of law that is reviewed de novo by the court of appeals. n140 However, if the party is claiming error in the court's formulation of the instructions or the particular choice of language, the appellate court reviews under the more deferential abuse of discretion standard. n141

If the party asserts that the trial court has erred by failing to give a properly requested instruction, n142 the appellate court will reverse the district court if the district court has abused its discretion. Under this standard, an appellate court will set aside the verdict only if an omitted jury instruction was (1) correct as a matter of substantive law, (2) not substantially covered in the charge as a whole, and (3) integral to an important point in the case. n143

[ii] Application of Standard of Review

When reviewing a jury instruction matter, the court of appeals must apply the law in effect at the time the appellate court renders its ruling, and not the law as it existed at the time of the trial court's decision. n144 An appellate court may not consider a claimed jury instruction error in isolation; it must be analyzed in the context of the entire jury charge, as part of an integrated whole. n145

[c] Limited Standard of Review for Plain Error When Party Has Not Preserved Error

If a party has not preserved a claimed jury instruction error by making a timely objection, and in the case of a refused instruction, a proper request, n146 the party may prevail on appeal only if the appellate court finds that the trial court committed a plain error. n147

Reversal on the grounds of plain error requires four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the party's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings. n148 Thus, reversal on the grounds of plain error is limited to the exceptional case when the error has resulted in a miscarriage of justice. n149

For example, the appellate court may find plain error when the error deprived the reviewing court of helpful factfinding; the issue is one of constitutional magnitude; the omitted argument is highly persuasive; the opponent would suffer special prejudice; and most importantly, the issue is of great importance to the public. n150 In civil cases, the plain error standard of review is applied in a stringent manner. n151 Probably the most important factor in applying the plain error standard of review in civil cases is the obviousness of the mistake. The importance of the error is the second major factor. The costs of correcting an error reflect a third factor. n152

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 51.10* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Dembowski v. N.J. Transit Rail Operations, Inc., 221 F. Supp. 2d 504, 512 (D.N.J. 2002)* ; *see Christopher v. Cutter Lab., 53 F.3d 1184, 1194 (11th Cir. 1995)* .

(n3)Footnote 2. *Christopher v. Cutter Lab., 53 F.3d 1184, 1194 (11th Cir. 1995)* ; *see Thornton v. First State Bank of Joplin, 4 F.3d 650, 652 (8th Cir. 1993)* (one purpose of jury instructions is to inform jury of various permissible ways of resolving issues in case).

(n4)Footnote 3. *Humphrey v. Staszak, 148 F.3d 719, 724 (7th Cir. 1998)* (jury instructions wholly unrelated to any of issues raised during course of trial are generally improper; therefore, when party never raised any claim of entrapment at any point in proceedings, it was improper issue for jury instruction).

(n5)Footnote 4. *Dembowski v. N.J. Transit Rail Operations, Inc., 221 F. Supp. 2d 504, 512 (D.N.J. 2002)* .

(n6)Footnote 5. *See Fed. R. Civ. P. 51.*

(n7)Footnote 6. *See Taita Chem. Co., Ltd. v. Westlake Styrene, 351 F.3d 663, 2003 U.S. App. LEXIS 23671, *11 (5th Cir. 2003)* .

(n8)Footnote 7. *Play Time, Inc. v. LDDS Metromedia Communications, Inc., 123 F.3d 23, 29 n.6 (1st Cir. 1997)* (Rule 51 applies to the jury charge and any special verdict form); *see Fed. R. Civ. P. 49(a).*

(n9)Footnote 8. *Matei v. Cessna Aircraft Co., 35 F.3d 1142, 1146 (7th Cir. 1994)* ; *Phav v. Trueblood, Inc., 915 F.2d 764, 769 (1st Cir. 1990)* ; *see Fed. R. Civ. P. 49(b).*

(n10)Footnote 9. *Fed. R. Civ. P. 51*, Committee Note to 2003 Amendments; *see Fed. R. Evid. 105*; *United States v. Mark, 943 F.2d 444, 449 (4th Cir. 1991)* .

(n11)Footnote 10. *Fed. R. Civ. P. 51*, Committee Note to 2003 Amendments.

(n12)Footnote 11. *Doe, By & Through G.S. v. Johnson, 52 F.3d 1448, 1458 (7th Cir. 1995)* ; *see Fed. R. Evid. 103(c).*

(n13)Footnote 12. *See* [b], *above.*

(n14)Footnote 13. *See Fed. R. Civ. P. 51.*

(n15)Footnote 14. *See Fed. R. Civ. P. 51(b).*

(n16)Footnote 15. *Gordon v. Degelmann, 29 F.3d 295, 298 (7th Cir. 1994)* .

(n17)Footnote 16. *Fed. R. Civ. P. 51(c), (d).*

(n18)Footnote 17. *Elder v. Holloway, 984 F.2d 991, 998 (9th Cir. 1993)* ; *see Palmer v. Hoffman, 318 U.S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, 653 (1943)* (Rule 51 requires that party bring into focus precise nature of alleged error).

(n19)Footnote 18. *McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 769 n.29 (3d Cir. 1990)* .

(n20)Footnote 19. *Highlands Ins. Co. v. National Union Fire Ins. Co., 27 F.3d 1027, 1032 (5th Cir. 1994)* , *cert. denied, 513 U.S. 1112 (1995)* .

(n21)Footnote 20. *Glaros v. H. H. Robertson Co., 797 F.2d 1564, 1572 n.10 (Fed. Cir. 1986)* , *cert. denied, 479 U.S. 1072 (1987)* .

(n22)Footnote 21. *See Thornton v. First State Bank of Joplin, 4 F.3d 650, 652 (8th Cir. 1993)* .

(n23)Footnote 22. *See Fed. R. Civ. P. 51(a).*

(n24)Footnote 23. *Fed. R. Civ. P. 51(b)(1).*

(n25)Footnote 24. *See Howard v. Antilla, 294 F.3d 244, 251 (1st Cir. 2002)* (noting that opening statements, parties' presentation of evidence and questioning of witnesses, closing arguments, and final jury instructions should be predicated on theory of case).

(n26)Footnote 25. *Fed. R. Civ. P. 51(a)(1).*

(n27)Footnote 26. *See Howard v. Antilla, 294 F.3d 244, 251 (1st Cir. 2002)* .

(n28)Footnote 27. *Spiller v. Brady, 169 F.3d 1064, 1066 (7th Cir. 1999)* .

(n29)Footnote 28. *Fed. R. Civ. P. 51*, Committee Note to 2003 Amendments.

(n30)Footnote 29. *Fed. R. Civ. P. 51(d)(1)(B), (2)*; *see Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000)* .

(n31)Footnote 30. *Fed. R. Civ. P. 51(a)(1).*

(n32)Footnote 31. *Fed. R. Civ. P. 51(a).*

(n33)Footnote 32. *Fed. R. Civ. P. 51(a)(2)(A)*, Committee Note to 2003 Amendments (if court establishes pretrial deadline for requesting jury instructions, court may be required to take additional requests after trial when actual evidence at trial raises new issues or alters issues from how issues stood before trial).

(n34)Footnote 33. *Fed. R. Civ. P. 51(a)(2)(B).*

(n35)Footnote 34. *Fed. R. Civ. P. 51*, Committee Note to 2003 Amendments.

(n36)Footnote 35. *See Estes v Georgetown Univ. 231 F. Supp. 2d 279, 283 (D.D.C. 2002)* .

(n37)Footnote 36. *Fed. R. Civ. P. 51(a)(1).*

(n38)Footnote 37. *See, e.g., Greenleaf v. Garlock, Inc., 174 F.3d 352, 365 n.10 (3rd Cir. 2003)* .

(n39)Footnote 38. *Katch v Speidel, Div. of Textron, Inc., 746 F.2d 1136, 1139 (6th Cir. 1984)* ; *see Wood v. Spring Hill College, 978 F.2d 1214, 1222 (11th Cir. 1992)* (when trial court was orally informed of requested instruction, failure to submit written instruction did not preclude appellate review of refusal to give instruction).

(n40)Footnote 39. *Fed. R. Civ. P. 51(a)(1).*

(n41)Footnote 40. *See Duran v. City of Maywood, 221 F.3d 1127, 1130 (9th Cir. 2000)* .

(n42)Footnote 41. *Fernandez v. Corporacion Insual de Seguros, 79 F.3d 207, 211 (1st Cir. 1996)* .

(n43)Footnote 42. *Bueno v City of Donna, 714 F.2d 484, 490 (5th Cir. 1983)* (even though trial court is not required to correct defective request, if inadequate or incorrect request is sufficient to direct court's attention to a particular legal issue, that request is sufficient to notify court that correct instruction is required).

(n44)Footnote 43. *Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001)* .

(n45)Footnote 44. *Spiller v. Brady, 169 F.3d 1064, 1066 (7th Cir. 1999)* .

(n46)Footnote 45. *Carvel Corp. v. Diversified Mgmt. Group, Inc., 930 F.2d 228, 230 (2d Cir. 1991)* .

(n47)Footnote 46. *BA II Banking Corp., v. UPG, Inc. 985 F.2d 685, 695 (2d Cir. 1993)* .

(n48)Footnote 47. *See McDowell v. Calderon, 130 F.3d 833, 841 (9th Cir. 1997)* .

(n49)Footnote 48. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 346 (2d Cir. 1994)* .

(n50)Footnote 49. *See Jones v. Swanson, 341 F.3d 723, 734 (8th Cir. 2003)* ; *Stuart Park Assocs. Ltd. Partnership v. Ameritech Pension Trust, 51 F.3d 1319, 1323 (7th Cir. 1995)* .

(n51)Footnote 50. *Fed. R. Civ. P. 51(a)(1).*

(n52)Footnote 51. *See Fed. R. Civ. P. 51(a).*

(n53)Footnote 52. *See* Ch. 9, *Pleadings and Motions in General.*

(n54)Footnote 53. *Fed. R. Civ. P. 83(a).*

(n55)Footnote 54. *Hutchison v. Amateur Elecs. Supply, 840 F. Supp. 612, 616 (E.D. Wis. 1993)* , *rev'd in part on other grounds, 42 F.3d 1037 (7th Cir. 1994)* .

(n56)Footnote 55. *Fed. R. Civ. P. 83(b).*

(n57)Footnote 56. *Christopher v. Cutter Lab., 53 F.3d 1184, 1194 (11th Cir. 1995)* .

(n58)Footnote 57. *See Thornton v. First State Bank of Joplin, 4 F.3d 650, 652 (8th Cir. 1993)* (one purpose of jury instructions is to inform jury of various permissible ways of resolving issues in case).

(n59)Footnote 58. *Humphrey v. Staszak, 148 F.3d 719, 724 (7th Cir. 1998)* .

(n60)Footnote 59. *Cooper Distrib. Co. v. Amana Refrigeration, Inc., 180 F.3d 542, 549 (3d Cir. 1999)* .

(n61)Footnote 60. *See Fed. R. Civ. P. 51(a)* (court must instruct jury on law); *see also* [a], *above.*

(n62)Footnote 61. *Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)* (provided that instruction as whole fairly and adequately covers relevant law, court need not give any particular form of instruction).

(n63)Footnote 62. *Adams v. Sewell, 946 F.2d 757, 767-768 (11th Cir. 1991)* (failure to give requested instruction error only if instruction is correct, not adequately covered by instructions actually given, and concerns a matter so important that failure to give instruction prejudices party's ability to present effective case).

(n64)Footnote 63. *Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 340 (2d Cir. 1993)* .

(n65)Footnote 64. *Kansas City Power & Light Co. v. Ford Motor Credit Co., 995 F.2d 1422, 1430 (8th Cir. 1993)* (district court need not give instruction contained in form contained in state's approved instruction manual).

(n66)Footnote 65. *See Sims v. ANR Freight Sys., 77 F.3d 846, 849 (5th Cir. 1996)* ; *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc. 830 F.2d 1332, 1345 (5th Cir. 1987)* (citing **Moore's Federal Practice**).

(n67)Footnote 67. *Rush v. Smith, 56 F.3d 918, 921 (8th Cir. 1995)* (because comments from court may be perceived as official sanction, court must be especially careful when commenting to jury).

(n68)Footnote 68. *See Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 327 F.3d 771, 782-783 (8th Cir. 2003)* .

(n69)Footnote 69. *Jones v. Swanson, 341 F.3d 723, 734 (8th Cir. 2003)* .

(n70)Footnote 70. *Life Plus Int'l v. Brown, 317 F.3d 799, 805 (8th Cir. 2003)* .

(n71)Footnote 71. *Kudabeck v. Kroger Co., 338 F.3d 856, 863 (8th Cir. 2003)* .

(n72)Footnote 72. *Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 821-822 (6th Cir. 2000)* .

(n73)Footnote 73. *Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990)* .

(n74)Footnote 74. *Fed. R. Civ. P. 51(b)(3)*.

(n75)Footnote 75. *Fed. R. Civ. P. 51(b)(1)*; *see Fed. R. Civ. P. 51(a)*; *see also* [2], *above*.

(n76)Footnote 76. *Fed. R. Civ. P. 51(b)(1)*.

(n77)Footnote 77. *Fed. R. Civ. P. 51(b)(2)*; *see Fed. R. Civ. P. 51(c)*; *see also* [4], *below*.

(n78)Footnote 78. *Fed. R. Civ. P. 51(b)(3)*.

(n79)Footnote 79. *See Fed. R. Civ. P. 51(d)*; *see also* [4], *below*.

(n80)Footnote 80. *United States v. Massey, 89 F.3d 1433, 1442-1443 (11th Cir. 1996)* .

(n81)Footnote 81. *See, e.g., Prieman v. Al/Jon United, Inc., 1994 U.S. Dist. LEXIS 17564, *10-11 (E.D. Pa. 1994)* .

(n82)Footnote 82. *Fed. R. Civ. P. 51(a)(1)*; *see* [2], *above* (requests by parties).

(n83)Footnote 83. *Fed. R. Civ. P. 51(b)(2)*; *see* [4], *below*.

(n84)Footnote 84. *Fed. R. Civ. P. 51(b)*, Committee Note to 2003 Amendments.

(n85)Footnote 85. *Industrias Magromer Cueros Y Pieles S.A. v. La. Bayou Furs, 293 F.3d 912, 925 (5th Cir. 2002)* .

(n86)Footnote 86. *Siddiqi v. Leak, 880 F.2d 904, 910-912 (7th Cir. 1989)* .

(n87)Footnote 87. *Fed. R. Civ. P. 51(a), (c)*.

(n88)Footnote 88. *Fed. R. Civ. P. 51(b)*.

(n89)Footnote 89. *Jones v. Southern Pac. R.R., 962 F.2d 447, 451 (5th Cir. 1992)* .

(n90)Footnote 90. *Fed. R. Civ. P. 51(b)(2)*; *see* [4], *below* (requirements for party to object to instruction rulings or proposed instructions by court).

(n91)Footnote 91. *Bertrand v. Southern Pacific Co., 282 F.2d 569, 571 (9th Cir. 1960)* .

(n92)Footnote 92. *Swain v. Boeing Airplane Co., 337 F.2d 940, 942-943 (2d Cir. 1964)* .

(n93)Footnote 93. *Fed. R. Civ. P. 51(d)(2)*; *see Fed. R. Civ. P. 51(d)(1)*.

(n94)Footnote 94. *Fed. R. Civ. P. 51(d)(2)*.

(n95)Footnote 95. *Day v. Toman, 266 F.3d 831, 837 (8th Cir. 2001)* ; *see* [5], *below*.

(n96)Footnote 96. *See* [2], *above*.

(n97)Footnote 97. *Fed. R. Civ. P. 51(d)(1)(B)*.

(n98)Footnote 98. *Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1030 (9th Cir. 2003)* ; *see Drohan v. Vaughn, 176 F.3d 17, 21 (1st Cir. 1999)* (plain error standard is at its strictest when appellate court is reviewing jury instructions as to which there was no timely objection).

(n99)Footnote 99. *Hollowell v. Orleans Reg'l Hosp. LLC, 217 F.3d 379, 389 (5th Cir. 2000)* ; *Coastal Fuels of Puerto Rico Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 189 n.4 (1st Cir. 1996)* , *cert. denied, 519 U.S. 927 (1996)* .

(n100)Footnote 100. *See* [d], *below*.

(n101)Footnote 101. *Heinrich v. Sweet, 308 F.3d 48, 60 (1st Cir. 2002)* .

(n102)Footnote 102. *Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1532 (11th Cir. 1987)* , *aff'd on other grounds, 489 U.S. 169 (1989)* .

(n103)Footnote 103. *Fed. R. Civ. P. 51(d)(1)*.

(n104)Footnote 104. *Garrett v. Hibler, 2003 U.S. App. LEXIS 22416, *11 (10th Cir. 2003)* .

(n105)Footnote 105. *Reed v. Landstar Ligon, Inc., 314 F.3d 447, 453 (10th Cir. 2002)* .

(n106)Footnote 106. *Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1030-1031 (9th Cir. 2003)* .

(n107)Footnote 107. *Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713-714 (9th Cir. 2001)* (objections did not satisfy Rule 51 because, despite repeated opportunities to specify grounds of objection to jury instructions, objections presented in both oral argument and written memoranda related only to sufficiency of evidence and alleged incomplete statement of law).

(n108)Footnote 108. *Estate of Keatinge v. Biddle, 316 F.3d 7, 15 (1st Cir. 2002)* .

(n109)Footnote 109. *Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc., 125 F.3d 468, 477-478 (7th Cir. 1997)* (use of particular words not necessary).

(n110)Footnote 110. *Kelly v. Boeing Petroleum Servs., Inc., 61 F.3d 350, 361 (5th Cir. 1995)* .

(n111)Footnote 111. *United States v. Parsons Corp., 1 F.3d 944, 945 (9th Cir. 1993)* (claim of error waived because, even though party specified that it would like different instruction, party did not inform court that failure to adopt party's instruction would constitute error).

(n112)Footnote 112. *Dotson v. Scotty's Contr., 86 F.3d 613, 616 (6th Cir. 1996)* .

(n113)Footnote 113. *Drohan v. Vaughn, 176 F.3d 17, 21 n.1 (1st Cir. 1999)* .

(n114)Footnote 114. *See Fed. R. Civ. P. 51(c)(1)*.

(n115)Footnote 115. *See Fed. R. Civ. P. 51(c)(2)*.

(n116)Footnote 116. *See Fed. R. Civ. P. 51(b)(1)*.

(n117)Footnote 117. *Fed. R. Civ. P. 51(c)(2)(A)*; *see Fed. R. Civ. P. 51(b)(2).*

(n118)Footnote 118. *Fed. R. Civ. P. 51(c)(2)(B).*

(n119)Footnote 119. *See Fed. R. Civ. P. 51(c)(2)(A), (d)(1).*

(n120)Footnote 120. *See Fed. R. Civ. P. 51(c)(2)(B), (d)(1).*

(n121)Footnote 121. *Moba v. Diamond Automation, 325 F.3d 1306, 1314 (Fed. Cir. 2003)* ; *Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1245 (10th Cir. 2000)* ; *see Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713-714 (9th Cir. 2001)* (important purpose of Rule 51 objection requirement is to ensure that potential errors in instructions are brought to the trial court's attention before jury begins to deliberate).

(n122)Footnote 122. *Hegger v. Green, 646 F.2d 22, 26 (2d Cir. 1981)* .

(n123)Footnote 123. *Phillips v. Cameron Tool Corp., 950 F.2d 488, 491 (7th Cir. 1991)* .

(n124)Footnote 124. *Brown v. M&M/Mars, 883 F.2d 505, 512-513 (7th Cir. 1989)* (law changed by Supreme Court during appeal permits review).

(n125)Footnote 125. *Phillips v. Cameron Tool Corp., 950 F.2d 488, 491 (7th Cir. 1991)* .

(n126)Footnote 126. *Castrignano v. E. R. Squibb & Sons, Inc., 900 F.2d 455, 460 (1st Cir. 1990)* .

(n127)Footnote 127. *Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 182 (9th Cir. 1989)* , *cert. denied, 493 U.S. 1058 (1990)* .

(n128)Footnote 128. *City of St. Louis v. Praprotnik, 485 U.S. 112, 120, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)* .

(n129)Footnote 129. *Geldermann, Inc. v. Financial Mgmt. Consultants, Inc., 27 F.3d 307, 312 (7th Cir. 1994)* .

(n130)Footnote 130. *See* [b], *below.*

(n131)Footnote 131. *Fed. R. Civ. P. 51(d)(1)*; *see Fed. R. Civ. P. 51(c).*

(n132)Footnote 132. *See Fed. R. Civ. P. 51(d)(2).*

(n133)Footnote 133. *Fed. R. Civ. P. 51(d)(1)(A)*; *see* [4] *above.*

(n134)Footnote 134. *Fed. R. Civ. P. 51(d)(1)(B).*

(n135)Footnote 135. *See Fed. R. Civ. P. 51(a)*; *see also* [2], *above.*

(n136)Footnote 136. *See Fed. R. Civ. P. 51(c)*; *see also* [4], *above.*

(n137)Footnote 137. *Fed. R. Civ. P. 51(d)(1)(B)*; *see Fed. R. Civ. P. 51(c)*, Committee Note to 2003 Amendments (because purpose of objection requirement is to ensure that trial court has sufficiently considered request, court's definitive rejection of request on record makes it unnecessary to make separate objection).

(n138)Footnote 138. *Fed. R. Civ. P. 51(d)(2).*

(n139)Footnote 139. *Fed. R. Civ. P. 51(d)(1).*

(n140)Footnote 140. *Min Jin v. Metro. Life Ins. Co., 310 F.3d 84, 91 (2nd Cir. 2002)* .

(n141)Footnote 141. *Pavon v. Swift Transp. Co., 192 F.3d 902, 907-908 (9th Cir. 1999)* .

(n142)Footnote 142. *See Fed. R. Civ. P. 51(d)(1)(B)*; *see also* [a], *above*.

(n143)Footnote 143. *Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 78-79 (1st Cir. 2001)* .

(n144)Footnote 144. *Hegger v. Green, 646 F.2d 22, 26 (2d Cir. 1981)* (current law must be applied on appeal, unless doing so would cause manifest injustice).

(n145)Footnote 145. *Mayo v. Borden, Inc., 784 F.2d 671, 673 (5th Cir. 1986)* .

(n146)Footnote 146. *See Fed. R. Civ. P. 51(d)(2)*; [a], *above*.

(n147)Footnote 147. *Fed. R. Civ. P. 51(d)(2)*.

(n148)Footnote 148. *Gomez v. Rivera Rodriguez, 344 F.3d 103, 118-119 (1st Cir. 2003)* .

(n149)Footnote 149. *Life Plus Int'l v. Brown, 317 F.3d 799, 805 (8th Cir. 2003)* .

(n150)Footnote 150. *Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 5-6 (1st Cir. 2002)* .

(n151)Footnote 151. *Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 5-6 (1st Cir. 2002)* .

(n152)Footnote 152. *Fed. R. Civ. P. 51(d)*, Committee Note to 2003 Amendments.

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.69

§ 22.69 Vote Required for Verdictn*

All jurors of the six to 12 members seated by the court must participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict must be unanimous and (2) no verdict may be taken from a jury reduced in size to fewer than six members. n1 This rule is different than at common law, in which a trial jury always consisted of exactly 12 jurors who had to reach a unanimous verdict. n2 In 1991, Rule 48 was amended to reflect the practice prevailing in many districts of seating fewer than 12 jurors in civil actions. n3

With respect to unanimity, the federal courts consistently followed the common-law rule, even if a different rule prevailed in the state in which they were sitting. Rule 48 has not changed the general federal practice in that respect. n4 The current version of Rule 48 does, however, permit the parties to stipulate that a verdict may be rendered by a majority rather than through unanimity. n5 The rule also states that if the jury is reduced to fewer than six members, the parties may stipulate to a verdict rendered by such a jury. In the absence of such a stipulation, a new trial will be required if the jury is reduced to fewer than six members. n6

Unanimity provides greater certainty in the result and reinforces each juror's agreement with the verdict, and therefore it is generally considered that unanimity protects the parties and the jury. While counsel should be careful about stipulating to a non-unanimous verdict, such a stipulation may be helpful in avoiding a mistrial. n7 Prior to the 1991 revision of Rule 48, courts disputed whether a federal jury verdict must be unanimous absent a stipulation by the parties. n8 The current version of the rule makes clear that the verdict must be unanimous unless the parties stipulate to the contrary. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 48.02* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 48.*

(n3)Footnote 2. *Patton v. United States, 281 U.S. 276, 298, 50 S. Ct. 253, 74 L. Ed. 854 (1930)* .

(n4)Footnote 3. *Fed. R. Civ. P. 48*, Advisory Committee Note to 1991 Amendment; *see Montiel v. City of Los Angeles, 2 F.3d 335, 338 (9th Cir. 1993)* (court rejected argument that 12-member jury was prejudicial since it required larger unanimous verdict than would be case with small jury).

(n5)Footnote 4. *Bledsoe v. Garcia, 742 F.2d 1237, 1241 (10th Cir. 1984)* (in absence of stipulation under Rule 48, plaintiffs had no basis for requesting a less than unanimous verdict, and it was not error for trial court to instruct jury that unanimous verdict was required).

(n6)Footnote 5. *Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969)* .

(n7)Footnote 6. *See Fed. R. Civ. P. 48*, Advisory Committee Note to 1991 Amendment.

(n8)Footnote 7. *See, e.g., Reynolds v. Green, 184 F.3d 589, 594 (6th Cir. 1999)* (after stalemate in deliberations, parties agreed and court instructed that six of eight jurors would suffice for verdict).

(n9)Footnote 8. *Compare Masino v. Outboard Marine Corp., 652 F.2d 330-332 (3d Cir. 1981)* , *cert. denied, 454 U.S. 1055 (1981) with Wieser v. Chrysler Motors Corp., 69 F.R.D. 97, 98-101 (E.D.N.Y. 1975)* .

(n10)Footnote 9. *Fed. R. Civ. P. 48.*

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.70

§ 22.70 Special Verdicts and Written Questionsn*

[1] Comparison of General Verdict with Alternatives to General Verdict

[a] Nature of General Verdict

A general verdict is one that either finds in favor of the defendant or finds in favor of the plaintiff against the defendant and assesses damages in a stated sum. n1 A general verdict has the advantages of certainty and simplicity but has the disadvantage of being either all wrong or all right, because it is an "inseparable unit." n2 Therefore, if a court commits error on any one of several issues, either in the admission of evidence or in the jury instructions given by the court, the verdict may not be upheld on appeal, because the appellate court will not be able to determine if the jury based its general verdict on the erroneous admission or instruction. n3

However, a general verdict does not mandate reversal in all circumstances. The courts have specifically recognized the possibility of applying harmless error analysis when appropriate to avoid the usual course of reversal and new trial. Harmless error applies only when the court is confident that the verdict was not influenced by any error in the trial court. n4

[b] Rules Provide Two Alternatives to General Verdict

Rule 49 provides two practical alternatives to the disadvantages that are inherent in the basic general verdict: n5 the special verdict n6 and the general verdict accompanied by answers to written questions. n7

A special verdict is a verdict submitted to the jury that requires the jurors to provide written answers to specific questions of fact. n8 A special verdict is returned in lieu of a general verdict and contains factual findings on all of the material issues in the case. n9 The trial court then applies the law to those answers and enters judgment accordingly. n10 By removing from the jury the consideration or application of the law, which a general verdict requires through application of the court's instructions, the special verdict avoids those two sources of possible error in the general verdict. n11 For a complete discussion of the special verdict, see [2], *below*.

The second alternative to a general verdict is provided by Rule 49(b), which allows the jury, after receiving its

instructions, to return a general verdict together with answers to written questions. n12 Rule 49(b) essentially combines the two other types of verdicts, the general verdict and the special verdict. If the answers to the written questions do not contradict the general verdict, the trial court enters judgment on the verdict. n13

Special interrogatories are directed to particular issues of fact and the answers should support, rather than take the place of, the general verdict. Thus, the Rule 49(b) verdict has been described as taking a middle course between the simple general verdict and the Rule 49(a) special verdict in that it focuses the jury's attention on the controlling points at issue, and the interrogatory answers provide a check on the propriety of the general verdict. n14 For a complete discussion of the general verdict with written questions, see [3], *below*.

[c] Alternatives to General Verdict Treat Inconsistent Verdicts Differently

Courts do not always make the distinction between the procedures prescribed by Rule 49(a) and those prescribed by Rule 49(b). n15 The most important distinction between Rule 49(a) and Rule 49(b) is in the effect of inconsistencies in the jury's special verdicts. Rule 49(a) contains no provision for this situation, while Rule 49(b) provides that when the answers to written questions are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment may not be entered, but the court must return the jury for further consideration of its answers and verdict or must order a new trial. n16 Thus, under Rule 49(b) the general verdict and the special answers to interrogatories must not conflict, for if they do conflict and the jury cannot resolve the conflict, both are extinguished. On the other hand under Civil rule 49(a), the jury instructions are melded with the juries' answers to questions, which are controlling. n17

[2] Special Verdict n*

[a] Purpose of Special Verdict

Rule 49(a) was promulgated in response to the disadvantages of the general verdict rule n1 and the limitations of the common-law special verdict. The rule was established to provide a procedure to allow the jury to render a verdict based on agreed questions. n2 In essence, the rule established a procedure that allows a district court to make a finding consistent with the judgment if the questions omit a material factual issue.

Furthermore, if the trial court fails to make an express finding, the court must be deemed to have made a finding in accord with the judgment. n3 This improvement over the common-law special verdict has allowed courts much greater flexibility in utilizing the procedure and has revitalized the special verdict since its common-law origins. n4

A special verdict also accomplishes the following three practical purposes:

1. The special verdict was designed to identify the bases on which the jury rendered its verdict. n5 This identification process avoids the need for additional proceedings and appellate uncertainty, n6 and promotes judicial efficiency by reducing the likelihood of new trials. n7 Special verdicts are especially helpful in complicateD cases involving multiple, alternative theories of recovery because they eliminate the uncertainty as to whether the verdict was based wholly on an improper theory requiring a retrial of the case. n8 For example, trial courts have found that special verdicts are particularly suited to patent cases by reducing the number of retrials. n9 Thus, the special verdict reveals the whole case for what it is, both fact and law, for the complete and final acceptance of the correct legal theory by the reviewing court. n10

2. The special verdict helps focus the jury's attention by identifying the issues in complex cases. n11 Special verdicts are helpful to a jury because they can reduce an otherwise complex trial with a mass of subtle issues to its simplest and most important form. The genuine issues are also distilled. n12 This

simplification of issues also has the effect of simplifying the court's jury instructions. n13

3. When a verdict contains one or more errors or inconsistencies, the special verdict permits the trial judge to grant a retrial on a limited issue while the rest of the verdict may be saved. n14 For example, in one case it was held that there was no need for a retrial because the district court's submission of a fraud claim to the jury was harmless error because the jury also specifically found by special verdict that negligence was a basis for liability. n15

[b] Trial Court Has Broad Discretion in Use of Special Verdict

The trial judge has sole discretion to implement a special verdict and the manner in which it should be implemented. n16 The broad discretion given to the trial court extends to the nature, form, and scope of the issues n17 and the composition and utilization of special verdict forms. n18

In its discretion, the court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. n19 The court may do so by: submitting written questions susceptible of a categorical or other brief answer; n20 submitting written forms of the special findings that might properly be made under the pleadings and evidence; n21 or using any other method that the court considers appropriate. n21.1 When using a special verdict, the court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue. n21.2

If the court uses a special verdict a party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on that issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict. n21.3

Questions submitted to the jury must be clear and unambiguous. n22 A court of appeals will reverse a judgment if the trial court enters a judgment on answers to interrogatories which mislead or confuse the jury n23 or which inaccurately frame the issues to be resolved by the jury.

Each question submitted to the jury should be limited to a single issue. n24 However, a single question may combine elements of one claim, provided that the question is fair and does not combine two issues disjunctively. n25 The district court is allowed to "mix and match" types of verdicts, because Rule 49(a) expressly authorizes the court to use such methods of submitting issues as it deems most appropriate. n26

Because the trial court has broad discretion in the use and composition of Rule 49(a) special verdicts, an appellate court's review is limited to whether the form of the interrogatories is an abuse of discretion. n27 For example, it has been held that the trial court abused its discretion by imposing in a special verdict an element of proof not required by law. n28

There are several factors in determining whether a court has abused its discretion with regard to the form of special verdict questions: (1) whether when read as a whole and in conjunction with the general charge the questions adequately presented the contested issues to the jury, (2) whether the submission of the issues to the jury was "fair," and (iii) whether the "ultimate questions of fact" were clearly submitted to the jury. n29 Additionally, once a court has decided to use a Rule 49(a) special verdict, it must submit all material issues raised by the pleadings and evidence, n30 and a failure to submit to the jury special verdict interrogatories on all material issues in the case is an abuse of discretion. n31

[c] Time for Submission of Special Verdict to Jury

A district court may submit special verdict questions to a jury within two time periods. The first is when the jury

receives the case for its deliberations; the second is after deliberations but before the jury is discharged. n32 First, Rule 49(a) authorizes the trial court to submit special verdict written questions before the jury's deliberations, at the same time it gives instructions to the jury, so that the jury may make findings on each issue. n33 Answers to these questions must be consistent with each other in order to form the basis of a valid judgment. n34

The second time period in which the trial court may submit special verdict questions occurs after the jury has deliberated but before it is discharged, following the jury's returning inconsistent answers. n35 Rule 49(a) is silent as to the procedure to be followed in the event that the jury makes inconsistent findings. However, it is well established that trial courts are required to attempt to reconcile apparent inconsistencies in the special verdict if at all possible. n36 For the court to refuse to attempt to reconcile could violate the *Seventh Amendment* right to a jury trial.

When a special verdict presents unresolvable inconsistencies or ambiguities which the judge has been unable to harmonize, the court may consult with the jury for assistance in reconciling the interrogatory answers. Although Rule 49(a) is silent as to whether it is proper to resubmit the questions that have resulted in inconsistent answers for further deliberations by the jury, it has consistently been held proper by the courts, provided there is no danger of coercing the jury by resubmitting the special questions, which would violate the *Seventh Amendment*.

To avoid giving the jury the impression that the court is making an improper suggestion as to the outcome of a case by resubmitting it to the jury, the trial judge should explain that no inference should be drawn concerning the ultimate decision reached by the jury merely from the resubmission. n37 In the absence of improper influence or coercion, it is proper for the court to allow the jury to reconsider its inconsistent answers. n38

In addition to the court's discretion in resubmitting the special verdict interrogatories to the jury, the court also may submit additional questions to aid the jury in reconciling inconsistencies or ambiguities. These questions are submitted to the jury after the original questions have been answered. n39 Another situation in which the court may submit questions after the jury has deliberated occurs when the jury is deadlocked, because although Rule 49 does not specifically address the submission of questions to a jury after a deadlock, neither does it expressly preclude this practice. n40

[d] Court's Obligation to Reconcile Inconsistent Answers

One of the disadvantages of the submission of special verdict questions is that the jury may provide inconsistent answers. Consequently, it has been held that a trial court must render a judgment that makes the jury's answers consistent if such a construction is possible. n41 A district court has considerable latitude in attempting to reconcile a jury's apparently inconsistent responses to special interrogatories, because a trial judge is in the best position to analyze the jury's intention. Thus, a district court may properly exercise its discretion by adopting a view of the case that makes the jury's answers consistent in light of the surrounding circumstances, including the instructions of the court. n42 Note, however that a court may not reform a jury's verdict in its effort to reconcile inconsistencies. n43

On review of a trial court's attempt to reconcile apparently inconsistent or ambiguous responses to special verdict questions, if the appellate court determines that there is no way to view the case in which the special verdict can be seen as supporting the judgment, the appellate court must reverse and remand for a new trial. This rule is consistent with efficient judicial management, because providing notice to the trial court gives the district judge the opportunity to resubmit questions to the jury before it has been discharged. n44

In attempting to reconcile inconsistent verdicts, the reviewing court must consider the court's instructions as well as the questions themselves. n45 Thus, the appellate court should review the entire record in order to ascertain whether the reconciliation of apparently inconsistent verdicts by the trial court represents a fair and reasonable view of the case. n46

It has been held that parties should be afforded a meaningful opportunity to read the verdict answers to determine if

there are any inconsistencies, although the courts of appeals disagree as to the amount of prior notice counsel should be given regarding the special interrogatories and instructions which will be submitted to the jury. Thus, the Sixth Circuit requires only that the trial judge give counsel the substance, and not the exact wording of the questions, n47 while the Second Circuit has determined that the trial court has discretion whether to show the text of the special verdict before submitting it to the jury. n48

[e] Court's Discretion to Supply Omitted Finding

Under Rule 49(a), a court may supply an omitted finding that would complete the jury's verdict. n49 Thus, when a party fails to request that an issue be submitted and if the court fails to make an express finding, Rule 49(a) permits a judgment by implying findings necessary to support it. Furthermore, courts have recognized that partially completed special verdict forms are sufficient, provided that the answered questions support the verdict and the unanswered questions, if answered in favor of the non-prevailing party, would not render the judgment erroneous. n50

If a jury fails to answer all the questions submitted in a special verdict, the verdict may be accepted for those issues that are resolved. n51 The court's legal rulings and the jury's factual findings may be combined to complete the jury's verdict. n52 However, in the absence of any jury verdict, a court may not determine the ultimate liability of a party, because that would violate the party's right to jury trial. n53 When a court does make a finding on a factual issue that has been omitted from the special verdict questions, the trial court's finding is reviewable under the clearly erroneous standard of Rule 52(a). n54

[f] Effect of Party's Failure to Object to Questions

If the court omits any issue of fact raised by the pleadings or by the evidence when the court is required to do so in its submission of questions to the jury, each party waives the party's right to a trial by jury of the issue so omitted unless, before the jury retires, the party demands its submission to the jury. n55 The waiver rule does not apply in situations where the omitted issue was not raised by the pleadings or the evidence. n56 It must also be remembered that waiver provision of Rule 49(a) applies only to questions under a special verdict and is inapplicable to cases in which the court requests only a general verdict. Consequently, if a court omits a particular issue regarding a general verdict, the party does not waive a jury trial regarding that issue. For example, if the court asks the jury if it finds that the defendant constructively discharged the plaintiff without just cause in violation of a particular statute because of the plaintiff's age, that question asks for a general verdict. The parties do not waive jury trial rights to any factual issues on grounds they have failed to ask the court to put a particular question to the jury--the waiver provision under Rule 49(a) does not apply. n56.1

A party's failure to object to the omission of a material issue of fact from a Rule 49(a) verdict before a jury retires constitutes a waiver of jury trial as to that issue. n57 A party must use methods which are sufficient to inform the court of the issues that are missing in the special interrogatories. n58

[3] General Verdict With Answers to Written Questions n*

[a] Purpose of General Verdict Requiring Answers to Written Questions

A general verdict with written questions under Rule 49(b) is a method for submitting particular written questions to a jury concerning selected issues of fact, and to have the jury give its answers with respect to a general verdict. Using this method, the court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both. n1 This verdict combines some aspects of both the general and special verdicts and has been described as a middle ground between the general and the special verdict. n2

In contrast to the basic general verdict, the Rule 49(b) verdict is very helpful in complex cases involving numerous theories of recovery. n3 Judicial economy is served through the use of a general verdict with written questions because the necessity of retrials lessens when the answers to written questions help indicate the jury's analysis. n4

Written questions are also useful to test the jury's verdict by providing a check on the application of the law to the facts. n5 Thus, the use of Rule 49(b) fact questions is strongly preferred as a mechanism to guide a jury and thus increasing the reliability of its verdict and facilitating appellate review. n6

[b] Distinguished from Special Verdict

Appellate courts often have difficulty in identifying whether a verdict represents a Rule 49(a) special verdict or a Rule 49(b) general verdict with answers to written questions. n7 The label given a verdict is not necessarily dispositive and often is inaccurate. n8 The primary distinction is that a Rule 49(a) special verdict is employed where the written questions require the jury to make findings on all issues of material fact and the court applies the law.

On the other hand, a Rule 49(b) submission utilizes questions which may not cover all of the issues presented in a case but may, instead, focus on one or two. Thus, in one case the court held that the written questions on only one special issue in the case did not constitute a special verdict; rather it was a Rule 49(b) verdict. n9

Two other indicators help to distinguish a Rule 49(b) from a Rule 49(a) verdict form. With a Rule 49(b) submission, the jury will also invariably be instructed on the law. n10 The jury is not necessary instructed under Rule 49(a) special verdicts, where the jury's role is limited to fact-finding n11 and the court applies the law. n12

Furthermore, a Rule 49(b) submission will always be accompanied by a general verdict. n13 If a party is uncertain whether a case is being submitted under Rule 49(a) or (b), the party should inquire of the court because of the different waiver of objections rules for the two types of verdicts. n14

[c] Court's Discretion on Use of General Verdict with Written Questions

The decision whether or not to submit written questions in connection with a general verdict is within the discretion of the trial court. n15 Furthermore, the form of the questions are also within the discretion of the court, n16 including determinations as to the number and wording of the questions. n17 Such decisions will not be overturned absent an abuse of discretion. n18

A court should make the decision to use written questions with a general verdict, if at all, before the case is submitted to the jury. Counsel may request the submission of questions, which the court in its discretion may allow or reject. However, the court should notify the attorneys that Rule 49(b) will be used and should give them an opportunity to review the questions. n19 If the jury sends back inconsistent answers to questions that are submitted, the judge may submit additional questions to the jury to clarify issues. n20

Additional written questions may not be submitted to a jury after it has reached a clear and unambiguous verdict. To do so invites inconsistency, as the jury may give different answers to post-verdict questions than it did originally; post-verdict questions may also give the jury an impression that the jury's verdict is unjustified. n21

[d] Failure to Object to Written Questions

If a party wants to object to the form or content of written questions that accompany a general verdict, the objection must be made before the jury is discharged. n22 Otherwise, the objections may be considered waived on appeal. n22.1

One case offers a good example of the danger involved in failing to make timely objections to written questions. The

plaintiff in the case initially claimed that the district court had submitted an improper verdict form which conformed to neither Rule 49(a) nor 49(b). The district court overruled plaintiff's objection. After closing argument, the court afforded plaintiff another opportunity to object to the form of the verdict; plaintiff declined to do so. Judgment was entered for defendant and plaintiff appealed. The appellate court dismissed the appeal, holding that plaintiff couldn't raise an objection to the form of the verdict or to the overemphasis of a particular issue for the first time on appeal, and that the plaintiff should, therefore, have inquired what type of verdict form was being submitted to the jury. n23

[e] Effect of Inconsistencies Among Answers to Written Questions

When the general verdict and all of the answers are consistent, the court must approve for entry under Rule 58 an appropriate judgment on the verdict and answers. n24 However, when the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, the court must not enter judgment; rather, the court must direct the jury to further consider its answers and verdict, or must order a new trial. n25

The circuits are not uniform as to the effect of a failure to object to inconsistencies, but most of the circuit courts that have considered the issue have held there is a waiver of objections not timely made. It is important to note that in nearly all of the cases where waiver has been invoked, the trial court had given counsel an opportunity to object to the jury's verdict before the jury was discharged and counsel raised no objection until appeal. n26 The waiver doctrine promotes the fair and expeditious correction of error while avoiding the need to present evidence to a new jury. n27 In addition, waiver promotes court efficiency in the management of its caseload. n28

A minority of circuits have taken a different position to the inconsistency objection issue. For example, the Ninth Circuit has taken the opposite position in holding that the failure to object to an inconsistency in answers to questions does not result in a waiver of the argument that the court erred in entering judgment on the general verdict. n29 As a result, a party may challenge the consistency of a verdict for the first time on a post-trial motion. n30

[f] Effect of Inconsistencies Between Answers to Written Questions and General Verdict

When a general verdict and the answers to written questions are consistent, the court must approve for entry under Rule 58 an appropriate judgment on the verdict and answers. n31 When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court must make one of three choices; it may: (1) approve for entry under Rule 58 an appropriate judgment according to the answers, notwithstanding the general verdict; n32 (2) direct the jury to further consider its answers and verdict; n33 or (3) order a new trial. n34

1. The first option a court has when presented with inconsistent general verdict and answers to written questions is to enter judgment according to the answers notwithstanding the general verdict. n34.1 The court has a duty to reconcile and harmonize the jury's answers to written questions to support the judgment, if that is possible. n35 The test in reconciling inconsistencies is whether the answers represent a logical and probable decision on the relevant issues as submitted. n36

2. The second option for a court is to return the jury for further consideration of its answers and verdict. n36.1 Under this option, the trial court has the power to permit a jury to correct mistakes in the verdict before it is discharged. n37 To have the jury correct its mistakes, the court may resubmit the special written questions that resulted in inconsistent answers, or may submit supplemental written questions to the jury that are designed to correct the mistakes. n38 A party who wants to challenge an inconsistency must always make a formal objection to the inconsistency, because the party's right to a new trial is waived if no objection to an alleged inconsistency or motion for resubmission of the verdict is made before the jury is discharged. n39

3. The third and final option for the court is to order a new trial. n39.1 Trial courts have broad discretion

in considering whether to grant a new trial. n40 The grant of a new trial may be in effect a refusal to accept a jury's inconsistent answers to written questions. n41 Thus, vacating a verdict and ordering a new trial does not violate a party's *Seventh Amendment* rights when the verdict is confused and impossible to understand. n42 However, the trial court must exhaust its efforts to harmonize the answers and the verdict before ordering a new trial. n43

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 49.02* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Porter v. Eckert, 465 F.2d 1307, 1309 (5th Cir. 1972)* .

(n3)Footnote 2. Sunderland, *Verdicts, General and Special, 29 Yale L.J. 253, 259 (1920)*.

(n4)Footnote 3. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)* .

(n5)Footnote 4. *Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 759-760 (1st Cir. 1998)* .

(n6)Footnote 5. *Hay v. Irving, 893 F.2d 796, 799 (5th Cir. 1990)* (general verdict must ordinarily be reversed when one or more claims was improperly submitted to jury, because it is not possible to tell whether verdict was based on the erroneously submitted claim); *see* [a], *above*.

(n7)Footnote 6. *Fed. R. Civ. P. 49(a)*; *see Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979)* , *cert. denied, 445 U.S. 929 (1980)* (special verdict permitted by Rule 49(a) is splendid device for focusing juror's attention on disputed facts).

(n8)Footnote 7. *Fed. R. Civ. P. 49(b)*.

(n9)Footnote 8. *Fed. R. Civ. P. 49(a)*.

(n10)Footnote 9. *Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)* , *cert. denied, 471 U.S. 1136 (1985)* .

(n11)Footnote 10. *Lattimore v. Polaroid Corp., 99 F.3d 456, 468 (1st Cir. 1996)* .

(n12)Footnote 11. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* (special verdict avoids errors stemming from consideration of questions of law and application of law to facts).

(n13)Footnote 12. *Fed. R. Civ. P. 49(b)*.

(n14)Footnote 13. *Lavoie v. Pacific Press & Shear Co., 975 F.2d 48, 53 (2d Cir. 1992)* (citing **Moore's Federal Practice**).

(n15)Footnote 14. *Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 1561-1562 (Fed. Cir. 1988)* , *cert. denied, 488 U.S. 850 (1988)* .

(n16)Footnote 15. *Commercial Contractors, Inc. v. United States Fid. & Guar. Co., 524 F.2d 944, 956 n. 2 (5th*

Cir. 1975) (concurring opinion, noting that distinction should be made).

(n17)Footnote 16. *Fed. R. Civ. P. 49(b).*

(n18)Footnote 17. *Commercial Contractors, Inc. v. United States Fid. & Guar. Co., 524 F.2d 944, 956 n.2 (5th Cir. 1975)* (concurring opinion).

(n19)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 49.10* et seq. (Matthew Bender 3d ed.).

(n20)Footnote 1. *See* [1], *above*.

(n21)Footnote 2. *Anderson v. Cryovac, Inc., 862 F.2d 910, 915 (1st Cir. 1988)* (unlike common law, Rule 49 does not require jury determinations on every material issue in case).

(n22)Footnote 3. *Fed. R. Civ. P. 49(a).*

(n23)Footnote 4. *See Watkins v. Fibreboard Corp., 994 F.2d 253, 258 (5th Cir. 1993)* .

(n24)Footnote 5. *Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644-645 (11th Cir. 1984)* (despite court's error in submitting fraud claim to jury, fact that jury also returned special verdicts as to claims of negligence and gross negligence avoided need for retrial).

(n25)Footnote 6. *Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983)* (appellate court aided by distillation of issues).

(n26)Footnote 7. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* (with special verdict court can easily determine where the jury erred, and the impact of jury's answer on ultimate decision).

(n27)Footnote 8. *Mueller v. Hubbard Milling Co., 573 F.2d 1029, 1038-1039 (8th Cir. 1978)* , *cert. denied, 439 U.S. 865 (1978)* (citing **Moore's Federal Practice**); *Workman v. Frito-Lay, Inc., 165 F.3d 460, 465 (6th Cir. 1999)* (court noted that special interrogatories probably could shed light on how jury reached its verdict as it made its way through Americans with Disabilities Act law, for instance, which prong of "disability" applied, and thereby could have aided district court and appellate court in reviewing verdict).

(n28)Footnote 9. *American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1361 (Fed Cir.)* , *cert. denied, 469 U.S. 821 (1984)* (especially in patent cases, use of special verdicts frees court from having to survey every possible basis for jury's decision).

(n29)Footnote 10. *Commercial Contractors, Inc. v. United States Fid. & Guar. Co., 524 F.2d 944, 956-957 (5th Cir. 1975)* (concurring opinion).

(n30)Footnote 11. *Workman v. Frito-lay, Inc., 165 F.3d 460, 465 (6th Cir. 1999)* (court noted that complicated nature of Americans with Disabilities Act claims makes special interrogatories worth consideration by district courts, because special interrogatories probably could shed light on how jury reached its verdict as it made its way through ADA law, for instance, which prong of "disability" applied).

(n31)Footnote 12. *Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983)* .

(n32)Footnote 13. *Structural Rubber Prods., Co. v. Park Rubber, Co., 749 F.2d 707, 723-724 (Fed. Cir. 1984)* .

(n33)Footnote 14. *Mendenhall v. Cedarapids, 5 F.3d 1557, 1563 (Fed. Cir. 1993)* , *cert. denied, 511 U.S. 1031 (1993)* (one advantage of use of separate verdicts is that some may be accepted for those issues that are resolved according to evidence and law, and others need not be relied on or may even be rejected outright).

(n34)Footnote 15. *See Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644-645 (11th Cir. 1984)* .

(n35)Footnote 16. *Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir.)* , *cert. denied, 516 U.S. 865 (1995)* (court has discretion whether to use special or general verdict, and also has discretion to determine content and form of any interrogatories it chooses to submit); *Garwood v. International Paper Co., 666 F.2d 217, 222 (5th Cir. 1982)* (citing **Moore's Federal Practice** for proposition that court did not abuse discretion in denying of use of special verdict, even though requested by both parties).

(n36)Footnote 17. *Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 643 (11th Cir. 1984)* (although trial court has discretion over nature and scope of issue, court must submit all material issues raised by pleadings and evidence).

(n37)Footnote 18. *Barton's Disposal Servs., Inc. v. Tiger Corp., 886 F.2d 1430, 1434 (5th Cir. 1989)* (court afforded broad latitude in composition and structure of special interrogatories used in antitrust action).

(n38)Footnote 19. *Fed. R. Civ. P. 49(a)(1).*

(n39)Footnote 20. *Fed. R. Civ. P. 49(a)(1)(A).*

(n40)Footnote 21. *Fed. R. Civ. P. 49(a)(1)(B).*

(n41)Footnote 21.1. *Fed. R. Civ. P. 49(a)(1)(C).*

(n42)Footnote 21.2. *Fed. R. Civ. P. 49(a)(2).*

(n43)Footnote 21.3. *Fed. R. Civ. P. 49(a)(3).*

(n44)Footnote 22. *Menne v. Celotex Corp., 861 F.2d 1453, 1455 (10th Cir. 1988)* (new trial required when special interrogatories and instructions were ambiguous regarding which side bore burden of proof as to causation).

(n45)Footnote 23. *Petes v. Hayes, 664 F.2d 523, 525 (5th Cir. 1981)* .

(n46)Footnote 24. *Dobbs v. Gulf Oil Co., 759 F.2d 1213, 1216 (5th Cir. 1985)* .

(n47)Footnote 25. *United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987)* .

(n48)Footnote 26. *Vieau v. Japax, Inc., 823 F.2d 1510, 1514 (Fed. Cir. 1987)* (no abuse of discretion to implement general verdict questions to conform to multiple claims and devices at issue in patent case).

(n49)Footnote 27. *Cutlass Productions, Inc. v. Bregman, 682 F.2d 323, 325 (2d Cir. 1982)* (abuse of discretion for trial court to withdraw valid theory of defense on which sufficient evidence was produced); *Ortiz v. New York City Hous. Auth., 22 F. Supp. 2d 15, 26 (E.D.N.Y. 1998)* (because district courts have broad discretion under Rule 49(a) to formulate special interrogatories, court did not abuse its discretion in failing to provide jury with separate special interrogatory on issue that was adequately covered in jury instructions).

(n50)Footnote 28. *Deadwyler v. Volkswagen of Am., Inc., 884 F.2d 779, 782 (4th Cir. 1989)* , *cert. denied, 493 U.S. 1078 (1990)* .

(n51)Footnote 29. *Dreiling v. General Electric Co., 511 F.2d 768, 774 (5th Cir. 1975)* (finding no abuse of discretion in trial court's withholding certain questions from jury in products liability action).

(n52)Footnote 30. *Martinez v. Union P.R. Co., 714 F.2d 1028, 1033 (10th Cir. 1983)* (when trial court failed to submit to jury special interrogatory concerning driver of car at time of accident, a material issue in personal injury

action against railroad, trial court abused its discretion).

(n53)Footnote 31. *Nance v. Gulf Oil Corp., 817 F.2d 1176, 1180-1181 (5th Cir. 1987)* (refusal to submit special interrogatory concerning a nonparty's comparative negligence constituted abuse of discretion, because it was material issue).

(n54)Footnote 32. *Fed. R. Civ. P. 49(a).*

(n55)Footnote 33. *Karl v. Burlington N. R. Co., 880 F.2d 68, 72 (8th Cir. 1989) .*

(n56)Footnote 34. *Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988)* (because jury's answers are basis for ultimate resolution of case, answers must be consistent).

(n57)Footnote 35. *Fed. R. Civ. P. 49(a).*

(n58)Footnote 36. *Gallick v. B & O R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963)* (duty of courts to attempt to harmonize answers to special interrogatories if it is possible under fair reading of them).

(n59)Footnote 37. *Nance v. Gulf Oil Corp., 817 F.2d 1176, 1179 (5th Cir. 1987)* (resubmission of verdict form was not coercive where accompanied by an explanation that judge was not suggesting that particular verdict should be reached).

(n60)Footnote 38. *Santiago-Negron v. Castro-Davila, 865 F.2d 431, 444 (1st Cir. 1989) .*

(n61)Footnote 39. *Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981) .*

(n62)Footnote 40. *Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 544-545 (1st Cir. 1993)* (judgment as matter of law followed jury's answers to questions posed to it by court after being notified of jury deadlock).

(n63)Footnote 41. *Loughman v. Consol-Pennsylvania Coal Co., 6 F.3d 88, 104 (3d Cir. 1993)* (district court must render judgment that makes jury's answers consistent if such construction is possible).

(n64)Footnote 42. *United States v. $9,041,598.68, 163 F.3d 238, 249 (5th Cir. 1998) .*

(n65)Footnote 43. *Gaia Techs. Inc. v. Recycled Prods. Corp., 175 F.3d 365, 371 (5th Cir. 1999)* (district court not permitted to reform jury's decision on issues submitted to jury on special verdict, and thus could not hold individual defendants liable on state law claims of tortious interference with prospective contractual relations and misappropriation of trade secrets, when jury had expressly found that plaintiff failed to prove any elements of those claims as to the individual defendants).

(n66)Footnote 44. *Riley v. K Mart Corp., 864 F.2d 1049, 1054-1055 (3d Cir. 1988) .*

(n67)Footnote 45. *Putnam Resources v. Pateman, 958 F.2d 448, 455 (1st Cir. 1992) .*

(n68)Footnote 46. *McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1311-1312 (2d Cir. 1993)* (when considering district court's reconciliation of inconsistent verdicts, appellate court must review record completely).

(n69)Footnote 47. *Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) .*

(n70)Footnote 48. *Cutlass Prods., Inc. v. Bregman, 682 F.2d 323, 330 (2d Cir. 1982)* (while holding that trial court abused its discretion and prejudiced defendants by not supplying special interrogatories to counsel prior to summation, appellate court noted that decision to provide special interrogatories before summation is generally "within a district court's broad discretion").

(n71)Footnote 49. *Watkins v. Fibreboard Corp., 994 F.2d 253, 257-258 (5th Cir. 1993)* (causation found by court in accordance with special verdict even though omitted in questions submitted to jury; ability of a court to fill in gap consistent with jury's findings is essential to viability of modern special verdict).

(n72)Footnote 50. *Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 190 (4th Cir. 1994)* .

(n73)Footnote 51. *Quaker City Gear Works Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)* .

(n74)Footnote 52. *Simms v. Village of Albion, 115 F.3d 1098, 1105-1106 (2d Cir. 1997)* (jury's failure to answer one interrogatory was inconsequential based on its answers to five other interrogatories and judge's prior legal rulings on summary judgment motion).

(n75)Footnote 53. *Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 965 (3d Cir. 1988)* (new trial ordered where interrogatories omitted reference to individual defendant, which effectively deprived defendant of jury trial).

(n76)Footnote 54. *Taherzadeh v. Clements, 781 F.2d 1093, 1100 (5th Cir. 1986)* (trial court's findings that defendants were not liable for conversion is reviewable under clearly erroneous standard).

(n77)Footnote 55. *Fed. R. Civ. P. 49(a)(3).*

(n78)Footnote 56. *Union Planters Nat'l Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1188 (6th Cir.)* , *cert. denied, 454 U.S. 1124 (1981)* (because issue of common-law fraud was not raised by pleadings or evidence, it could not be "omitted" from special verdict).

(n79)Footnote 56.1. *Ramos v. Davis & Geck, Inc., 224 F.3d 30, 32-33 (1st Cir. 2000)* .

(n80)Footnote 57. *Matei v. Cessna Aircraft Co., 35 F.3d 1142, 1144-1146 (7th Cir. 1994)* (substantive objections to interrogatories were waived where not raised in trial court); *Bradway v. Gonzales, 26 F.3d 313, 316-318 (2d Cir. 1994)* (general objection to fact that interrogatories were to be submitted was insufficient to preserve substantive objections to interrogatories, and objections deemed waived).

(n81)Footnote 58. *Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 641 (11th Cir. 1984)* (when plaintiff's proposed special verdict questions were rejected, it was sufficient to preserve objection for appeal that plaintiff objected to joint special verdict form as lacking elements of all causes of action).

(n82)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 49.20* et seq. (Matthew Bender 3d ed.).

(n83)Footnote 1. *Fed. R. Civ. P. 49(b)(1).*

(n84)Footnote 2. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* ; *Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 1561-1562 (Fed. Cir.)* , *cert. denied, 488 U.S. 850 (1988)* .

(n85)Footnote 3. *Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1098 (11th Cir. 1983)* (when general verdict is utilized in multiple issue action, appellee bears burden of supporting each theory of liability submitted to jury).

(n86)Footnote 4. *Austin-Westshore Constr. Co., Inc. v. Federated Dep't Stores, Inc., 934 F.2d 1217, 1220 (11th Cir. 1991)* (special interrogatories allow court and parties insight into jury's reasoning in reaching its verdict).

(n87)Footnote 5. *Allen Organ Co. v. Kimball Int., Inc., 839 F.2d 1556, 1562 (Fed. Cir.)* , *cert. denied, 488 U.S. 850 (1988)* .

(n88)Footnote 6. *Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515-1516 (Fed. Cir.)* , *cert. denied, 469 U.S. 871 (1984)* .

(n89)Footnote 7. *Bills v. Aseltine, 52 F.3d 596, 604-605 (6th Cir.)* , *cert. denied, 516 U.S. 865 (1995)* (interrogatory answers constituted special interrogatory answers under Rule 49(b) rather than special verdicts under Rule 49(a).

(n90)Footnote 8. *Manes v. Metro N.C. Railroad, 801 F. Supp. 954, 957 (D. Conn. 1992)* .

(n91)Footnote 9. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520-1522 (6th Cir. 1990)* .

(n92)Footnote 10. *Lavoie v. Pacific Press, 975 F.2d 48, 53 (2d Cir. 1992)* (distinction between these two types of verdict forms is that under Rule 49(a), jury answers primarily factual questions for benefit of trial court; which then applies law to those answers; under Rule 49(b), jury is fully instructed, and after answering interrogatories, renders general verdict and trial court enters judgment on jury's verdict.").

(n93)Footnote 11. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1521 (6th Cir. 1990)* .

(n94)Footnote 12. *Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir.)* , *cert. denied, 516 U.S. 865 (1995)* (when special verdicts are involved, jury's sole function is to determine facts; therefore, neither instruction on law nor summary concerning their role in relation to law was necessary).

(n95)Footnote 13. *Lavoie v. Pacific Press, 975 F.2d 48, 53 (2d Cir. 1992)* (Rule 49 distinguished by use of general verdict as well as special questions to jury).

(n96)Footnote 14. *See* [4] *below*.

(n97)Footnote 15. *Moody v. FMC Corp., 995 F.2d 63, 66 (5th Cir. 1993)* .

(n98)Footnote 16. *Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir.)* , *cert. denied, 516 U.S. 865 (1995)* (content and form of any interrogatories trial court chooses to submit is within discretion of trial court).

(n99)Footnote 17. *Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555* (lst Cir. 1994) (number); *Piper v. Goodwin, 20 F.3d 216, 221 (6th Cir. 1994)* (although wording of interrogatory could have been better, submission of interrogatory upheld when jury was not misled).

(n100)Footnote 18. *Lummus Indus., Inc. v. D.M. & E. Corp., 862 F.2d 267, 272 (Fed. Cir. 1988)* .

(n101)Footnote 19. *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* (counsel should be notified in advance so that they may determine all issues that must be submitted, prepare requested charges and plan effective closing argument).

(n102)Footnote 20. *Fed. R. Civ. P. 49(b)(2)(B)*.

(n103)Footnote 21. *Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259, 1267 (8th Cir. 1994)* , *cert. denied, 513 U.S. 989 (1994)* .

(n104)Footnote 22. *See Fed. R. Civ. P. 49(b)(1)*.

(n105)Footnote 22.1. *Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 535 (5th Cir. 1974)* .

(n106)Footnote 23. *Reorganized Church of Jesus Christ of Latter Day Saints v. United States Gypsum Co., 882 F.2d 335, 338 (8th Cir. 1989)* (defendant waived right to object to verdict form by failing to raise objection before trial

court).

(n107)Footnote 24. *See Fed. R. Civ. P. 49(b)(2).*

(n108)Footnote 25. *See Fed. R. Civ. P. 49(b)(4).*

(n109)Footnote 26. *White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.) , cert. denied, 493 U.S. 964 (1989)* ; *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416, 1422-1423 (10th Cir.) , cert. denied, 479 U.S. 1007 (1986)* ; *Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982) , aff'd on other grounds, 462 U.S. 650 (1983) .*

(n110)Footnote 27. *White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.) , cert. denied, 493 U.S. 964 (1989)* (purpose of rule is to promote efficiency by allowing original jury to reconcile inconsistencies without need for another presentation of evidence before new trier of fact).

(n111)Footnote 28. *Strauss v. Stratojac Corp., 810 F.2d 679, 683 (7th Cir. 1987) .*

(n112)Footnote 29. *Grosvenor Properties, Ltd. v. Southmark Corp., 896 F.2d 1149, 1151 (9th Cir. 1990) .*

(n113)Footnote 30. *Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1354 (9th Cir. 1987) .*

(n114)Footnote 31. *See Fed. R. Civ. P. 49(b)(2).*

(n115)Footnote 32. *See Fed. R. Civ. P. 49(b)(3)(A).*

(n116)Footnote 33. *See Fed. R. Civ. P. 49(b)(3)(B).*

(n117)Footnote 34. *See Fed. R. Civ. P. 49(b)(3)(C).*

(n118)Footnote 34.1. *See Fed. R. Civ. P. 49(b)(3)(A).*

(n119)Footnote 35. *Cool Light Co. v. GTE Prods. Corp., 973 F.2d 31, 34 (1st Cir. 1992) , cert. denied, 507 U.S. 973 (1993) .*

(n120)Footnote 36. *White v. Grinfas, 809 F.2d 1157, 1161 (5th Cir. 1987))* (affirming district court's reconciliation of general verdict and special interrogatory answers in action for breach of implied warranty and fraud.

(n121)Footnote 36.1. *See Fed. R. Civ. P. 49(b)(3)(B).*

(n122)Footnote 37. *Rowe Int., Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981)* (district court did not err in sending jury back for further deliberations to correct inconsistency in its verdict).

(n123)Footnote 38. *McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 596 (3d Cir. 1986) .*

(n124)Footnote 39. *Brode v. Cohn, 966 F.2d 1237, 1239 (8th Cir. 1992)* (court suggested that plaintiff may have waived right to new trial by failing either to object to inconsistencies between verdicts and interrogatories or to move for resubmission of inconsistent verdict).

(n125)Footnote 39.1. *See Fed. R. Civ. P. 49(b)(3)(C).*

(n126)Footnote 40. *MacQuarrie v. Howard Johnson Co., 877 F.2d 126, 131 (1st Cir. 1989) .*

(n127)Footnote 41. *Atlantic Tubing & Rubber Co. v. International Engraving Co., 528 F.2d 1272, 1276 (1st Cir. 1976) .*

(n128)Footnote 42. *Cool Light Co. v. GTE Prods. Corp., 973 F.2d 31, 35-36 (1st Cir. 1992)* .

(n129)Footnote 43. *Harvey v. General Motors Corp., 873 F.2d 1343, 1348 (10th Cir. 1989)* (motion for new trial properly denied when court could have reconciled verdict of no damages with answers to interrogatories that found defective design in vehicle and defendant's negligence).

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 22 Trial by Jury
PART III. CONDUCT OF JURY TRIAL

3-22 Moore's Manual--Federal Practice and Procedure § 22.71

§ 22.71 Judgment As Matter of Lawn*

[1] Nature of Judgment as Matter of Law

[a] Purpose and Use of Judgment as Matter of Law

A "judgment as a matter of law" is a judgment that a trial court has discretion to enter in favor of either party to a civil jury trial when the opposition party has failed to make a sufficient showing of an essential element of a case to which the opposition party has the burden of proof. Rule 50 specifies the procedural requirements for challenging the sufficiency of the evidence in a jury trial, and establishes two stages for such challenges: n1 prior to submission of the case to the jury, and after the verdict and entry of judgment. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to submission of the case to the jury and authorizes a district court to grant such motions at the court's discretion. n2 If the Rule 50(a) motion is not granted, and the jury subsequently decides against that party, the party may renew its motion for a judgment as a matter of law pursuant to Rule 50(b). n2.1 The Rule 50(a) motion is referred to as a preverdict motion for judgment as a matter of law, and the Rule 50(b) motion is referred to as postverdict motion for judgment as a matter of law. n2.2 Under former terminology, these were a motion for directed verdict and a motion for judgment notwithstanding the verdict (JNOV), respectively. n2.3 By its terms, Rule 50 only applies to jury trials, and therefore does not apply to cases tried to the court or cases involving merely advisory juries. n3 A judgment as a matter of law may be rendered for or against any party, regardless of which party submits the motion. n4 Furthermore, a court may grant a judgment as a matter of law on its own initiative. n5

[b] Judgment as Matter of Law Compared With Judgment on Partial Findings

A motion for a judgment as a matter of law differs from a motion for a judgment on partial findings, although the purpose of both motions is to challenge the merits of the opponent's case. First, while a motion for judgment as a matter of law applies only in cases involving a jury, a motion for judgment on partial findings is applicable only in cases which do not involve juries. n6 The second major difference is that, unlike a motion for a judgment as a matter of law, a judge reviewing a motion for a judgment on partial findings may assess the credibility of witnesses and weigh the merits of the evidence presented at trial. n7

[c] Judgment as Matter of Law Compared With Grant of New Trial

A motion for judgment as a matter of law differs from a motion for a new trial. The primary distinction between the two motions is that if a motion for a judgment as a matter of law is granted, a decision is made in favor of one party and the action ceases, while the granting of a motion for a new trial merely discards the decision in the previous trial and restarts the trial process. n7.1

There are other distinctions. A court assessing a motion for a new trial may weigh the evidence presented at trial and judge the credibility of trial witnesses, and need not view it in the light most favorable to the verdict winner. n8 In contrast, a judge ruling on a motion for judgment as a matter of law may not weigh the evidence presented at trial or judge the credibility of trial witnesses. n9 Furthermore, because its consequences are more severe, the standard for granting judgment as a matter of law is more stringent than the applicable standard for granting a motion for new trial. n9.1

Judgment as a matter of law may be granted only when no reasonable jury could find for the nonmovant, but a motion for new trial may be granted as long as the judge has the firm conviction that the verdict is incorrect. n10 Furthermore, courts assessing new trial motions need not view the evidence in the light most favorable to the verdict winner or afford that party the benefit of all reasonable inferences that the jury might have drawn in its favor from the evidence, as is required for motions for judgment as a matter of law. n11 Consequently, when a party moves jointly under *Federal Rules of Civil Procedure 50(b)* and *59(a)*, the court must rule separately on each motion. n12

[d] Judgment as Matter of Law Compared With Summary Judgment

The standard for assessing a motion for judgment as a matter of law is the same as the standard for a motion for summary judgment: n12.1 whether the evidence adduced at trial could lead a reasonable fact-finder to only one conclusion. n13 However, while a motion for summary judgment is a mechanism for a party to obtain a pre-trial dismissal of an action, a motion for judgment as a matter of law is a mechanism for the court to enter a judgment after evidence has been presented, when it is apparent that either party is unable to carry a burden of proof required of that party. n14 Thus, when considering either a motion for judgment as a matter of law or a summary judgment motion, the court must review all of the evidence in the record and must draw all reasonable inferences in favor of the nonmoving party, but must make no credibility determinations or weigh any evidence, because such determinations are for the jury and not the court. Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. n15

[2] Grounds for Grant of Judgment As Matter of Law

[a] Basis for Grant of Judgment

A court may enter a judgment as a matter of law only if there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue. n1 In its consideration of a motion for judgment as a matter of law, the court should review all of the evidence in the record, n1.1 but, in doing so, must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. The court must disregard all evidence favorable to the moving party that the jury is not required to believe. This means that the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses. n1.2 Therefore, a court may render a judgment as a matter of law if a party fails to present any evidence on a material issue, n2 and it is generally held that a mere scintilla of evidence is insufficient to present a question for the jury. n3 Additionally, a court may render judgment as a matter of law if at the time a motion is presented there is no material issue of fact that could be submitted to a jury because no reasonable jurors could differ about the outcome. n4 Essentially, a court may grant a motion for judgment as a matter of law if it determines that a reasonable jury could draw inferences from the evidence to support a finding in favor only of one party. n5

On the other hand, if reasonable jurors could differ as to the inferences that may be drawn from the evidence adduced at trial, such a motion should be denied. n6 In order to counter a motion for judgment as a matter of law, the non-moving party must present sufficient evidence in support of a material issue. n7

[b] Considerations in Determination

When the trial court evaluates a motion for a judgment as a matter of law, the court must consider all of the evidence adduced at trial in a light most favorable to the party against whom the motion was made. n8 The trial court does not have the power to weigh evidence and must issue a ruling of law. n9

The court may not assess the credibility of witnesses, resolve conflicting evidence, or substitute its conclusions for that of the jury, because credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are functions of the jury rather than the judge. n9.1 The district court improperly invades the province of the jury when the court finds one witness' testimony more credible than others. For example, in one case, it was held that the trial court erred in disbelieving allegations in a witness' letter and drew inferences from facts when finding the letter false. Therefore, judgment as a matter of law was improper. n10

[c] Controlling Law in Motions for Judgment as Matter of Law

There is a conflict among the circuits on the issue of whether federal or state law governs the standard for judgments as a matter of law in diversity actions. Most circuits have expressly held that federal law controls motions for judgments as a matter of law in diversity actions. n11 These courts reason that the Rules Enabling Act, n12 provides that the Federal Rules of Civil Procedure supersede conflicting state law when the rules only incidentally impact on state substantive rights and that this result is necessary to the maintenance of the procedural integrity of the rules. n13

However, the Sixth and Eighth Circuits have held that state-law standards govern motions for judgment as a matter of law in diversity cases. n14 The Second Circuit has avoided the conflict by determining that state and federal standards are the same either in language or in application. As of present, the Supreme Court has not resolved the disagreement, indicating in the cases it has considered that state and federal laws essentially apply the same standard for motions for judgments as a matter of law. n15

[d] Losing Party in Judgment May Move for New Trial

When a judgment as a matter of law is rendered against a party, that party may file a motion for a new trial within 28 days of entry of the judgment. n16

A verdict winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment as a matter of law has been entered against the verdict winner. In arguing to the trial court in opposition to the motion for judgment as a matter of law, the verdict winner often will contend that he or she, at the least, is entitled to a new trial. The trial court then has a range of discretion to grant a new trial or, if the plaintiff won the verdict, to order a dismissal of the action without prejudice, or to grant judgment as a matter of law. n17

Rule 50(d) is a reminder that the verdict winner is entitled, even after entry of a judgment as a matter of law against him or her, to move for a new trial in the usual course, provided it is done within the 28-day time limit. n18 If in these circumstances the motion is granted, the judgment is superseded. n19

[3] Contents Required in Motion

A motion for judgment as a matter of law must be supported with specific law and facts used as a basis for the judgment. n1 Thus, at a minimum, the motion must identify the specific element that the party contends is insufficiently

supported. n2 The purposes of the specificity requirement are twofold: (1) to assure that the trial court has an adequate basis for its decision; and (2) to afford the adverse party the opportunity to correct any possible infirmities in the proof required. n3

If the purposes of the specificity requirement are otherwise satisfied, however, a party's failure to technically comply with the specificity requirement may be excused. n4 For example, lack of specificity may be excused when the court brings up the factual and legal details of the issue in the hearing on the motion, and all of the parties become aware of the issue. n5

The specificity requirement will also not be enforced on appeal if the opposition does not object in the trial court. For example, the defendant in one case moved at the close of plaintiff's case for a judgment as a matter of law on each of the plaintiff's claims, without further comment. After the verdict, the defendant sought to renew the motion, but the trial court denied it. On appeal, the plaintiff argued that the motion for judgment as a matter of law was deficient in that it failed to articulate the grounds with sufficient specificity. The defendant countered that although it did not identify the legal or factual basis for its motion the basis for the motion was known by the parties and court in that similar motions had been made before. The appellate court held that the plaintiff's objection was deemed waived and did not reach the issue of whether or not the defendant violated Rule 50(a)(2)'s specificity requirement. n6

[4] Time for Making Motion for Judgment As Matter of Law

[a] Preverdict Motion

A party may make a motion for judgment as a matter of law at any time prior to the submission of the case to the jury. n1 Furthermore, the party may make the motion at the conclusion of its opponent's case. n2 However, a court may not grant a judgment as a matter of law against a party that has not rested its case because such an action would prevent the non-moving party from presenting evidence that may be sufficient to establish a material issue of fact for the jury to assess. n3

When a party moves for judgment as a matter of law at the close of its opponent's case and the motion is denied, the party may proffer evidence in support of its own case. n4 In some instances, a trial court may defer issuing a ruling on a motion for judgment as a matter of law which was submitted at the close of one party's case until the close of all evidence because a court may wish to first hear all the evidence that each side intends to present at trial. n5

If the court does not grant a motion for judgment as a matter of law made prior to submission of the case to the jury, n6 the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. Consequently, the moving party may renew its motion for judgment as a matter of law by filing a motion after the entry of judgment. n7 Rule 49(b) has been amended to remove the previous requirement that a party had to renew a motion for judgment as a matter of law at the close of all evidence. n8

[b] Postverdict Renewal of Motion

[i] Renewal of Motion for Judgment as Matter of Law

If the court does not grant a "preverdict" motion for judgment as a matter of law made prior to submission of the case to the jury, n9 the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. Therefore, if it loses the jury verdict, the moving party may then renew its motion by filing a "postverdict" motion for judgment as a matter of law no later than 28 days after the entry of judgment or, if the motion pertains to a jury issue which was not decided by the verdict, no later than 28 days after the jury was discharged. n10 The moving party also has the option to move for a new trial under Rule 59. n11

Under the two-stage procedure of Rule 50 for challenges to the sufficiency of the evidence in a jury trial, if the Rule

50(a) preverdict motion is not granted, and the jury subsequently decides against that party, the party must renew its motion after the verdict by filing a postverdict motion pursuant to Rule 50(b). n11 However, a party that fails to make a preverdict motion for judgment as a matter of law may not file a post-verdict renewal motion. n12 Furthermore, if a party has not made a postverdict renewal motion under Rule 50(b), the circuit court of appeals may not review the trial court decision regarding the challenge to the sufficiency of the evidence. A postverdict motion is necessary to preserve appellate review because a determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the trial judge who saw and heard the witnesses and has the feel for the case, which no appellate printed transcript can provide. n13 The majority of courts hold that the grounds for the renewed motion are limited to those asserted in the earlier Rule 50(a) motion. In other words, the movant may not use a Rule 50(b) motion as a vehicle to introduce a legal theory not distinctly articulated in the motion for judgment as a matter of law at the close of evidence. n14 However, some circuits have held that an issue raised for the first time in a post-verdict motion is preserved for appellate review if the nonmoving party failed to argue in opposition to the motion that the moving party waived the right to raise the issue by not first raising it in a pre-verdict motion. n15

[ii] Alternative Request for New Trial

When a party makes a motion for judgment as a matter of law, the party may alternatively request a new trial or joinder of a motion for judgment as a matter of law and a motion for a new trial under Rule 59. n16 If a motion for a new trial is joined with a motion for a post-verdict judgment as a matter of law, both motions must be timely filed; timely filing one motion does not satisfy the filing requirement for the other motion. n17

[iii] Time for Renewed Motion

The moving party must renew its preverdict motion for judgment as a matter of law by filing a postverdict motion no later than 28 days after the entry of judgment or, if the motion pertains to a jury issue which was not decided by the verdict, no later than 28 days after the jury was discharged. n18 Rule 6 expressly prohibits the district court from extending the 28-day period to submit a renewed motion for judgment as a matter of law. n19 If a party fails to move for a post-verdict judgment as a matter of law in a timely fashion, it is precluded from seeking an appellate order to enter such a judgment. n20

[5] Ruling on Renewed Motion for Judgment as Matter of Law

In its determination of a renewed motion for judgment as a matter of law, the court may choose one of three options: (1) if the jury returned a verdict, the court may allow judgment on the verdict; n1 (2) the court may order a new trial; n2 or (3) the court may direct the entry of judgment as a matter of law. n3

A trial court may not grant judgment as a matter of law solely on the basis of an internal inconsistency in the jury's verdict. The appropriate remedy in that case is to order a new trial. n4 The standard for assessing whether to grant a new trial is broader and, in general, more lenient than the standard for evaluating a motion for a judgment as a matter of law. n5 However, a court may grant a motion for judgment as a matter of law and deny a motion for a new trial, because a denial of a motion for new trial does not automatically constitute an abuse of discretion when a judgment as a matter of law has been granted. n6

A court may grant a new trial if the jury's verdict clearly was against the evidence presented at trial, n7 although some circuits additionally require that the trial court also consider whether the verdict would effect a miscarriage of justice. n8 In ruling on a motion for judgment as a matter of law, the court must inquire whether there is a legally sufficient evidentiary basis for a reasonable jury to find for the opponent of the motion. n9 The court should not consider in making that decision any inadmissible evidence, because such evidence contributes nothing to a "legally sufficient evidentiary basis." n10 Furthermore, a court of appeals may order entry of judgment as a matter of law on sufficiency-of-the-evidence grounds without violating the *Seventh Amendment*. n11

[6] Effect of Joinder of Motion for Judgment as Matter of Law With Motion for New Trial

If a party has joined a renewed motion for a judgment as a matter of law with a motion for a new trial, n1 and the court grants the motion for judgment as a matter of law, the court must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial. n2 Such a conditional grant of the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders. n3

As noted above, if a moving party joins a renewed motion for judgment as a matter of law with a motion for a new trial, and the court grants the renewed motion for judgment as a matter of law, the court also must consider the motion for a new trial. n4 However, the ruling on a motion for a new trial is applicable only if the trial court's judgment was vacated or reversed. n5 The granting of a motion for a new trial does not affect the finality of the judgment. n6 If a motion for a new trial is granted and the judgment of the action is reversed on appeal, a new trial must commence unless otherwise ordered by the appellate court. n7

[7] Appellate Review Is De Novo and Applies Same Standards as Trial Court

[a] Standard of Review

A trial court's grant or denial of a motion for judgment as a matter of law made under Rule 50 is reviewed by the appellate court de novo, using the same standards as those to be employed by the trial court. n1 In conducting its appellate review, the circuit court determines whether there is (1) such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) such overwhelming evidence in favor of the movant that reasonable and fair-minded persons could not arrive at a verdict against the movant. n2

The appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. n3 Thus, when the jury has returned a verdict, the appellate court reviews the entire trial record and determines whether the evidence sufficiently supports the jury's verdict for the prevailing party. n4 However, a mere scintilla of evidence is not sufficient for the appellate court to uphold a jury verdict. n5

The appellate court must assume that the jury resolved all conflicts in favor of the prevailing party and assumes as proved all facts the prevailing party's evidence tended to prove. n6 The appellate court may not weigh conflicting evidence, judge the credibility of trial witnesses, or substitute its determination for that of the jury. n7

[b] Grounds for Reversal

An appellate court may reverse a denial of a motion for judgment as a matter of law only if it concludes that the trial court erred because the evidence adduced at trial supports a finding only in appellant's favor. n8 Therefore, the appellate court must reverse a district court ruling denying a motion for judgment as a matter of law if the evidence adduced at trial is insufficient for a reasonable juror to find in favor of the party against whom the motion was made. n9 On appeal of a denial of a motion for judgment as a matter of law, the appellate court reviews the evidence in the light most favorable to the prevailing party and resolves ambiguities in favor of the prevailing party. n10

To reverse a grant of a judgment as a matter of law, the circuit court must draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party, and then reverse only if no reasonable jury would have arrived at its verdict. n11 On the other hand, the circuit court must affirm a judgment as a matter of law under its de novo review only when all evidence points in one direction and is susceptible to no reasonable

interpretation supporting the jury verdict. n12

[c] Relief Provided by Appellate Court on Reversal

[i] Grant of Motion for New Trial

When the trial court denies a motion for judgment as a matter of law, the prevailing party as the appellee may assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may (1) order a new trial, (2) direct the trial court to determine whether a new trial should be granted, or (3) direct the entry of judgment. n13

The appellate court may find it particularly appropriate to grant appellee a new trial, rather than remand to the district court for that determination, when the new trial issues are ones with which the district court has no special skill or competence and a full record has been presented, as is common when the appeal is based on sufficiency of the evidence. n14 If the appellate court does not remand the case for a new trial after reversing the trial court, the appellee's failure to secure a remand for consideration of an alternative theory does not prohibit seeking a new trial from the district court on the alternative theory. n15

If the appellate court reverses the denial of a motion for judgment as a matter of law, in appropriate cases the appellate court may direct judgment for the appellant. n16 However, the relief available to the appellant from the appellate court is limited to the possible ordering of a new trial when the appellant has not strictly complied with the procedural requirements of Rule 50(b) and has made no post-trial motion for judgment as a matter of law or motion for a new trial. n17 This rule applies because the appellate court may not issue a ruling as a matter of law that contradicts the trial court's determination where the appellant did not first give the trial court an opportunity to correct its own error. n18

[ii] Directed Judgment or Dismissal by Court of Appeals

In appropriate cases, the appellate court may direct judgment against the appellee without permitting the appellee to seek a new trial from the district court. n19 For example, a court of appeals may properly enter judgment when the appellant shows a defect in subject matter jurisdiction or entitlement on a dispositive issue of law. The court may enter judgment even when the appeal is based on the sufficiency of the evidence, particularly when the appellee suggests no grounds for a new trial either on appeal or on a petition for rehearing. n20 Thus, the court of appeals may enter judgment as matter of law for the verdict loser on appeal, either when the plaintiff failed to produce enough evidence to warrant a jury verdict or when proof introduced at trial became insufficient because the court of appeals determined that certain evidence should not have been admitted and that the remaining, properly admitted evidence was insufficient to even submit the case to the jury. n21

On the other hand, the appellate court may not direct judgment for the appellant when the appellant has not strictly complied with the procedural requirements of Rule 50(b). It may not direct judgment against the appellee when the record reveals a new trial issue that has not been resolved, such as an alternative theory of liability that had not been particularly decided by the jury. n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice, § 50.02* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 50(a).*

(n4)Footnote 2.1. *See Fed. R. Civ. P. 50(b).*

(n5)Footnote 2.2. *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)* .

(n6)Footnote 2.3. *Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1093 n.1 (3d Cir. 1995)* . Note that some of the opinions in cases cited in this section may use the former terminology, and some courts still use that terminology.

(n7)Footnote 3. *Schlitt v. Florida, 749 F.2d 1482, 1482-1483 (11th Cir. 1985)* .

(n8)Footnote 4. *Fed. R. Civ. P. 50(a)(1)*, Advisory Committee Note to 1993 Amendments.

(n9)Footnote 5. *Norton v. Snapper Power Equip., Div. of Fuqua Indus., 806 F.2d 1545, 1547 (11th Cir.)* (district court properly entered judgment notwithstanding verdict even though losing party did not enter specific motion).

(n10)Footnote 6. *Compare Fed R. Civ. P. 50(a) with Fed. R. Civ. P. 52(c).*

(n11)Footnote 7. *Cox v. C.H. Masland & Sons, Inc. 607 F.2d 138, 144 fn.8 (5th Cir. 1979)* .

(n12)Footnote 7.1. *See Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 173-182 (5th Cir. 2005)* .

(n13)Footnote 8. *Song v. Ives Labs., 957 F.2d 1041, 1047 (2d Cir. 1992)* ; *Poynter v. Ratcliff, 874 F.2d 219, 222-223 (4th Cir. 1989)* ; *Peterson v. County of Nassau, 995 F. Supp. 305, 318 (E.D.N.Y. 1998)* .

(n14)Footnote 9. *Caruso v. Forslund, 47 F.3d 27, 32 (2d Cir. 1995)* (court may not rule on witness credibility or weight of evidence when ruling on Rule 50 motion).

(n15)Footnote 9.1. *See Kelly v. Armstrong, 206 F.3d 794, 797-798 (8th Cir. 2000)* .

(n16)Footnote 10. *In re Asbestos Litig., 986 F. Supp. 761, 765 (S.D.N.Y. 1997)* (standard for judgment as a matter of law more stringent than standard for new trial).

(n17)Footnote 11. *Holzapfel v. Town of Newburgh, 950 F. Supp. 1267, 1272 (S.D.N.Y. 1997)* , *rev'd in part on other grounds, 145 F.3d 516 (2d Cir. 1998)* .

(n18)Footnote 12. *In re Asbestos Litig., 986 F. Supp. 761, 765 (S.D.N.Y. 1997)* ; *see Fed. R. Civ. P. 50(b), 59(a).*

(n19)Footnote 12.1. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253-257, 106 S. Ct. 2505, 2513-2514, 91 L. Ed. 2d 202, 214-217 (1986)* ; *see McSherry v. City of Long Beach, 423 F.3d 1015, 1020 (9th Cir. 2005)* (standard is essentially identical to summary judgment standard).

(n20)Footnote 13. *Save Our Health Org. v. Recomp of Minn., Inc., 37 F.3d 1334, 1336-1337 (8th Cir. 1994)* .

(n21)Footnote 14. *McSherry v. City of Long Beach, 423 F.3d 1015, 1019-1020 (9th Cir. 2005)* .

(n22)Footnote 15. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-151, 120 S. Ct. 2097, 147 L.*

Ed. 2d 105 (2000) (standard for granting summary judgment "mirrors" standard for judgment as matter of law, such that inquiry under each motion is same); *see* [2][a], *below*.

(n23)Footnote 1. *Fed. R. Civ. P. 50(a)(1)*.

(n24)Footnote 1.1. *See* [b], *below*.

(n25)Footnote 1.2. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151-152, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* (defendant was not entitled to judgment as matter of law in age discrimination case, because in addition to establishing prima facie case of discrimination and creating jury issue as to falsity of employer's explanation, plaintiff introduced additional evidence that his superior was motivated by age-based animus, and was principally responsible for discharge of plaintiff).

(n26)Footnote 2. *Daniel J. Hartwig Assoc., Inc. v. Kanner, 913 F.2d 1213, 1221 (7th Cir. 1990)* (district court correctly directed verdict in plaintiff's favor because defendant failed to present any evidence to support claim).

(n27)Footnote 3. *Gaia Techs. Inc. v. Recycled Prods. Corp., 175 F.3d 365, 374-375 (5th Cir. 1999)* (there must be conflict in substantial evidence to create jury question, and consequently, mere scintilla of evidence is insufficient to present question for jury); *La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1984)* (mere scintilla of evidence is insufficient to present question for jury).

(n28)Footnote 4. *Falco Lime v. Tide Towing Co., 29 F.3d 362, 365-366 (8th Cir. 1994)* (judgment as matter of law properly granted because no unresolved questions of fact remained).

(n29)Footnote 5. *Burch v. Coca-Cola Co., 119 F.3d 305, 314-317 (5th Cir. 1997) , cert. denied, 522 U.S. 1084 (1998)* (in action with jury verdict for plaintiff for violation of Americans With Disabilities Act, appellate court reversed denial of judgment as matter of law because insufficient evidence to support jury finding that plaintiff was qualified individual with disability and that he requested reasonable accommodation from employer); *Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613-614 (3d Cir. 1995)* (judgment as matter of law properly granted on contract claim because contract unambiguous and thus, no reasonable jury could find liability).

(n30)Footnote 6. *Shetterly v. Raymark Indus., Inc. 117 F.3d 776, 781 (4th Cir. 1997)* (reversing judgment as matter of law at close of plaintiffs' evidence because jury could have found that defendant's asbestos cloth was substantial factor in plaintiffs' injuries, when evidence was taken in light most favorable to plaintiffs); *GNB Battery Techs., Inc. v. Exide Corp., 876 F. Supp. 582 (D. Del. 1995)* (in patent infringement action, motion for judgment as matter of law, reviewing court must apply reasonable jury standard).

(n31)Footnote 7. *See Bond v. Morton Bldgs., Inc., 815 F. Supp. 944, 945-946 (S.D. W. Va. 1993)* (judgment as matter of law granted because court could not allow jury to speculate and evidence presented was insufficient).

(n32)Footnote 8. *Information Commun. Corp. v. Unisys Corp., 181 F.3d 629, 632-633 (5th Cir. 1999)* (in ruling on motion for judgment as matter of law based on sufficiency of evidence, Court of Appeals considers all of evidence, not just that evidence which supports the non-mover's case); *Focus Inv. Assocs. v. American Title Ins. Co., 992 F.2d 1231, 1235-1237 (1st Cir. 1993)* (motion for judgment as matter of law properly granted in negligence in title searching action because no duty to search title existed).

(n33)Footnote 9. *Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994)* (district court properly granted judgment as matter of law in assault claim because jury could not reasonably find that assault occurred under color of state law).

(n34)Footnote 9.1. *See Miller v. Auto. Club of New Mexico, Inc., 420 F.3d 1098, 1131 (10th Cir. 2005)* .

(n35)Footnote 10. *Payne v. Milwaukee County, 146 F.3d 430, 433 (7th Cir. 1998)* (when case turns on credibility, neither side is entitled to judgment as matter of law unless objective evidence shows that it would be unreasonable to believe critical witness for one side).

(n36)Footnote 11. *Deimer v. Cincinnati Sub-Zero Prods., 58 F.3d 341, 343 (7th Cir. 1995)* ; *Romero v. International Harvester Co., 979 F.2d 1444, 1448-1449 (10th Cir. 1992)* ; *Mattison v. Dallas Carrier Corp., 947 F.2d 95, 107 (4th Cir. 1991)* ; *Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1448 (11th Cir. 1991)* .

(n37)Footnote 12. *28 U.S.C. § 2072*.

(n38)Footnote 13. *Burlington Northern R.R. v. Woods, 480 U.S. 1987)* .

(n39)Footnote 14. *Morris v. Union Pac. R.R., 373 F.3d 896, 899 (8th Cir. 2004)* ; *Preceptron, Inc. v. Sensor Adaptive Machines, Inc., 221 F.3d 913, 918 (6th Cir. 2000)* .

(n40)Footnote 15. *See, e.g., Mercer v. Theriot, 377 U.S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964)* (Supreme Court found evidence was sufficient under any standard that could possibly be applied, whether state or federal); *see also Weisgram v. Marley Co., 528 U.S. 440, 448-449, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* (in diversity case, Supreme Court did not discuss whether state or federal standard should apply).

(n41)Footnote 16. *Fed. R. Civ. P. 50(d)*.

(n42)Footnote 17. *See Weisgram v. Marley Co., 528 U.S. 440, 451-452, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* ; *Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 218, 67 S. Ct. 755, 91 L. Ed. 849 (1947)* .

(n43)Footnote 18. *Fed. R. Civ. P. 50(d)*.

(n44)Footnote 19. *Fed. R. Civ. P. 50*, Committee Note to 1963 Amendment.

(n45)Footnote 1. *Fed. R. Civ. P. 50(a)(2)*; *see Lightning Lube v. Witco Corp., 4 F.3d 1153, 1173 (3d Cir. 1993)* (motion for judgment as matter of law must be preceded by motion sufficiently specific to afford opposing party opportunity to cure defects in proof).

(n46)Footnote 2. *Wimmer v. Suffolk County Police Dep't, 176 F.3d 125, 136 (2d Cir. 1999)* (in motion in § 1983 discrimination employment discharge case, defense motion clearly stated that plaintiff had failed to satisfy first element of a prima facie case of retaliation).

(n47)Footnote 3. *Gordon v. County of Rockland, 110 F.3d 886, 887 n.2 (2d Cir. 1997)* , *cert. denied, 522 U.S. 820 (1997)* (citing **Moore's Federal Practice** for purposes of specificity requirement); *see Atchley v. The Nordam Group, Inc., 180 F.3d 1143, 1147-1148 (10th Cir. 1999)* .

(n48)Footnote 4. *Junker v. Eddings, 396 F.3d 1359, 1363 (Fed. Cir. 2005)* (citing **Moore's Federal Practice**).

(n49)Footnote 5. *Gordon v. County of Rockland, 110 F.3d 886, 887 n.2 (2d Cir. 1997)* , *cert. denied, 522 U.S. 820 (1997)* .

(n50)Footnote 6. *Marfia v. T.C. Ziraat Bankasi, 147 F.3d 83, 87 (2d Cir. 1998)* (argument that Rule 50 motion must be articulated with sufficient specificity is waived on appeal absent objection in district court).

(n51)Footnote 1. *Fed. R. Civ. P. 50(a)(2)*.

(n52)Footnote 2. *Fed. R. Civ. P. 50(a)(2)*; *see Pro Football Weekly, Inc. v. Gannett Co., 988 F.2d 723, 725-726 (7th Cir. 1993)* ; *see also Nobelpharma AB v. Implant Innovations, Inc. 141 F.3d 1059, 1065 (Fed. Cir. 1998)* (court

could enter judgment as matter of law against plaintiff at conclusion of plaintiff's case, even though defendant had burden of proof on affirmative defense, when admission by plaintiff's witness was sufficient proof on that issue).

(n53)Footnote 3. *McSherry v. City of Long Beach, 423 F.3d 1015, 1020-1021 (9th Cir. 2005)* .

(n54)Footnote 4. *International Union, United Auto. v. Mack Trucks, Inc., 917 F.2d 107, 110-111 (3d Cir. 1990)* , *cert. denied, 499 U.S. 921 (1991)* (defendant maintained right to present case following its motion for directed verdict).

(n55)Footnote 5. *Kelley Metal Trading Co. v. Al-Jon/United, 877 F. Supp. 1478, 1483-1484 (D. Kan. 1995)* (although plaintiff claimed that delay would confuse jury, court did not err by deferring ruling on motion for judgment as matter of law until after close of all evidence).

(n56)Footnote 6. *See Fed. R. Civ. P. 50(a)*.

(n57)Footnote 7. *See Fed. R. Civ. P. 50(b)*; *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974, 982-983 (2006)* (Rule 50 establishes two stages for challenges to sufficiency of evidence in jury trial and specifies procedural requirements for each stage); *see also* [b], *below*.

(n58)Footnote 8. *See Fed. R. Civ. P. 50(b)*, Committee Note to 2006 Amendments.

(n59)Footnote 9. *See Fed. R. Civ. P. 50(a)*; [a], *above*.

(n60)Footnote 10. *Fed. R. Civ. P. 50(b)*.

(n61)Footnote 11. *See Fed. R. Civ. P. 50(b)*; *Fed. R. Civ. P. 59(b)*; *see also* [ii], *below*.

(n62)Footnote 11. *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974, 982-984 (2006)* .

(n63)Footnote 12. *Jackson v. City of Cookeville, 31 F.3d 1354, 1357-1358 (6th Cir. 1994)* .

(n64)Footnote 13. *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974, 986-987 (2006)* .

(n65)Footnote 14. *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co., 381 F.3d 811, 821 (8th Cir. 2004)* (citing **Moore's Federal Practice**).

(n66)Footnote 15. *See, e.g., Thompson & Wallace, Inc. v. Falconwood Corp., 100 F.3d 429, 435 (5th Cir. 1996)* ; *Gibeau v. Nellis, 18 F.3d 107, 109 (2d Cir. 1994)* .

(n67)Footnote 16. *Fed. R. Civ. P. 50(b)*; *see Fed. R. Civ. P. 59(a)*; *see, e.g., Information Commun. Corp. v. Unisys Corp., 181 F.3d 629, 631 (5th Cir. 1999)* (in breach of contract case, after verdict in favor of plaintiff in amount of $2.7 million defendant moved for judgment as matter of law or, alternatively, for remittitur of damage award.).

(n68)Footnote 17. *Bass v. Spitz, 522 F. Supp. 1343, 1346-1347 (E.D. Mich. 1981)* .

(n69)Footnote 18. *Fed. R. Civ. P. 50(b)*, *59(b)*.

(n70)Footnote 19. *Fed. R. Civ. P. 6(b)(2)*.

(n71)Footnote 20. *United States v. Valdosta-Lowndes County Hospital Auth., 696 F.2d 911, 912-913 (11th Cir. 1983)* .

(n72)Footnote 1. *Fed. R. Civ. P. 50(b)(1)*.

(n73)Footnote 2. *Fed. R. Civ. P. 50(b)(2)*; *see Quintel Corp., N.V. v. Citibank, 606 F. Supp. 898, 905-906 (S.D.N.Y. 1985)* (new trial may be granted in interests of justice when judgment as legal matter is not warranted under circumstances of case).

(n74)Footnote 3. *Fed. R. Civ. P. 50(b)(3)*.

(n75)Footnote 4. *Mosley v. Wilson, 102 F.3d 85, 89-91 (3d Cir. 1996)* .

(n76)Footnote 5. *Lang v. Birch Shipping Co., 523 F. Supp. 1112, 1114 (S.D.N.Y. 1981)* (new trial may be granted if verdict against weight of evidence while judgment as matter of law requires legal conclusion that moving party entitled to judgment regardless of witness credibility).

(n77)Footnote 6. *Stone v. First Wyoming Bank, N.A., 625 F.2d 332, 350-351 (10th Cir. 1980)* .

(n78)Footnote 7. *United States v. Tobias, 899 F.2d 1375, 1380-1381 (4th Cir. 1990)* (order granting new trial vacated because district court did not justify decision and record revealed no reason to justify it).

(n79)Footnote 8. *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co., 308 F.3d 1167, 1185 (Fed. Cir. 2002)* (applying 3d Circuit precedent); *Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1075-1076 (3d Cir. 1996)* , *cert. denied, 521 U.S. 1129 (1997)* .

(n80)Footnote 9. *Fed. R. Civ. P. 50(a)(1)*.

(n81)Footnote 10. *Weisgram v. Marley Co., 528 U.S. 440, 453, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* .

(n82)Footnote 11. *Weisgram v. Marley Co., 528 U.S. 440, 454-456, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* (court of appeals did not abuse its discretion by directing entry of judgment for verdict loser, rather than remanding case to district court for new trial, when, after holding verdict winner's expert testimony inadmissible, court found properly admitted evidence insufficient to support verdict).

(n83)Footnote 1. *See* [4][b][ii], *above*.

(n84)Footnote 2. *Fed. R. Civ. P. 50(c)(1)*.

(n85)Footnote 3. *Fed. R. Civ. P. 50(c)(2)*; *see* [7], *below*.

(n86)Footnote 4. *Fed. R. Civ. P. 50(c)*.

(n87)Footnote 5. *Fed. R. Civ. P. 50(c)(1)*; *Gilbrook v. City of Westminster; 177 F.3d 839, 852 (9th Cir. 1999)* (in this civil rights case, district court entered judgment as matter of law in favor of defendants on plaintiffs' equal protection claims, but conditionally granted new trial on ground that it had given jury erroneous instruction on equal protection claim.).

(n88)Footnote 6. *Fed. R. Civ. P. 50(c)*; *see Cook v. Carolina Freight Carriers Corp., 867 F.2d 1266, 1267-1268 (11th Cir. 1989)* (grant of new trial in civil case ordinarily appealable only after verdict in new trial).

(n89)Footnote 7. *Fed. R. Civ. P. 50(c)(1)*.

(n90)Footnote 1. *King v. Ames, 179 F.3d 370, 373 (5th Cir. 1999)* .

(n91)Footnote 2. *Weisgram v. Marley Co., 528 U.S. 440, 454, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* .

(n92)Footnote 3. *Shetterly v. Raymark Indus., Inc., 117 F.3d 776, 781 (4th Cir. 1997)* (reversing directed verdict at close of plaintiffs' evidence on claims of asbestos-related personal injuries).

(n93)Footnote 4. *Advantor Capital Corp. v. Yeary, 136 F.3d 1259, 1263 (10th Cir. 1998)* .

(n94)Footnote 5. *Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1310 (11th Cir. 1998)* (nonmoving party must provide more than scintilla of evidence to survive motion for judgment as matter of law; substantial conflict in evidence to support jury question required).

(n95)Footnote 6. *Vetter v. Farmland Indus., Inc., 120 F.3d 749, 751-752 (8th Cir. 1997)* (trial court erred in granting judgment as matter of law to plaintiff following jury verdict because evidence conflicted and prevailing party's evidence was sufficient to support verdict).

(n96)Footnote 7. *Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1310 (11th Cir. 1998)* (court may not weigh evidence or decide credibility of witnesses).

(n97)Footnote 8. *Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1363-1365 (10th Cir. 1994)* (district court correctly denied plaintiff's Rule 50 motion in age discrimination action).

(n98)Footnote 9. *See, e.g., Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1098-1099 (3d Cir.)* , *cert. denied, 450 U.S. 981 (1980)* (district court erred by not granting judgment as matter of law because record insufficient as matter of law to support verdict in favor of plaintiff).

(n99)Footnote 10. *De Kwiatkowski v. Bear, Stearns & Co., Inc., 306 F.3d 1293, 1296 (2d Cir. 2002)* .

(n100)Footnote 11. *Cozzo v. Tangipahoa Parish Council, 279 F.3d 273, 280 (5th Cir. 2002)* ; *Union Oil Co. v. Atlantic Richfield Co., 208 F.3d 989, 994 (Fed. Cir. 2000)* , *cert. denied, 531 U.S. 1183 (2001)* (under required de novo standard of review, circuit court will reverse grant of judgment as a matter of law only if, after considering evidence in light most favorable to nonmoving party, it finds that reasonable persons could not reach verdict returned by jury).

(n101)Footnote 12. *Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1194-1195 (8th Cir. 2000)* .

(n102)Footnote 13. *Fed. R. Civ. P. 50(e).*

(n103)Footnote 14. *Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1481 (Fed. Cir. 1998)* , *cert. denied, 525 U.S. 877 (1998)* .

(n104)Footnote 15. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1477-1479, 1480-1483 (Fed. Cir. 1998)* , *cert. denied, 525 U.S. 877 (1998)* (appellee need not raise doctrine of equivalents in first appeal to seek new trial on that theory in district court, because that theory constituted alternative theory that had not been passed on by jury and might justify new trial); *Pentax Corp. v. Robison, 135 F.3d 760, 762 (Fed. Cir. 1998)* (new arguments to appellate court may ordinarily not be raised by rehearing petitions).

(n105)Footnote 16. *See* [ii], *below*.

(n106)Footnote 17. *Lenard v. Argento, 699 F.2d 874, 888 (7th Cir. 1983)* , *cert. denied, 464 U.S. 815 (1983)* (citing **Moore's Federal Practice,** appellate court could not grant cross-appellant's request for judgment where cross-appellant failed to move for judgment as matter of law or new trial in trial court).

(n107)Footnote 18. *Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1334 (10th Cir. 1984)* .

(n108)Footnote 19. *Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322, 324, 326-329, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967)* (appellate court may direct entry of judgment or order dismissal rather than remanding case for consideration of merits of granting new trial when court can make informed judgment based on record).

(n109)Footnote 20. *Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1481 (Fed. Cir. 1998)* (Supreme

Court in *Neely* explicitly tied exercise of appellate authority to direct entry of final judgment against verdict winner to court's ability to make informed judgment based on record).

(n110)Footnote 21. *Weisgram v. Marley Co., 528 U.S. 440, 454, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)* .

(n111)Footnote 22. *Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 325, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967)* .

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.01

§ 23.01 Use and Purpose of Findings by Courtn*

[1] Nature and Purpose of Findings

The trial court must make specific findings of fact and conclusions of law in all non-jury trials or in trials with an advisory jury. n1 The primary purposes of this requirement is to provide an adequate and precise record for an appellant in the event the judgment of the trial court is appealed, and to aid the trial court in considering and adjudicating the facts. n2 With respect to possible appeal, the question of whether the trial court has made adequate findings is based on whether the findings afford a reviewing court a clear understanding of the basis of the trial court's decision. n2.1 However, to accomplish this goal, the trial court does not have to make specific findings on all facts but only on the ultimate facts necessary to reach a decision. n3 The trial court must express the findings it does make with sufficient particularity to enable the appellate court to follow the district court's reasoning and to determine whether the law has been applied correctly without having to resort to speculation. Thus, if a particular issue or claim includes a number of elements or factors the district court should make findings for each element or factor necessary to reach the decision made by the court. n3.1 The trial court should not make conclusory findings, because they do not supply the reviewing court with adequate information to render a decision. n4

Findings of fact and conclusions of law also ensure that the trial court has carefully reviewed the evidence presented in the case. n5 Thus, the mere act of preparing findings prompts the trial court to carefully ascertain the facts of the case. n6 Thus, as every judge is aware, to set down in precise words the facts as the judge finds them is the best way to avoid carelessness in the discharge of that duty; and often a strong first impression that on the basis of the evidence the facts give one result can give way to another after the judge has expressed that impression on paper. n7

The third fundamental purpose for the requirement of findings and conclusions is that it assists in the application of the doctrines of collateral estoppel and res judicata in future litigation. Thus, for courts in future cases to apply the principles of estoppel and res judicata, the trial court in each must make definite findings with respect to all factual and legal issues. n8 The final purpose of requiring clear and complete findings is to enable the parties to assess the appealability of the case. n9

[2] Scope of Rule Requiring Findings and Conclusions

Rule 52(a) of the Federal Rules of Civil Procedure governs the requirements for findings in civil cases. n1 Rule 52(a) requires the trial court to make findings of fact and conclusions of law in all actions tried on the facts without a jury or with an advisory jury, n2 and in granting or refusing interlocutory injunctions. n3 Because of the important purpose of findings, a court of appeals may remand to the district court when inadequate findings by the district court would substantially hinder the court of appeals' review. n4 In contrast, Rule 52(a) provides that findings of fact and conclusions of law are not required for most motions, including motions under Rule 12 (motions to dismiss) or Rule 56 (motions for summary judgment). n4.1 Rule 52(a) also does not require findings of fact for judgments entered pursuant to a consent decree, n5 or for default judgments, except with respect to damages. n6

Rule 52 is of such importance that a party does not need to request or move for findings for purposes of review. The court is automatically required to make findings in all non-jury trials. n7 Furthermore, a motion or request for findings regarding a particular fact is not a prerequisite to preserving an issue for appellate review; a party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested any findings, objected to them, moved to amend them, or moved for partial findings. n8 A motion is required, however, if a party wants to request the court to amend findings or make additional findings, once the court has made the findings. n9 Rule 52 requires the district court in a non-jury case to make findings of fact and state separately its conclusions of law, compliance with the rule is not a jurisdictional requirement for appeal. n10 In other words, the circuit court may proceed with appellate review despite inadequate findings whenever the circuit court is able to discern enough solid facts from the record to permit the circuit court to render a decision. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(a)(1).*

(n3)Footnote 2. *Freeland v. Enodis Corp., 540 F.3d 721, 739 (7th Cir. 2008)* .

(n4)Footnote 2.1. *Alleyne v. N.Y. State Educ. Dep't, 516 F.3d 96, 101 (2d Cir. 2008)* .

(n5)Footnote 3. *Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079 (1st Cir. 1995)* .

(n6)Footnote 3.1. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 711-712 (3d Cir. 2004)* (citing **Moore's Federal Practice**).

(n7)Footnote 4. *Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1549 (11th Cir. 1987) , cert. denied, 486 U.S. 1033 (1988)* (although district court's opinion was generally careful and thorough, failure to supply sufficient findings on damages made adequate review of this issue impossible); *see Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 837, 841-842 (7th Cir. 1993)* (district court's findings were adequate despite fact they were adopted from findings offered by plaintiff).

(n8)Footnote 5. *Kaspar Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 543 (5th Cir.1978)* (district court's findings reflected careful review despite fact that court adopted one party's language).

(n9)Footnote 6. *Chandler v. City of Dallas, 958 F.2d 85, 88 (5th Cir. 1992) , cert. denied, 511 U.S. 1011 (1994)* (detailed findings of fact as required by Rule 52(a) serve to aid the trial court's adjudication process by engendering care by court in determining facts).

(n10)Footnote 7. *United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942)* (suit to enforce cancellation of lease for failure to pay rent).

(n11)Footnote 8. *Wattleton v. International Bhd. of Boiler Makers, 686 F.2d 586, 591 (7th Cir. 1982)* , *cert. denied, 459 U.S. 1208 (1983)* ; *In re Texas Extrusion Corp., 836 F.2d 217, 220 (5th Cir. 1988)* , *cert. denied, 488 U.S. 926 (1988)* .

(n12)Footnote 9. *Inverness Corp. v. Whitehall Labs., 819 F.2d 48, 50 (2d Cir. 1987)* (clear understanding of basis of trial court's decision is necessary for a party to properly exercise the party's appellate rights and options).

(n13)Footnote 1. *United States v. City of Yonkers, 181 F.3d 301, 321-323 (2nd Cir. 1999)* .

(n14)Footnote 2. *Fed. R. Civ. P. 52(a)(1).*

(n15)Footnote 3. *Fed. R. Civ. P. 52(a)(2).*

(n16)Footnote 4. *See, e.g., Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 394 (3d Cir. 2004)* .

(n17)Footnote 4.1. *Fed. R. Civ. P. 52(a)(3).*

(n18)Footnote 5. *United States v. Scholnick, 606 F.2d 160 (6th Cir. 1979)* (Rule 52(a) requires findings of fact only when action is tried on facts without jury; therefore, findings of fact are not required on judgments entered pursuant to consent decree, because judgment does not follow trial on facts but rather incorporates terms of consent decree).

(n19)Footnote 6. *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1412-1413 (9th Cir. 1990) In re Uranium Antitrust Litig., 473 F. Supp. 382, 387 (N.D. Ill. 1979)* (Rule 52(a) does not impose findings requirement on default judgments except as to damages, because rule requires findings of fact only in actions tried on the facts).

(n20)Footnote 7. *Fed. R. Civ. P. 52(a)(1),(2)* (court must make findings).

(n21)Footnote 8. *Fed. R. Civ. P. 52(a)(5).*

(n22)Footnote 9. *Fed. R. Civ. P. 52(b).*

(n23)Footnote 10. *Stetson v. Howard D. Wolf & Assoc., 955 F.2d 847, 850 (2d Cir. 1992)* (appellate court has power to decide cases on appeal if facts in record adequately support result).

(n24)Footnote 11. *United States v. City of Yonkers, 181 F.3d 301, 313 (2nd Cir. 1999)* (absent good reason to remand, court of appeals may decide appeal on record before it); *see § 23.08.*

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.02

§ 23.02 Cases When Findings Are Mandatoryn*

[1] Non-jury Trial or Trial With Advisory Jury

A district court must make findings of fact specially and separately state its conclusions of law in all civil actions tried on the facts without a jury or with an advisory jury. n1 A party need not make a request or motion for findings to impel the court's compliance with the requirement, n2 and the obligation of the court to make findings may not be waived by the parties. n3 The Federal Rules of Civil Procedure are applicable to all civil actions, whether they would formerly have been actions at law or suits in equity, and also to suits in admiralty. n4 Consequently, findings are required in all general categories of civil litigation, both in cases between private parties and in cases brought by the United States n5 or brought against the United States. n6 Thus, for example, the court must make findings in all of the following types of cases:

1. Bankruptcy cases. n7

2. Tax Court cases. n8

3. Habeas corpus proceedings. n9

4. Civil contempt proceedings. n10

5. Cases of forfeiture of property for violation of federal law. n11

[2] Injunctions

[a] Interlocutory Injunctions

In any case in which the district court grants or denies an interlocutory injunction, the court must state the factual findings and conclusions of law that support its action, in the same manner as it states findings and conclusions in other civil cases. n1 The United States Supreme Court has stated that compliance with the findings requirement in cases seeking an interlocutory injunction is especially important because of the immediate effect of such injunctions. n2 As

with findings in non-jury trials, the findings must be sufficient to allow the appellate court the opportunity to conduct a meaningful review. n2.1

Requiring trial courts to explain their interlocutory injunction orders serves at least three important purposes. First, it allows the parties to better understand the reasons for the court's actions. Second, a written explanation of the district court's reasoning permits an appellate court to meaningfully review that decision. n3 Third, the requirement that the district court write out its findings and conclusions in granting or refusing interlocutory injunctions encourages the trial judge to ascertain the facts with due care and render a decision in accord with the evidence and the law. What is adequate to serve the purposes of the findings requirements depends on the importance and complexity of a given issue, the depth and nature of the evidence presented, and similar factors that may vary from case to case. n4

When making its findings and conclusions for its decision on a motion for an interlocutory injunction, the court should not make findings on the substantive issues of the case. In this regard, the trial court should limit the findings to issues relating directly to the injunction motion. These include the four factors for granting a preliminary injunction: the moving party's likelihood of success on the merits; the risk of irreparable injury to the moving party; whether the threatened injury to the moving party outweighs the threatened harm to the opposing party; and the public interest. n4.1 To require findings of fact on substantive issues at this stage of a case would require conjecture rather than an informed judgment, because some issues of fact may not fairly be determined on affidavits or even at a preliminary hearing. n5 For this reason, findings of fact made in an action on a motion for a preliminary injunction are not controlling at any subsequent hearing for a permanent injunction, and parties at the later hearing must retry the issues. n6

Findings are not required when there is no issue of fact involved in the grant or denial of the injunction. n7 It has also been held that, in contrast to when the interlocutory injunction is issued, findings are not required on a motion to dissolve an injunction. n8

In general, the fact that the district court failed to make findings in a case seeking an interlocutory injunction does not deprive the appellate court of jurisdiction over the case. An appellate court may review the order in the absence of findings if the entire record provides a sufficient basis for the district court's decision. n9 If the appellate court concludes that the findings are not adequate for review, the court may vacate and remand to the district court for further findings. n10 Alternatively, the appellate court may choose to vacate and remand to the lower court for a further evidentiary hearing, if it does not appear that the trial court could make adequate findings on the basis of the evidence heard by the trial court. n11

[b] Temporary Restraining Orders

Rule 52 generally does not require findings of fact and conclusions of law for temporary restraining orders, because such orders are issued in emergency circumstances to prevent irreparable harm and are usually of limited duration and therefore exempt from appellate review. n12 When a temporary restraining order is continued beyond the statutory time limits without the consent of the party against whom it was issued in contravention of Rule 65(b), however, the order in effect becomes an interlocutory injunction. As discussed above, the court is then required to make findings of facts and conclusions of law, and if the court does not make the findings and conclusions, the temporary restraining order becomes invalid. n13 However, even when findings are required for a temporary restraining order, the requirement is not jurisdictional and remand by the appellate court may not be necessary. If the entire record contains sufficient evidence to support injunctive relief, the reviewing court may examine the record even in the absence of findings of fact and conclusions of law. n14

[c] Permanent Injunctions

Because Rule 52(a)(2) expressly refers only to interlocutory injunctions, n15 courts have indicated that Rule 52(a)(2) is inapplicable to permanent injunctions. n16 However, because Rule 52(a)(1) extends to all actions tried on the facts

without a jury, that provision does extend to actions seeking permanent injunctions, n17 which must be decided without a jury. Therefore, a court must make findings of fact and conclusions of law in all cases when a permanent injunction is granted or denied. n18 As is the case with an interlocutory injunction, a court must make findings with respect to the four factors that govern issuance of a permanent injunction. The four factors for issuing a permanent or interlocutory injunction are essentially the same except for one key difference. A permanent injunction requires the moving party to show actual success on the merits, rather than the fair chance of prevailing on the merits required for an interlocutory injunction. n19

[3] Motion for Partial Findings

In a non-jury trial, Rule 52(c) requires findings of fact and conclusions of law in order for the court to enter a judgment on partial findings, n1 which is a judgment against a party with respect to a particular claim or defense after the party has been fully heard on that issue. n2 Consequently, the court must make findings of fact and conclusions of law that support any decision the court makes on a motion for partial findings. n3 On the other hand, findings of fact and conclusions of law are not required to accompany decisions on any other motion. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

FOOTNOTES:
(n1)Footnote *. For further discussion, see 9 *Moore's Federal Practice*, § 52.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(a)(1)*. For a discussion of the procedures followed in a case with an advisory jury, *see* Ch. 22, *Trial by Jury*.

(n3)Footnote 2. *Fed. R. Civ. P. 52(a)(1)* (court must make findings).

(n4)Footnote 3. *Inverness Corp. v. Whitehall Laboratories, 819 F.2d 48, 50 (2d Cir. 1987)* (requirement of Rule 52(a) is mandatory and may not be waived); *see United States v. City of Yonkers, 181 F.3d 301, 325 (2d Cir.)* , *vacated*, *197 F.3d 41 (2d Cir. 1999)* (appellate court requires findings from district court, not stipulation of parties regarding what findings should be).

(n5)Footnote 4. *Fed. R. Civ. P. 1.*; *see Fed. R. Civ. P. 81(a)(1)* (exceptions); *see also McAllister v. United States, 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954)* (United States Supreme Court resolved conflict in case law by ruling that Rule 52 was applicable to admiralty cases).

(n6)Footnote 5. *United States v. Yellow Cab Co., 338 U.S. 338, 341-342, 94 L. Ed. 150 (1949)* (Rule 52 applies to appeals by Government as well as to those of other parties).

(n7)Footnote 6. *Dempsey v. United States, 32 F.3d 1490, 1493 (11th Cir. 1994)* (Federal Trade Commission Act action against United States).

(n8)Footnote 7. *Fellows v. Colonial Sav. & Loan Ass'n, 19 F.3d 245, 246 (5th Cir. 1994)* ; *In re X-Cel, Inc., 776 F.2d 130,132-133 (7th Cir. 1985)* .

(n9)Footnote 8. *Laney v. Commissioner of Internal Revenue, 674 F.2d 342, 345 (5th Cir. 1982)* (Tax Court's findings of fact, like those of district court, are subject to requirements of Rule 52(a)); *see 26 U.S.C. § 7482*; *Commissioner v. Duberstein, 363 U.S. 278, 291, 80 S. Ct 1190, 4 L. Ed. 2d 1218 (1960)* (under *IRC § 7482(a)*, decisions by Tax Court must be reviewed in same manner and to the same extent as decisions of district court in civil

actions tried without jury).

(n10)Footnote 9. *Mason v. Vasquez, 5 F.3d 1220, 1224-1225 (9th Cir. 1993)* ; *United States v. Cruz, 581 F.2d 535, 540-541 (5th Cir. 1978)* (citing **Moore's Federal Practice**).

(n11)Footnote 10. *Sanders v. Monsanto Co., 574 F.2d 198, 200 (5th Cir. 1978)* (Rule 52(a) applies to civil contempt actions because of factual nature of these actions).

(n12)Footnote 11. *United States v. One 1964 Cadillac 2-Door Coupe, 458 F.2d 391, 392 (9th Cir. 1972)* (district court's factual findings that automobile was not used to facilitate transportation of contraband in forfeiture proceeding were not clearly erroneous); *Utley Wholesale Co. v. United States, 308 F.2d 157, 159 (5th Cir. 1962)* (in forfeiture case, factual findings that vehicles were used in violation of internal revenue law were not clearly erroneous).

(n13)Footnote 1. *Fed. R. Civ. P. 52(a)(2)*; *see Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 304-305 (D.C. Cir. 2006)* .

(n14)Footnote 2. *Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 84 L. Ed. 774 (1940)* .

(n15)Footnote 2.1. *Alleyne v. N.Y. State Educ. Dep't, 516 F.3d 96, 101 (2d Cir. 2008)* ; *see Fed. R. Civ. P. 65(d)(1)(A)*.

(n16)Footnote 3. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 423 (4th Cir. 1999)* .

(n17)Footnote 4. *Davis v. New York City Housing Auth., 166 F.3d 432, 435 (2d Cir. 1999)* .

(n18)Footnote 4.1. *See Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006)* ; *see also Ridgely v. FEMA, 512 F.3d 727, 734 (5th Cir. 2008)* (statement of four factors).

(n19)Footnote 5. *Bose Corp. v. Linear Design Labs., Inc., 467 F.2d 304, 311 (2d Cir. 1972)* (court of appeals affirmed denial of preliminary injunction in patent infringement action with modification to maintain status quo).

(n20)Footnote 6. *Imperial Chem. Indus., Ltd. v. National Distillers & Chem. Corp., 354 F.2d 459, 463 (2d Cir. 1965)* (court of appeals affirmed denial of preliminary injunction against disclosure of trade secrets and remanded case to trial court where parties were free to retry same issues at hearing for permanent injunction).

(n21)Footnote 7. *Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810, 816 (6th Cir. 1954) , cert. denied, 349 U.S. 930 (1955)* ; *see § 23.03[1]*.

(n22)Footnote 8. *Baltimore & O. R.R. Co. v. Chicago River & Ind. R.R. Co., 170 F.2d 654, 659 (7th Cir. 1948)* .

(n23)Footnote 9. *San Filippo v. United Bhd. of Carpenters & Joiners, 525 F.2d 508, 511 (2d Cir. 1975)* (because decision was based on pleadings and affidavits, court was able to render decision based on record).

(n24)Footnote 10. *Davis v. United States, 422 F.2d 1139, 1141-1142 (5th Cir. 1970)* (citing **Moore's Federal Practice,** court remanded because facts were hotly disputed, and court could not reach full understanding of issues in absence of findings by trial court).

(n25)Footnote 11. *Landmark Land Co. v. Office of Thrift Supervision, 990 F.2d 807, 811 (5th Cir. 1993)* (record revealed several disputes of material fact which had to be resolved at evidentiary hearing).

(n26)Footnote 12. *See Romer v. Green Point Sav. Bank, 27 F.3d 12, 16 (2d Cir. 1994)* (in class action by depositors challenging conversion plan of savings bank into public stock company, it was error to issue temporary

restraining order disposing of all that was at stake in litigation without findings of fact and conclusions of law even if not required by Rule 52(a)).

(n27)Footnote 13. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 443, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (proper procedure where preliminary injunction hearing has been held after issuance of temporary restraining order is not to simply continue order in effect, but rather to issue preliminary injunction accompanied by necessary findings of fact and conclusions of law).

(n28)Footnote 14. *Sampson v. Murray, 415 U.S. 61, 87 n.58, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* (Supreme Court examined district court's record to determine if sufficient allegations or evidence supported issuance of injunctive relief, even though district court did not comply with requirements of Rule 52(a)).

(n29)Footnote 15. *Fed. R. Civ. P. 52(a)(2).*

(n30)Footnote 16. *Dresser-Rand Co. v. Virtual Automation, Inc., 361 F.3d 831, 847 (5th Cir. 2004)* .

(n31)Footnote 17. *Fed. R. Civ. P. 52(a)(1).*

(n32)Footnote 18. *See Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 423 F.3d 539, 546 (6th Cir. 2005)* .

(n33)Footnote 19. *Oglala Sioux Tribe v. C & W Enters., 542 F.3d 224, 229 (8th Cir. 2008)* .

(n34)Footnote 1. *Fed. R. Civ. P. 52(c)*; *see Bowen v. Celotex Corp., 292 F.3d 565, 566 (8th Cir. 2002)* ; *see also Nieto v. Kapoor, 268 F.3d 1208, 1217-1218 (10th Cir. 2001)* (motion for judgment made in trial to court at close of the plaintiff's evidence is governed by Rule 52(c), which requires court to make findings of fact and conclusions of law if it grants motion).

(n35)Footnote 2. *Fed. R. Civ. P. 52(c)*; *see § 23.10* (complete discussion of judgment on partial findings).

(n36)Footnote 3. *Bd. of Trs. New Orleans Emplrs. Int'l Longshoremen's Ass'n v. Gabriel, 529 F.3d 506, 509 (5th Cir. 2008)* ; *see Fed. R. Civ. P. 52(c).*

(n37)Footnote 4. *Fed. R. Civ. P. 52(a)(3)*; *see § 23.03[3].*

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.03

§ 23.03 Cases When Court is not Required to Make Findingsn*

[1] Absence of Factual Dispute

The courts have generally held that findings of fact need not be made in a case when the parties are not disputing the facts. n1 Findings need not be included in the record for review because the appellate court will not need to resolve issues related to the facts. However, even when there are no disputed facts, findings of fact may be required in those cases when the trier of fact could reasonably draw different inferences from the stipulated facts. n2

[2] Consent Decree

A consent decree, also known as a consent judgment or settlement judgment, n1 is a judgment of the court that incorporates a settlement agreement of the parties. n2 A consent decree does not generally require the trial court to make findings of fact because the consent decree does not result from a trial on the facts and the parties generally may not attack the decree on appeal. If a party is authorized to take an appeal, however, the district court may have to make and file findings of fact and conclusions of law. n3

[3] Motions

[a] Findings Generally Not Required

Generally, the court is not required to make findings of fact and conclusions of law with respect to motions. In particular, findings and conclusions are not mandatory for decisions made on two types of motions: n1 motions for summary judgment, n2 and motions to dismiss under Rule 12. n3 Additionally, findings and conclusions are not required for any other types of motions made to the court unless the federal rule controlling the particular rule requires them. n4 However, there is an important exception to this rule for motions for partial findings, as discussed in *§ 23.02[3]*.

[b] Motions for Summary Judgment

When the trial court grants or denies a motion for summary judgment, the court is not required to make findings of fact.

n5 Two important reasons for this rule are that the court is not permitted to judge the evidence on a summary judgment motion, n5.1 and, by definition, a summary judgment is granted because there are no triable issues of fact. n6 Even though they are not required to do so, most district judges, when ruling on a motion for summary judgment, include a brief statement containing the reasons for their conclusions; n7 furthermore, many appellate courts have noted that when a court issues an order either granting or denying a motion for summary judgment, it is very helpful to the appellate court when the trial court does indicate those material facts as to which the court determined that a genuine issue of fact does or does not exist. n8

While not technically requiring formal findings of fact, some appellate courts have reversed summary judgment orders on the grounds that the district court failed to provide an adequate explanation of the basis of its decision. n9 Thus, an appellate court may require that district courts accompany summary judgment orders with some articulation of the reasoning for the order. A brief explanation by the trial court does not impose a serious burden, would assist parties in crafting appellate briefs responsive to dispositive issues, and would clearly facilitate appellate review. n9.1 Such courts rationalize this requirement on grounds that they are only requiring an explanation of the legal basis of the lower court's order, not a finding of fact. n10

[c] Motions to Dismiss

A trial court does not need to state findings of fact nor conclusions of law when ruling on a Rule 12 motion to dismiss. n11 The first five defenses enumerated in Rule 12(b), which may be asserted by motion and do not require findings under Rule 52 are: lack of jurisdiction over the subject matter; lack of jurisdiction over the person; improper venue; insufficiency of process; and insufficiency of service of process. Generally, a motion raising one of these defenses involves only undisputed facts and questions of law, and findings of fact would not be helpful because the reviewing court will not be concerned with the factual issues. n12

Unlike motions for summary judgment, which by definition do not involve conflicting sets of facts, some motions made under Rule 12 are not limited to questions of law, and disposition of these motions may require a determination of factual questions. Therefore, some courts have suggested that the district court should make factual findings whenever factual determinations are necessary for a motion, n13 or when findings and conclusions would be helpful for the appellate court to review the determination of a motion. n14

[d] Other Motions

For any other motion, a trial court does not need to state findings of fact nor conclusions of law, except when expressly required by a federal rule governing a particular motion. n15 For example, findings and conclusions are explicitly required for motions regarding the following: n15.1 Rules 23(e); n15.2 23(h); n15.3 and 54(d)(2)(C). n15.4 are not required, for example, on a motion for judgment as a matter of law; n16 a motion seeking dismissal for want of prosecution; n17 or a motion to quash service of process. n18 Rule 52 does not forbid a court from making findings on these motions, and an explanation of the court's conclusions may be helpful to the reviewing court. n19 Furthermore, when a motion involves conflicting positions of factual substance, several appellate courts have concluded that findings are desirable and should be made. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 273 (7th Cir. 1976)* (because facts were not disputed in trademark infringement action, and there was no need for resolution of conflicts in testimony, Rule 52(a) was inapplicable).

(n3)Footnote 2. *Weissbaum v. Hannon, 439 F. Supp. 873, 876 n.2 (N.D. Ill. 1977)* (citing **Moore's Federal Practice** in action for monetary and injunctive relief for termination of employment in violation of *First* and *Fourteenth amendment* rights).

(n4)Footnote 1. *See United States v. IBM, 163 F.3d 737 (2d Cir. 1998)* .

(n5)Footnote 2. *United States v. Sforza, 326 F.3d 107, 115-116 (2d Cir. 2003)* (consent decree requires court approval of the parties' settlement agreement, which means that court must make determination that settlement agreement is appropriate to be accorded status of judicially enforceable decree).

(n6)Footnote 3. *See United States v. American Cyanamid, 20 F. Supp. 2d 326, 338-339 (D.R.I. 1998)* ; *Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790 (1st Cir. 1982)* ; *United States v. Institute of Carpet Mfrs., Ltd., 1 F.R.D. 636, 637-638 (S.D.N.Y. 1941)* .

(n7)Footnote 1. *Fed. R. Civ. P. 52(a)(3).*

(n8)Footnote 2. *See Fed. R. Civ. P. 56*; *see* [b], *below*.

(n9)Footnote 3. *See Fed. R. Civ. P. 12*; *see* [c], *below*.

(n10)Footnote 4. *Fed. R. Civ. P. 52(a)(3)*; *see* [d], *below*.

(n11)Footnote 5. *Fed. R. Civ. P. 52(a)(3)*; *see Fed. R. Civ. P. 56*.

(n12)Footnote 5.1. *Patton v. MFS/Sun Life Fin. Distribs., 480 F.3d 478, 484 (7th Cir. 2007)* .

(n13)Footnote 6. *Gaines v. Haughton, 645 F.2d 761, 768 n.13 (9th Cir. 1981)* , *cert. denied, 454 U.S. 1145 (1982)* (citing **Moore's Federal Practice,** summary judgment granted in action for breach of fiduciary duty and for wasting corporate assets in favor of defendants, because there were no genuine issues of material fact).

(n14)Footnote 7. *Mallary v. United States, 238 F. Supp. 87, 88 (M.D. Ga. 1965)* .

(n15)Footnote 8. *Pasquino v. Prather, 13 F.3d 1049, 1051 (7th Cir. 1994)* (in reviewing order denying summary judgment, circuit court did not say that explanation was desirable in all cases; however, because issue was relatively close question, trial court should have isolated genuine issues of material fact rather than merely stating that such facts existed).

(n16)Footnote 9. [Reserved]

(n17)Footnote 9.1. *Forbes v. Twp. of Lower Merion, 313 F.3d 144, 148-149 (3d Cir. 2002)* (requiring courts in circuit to accompany decision on summary judgment with explanation sufficient to permit parties and court to understand legal premise for court's order).

(n18)Footnote 10. *See Vadino v. A. Valey Eng'rs, 903 F.2d 253, 258-259 (3d Cir. 1990)* .

(n19)Footnote 11. *Fed. R. Civ. P. 52(a)(3)*; *see Fed. R. Civ. P. 12*; *Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1177 (9th Cir. 2007)* .

(n20)Footnote 12. *Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1177 (9th Cir. 2007)* ; *Huckeby v.*

Frozen Food Express, 555 F.2d 542, 545 (5th Cir. 1977) .

(n21)Footnote 13. *Francis v. Goodman, 81 F.3d 5, 7-8 (1st Cir. 1996)* (remanding for findings of fact and conclusions of law concerning motion to remand for lack of diversity jurisdiction, when facts were in issue, and reviewing court could not determine facts or theory relied on by trial court).

(n22)Footnote 14. *Societe de Conditionnement en Aluminum v. Hunter Engineering Co., 655 F.2d 938, 942 (9th Cir. 1981)* (when district court dismissed case for lack of subject matter jurisdiction, it would have been helpful to reviewing court if district court had provided findings of fact and conclusions of law).

(n23)Footnote 15. *Fed. R. Civ. P. 52(a)(3)*.

(n24)Footnote 15.1. *See Fed. R. Civ. P. 55*, Committee Notes to 2007 Amendments.

(n25)Footnote 15.2. *See Fed. R. Civ. P. 23(e)* (class action settlement, dismissal or compromise).

(n26)Footnote 15.3. *See Fed. R. Civ. P. 23(h)* (class action attorney's fees and costs).

(n27)Footnote 15.4. *See Fed. R. Civ. P. 54(d)(2)(C)* (attorney's fees on judgment).

(n28)Footnote 16. *Weir v. Chicago Plastering Inst., 272 F.2d 883, 888 (7th Cir. 1959)* .

(n29)Footnote 17. *Esteva v. House of Seagram, Inc., 314 F.2d 827, 830 (7th Cir. 1963)* , *cert. denied, 375 U.S. 826 (1963)* .

(n30)Footnote 18. *Republic Supply Corp. v. Lewyt Corp., 160 F. Supp. 949, 950 (E.D. Mich. 1958)* .

(n31)Footnote 19. *Cody v. Hillard, 139 F.3d 1197, 1200 (8th Cir. 1998)* (although Rule 52 does not require district court to make findings of fact and conclusions of law for rulings on motions, circuit court may remand case for findings and conclusions if appellate review would be hindered without them).

(n32)Footnote 20. *Sanders v. Monsanto Co., 574 F.2d 198, 200 (5th Cir. 1978)* (civil contempt order proceeding); *Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 404 (3d Cir. 1971)* (decision on certification of class action).

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.04

§ 23.04 Effect of Court's Failure to Make Required Findingsn*

[1] Failure is Not Jurisdictional Bar to Appeal

Although Rule 52 requires the district court in a non-jury case to make findings of fact and state separately its conclusions of law, compliance with the rule is not a jurisdictional requirement for appeal. This means that the circuit court may proceed with appellate review despite inadequate findings whenever the circuit court is able to discern enough solid facts from the record to permit the court to render a decision. n1 If the appellate court can discern enough substantial facts from the record as a whole to enable it to render a decision, it may proceed to review the trial court order, n1.1 despite the fact that the findings are themselves inadequate. n2 Thus, the appellate court is not required to remand n3 if the court will be able to get a complete understanding of the issues without the aid of separate findings. n4 In this regard, if the trial court's decision did not turn on the facts, n5 or if the facts of the case are undisputed, n6 remand is not usually necessary unless different inferences may be drawn from the facts in the record. n7

[2] Appellate Court May Require Remand or Retrial

In the event that the trial court completely fails to make the necessary findings of fact, or fails to make findings on a material issue, the appellate court should vacate the judgment and remand the action to the district court for the district court to make the required findings and conclusions. n1 The court of appeals may also vacate the judgment and remand if the district court makes findings that are otherwise inadequate, for example, if the district court makes only partial or conclusory factual findings or fails to state its conclusions of law. n2 n3

However, in some cases the appellate court may require additional evidence, rather than merely remanding for findings alone, if the appellate court determines that the trial court failed to hear testimony on a material issue. n4 In such cases, the appellate court may remand and instruct the district court to hear additional evidence, n5 instead of merely remanding for further findings. Another alternative available to the appellate court is to remand the case and require the trial court determine whether it can make additional findings based on the existing record, or whether it will need to hear additional evidence in order to prepare sufficient findings. n6

In some circumstances, the appellate court may deem it necessary to order a retrial, n7 for example, when a significant period of time has elapsed since the trial, and the appellate court determines that the record might not be fresh in the

trial judge's mind. n8 Also, the appellate court may itself review the findings and conclusions of the district court and the factual assertions and contentions of the parties in light of the controlling legal principles, to determine whether the facts and law compel a particular result and, if so, remand to the district court to enter an order with that result. n8.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureAppealsRemands

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *LGS Architects, Inc. v. Concordia Homes, 434 F.3d 1150, 1155 (9th Cir. 2006)* (absence of conclusions of law did not preclude court of appeals from undertaking meaningful appellate review of legal interpretation of parties' agreement).

(n3)Footnote 1.1. *FTC v. Enforma Natural Prods., 362 F.3d 1204, 1212 (9th Cir. 2004)* (failure to comply with Rule 52(a) does not require reversal unless complete understanding of question is not possible without aid of separate findings or conclusions).

(n4)Footnote 2. *Boatmen's First Nat'l Bank v. Kansas Pub. Employees Retirement Sys., 57 F.3d 638, 640 n.5 (8th Cir. 1995)* (appellate review absent specific findings and conclusions from district court may proceed when record itself sufficiently informs court of basis for decision on material issues).

(n5)Footnote 3. *See* [2], *below*.

(n6)Footnote 4. *Magna Weld Sales Co. v. Magna Alloys & Research Pty., 545 F.2d 668, 671 (9th Cir. 1976)* (citing **Moore's Federal Practice**).

(n7)Footnote 5. *Spray-Bilt, Inc. v. Ingersoll-Rand World Trade, Ltd., 350 F.2d 99, 103 (5th Cir. 1965)* .

(n8)Footnote 6. *Yanish v. Barber, 232 F.2d 939, 947 (9th Cir. 1956)* (citing **Moore's Federal Practice** and holding that because of lack of dispute or contradiction in record, case did not have to be remanded for further findings).

(n9)Footnote 7. *Rothenberg v. Security Management Co., 736 F.2d 1470, 1472 (11th Cir. 1984)* (case remanded to district court for factual findings supporting its conclusion that appellants' derivative actions were brought as leverage for their personal claims).

(n10)Footnote 1. *Amadeo v. Zant, 486 U.S. 214, 228, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988)* (district court's lack of findings does not allow court of appeals to engage in impermissible appellate factfinding); *Pullman Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* , *vacated*, *493 U.S. 929, 110 S. Ct. 316, 107 L. Ed. 2d 307 (1989)* (citing **Moore's Federal Practice**; if district court has failed to make findings because of an erroneous view of law, usual rule is that appellate court should remand for further proceedings for trial court to make missing findings).

(n11)Footnote 2. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 711-712 (3d Cir. 2004)* (citing **Moore's Federal Practice**); *see Duffie v. Deere & Co., 111 F.3d 70, 73-74 (8th Cir. 1997)* (remand for additional findings was appropriate where district court made only one conclusory finding).

(n12)Footnote 3. [Reserved]

(n13)Footnote 4. *Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1138 (5th Cir. 1983)* .

(n14)Footnote 5. *Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1138 (5th Cir. 1983)* (in discrimination case, district court erred in refusing to consider statistical evidence; therefore, appellate court remanded case for additional review of evidence and new findings); *Girard Trust Co. v. Windt, 178 F.2d 359, 360 (2d Cir. 1949)* .

(n15)Footnote 6. *Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1192 (7th Cir. 1987)* (remanded case for more precise findings of fact and conclusions of law, and instructed trial court to decide whether additional evidence would have to be received).

(n16)Footnote 7. *Andre v. Bendix Corp., 774 F.2d 786, 801 (7th Cir. 1985)* , *cert. denied, 488 U.S. 855 (1988)* .

(n17)Footnote 8. *Rucker v. Higher Educational Aids Bd., 669 F.2d 1179, 1184 (7th Cir. 1982)* (trial ended more than one year prior to appeal, so record might be stale in trial judge's mind).

(n18)Footnote 8.1. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 711-712 (3d Cir. 2004)* .

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.05

§ 23.05 Methods for Trial Court to Make Findingsn*

[1] Findings in Writing

[a] Findings Either in Opinion or in Separate Document

The court must make findings of facts specially and state its conclusions of law separately. The findings and conclusions may appear in written form in an opinion or a memorandum of decision filed by the court or may be stated on the record after the close of the evidence. n1 When in written form, the court has three choices. The court may: n1.1 (1) place them in a separate document as formal findings; (2) draft them as part of the court's opinion; or (3) prepare both formal findings and an opinion to provide the appellate court with a more thorough understanding of the issues before the trial court. n2 The appellate court will interpret the trial judge's opinion liberally and will find the information in the opinion to contain adequate findings if at all possible. n3

If the opinion conflicts with the formal findings, the formal findings will be controlling. n4 Similarly, a court's statements from the bench will not be considered controlling, and will not cause error if they do not support or amplify formal findings made by the court. n5 The appellate court may consider additional findings in the district court's opinion only to the extent that they are direct, clear, and consistent with the district court's formal findings. n6

[b] Particular Format Not Essential

The district court need not use any particular format for the court's findings of fact and conclusions of law. n7 However, local court rules may contain more specific requirements. n8 Appellate courts also may tolerate or even approve particular methods for preparing findings. One court approved a procedure in which the district court first stated its findings in a rambling manner and then methodically reviewed every item, using as a framework a list of disputed facts submitted by each party before the trial. With respect to each relevant contention, the court then stated whether the contention was proven or not proven, by rewording or adding to the party's statement of the factual contention, to clarify the precise extent of the finding. The court of appeals concluded that this method would result in a detailed, annotated list of findings that would leave no doubt about what the court found with respect to each relevant factual element of the case, or that the trial court had taken considerable care and attention in reaching its findings. n9

[2] Verbal Findings

Rule 52 expressly allows trial judges to make their findings verbally, provided the findings are stated on the record in open court following the close of the evidence. n1 Even before the federal rule expressly authorized the use of verbal findings, this practice was commonly used by district judges. n2 The amendment to Rule 52 confirmed the propriety of this practice for the purpose of reducing the burden on trial judges in non-jury trials. n3 Thus, in certain circumstances oral opinions are often the most efficient and economical method of meeting the requirements of Rule 52. n4 Of course, oral findings must contain sufficient information to provide the appellate court with a clear understanding of the lower court's reasoning, and must meet all the requirements of clarity and completeness that are applicable to written findings. n5 However, oral findings may be particularly inappropriate in a complex case. A judge who attempts to make findings orally may fail to identify and resolve all existing issues, and thus fail to provide the appellate court with an inadequate record for review. n6 Courts have been required in such cases to prepare written findings at least with respect to the most important issues presented. n7

[3] Findings Made Only on Record

Findings of the trial court may be based on a written record, and is no requirement for an evidentiary hearing. n1 For example, the district court may base findings of fact only on depositions and documents, and such findings are reviewed by the appellate court under the "clearly erroneous" test. n2 Of course, the appellate court may not give such findings the special weight normally accorded findings when the trial court has observed the demeanor of live witnesses. n3

[4] Adoption of Findings Made by Special Master

A district court may adopt the findings of a master designated to the case, and these findings are deemed to be the findings of the court itself. n1 A trial court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury provided that appointment is warranted by some exceptional condition, n2 or the need to perform an accounting or resolve a difficult computation of damages. n3 The trial court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that the findings will be reviewed for clear error. n4 The court must decide de novo all objections to conclusions of law made or recommended by a master. n5

If a master dies after the close of testimony but before findings are made, the district court may, if possible, make findings of fact and conclusions of law based on the transcript. If the record is not sufficiently clear for the district judge to make findings, a new hearing must be held, and the district court must make new findings and conclusions. n6

[5] Adoption of Findings Made by Parties

[a] Trial Court's Request for Proposed Findings

The trial judge may request assistance in preparing findings by asking counsel for both parties to submit proposed findings of fact and conclusions of law. Local rules of court may require submission of proposed findings of fact and conclusions of law as part of final preparations for trial of a case. However, submission of proposed findings is not required under the Federal Rules of Civil Procedure. Therefore, it is not error for the trial judge to proceed without proposed findings. n1

A request for proposed findings from the parties is particularly useful in very complex cases or in cases containing highly technical scientific issues, such as patent cases. It has even been suggested that proposed findings prepared by an expert are highly desirable in these cases to avoid inadvertently committing a serious technological or scientific error. n2

[b] Obligation to Prepare Proposed Findings When Requested by Court

When requested by the court or directed by a local rule of court, the attorney has an affirmative obligation to assist the court by preparing and filing proposed findings. The attorney should take care to ensure that the proposed findings are sufficient to form a proper factual basis for the ultimate conclusions of the court. n3 A party that does not provide proposed findings of fact and conclusions of law is at a disadvantage when attempting to argue later that the court adopted the findings submitted by opposing counsel, n4 or to argue that the final findings and conclusions are inadequate or incomplete. If a local rule of court requires parties to prepare and file proposed findings in non-jury cases, and this is not done, such failure may subject the party to risk of sanctions or an adverse ruling.

[c] Court's Use of Party's Proposed Findings

In using proposed findings, the judge should carefully consider and independently determine the accuracy of the parties' proposed findings, and adopt only those proposed findings that are supported by the other items which must be reviewed by the court in the case, including the evidence presented at trial, the testimony of the witnesses at trial, the parties' trial briefs, the other documents and evidence in the record, and the applicable law. n5 The trial court may adopt any reasonable methods it considers appropriate for using the proposed findings. For example, in some jurisdictions it is common for the court to make a decision and then request that only the prevailing party submit proposed findings. While this practice has been criticized, it is an acceptable procedure. n6

The final findings submitted by the trial court must be sufficiently detailed to provide the appellate court with an adequate record for review, and an appellate court will use only findings that are the result of a careful and thoughtful review of the evidence, rather than just a reiteration of the party's point of view.

A number of trial courts have employed procedures that have used proposed findings of the parties effectively and these have gained the approval of appellate court. For example, in one case, the trial court had the parties exchange proposals and object to the counter proposals with appropriate fact and legal references, with the court then deciding on which proposals to incorporate in its findings. n7

[d] Trial Court's Verbatim Use of Party's Proposed Findings Tolerated

[i] Verbatim Adoptions Permitted

Rule 52 does not forbid the practice of verbatim adoption of the proposed findings or portions of the proposed findings of a party. The United States Supreme Court has held that even findings made by verbatim adoption may not be rejected out-of-hand, and the appellate court should let them stand if supported by the evidence. n8 Consequently, while the practice is usually viewed with disfavor, n9 appellate courts may accept verbatim proposed findings unless they are shown to be clearly erroneous. n10 If certain factors are present, an appellate court is generally more amenable to the verbatim adoption of proposed findings with more favor. For example, the practice has been accepted if the facts of a case are very technical or complex. n11 Similarly, a reviewing court is more likely to approve of verbatim findings if the proposed findings of the parties are skillfully and intelligently drafted. n12

Appellate courts also have approved the use of findings proposed by one party, although not verbatim, in cases in which the trial court carefully reviewed the proposed findings, removed those that were incorrect, and otherwise edited the content and the language of the findings to ensure that they reflected his or her own conclusions regarding the evidence. n13 However, while these factors make an appellate court more likely to adopt findings, they are not required as a prerequisite for approval. Appellate courts recognize that district courts are under great time pressure, n14 and reviewing courts have refused to set aside verbatim findings found to be supported by the record even though they incorporated, for example, the same typographical errors as those contained in the findings proposed by counsel. n15

[ii] Criticisms of Verbatim Adoptions

Appellate courts do not generally approve of the practice of verbatim adoptions of party's proposed findings, n15.1 even though the appellate courts will accept them in certain circumstances, as described in [i], above. Many courts have expressed their criticism with the practice, even though they may uphold the findings, except when a party can demonstrate that the process by which the judge adopted them was fundamentally unfair. n15.2 In fact, many courts have expressed their criticism with the practice, even as they may uphold the findings. n16 Among the reasons given for criticizing verbatim or mechanical adoption of findings are:

1. Findings prepared by the court are as a general rule more helpful to the appellate court. n17

2. Verbatim findings tend not to accomplish one of the most important purposes of findings, which is to promote care on the part of the trial judge in examining the facts of the case. n18

3. Verbatim findings may create doubt as to whether the district court has discharged its duty to review the evidence for itself and reached its own evaluation of the evidence rather than that of an advocate. n19

4. The use of verbatim findings may cause the losing parties to conclude that they did not receive a fair hearing from the court. Therefore, it diminishes the perception that the courts decide cases carefully and impartially. n20

For all these reasons, the use of such findings may cause the reviewing court to give them a closer and harder look, despite the fact that the appellate courts are required to apply the clearly erroneous test to mechanical and verbatim findings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.13, § 52.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(a)(1)*; *see* [2], *below* (verbal findings).

(n3)Footnote 1.1. *See In re Cendant Corp. Secs. Litig., 454 F.3d 235, 243 (3d Cir. 2006)* (noting that findings and conclusions should *not* appear in Rule 58(a) "judgment").

(n4)Footnote 2. *Safeway Stores, Inc., v. Safeway Quality Foods, Inc., 433 F.2d 99, 102 (7th Cir. 1970)* .

(n5)Footnote 3. *Goode v. Herman Miller, Inc., 811 F.2d 866, 871 (5th Cir. 1987)* (appeals court read trial court's findings liberally to conclude that plaintiff's use of product was normal use of product).

(n6)Footnote 4. *EEOC v. Exxon Shipping Co., 745 F.2d 967, 974 (5th Cir. 1984)* (appellate court would not imply from isolated language in opinion that trial court applied erroneous standard when findings and conclusions established that court properly allocated burden of proof and made sufficient findings to support judgment).

(n7)Footnote 5. *Hong v. United States, 363 F.2d 116, 120 (9th Cir. 1966)* (because district court made formal and detailed findings, appellate court "need not and should not" review conflicting oral statements).

(n8)Footnote 6. *Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 878 (9th Cir. 1989)* , *cert. denied, 498 U.S. 814 (1990)* .

(n9)Footnote 7. *Okaw Drainage Dist. v. National Distillers & Chem. Corp., 882 F.2d 1241, 1244 (7th Cir. 1989)* (Rule 52(a) does not prescribe any format for judge's findings and conclusions).

(n10)Footnote 8. *Nuelsen v. Sorensen, 293 F.2d 454, 459 (9th Cir. 1961)* .

(n11)Footnote 9. *Stock Equip. Co. v. Tennessee Valley Auth., 906 F.2d 583, 592-593 (11th Cir. 1990)* (claim that district court damages award was erroneous because court's findings were both contradictory and inadequate as a matter of law rejected by appellate court, which found that district court's findings were adequate).

(n12)Footnote 1. *Fed. R. Civ. P. 52(a)(1)*.

(n13)Footnote 2. *See, e.g., Mims v. Board of Education, 523 F.2d 711, 713 (7th Cir. 1975)* .

(n14)Footnote 3. *See Fed. R. Civ. P. 52(a)*, Committee Note to 1983 Amendments; *see also Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1214 (3d Cir. 1993)* (in 1983, Rule 52(a) was amended explicitly to sanction use of oral findings in bench trials).

(n15)Footnote 4. *Okaw Drainage Dist. v. National Distillers & Chem. Corp., 882 F.2d 1241, 1244 (7th Cir. 1989)* .

(n16)Footnote 5. *In re Mazzeo, 167 F.3d 139, 142-143 (2nd Cir. 1999)* ; *Chandler v. City of Dallas, 958 F.2d 85, 88-90 (5th Cir. 1992)* , *cert. denied, 511 U.S. 1011 (1994)* .

(n17)Footnote 6. *In re Mazzeo, 167 F.3d 139, 142-143 (2nd Cir. 1999)* .

(n18)Footnote 7. *Bartsh v. Northwest Airlines, Inc., 831 F.2d 1297, 1305 (7th Cir. 1987)* (in complex age discrimination case, transcribed findings of eight and one half pages could have been more complete, but they dealt with critical issues and were not clearly erroneous).

(n19)Footnote 1. *Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 837, 840-841 (7th Cir. 1993)* (district court findings in class action were sufficient although based solely on written record); *SMP Sales Management, Inc. v. Fleet Credit Corp., 960 F.2d 557, 559 (5th Cir. 1992)* (in case claiming tortious interference with contract, trial court's findings based on depositions and stipulation were entitle to same standard of review that they would receive if based on oral testimony).

(n20)Footnote 2. *SMP Sales Management, Inc. v. Fleet Credit Corp., 960 F.2d 557, 559 (5th Cir. 1992)* .

(n21)Footnote 3. *Edwards v. United States Postal Serv., 909 F.2d 320, 322 (8th Cir. 1990)* .

(n22)Footnote 1. *Fed. R. Civ. P. 52(a)(4)*.

(n23)Footnote 2. *Fed. R. Civ. P. 53(a)(1)(B)(i)*.

(n24)Footnote 3. *Fed. R. Civ. P. 53(a)(1)(B)(ii)*.

(n25)Footnote 4. *Fed. R. Civ. P. 53(f)(3)*; *see Summers v. Howard Univ., 374 F.3d 1188, 1195 (D.C. Cir. 2004)* .

(n26)Footnote 5. *Fed. R. Civ. P. 53(f)(4)*.

(n27)Footnote 6. *Smith v. Dental Products Co., 168 F.2d 516, 518-519 (7th Cir. 1948)* .

(n28)Footnote 1. *Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972)* .

(n29)Footnote 2. *Nyyssonen v. Bendix Corp., 342 F.2d 531, 532 (1st Cir. 1965)* (trial court in patent infringement

action properly based its decision that there was no infringement on defendant's proposed findings of fact and on defendant's expert witness' testimony).

(n30)Footnote 3. *Desch v. United States, 186 F.2d 623, 626 (7th Cir. 1951)* (while burden and responsibility to make findings of fact and state conclusions of law are primarily and ultimately on trial court, counsel for parties, especially prevailing party, have an obligation to assist it in performance of its duty in this regard).

(n31)Footnote 4. *Bright v. Land O'Lakes, Inc., 844 F.2d 436, 440 (7th Cir. 1988)* (in action for unlawful cancellation of distribution agreement, district court adopted findings proposed by defendant because plaintiff failed to submit findings on this issue as requested by district court).

(n32)Footnote 5. *Selman v. Cobb County Sch. Dist., 449 F.3d 1320, 1326-1327 (11th Cir. 2006)* .

(n33)Footnote 6. *Schnell v. Allbright-Nell Co., 348 F.2d 444, 446 (7th Cir. 1965)* , *cert. denied, 383 U.S. 934 (1966)* (district court adopted prevailing party's findings of fact supported by evidence); *Roberts v. Ross, 344 F.2d 747, 751-752 (3rd Cir. 1965)* (prior to Supreme Court's decision that permitted trial court to adopt party's findings verbatim, third circuit frowned on trial court's dependency on prevailing party's formulation of findings).

(n34)Footnote 7. *Heterochemical Corp. v. United States Rubber Co., 368 F.2d 169, 172 (7th Cir. 1966)* .

(n35)Footnote 8. *United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964)* .

(n36)Footnote 9. *In re Jess, 169 F.3d 1204, 1209-1210 (9th Cir. 1999)* (circuit has frequently criticized trial court's wholesale adoption of party's proposed findings.

(n37)Footnote 10. *Dole Fresh Fruit Co. v. United Banana Co., 821 F.2d 106, 109 (2d Cir. 1987)* (court adopted by reference findings of fact proposed by plaintiff).

(n38)Footnote 11. *Photo Elecs. Corp. v. England, 581 F.2d 772, 777 (9th Cir. 1978)* (adoption may be permissible in patent cases and in cases with complex scientific problems).

(n39)Footnote 12. *PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1267 & n.4 (7th Cir. 1995)* (when under time deadline pressures of preliminary injunction, it was acceptable for court to adopt many or most of parties' proposed findings, particularly if skillfully and wisely crafted).

(n40)Footnote 13. *James v. Stockham Valves & Fittings Co., 559 F.2d 310, 314 & n.1 (5th Cir. 1977)* , *cert. denied, 434 U.S. 1034 (1978)* .

(n41)Footnote 14. *Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 837, 842 (7th Cir. 1993)* .

(n42)Footnote 15. *PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1267 n.4 (7th Cir. 1995)* .

(n43)Footnote 15.1. *Silver v. Exec. Car Leasing Long Term Disability Plan, 466 F.3d 727, 733-734 (9th Cir. 2006)* .

(n44)Footnote 15.2. *In re Dixie Broadcasting, Inc., 871 F.2d 1023, 1030 (11th Cir. 1989)* .

(n45)Footnote 16. *In re Jess, 169 F.3d 1204, 1209-1210 (9th Cir. 1999)* (although verbatim adoption of findings proposed by party might be permissible way for trial court to make findings, circuit has frequently criticized trial court's wholesale adoption of party's proposed findings).

(n46)Footnote 17. *Edward Valves, Inc. v. Cameron Iron Works, Inc., 289 F.2d 355, 356 (5th Cir. 1961)* , *cert.*

denied, 368 U.S. 833 (1961) (trial court's independent judicial labors and study are far more helpful to appellate courts than mechanical adoption of successful attorney's proposed findings).

(n47)Footnote 18. *United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942)* (it is better practice to file opinion with findings by trial judge, as opposed to those proposed by parties because it requires more care exercised by trial judge).

(n48)Footnote 19. *Falcon Constr. Co. v. Economy Forms Corp., 805 F.2d 1229, 1232 (5th Cir. 1986)* ; *Andre v. Bendix Corp., 774 F.2d 786, 800 (7th Cir. 1985)* , *cert. denied, 488 U.S. 855 (1988)* .

(n49)Footnote 20. *Walton v. United Consumers Club, Inc., 786 F.2d 303, 313-314 (7th Cir. 1986)* (wholesale adoption of party's proposed findings obscures reasoning process of judge).

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.06

§ 23.06 Sufficiency of Findingsn*

[1] Distinction Between Findings of Fact and Conclusions of Law

Rule 52 expressly provides that the trial court must find the facts specially and state separately its conclusions of law. n1 However, the rule does not instruct the court or the parties the method how to distinguish between factual findings and legal conclusions. As a general matter, a finding of fact is an examination and determination regarding the existence of circumstances related to the claim in the case. n1.1 A conclusion of law is an application of those factual circumstances to make a determination according to the correct legal standard or principle as set out in statutes, cases, and regulations. n1.2

The importance of the distinction between law and fact is that the standards of review for findings of fact and conclusions of law are different. Findings of fact may not be reversed on appeal unless they are clearly erroneous. On the other hand, the court of appeals may review conclusions de novo. Thus, the distinction between law and fact is important, but the attempt of separating findings of fact from conclusions of law may be difficult because there is no bright line between the two.

The United States Supreme Court has recognized this difficulty, and has explained that the point at which the line is drawn between law and fact varies according to the nature of the substantive law at issue. n2 Consequently, circuits often do not have uniform positions as to whether certain determinations are properly characterized as legal or factual. For example, a finding of negligence is considered by the Second Circuit as a legal conclusion because it involves a specific rule of conduct, that of reasonable care under the particular circumstances. n3 However, other circuits consider a finding of negligence to be a question of fact because the application of the standard is so fact specific. n4

[2] Findings of Fact

[a] Adequacy of Findings

The trial court must state its findings in terms sufficient to allow the appellate court the opportunity to conduct a meaningful review. n1 A district court may not merely state its findings in conclusory terms. The findings, whether written or oral, must be sufficiently detailed to disclose the steps by which the court reached its ultimate conclusions on

factual issues. n1.1 The ultimate question with respect to the adequacy of findings of fact is whether the findings are sufficiently comprehensive and detailed to provide the appellate court with a clear understanding of the basis of the district court's decision. n2

There is no single test that will indicate in every case whether findings are sufficient. The degree of specificity that will be necessary to meet the requirement of sufficiency will vary from case to case. n3 Nonetheless, when a conclusion of law on a particular issue or claim requires a determination of a number of elements or factors, the district court should state the factual basis of its decision on each of the elements or factors. n3.1 The fact that the record of a case may be voluminous and the issues complicated, making the task of articulating findings more difficult, does not excuse the trial judge from making detailed findings. The appellate court needs even more detailed information to perform an adequate review in a complex case. n4 However, even where the district court's findings are poorly done and do not articulate specific factual bases for the decision, there is no Rule 52(a) defect when the basis for the decision is clear, and the record gives substantial and unequivocal support for the ultimate conclusion. n5

The trial court need not make findings on undisputed or stipulated facts, n6 unless different inferences may be drawn from the undisputed facts. n7 The court also does not need to make findings on issues that are not decisive or material to the case. For example, the court need not make findings on allegations relating to damages when the court would enter judgment for the defendant. n8

[b] Discussion of Evidence In Findings

The court of appeals will liberally construe the findings of the trial court to support a judgment or order. Consequently, if facts can be inferred from those specified in the findings, the appellate court will deem that the trial court has drawn such inferences. n9 While the court's findings must be clear, coherent, and complete on all material issues, they should avoid an unnecessarily elaborate review of the evidence. n10

As a general rule, the district court is not required to make findings on every detail, to discuss all evidence that supports each finding made, or to respond individually to each evidentiary or factual contention made by a party. n11 A decision between the positions of two parties necessarily rejects contentions made by one or the other. The trial court's failure to discuss each party's contentions does not make the findings inadequate or suggest that the court failed to understand the propositions. n12 Furthermore, the trial court may disbelieve the testimony of witnesses without giving specific reasons for doing so, provided that the record supports the conclusion that the court made adequate credibility determinations. n13

On the other hand, if substantial evidence exists to support a contrary conclusion to the one reached, the trial court should discuss that evidence and explain its conclusions. n14 The trial court is not, however, required to assert the negative of rejected propositions. n15 The appellate court will presume that the judge considered all the evidence and relied on the evidence that supported the findings, and rejected the evidence that did not support the findings, unless the trial court has stated otherwise. n16

[c] No Distinction Required Between Ultimate and Subsidiary Facts

The Supreme Court has disapproved of prior case-law distinctions between "ultimate facts" on one hand, and "preliminary," "subsidiary," or "subordinate" facts on the other. The Supreme Court noted that Rule 52(a) does not divide facts into categories and that the trial court should include a statement of all facts in its findings. n17 However, these distinctions may still be important to show how the trial court made its ultimate factual decision when the court's findings on one set of facts are necessary to form the basis of other findings. For example, a district court must state its "subordinate" factual findings in support of its "ultimate" findings, so that the court of appeals can ascertain what evidence the district judge accepted as credible and what evidence was rejected. n18 Thus, the trial court should include enough of the underlying or subsidiary facts to allow a reviewing court to follow the steps that were taken by the trial

court to arrive at its conclusion on each factual issue. If the trial court fails to do so, the appellate court may rule that the findings of fact are inadequate. n19 If, however, subsidiary facts are inherent in or obvious from the findings of ultimate facts, the appellate court may not remand for further findings. n20

[3] Conclusions of Law Must State Reasons for Legal Determinations

As with the findings of fact, n1 the conclusions of law must carefully state and clearly explain the trial court's resolution of questions of law, so that the appellate court is able to conduct a just and orderly review of the rights of the parties. n2 A trial court's carefully prepared discussion of the legal issues becomes particularly important in cases that involve complex legal issues. When the district court carefully states the steps it took in its resolution of questions of law, the appellate court can then conclude that it has thoughtfully and diligently decided the legal issues. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewFact & Law Issues

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.15 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(a)(1).*

(n3)Footnote 1.1. *Janis v. Comm'r, 461 F.3d 1080, 1084 (9th Cir. 2006)* .

(n4)Footnote 1.2. *See Westefer v. Snyder, 422 F.3d 570, 583 (7th Cir. 2005)* .

(n5)Footnote 2. *Bose Corp. v. Consumers, Inc., 466 U.S. 485, 501 n.17, 104 S. Ct. 1949, 80 L. Ed.2d 502 (1984)* (determination of actual malice in defamation suit is question of law held to de novo review and not to clearly erroneous standard for factual finding under Rule 52(a)).

(n6)Footnote 3. *Cleary v. United States Lines Co., 411 F.2d 1009, 1010 (2d Cir. 1969)* .

(n7)Footnote 4. *See, e.g., Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1321 (11th Cir. 1989)* (issue of whether shipowner negligently maintained ship's dance floor was a question of fact).

(n8)Footnote 1. *Collins v. Henderson, 180 F.3d 988, 990 (8th Cir. 1999)* ; *Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 423 (4th Cir. 1999)* .

(n9)Footnote 1.1. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 711-712 (3d Cir. 2004)* (citing **Moore's Federal Practice**; findings inadequate when court considered only two of eight factors and failed to properly weigh factors).

(n10)Footnote 2. *League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 846 (5th Cir. 1997)* (trial court need not expressly mention all evidence in its decision, so long as court specifically identifies evidence found credible, states reasons for court's conclusions, and discusses all substantial evidence contrary to its decision).

(n11)Footnote 3. *Kelley v. Everglades Drainage Dist., 319 U.S. 415, 419, 63 S. Ct. 1141, 87 L. Ed. 1485 , reh'g denied, 320 U.S. 214 (1943)* .

(n12)Footnote 3.1. *Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 711-712 (3d Cir. 2004)* .

(n13)Footnote 4. *Davis v. New York City Hous. Auth., 166 F.3d 432, 435 (2d Cir. 1999)* (whether findings are adequate depends on importance and complexity of given issue, and depth and nature of evidence presented).

(n14)Footnote 5. *Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079 (1st Cir. 1995)* (anemic factual findings are not fatal to decision so long as complete understanding of issues may be had from record); *see* [b], *below*.

(n15)Footnote 6. *James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 273 (7th Cir. 1976)* (when there was no dispute of facts, findings were not required); *Nuelsen v. Sorensen, 293 F.2d 454, 459 (9th Cir. 1961)* (findings not required as to undisputed allegations).

(n16)Footnote 7. *Weissbaum v. Hannon, 439 F. Supp. 873, 876 n.1 (N.D. Ill. 1977)* (citing **Moore's Federal Practice**).

(n17)Footnote 8. *Nuelsen v. Sorensen, 293 F.2d 454, 459 (9th Cir. 1961)* .

(n18)Footnote 9. *Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 179 (7th Cir. 1948)* , *aff'd on other grounds, 336 U.S. 956 (1949)* ; *see Century Marine Inc. v. United States, 153 F.3d 225, 231 (9th Cir. 1998)* (if district court fails to make specific finding of particular fact, circuit court may assume that district court impliedly made finding consistent with its general holding, provided that implied finding is supported by evidence).

(n19)Footnote 10. *See Reich v. Lancaster, 55 F.3d 1034, 1045 (5th Cir. 1995)* (if trial judge fails to make specific finding on particular fact, appellate court may assume that court made finding consistent with general holding, so long as implied holding is supported by evidence).

(n20)Footnote 11. *Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 55 (1st Cir. 1998)* (in antitrust case, district court's findings were sufficient because they included explicit intermediate findings, such as existence of competition, and strengths and weaknesses of plaintiff's product, and it was possible for circuit court to discern evidence underlying these key findings).

(n21)Footnote 12. *ViCon, Inc. v. CMI Corp., 657 F.2d 768, 772 (5th Cir. 1981)* (master's acceptance of findings of one party and rejection of other's does not indicate that master failed to perform judicial function).

(n22)Footnote 13. *Krieger v. Gold Bond Bldg. Prods., 863 F.2d 1091, 1097 (2d Cir. 1988)* (trial court's findings were not inadequate merely because they failed to refer to defendant's expert evidence that indicated that plaintiff's job performance was not satisfactory).

(n23)Footnote 14. *McIntosh County Branch of NAACP v. Darien, 605 F.2d 753, 757 (5th Cir. 1979)* (remand required because judge failed to discuss substantial evidence supporting contrary conclusion in complex voting rights case, where it was important for trial court to meticulously comply with Rule 52(a)).

(n24)Footnote 15. *Stock Equip. Co. v. Tennessee Valley Auth., 906 F.2d 583, 592-593 (11th Cir. 1990)* (citing **Moore's Federal Practice**).

(n25)Footnote 16. *Western Pac. Fisheries, Inc. v. SS President Grant, 730 F.2d 1280, 1285 (9th Cir. 1984)* (court not required to recite every item of evidence and either adopt it or reject it).

(n26)Footnote 17. *See Pullman-Standard v. Swint, 456 U.S. 273, 288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n27)Footnote 18. *Edwards v. Wyatt, 335 F.3d 261, 275 (3d Cir. 2003)* (trial court must not leave subordinate findings unarticulated; when they actually were reached in process of arriving at ultimate factual conclusion, they must be stated).

(n28)Footnote 19. *Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1192 (7th Cir. 1987)*

(findings must disclose the steps by which ultimate conclusion was reached); *Lettsome v. United States, 434 F.2d 907, 909 (5th Cir. 1970)* (case remanded for findings of fact and conclusions of law in case in which district court held plaintiff was not contributorily negligent, because court did not enter any subsidiary findings of fact).

(n29)Footnote 20. *Brown v. Lykes Bros. S.S. Co., 484 F.2d 61, 62 n.4 (5th Cir. 1973)* , *cert. denied, 414 U.S. 1158 (1974)* .

(n30)Footnote 1. *See* [2], *above*.

(n31)Footnote 2. *Kos Pharms., Inc. v. Andrx Corp., 2004 U.S. App. LEXIS 10165, at *27 (3d Cir. May 24, 2004)* (citing **Moore's Federal Practice;** conclusions of law must carefully enunciate and explain trial court's resolution of each question of law, including statement explaining each factor or element that forms basis of particular claim or cause of action); *Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1192 (7th Cir. 1987)* (district court's statement merely that law was with defendant was inadequate as legal conclusion).

(n32)Footnote 3. *Chandler v. City of Dallas, 958 F.2d 85, 90 (5th Cir. 1992)* , *cert. denied, 511 U.S. 1011 (1994)* (court was unable to determine district court's reasons for deciding legal issue in *First Amendment* analysis of whether speech involved matters of public concern).

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.07

§ 23.07 Time for Trial Court to Make Findingsn*

The Federal Rules of Civil Procedure do not specify any particular time for the trial court to issue its findings. Rule 52(a) merely states that the court shall find the facts specially and state separately its conclusions of law on the findings of fact, and judgment shall be entered pursuant to Rule 58. n1 It has been held that the federal rules do not require the issuance of findings and conclusions before or at the same time as the order or judgment. Therefore, the court may issue its findings and conclusions after the time of judgment. n2 When the court is ruling on a motion for an injunction, for example, a requirement that findings and conclusions be issued simultaneously with the order might prevent necessary immediate action on the injunction. n3

However, in cases that do not require emergency or immediate action, it has been held that the best practice for the trial court is to prepare findings after the evidence presented by all parties has been heard and analyzed n4 but before or contemporaneously with the announcement of the decision. n5 This timing is preferred because preparation of the findings promotes thoroughness and accuracy and enables the trier of fact to clarify the issues. n6

Although the rule itself does not specify a deadline for filing findings, it apparently contemplates that findings will be filed with the judgment or shortly after judgment. This intent is apparent by the fact that Rule 52 expressly provides that a party must make any motion to amend or add to findings no later than 28 days after the entry of the judgment, n7 and this deadline may not be extended. n8

The importance of filing findings expeditiously may be affected by the circumstances of a particular case. For example, in a bifurcated trial where the damages phase of trial is held separately from the liability phase, it is helpful for the trial court to issue the findings before trial of the damages phase to enable the parties to plan their cases accordingly. Filing of findings after entry of judgment will not be deemed reversible error if the timing does not prejudice the appellant. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.16 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 52(a).*

(n3)Footnote 2. *See* Parcel 49C *Ltd. P'ship v. United States, 31 F.3d 1147, 1150 (Fed. Cir. 1994)* (findings and conclusions issued two weeks after injunctive order).

(n4)Footnote 3. Parcel 49C *Ltd. P'ship v. United States, 31 F.3d 1147, 1150 (Fed. Cir. 1994)* (issuance of findings and conclusions two weeks after injunctive order was not error because neither party suffered prejudice from interval between order and supportive factual and legal reasoning).

(n5)Footnote 4. *Jackson v. DeSoto Parish School Board, 585 F.2d 726, 730 (5th Cir. 1978)* (due process requires that findings should be made only after evidentiary hearing at which both sides have opportunity to be heard); *United States v. Mills, 372 F.2d 693, 697 (10th Cir. 1966)* (findings should not have been made on controverted issues at time court was deciding motion for summary judgment, such findings must await evidentiary hearing at which all parties may be heard).

(n6)Footnote 5. *Gibbs v. Buck, 307 U.S. 66, 78, 59 S. Ct. 725, 83 L. Ed. 1111 (1939)* (filing of findings of facts and conclusions of law should occur before or contemporaneously with the order or decree); *see Lapeyrouse v. Texaco, Inc., 670 F.2d 503, 504 (5th Cir. 1982)* (findings issued at time of order dismissing party for lack of in personam jurisdiction).

(n7)Footnote 6. *Roberts v. Ross, 344 F.2d 747, 751-752 (3d Cir. 1965) .*

(n8)Footnote 7. *Fed. R. Civ. P. 52(b).*

(n9)Footnote 8. *Fed. R. Civ. P. 6(b)(2); Empresa Cubana Del Tabaco v. Culbro Corp., 478 F. Supp. 2d 513, 518 (S.D.N.Y. 2007) .*

(n10)Footnote 9. Parcel 49C *Ltd. Partnership v. United States, 31 F.3d 1147, 1150 (Fed. Cir. 1994) .*

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.08

§ 23.08 Appellate Reviewn*

[1] Requests for Findings Not Prerequisite to Appeal

Because the trial court has a mandatory, automatic obligation to make findings and conclusions, n1 a party may on appeal question the sufficiency of evidence supporting the findings, even if the party has not made any prior request for the findings, objected to them, moved to amend them, or moved for partial findings. n2 However, rather than wait for an appeal and seeking a remand, courts have suggested that it may be advisable for a party to seek in the district court a post-judgment amendment of the findings under Rule 52(b). n3

[2] Appellate Review of Findings of Fact

[a] Clearly Erroneous Standard

An appellate court may not set aside findings of fact by the district court, whether based on oral testimony or other evidence, unless the findings are clearly erroneous. n1 However, the precise meaning of the term "clearly erroneous finding" is not stated in the rule, and it has been developed by case-law precedent. n2 The Supreme Court has provided a guiding definition: a finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, even though there may be some evidence to support the finding. n3

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, n4 the appellate court may not reverse even though it is convinced that it would have weighed the evidence differently and arrived at a different result if it had been sitting as the trier of fact. n5 In other words, a choice between two plausible views of the evidence may not be clearly erroneous. n6 The appellate court must be convinced that the decision is more than just a possibility or probability that it is wrong. n7

As examples of the clearly erroneous standard, appellate courts have determined findings to be clearly erroneous in the following cases: the finding is not supported by substantial evidence; n8 even though there is substantial evidence to support the finding, the reviewing court concludes that the finding is against the clear weight of the evidence; n9 the finding is based on the application of an incorrect legal standard; n10 and the finding is directly contrary to the only

testimony presented. n11

[b] Deference Accorded Trial Courts Findings

The Supreme Court has stated that the clearly erroneous standard of review by appellate courts is significantly deferential to a district court's findings, although not as deferential as the "reasonableness" standard of review. n12 Courts have reasoned that district judges are specialists in fact finding, n13 while the primary function of the appellate courts is to maintain the uniformity and coherence of the law. n14 Additionally, trial courts are entitled to deference on review because they have the advantage of direct experience of the testimony and evidence presented at trial. n15

However, the findings of the trial court in a non-jury trial are accorded less deference than the findings of the jury in a jury trial. n16 Under the *Seventh Amendment*, appellate review of the fact findings of a jury is prohibited, but this prohibition is not applicable to non-jury cases or to cases with an advisory jury. n17

The correct standard of review of the findings in a non-jury does not require an appellate court to view the evidence in a light most favorable to the prevailing party. While the reviewing court must give great weight to the findings of the trial court, it is permitted to examine all the evidence in the record and discard those findings that it determines are clearly erroneous. n18

The usefulness of the clearly erroneous, deferential standard of review is most obvious when the evidence was largely testimonial and the district court has had the opportunity of observing witnesses and evaluating their credibility directly. n19 The United States Supreme Court has observed that only the trial judge can be aware of the variations in demeanor and tone of voice that bear heavily on the listener's understanding of and belief in what is said. Therefore when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and plausible story that is not contradicted by extrinsic evidence, that finding may virtually never be overturned as clear error. n20 Consequently, if the district court disregards the testimony of witnesses it finds to be untruthful n21 or resolves issues by weighing the credibility of conflicting expert witnesses, the appellate court must give the resulting findings great deference. n22

On the other hand, an appellate court may determine that findings are clearly erroneous, even if based on the credibility of witnesses, because there are factors other than demeanor and inflection that go into a decision whether or not to believe a witness. For example, the appellate court may determine a finding based on credibility testimony is clearly erroneous when the testimony internally implausible or inconsistent. n23

It should be noted also that the clearly erroneous standard of review applies to the district court's findings of fact even if those findings are based wholly or mainly on documentary evidence rather than on the trial court's evaluation of primarily oral testimony. n24 Similarly, the clearly erroneous standard controls the review of findings which are based on other items reviewed by the trial court in which the credibility and demeanor of witnesses is not subject to direct evaluation of the trial court, such as stipulated or undisputed facts, depositions, n25 the parties' trial briefs, and the other documents and evidence in the record. n26

[c] Findings of Master

The trial court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that the findings will be reviewed for clear error. n27 The court must decide de novo all objections to conclusions of law made or recommended by a master. n28 When the trial judge adopts the findings of a master, they become the findings of the trial court. n29 Consequently, a reviewing court is in turn required to review these adopted findings by the clearly erroneous standard. n30 However, the rule is more complicated when the district court rejects the findings of the master and prepares new findings. Most circuits hold that if the trial court has discarded some or all of the master's findings, the reviewing court must disregard the district court's review of the

master's findings, and apply the clearly erroneous test to the findings of the master. n31

A few circuits have held that a more deferential approach to the intermediate court is proper because there is a significant difference between "direct review" and "review of review." n32 These circuits rationalize that a trial court's decision holding a finding by the master clearly erroneous is not itself a finding of fact subject to the clearly erroneous rule. They first review the correctness of the district court's decision to reject the master's report, as a matter of law, without reference to the district court's own substituted factual findings. n33 Then, if the appellate court concludes that the master's findings were clearly erroneous, and that the district court made the correct decision, it will review any substituted or additional findings made by the district court under the clearly erroneous standard. n34

[d] Standard in Cases With Advisory Jury

When an appellate court reviews findings of fact in a case where the court used an advisory jury, the standard of review for the findings is the same as the standard employed in a non-jury case, which is that the findings may not be set aside unless they are clearly erroneous. n35 An advisory jury's verdict is not binding on the district court, which may adopt it in whole or in part, or totally disregard it. The ultimate decision is left to the trial judge. n36 However, the trial court must make findings of fact and conclusions of law irrespective of whether the verdict of the advisory jury is accepted or rejected. n37 Thus, when the trial judge adopts the findings of an advisory jury, those findings are reviewable for clear error. n38

When the trial court refuses to adopt the findings of the advisory jury, the court must make independent findings which provide the basis for subsequent review under the clearly erroneous standard. n39 The district court's decision to reject the advisory jury's verdict is not itself subject to review. n40

[3] Appellate Review of Conclusions of Law

[a] Standard of Review is De Novo

An appellate court reviews the trial court's conclusions of law under a de novo standard, n1 which means that it may substitute its own legal conclusions for those of the trial court. The de novo standard is in contrast to the clearly erroneous standard used for review of factual findings, n2 Under the de novo standard, the appellate court is not required to show deference to the trial court's legal analysis, and may freely overturn conclusions it considers erroneous. n3 De novo review is applicable to all conclusions of law, including determinations by the trial court that interpret federal or state law, n4 or the law of a foreign country. n5

There are several reasons for de novo review of conclusions of law. First, appellate judges can concentrate on legal questions because they are not burdened by the important but time-consuming process of hearing witnesses and evidence. Second, the judgment of at least three members of an appellate panel is applied to every case. Thus, it is logical to assume that the collaborative process of an appellate court reduces the risk of judicial error on questions of law and minimizes judicial error by assigning the primary responsibility to the court best positioned to decide the issue. n6

De novo review also serves to support the appellate function of announcing, clarifying, and conforming the rules of law. De novo review of questions of law is required in part because of the precedential effect of those questions on future parties. While findings of fact in a particular case bind only the parties to the action, determinations of legal issues affect the rights of future parties. n7

[b] Imprecise Distinction Between Law and Fact

Although conclusions of law are reviewed de novo, n8 the individual, underlying findings of fact that lead to a legal conclusion must be reviewed under the more restrictive clearly erroneous standard. n9 However, if the trial court's

factual findings are themselves based on an erroneous view of the controlling law, the appellate court is not bound by the findings. n10 The appellate court may discard factual findings only if the legal error by the trial court actually affected the challenged findings. n11

While the important consequence of the standard for review is based on whether a finding is factual or legal, in many situations it may be difficult to distinguish between findings of fact and conclusions of law for the purpose of determining which standard should be applied. A number of courts have tried to clarify the distinction. One circuit court has suggested that a determination is a finding of fact if it concerns whether the evidence showed that something occurred or existed; in contrast, a determination is a conclusion of law if it is the result of the processes of legal reasoning from, or interpretation of, the legal significance of the evidentiary facts. n12 Another circuit has concluded that a finding of fact is one closely related to practical human experience, while a conclusion of law is based on the application of a legal standard. n13

Despite such attempts to solidify the distinction between law and fact, the difference between the two remains elusive, and the Supreme Court, after noting the difficultly concluded that the distinction between the two varies according to the nature of the substantive law at issue. n14 In any event, the label a trial court places on a determination as either a finding of fact or a conclusion of law is not controlling, and if the appellate court concludes that the trial court mislabeled a conclusion of law as a finding of fact, it may disregard the label and review the issue de novo. n15 Conversely, if a trial court incorrectly characterizes a finding of fact as a conclusion of law, the appellate court will review the determination under a clearly erroneous standard, as if it had been properly labeled a finding of fact. n16

[4] Appellate Review of Mixed Determinations of Law and Fact

[a] Characterization as Mixed Question of Law and Fact

Appellate courts usually apply a de novo standard of review to mixed questions of law and fact. n1 However, as the term "mixed question" indicates, the determination of whether a question fits in that category is not simple. An issue may be labeled a mixed question of law and fact in one circuit because the court interpreted the issue as a question of law. In another circuit the same issue may be classified as a pure question of fact because that court labeled the same underlying issue as a question of fact. n2

The United States Supreme Court has defined mixed questions of law and fact as those in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant statutory or constitutional standard; in other words, whether the rule of law as applied to the established facts has or has not been violated. In this definition, the rule of law is correct; it is the application of the law to the facts that is at issue. n3

[b] Standard of Review

There has long been much litigation and dispute over the proper standard of review for trial court determinations of mixed questions of law and fact. n4 Many courts have ruled that determinations by the trial court that involve mixed questions of law and fact are not subject to the clearly erroneous test and may be reviewed de novo. n5 Some courts have held that determinations based on mixed questions of law and fact should be given deference and reviewed under the clearly erroneous test. n6 Other courts have circumvented the issue by reviewing the underlying facts under the clearly erroneous standard, while reviewing the legal conclusions that flow from the facts de novo. n7

The United States Supreme Court has not conclusively resolved the issue of whether, or in what circumstances, an appellate court can review mixed questions of law and fact free of the clearly erroneous standard. The Supreme Court, while reserving decision on the issue, n8 has suggested that deference to the trial court's determination of mixed questions of law and fact is warranted when it appears that the trial court is better situated than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. n9

When a circuit does not rigidly apply either the clearly erroneous or de novo test, the circuits have developed two similar, hybrid tests:

The first test reviews findings of issues containing mixed questions of fact and law based on where the findings fall along the degree of deference continuum: the more fact dominated the question, the more likely it is that the trier's resolution of it will be accepted unless shown to be clearly erroneous. n10 For example, questions of negligence, including professional negligence, are fact intensive; therefore, a court-tried finding of negligence is ordinarily reviewed for clear error. n11

The second test uses a two step approach for deciding the appropriate standard of review for a trial court's application of law to fact: (a) use the clearly erroneous test if the application of the law to the facts requires an inquiry that is essentially factual, that is, if it relies on the trial court's experience with the principles of human conduct; and (b) use de novo review if the question requires significant consideration of legal concepts in the mix of fact and law. This test generally favors de novo review because the application of law usually requires the consideration of legal concepts and involves the exercise of judgment about the values underlying legal principles. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewFact & Law Issues

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States v. City of Yonkers, 181 F.3d 301, 321-323 (2d Cir. 1999)* , *vacated*, *197 F.3d 41 (2d Cir. 1999)* (Rule 52(a) requirement is mandatory and may not be waived).

(n3)Footnote 2. *Fed. R. Civ. P. 52(a)(5).*

(n4)Footnote 3. *Amadeo v. Zant, 486 U.S. 214, 223-228, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988)* ; *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, 45 F.3d 1550, 1555 (Fed. Cir. 1995)* ; *see Fed. R. Civ. P. 52(b)*; *see also § 23.09.*

(n5)Footnote 1. *Fed. R. Civ. P. 52(a)(6).*

(n6)Footnote 2. *See Ellis v. Grant Thornton LLP, 530 F.3d 280, 286-287 (4th Cir. 2008)* .

(n7)Footnote 3. *Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n8)Footnote 4. *United States v. Brown, 561 F.3d 420, 432 (5th Cir. 2009)* .

(n9)Footnote 5. *Amadeo v. Zant, 486 U.S. 214, 223-228, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988)* (court of appeals erred in merely expressing disagreement and substituting its own factual findings for those of district court).

(n10)Footnote 6. *United States v. Yellow Cab Co., 338 U.S. 338, 342, 94 L. Ed. 150 (1949)* .

(n11)Footnote 7. *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)* , *cert. denied, 493 U.S. 847 (1989)* .

(n12)Footnote 8. *Blohm v. Commissioner, 994 F.2d 1542, 1548 (11th Cir. 1993)* .

(n13)Footnote 9. *Barrett v. United States, 51 F.3d 475, 479 (5th Cir. 1995)* .

(n14)Footnote 10. *Weissmann v. Freeman, 868 F.2d 1313, 1317 (2d Cir. 1989)* , *cert. denied, 493 U.S. 883 (1989)* .

(n15)Footnote 11. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 571 (2d Cir. 1991)* .

(n16)Footnote 12. *Concrete Pipe & Prods., Inc., v. Construction Laborers Pension Trust, 508 U.S. 602, 623, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)* (clearly erroneous standard requires a definite and firm conviction that mistake has been committed).

(n17)Footnote 13. *Ellis v. Grant Thornton LLP, 530 F.3d 280, 286-287 (4th Cir. 2008)* (appellate court must give due regard to the opportunity of the district court to judge the credibility of the witnesses).

(n18)Footnote 14. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 856-858, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)* (determining weight and credibility of evidence is special province of trier of fact).

(n19)Footnote 15. *Reich v. Lancaster, 55 F.3d 1034, 1045 (5th Cir. 1995)* (trial judge's unique perspective to evaluate witnesses and to consider entire context of evidence must be respected).

(n20)Footnote 16. *United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945)* .

(n21)Footnote 17. *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)* .

(n22)Footnote 18. *EEOC v. Clear Lake Dodge, 25 F.3d 265, 270 (5th Cir. 1994)* , *aff'd without op., 108 F.3d 332 (5th Cir. 1997)* (appellate court will overturn district court where there is only one permissible view of weight of evidence).

(n23)Footnote 19. *Ellis v. Grant Thornton LLP, 530 F.3d 280, 287 (4th Cir. 2008)* .

(n24)Footnote 20. *Anderson v. City of Bessemer, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n25)Footnote 21. *Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756, 760 (7th Cir. 1992)* (district court may disregard testimony of any witness when he or she is satisfied that witness is not telling truth).

(n26)Footnote 22. *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A., 898 F.2d 1071, 1076-1077 (5th Cir. 1990)* , *cert. denied, 498 U.S. 900 (1990)* (in non-jury trial, credibility choices between conflicting experts are within province of trial court, subject only to clearly erroneous standard).

(n27)Footnote 23. *Bennett v. Local Union No. 66, 958 F.2d 1429, 1433 (7th Cir. 1992)* (if trial court relies on testimony that is itself implausible, illogical, or internally inconsistent, finding of clear error may be made even in absence of contradictory extrinsic evidence).

(n28)Footnote 24. *Fed. R. Civ. P. 52(a)(6)* (clearly erroneous standard applies to both oral and other evidence).

(n29)Footnote 25. *SMP Sales Management, Inc. v. Fleet Credit Corp., 960 F.2d 557, 559 (5th Cir. 1992)* .

(n30)Footnote 26. *See Selman v. Cobb County Sch. Dist., 449 F.3d 1320, 1326 (11th Cir. 2006)* .

(n31)Footnote 27. *Fed. R. Civ. P. 53(f)(3)*.

(n32)Footnote 28. *Fed. R. Civ. P. 53(f)(4).*

(n33)Footnote 29. *Fed. R. Civ. P. 52(a)(4).*

(n34)Footnote 30. *See Summers v. Howard Univ., 374 F.3d 1188, 1195 (D.C. Cir. 2004)* .

(n35)Footnote 31. *See, e.g., Gottlieb v. Barry, 43 F.3d 474, 480 (10th Cir. 1994)* (under majority view, district court should not have rejected master's conclusion regarding method for calculating attorney fees, when master's use of this method was not clearly erroneous).

(n36)Footnote 32. *Stone v. Commissioner, 865 F.2d 342, 348 (D.C. Cir. 1989)* .

(n37)Footnote 33. *Milliken Research Corp. v. Dan River, Inc., 739 F.2d 587, 592-593 (Fed. Cir. 1984)* .

(n38)Footnote 34. *Martin v. University of South Alabama, 911 F.2d 604, 608 (11th Cir. 1990)* .

(n39)Footnote 35. *Fed. R. Civ. P. 52(a)(1),(6).*

(n40)Footnote 36. *Wynn Oil Co. v. Purolator Chem. Corp., 536 F.2d 84, 86 (5th Cir. 1976)* (district court's decision to accept advisory jury's findings was not error); *see* Ch. 22, *Trial by Jury*.

(n41)Footnote 37. *McKnight v. General Motors Corp., 908 F.2d 104, 113 (7th Cir. 1990)* , *cert. denied, 499 U.S. 919 (1991)* (findings by jury were far too sparse to satisfy Rule 52(a), and therefore district court judge had duty under that rule to make findings of fact and conclusions of law).

(n42)Footnote 38. *Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 965 (8th Cir. 2005)* .

(n43)Footnote 39. *Reachi v. Edmond, 277 F.2d 850, 852 (9th Cir. 1960)* .

(n44)Footnote 40. *Interstate Commerce Comm'n. v. Southwest Marketing Ass'n, 315 F. Supp. 805, 807 (N.D. Tex. 1970)* (when trial court does not accept jury's advice, trial court may proceed to make its own independent findings of fact and conclusions of law, and its rejection of advisory verdict is not subject to appellate review).

(n45)Footnote 1. *Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n46)Footnote 2. *Sabah Shipyard v. M/V Harbel Tapper, 178 F.3d 400, 404-405 (5th Cir. 1999)* .

(n47)Footnote 3. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development, 170 F.3d 449, 453-454 (4th Cir. 1997)* (appellate court may disagree completely or partially with district court's conclusions of law, and adjust judgment accordingly).

(n48)Footnote 4. *Salve Regina College v. Russell, 499 U.S. 225, 232-233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* (federal court of appeals is required to review de novo district court's determinations of state law).

(n49)Footnote 5. *Fed. R. Civ. P. 44.1.*

(n50)Footnote 6. *Salve Regina College v. Russell, 499 U.S. 225, 232-233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* (federal court of appeals is required to review de novo district court's determinations because independent judicial review of legal issues by multi-judge appellate panels best serves the goals of doctrinal coherence and judicial economy).

(n51)Footnote 7. *See In re McLinn, 739 F.2d 1395, 1401 (9th Cir. 1984)* (federal court determinations of state law have precedential importance).

(n52)Footnote 8. *Sabah Shipyard v. M/V Harbel Tapper, 178 F.3d 400, 404 (5th Cir. 1999)* .

(n53)Footnote 9. *Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 686 (6th Cir. 1979)* , *cert. denied, 452 U.S. 938 (1981)* (whether discrimination occurred was conclusion of law based on underlying findings of fact, that were subject to clear error standard).

(n54)Footnote 10. *North Miss. Communications, Inc. v. Jones, 951 F.2d 652, 657 (5th Cir. 1992)* , *cert. denied, 506 U.S. 863 (1992)* (when trial court has made fact finding on erroneous view of law, factual findings lose validity and remand is required).

(n55)Footnote 11. *Lincoln v. Board of Regents, 697 F.2d 928, 939 n.13 (11th Cir. 1983)* , *cert. denied, 464 U.S. 826 (1983)* (appellate court should not depart from the clear error standard when application of wrong legal standard did not "taint or infect" district court's factual findings).

(n56)Footnote 12. *Poyner v. Lear Siegler, Inc., 542 F.2d 955, 959 (6th Cir. 1976)* , *cert. denied, 430 U.S. 969 (1977)* .

(n57)Footnote 13. *McCrary's Farm Supply, Inc., 705 F.2d 330, 332 (8th Cir. 1983)* .

(n58)Footnote 14. *Bose Corp. v. Consumers Union, 466 U.S. 485, 501, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)* (determination of "actual malice" in defamation suit is held to de novo review and not to clearly erroneous standard of Rule 52(a)).

(n59)Footnote 15. *Poyner v. Lear Siegler, Inc., 542 F.2d 955, 959 (6th Cir. 1976)* , *cert. denied, 430 U.S. 969 (1977)* (labeling determinations as findings does not make them so if they are really conclusions of law).

(n60)Footnote 16. *Mentor Ins. Co. (U.K.) v. Brannkasse, 996 F.2d 506, 513 (2d Cir. 1993)* (special master's determinations as to custom and usage of reinsurance that were labeled as conclusions of law were actually findings of fact, and therefore would not be set aside unless clearly erroneous).

(n61)Footnote 1. *See United States v. City of Yonkers, 181 F.3d 301, 321-323 (2nd Cir. 1999)* .

(n62)Footnote 2. *Miller v. Fenton, 474 U.S. 104, 113-114, 106 S. Ct. 445, 88 L. Ed.2d 405 (1985)* (labeling issue as law, fact, or mixed question of law and fact is sometimes difficult).

(n63)Footnote 3. *Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n64)Footnote 4. *Pullman-Standard v. Swint, 456 U.S. 273, 289-290 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* (substantial authority in circuits on both sides of question); *United States v. McCombs, 30 F.3d 310, 317 (2d Cir. 1994)* (stating that degree to which Rule 52(a) governs appellate review of mixed questions of law and fact has been subject of battle for over century).

(n65)Footnote 5. *See, e.g., United States v. City of Yonkers, 181 F.3d 301, 321-323 (2nd Cir. 1999)* ; *Scribner v. Summers, 84 F.3d 554, 557 (2d Cir. 1996)* .

(n66)Footnote 6. *Roper v. Peabody Coal Co., 47 F.3d 925, 927 (7th Cir. 1995)* .

(n67)Footnote 7. *Reich v. Lancaster, 55 F.3d 1034, 1044-1045 (5th Cir. 1995)* .

(n68)Footnote 8. *Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n69)Footnote 9. *Salve Regina College v. Russell, 499 U.S. 225, 233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n70)Footnote 10. *AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 7 (1st Cir. 1994)* .

(n71)Footnote 11. *Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 181 (1st Cir. 1997)* .

(n72)Footnote 12. *United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984)* , *cert. denied*, *469 U.S. 824 (1984)* .

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.09

§ 23.09 Amendment of Findingsn*

[1] Trial Court Has Discretion to Amend Findings and Conclusions on Motion of Either Party

Any party may file a motion no later than 28 days after the entry of judgment for the court to amend its findings or make additional findings. When it amends or adds findings, the court may also amend its judgment accordingly. n1 even to the extent of a reversal of judgment. n2 A motion to amend findings may accompany a motion for a new trial under Rule 59(a), n3 or a motion to amend the judgment under Rule 59(e). n4

The district court has considerable discretion whether to grant or deny a motion to amend its findings of fact or conclusions of law, and a review of that decision is for abuse of discretion. n4 The district court also has the discretion to review and amend any of its findings and conclusions on its own initiative. n5

[2] Purpose of Amendment

The primary purpose for allowing the parties to make a motion for amendment of the findings is to correct, clarify, or expand the findings so that the appellate court will be able to arrive at a thorough understanding of the factual basis of the trial court's decision. n1 On the other hand, a motion to amend findings or conclusions may not be used to relitigate old matters nor may the motion be used by the parties to present claims under new theories of law. n2 Consequently, a party may not use the motion to amend the findings in order to advance new theories or secure a rehearing on the merits. n3

Rule 52(b) is generally not used to preserve an appeal. Thus, when a non-jury case is appealed, a party may question the sufficiency of the evidence supporting the findings even if that party has previously failed to question or object to the findings n4 or to file a motion for amendment. Thus, a party may attack an erroneous finding on appeal, even if the party has failed to make a motion to amend or a motion for partial findings. n5 However, even though a party that does not make a motion to amend or add to the findings may later attack an erroneous finding or a finding unsupported by the evidence on appeal, it is sound practice for the party to make challenges relating to the completeness of the findings of fact by motion to the trial court. n6 As one court advised, attorneys should not simply ignore the rule and head off to the appellate court to seek a remand for the making of those same findings. n7

[3] Grounds for Amendment

[a] Supplement or Expand Findings

A court may grant a motion to amend to supplement or expand the findings, when such additional or expanded findings would give the appellate court a more thorough understanding of the facts that formed the basis of the trial court's decision. n1 However, a motion to amend findings to obtain a complete wholesale revision of findings merely to make them more favorable to the movant will be denied. n2 Furthermore, if amendments requested do not serve to clarify the issues for review granting the motion runs counter to the interest in finality of judgments. n3 For this reason, a district court should not grant a motion to amend the findings merely because the requested amendment does not prejudice the opposing party. n4

[b] Correction of Error

Any party may move the court to amend or supplement the findings to correct a manifest error in the court's findings of fact or conclusions of law. n5 The court is not required to amend the findings, however, if the errors alleged would not in any way affect the decision in the case. n6

The party making the motion to amend the findings has the burden of showing that a harmful error has been made. n7 This burden is particularly strong because the court is being requested to reconsider its decision. n8 The party requesting the change must therefore articulate and demonstrate some substantial reason why the court should modify its prior decision and also must set forth facts or law that are strong and convincing. n9

When making a determination whether to amend the findings on the basis of manifest error, the trial court considers only the evidence contained in the record. n10 To require that the court look outside the record would defeat the compelling interest in the finality of litigation. n11

In exceptional circumstances, a change in the law may necessitate an amendment of the findings of fact or conclusions of law. n12 However, the court will not grant an amendment on this basis merely to relitigate old issues, rehear the merits of a case, or to advance new theories, unless the new theory is based on the change in the law. n13

[c] Discovery of New Evidence

A motion to amend also may be based on newly discovered evidence, n14 with an important qualification: the moving party may not introduce evidence that was available at trial but not proffered. n15 Similarly, it is improper for a party to move to amend to advance new theories based on evidence that was already proffered at trial, or to reassert arguments already rejected by the court. n16

[4] Time for Filing Motion

[a] Time Period for Filing

A motion by a party for the court to amend or make additional findings must be filed with the court no later than 28 days after the entry of judgment. n1 The triggering event for the time period is filing, because the time of filing can be determined with certainty from court records. n2

It should be noted that a party may file a motion for amendment before the actual entry of judgment, because the rule requires that the motion be filed "no later than" 28 days after judgment rather than "within 28 days." n3 Also, Rule 6(b) provides that the time period for making motions to amend or add findings may not be extended by the trial court. n4 The court has no discretion in this matter, because the court's jurisdiction to hear the motion is terminated after the statutory period has run. n5 However, the untimely motion may be effective for another purpose, as discussed in [b],

below.

[b] Untimely Motion for Amendment May be Used as Other Motion

Although the time for filing the motion may not be extended, n6 all is not necessarily lost for the moving party. If the motion for amendment states proper grounds, an untimely motion to amend the findings may be treated as a motion for relief from a judgment or order under Rule 60, n7 which is not subject to the strict time limitations of Rule 6(b). n8 Rule 60 permits correction of clerical and other errors made by district judges, including errors of both fact and law, and the broad scope of Rule 60 empowers a district judge to do justice in the particular circumstances of each case. n9 Rule 60(a) has no time limit for correcting clerical errors. n10 There are two limits for Rule 60(b) motions. First, any Rule 60(b) motion must be made "within a reasonable time." Second, a motion under Rules 60(b)(1), 60(b)(2), and 60(b)(3), that is, because of mistake, inadvertence, etc.; newly discovered evidence; or fraud, must be made within a year after entry of the judgment or order. n11

[5] Effect of Motion on Judgment and Appeal

[a] Motion Destroys Finality of Judgment

If a party timely files in the district court a motion to amend or make additional factual findings under Rule 52(b), the time to file an appeal for the motion runs for all parties from the entry of the order disposing of the motion, or other similar types of post-judgment motions, n1 whether or not granting the motion would alter the judgment. n2 In other words, when the Rule 52(b) motion is filed, the complete time to appeal begins to run anew from entry of the order disposing of the motion. n3 Thus, a party may not deprive the opposition of the right to have the district court fully consider a timely motion to amend or add to the findings by filing a hurried notice of appeal before the court's disposition of the motion, n4 because the Federal Rules of Appellate Procedure expressly provide that a notice of appeal filed before the disposition of a timely motion to amend or add to the findings is ineffective to appeal the judgment or order. The motion automatically revives the jurisdiction of the district court without the necessity of remand by the appellate court. n5

The rule regarding the finality of judgments is not limited to appeals made from a district court to the court of appeals. The same principles apply to direct appeals to the Supreme Court. A post-judgment motion that has the potential to modify or set aside the judgment destroys its finality for purposes of review by the Supreme Court until the motion is decided by the court that rendered the judgment. n6

[b] New Notice of Appeal Must Be Filed After Disposition

If a notice of appeal has been filed before the disposition of a motion to amend the findings, the notice is premature and ineffective and a new notice of appeal must be filed after the disposition of all post trial motions. The Supreme Court has held that an appellate court may not waive the defect of a premature notice of appeal, because a premature notice of appeal is not merely defective, it is a nullity. n7 A notice of appeal filed before a motion to amend findings is decided is ineffective even if filed after the filing of the motion to amend the findings, and a new notice of appeal is required after the final disposition of all the post-trial motions. n8

Appellate courts tend to be imprecise in their determinations of what constitutes "disposition" of a motion. For example, in one case the trial court did not file any findings with the judgment. A motion for findings of fact and conclusions of law was timely filed on the same day the trial court entered its order which contained findings and conclusions. The Fifth Circuit Court held that the trial court's inclusion of the findings and conclusions in its order effectively granted the appellant's request for findings, and constituted a disposition of the motion. Because the notice of appeal was filed two days after these events took place, the court concluded that no second notice of appeal was required. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(b).*

(n3)Footnote 2. *Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986)* ; *see Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993)* .

(n4)Footnote 3. *Fed. R. Civ. P. 52(b).*

(n5)Footnote 4. *Herman v. RSR Security Services Ltd., 172 F.3d 132, 138 (2d Cir. 1999)* .

(n6)Footnote 4. *Golden Blount, Inc. v. Robert H. Peterson Co., 438 F.3d 1354, 1358 (Fed. Cir. 2006)* .

(n7)Footnote 5. *Boone v. United States, 743 F. Supp. 1367, 1371 n.1 (D. Haw. 1990)* , *aff'd on other grounds, 944 F.2d 1489 (9th Cir. 1991)* ; *Daly v. Harris, 209 F.R.D. 180, 198 (D. Haw. 2002)* .

(n8)Footnote 1. *United States v. Local 1804-1, International Longshoremen's Assn., 831 F. Supp. 167, 169 (S.D.N.Y. 1993)* .

(n9)Footnote 2. *Pro Edge L.P. v. Gue, 377 F. Supp. 2d 694, 698 (N.D. Iowa 2005)* .

(n10)Footnote 3. *Weatherchem Corp. v. J.L. Clark, Inc., 163 F.3d 1326, 1336 (Fed. Cir. 1998)* (district court properly denied motion to amend findings when moving party's proposed amended findings were merely attempt to get district court to reverse itself); *Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993)* (Rule 52(b) motion is not intended to allow parties to relitigate old issues, to advance new theories, or to rehear merits of case); *Davis v. Mathews, 450 F. Supp. 308, 318 (E.D. Cal. 1978)* (Rule 52(b) motion is not intended to serve as vehicle for rehearing).

(n11)Footnote 4. *Fed. R. Civ. P. 52(b)* (sufficiency of findings always assertable on appeal); *Michael-Regan Co. v. Lindell, 527 F.2d 653, 660 (9th Cir. 1975)* (question raising issue of sufficiency of evidence could be raised for first time on appeal).

(n12)Footnote 5. *Evans v. Suntreat Growers & Shippers, Inc., 531 F.2d 568, 570 (Ct. App. 1976)* .

(n13)Footnote 6. *Hollinger v. United States, 651 F.2d 636, 640-641 (9th Cir. 1981)* (in tort action, defendant could not complain of lack of specificity in district court's finding that plaintiff was totally disabled from pursuing all normal courses of employment, because defendant failed to move district court to amend or make additional findings).

(n14)Footnote 7. *Consolidated Aluminum Corp. v. Foseco Int'l, Ltd., 910 F.2d 804, 814 n.9 (Fed. Cir. 1990)* .

(n15)Footnote 1. *United States v. Anderson, 591 F. Supp. 1, 6 (E.D. Wash. 1982)* (in water law case, party was entitled to amended factual findings regarding creek's drainage system, although those findings merely supplemented and did not contradict court's original findings).

(n16)Footnote 2. *De Gidio v. Pung, 125 F.R.D. 503, 505 (D. Minn. 1989)* , *aff'd on other grounds, 920 F.2d 525 (8th Cir. 1990)* .

(n17)Footnote 3. *Filner v. Shapiro, 83 F.R.D. 630, 631 (S.D.N.Y. 1979)* (court denied amendment to findings that would have blurred rather than clarified record).

(n18)Footnote 4. *Filner v. Shapiro, 83 F.R.D. 630, 631 (S.D.N.Y. 1979)* (Rule 52(b) motion denied even though plaintiff would not suffer prejudice if suggested alterations were made).

(n19)Footnote 5. *Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986)* (Rule 52(b) allows parties to petition court to amend its findings of fact in order to correct manifest errors of law or fact).

(n20)Footnote 6. *Lyons v. Jefferson Bank & Trust, 793 F. Supp. 989, 991 (D. Colo. 1992)* , *rev'd in part on other grounds, 994 F.2d 716 (1993)* (motion to amend may not be granted when proposed additional findings of fact are not material to district court's conclusions).

(n21)Footnote 7. *United States v. Anderson, 591 F. Supp. 1, 4 (E.D. Wash. 1982)* (burden of showing harmful error rests on party seeking to amend findings).

(n22)Footnote 8. *Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223, 236 (N.D.N.Y. 2002)* ; *see Smith v. Northeastern Ill. Univ., 388 F.3d 559, 569 (7th Cir. 2004)* .

(n23)Footnote 9. *Dale and Selby Superette & Deli v. United States Dep't of Agric., 838 F. Supp. 1346, 1347 (D. Minn. 1993)* .

(n24)Footnote 10. *See Shaw v. Broadcast.com, Inc., 2005 U.S. Dist. LEXIS 34553, at *4-*6 (N.D. Tex. 2005)* .

(n25)Footnote 11. *Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1220 (5th Cir. 1986)* (helicopter company was not entitled to amend findings that found it was partly responsible for injuries to passenger, because it had opportunity to present evidence itself before determination was made).

(n26)Footnote 12. *Dow Chem. Pac., Ltd. v. Rascator Maritime S.A., 609 F. Supp. 451, 453 (S.D.N.Y. 1984)* , *rev'd on other grounds, 782 F.2d 329, (2d Cir. 1986)* (citing **Moore's Federal Practice**).

(n27)Footnote 13. *Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993)* .

(n28)Footnote 14. *Dow Chem. Pac., Ltd. v. Rascator Maritime S.A., 609 F. Supp. 451, 452-453 (S.D.N.Y. 1984)* .

(n29)Footnote 15. *Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219-1220 (5th Cir. 1986)* (Rule 52(b) allows parties to petition court to amend its findings of fact in order to present newly discovered evidence, but petition may not be based on evidence that was available at trial but was not proffered, as party attempted to do in this case).

(n30)Footnote 16. *Davis v. Mathews, 450 F. Supp. 308, 318 (E.D. Cal 1978)* (Rule 52(b) motion is not intended to serve as vehicle for rehearing).

(n31)Footnote 1. *Fed. R. Civ. P. 52(b).*

(n32)Footnote 2. *See Fed. R. Civ. P. 52(b)*; Committee Note to 1995 Amendments.

(n33)Footnote 3. *See Fed. R. Civ. P. 52(b)*; Committee Note to 1995 Amendments.

(n34)Footnote 4. *Fed. R. Civ. P. 6(b)(2).*

(n35)Footnote 5. *Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980)* .

(n36)Footnote 6. *See* [a], *above.*

(n37)Footnote 7. *Lee v. Gruel, 248 F. Supp. 2d 413, 416 (D.V.I. 2003)* .

(n38)Footnote 8. *Halicki v. Louisiana Casino Cruises, 151 F.3d 465, 470-471 (5th Cir. 1998)* (district court could

properly consider employee's untimely motion to alter or amend judgment under Rule 52 as motion for relief from judgment under Rule 60 when grounds asserted supported Rule 60 motion for relief from judgment).

(n39)Footnote 9. *See* Ch. 26, *Post-Judgment Procedures*.

(n40)Footnote 10. *Fed. R. Civ. P. 60(a)*.

(n41)Footnote 11. *Fed. R. Civ. P. 60(c)(1)*.

(n42)Footnote 1. *See Fed. R. Civ. P. 4(a)(4)(A)(i)-(vi)*.

(n43)Footnote 2. *Fed. R. App. P. 4(a)(4)(A)(ii)*.

(n44)Footnote 3. *Glass v. Seaboard C. L. R. Co., 714 F.2d 1107, 1109 (11th Cir. 1983)* .

(n45)Footnote 4. *Baker Indus., Inc. v. Howard Elec. & Mechanical, Inc., 794 F.2d 965, 967 (5th Cir. 1986)* , *cert. denied, 479 U.S. 931 (1986)* (notice of appeal filed before disposition of motion for additional findings of fact under Rule 52(b) is nullity).

(n46)Footnote 5. *Fed. R. App. Proc. 4(a)(4)*, Committee Note to 1979 Amendments.

(n47)Footnote 6. *Leishman v. Associated Wholesale Elec. Co., 318 U.S. 203, 205-206, 63 S. Ct. 543, 87 L. Ed. 714 (1943)* .

(n48)Footnote 7. *Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982)* (overturning Third Circuit decision that appellate court could waive defect).

(n49)Footnote 8. *Lapeyrouse v. Texaco, Inc., 670 F.2d 503, 504 (5th Cir. 1982)* (when party files timely post-trial motion and district court grants or denies it after notice of appeal is filed, Rule 4(a)(4) requires filing of second notice of appeal).

(n50)Footnote 9. *Lapeyrouse v. Texaco, Inc., 670 F.2d 503, 505 (5th Cir. 1982)* .

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART I. FINDINGS BY THE TRIAL COURT

3-23 Moore's Manual--Federal Practice and Procedure § 23.10

§ 23.10 Judgment on Partial Findingsn*

[1] Discretion of Trial Court to Enter Judgment on Partial Findings

Before the end of a non-jury trial on any claim, the district judge has discretion to enter a judgment as a matter of law against a party on any claim, counterclaim, cross-claim, third party claim, or defense, provided that: the court has decided against the party as to a particular issue; the claim may not be maintained or defeated absent a favorable finding on that issue; and the party has been fully heard with respect to that issue. n1

The trial court may enter judgment on partial findings against either a claiming party or a defending party with respect to issues that may or may not be wholly dispositive of a claim or defense. n2

[2] Grounds for Judgment on Partial Findings

The trial court may render a judgment on partial findings when: (1) the party making the claim has not established the elements of the claim either in fact or in law; or (2) the evidence of the party making the claim has established one of the opposing party's defenses as a matter of fact or law. n1 The failure of a party to establish an essential issue justifies the immediate termination of the case or claim. The judgment on partial findings conserves time and resources by making it unnecessary for the court to hear evidence on additional facts when the result would not be different even if those additional facts were established. Unless the court directs otherwise, a Rule 52 dismissal operates as an adjudication on the merits. n2

When the court makes a decision to enter a judgment on partial findings, the decision must be supported by findings of fact and conclusions of law. n3 These findings are subject to all the requirements of clarity and completeness that are applicable to the findings that are required in any non-jury trial. n4

[3] Timing of Judgment

A court may enter judgment at any time after the losing party has been fully heard with respect to the issue. The court does not need to wait until the conclusion of that party's case. Furthermore, the court in its discretion may enter a judgment on a claim after all the evidence on the critical issue is heard, or the court may wait and render a judgment at

the close of all the evidence. n1 The court may enter judgment on its own motion or following a motion by a party. A trial court that decides to wait until all the evidence has been heard does not abuse its discretion. n2

[4] Judgment on Partial Findings Compared to Judgment As Matter of Law

A trial court's evaluation of a motion for judgment on partial findings in a non-jury case or a case with an advisory jury is controlled by a different standard than the standard for a judgment as a matter of law in a jury trial. In particular, a court may properly enter a judgment for a party under a Rule 52(c) judgment on partial findings that could not be justified under a Rule 50(a) judgment as a matter of law because the court may resolve disputed factual questions under the former but not the latter. n1 Furthermore, when entering a judgment on partial findings, the trial court is notrequired to draw any special inferences in favor of the nonmoving party. n2

The judge may sustain a motion for judgment on partial findings even when the moving party has established a prima facie case. However, the court usually will not sustain the motion unless the prima facie case has been challenged in some way. n3 A trial judge who is deciding whether to order a judgment on partial findings must evaluate and weigh all the evidence, make determinations regarding credibility, and resolve the case on the basis of the preponderance of the evidence. n4

[5] Appellate Review of Judgment on Partial Findings

[a] Clearly Erroneous Standard Applies

A district court's findings in support of a judgment on partial findings are reviewed in the same manner as the findings made in any other non-jury case. Thus, because a district court entering a judgment on partial findings under Rule 52(c) may resolve disputed factual questions, the court of appeals reviews district court's findings of fact for clear error. This means that the appellate court may not reverse the judgment unless its review of the evidence leaves the appellate court with a firm belief that a mistake has been made. n1 The appellate court reviews the conclusions of law in a judgment on partial findings de novo. n2

[b] Procedure Following Reversal on Appeal

If a judgment on partial findings is reversed on appeal, the court of appeals will usually remand the matter to the trial court for further proceedings. The trial court then may hear any evidence that was not heard before the judgment on partial findings was entered. n3 In most circumstances, it is not necessary to repeat the evidence that was heard before the judgment, although the party against whom the judgment was entered may supplement the evidence already supplied with any evidence that would have been admissible at the first trial. n4 In other words, the trial court may proceed with the case as if the judgment had not been entered. In unusual circumstances, such as the death of the original judge or a protracted delay following the original proceedings, a complete retrial may be warranted, particularly if much of the evidence was based on witnesses' testimony. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 9 *Moore's Federal Practice,* § 52.50 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 52(c)*; *Premier Capital Funding, Inc. v. Earle (In re Earle), 307 B.R. 276, 289 (Bankr. S.D. Ala. 2002)* (judgment pursuant to Rule 52(c) operates as decision on merits in favor of moving party).

(n3)Footnote 2. *Fed. R. Civ. P. 52(c)*; *see LaMarca v. United States, 31 F. Supp. 2d 110, 123-124 (E.D.N.Y. 1998)* (although Rule 52(c) motions are typically made by defendant at close of plaintiff's case, judgments on partial findings are available against both plaintiffs and defendants); *see, e.g., Pannebecker v. Liberty Life Assur. Co., 542 F.3d 1213, 1217 (9th Cir. 2008)* (motion made by plaintiff).

(n4)Footnote 1. *Eberhardt v. Comerica Bank, 171 B.R. 239, 243 (E.D. Mich. 1994)* ; *see Schoedinger v. United Healthcare of the Midwest, Inc., 557 F.3d 872, 877 (8th Cir. 2009)* (however, judgment on partial findings is not related to standard controlling "judgment as matter of law"; *see* [4], *below*).

(n5)Footnote 2. *See Matis v. United States, 236 B.R. 562, 569-570 (E.D.N.Y. 1999)* (in connection with motion for judgment on partial findings, district court acts as both judge and jury, weighing evidence, resolving any conflicts, and deciding where preponderance lies).

(n6)Footnote 3. *Martinez v. United States Sugar Corp., 880 F. Supp. 773, 775 (M.D. Fla. 1995) , aff'd without op., 77 F.3d 497 (11th Cir. 1996)* (district court must weigh all evidence presented and set forth findings of fact and conclusions of law).

(n7)Footnote 4. *Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir. 1986)* (district court must enter findings on order of dismissal, and unclear or incomplete findings may require reversal).

(n8)Footnote 1. *Fed. R. Civ. P. 52(c)*; *see Hyde v. Midland Credit Mgmt., Inc., 567 F.3d 1137, 1139 (9th Cir. 2009)* (at the close of plaintiff's case, two defendants moved for judgment on partial findings; court granted motion in part, dismissing all claims against one defendant and some claims against other defendant, and trial then continued on plaintiff's remaining claims against remaining defendant).

(n9)Footnote 2. *International Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp., 13 F.3d 253, 257 (7th Cir. 1994)* (trial court's decision to reserve ruling until close of all evidence was not abuse of discretion).

(n10)Footnote 1. *Schoedinger v. United Healthcare of the Midwest, Inc., 557 F.3d 872, 878 (8th Cir. 2009)* (Rule 52(c) was amended in 2007 to delete prior reference to judgment as matter of law because standards that govern judgment as matter of law in jury case have no bearing on decision for judgment on partial findings); *see Fed. R. Civ. P. 52(c)*.

(n11)Footnote 2. *Matis v. United States, 236 B.R. 562, 569-570 (E.D.N.Y. 1999)* ; *Geddes v. Northwest Mo. State Univ., 49 F.3d 426, 429 n.7 (8th Cir. 1995)* .

(n12)Footnote 3. *Martinez v. United States Sugar Corp., 880 F. Supp. 773, 775 (M.D. Fla. 1995) , aff'd without op., 77 F.3d 497 (11th Cir. 1996)* ; *see Matis v. United States, 236 B.R. 562, 569-570 (E.D.N.Y. 1999)* (judgment on partial findings pursuant to Federal Rules of Civil Procedure operates as decision on merits in favor of moving party and should be granted when, despite plaintiff's establishment of prima facie case, court determines that preponderance of evidence goes against plaintiff's claim).

(n13)Footnote 4. *International Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp., 13 F.3d 253, 257 (7th Cir. 1994)* ; *Matis v. United States, 236 B.R. 562, 569-570 (E.D.N.Y. 1999)* .

(n14)Footnote 1. *Schoedinger v. United Healthcare of the Midwest, Inc., 557 F.3d 872, 878 (8th Cir. Mo. 2009)* (citing **Moore's Federal Practice**); *see § 23.08[2][a]*.

(n15)Footnote 2. *Rego v. ARC Water Treatment Co., 181 F.3d 396, 400 (3rd Cir. 1999)* ; *see § 23.08[3][a]*.

(n16)Footnote 3. *Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793 (5th Cir. 1975)* (citing **Moore's Federal Practice** for proposition that defendant must be allowed to present evidence).

(n17)Footnote 4. *Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793 (5th Cir. 1975)* (citing **Moore's Federal Practice,** district court need not compel plaintiff to offer again evidence it had already introduced; nevertheless, plaintiff should be allowed to supplement record in chief or by rebuttal).

(n18)Footnote 5. *See Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1260 (D.C. Cir. 1999)* .

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[Reserved]

§§ 23.11[Reserved]

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART II. REPLACEMENT OF TRIAL COURT JUDGE

3-23 Moore's Manual--Federal Practice and Procedure § 23.30

§ 23.30 Scope of Rule Governing Inability of a Judge to Proceedn*

[1] Purpose of Allowing Successor Judge to Proceed

Rule 63 provides the authority for replacing a trial judge who is unable to proceed in a trial or other proceeding, with the purpose of enabling an ongoing civil trial or hearing to continue without the original judge. n1 Because the growing length of federal trials increased the likelihood that the inability of a judge to continue would interrupt a trial before verdict or judgment, Rule 63 was substantially broadened in 1991 to allow successor judges to take over at any point after trial begins, thus creating a more "efficient mechanism" for completing interrupted trials without causing "unnecessary expense and delay." n2

The term "inability to proceed" as used in Rule 63 is broader than the term "disability." Thus, the rule is applicable whether the judge's inability to proceed is the result of death, disability, sickness, or disqualification. n3

[2] Successor May Take Over at Any Time During Trial

Rule 63 is applicable at any time after a trial or hearing in a civil suit has commenced. n1 Rule 63 allows successor judges to take over at any point after trial begins, thus creating a more efficient procedure for completing interrupted trials without causing expense and delay. n2 However, recognizing that injustice may result if the substitute judge proceeds despite unfamiliarity with the action, Rule 63 also imposes additional responsibilities on successor judges, such as certifying familiarity with the record in the case. n3 The prior version of Rule 63 made no provision for a judge becoming unable to proceed during a trial, and where an original judge became unavailable at any point prior to return of a verdict in a jury trial or the filing of findings of fact and conclusions of law in a bench trial, courts interpreted Rule 63 to require complete retrial. n4

[3] Applicability of Rule to Special Masters and Magistrate Judges

According to its express terms, Rule 63 applies only to judges, not to magistrate judges or special masters appointed pursuant to Rule 53. n1 However, because no federal rule addresses the inability of a master or magistrate judge to proceed, n2 some courts have applied the function of Rule 63 and the cases decided under it to situations involving the substitution of one master or magistrate judge for another. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesSuccessors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 63*; *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* (Rule 63, which governs proceedings by successor judges, allows successor judge to avoid retrial, but only to the extent successor ensures that successor stands in shoes of predecessor).

(n3)Footnote 2. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* .

(n4)Footnote 3. *See Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1286 (11th Cir. 2005)* ; *Canseco v. United States, 97 F.3d 1224, 1226 (9th Cir. 1996)* .

(n5)Footnote 1. *Canseco v. United States, 97 F.3d 1224, 1226 (9th Cir. 1996)* (Rule 63 applies after trial or hearing begins and trial judge becomes unable to proceed; fact that trial judge entered judgment does not affect application because successor judge must certify familiarity with record).

(n6)Footnote 2. *See Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1286-1287 (11th Cir. 2005)* .

(n7)Footnote 3. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* .

(n8)Footnote 4. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* .

(n9)Footnote 1. *Henry A. Knott Co. v. Chesapeake & Potomac Tel. Co., 772 F.2d 78, 82 (4th Cir. 1985)* (when master dies or is disqualified before issuing findings of fact and conclusions of law, new trial must be granted if case involves disputed issues of fact).

(n10)Footnote 2. *Henry A. Knott Co. v. Chesapeake & Potomac Tel. Co., 772 F.2d 78, 82 n.6 (4th Cir. 1985)* .

(n11)Footnote 3. *Anaya v. Romero, 627 F.2d 226, 227-228 (10th Cir. 1980)* (applying theory of rule to magistrate judges).

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3-23 Moore's Manual--Federal Practice and Procedure § 23.31

§ 23.31 Extent of Judge's Inability to Proceed for Purposes of Rulen*

The trial court or party will typically invoke Rule 63 when it is necessary to appoint a successor judge because of the death, n1 illness, or other disability of the original judge in a proceeding. n2

However, the expression "inability to proceed" is not limited merely to a judge's physical or mental incapability to continue. Thus, the rule is also applicable when a trial judge retires n3 or resigns. n4 Furthermore, the rule applies whenever a judge is precluded from proceeding due to recusal for disqualification. n5 The most common basis for disqualification is the appearance of partiality. n6

Before it is applicable, Rule 63 does require that there be a compelling reason for a judge's discontinuing participation in an ongoing trial or proceeding. The rule is not intended to authorize the replacement or substitution of judges merely for the personal convenience of the court. n7 Furthermore, the reason for the sitting judge's inability to proceed should be stated on the record. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesSuccessors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Thompson v. Sawyer, 678 F.2d 257, 268-270 (D.C. Cir. 1982)* (no abuse of discretion to order new trial based on death of predecessor judge).

(n3)Footnote 2. *Berry v. School Dist. of Benton Harbor, 494 F. Supp. 118, 119 (W.D. Mich. 1980)* (motion for new trial lies with discretion of successor trial judge when original trial judge becomes unable to preside due to death, sickness, or other disability).

(n4)Footnote 3. *Canseco v. United States, 97 F.3d 1224, 1226 (9th Cir. 1996)* .

(n5)Footnote 4. *Gaddy v. Abex Corp., 884 F.2d 312, 314-316 (7th Cir. 1989)* .

(n6)Footnote 5. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments; *see 28 U.S.C. § 144*; *see also § 23.32*.

(n7)Footnote 6. *In the Matter of Huntington Commons Assocs., 21 F.3d 157, 158 (7th Cir. 1994)* ; *see § 23.32[1]*.

(n8)Footnote 7. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments; *see United States v. Lane, 708 F.2d 1394, 1395-1397 (9th Cir. 1983)* .

(n9)Footnote 8. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments.

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3-23 Moore's Manual--Federal Practice and Procedure § 23.32

§ 23.32 Disqualification of Judge for Biasn*

[1] Nature of Partiality

[a] Extent of Partiality

A federal judge may be disqualified in any proceeding in which his or her impartiality might reasonably be questioned. n1 A judge is also subject to disqualification if he or she has a personal bias or prejudice either against or in favor of a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. n2 The basis for the disqualification requirements for judges on the grounds of partiality or bias are: the requirement of the *Due Process Clause of the Fourteenth Amendment* that every litigant is entitled to a fair trial before a fair and impartial judge, n3 and the two statutes that control the United States judiciary and judicial procedure. n4 As used in the recusal statutes, "partiality" refers only to favoritism to one party or another that is wrongful or inappropriate. Thus, a judge is acting with partiality if the judge makes a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it rests upon knowledge that the judge ought not possess or because it is excessive in degree. n5

The statutory requirement that a judge whose impartiality is in question must disqualify himself or herself and allow another judge to preside over the case n6 is designed to promote public confidence in the judicial process. The integrity of the judiciary is the ultimate concern of the statute, which is as much a protection for the public as it is for an individual party. n7 If the issue of whether the statute requires disqualification is a close one, the judge must be recused. On the other hand, a judge is as much obliged not to recuse himself or herself when it is not called for as he or she is obliged to when the law and facts do require recusal. n8 Judges must balance the duty to appear impartial against several practical considerations, including the availability of other judges, the cost in judicial resources of recusal and reassignment of a case to different judges, and the interest of the parties and the public in a expeditious resolution of the dispute. n9 The recusal statutes should not be construed so broadly that it becomes a presumption or to allow recusal based on unsubstantiated suggestions of personal bias or prejudice. n10 Furthermore, the statute is not intended to give litigants a veto power over a sitting judge or a vehicle for obtaining a judge of their choice. n11

[b] Extrajudicial Source of Partiality

The recusal statutes base disqualification of a jurist on partiality, bias, and prejudice. n12 However, the statutes use those terms in the pejorative sense. Consequently, it is only *wrongful or inappropriate* partiality or bias that requires disqualification. Not all unfavorable disposition towards a party is wrongful or inappropriate. For example, a judge may come to believe during a trial that a party is a thoroughly reprehensible person. However, the judge is not thereby recusable for bias or prejudice if his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings. n13 Under the "extrajudicial source doctrine," only facts learned by a judge outside of his or her direct judicial capacity regarding the parties before the court may be the basis for disqualification based on bias. n14 Wrongful bias or prejudice is only that learned from an "extrajudicial source," which is a source outside the current judicial proceeding or that learned from an earlier proceeding conducted by the same judge. n15

The extrajudicial factor doctrine recognizes that judges may not avoid forming opinions about the parties based on what they observe and hear from the bench. All judges inevitably develop opinions during the proceedings and must strive to rule impartially despite them. n16 Thus, expressions of impatience, dissatisfaction, annoyance, and anger do not normally establish bias or partiality, unless the feelings derive from an extrajudicial source. Even if a judge is stern and short-tempered, the judge's ordinary efforts at courtroom administration and admonitions to counsel and witnesses do not warrant recusal. n17 Even though a judge may become unfavorably disposed toward a party during trial, the judge is not recusable for bias or prejudice based on such feelings n18 unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. n19

There is an exception to the extrajudicial source doctrine, the "pervasive bias" exception. This exception applies when a judge's favorable or unfavorable predisposition toward a party, although based solely on the facts learned by the judge at trial, nonetheless becomes so extreme that it demonstrates the judge's clear inability to render a fair judgment. n20 However, mere friction between the court and attorney is not enough to demonstrate pervasive bias. n21 Thus, the pervasive bias exception is construed narrowly; bias stemming solely from facts gleaned during judicial proceedings must be particularly strong in order to justify disqualification. n22

[2] Objective Standard Controls Questions of Impartiality

[a] Test Based on Perception of Reasonable Person

Under both the U.S. Constitution and the recusal statutes, an objective test controls whether a judge is disqualified on the basis of partiality or bias. Under the due process constitutional standard, which sets the outer boundaries of qualification for both state and federal judges, the inquiry is whether the probability of bias on the part of the judge is too high to be constitutionally tolerable. In other words, the standard is whether the circumstances lead the reasonable person to believe the probability of actual bias on the part of the judge is too high to be constitutionally tolerable. n1

Under the federal recusal statutes applicable to federal judges, the standard for disqualification and recusal is whether a reasonable person, with knowledge and understanding of all the relevant facts, would conclude that the judge's impartiality might reasonably be questioned. n2 Thus, the recusal statutes require not only that a judge be subjectively confident of his or her ability to be unbiased, but also that an objective observer would not doubt the judge's impartiality. n3 In making a determination of partiality, the court may consider outward manifestations and reasonable inferences drawn from those manifestations. In other words, the recusal inquiry must be made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. n4 For example, the Supreme Court has held that a district judge was not required to be recused solely because, prior to his appointment to the bench, his name appeared erroneously on a motion to file an amicus brief in a similar suit against some of the same defendants, because if a reasonable person had knowledge of all of the circumstances, the person would not believe the judge had any interest or bias in the case. n5 Because the recusal statutes must apply to varied and unpredictable situations not subject to all reasonable legislative considerations and because each case involving a judge's disqualification is based on facts, it must be determined on its unique facts and circumstances, rather than by necessary comparison to factual situations in prior cases. n6

The objective standards governing disqualification are not concerned with whether there is actual partiality or bias. n7 Rather, a judge may be disqualified if there is a mere appearance of partiality or bias. n8 Consequently, the standard is whether a reasonable person observing all of the circumstances might reasonably question the neutrality of the judge. n9 The purpose of the objective standard to maintain public's confidence in judicial integrity justifies the standard, even if on occasion a judge without any actual bias is disqualified or removed from a particular case. n10

[b] Appearance of Partiality Not Affected by Judge's Awareness

A judge's lack of knowledge of a circumstance requiring his or her disqualification due to the appearance of partiality is immaterial, because scienter is not an element of the objective standard for partiality or bias under the recusal statutes. n11 Therefore, absence of knowledge by the judge of the circumstances creating an appearance of impropriety does not eliminate the risk that the judge's impartiality might reasonably be questioned by other persons. Furthermore, the advancement of the statute's purpose, promotion of public confidence in the integrity of the judicial process, does not depend on whether the judge actually had knowledge the circumstances. n12 Therefore, if a judge does not learn of the facts requiring disqualification until after the proceedings have begun, the judge must apply the recusal statute retroactively and take whatever steps are necessary to rectify the inadvertence. n13

[3] Effect of Judge's Bias Toward Party's Attorney

The recusal statutes generally are not concerned with whether a judge has bias or prejudice directed against a party's attorney, rather than the party itself. n1 Thus, a controversy between a judge and an attorney is insufficient in itself to justify disqualification of the judge and normally is not relevant in considering whether the judge is biased or prejudiced with respect to a party. n2 A judge's bias for or against an attorney may warrant recusal, however, if it results in material and identifiable harm to a party's case. Similarly, an attorney's past criticism of a judge does not ordinarily justify recusal of the judge. In any event, judges occasionally remove themselves from cases as a result of harsh criticism from attorneys if there is immediate danger of prejudice to a party. n3

[4] Presumption of Impartiality

Despite the objective standard applied to the question of partiality and the prohibition against even the appearance of partiality, n1 a judge is presumed to be impartial and unbiased. This presumption creates a substantial burden on the party seeking disqualification to prove otherwise. In order to establish bias or prejudice from a judge's conduct in the current proceedings, a party must show the judge had a disposition so extreme as to display a clear inability to render a fair judgment, or such a deep seated favoritism or antagonism that a fair judgment would be impossible. n2 If the bias is extra-judicial, the party need only establish that a reasonable person with knowledge and understanding of all the relevant facts would conclude that the judge's impartiality might be in question. n3 The recusal statutes were not intended to allow a party to compel disqualification simply on an unfounded aspersion concerning the judge's possible partiality. n4 Rather, the deprecatory connotation of the terms "bias" and "prejudice" demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable. n5

The law presumes that judges are ordinarily capable of overcoming their prejudices and rendering equitable justice. Thus, the presumption is not met merely by a showing of threats or other attempts to intimidate the judge, n6 or a showing of public criticism of a judge or the judge's decisions. n7 However, even though the law places a substantial burden on a party seeking disqualification, if the question of whether to disqualify a judge is a close one, it should be resolved in favor of recusal. n8

[5] Waiver of Partiality as Grounds for Disqualification

[a] Waiver of Disqualification Permitted

Whether a ground for disqualification of a judge may be waived depends on the ground for disqualification. When the only ground for disqualification is that a judge's impartiality might reasonably be questioned (the objective test), all parties to the proceeding may waive the disqualification, provided that the judge makes full disclosure on the record of the basis for disqualification. n1 If the ground for disqualification is based on any of the grounds listed in Section 455(b), the disqualification may not be waived and the judge must be recused. n2

When the parties decide to waive a disqualification after full disclosure, the court has discretion to accept the waiver and continue in the trial or proceeding, but the court is not required to accept the waiver when the court determines that the appearance of bias is too great. n3 An attorney for a party may effectively waive disqualification on behalf of a party, even outside the party's presence if the party is not present at the time of the waiver. n4

[b] Requirement of Full Disclosure on Record

Before the parties may waive disqualification, the judge must fully disclose on the record all the facts relating to any alleged appearance of partiality. n5 After disclosure, the judge should leave it to the parties to decide whether or not to waive disqualification. Appellate courts have strictly applied the disclosure requirement when determining whether a waiver was adequate. n6 Only the disclosure itself and not the parties' waiver, must appear on the record. Thus, a party may waive disqualification by electing to proceed and failing to seek recusal after the judge has fully disclosed the ground on the record. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of ImproprietyCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal Bias

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 455(a).*

(n3)Footnote 2. *28 U.S.C. §§ 144, 455(b)(1)*; *see § 23.33[1]* (personal bias or prejudice of judge).

(n4)Footnote 3. *Caperton v. A. T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, 1217 (2009)* .

(n5)Footnote 4. *See 28 U.S.C. §§ 144, 455(a).*

(n6)Footnote 5. *Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006)* .

(n7)Footnote 6. *28 U.S.C. § 455(a).*

(n8)Footnote 7. *United States v. Greenspan, 26 F.3d 1001, 1007 (10th Cir. 1994)* ; *see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (purpose of statute is to promote public confidence in integrity of judicial process).

(n9)Footnote 8. *Cheney v. United States Dist. Court, 541 U.S. 913, 915-916, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* (unnecessary recusals impair functioning of courts).

(n10)Footnote 9. *Muchnick v. Thomson Corp. (In re Literary Works in Elec. Databases Copyright Litig.), 509 F.3d 136, 140 (2d Cir. 2007)* .

(n11)Footnote 10. *Am. Prairie Constr. Co. v. Hoich, 560 F.3d 780, 790 (8th Cir. 2009)* (on contrary, judge is presumed to be impartial, and party seeking disqualification has substantial burden of proving otherwise).

(n12)Footnote 11. *Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 659-660 (10th Cir. 2002)* .

(n13)Footnote 12. *See 28 U.S.C. §§ 144, 455(a), (b)(1).*

(n14)Footnote 13. *Liteky v. United States, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* .

(n15)Footnote 14. *Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888, 905-906 (8th Cir. 2009)* .

(n16)Footnote 15. *In re Charges of Judicial Misconduct, 465 F.3d 532, 551 (2d Cir. 2006)* .

(n17)Footnote 16. *In the Matter of Huntington Commons Assocs., 21 F.3d 157, 158 (7th Cir. 1994)* .

(n18)Footnote 17. *Bin-Wahad v. Coughlin, 853 F. Supp. 680, 683-684 (S.D.N.Y. 1994)* (judge's comments and opinions solely based on evidence presented during trial are not sufficient to recuse).

(n19)Footnote 18. *Liteky v. United States, 510 U.S. 540, 550-551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* .

(n20)Footnote 19. *United States v. Antar, 53 F.3d 568, 574 (3d Cir. 1995)* (because beliefs or opinions that merit recusal must involve extrajudicial factor, bias stemming from facts gleaned during judicial proceedings must be particularly strong to merit recusal).

(n21)Footnote 20. *Groden v. Random House Inc., 61 F.3d 1045, 1053 (2d Cir. 1995)* .

(n22)Footnote 21. *Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1330 (11th Cir. 2002)* .

(n23)Footnote 22. *In the Matter of Huntington Commons Assocs., 21 F.3d 157, 158 (7th Cir. 1994)* (judge does not have to be impervious to impressions about parties; impatience, admonishments to defendant, adverse rulings, and vague reference to possible predisposition not sufficient to meet requirement of deep-seated and unequivocal antagonism that would render fair judgment impossible).

(n24)Footnote 1. *Caperton v. A. T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, 1217 (2009)* (standard is whether there is an influence on the judge under all the circumstances that would offer a possible temptation to the average judge to lead him not to hold the judicial balance "nice, clear, and true").

(n25)Footnote 2. *Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir. 2008)* .

(n26)Footnote 3. *In re Bernard v. Coyne, 31 F.3d 842, 844 (9th Cir. 1994)* .

(n27)Footnote 4. *Cheney v. United States Dist. Court, 541 U.S. 913, 924, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* .

(n28)Footnote 5. *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co., 535 U.S. 229, 122 S. Ct. 1290, 1292, 152 L. Ed. 2d 346 (2002)* (reasonable person would find no partiality if person knew facts that judge's name was added mistakenly and without his knowledge to motion to file amicus brief in prior case and that judge took no part in preparation or approval of the amicus brief).

(n29)Footnote 6. *Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995)* ; *United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995)* .

(n30)Footnote 7. *Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* ; *see Caperton v. A. T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, 1221-1222 (2009)* (disqualification is based on objective rather than subjective findings of partiality and impropriety).

(n31)Footnote 8. *Huber v. Taylor, 532 F.3d 237, 251 (3d Cir. 2008)* .

(n32)Footnote 9. *Muchnick v. Thomson Corp. (In re Literary Works in Elec. Databases Copyright Litig.), 509 F.3d 136, 140 (2d Cir. 2007)* .

(n33)Footnote 10. *Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 660 (10th Cir. 2002)* .

(n34)Footnote 11. *Moran v. Clarke, 296 F.3d 638, 648 (8th Cir. 2002)* .

(n35)Footnote 12. *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-860, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (whether judge actually has knowledge of grounds requiring recusal is irrelevant).

(n36)Footnote 13. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 861, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n37)Footnote 1. *Baldwin Hardware Corp. v. Franksu Enterprise Corp., 78 F.3d 550, 557 (Fed. Cir. 1996)* (bias warrants disqualification only when directed against party, and bias directed against attorney will only merit recusal when it results in material and identifiable harm to party).

(n38)Footnote 2. *A.J. by L.B. v. Kierst, 56 F.3d 849, 862 (8th Cir. 1995)* .

(n39)Footnote 3. *Standing Comm. v. Yagman, 55 F.3d 1430, 1444 (9th Cir. 1995)* (substantial showing of jeopardy to party's interest required for judge to recuse self due to attorney's criticism of judge).

(n40)Footnote 1. *See* [2], *above*.

(n41)Footnote 2. *Am. Prairie Constr. Co. v. Hoich, 560 F.3d 780, 790 (8th Cir. 2009)* .

(n42)Footnote 3. *Cotton v. Wash. Metro. Area Transit Auth., 264 F. Supp. 2d 39, 41-42 (D.D.C. 2003)* ; *see* [2], *above* (objective standard).

(n43)Footnote 4. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 140 (1st Cir. 1994)* (partiality must have some basis in fact).

(n44)Footnote 5. *Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994)* (judge forming opinions as to parties during course of trial is not reason for recusal, since this is necessary to fulfill judge's role).

(n45)Footnote 6. *United States v. Cooley, 1 F.3d 985, 993-994 (10th Cir. 1993)* , *cert. denied sub nom. Turner v. United States, 515 U.S. 1104 (1995)* (threats or attempts to intimidate judge do not ordinarily satisfy disqualification requirements).

(n46)Footnote 7. *Standing Comm. v. Yagman, 55 F.3d 1430, 1444-1445 (9th Cir. 1995)* (federal judges have life tenure to shield them from public criticism).

(n47)Footnote 8. *Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995)* .

(n48)Footnote 1. *28 U.S.C. § 455(e)*; *see* [b], *below*.

(n49)Footnote 2. *28 U.S.C. § 455(e)*; *see, e.g., Davis v. Jones, 506 F.3d 1325, 1332 (11th Cir. 2007)* (parties may

not waive disqualification of judge under *28 U.S.C. § 455(b)(5)(ii)* when lawyer in proceeding is related within third degree to judge).

(n50)Footnote 3. *See Moran v. Clarke, 296 F.3d 638, 648-649 (8th Cir. 2002)* ; *United States v. Pepper & Potter, Inc., 677 F. Supp. 123, 126 (E.D.N.Y. 1988)* .

(n51)Footnote 4. *Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11-12 (1st Cir. 1981)* .

(n52)Footnote 5. *28 U.S.C. § 455(e)*; *Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1110 (5th Cir. 1980)* (waiver ineffective absent full disclosure of facts relating to business relationship with attorney); *Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11-12 (1st Cir. 1981)* (discussion of procedure for partiality waiver).

(n53)Footnote 6. *Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1110 (5th Cir. 1980)* (waiver ineffective absent full disclosure of facts relating to business relationship with attorney); *Barksdale v. Emerick, 853 F.2d 1359, 1361-1362 (6th Cir. 1988)* (lack of properly obtained waiver required remand to supplement and clarify record).

(n54)Footnote 7. *United States v. Nobel, 696 F.2d 231, 236-237 (3d Cir. 1982)* (party's election to proceed after full disclosure constituted waiver of disqualification).

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART II. REPLACEMENT OF TRIAL COURT JUDGE

3-23 Moore's Manual--Federal Practice and Procedure § 23.33

§ 23.33 Disqualification of Judge Based on Judge's Involvement or Interestn*

[1] Judge's Previous Involvement With Matter in Controversy

The recusal statutes provide that a judge is disqualified in any circumstances in which the judge has actual bias or prejudice interest in the matter. n1 Thus, a judge must disqualify himself or herself in the following circumstances:

1. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. n2 The bias must be personal in the sense that the bias is subjective from the perspective of the judge, rather than objective from the perspective of the reasonable person. n3

2. A judge is disqualified if the judge was a lawyer in private practice in the matter in controversy. A judge is also disqualified if a lawyer with whom he or she previously practiced law was involved as a lawyer in the matter during their association. n4 This requirement applies regardless of whether the judge or members of the judge's former firm represented either a named party in the suit or merely a nonparty interested in the matter. n5

3. A judge who has been a material witness concerning the matter in controversy may not hear a case relating to such matter. Similarly, a judge is disqualified if a lawyer with whom the judge previously practiced law has been a material witness in the matter in controversy. n6 Note that this disqualification applies only if the matter must have been under consideration by the firm while the judge and the lawyer were still associated with the firm. n7

4. A judge is disqualified if, while serving in governmental employment, the judge actively participated as counsel, adviser, or material witness concerning the proceeding. A judge is also disqualified if, while serving in that capacity, he or she expressed an opinion concerning the merits of the particular case in controversy. n8 This grounds for disqualification requires that the judge have personally served on the case to be disqualified. Therefore, this grounds is much less broad than the "associational" rule for disqualification based on prior law firm employment stated in under item 2, above. n9

[2] Financial Interest of Judge or Immediate Family

[a] Disqualification Because of Financial Interest

A judge who knows that he or she has a financial interest in the subject matter in controversy, or in a party to the proceeding, must be disqualified. This disqualification applies regardless of whether the interest is held by the judge individually or as a fiduciary; the rule of disqualification also applies if the interest is held by the judge's spouse or minor child residing in the judge's household. n1 Furthermore the rule applies regardless of how insubstantial the financial interest is, and regardless of whether or not the interest actually creates an appearance of impropriety. n2 However, the judge must have knowledge of the existence of the disqualifying financial interest. n3

[b] Scope of Financial Interest

A "financial interest in the subject matter in controversy for purposes of disqualification under Section 455(b)(4) means an investment or other asset whose value depends on the outcome of the controversy, or some other concrete, direct financial effect, such as how much property tax a judge pays. n4 A financial interest includes ownership of either a legal or equitable interest in any monetary amount, however insubstantial the interest may appear. n5 and whether or not the interest actually creates any appearance of partiality. n6 A "financial interest" also includes a relationship of the judge as director, adviser, or other active participant in the affairs of a party. n7

However, because the financial interest requirement originated in the due process clause of the constitution, n8 an interest is not disqualifying if is indirect or merely a remote, contingent, or speculative possibility. On the contrary, the disqualifying interest must be direct, personal, substantial, and pecuniary. n9

The recusal statutes provide several specific exceptions from the financial interest concept. The ownership in a mutual or common investment fund that holds securities is not a financial interest in the securities, for purposes of recusal, unless the judge participates in the management of the fund. n10 For purposes of the recusal statutes, an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in the securities held by the organization. n11 The proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or similar proprietary interest does not constitute a financial interest in the organization unless the outcome of the proceeding could substantially affect the value of the interest. n12 The ownership of government securities is not a financial interest in the issuer unless the outcome of the proceeding could substantially affect the value of the interest. n13

[c] Knowledge Required on Part of Judge

Unlike the objective standard under Section 455(a), the Section 455(b)(4) financial interest disqualification contains a scienter requirement, an actual knowledge test regarding the disqualifying circumstances. n14 Before he or she becomes disqualified, the judge must have knowledge of the existence of the disqualifying financial interest. n15 However, judges have an affirmative obligation to stay informed about their personal and fiduciary financial interests, and are also required to make reasonable efforts to stay informed about the personal financial interests of their spouses and minor children residing in their households. n16 If the judge fails to keep informed, the failure itself may constitute a separate violation of the recusal statute. n17

If a judge obtains knowledge of a financial interest ground for disqualification only after substantial judicial time has been devoted to the matter, n18 and the interest is not one that could be substantially affected by the outcome of the proceeding, disqualification is not required provided that the judge or the judge's spouse or minor resident child divests himself or herself of the interest. n19 For example, a judge may avoid recusal by divestiture of a small financial interest in the subject matter of the litigation, or in a party to the proceeding, that would otherwise disqualify the judge if he or she did not divest. A curative divestment is generally available under Section 455(a) or 455(b) if a reasonable person

would not have known the circumstances warranting recusal prior to his or her divestment of an offending interest. n20

[3] Status or Other Nonfinancial Interest of Judge, Spouse, or Relative

A judge may also be disqualified in several situations based merely on the status of the judge or a related person. Thus, a judge is disqualified from service if the judge, the judge's spouse, or a related party is a party to the proceeding, or an officer, director, or trustee of a party. "Related parties" include a person within the third degree of relationship to the judge or the judge's spouse, or the spouse of that relative. n21 A party proceeding under a fictitious business name or pseudonym should disclose his or her true name to district court, so that district judge may determine whether to recuse himself or herself from the case. When a case is being reviewed on appeal the same disclosure should be made to the circuit court of appeals. n22

The second ground for disqualification in this category occurs when if the judge, the judge's spouse, a person within the third degree of relationship to the judge or the judge's spouse, or the spouse of that relative is acting as a lawyer in the proceeding. n23 This disqualification rule applies whenever the related party is actively participating as a lawyer in the proceeding in question, either in pretrial participation, or when a lawyer is enrolled as counsel of record. n24 To prevent abuse of this rule, parties may not choose counsel solely or primarily for the purpose of disqualifying the assigned judge. n25

The third situation in this category that may disqualify a judge is any personal interest in the case, even if the interest is not financial. Thus, a judge is disqualified from service if the judge, the judge's spouse, or a related party is known to have an interest that could be substantially affected by the outcome of the proceeding. Related parties include any person within the third degree of relationship to the judge or the judge's spouse, or the spouse of that relative. n26 To require disqualification of a judge, the personal interest of the judge or person related to the judge must be direct and concrete, and not speculative or remote. n27

The final disqualifier based on status is that of material witness. Thus, a judge is disqualified from service if the judge, the judge's spouse, person within the third degree of relationship to the judge, judge's spouse, or the spouse of that relative is likely to be a material witness in the proceeding. n28 For the judge to be disqualified means that there must be a showing that the judge or related person will probably be called to testify to a material fact regarding a claim in the proceeding. n29 Recusal under Section 455(b)(5)(iv) is mandatory, which means that if the judge or a party determines that there is a probability the judge will need to testify, disqualification is automatic. The purpose of this mandatory disqualification provision is to prevent a judge from having to pass on the competence and veracity of the judge's testimony given with respect to the matter in controversy before him or her. n30

[4] Judge's Interest or Expertise in Particular Specialty of Law

A judge's academic interest or expertise in a particular area of law does not in itself constitute a ground for recusal. The rationale for this principle is that judges should not be reluctant to inform themselves on any legal subject, or participate in conferences concerning any area of the law, on the apprehension that their sources of information might later be assailed as one-sided. Furthermore, knowledge gained from scholarly sources does not constitute extrajudicial knowledge of disputed evidentiary facts. n1

Attendance at a conference that is sponsored or dominated by parties and attorneys representing one side of an issue, on the other hand, may justify recusal under extreme circumstances. For example, it was held in one case that a judge's attendance at pro-plaintiff conference on key issues in a nationwide products liability class action, which the judge attended at plaintiffs' expense out of a settlement fund deposited with the court, created the appearance of impropriety. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPrior Involvements

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. §§ 144, 455(b)*; *Collins v. Illinois, 554 F.3d 693, 697 (7th Cir. 2009)* .

(n3)Footnote 2. *28 U.S.C. § 455(b)(1).*

(n4)Footnote 3. *In re Syntax-Brillian Corp., 400 B.R. 21, 26 (D. Del. 2009)* .

(n5)Footnote 4. *28 U.S.C. § 455(b)(2).*

(n6)Footnote 5. *Preston v. United States, 923 F.2d 731, 734-735 (9th Cir. 1991)* .

(n7)Footnote 6. *28 U.S.C. § 455(b)(2).*

(n8)Footnote 7. *Rahman v. Johanns, 501 F. Supp. 2d 8, 14 (D.D.C. 2007)* ; *see Faulkner v. Nat'l Geographic Soc'y, 296 F. Supp. 2d 488, 491 (S.D.N.Y. 2003)* (*28 U.S.C. § 455(b)(2)* is triggered only when lawyer with whom judge practiced was material witness during period in which judge and lawyer were associated).

(n9)Footnote 8. *28 U.S.C. § 455(b)(3).*

(n10)Footnote 9. *Baker & Hostetler LLP v. United States DOC, 471 F.3d 1355, 1357 (D.C. Cir. 2006)* .

(n11)Footnote 1. *28 U.S.C. § 455(b)(4).*

(n12)Footnote 2. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860 n.8, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (judge who was trustee of university should have disqualified self in action seeking declaration of ownership of corporation in which university had interest).

(n13)Footnote 3. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (Congress intended scienter under § 455(b)(4)); *see* [3], *below*.

(n14)Footnote 4. Guardian Pipeline, L.L.C. v. 950. *80 Acres of Land, 525 F.3d 554, 557 (7th Cir. 2008)* .

(n15)Footnote 5. *28 U.S.C. § 455(d)(4)*; *see Berthelot v. Boh Bros. Constr. Co., L.L.C., 431 F. Supp. 2d 639, 648 (E.D. La. 2006)* (judge would be disqualified by financial interest even if it were "small" interest of class member when class is seeking monetary relief).

(n16)Footnote 6. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860 n.8, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n17)Footnote 7. *28 U.S.C. § 455(d)(4).*

(n18)Footnote 8. *Caperton v. A. T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, 1218-1219 (2009)* .

(n19)Footnote 9. *Sensley v. Albritton, 385 F.3d 591, 600 (5th Cir. 2004)* .

(n20)Footnote 10. *28 U.S.C. § 455(d)(4)(i)*; *see New York Dev't Corp. v. Hart, 796 F.2d 976, 978-979 (7th Cir.*

1986) .

(n21)Footnote 11. *28 U.S.C. § 455(d)(4)(i)*.

(n22)Footnote 12. *28 U.S.C. § 455(d)(4)(iii)*.

(n23)Footnote 13. *28 U.S.C. § 455(d)(4)(iv)*.

(n24)Footnote 14. *Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2003)* .

(n25)Footnote 15. *See 28 U.S.C. § 455(b)(4)*; *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n26)Footnote 16. *28 U.S.C. § 455(c)*; *see In re Hussey, 391 B.R. 911, 919 (S.D. Fla. 2008)* .

(n27)Footnote 17. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 867-868, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n28)Footnote 18. *28 U.S.C. § 455(f)*.

(n29)Footnote 19. *28 U.S.C. § 455(f)*.

(n30)Footnote 20. *Muchnick v. Thomson Corp. (In re Literary Works in Elec. Databases Copyright Litig.), 509 F.3d 136, 142 (2d Cir. 2007)* .

(n31)Footnote 21. *28 U.S.C. § 455(b)(5)(i)*; *see Muchnick v. Thomson Corp. (In re Literary Works in Elec. Databases Copyright Litig.), 509 F.3d 136, 142 (2d Cir. 2007)* (determination of effect of judge's status as "party" based on membership in class).

(n32)Footnote 22. *Coe v. Cook County, 162 F.3d 491, 498 (7th Cir. 1998)* .

(n33)Footnote 23. *28 U.S.C. § 455(b)(5)(ii)*.

(n34)Footnote 24. *United States v. Vazquez Botet, 532 F.3d 37, 47 (1st Cir. 2008)* (nature of active participation by lawyer).

(n35)Footnote 25. *McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1257, 1260-1263 (5th Cir. 1983)* (if successor judge finds that sole and primary purpose for retaining relative of original judge as counsel is to disqualify judge, attorney must be disqualified).

(n36)Footnote 26. *28 U.S.C. § 455(b)(5)(iii)*.

(n37)Footnote 27. *Microsoft Corp. v. United States, 530 U.S. 1301, 1302, 121 S. Ct. 25, 147 L. Ed. 2d 1048 (2000)* (Supreme Court justice not disqualified in one antitrust case merely because his son's law firm represented same party in another antitrust case).

(n38)Footnote 28. *28 U.S.C. § 455(b)(5)(iv)*.

(n39)Footnote 29. *Pesnell v. Arsenault, 543 F.3d 1038, 1044 (9th Cir. 2008)* .

(n40)Footnote 30. *Adrian v. Mesirow Fin. Structured Settlements, 588 F. Supp. 2d 216, 219 (D.P.R. 2008)* .

(n41)Footnote 1. *United States v. Bonds, 18 F.3d 1327, 1329-1331 (6th Cir. 1994)* .

(n42)Footnote 2. *In re School Asbestos Litig., 977 F.2d 764, 781-782 (3d Cir. 1992)* .

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART II. REPLACEMENT OF TRIAL COURT JUDGE

3-23 Moore's Manual--Federal Practice and Procedure § 23.34

§ 23.34 Procedure for Disqualificationn*

[1] Initiation of Disqualification Request

[a] Recusal Initiated by Disqualified Judge

The initial decision of whether a judge should adjudicate a case rests with the individual judge assigned to the case. Every judicial officer must be satisfied that he or she is unbiased toward the parties, and that his or her impartiality is not reasonably subject to question. The statute providing the grounds for disqualification of a judge places the obligation to identify the existence of those grounds on the judge, rather than requiring disqualification only in response to a party's motion. n1 Thus, a judge has a continuing duty to examine grounds for disqualification at all stages of a proceeding: recusal is required before, during, or even after a proceeding if the judge concludes that sufficient factual grounds exist to cause an objective person reasonably to question the judge's impartiality. n2 As a practical matter, if a judge perceives any conflict in a case assigned to him or her, the judge usually recuses himself or herself even prior to the time the parties learn of the assignment. n3

However, a judge should not be precipitate in his or her decision. A judge's duty to hear a case when no legitimate reason for disqualification exists is as strong as the judge's duty to disqualify when there is a valid reason. n4 A judge should not recuse on unsupported, irrational, speculative, or highly tenuous grounds. n5 However, a judge faced with a close question on disqualification should err on the side of caution and disqualify himself or herself from the case. n6 n7

[b] Recusal Initiated by Party

If a party believes that a judge should have disqualified himself or herself but did not, the party may file a motion for disqualification n8 pursuant to one or more of the recusal statutes. n9 A motion to disqualify does not criticize the integrity of the judge whose impartiality is questioned. On the contrary, an attorney who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his or her client to raise the matter, but also an independent obligation as an officer of the court to preserve public confidence in the judicial system. n10

If a motion for disqualification is made under Section 144, a party asserting the bias or prejudice of a judge must file an

affidavit at least 10 days before the beginning of the term at which the proceeding is to be heard; n11 because terms of court have been abolished, courts have interpreted the statute to require a party to file an affidavit at the earliest moment after acquiring knowledge of the facts demonstrating the basis for disqualification. n12

If a motion for disqualification is made under Section 455 most circuit courts of appeal have held that the party's motion must be timely filed when a judge does not voluntarily recuse himself or herself. In general, a party seeking disqualification must do so at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for disqualification. n13 One court has applied a four-factor test to consider whether a disqualification motion is timely: (1) whether the movant has participated in a substantial manner in trial or pre-trial proceedings; (2) whether granting the motion would represent a waste of judicial resources; (3) whether the motion was made after the entry of judgment; and (4) whether the movant can demonstrate good cause for delay. n14

[2] Requirements of Motion for Disqualification

A party seeking the disqualification of a judge under Section 144 must file an affidavit stating that the judge before whom the matter is pending has a personal bias or prejudice either against the party or in favor of any adverse party. The affidavit must state the facts and reasons for the party's belief that bias or prejudice exists. n1 Specifically, the affidavit should identify and carefully specify the time, place, persons, occasions, and circumstances supporting the party's belief of bias or prejudice. n2 If the party is seeking recusal on the theory that the judge's bias against the party's attorney should be imputed to the party, the affidavit must allege facts suggesting that the alleged bias against the attorney might extend to the party. n3 If the affidavit of bias is based on an extrajudicial statement of the judge, the substance of that statement should be stated in the affidavit. n4

An affidavit made pursuant to Section 144 must be filed by a party to the proceeding and must state facts and reasons that are sufficient to convince a reasonable person that a bias or prejudice exists. n5 The affidavit must be personally signed by the party, not the party's attorney. n6 An affidavit filed pursuant to Section 144 must be accompanied by a certificate of counsel. n7 The certificate must be signed by a counsel of record and must state that the affidavit is made in good faith. n8

A party may assert disqualification of a judge under Section 455 by motion. n9 Unlike Section 144, Section 455 specifies no procedure for seeking recusal. However, courts have held that the motion should allege facts showing that a reasonable person would harbor doubts about the judge's impartiality. n10 Unlike Section 144, no affidavit is required in connection with a Section 455 motion. n11 In evaluating a Section 455 motion, a judge need not accept as true its factual assertions, but may weigh the evidence n12 and contradict the allegations with facts drawn from his or her personal knowledge. n13

[3] District Court May Rule on Motion or May Refer it to Another Judge

When a party seeks to disqualify an assigned judge, the judge has the discretion to either refer the recusal motion for determination by another judge or to rule on the motion himself or herself. n1 Although the recusal statutes do not require that the motion be heard and decided by another judge, n2 courts have recognized that determination of a recusal motion by the same judge whose impartiality is being questioned may create tension in the courtroom. n3 Furthermore, judges who are asked to recuse themselves may be reluctant to impugn their own impartiality. However, district court judges have broad discretion in determining whether or not disqualification is required and their decisions are reviewed for abuse of discretion. n4

[4] Documentation and Effect of Ruling

When a judge rules on a motion for disqualification, the judge must document the reasons for his or her decision. It is not a question of either party having the burden of proof. Rather, recusal is an action taken by a judge, and the judge

must document the reasons for the decision so that it may be reviewed by an appellate court if necessary. n1 If the ground for disqualification is one that may be waived, the judge must place on the record all the facts relating to any alleged appearance of partiality. n2

Once a judge has been recused, the judge may ordinarily take no further action in the proceeding, except whatever ministerial acts are necessary to transfer the case to a successor judge. n3 Thus, a recused judge may not vacate his or her previously final judgment. n4 Furthermore, even absent a valid ground for recusal, it is not proper for the same judge who issued an order recusing himself or herself to reconsider the order and set it aside. n5

[5] Appellate Review of Ruling on Disqualification

[a] Grant of Disqualification

Most appeals arise in the context of a failure to recuse, n1 because as a general rule, an order granting recusal is not subject to appellate review. One circuit court concluded that the grant of the motion was not a final order, was not reviewable under the collateral order doctrine, and could not be reviewed by mandamus. The court rejected the party's challenge, which had argued that recusal was unnecessary under the circumstances and that permitting unnecessary recusals would prevent proper judicial administration. The court reasoned that even if true, no party could seek reversal because the interest being vindicated would be that of the public in the administration of justice, and not the interest of the particular party. n2

There are to exceptions to the general rule. First, when a basis for recusal would require the disqualification of every judge in a state or in a particular district, the rule of necessity provides that none of the justices is disqualified. n3 Second, in exceptional circumstances, such as when the parties will face significant costs and delay while a new judge is becoming familiar with the previous proceedings in the case, the parties have a protectable interest in continuing the case before the original judge. In such cases, the parties may challenge the recusal order by mandamus. n4 When review is allowed, the grant of recusal is reviewed for abuse of discretion. n5

[b] Denial of Disqualification

An order denying a motion to recuse is interlocutory and therefore not immediately appealable. n6 However, an order denying a motion to recuse is immediately appealable in conjunction with an otherwise appealable interlocutory order. n7 Thus, in the majority of cases, an order denying a motion to recuse is only fully reviewable on appeal from a final judgment. n8

Most circuit courts of appeal hold that a writ of mandamus is an appropriate vehicle by which to challenge a district court's denial of a recusal motion. n9 *Rule 21 of the Federal Rules of Appellate Procedure* establishes the procedure for writs of mandamus. n10 Mandamus is available only on a showing of an indisputable right to relief or exceptional circumstances. An Applicant for mandamus relief must demonstrate a clear abuse of discretion, or conduct by the district court amounting to a usurpation of judicial authority. Petitioners must also show that they lack adequate alternative means to obtain the relief they seek; n11 because these criteria are difficult to satisfy, the majority of courts deny the writ. n12

When the issue of recusal is not raised at trial, some courts have held that the issue may not be addressed on appeal. n13 For courts that do permit review absent objection of a district court's failure to recuse, a plain error standard of review applies. n14 However, if the appellate court is reviewing a district court's order by means of mandamus, the higher standard dictated by that writ governs appellate review. n15 Facts not known at the time of the recusal motion may be considered in determining whether the judge should have been recused. n16 Furthermore, the recusal statutes may be applied retroactively to correct a lower court's oversight and take the steps necessary to maintain public confidence in the impartiality of the judiciary. n17

[c] Remedy on Reversal of Denial of Recusal

The failure to recuse constitutes reversible error only when the conflict of interest is readily apparent and the risk of impartiality is substantial. The judge's lack of knowledge of the disqualifying circumstance may bear on the selection of a remedy. n18 With respect to remedy, the court of appeals usual remedy on reversal is to order a new trial for improper failure to recuse. Not every improper failure to recuse requires a new trial. Rather, the factors to be balanced in determining whether the court is required to vacate the judgment include: the risk of injustice to the parties in the particular case; the risk that the denial of vacatur will lead to unjust results in other cases; and the risk of undermining the public's confidence in the judicial process. n19

On the other hand, when the failure to recuse rises to the level of a constitutional violation, a higher standard than the more restrictive statutory disqualification provisions, and the disqualified judge casts the deciding vote and authors the opinion, the appearance of partiality requires the court to vacate the judgment. n20 In determining whether vacatur of judgment is appropriate in a particular case, courts should consider the risk of injustice in the case, the risk that denial of relief will cause harm in other cases, and the risk of undermining public confidence in the federal judicial process. n21

When the facts relating to the issue of disqualification are not sufficiently apparent from the record, an appellate court may remand for an evidentiary hearing. n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal Judges

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 455(a), (b); see Liteky v. United States, 510 U.S. 540, 548, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* (obligation to identify grounds for recusal are on judge, rather than party requesting disqualification).

(n3)Footnote 2. *See Youn v. Track, Inc., 324 F.3d 409, 423 (6th Cir. 2003)* .

(n4)Footnote 3. *See, e.g., In re Bernard v. Coyne, 31 F.3d 842, 843 (9th Cir. 1994)* .

(n5)Footnote 4. *Cheney v. United States Dist. Court, 541 U.S. 913, 915-916, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* .

(n6)Footnote 5. *In re American Ready Mix, Inc., 14 F.3d 1497, 1501 (10th Cir. 1994)* .

(n7)Footnote 6. *Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995)* (if question is close, balance tips in favor of recusal).

(n8)Footnote 7. [RESERVED]

(n9)Footnote 8. *In re Bernard v. Coyne, 31 F.3d 842, 843 (9th Cir. 1994)* (motion to disqualify is decided by judge whom party wishes to disqualify).

(n10)Footnote 9. *Lindsey v. City of Beaufort, 911 F. Supp. 962, 967 (D.S.C. 1995)* (parties may move to disqualify judge under either *28 U.S.C. § 144* or *28 U.S.C. § 455*).

(n11)Footnote 10. *In re Bernard v. Coyne, 31 F.3d 842, 846-847 (9th Cir. 1994)* .

(n12)Footnote 11. *28 U.S.C. § 144*.

(n13)Footnote 12. *United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993)* (affidavit not filed until two months after allegedly prejudicial statement was untimely).

(n14)Footnote 13. *Gil Enters. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996)* .

(n15)Footnote 14. *United States v. Brinkworth, 68 F.3d 633, 639 (2d Cir. 1995)* .

(n16)Footnote 1. *28 U.S.C. § 144*.

(n17)Footnote 2. *Travelers Ins. Co. v. St. Jude Medical Office Bldg., 843 F. Supp. 138, 143 (E.D. La. 1994)* .

(n18)Footnote 3. *United States v. Sykes, 7 F.3d 1331, 1339-1340 (7th Cir. 1993)* .

(n19)Footnote 4. *United States v. Professional Air Traffic Controllers Org., 527 F. Supp. 1344, 1358 (N.D. Ill. 1981)* .

(n20)Footnote 5. *Lindsey v. City of Beaufort, 911 F. Supp. 962, 965 (D.S.C. 1995)* .

(n21)Footnote 6. *Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980)* .

(n22)Footnote 7. *28 U.S.C. § 144*.

(n23)Footnote 8. *28 U.S.C. § 144*; *see Lamborn v. Dittmer, 726 F. Supp. 510, 514-515 (S.D.N.Y. 1989)* .

(n24)Footnote 9. *28 U.S.C. § 455*.

(n25)Footnote 10. *Lindsey v. City of Beaufort, 911 F. Supp. 962, 967 n.4 (D.S.C. 1995)* (motion must state facts and reasons sufficient to convince reasonable person that bias or prejudice exists).

(n26)Footnote 11. *Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1411 (5th Cir. 1994)* .

(n27)Footnote 12. *United States v. Balistrieri, 779 F.2d 1191, 1203 (7th Cir. 1985)* .

(n28)Footnote 13. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n., 872 F. Supp. 1346, 1349 (E.D. Pa. 1994)* (judge permitted to contradict allegations with facts drawn from his own personal knowledge).

(n29)Footnote 1. *McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1259-1260 (5th Cir. 1983)* .

(n30)Footnote 2. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 142 n.8 (1st Cir. 1994)* .

(n31)Footnote 3. *In re Bernard v. Coyne, 31 F.3d 842, 843-845 (9th Cir. 1994)* .

(n32)Footnote 4. *Bannister v. Delo, 100 F.3d 610, 614 (8th Cir. 1996)* , *cert. denied sub nom. Bannister v. Bowersox, 521 U.S. 1126 (1997)* .

(n33)Footnote 1. 1 *Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994)* ; *United States v. Greenspan, 26 F.3d 1001, 1007 (10th Cir. 1994)* .

(n34)Footnote 2. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994)* (waiver of disqualification on grounds of partiality must be decision made by party).

(n35)Footnote 3. *28 U.S.C. § 144*.

(n36)Footnote 4. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 142 (1st Cir. 1994)* .

(n37)Footnote 5. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141-142 (1st Cir. 1994)* .

(n38)Footnote 1. *See* [b], *below*.

(n39)Footnote 2. *Hampton v. City of Chicago, 643 F.2d 478, 479-480 (7th Cir. 1981)* .

(n40)Footnote 3. *Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986)* .

(n41)Footnote 4. *Hampton v. City of Chicago, 643 F.2d 478, 479-480 (7th Cir. 1981)* (court acknowledged possible exception to rule of nonreview for substantial cost or delay).

(n42)Footnote 5. *In re Cement Antitrust Litig., 673 F.2d 1020, 1025 (9th Cir. 1982)* .

(n43)Footnote 6. *In re Corrugated Container Antitrust Litig., 614 F.2d 958, 961 (5th Cir. 1980)* . Parties may attempt to remove a judge who has denied their recusal motion by seeking a writ of mandamus from the court of appeals, as discussed below. *Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995)*

(n44)Footnote 7. *In re Federal Skywalk Cases, 680 F.2d 1175, 1183-1184 (8th Cir. 1982)* .

(n45)Footnote 8. *In re Continental Airlines, 981 F.2d 1450, 1463 (5th Cir. 1993)* .

(n46)Footnote 9. *Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995)* .

(n47)Footnote 10. *See Fed. R. App. P. 21*.

(n48)Footnote 11. *In re School Asbestos Litigation, 977 F.2d 764, 774-778 (3d Cir. 1992)* .

(n49)Footnote 12. *Union Carbide Corp. v. United States Cutting Service, Inc., 782 F.2d 710, 712-713 (7th Cir. 1986)* .

(n50)Footnote 13. *Ogala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1414 (8th Cir. 1983)* .

(n51)Footnote 14. *Hamm v. Members of Bd. of Regents of State of Fla., 708 F.2d 647, 650 (11th Cir. 1983)* .

(n52)Footnote 15. *Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995)* .

(n53)Footnote 16. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 861, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n54)Footnote 17. *United States v. Jordan, 49 F.3d 152, 156 n.4 (5th Cir. 1995)* .

(n55)Footnote 18. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-862, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n56)Footnote 19. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n57)Footnote 20. *Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 827-828, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986)* .

(n58)Footnote 21. *Cool Light Co., Inc. v. GTE Products Corp., 24 F.3d 349, 351-352 (1st Cir. 1994)* , *cert. denied, 513 U.S. 994 (1994)* (Rule 60(b)(6) motion to vacate judgment based on ground that initial judge was prejudiced must be denied when initial judge granted new trial on breach of contract and fraud claims; even assuming prejudice, the party had already secured new trial before different judge).

(n59)Footnote 22. *Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 798 (5th Cir. 1986)* , *aff'd on other grounds, 486 U.S. 847 (1988)* (appellate court may remand for further evidentiary hearing).

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART II. REPLACEMENT OF TRIAL COURT JUDGE

3-23 Moore's Manual--Federal Practice and Procedure § 23.35

§ 23.35 Certification of Successor Judgen*

Before succeeding a judge who is unable to proceed, a successor judge must certify familiarity with the record n1 and determine that the proceedings may be completed before the successor judge without prejudice to the parties. n2 To certify familiarity with the record, a successor judge must read and consider all relevant portions of the record. If the judge determines that sufficient evidence supports any findings actually made or other necessary findings, and the evidence does not depend on the testimony of a witness whose credibility is in question, the judge may conclude that the findings are supported by the evidence, make any necessary findings, and rule on post-trial motions. n3

These prerequisites ordinarily require the availability of a transcript or videotape of the proceedings before substitution. Further, in a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of Rule 63, because the jury may not be held for an extended period of time while an extensive transcript is prepared without resulting in prejudice to one or more parties. n4

It is not absolutely necessary for certification that the successor read all of the transcript. Successor judges need only certify their familiarity with those portions of the record that relate to the issues before them. The extent of a successor judge's obligation to certify familiarity with the record depends on the nature of the successor judge's role in a given case. Therefore, it has been held that a successor judge assigned to a contract dispute following the close of evidence in a bench trial did not violate the rule requiring a successor judges to certify familiarity with record: although he never expressly certified familiarity, he instructed parties that their briefs should highlight specific pages, specific exhibits, and specific pages in original judge's opinion in order for him to read those pertinent portions in order to meet the standard established for successor judges. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesSuccessors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.04[3] (Matthew Bender 3d

ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 63*; *see Hoult v. Hoult, 57 F.3d 1, 8 (1st Cir. 1995)* (successor judge adequately certified familiarity with record by stating in conference with counsel that judge would certify familiarity with record); *Canseco v. United States, 97 F.3d 1224, 1225-1227 (9th Cir. 1996)* (successor judge erred by refusing to certify record before ruling on post-trial motions, erroneously concluding that Rule 63 did not apply when previous trial judge had entered judgment; denial of motion for new trial vacated).

(n3)Footnote 2. *Fed. R. Civ. P. 63*; *see Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1204 n.6 (1st Cir. 1987)* (undue prejudice to parties might exist if determination to be made by successor judge turns substantially on credibility of witnesses whom judge did not have opportunity to observe in context of original trial).

(n4)Footnote 3. *Canseco v. United States, 97 F.3d 1224, 1226 (9th Cir. 1996)* .

(n5)Footnote 4. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments.

(n6)Footnote 5. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1265 (D.C. Cir. 1999)* (successor judge wisely entrusted parties to guide him through massive record and point him to material relevant to their arguments).

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3-23 Moore's Manual--Federal Practice and Procedure § 23.36

§ 23.36 General Procedure for Replacement of Judge Unable to Proceedn*

There are three steps for the substitution of a successor judge in the place of a judge who has an inability to proceed:

1. There must be a determination of the inability to proceed, which ultimately must be stated on the record. n1 Obviously, if the current judge dies or becomes ill or incurs a disability, the inability to proceed will be apparent. Otherwise, the current judge may recuse himself or herself, or one or more of the parties may raise the issue by motion. Rule 63 does not specifically address recusal procedure, but that matter is discussed in the substantive statutes; for example, affidavits setting forth the facts relating to disqualification must ordinarily accompany a recusal motion. The requirements applicable to affidavits under *28 U.S.C. Section 144* are discussed in *§ 23.34[2]*.

2. A successor judge must be selected who has the necessary qualifications. Thus, before being assigned to the case, a successor judge must certify familiarity with the record n2 and determine that the proceedings may be completed before the successor judge without prejudice to the parties. n3 For a complete discussion of these requirements, *see § 23.33*.

3. After the original judge is unable to proceed, the district court presiding judge or the court of appeals reassigns the case to the qualified successor judge; however, if the disqualification occurs after the commencement of a trial or hearing, the disqualified judge may not personally select the substitute judge. n4 Any other judge sitting in or assigned to that district court may take the case, n5 provided that the successor judge satisfies the prerequisites, discussed in *§ 23.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesSuccessors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments.

(n3)Footnote 2. *Fed. R. Civ. P. 63*; *see Hoult v. Hoult, 57 F.3d 1, 8 (1st Cir. 1995)* (successor judge adequately certified familiarity with record by stating in conference with counsel that judge would certify familiarity with record).

(n4)Footnote 3. *Fed. R. Civ. P. 63*; *see Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1204 n.6 (1st Cir. 1987)* .

(n5)Footnote 4. *Liteky v. United States, 510 U.S. 540, 548-549, 114 S. Ct. 1147, 1154, 127 L. Ed. 2d 474 (1994)* (appellate authority to reassign case on remand rests on recusal and power to require further proceedings as justice requires); *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 142 (1st Cir. 1994)* (reassignment required on remand).

(n6)Footnote 5. *28 U.S.C. § 296*.

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PART VI Trial and Judgment
CHAPTER 23 TRIAL TO COURT; INABILITY OF JUDGE TO PROCEED
PART II. REPLACEMENT OF TRIAL COURT JUDGE

3-23 Moore's Manual--Federal Practice and Procedure § 23.37

§ 23.37 Authority and Powers of Successor Judgen*

[1] Change or Modify Predecessor Judge's Orders and Findings

A successor judge has the power to reconsider the legal conclusions of a predecessor judge to the same extent that the predecessor could have, n1 either on the court's own initiative n2 or on a party's timely and proper motion to reconsider. n3 Thus, a court should not deny a party's right to try to persuade the court that it has erred simply because the judge who rendered the original decision is unavailable and may not be called on to reconsider the matter. n4 In such cases, the successor judge acquires full authority to reconsider the previous ruling and to revise or reverse, n5 if necessary, at any time before final disposition of the action. n6

The need for finality and conservation of judicial resources weighs against an inflexible rule automatically invalidating the original judge's actions. n7 Thus, to foster predictability and stability the successor should ordinarily defer to the original judge's findings n8 and should overrule his or her predecessor only on the basis of a sufficient reason. n9

[2] Issue New Orders and Findings on Existing Record

A successor judge may make new findings of fact and conclusions of law on the existing record. n1 In addition, the successor, in his or her discretion, may direct that the existing record be supplemented. n2 In fact the successor judge has an affirmative obligation to make findings and conclusions with respect to those issues that the original judge was not able make findings and conclusions. n3

When a determination of damages must be made, and the original judge is no longer available to hear the case, in appropriate circumstances the successor judge has the power to make new findings on damages without ordering a new trial. The exercise of this power is particularly appropriate when a retrial would be extremely time-consuming, when the credibility of witnesses' testimony is not central to the determination to be made on remand, and when an independent and impartial review of the evidence contained in a written record would be sufficient. n4

[3] Recall Witnesses

Either on a party's request or on its own initiative, Rule 63 expressly authorizes a successor judge to recall witnesses. n1

The rationale behind this rule is that the successor judge has not heard the witnesses at the trial and, therefore, may be hindered in the ability to resolve issues of credibility. n2 The recall of witnesses is of especially great importance in a bench trial, because the judge must make decisions as to which witnesses are more credible based on their live testimony and demeanor. n3 This concern is especially important in the context of complex litigation. Thus, Rule 63 does not require that a successor judge must enter judgment based on the predecessor judge's findings, because the successor judge may be unable to assess complex litigation with complete confidence. n4

In certain circumstances, a successor judge has an affirmative duty to recall a witness, as when all of the following five factors are present: n5

1. The hearing or trial is conducted without a jury.

2. A party requests recall of the witness.

3. The witness's testimony is material.

4. The witness's testimony is disputed.

5. The witness is presently available to testify without undue burden.

Thus, in the context of making new findings, the plain language of Rule 63 provides that if the party so requests, the successor judge must recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. n6

In situations other than when a recall of a witness is mandatory, the recall of any witness lies within the successor judge's discretion. n7 However, as pointed out in the committee notes, a successor judge who had no opportunity to observe the demeanor of witnesses at trial may be unable to resolve issues of credibility. Although Rule 63 authorizes a successor judge to make findings of fact at a bench trial based on evidence heard by the predecessor judge, a court would risk error by determining the credibility of a witness whose testimony was not heard by the successor and who is available for recall. n8

If the predecessor judge made both elaborate findings of fact and specific notes regarding his or her evaluation of the witnesses' credibility, the successor judge may be able to examine the record in a sufficiently discriminating manner to resolve credibility issues effectively. n9 Similarly, if a successor judge has reviewed a videotaped record of the trial, the successor judge may be justified in having greater confidence in his or her ability to proceed without recalling witnesses. n10

[4] Order New Trial

If a successor judge is satisfied that he or she may not perform the duties imposed by the Federal Rules of Civil Procedure with respect to the particular case, the successor is empowered to, and must, order a new trial. n1 Although the changes brought about by the 1991 amendments to Rule 63 obviate the need for a new trial in most situations, a successor nonetheless must have sufficient confidence in the existing record to be able to resolve the case on a fair and intelligent basis. n2 The decision whether to hold a new trial is left to the discretion of the successor judge. n3 If the successor decides not to perform the tasks left unfinished by the predecessor judge, he or she must grant a new trial. n4

A successor judge is not required to re-litigate all issues decided by the predecessor judge. n5 Rule 63 is not an invitation to argue again the legal questions settled by the original judge. However, the law of the case doctrine applies only to an issue or issues that were actually decided by the prior judge. The doctrine does not apply to statements made by the court in passing, or stated as possible alternatives. n6

Parties may waive their right to a new trial under Rule 63 by their conduct, such as failing to appear at conferences required by the successor judge, by failing to respond to notice that the court intends to proceed under the existing record, otherwise neglecting to respond or communicate with the court, n7 or by acquiescing in the procedure established by the successor judge. n8

[5] Enter Judgment

A successor judge under Rule 63 has the power to enter judgment on all claims that have been tried. n1 However, the rule does not obligate the successor judge to enter judgment based on the predecessor's findings; that decision lies within the successor's discretion. n2 Similarly, a successor judge has the power to grant summary judgment based on the predecessor judge's findings of fact and conclusions of law. n3 The successor judge may examine the trial transcript as if it were supporting affidavits, for summary judgment purposes, and enter summary judgment if no credibility determinations are required. n4

[6] Rule on Post-Trial Motions

A successor judge has the power in the interest of judicial economy to dispose of post-trial motions if the original judge is unable to rule on them. n1 Thus, a successor has the same authority that the original judge had to grant or deny motions for judgment as a matter of law or for a new trial. n2 Furthermore, although a successor district court judge enjoys wide discretion to grant or deny post-trial motions, they may not refuse to exercise that discretion.

It has been held that when a successor judge was assigned to a contract case following the close of evidence in bench trial, and after the issuance of an opinion containing partial findings of fact and conclusions of law and the death of district court judge who had issued the opinion, the successor judge erred under Rule 63 when he refused to reconsider the original judge's findings pursuant to a party's timely post-trial motions. In that situation the successor judge assumed the original judge's obligation to exercise his discretion with respect to post-trial motions. Furthermore, after the successor judge erred in refusing to consider post-trial motions, the court of appeals remanded to the successor judge, rather than addressing merits of action; the successor judge's failure to consider recalling witnesses left a gap in the case that the appellate court could not fill, and the sheer number of witnesses in the case made it virtually inevitable that remand would be necessary to allow the successor judge to hear new testimony. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesSuccessors

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 63.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States Gypsum Co. v. Schiavo Bros., Inc., 668 F.2d 172, 176 (3d Cir. 1981)* (when successor judge is asked by motion to reconsider legal conclusions of unavailable predecessor, judge is empowered to reconsider those issues to the same extent that his or her predecessor could have).

(n3)Footnote 2. *United States v. Young, 657 F.2d 246, 247 (10th Cir. 1980)* (when original judge reserved final decision, successor judge acquired full authority to bring case to conclusion on its own initiative).

(n4)Footnote 3. *United States Gypsum Co. v. Schiavo Bros., Inc., 668 F.2d 172, 176 (3d Cir. 1981)* .

(n5)Footnote 4. *Thompson v. Sawyer, 678 F.2d 257, 269 (D.C. Cir. 1982)* .

(n6)Footnote 5. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F. Supp. 107, 126 (D. Del.*

1983) , *aff'd on other grounds, 740 F.2d 956 (3d Cir. 1984)* , *cert. denied, 469 U.S. 1159 (1985)* .

(n7)Footnote 6. *Zand v. Commissioner, 143 F.3d 1393, 1396, 1400 (11th Cir. 1998)* .

(n8)Footnote 7. *El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 142 (1st Cir. 1994)* .

(n9)Footnote 8. *Berry v. School Dist. of City of Benton Harbor, 494 F. Supp. 118, 120 (W.D. Mich. 1980)* (court may not properly overrule decision of first judge in absence of special circumstances, and even if such circumstances exist, deference must be paid to original trial judge's findings).

(n10)Footnote 9. *United States v. Desert Gold Mining Co., 433 F.2d 713, 715 (9th Cir. 1970)* .

(n11)Footnote 1. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc., 555 F.2d 426, 438 n.20 (5th Cir. 1977)* (successor judge may make new findings of fact and may supplement record); *see Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1259 (D.C. Cir. 1999)* (when original judge became terminally ill after the close of evidence and could make only partial findings of fact and conclusions of law before he died, successor judge faced task of making findings and conclusions of his own regarding issues).

(n12)Footnote 2. *Rewis v. United States, 445 F.2d 1303, 1306 (5th Cir. 1971)* (judge to whom case assigned on remand may supplement record).

(n13)Footnote 3. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* .

(n14)Footnote 4. *Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1204 (1st Cir. 1987)* .

(n15)Footnote 1. *Fed. R. Civ. P. 63*; *see, e.g., Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999)* .

(n16)Footnote 2. *Thompson v. Sawyer, 678 F.2d 257, 269-270 (D.C. Cir. 1982)* (citing **Moore's Federal Practice,** appellate court stated that policy behind Rule 63 is that successor judge may be unable to resolve issues of witness credibility).

(n17)Footnote 3. *Henry A. Knott Co. v. Chesapeake & Potomac Tel. Co., 772 F.2d 78, 83 (4th Cir. 1985)* (successor judge may decide case based on transcript if credibility of witnesses is not at issue).

(n18)Footnote 4. *Thompson v. Sawyer, 678 F.2d 257, 269-270 (D.C. Cir. 1982)* .

(n19)Footnote 5. *Fed. R. Civ. P. 63*; *see Canseco v. United States, 97 F.3d 1224, 1225-1226 (9th Cir. 1996))* (after reviewing record and certifying familiarity, successor judge must recall witness whose credibility is in question and credibility may not be determined by record, if witness is available without undue burden).

(n20)Footnote 6. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1265-1266 (D.C. Cir. 1999)* (successor judge failed to comply with Rule 63, when nothing in record indicated that successor judge determined that party's damages expert was unavailable or that testimony was immaterial or undisputed--only permissible reasons for not recalling witnesses when making fresh findings; furthermore, successor judge never afforded party opportunity to suggest which additional witnesses they wished to recall).

(n21)Footnote 7. *Fed. R. Civ. P. 63*.

(n22)Footnote 8. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments; *see Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1266-1267 (D.C. Cir. 1999)* (that witness was unavailable or witness's testimony was immaterial or undisputed are only permissible reasons for not recalling witnesses when making

new findings); *Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1204 n.6 (1st Cir. 1987)* (undue prejudice might exist if determination to be made by successor judge turns substantially on credibility of witnesses whom judge did not have opportunity to observe).

(n23)Footnote 9. *Lever v. United States, 443 F.2d 350, 351 (2d Cir. 1971)* .

(n24)Footnote 10. *Fed. R. Civ. P. 63*, Committee Note to 1991 Amendments.

(n25)Footnote 1. *Gaddy v. Abex Corp., 884 F.2d 312, 314-316 (7th Cir. 1989)* (successor judge did not abuse discretion in granting motion for new trial when successor did not observe parties and counsel at trial, findings of fact were inconsistent, and previous judge disclosed conflict of interest).

(n26)Footnote 2. *Berry v. School Dist. of City of Benton Harbor, 494 F. Supp. 118, 120 (W.D. Mich. 1980)* .

(n27)Footnote 3. *Thompson v. Sawyer, 678 F.2d 257, 268-270 (D.C. Cir. 1982)* .

(n28)Footnote 4. *Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82, 87 (5th Cir. 1989)* , *cert. denied sub nom. Transoil, Ltd. v. Rex Oil Ltd., 493 U.S. 1043 (1990)* .

(n29)Footnote 5. *Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977)* (when retrial required after judge in non-jury trial died without making findings of fact and conclusions of law under *Fed. R. Civ. P. 52*, new judge had discretion to use transcripts as depositions when witnesses are unavailable).

(n30)Footnote 6. *DeWeerth v. Baldinger, 38 F.3d 1266, 1271 (2d Cir. 1994)* , *cert. denied, 513 U.S. 1001 (1994)* .

(n31)Footnote 7. *Townsend v. Gray Line Bus Co., 767 F.2d 11, 18 (1st Cir. 1985)* .

(n32)Footnote 8. *In re Higginbotham, 917 F.2d 1130, 1133 (8th Cir. 1990)* ; *see Zand v. Commissioner of Internal Revenue Service, 143 F.3d 1393, 1401 (11th Cir. 1998)* (although taxpayers objected to reassignment of case to successor judge after presiding judge retired on permanent disability, taxpayers waived their right to new trial, by failing to request one while at same time indicating that new trial would cause them hardship).

(n33)Footnote 1. *Sweeney v. Resolution Trust Corp., 16 F.3d 1, 6 (1st Cir. 1994)* , *cert. denied, 513 U.S. 914 (1994)* (no prejudice found in successor judge's entering judgments on jury verdicts).

(n34)Footnote 2. *Thompson v. Sawyer, 678 F.2d 257, 269 (D.C. Cir. 1982)* .

(n35)Footnote 3. *Mesa Petroleum Co. v. Coniglio, 787 F.2d 1484, 1488 (11th Cir. 1986)* , *cert. denied sub nom. Locke v. Mesa Petroleum, 479 U.S. 1031 (1987)* (successor judge may award summary judgment if there is no genuine issue as to material fact).

(n36)Footnote 4. *Bromberg v. Moul, 275 F.2d 574, 576 (2d Cir. 1960)* (successor judge may treat trial record as supporting affidavit under Rule 56(a) on motion for summary judgment when initial judge died before making findings and issuing decision).

(n37)Footnote 1. *Bangor & Aroostook R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 314 F. Supp. 352, 355-356 (D. D.C. 1970)* , *rev'd in part on other grounds, 442 F.2d 812 (D.C. Cir. 1971)* (when judge died before ruling on postjudgment motions based on affidavits, briefs, and oral argument, successor could rule on motions based on same papers and transcript).

(n38)Footnote 2. *Miller v. Pennsylvania R. Co., 161 F. Supp. 633, 636 (D.D.C. 1958)* .

(n39)Footnote 3. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1267*

(D.C. Cir. 1999) .

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR

3-24 Moore's Manual--Federal Practice and Procedure 24.syn

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§ 24.02 Rule Governing New Trial is Procedural Mechanism

§ 24.03 Effect on Right to Jury Trial

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[2] Jury Selection

[3] Jury Instructions

§ 24.122 Errors in Procedural Rulings

§ 24.123 Court's Conduct of Trial

§ 24.124 Misconduct by Attorney

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
A. FUNCTION OF ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure § 24.01

§ 24.01 Purpose of New Trialn*

A party may file a motion for new trial, or the court may order a new trial on its on initiative, when the party or court wants to reopen issues after they have been tried, in whole or in part, and to retry those issues that have been resolved improperly at the first trial. Thus, the purpose of the federal civil rule governing new trials n1 is to provide the district court with a procedure to allow the parties to retry the case in a jury trial when the jury has reached a plainly erroneous result n2 or when the verdict is against the clear weight of the evidence, n3 and in other cases to avoid a miscarriage of justice. n4

The procedure of Rule 59, which allows the order for new trial, is based on the common-law principle that a trial court has inherent power to set aside a jury verdict and grant a new trial in order to ensure that justice is done in a particular case. n5 Rule 59 provides a motion for a new trial by any party in either a jury or a non-jury action, n6 an order for a new trial made on the district court's own initiative, or the grant of a motion for a new trial on any grounds that the district court deems appropriate after the issue has been raised by a moving party, even if such grounds have not been specified in the moving party's motion or supporting documents. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 59(a).*

(n3)Footnote 2. *DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 133-134 (2d Cir. 1998) .*

(n4)Footnote 3. *Whitehead v. Food Max, Inc., 163 F.3d 265, 269 (5th Cir. 1998) .*

(n5)Footnote 4. *Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000)* .

(n6)Footnote 5. *Lack Indus., Inc. v. Ralston Purina Co., 327 F.2d 266, 274 (2d Cir. 1964)* (discussing origin of rule).

(n7)Footnote 6. *Fed. R. Civ. P. 59(a)*.

(n8)Footnote 7. *Fed. R. Civ. P. 59(d)*.

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
A. FUNCTION OF ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure § 24.02

§ 24.02 Rule Governing New Trial is Procedural Mechanismn*

Rule 59 is a procedural device that governs the grant or denial of a new trial in federal courts, regardless of whether jurisdiction is based on a federal question or diversity of citizenship. n1 Although the right to a new trial or to an amendment of a judgment may appear to be substantive, Rule 59 is a procedural device and is therefore generally applicable in all federal cases. However, in diversity actions, certain substantive issues, which often arise under Rule 59 motions, such as, the excessiveness of damages and remittitur, are governed by state law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 206 (5th Cir. 1992)* (federal rules govern Rule 59 determination); *Mattison v. Dallas Carrier Corp., 947 F.2d 95, 96 (4th Cir. 1991)* (state procedures for post-trial reconsideration of damage awards are inapplicable in diversity action in federal court; federal court must apply Federal Rules of Civil Procedure).

(n3)Footnote 2. *T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1530 (11th Cir. 1985)* (in diversity case, whether jury's verdict is excessive in amount is controlled by state substantive law; if excessive amount is found, then federal law determines if new trial should be granted); *Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677, 690 (W.D.N.Y. 1993)* (substantive issue in diversity case of excessiveness in amount of damage award is reviewed under state law).

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
A. FUNCTION OF ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure § 24.03

§ 24.03 Effect on Right to Jury Trialn*

In jury trials, a district court's order for new trial may involve constitutional limitations because of the *Seventh Amendment's* prescriptions allocating the trial roles of the trial judge and the jury in federal court. n1 Thus, a party in federal court has a general right to a jury determination of all legal issues and all issues that are common to both legal and equitable claims, while the trial court is to determine all equitable issues. Therefore, the court may not completely disregard the jury's findings with regard to legal issues. n2

A grant of a new trial also involves the trial court's authority to review jury verdicts. n3 However, the Supreme Court has held that the *Seventh Amendment's* prohibition against a trial court's reexamination of a jury verdict does not limit the authority of a trial court to grant a new trial for any of the grounds for which new trials have been granted in federal courts under Rule 59. n4 A jury trial limitation that remains despite the district court's broad powers of reexamination is that if a district court grants a Rule 59 new trial in a trial for which the *Seventh Amendment* requires a jury trial, the retrial must also be before a jury. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000)* (*Seventh Amendment* ensures that factual determinations made by jury are not later set aside by the court, except as permitted under common law; court may not substitute its judgment of facts for that of jury; it may only grant new trial if it concludes that jury's verdict was so against weight of evidence as to be unsupportable).

(n3)Footnote 2. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-553, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)*

(reversing judgment based on trial judge's findings on equitable claims; when properly joined legal claims had been dismissed in error, entire judgment must be vacated and case retried with legal claims decided by jury so that party's right to jury trial is preserved); *see U.S. Const., Amend. VII*.

(n4)Footnote 3. *See U.S. Const., Amend. VII* (for issues at law, right to trial by jury must be preserved, and no fact tried by jury may be otherwise reexamined by federal court unless permitted by common law).

(n5)Footnote 4. *Gasperini v. Center for Humanities, 518 U.S. 415, 433-435, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (citing **Moore's Federal Practice** for proposition that under "re-examination" clause trial court in federal system has discretion to grant new trial if verdict appears to court to be against weight of evidence; this discretion includes overturning verdicts for excessiveness and either ordering new trial without qualification or ordering new trial conditioned on verdict winner's refusal to agree to remittitur in verdict); *see Fed. R. Civ. P. 59(a)* (grounds for grant of new trial).

(n6)Footnote 5. *Slocum v. New York Life Ins. Co., 228 U.S. 364, 376, 33 S. Ct. 523, 57 L. Ed. 879 (1913)* (when verdict is set aside, right of retrial by jury applied as in first instance).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.04

§ 24.04 Order for New Trial Compared With Judgment as Matter of Lawn*

[1] Different Standards

Generally, the district court may order a new trial n1 when the court is firmly convinced that the jury has reached a plainly erroneous result or the verdict is a miscarriage of justice n2 or the verdict is against the clear weight of the evidence. n3 A motion for new trial is often made at the same time as a motion for judgment as a matter of law under Rule 50. n4 However, the standards applied by the trial court in considering the motion for a new trial and the motion for judgment as a matter of law differ significantly, with a more stringent standard applicable before the court may grant a motion for judgment as a matter of law. n5

A more lenient standard is applied to a motion for new trial than for a judgment as a matter of law because the motion for new trial merely returns the case to the trier of fact, and does not immediately put in place a new judgment. Thus, trial courts have considerable discretion to grant a new trial motion and may do so even when substantial evidence supports the jury's verdict. n6 The district court may weigh the evidence and need not view it in the light most favorable to the verdict winner. n7

On the other hand, for a motion for judgment as a matter of law, the district court may not weigh evidence nor consider credibility of witnesses. The court must view the evidence in the light most favorable to the opposing party, and ascertain that the evidence does not provide a reasonable jury with legally sufficient basis to find for the moving party on the issue. n8 Thus, judgment as a matter of law may be granted only if: (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the moving party that reasonable and fair minded persons could not arrive at a verdict against it. n9

Finally, while the grant or denial of a new trial motion is reviewed solely for abuse of discretion, the grant or denial of a motion for judgment as a matter of law is reviewed de novo. n10

[2] Procedures

After a party has been fully heard on an issue during a jury trial, and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve that issue against the party, n1 and grant a motion for judgment as a matter of law against the party on a claim or defense that depends on that issue. n2 A motion for judgment as a matter of law must be made at trial before the case is submitted to the jury and after a party has been fully heard on an issue and the opposition asserts that no legally sufficient evidentiary basis exists for a reasonable jury to find for that party on the issue that has been fully presented. n3

Rule 50 also provides a procedure for renewing a motion for judgment as a matter of law after trial, provided that a prior such motion was made before the close of evidence; the motion after trial must be filed no later than 28 days after entry of judgment and may alternatively request a new trial, or make a joint request for a new trial, pursuant to Rule 59(e). n4 If the court grants a renewed motion for judgment as a matter of law, the court must also rule on any motion for new trial, must determine whether a new trial should be granted in the event the judgment as a matter of law is later vacated or reversed, and must state the grounds for granting or denying the motion for new trial. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawAlternative MotionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 24.21[1].*

(n3)Footnote 2. *Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000)* ; *DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 133-134 (2d Cir. 1998)* .

(n4)Footnote 3. *AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000)* (court may grant new trial only if it concludes that jury's verdict was so against weight of evidence as to be unsupportable); *Whitehead v. Food Max, Inc., 163 F.3d 265, 269 (5th Cir. 1998)* (new trial should not be granted unless verdict against great weight of evidence).

(n5)Footnote 4. *Fed. R. Civ. P. 50(b)* (moving party may file renewed motion for judgment as matter of law and may include alternative or joint request for new trial under Rule 59).

(n6)Footnote 5. *Manley v. AmBase Corp., 337 F.3d 237, 244-245 (2d Cir. 2003)* ; *see Asa-Brandt, Inc. v. ADM Investor Servs., 344 F.3d 738, 744 (8th Cir. 2003)* .

(n7)Footnote 6. *Poynter v. Ratcliff, 874 F.2d 219, 222-223 (4th Cir. 1989)* .

(n8)Footnote 7. *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358, 1371 (Fed. Cir. 2009)* .

(n9)Footnote 8. *Poliner v. Tex. Health Sys., 537 F.3d 368, 376 (5th Cir. 2008)* .

(n10)Footnote 9. *Caruolo v. John Crane, Inc., 226 F.3d 46, 51 (2d Cir. 2000)* .

(n11)Footnote 10. *Whitehead v. Food Max, Inc., 163 F.3d 265, 269-271 (5th Cir. 1998)* (court would not treat new trial motion as renewed motion for judgment as matter of law).

(n12)Footnote 1. *Fed. R. Civ. P. 50(a)(1)(A).*

(n13)Footnote 2. *Fed. R. Civ. P. 50(a)(1)(B)*; *see United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 1, 5 (D.D.C. 2007)* .

(n14)Footnote 3. *Fed. R. Civ. P. 50(a)(2)*; *Holmes v. United States, 85 F.3d 956, 961-962 (2d Cir. 1996)* (motion may be renewed after verdict).

(n15)Footnote 4. *Fed. R. Civ. P. 50(b)*, *59(e)*.

(n16)Footnote 5. *Fed. R. Civ. P. 50(c)(1)*; *Kowalski v. American S.S. Co., 954 F. Supp. 140, 142-143 (E.D. Mich. 1995)* , *aff'd without opinion, 103 F.3d 129 (E.D. Mich. 1995)* (procedural requirements).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.05

§ 24.05 Motion for New Trial Filed With Motion for Amendment of Findingsn*

A party must file a motion to have the court amend its findings or make additional findings of fact no later than 28 days after entry of judgment, and the court may amend its judgment accordingly. n1 A motion for the amendment of the court's findings, which must be made in all actions tried on the facts without a jury, n2 may accompany a motion for a new trial under Rule 59. n3 One court of appeals has noted, therefore, that Rule 52(b) and Rule 59 are both explicit sources of authority for a motion to amend a judgment in a nonjury case. n4 When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned, whether or not the party raising the question had earlier in the district court objected to the findings, moved to amend them, or moved for partial findings. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.05 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 52(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 52(a)(1).*

(n4)Footnote 3. *Fed. R. Civ. P. 52(b).*

(n5)Footnote 4. *United States v. Martin, 226 F.3d 1042, 1047 (9th Cir. 2000)* ; *see Fed. R. Civ. P. 59(e)*; *see also § 24.80* et seq.

(n6)Footnote 5. *Fed. R. Civ. P. 52(b).*

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3-24 Moore's Manual--Federal Practice and Procedure § 24.06

§ 24.06 Principle of Harmless Error Applicable to Motion for New Trialn*

Unless justice requires otherwise, no error by a party or the court, including an error in admitting or excluding evidence, is grounds for the court to grant a new trial or otherwise disturb a judgment or order. n1 Therefore, an error is not a sufficient ground for the trial court to grant a new trial under Rule 59 unless the court deems that its refusal to grant a new trial would be inconsistent with substantial justice. n2 Furthermore, if the party does not make a timely objection, even substantial errors are deemed waived and do not constitute grounds for a new trial unless a miscarriage of justice would result from the denial of a motion. n3 For discussion of the harmless error principle, as specified in Rule 61, see Part III. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 61*; *Armstrong v. Burdette Tomlin Mem'l Hosp., 438 F.3d 240, 246 (3d Cir. 2006)* .

(n3)Footnote 2. *Fed. R. Civ. P. 61*; *Falk v. Paluch, 163 F.R.D. 8, 9 (N.D. Ill. 1995)* (wrongdoing amounts to harmless error unless it affects substantial rights).

(n4)Footnote 3. *Caruolo v. John Crane, Inc., 226 F.3d 46, 51 (2d Cir. 2000)* (there was no ground to grant new trial with respect to testimony about expert's study because party never objected to study on hearsay or prejudice grounds, thereby failing to preserve these arguments for appeal; therefore, court of appeal reviewed evidentiary ruling for plain error, that is, to determine if ruling resulted in miscarriage of justice, which was not present in this case); *see also United States v. Hourihan, 66 F.3d 458, 463 (2d Cir. 1995)* , *cert. denied, 516 U.S. 1135 (1996)* .

(n5)Footnote 4. *See § 24.100* et seq.

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3-24 Moore's Manual--Federal Practice and Procedure § 24.07

§ 24.07 Stay of Execution of Judgmentn*

Pending the disposition of a Rule 59 motion for a new trial or to alter or amend a judgment, n1 a court may stay the execution of a judgment or proceedings to enforce the judgment. n2 Rule 62(b) allows the court to enter the judgment immediately after trial, but allows the court to specify appropriate terms to provide protection to a party from the immediate execution of the judgment pending the determination of the post-trial motion for a new trial. n3 Whether to grant or deny a Rule 62(b) motion is entirely within the discretion of the district court n4 and subject to any proper conditions imposed by the court for the security of the adverse party. n5 For further discussion of motions under Rule 62, see Ch. 26, *Post-Judgment Procedures*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.05[10] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(a)(1), (e).*

(n3)Footnote 2. *Fed. R. Civ. P. 62(b)(3).*

(n4)Footnote 3. *Houben v. Telular Corp., 309 F.3d 1028, 1034 (7th Cir. 2002)* ; *see Fed. R. Civ. P. 62(b).*

(n5)Footnote 4. *Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817, 820-821 (5th Cir. 1989)* (court's power pursuant to Rule 62 should be exercised only to maintain status quo).

(n6)Footnote 5. *Fed. R. Civ. P. 62(c)*; *Peacock v. Thomas, 516 U.S. 349, 354 n.7, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996)* (noting that district court may stay execution of judgment pending disposition of post-trial motion for new trial only if court provides for security of judgment creditor; Rule 62(b) stay conditioned on security of adverse party as court deems proper).

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3-24 Moore's Manual--Federal Practice and Procedure §§ 24.08through 24.19

[Reserved]

§§ 24.08[Reserved]

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PART VI Trial and Judgment
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3-24 Moore's Manual--Federal Practice and Procedure § 24.20

§ 24.20 General Groundsn*

The determinations that a trial court must make in its decision whether to grant a motion for a new trial include whether a new trial is necessary to avoid a miscarriage of justice, or to rectify a serious error such as a verdict that is against the law or against the considerable weight of the credible evidence. n1 To determine whether to grant the motion for a new trial, the court asks different questions depending on the grounds that are asserted in the motion or brought up by the court on its own initiative. n2 Thus, the primary bases for the grant of a new trial are that the jury has reached a plainly erroneous result, n3 that the jury's verdict is against the clear weight of evidence, n4 that the damages are excessive, that the trial was not fair, or that substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions. n5 On the other hand, a new trial may not be granted merely because the losing party may be able to present a better case in another trial. n6 The particular grounds for new trial are discussed in *§§ 24.21 -24.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.13 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Crowe v. Marchand, 506 F.3d 13, 19 (1st Cir. 2007)* ; *Manley v. AmBase Corp., 337 F.3d 237, 244-245 (2d Cir. 2003)* .

(n3)Footnote 2. *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242 (D.V.I. 1995)* (test to decide Rule 59 motion depends on grounds asserted for new trial).

(n4)Footnote 3. *DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 133-134 (2d Cir. 1998)* .

(n5)Footnote 4. *Whitehead v. Food Max, Inc., 163 F.3d 265, 269 (5th Cir. 1998)* .

(n6)Footnote 5. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940)* (nonexclusive list); *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1284 (Fed. Cir. 2000)* (concealing material evidence throughout discovery and then revealing it late during trial deprives opposition of fair trial).

(n7)Footnote 6. *Ball v. Interoceanica Corp., 71 F.3d 73, 76 (2d Cir. 1995) , cert. denied, 519 U.S. 863 (1996) .*

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3-24 Moore's Manual--Federal Practice and Procedure § 24.21

§ 24.21 Grounds for New Trial in Case Tried to Juryn*

[1] Extraordinary Circumstances Required

In general, the district court may not set aside a jury verdict except in extraordinary circumstances, such as a case of manifest injustice or abuse of the jury's function. Courts will sustain jury verdicts if reasonable bases exist to uphold the verdict. n1 In ruling on a new trial motion, the court will search the record for evidence that could reasonably lead the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner. n2 However, the fact that some substantial evidence exists in support of the verdict does not necessarily mean that there is a reasonable basis for the verdict. If a jury's verdict is against the great weight of evidence, the court may order a new trial, even if substantial evidence supports the verdict. n3 On the other hand, the district court may not grant a motion for new trial merely because the court would have come to different conclusion than the jury. n4

[2] Problems With Verdict

[a] Verdict Must Be Improper or Unjust

Generally, the court may grant a new trial based on impropriety in the jury's verdict only if there is no way the trial court may justify the verdict. n1 In other words, it is proper for the trial court to grant a new trial motion in a jury case only if the court is convinced that the jury has reached a seriously erroneous result n2 or the verdict is a miscarriage of justice. n3 The trial court has broad power to grant a new trial whenever it is necessary to set aside an unjust verdict. n4 When the power is wisely used, it prevents a miscarriage of justice and makes jury trials instruments of justice, provided that the court does not invade the common-law function of juries or the constitutional right of jury trial. n5

[b] Weight of Evidence

The district court may grant a new trial if it concludes that the jury's verdict was so against the weight of the evidence that the verdict is not supportable. n6 The trial court may grant a new trial motion even though substantial evidence supports the verdict. n7 However, this does not mean that the court may substitute its judgment of the facts for that of the jury when the weight of the evidence may fall either way. n8 When the district court determines that the verdict is

against the clear weight of the evidence, the court has discretion to grant a new trial outright or to condition a new trial order on the verdict winner's refusal to accept a reduction in the amount of damages. n9

A jury verdict is against the weight of the evidence, such that a new trial is appropriate, if and only if the verdict is (1) seriously erroneous or (2) a miscarriage of justice. n9.1 Thus, in making a determination whether to grant a new trial, a court should determine whether the verdict is against the great weight of the evidence, in that it is seriously erroneous or a miscarriage of justice, based on all of the circumstances and events of trial. n10 The court must review the evidence, view all the evidence as a whole, and weigh the relative strengths and weaknesses of the evidence. Such a review must be done considering the credibility of the witnesses, conflicting testimony, and the strength of the evidence. n11

When a trial is of extended duration, complex, and involves subject matters outside the ordinary knowledge of jurors, the court should more closely scrutinize the verdict; on the other hand, when the subject matter of the trial is simple and easily comprehended by laypersons, the court should use less demanding scrutiny. n12 On a motion for new trial the trial court may make its own judgments regarding the credibility of witnesses, unlike the more stringent standard for a judgment as a matter of law, under which the trial court may not make credibility determinations. n13

[c] Inconsistency of Verdict

[i] General Standard

If it appears to the trial court that there is an inconsistency in a jury verdict, the trial judge must nevertheless uphold the verdict if there is any way to justify it. n14 Thus, a court should grant a new trial motion based on inconsistency only when the court is convinced that the jury has reached a significantly erroneous result or the verdict is a miscarriage of justice. n15 In connection with its general verdict of either nonliability or liability and imposition of damages, a court may also require a special verdict and verdict interrogatories. Inconsistencies between these verdicts are discussed below.

[ii] Inconsistency in General Verdict

If on its face a general verdict is inconsistent and reflects confusion on the part of the jury, the court has discretion to order a new trial. For example, when the jury's general verdict in a case differed in damage amounts with respect to two defendants to the extent that they indicated jury confusion as to liability, the court was justified in requiring a new trial. n16 The new trial should be granted only if the general verdict shows that the jury abused its power or otherwise conducted itself inappropriately. n17 However, a new trial in such circumstances is not necessary if the verdicts may be interpreted in any way that results in a consistent verdict. n18 Furthermore, if the jury has not been discharged, the court may return the verdicts to the jury for further deliberation in an effort to obtain a consistent verdict. n19

[iii] Inconsistency Involving Special Verdict or Verdict Interrogatories

A special verdict is one in which the court requires the jury to return the verdict in the form of special written findings on each issue of fact. n20 If such verdicts are inconsistent with one another, the court has discretion either to harmonize the inconsistent verdicts, viewing the case in any reasonable way that makes the verdicts consistent, n21 or, if that is not possible, to grant a new trial. n22

Instead of a special verdict, the trial court also has the option to submit written interrogatories to the jury and require the jury to return answers to the interrogatories together with a general verdict. n23 When the answers to interrogatories are inconsistent with each other or with the general verdict, a new trial may be warranted. However, the trial court should attempt to read the answers to the interrogatories consistently, if possible. If the answers to interrogatories may be read in a way that shows a verdict that makes sense and does not show an abuse of power or other misconduct by the jury, a new trial should not be required. n24 When the answers to the interrogatories are internally consistent but one or more is inconsistent with the general verdict, a judgment may be entered based on the answers, notwithstanding the general

verdict, or the court may return the matter to the jury for reconsideration or order a new trial. n25 However, if the answers to the interrogatories are internally inconsistent and one or more is also inconsistent with the general verdict, the court must either resubmit the matter to the jury or order a new trial. n26

[d] Damages

[i] General Standard

The trial court may grant a motion for a new trial under Rule 59(a) on the issue of compensatory damages when the amount of the jury verdict is unreasonable to the extent that it is entirely disproportionate to the damages shown at trial based on the plaintiff's injury. n27 Similarly, if a verdict awards damages for pecuniary loss but not for pain and suffering, the court may order a new trial only if the jury's decision is unreasonable to the extent that it is entirely disproportionate to the injury suffered by the plaintiff. n28

A court's determination to grant or deny a new trial on the grounds of a compensatory damage award is within the sound discretion of the district court, and a refusal to grant a new trial on the grounds of disproportionate compensatory damages will not be overturned unless there has been a clear abuse of discretion. n29 On the other hand, the Supreme Court has held that an appellate court should apply a de novo standard when reviewing a district court's determination whether a punitive damages award was unconstitutional under the due process clause. n30 The *Due Process Clause of the Fourteenth Amendment* prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, because elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. n30.1 Thus, while a motion for new trial on the grounds of excessiveness or inadequacy of damages usually involves an error of fact with respect to compensatory damages, it may involve an error of law if it decides a constitutional punitive damages issue. n30.2

[ii] Excessive Damages and Remittitur

A jury award of excessive damages is grounds for the court to grant a motion for new trial. In a federal court, the substantive issue of whether or not damages are excessive depends on whether the case is based on federal question jurisdiction, which is controlled by federal law, or diversity jurisdiction, which is controlled by state law. n31 In a federal question case, a district court will ordinarily deem an award excessive if it shocks the judicial conscience. n32 For example, a court may grant a new trial if a punitive damages award is grossly excessive and violates the due process clause in that it goes beyond the interest that a punitive award is designed to serve. n33 Courts have also expressed the standard for excessiveness under federal law as when one's sense of justice is outraged. n34 The Supreme Court has held that in diversity cases state law controlling compensatory damages for excessiveness or inadequacy should be given effect and applied by the federal trial court judge in deciding whether to grant a new trial. Likewise, a federal appellate court must review the trial court's ruling regarding compensatory damages under the abuse of discretion standard. n35 However, the Supreme Court has expressly held that a court of appeals should apply a de novo standard when reviewing a district court's determination of the constitutionality of punitive damages awards and not the less demanding abuse of discretion standard. n35.1 With regard to punitive damages, the Supreme Court has held that the *Due Process Clause of the Fourteenth Amendment* prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. To determine whether an award of punitive damages by a jury is excessive based on this constitutional limitation, the state or federal court must make a de novo determination of whether the award is reasonable based on: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The most important factor in the determination of the reasonableness is the degree of reprehensibility of the defendant's conduct. The court must determine the reprehensibility of a defendant by considering whether: the harm caused was physical, as

opposed to economic; the tortious conduct evinced an indifference to, or a reckless disregard of, the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. However, the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any punitive award suspect. n35.2

As an alternative to an outright grant of a new trial when a damage award is excessive, the trial court may order a new trial conditioned on the verdict winner's refusal to accept a "remittitur." *Remittitur* is a process that a court may use to compel a plaintiff who has won on the liability issue to choose between either the reduction of the excessive verdict or an order for a new trial. n36 If the plaintiff rejects the specified reduction in the amount of damages, the court must grant a new trial; because of the plaintiff's right to a jury trial, the court does not have the option of entering judgment for the reduced amount without the plaintiff's consent. n37 To determine the amount of the remittitur that the court will propose to the plaintiff, the courts in some circuits use the "maximum recovery rule," which is a loosely defined standard that generally provides either that the remittitur amount should be based on the highest amount of damages a jury could properly have awarded n37.1 or that the remittitur amount should be set at the maximum recovery that does not shock the judicial conscience. n37.2 The purpose of the maximum recovery rule is to preserve the right to jury trial by preventing the appellate courts from merely replacing what a jury thought would make a plaintiff whole with what the appellate court thinks would make a plaintiff whole. Consequently, some courts further refine the maximum recovery rule by fixing the amount of the remittitur as that amount the court thinks reasonable and then tacking on a percentage addition to avoid supplanting the judgment of the jury. The total amount of the remittitur may also be limited by a comparison to the highest previous recovery in the relevant jurisdiction for a factually similar case. n37.3 As discussed above, the maximum recovery rule has as an ultimate cap for punitive damages the amount that is reasonable under the Due Process Clause of the Constitution. This amount is determined by the court based on the degree of reprehensibility of the defendant's misconduct, the difference between the actual or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. n37.4

[iii] Additur Only in Limited Circumstances

In contrast to remittitur, the use of the procedure of additur has generally been ruled unconstitutional. *Additur* is the practice of denying a plaintiff's motion for a new trial based on a claim of an insufficient amount of damages awarded by a jury, conditioned on the defendant's agreement to pay damages in an amount greater than the verdict returned by the jury. n38 Generally, additur is deemed impermissible under federal law because it is considered a violation of the *Seventh Amendment* right to a jury trial. n39 The Supreme Court has held that the additur procedure violates the *Seventh Amendment's* proscription against a court's reexamination of facts tried by a jury, in that the practice of additur did not exist at common law. n40 The rationale for the proscription against additur is that addition to a jury award constitutes a greater invasion of the jury's province than does reduction. In the case of additur, no jury has ever passed on the greater amount to be awarded by the court; on the other hand, in the case of remittitur, a jury has already specified an amount in its verdict; the court has merely decided to award a portion of that amount.

Although, the Supreme Court has rejected additur on constitutional grounds, the concept of additur may still be used when damages are incorrectly low as a matter of law, for example, in the following limited circumstances:

1. The increase in damages is required simply to correct a clerical error. n41

2. The increase in damages is required to correct an error in the trial court's instruction to the jury to credit the defendant a sum certain as a matter of law, when that instruction was an error as a matter of law. n42

3. The increase in damages is ordered when the amount of damages is not in issue or the increase reflects

the amount that was stipulated by the parties. n43 In these circumstances, the addition to the amount of damages is not prohibited by the *Seventh Amendment* because the jury's error is one of law rather than fact, and the order does not technically involve additur, because the correct figure is prescribed as a matter of law; furthermore, the plaintiff is not compelled to choose between the increased damage award and a new trial. n44

[3] Newly Discovered Evidence

[a] Three-Part Test

A court may order a new trial when a party or the court procures newly discovered evidence. n1 In making its decision whether to grant a new trial based on newly discovered evidence, the court must ascertain whether all three of the following criteria are met: n2

1. The evidence discovered must be material, that is, it must be of a kind that would probably change the outcome of the case. n3

2. The newly discovered evidence must have been discovered after judgment and the moving party must have been excusably ignorant of the facts at the time of the trial despite due diligence to learn about the facts of the case. n4

3. The evidence must not be merely cumulative or impeaching. n5

The party making the Rule 59 motion has the burden of affirmatively proving that the evidence on which the motion is based existed at the time of the trial but was not discovered in time to use at the trial, although the party diligently prepared for trial. Additionally, the moving party must allege the nature of the evidence, showing that the evidence is admissible and probative, that it is not merely cumulative, and will not be used primarily for impeachment. Finally, the moving party must convince the court that, if the evidence had been introduced at the trial, a different result would have been reached. The moving party should supply whatever proof is available to support the motion, such as testimony, affidavits, and documentary evidence. n6

[b] Materiality of New Evidence

The court may not grant a new trial unless the newly discovered evidence is admissible, material, and probative. n7 Furthermore, the evidence must potentially affect the jury's verdict or the court's judgment. In other words, the evidence must be of such substantial probative value that a different result would have been attained if introduced at the original trial. n8 The party moving for the new trial based on newly discovered evidence must establish the probability that the new evidence would change the outcome of the case. n9 For example, in patent infringement litigation, the moving party may establish that the new evidence was probably outcome determinative if the evidence tended to show (or not show) that the claimed patented invention was invalid for "obviousness." n10

[c] Discovery of New Evidence After Trial

The court will grant a motion for new trial based on the ground of newly discovered evidence only if the evidence has been discovered after judgment. n11 Furthermore, courts require that the moving party must have been excusably ignorant of the facts at the time of the trial in spite of the party's due diligence in an effort to learn about the facts of the case. n12 For example, evidence qualifies as newly discovered if the opposition party has concealed material evidence throughout discovery and then reveals the evidence late in the trial. The moving party is considered to have "discovered it" after trial because even with due diligence the moving party could not possibly ascertain the full scope of the evidence until after the trial was over and the jury had retired to deliberate. n13 It should be noted that if facts are

known to a party during the pendency of the trial, but not disclosed to counsel until after the trial, knowledge is imputed to counsel, and such facts are not considered to be newly discovered evidence for purposes of Rule 59. n14

[d] New Evidence Not Merely Cumulative or for Impeachment

To support a Rule 59 motion for a new trial based on newly discovered evidence, the new evidence must constitute something more than merely cumulative or impeachment evidence. n15 For example, a court in a patent case held that newly discovered deposition testimony was not merely cumulative or impeaching but contained a significant amount of additional material evidence about how the parties obtained the scientific formula in question and how that formula was used to duplicate material in its own device and also had an added admission that the device in question was essentially the same as the opposing party's. n16

[4] Composition and Performance of Jury

[a] Jury Selection

The court may grant a new trial if a party was improperly denied peremptory challenges, provided that the party establishes how the denial was prejudicial. n1 The systematic exclusion of a particular group from service on a jury is also grounds for a new trial. n2 Again, however, such a motion will not be granted by the court unless the error prejudiced the moving party and a timely objection was made. n3 It should be noted that the district court has wide latitude in its management of peremptory challenges, which will be reversed on appeal only if the court's procedure bars a party from using the statutorily mandated number of peremptory challenges against a person who becomes a member of the jury. n4 Additionally, a party may not claim error with respect to the district court's denial of any number of peremptory challenges unless all available peremptories have been exercised. n5

[b] Bias or Disqualification of Juror

The grant of a new trial is justified either by bias on the part of a juror or by failure of a juror to disclose information that would have justified disqualification for cause. To prevail on either basis, the moving party must show that (1) the juror failed to truthfully answer a material question during voir dire and (2) if that question had been answered truthfully, the answer would have constituted cause to challenge that juror. n6 If the first prong of the inquiry is satisfied, a motion for a new trial will not be granted merely because the untruthful answer deprived the moving party of the information necessary to intelligently exercise a peremptory challenge. To support the motion, the moving party must show that the withheld information would have supported a challenge for cause. n7 Thus, actual prejudice is required, a juror's motive for concealment is relevant but not dispositive, and only motives that affect impartiality or bias affect the fairness of the trial. n8

[c] Misconduct of Jury

[i] Misconduct Is Grounds for New Trial

A jury must perform its duties within the parameters specified by the court in its charge to the jury. The jury must make a decision based on the facts presented and proven at trial; otherwise, it commits misconduct that is grounds for a new trial. Thus, if a verdict is the result of mistake, passion, prejudice, compromise, or other improper motive the losing party has grounds for a motion for a new trial. n9

Federal law governs the determination of jury misconduct under Rule 59. n10 Therefore, it should be noted that a motion for a new trial based on juror misconduct is difficult to support because of the federal common-law rule prohibiting a juror from impeaching the verdict. Under this principle, appropriate proof of juror misconduct may be in the form of testimony by third parties or testimony of the jurors themselves. However, a juror's ability to impeach his or her own verdict is limited to evidence regarding the introduction of improper extraneous influences and may not

concern those matters that arise exclusively among the jurors during deliberation. n11 This evidence rule distinguishes between impeachment concerning those matters that arise exclusively among the jurors, on the one hand, and the introduction of improper extraneous influences, on the other. n12

[ii] Compromise or Voting Irregularity

One of the most common grounds for grant of a new trial based on juror voting is because of a compromise used by the jury to reach its vote. The relevant factors in determining whether the verdict was a result of impermissible compromise, and therefore a justification for a new trial, include a grossly inadequate damage award, a close question of liability, and an unusual chronology of jury deliberations. n13 A new trial must also be granted when the record shows that the verdict was not unanimous or otherwise had the requisite number of votes; however, a juror that votes with the verdict when received by the court may not subsequently establish lack of agreement or coercion by fellow jurors. n14

When the trial judge determines that the verdict is a compromise, the court may order a new trial sua sponte, after setting aside the verdict. However, the trial court may not merely attempt to correct the compromise by making the court's own findings on an equitable basis, while leaving the jury's verdict intact. n15

[iii] Reference to Prohibited Sources of Information

When deliberating, a jury must consider only the evidence presented to the court, and a violation of this requirement may be grounds for a new trial. For example, a new trial is justified if the jury considers evidence not introduced at the trial, n16 or if one or more jurors discuss the case with a person other than a juror. n17 As with other types of error, an error involving juror reference to inappropriate information may be harmless. n18 Also, the failure to make a timely objection to contact between a juror and an outside party may constitute waiver of the objection. n19

[iv] Independent Investigation or External Influence

It is juror misconduct, and grounds for a new trial, if a juror conducted an independent investigation or was otherwise influenced by an outside source, if the influence was prejudicial under the harmless error rule. n20 The influence of an outside party or an independent investigation by the juror could be a very prejudicial error because the jury is required to base its decision only on the facts and evidence submitted and proven at trial. n21 A juror may also commit misconduct by relating to the other jurors particular facts or experiences from his or her past that relate to the facts presented at trial and influence the result of the deliberation. n22 However, it is not misconduct for a juror merely to call on his or her general experience or knowledge to make decisions in deliberation. n23

A jury's critical examination of the trial exhibits during deliberations is not grounds for a new trial, unless the court has placed in the jury's possession evidence that was not presented at trial. For example, when the jury in a personal injury performed an experiment to determine the strength of a cleaning solution allegedly ingested by the plaintiff, it was held not to constitute misconduct, because, in conducting the experiment, the jury used a coffee pot and carafe that were both exhibits at trial. The experiment utilized only evidence placed in the jury's possession that has been presented at trial; therefore, the experiment did not constitute jury misconduct justifying a new trial. n24

[5] Performance of Court

[a] Error of Law

[i] Effect of Error

An error of law committed by a court during the course of litigation, n1 is grounds for a new trial if the error is prejudicial. n2 However, a court's legal error may be waived if the party fails to make a demand or a timely objection. n3 Furthermore, an error of law is subject to the harmless error rule and is not grounds for a Rule 59 new trial motion if

deemed harmless. n4

[ii] Submission of Legal Issues to Jury

If the district court in a jury trial denies a proper request to submit an issue to the jury, the denial, if prejudicial, is grounds for a new trial. On the other hand, a new trial is not justified if no issue of material fact is required to be submitted to and determined by a jury. n5 Thus, issues that are either erroneously submitted to or withdrawn from the jury's consideration may be grounds for a new trial. However, the proponent waives the submission of an issue to the jury if a demand for submission and a timely objection are not made before the jury retires for deliberation. n6 For discussion of the submission of issues to the jury, see Ch. 22, *Trial by Jury*.

[iii] Jury Instructions

If the district court issues incorrect jury instructions, or fails to give a properly requested jury instruction, the court may grant a new trial if the improper or omitted instruction impaired the deliberation process. n7 However, the district court has broad discretion in ruling on proffered jury instructions, and its decision is subject to reversal only if the instructions, viewed in their entirety, contained an error or errors that affected the substantial rights of the parties. n8 Provided that the charge as a whole adequately states the law, the district court has discretion over the "style and wording" of instructions. n9 Furthermore, the moving party must have made an appropriate objection, stating the grounds for the objection with particularity, before the commencement of jury deliberations. n10 For discussion of the requirements for jury instructions, see Ch. 22, *Trial by Jury*.

[iv] Rulings on Evidence

If the district court erroneously admits evidence at trial, the admission is grounds for a new trial when the evidence improperly admitted is deemed to be prejudicial. n11 A court's failure to admit highly probative evidence that is likely to have a profound impact on the outcome of the trial may also be grounds for a new trial. n12 However, the district court enjoys wide latitude in determining whether evidence is admissible at trial, and the appellate court reviews evidentiary rulings under a deferential abuse of discretion standard.

Additionally, even improperly admitted testimony is not grounds for a new trial unless the error has led to a seriously erroneous result or a miscarriage of justice; this is not the result when other, unchallenged testimony established the same facts. n13 Furthermore, a new trial motion based on either of these grounds requires a proper objection at trial and is limited to the basis of the objection argued when the evidence was offered for admission. n14 For a complete discussion about the standards for reviewing erroneous rulings that admit or exclude evidence, see 1 WEINSTEIN'S FEDERAL EVIDENCE, Ch. 103, *Rulings on Evidence* (Matthew Bender 2d ed.).

[b] Misconduct

The misconduct of a trial judge is grounds for a new trial provided that the judge's conduct is so improper that it calls into question the fairness of the trial or if the conduct has an adverse impact on the jury. n15 The moving party has a heavy burden to prove that the misconduct made the trial unfair. n16 Furthermore, a new trial motion based on the judge's alleged misconduct should be granted only if the conduct of the judge or other officer of the court is prejudicial, n17 and not if the misconduct is deemed harmless error. n18 An objection to the alleged misconduct is ordinarily required, either at the time of the misconduct or at the next available opportunity outside the jury's presence. n19

[c] Inability of Judge to Continue

When a judge becomes unable to proceed after the commencement of a case, any other judge may proceed with the case after certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. If a successor judge determines that he or she cannot preside over the remainder of the case for any reason,

the judge may order a new trial. n20

In a jury trial, the death or disability of the judge during the trial but before the verdict is reached results in a mistrial, unless all of the parties consent to the substitution of another judge under Rule 63. n21 The replacement of a deceased or disabled trial judge after the verdict is returned is governed by Rule 63 and does not require the consent of the parties. n22 For complete discussion of Rule 63 motions, see Ch. 23, *Trial to Court; Inability of Judge to Proceed*.

[6] Misconduct of Attorney

Prejudicial misconduct of an attorney in a case is grounds for a new trial. As a general rule, the moving party must establish that the conduct complained of constitutes actual misconduct and not mere aggressive advocacy. Misconduct by counsel is sufficient grounds for a new trial if the misconduct affects the moving party's substantial rights, n1 or if the misconduct prevents the claim from being fully and fairly presented or the jury from considering the full extent of damages. n2 The test for determining whether or not to grant a motion for new trial is whether or not it is reasonably probable that the verdict was influenced by the misconduct of counsel. n3

The alleged misconduct must generally be objected to at the time it occurs. n4 However, the failure to make a timely objection does not foreclose a new trial if a miscarriage of justice results from the misconduct. n5 It should also be noted that the harm resulting from misconduct may in some cases be cured by prompt curative action by the court, including appropriate instructions to the jury. n6

[7] Misconduct of Witness or Party

The district court may grant a Rule 59 motion for a new trial when a witness makes a statement while on the witness stand that is both improper and prejudicial, provided that no curative instruction or measure by the court could adequately eliminate the effect of the statement on the jury. n1 Similarly, false testimony or perjury by a witness may be grounds for a new trial n2 provided that the falsity of the testimony can be established to the satisfaction of the court. n3

Ordinarily, the misconduct of a party is not considered as sufficiently disruptive to provide adequate grounds for a new trial. For example, courts have held that emotional outbursts by a party in open court n4 and loud accusations that a witness was lying in the presence of the jury do not provide grounds for a new trial. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.13[2] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987)* .

(n3)Footnote 2. *Nissim v. McNeil Consumer Prods. Co., 957 F. Supp. 600, 602-604 (E.D. Pa. 1997)* , *aff'd on other grounds, 135 F.3d 765 (3d Cir. 1997)* (motion to set aside jury verdict denied because court could not conclude that verdict was inconsistent with evidence to extent in constituted manifest injustice).

(n4)Footnote 3. *United States v. Landau, 155 F.3d 93, 104 (2d Cir. 1998)* .

(n5)Footnote 4. *Peterson v. Wilson, 141 F.3d 573, 577 (5th Cir. 1998)* .

(n6)Footnote 1. *Palmer v. City of Monticello, 31 F.3d 1499, 1505 (10th Cir. 1994)* ; *Zarow-Smith v. New Jersey*

Transit Rail Operations, 953 F. Supp. 581, 591 (D.N.J. 1997) .

(n7)Footnote 2. *DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 133-134 (2d Cir. 1998)* .

(n8)Footnote 3. *Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000)* ; *Holzapfel v. Town of Newburgh, 950 F. Supp. 1267, 1272 (S.D.N.Y. 1997)* , *aff'd in part on other grounds and reversed in part on other grounds, 145 F.3d 516 (2d Cir. 1998)* .

(n9)Footnote 4. *Rice v. Community Health Ass'n, 203 F.3d 283, 285 (4th Cir. 2000)* (court may on its own initiative grant new trial if miscarriage of justice otherwise would result, even despite lack of proper motion).

(n10)Footnote 5. *Gasperini v. Center for Humanities, 518 U.S. 415, 433-435, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* ; *see* 24.03.

(n11)Footnote 6. *AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000)* (court may grant new trial only if it concludes that jury's verdict was so against weight of evidence as to be unsupportable); *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242-243 (D.V.I. 1995)* (court should grant new trial when record shows verdict cries out to be overturned or shocks conscience).

(n12)Footnote 7. *United States v. Landau, 155 F.3d 93, 104 (2d Cir. 1998)* ; *Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994)* .

(n13)Footnote 8. *Dunn v. HOVIC, 1 F.3d 1362, 1367 (3d Cir. 1993)* , *cert. denied, 510 U.S. 1031 (1993)* ; *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242 (D.V.I. 1995)* (court has power to overturn verdict when against weight of evidence but power is severely circumscribed).

(n14)Footnote 9. *Gasperini v. Center for Humanities, 518 U.S. 415, 433-435, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* .

(n15)Footnote 9.1. *Farrior v. Waterford Board of Educ., 277 F.3d 633, 635 (2d Cir. 2002)* , *cert. denied, 153 L. Ed. 2d 836 (2002)* ; *see Amorgianos v. AMTRAK, 303 F.3d 256, 261 (2d Cir. 2002)* (trial court may grant new trial on basis that verdict is against weight of evidence if jury has reached seriously erroneous result or if verdict is miscarriage of justice).

(n16)Footnote 10. *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242-243 (D.V.I. 1995)* (verdict must be plausible in light of full evidentiary record).

(n17)Footnote 11. *Lincoln Carpet Mills, Inc. v. Singer Co., 549 F.2d 80, 82 (8th Cir. 1977)* .

(n18)Footnote 12. *Lind v. Schenley Indus., Inc., 278 F.2d 79, 89-91 (3d Cir. 1960)* , *cert. denied, 364 U.S. 835 (1960)* .

(n19)Footnote 13. *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242-243 (D.V.I. 1995)* .

(n20)Footnote 14. *Palmer v. City of Monticello, 31 F.3d 1499, 1505 (10th Cir. 1994)* .

(n21)Footnote 15. *Holzapfel v. Town of Newburgh, 950 F. Supp. 1267, 1272 (S.D.N.Y. 1997)* , *aff'd in part on other grounds and reversed in part on other grounds, 145 F.3d 516 (2d Cir. 1998)* .

(n22)Footnote 16. *Wilkerson v. Sarver, 72 F.R.D. 605, 610 (E.D. Ark. 1976)* .

(n23)Footnote 17. *Hopkins v. Coen, 431 F.2d 1055, 1059-1060 (6th Cir. 1970)* .

(n24)Footnote 18. *Gallick v. B & O R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963)* (verdicts should be harmonized if possible); *First State Bank v. Jubie, 86 F.3d 755, 759 (8th Cir. 1996)* (court must read verdicts consistently if possible).

(n25)Footnote 19. *Rowe Intl., Inc. v. J-B Enter., Inc., 647 F.2d 830, 835 (8th Cir. 1981)* .

(n26)Footnote 20. *Fed. R. Civ. P. 49(a).*

(n27)Footnote 21. *Floyd v. Laws, 929 F.2d 1390, 1394-1396 (9th Cir. 1991)* (court should harmonize apparently inconsistent special verdicts if possible).

(n28)Footnote 22. *Anheuser-Busch, Inc. v. John Labatt Ltd., 89 F.3d 1339, 1347 (8th Cir. 1996)* , *cert. denied, 519 U.S. 1109 (1997)* .

(n29)Footnote 23. *Fed. R. Civ. P. 49(b).*

(n30)Footnote 24. *Gaia Techs., Inc. v. Recycled Prods. Corp., 175 F.3d 365, 372 (5th Cir. 1999)* (jury's answers to special interrogatories should be considered inconsistent with each other or with verdict only if there is no way to reconcile them); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)* (court must, if possible, read answers to special interrogatories in manner that makes them consistent).

(n31)Footnote 25. *Fed. R. Civ. P. 49(b)*; *see Harvey v. General Motors Corp., 873 F.2d 1343, 1346-1348 (10th Cir. 1989)* (absent inconsistency in verdict, new trial is not mandatory, but remains in discretion of trial court).

(n32)Footnote 26. *See Fed. R. Civ. P. 49(b), 59(a), 59(d)*; *Turyna v. Martam Constr. Co., 83 F.3d 178 (7th Cir. 1996)* (one option when jury returns factually inconsistent answers is to return matter to jury; after discharge, only option is new trial).

(n33)Footnote 27. *See Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995)* ; *Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1100 (3d Cir. 1995)* .

(n34)Footnote 28. *Zarow-Smith v. New Jersey Transit Rail Operations, 953 F. Supp. 581, 590-591 (D.N.J. 1997)* .

(n35)Footnote 29. *Carter v. Decisionone Corp., 122 F.3d 997, 1005-1006 (11th Cir. 1997)* (in age discrimination case, damage award for back pay determined by jury was within parameters supported by plaintiff's evidence and was apparently reduced to reflect plaintiff's failure to entirely mitigate damages; consequently, award was not excessive).

(n36)Footnote 30. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S, 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 601 (2003)* (punitive damages pose a greater danger of an arbitrary deprivation of property of the tortfeasor than compensatory damages); *Cooper Indus., Inc. v. Leatherman Tool Group Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)* ; *see* [ii], *below*.

(n37)Footnote 30.1. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S, 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 600-601 (2003)* ; *see* [ii], *below* (discussion of constitutional standards).

(n38)Footnote 30.2. See *Cooper Indus., Inc. v. Leatherman Tool Group Inc., 532 U.S. 424, 435-436, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)* (because jury's award of punitive damages is not finding of "fact," appellate review of district court's determination that award is consistent with due process does not implicate *Seventh Amendment* concerns and appellate court must apply a de novo standard of review); *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1204-1205 (11th Cir. 1993)* , *cert. denied, 510 U.S. 1012 (1993)* (new trial based on trial court's erroneous assumptions regarding basis of damages).

(n39)Footnote 31. *See Gasperini v. Center for Humanities, 518 U.S. 415, 432-434, 116 S. Ct. 2211, 135 L. Ed.*

2d 659 (1996) (discussing excessiveness and inadequacy of damages); *see also Fed. R. Civ. P. 59(a)(1)* (grounds for new trial).

(n40)Footnote 32. *Henry v. Hess Oil V.I. Corp., 163 F.R.D. 237, 242-243 (D.V.I. 1995)* ; *Carter v. Decisionone Corp., 122 F.3d 997, 1005-1006 (11th Cir. 1997)* (however, if jury's verdict is within bounds of possible awards supported by evidence, award should not be disturbed).

(n41)Footnote 33. *BMW of N. Am. v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)* .

(n42)Footnote 34. *Dagnello v. Long Island R.R., 289 F.2d 797, 802, 806 (2d Cir. 1961)* (although properly within province of jury to calculate damages, upper limit exists; whether that limit has been exceeded is question of law); *Gorsalitz v. Olin Mathieson Chem. Corp., 429 F. 2d 1033, 1042 (5th Cir. 1970)* (question is whether amount of damages found by jury is so excessive and exorbitant as to show passion and prejudice on part of jury).

(n43)Footnote 35. *Gasperini v. Center for Humanities, 518 U.S. 415, 423-425, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* .

(n44)Footnote 35.1. *Cooper Indus., Inc. v. Leatherman Tool Group Inc., 532 U.S. 424, 435-436, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)* .

(n45)Footnote 35.2. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S, 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 606-608 (2003)* (when full amount of compensatory damages was $1 million, punitive damages award of $145 million was excessive and violated *Due Process Clause of Fourteenth Amendment*).

(n46)Footnote 36. *Kazan v. Wolinski, 721 F.2d 911, 914-916 (3d Cir. 1983)* .

(n47)Footnote 37. *Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 305-306 (4th Cir. 1998)* (when it finds that jury's award of either compensatory or punitive damages is excessive, court may grant new trial conditioned on refusal of remittitur, giving plaintiff option of accepting remittitur or submitting to new trial; this procedure avoids conflict with *Seventh Amendment*, which precludes court from setting aside jury award and replacing it with one of court's own calculation).

(n48)Footnote 37.1. *Thomas v. Texas Dep't of Crim. Justice, 297 F.3d 361, 368-369 (5th Cir. 2002)* (out of deference to jury's right to decide damages amount, maximum recovery rule compels court to reduce damages under remittitur only to maximum amount jury could have awarded); *Unisplay, S.A. v. American Electronic Sign Co., 69 F.3d 512, 519 (Fed. Cir. 1995)* (applying maximum recovery rule which requires that remittitur amount be based on highest amount of damages jury could properly have awarded based on relevant evidence).

(n49)Footnote 37.2. *Evans v. Port Auth. of N.Y. & N.J., 273 F.3d 346, 355 (3d Cir. 2002)* (maximum recovery line is line between excessive jury award and maximum award that reasonable jury could impose in case).

(n50)Footnote 37.3. *See Salinas v. O'Neill, 286 F.3d 827, 830-831 (5th Cir. 2002)* .

(n51)Footnote 37.4. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S, 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 601 (2003)* .

(n52)Footnote 38. *Zarow-Smith v. New Jersey Transit Rail Operations, 953 F. Supp. 581, 590-591 (D.N.J. 1997)* .

(n53)Footnote 39. *Dimick v. Schiedt, 293 U.S. 474, 486-487, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* ; *Davis v. Naviera Aznar S.A., 37 F.R.D. 223, 225 (D. Md. 1965)* .

(n54)Footnote 40. *Dimick v. Schiedt, 293 U.S. 474, 482-483, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n55)Footnote 41. *Zarow-Smith v. New Jersey Transit Rail Operations, 953 F. Supp. 581, 590-591 (D.N.J. 1997)* (correction of clerical error does not constitute additur).

(n56)Footnote 42. *Mumma v. Reading Co., 247 F. Supp. 252, 260 (E.D. Pa. 1965)* (elimination of jury's unsupported reduction of damages did not constitute additur); *see Taylor v. Green, 868 F.2d 162 (5th Cir. 1989) , cert. denied, 493 U.S. 841 (1989)* (if court determines that verdict establishing liability is proper but that award of damages is inadequate, and there is no genuine factual issue regarding amount of recoverable damages, court may order that judgment be entered for that amount as matter of law, even though ordered amount exceeds verdict amount).

(n57)Footnote 43. *Liriano v. Hobart Corp., 170 F.3d 264, 272-273 (2d Cir. 1999)* (district court adjusted jury's damage award to include hospital bill that was undisputed and that manifestly should have been part of jury's damage calculations); *Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 985-986 (5th Cir. 1989)* (when plaintiff stipulates to amount of damages, plaintiff waives right to jury verdict with respect to amount, and trial court's order of stipulated amount does not constitute additur).

(n58)Footnote 44. *Cf. McCoy v. Wean United, Inc., 67 F.R.D. 495, 498 (D. Tenn. 1975)* .

(n59)Footnote 1. *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1155 (5th Cir. 1997)* ; *see Fed. R. Civ. P. 59(a).*

(n60)Footnote 2. *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1284-1287 (Fed. Cir. 2000)* ; *Morgan v. Labiak, 368 F.2d 338, 341 (10th Cir. 1966)* .

(n61)Footnote 3. *See* [b], *below.*

(n62)Footnote 4. *See* [c], *below.*

(n63)Footnote 5. *See* [d], *below.*

(n64)Footnote 6. *Morgan v. Labiak, 368 F.2d 338, 341 (10th Cir. 1966)* .

(n65)Footnote 7. *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1154 (5th Cir. 1997)* (new evidence must be outcome determinative); *Morgan v. Labiak, 368 F.2d 338, 341 (10th Cir. 1966)* (newly discovered evidence must have real probative value; evidence must be material and likely to cause new result).

(n66)Footnote 8. *Superchi v. Town of Athol, 170 F.R.D. 3, 5-6 (D. Mass. 1996)* (newly discovered evidence must be admissible and potentially affect jury's verdict or court judgment).

(n67)Footnote 9. *LiButti v. United States, 178 F.3d 114, 119 (2d Cir. 1999)* .

(n68)Footnote 10. *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1285 (Fed. Cir. 2000)* .

(n69)Footnote 11. *Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994)* (decision to grant or deny in trial court's discretion, and new trial is justified only if second jury could better determine issues); *Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 210-212 (9th Cir. 1987)* (new trial motion may not be based on evidence that was available during trial).

(n70)Footnote 12. *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1154 (5th Cir. 1997)* .

(n71)Footnote 13. *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1286 (Fed. Cir. 2000)* ; *see also Duffy v. Clippinger, 857 F.2d 877 (1st Cir. 1988)* (in personal injury action, defendant objected to testimony of previously undiscovered witness to accident, who was found only days before trial, on ground of surprise, trial proceeded without testimony, and the district court denied plaintiff's motion for new trial; court of appeals reversed, noting that, although witness had been found prior to trial, plaintiff could not be expected to utilize testimony on short

notice, and other requirements for granting a new trial for newly discovered evidence had been met: plaintiff had been diligent, testimony was not merely cumulative, and it was likely to change result of trial).

(n72)Footnote 14. *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1154-1155 (5th Cir. 1997)* .

(n73)Footnote 15. *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1154 (5th Cir. 1997)* .

(n74)Footnote 16. *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272 (Fed. Cir. 2000)* .

(n75)Footnote 1. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555-556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* (when plaintiff was prevented from intelligently using peremptory challenges, plaintiff was not automatically entitled to new trial; plaintiff had to show prejudice and not merely possible removal of juror).

(n76)Footnote 2. *Anglo-American Gen. Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41, 43-44 (N.D. Cal. 1979)* .

(n77)Footnote 3. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555-556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* .

(n78)Footnote 4. *Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992)* , *cert. denied, 113 S. Ct. 2415 (1993)* .

(n79)Footnote 5. *Goldstein v. Kelleher, 728 F.2d 32, 37-38 (1st Cir. 1984)* , *cert. denied, 469 U.S. 852 (1984)* .

(n80)Footnote 6. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555-556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* .

(n81)Footnote 7. *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1473 (11th Cir. 1992)* , *cert. denied, 506 U.S. 1049 (1992)* (on new trial motion based on juror's false responses in voir dire, court found that although responses were false, correct answers would not have constituted cause for excusing jurors in question).

(n82)Footnote 8. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* .

(n83)Footnote 9. *See, e.g., Mekdeci v. Merrell Nat'l Labs., Div. of Richardson-Merrell, Inc., 711 F.2d 1510, 1513-1515 (11th Cir. 1983)* (court has discretion to order new trial on all issues if it appears that jury's verdict is result of compromise).

(n84)Footnote 10. *Thomas v. Peerless Mattress Co., 284 F.2d 721, 722 (4th Cir. 1960)* (federal law determines juror misconduct in context of new trial).

(n85)Footnote 11. *See Fed. R. Evid. 606(b)*.

(n86)Footnote 12. *See Fed. R. Evid. 606(b)*; *Peterson v. Wilson, 141 F.3d 573, 577-579 (5th Cir. 1998)* (district court abused its discretion by meeting with jurors after verdict and granting new trial on basis of jurors' statements about their mental processes during deliberations, and their fidelity to court's instructions). For a complete discussion, see 3 WEINSTEIN'S FEDERAL EVIDENCE, Ch. 606, *Competency of Juror as Witness* (Matthew Bender 2d ed.)

(n87)Footnote 13. *Carter v. Moore, 165 F.3d 1071, 1077-1078 (7th Cir. 1998)* .

(n88)Footnote 14. *Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969)* (juror affidavit may not be used to impeach verdict announced in open court).

(n89)Footnote 15. *AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000)* .

(n90)Footnote 16. *Stephens v. South Atl. Canners, Inc. (Coca Cola Co.), 848 F.2d 484, 489 (4th Cir. 1988)* , *cert. denied, 488 U.S. 996 (1988)* (new trial justified when exhibit examined by jury contained notations made by plaintiff's counsel and other additional information not introduced in evidence); *Tetenes v. County of Rockland, 146 F.R.D. 82, 83 (S.D.N.Y. 1993)* (improper alteration of documents or creation of erroneous inferences regarding their history is grounds for new trial if sufficient adverse impact shown).

(n91)Footnote 17. *Thomas v. Peerless Mattress Co., 284 F.2d 721, 722 (4th Cir. 1960)* (conversation between deputy marshal and juror in which marshal advised juror of party's right to appeal from adverse verdict was adequate basis for new trial because statement called into question role of jury and finality of its judgment).

(n92)Footnote 18. *Gault v. Poor Sisters of St. Frances, etc., 375 F.2d 539, 549-551 (6th Cir. 1967)* (new trial not justified because information provided to juror was type of information that any juror would have and bring to consideration of lawsuit).

(n93)Footnote 19. *Cooper v. Dyke, 814 F.2d 941, 949 (4th Cir. 1987)* (absent extraordinary circumstances that detract from integrity of proceedings, new trial should not be granted if moving party failed to raise timely objection to alleged impropriety).

(n94)Footnote 20. *See § 24.100* et seq.

(n95)Footnote 21. *See Kilgore v. Greyhound Corp., Southern Greyhound Lines, 30 F.R.D. 385, 387-389 (E.D. Tenn. 1962)* (no prejudice found because juror's alleged independent investigation of accident scene, of types of vehicles involved in accident, and report of those findings to deliberating jury, did not contribute to outcome of verdict).

(n96)Footnote 22. *Young v. Illinois C. G. R. Co., 618 F.2d 332, 336-337 (5th Cir. 1980)* .

(n97)Footnote 23. *Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927)* , *aff'd on other grounds, 276 U.S. 413 (1928*); *see, e.g., Reed v. PST Vans, Inc., 1998 U.S. App. LEXIS 17928, at *9-10 (6th Cir. July 31, 1998)* (living expenses are within that category of matters as to which jurors may to some degree rely on their everyday experience and knowledge; where there is evidence as to life expectancy, health and habits, present living conditions and standards, all bearing on the manner and nature of person's present scale of living, it is not unreasonable to permit a jury to use this information in projecting future living expenses in order to reach verdict).

(n98)Footnote 24. *Konkel v. Bob Evans Farms Inc., 165 F.3d 275, 282 (4th Cir. 1999)* , *cert. denied, 528 U.S. 877 (1999)* .

(n99)Footnote 1. *See* [b]-[d], *below*.

(n100)Footnote 2. *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt-Meridian Constr. Corp., 890 F. Supp. 1213, 1223 (S.D.N.Y. 1995)* , *rev'd in part on other grounds, 95 F.3d 153 (2d Cir. 1996)* .

(n101)Footnote 3. *Sector Ref., Inc. v. Enterprise Ref. Co., 771 F.2d 496, 505 (Temp. Emer. Ct. App. 1985)* (proponent waives submission of an issue to jury if demand for submission and timely objection are not made before jury retires for deliberation; court refused to consider whether new trial was justified because of improper submission to jury, because movant had not objected to submission at trial).

(n102)Footnote 4. In re N-500L *Cases, 691 F.2d 15, 25 (1st Cir. 1982)* (failure to impanel jury on issue of tort liability erroneous, but harmless error, because court would have had to direct verdict on liability issue); *King v. United Ben. Fire Ins. Co., 377 F.2d 728, 731-732 (10th Cir. 1967)* , *cert. denied, 389 U.S. 857 (1967)* (when evidence established execution of contract as matter of law, failure to present issue to jury is harmless error).

(n103)Footnote 5. *Deringer v. Columbia Transp. Div., Oglebay Norton Co., 866 F.2d 859, 862-864 (6th Cir. 1989)* (because no jury was required in particular type of action, failure to impanel jury was not reversible error).

(n104)Footnote 6. *See Fed. R. Civ. P. 49.*

(n105)Footnote 7. *Eastern Mt. Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 500-503 (1st Cir. 1994) , cert. denied, 515 U.S. 1103 (1995) .*

(n106)Footnote 8. *Horstmyer v. Black & Decker, 151 F.3d 765, 771 (8th Cir. 1998) .*

(n107)Footnote 9. *Belk v. City of Eldon, 228 F.3d 872, 881 (8th Cir. 2000) .*

(n108)Footnote 10. *Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1543-1544 (11th Cir. 1996)* (timely objection must be made before jury retires).

(n109)Footnote 11. *Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)* (after court determined on motion for new trial that medical evidence of need for back surgery was erroneously admitted, new trial on damages properly ordered).

(n110)Footnote 12. *Dabney v. Montgomery Ward & Co., 692 F.2d 49, 51-53 (8th Cir. 1982) , cert. denied, 461 U.S. 957 (1983) .*

(n111)Footnote 13. *Caruolo v. John Crane, Inc., 226 F.3d 46, 54 (2d Cir. 2000) .*

(n112)Footnote 14. *Green v. Philadelphia Gas Works, 333 F. Supp. 1398, 1405 (D. Pa. 1971) , aff'd on other grounds, 478 F.2d 313 (3d Cir. 1973) .*

(n113)Footnote 15. *Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265, 273-274 (2d Cir. 1996)* (court's remarks went beyond mere judicial skepticism, and new trial was required, when comments and questioning of witnesses demonstrated clear antipathy to counsel and case).

(n114)Footnote 16. *See Johnson v. Helmerich & Payne, 892 F.2d 422, 426 (5th Cir. 1990)* (new trial was not required, even though trial judge repeatedly interrupted plaintiff's counsel during cross-examination, commented on testimony of defense witness, and instructed expert witnesses not to act as advocates for their respective sides; court of appeals, noting that bias will not lightly be inferred, ruled that any prejudice was cured by instruction to jury that it ignore court's remarks and be sole judge of facts).

(n115)Footnote 17. *Rush v. Smith, 45 F.3d 1197, 1200 (8th Cir. 1995)* (in civil rights suit initiated by black man, order denying a new trial was affirmed even though district court remarked in jury's presence that there is tendency for races to stick together; plaintiff's counsel did not object to this statement on record, and remark would be reviewed under plain error standard; because the remark did not disparage either party or indicate preference for any party, remark did not amount to plain error).

(n116)Footnote 18. *Garrett v. Desa Indus., Inc., 705 F.2d 721, 723-724, 724 n.1 (4th Cir. 1983) .*

(n117)Footnote 19. *Fed. R. Evid. 614(c)*; *see Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677, 691 (W.D.N.Y. 1993) .*

(n118)Footnote 20. *Fed. R. Civ. P. 63.*

(n119)Footnote 21. *Olle v. Henry & Wright Corp., 910 F.2d 357, 361 (6th Cir. 1990)* (new trial order is proper if judge dies before preparing findings).

(n120)Footnote 22. *See Fed. R. Civ. P. 63.*

(n121)Footnote 1. *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 757-758 (6th Cir. 1980)* (counsel's references to insurance policies or to defendant's wealth generally held to be prejudicial).

(n122)Footnote 2. *Spurlock v. Lawson, 881 F. Supp. 436, 438-439 (E.D. Ark. 1995)* (undisclosed medical testimony may lead to element of surprise requiring new trial order).

(n123)Footnote 3. *Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1236 (3d Cir. 1994)* .

(n124)Footnote 4. *Coleman v. Quaker State Coca-Cola Bottling Co., 328 F. Supp. 314, 316-317 (D. Pa. 1971)* .

(n125)Footnote 5. *Curtis Publ'g Co. v. Butts, 351 F.2d 702, 713-714 (5th Cir. 1965)* , *aff'd on other grounds, 388 U.S. 130 (1967)* (court has discretion regarding requirement of objection in cases where objection may magnify harm).

(n126)Footnote 6. *Nunley v. Kloehn, 888 F. Supp. 1483, 1491-1493 (D. Wis. 1995)* (improper statements in closing argument by patient's attorney in medical malpractice case not prejudicial when doctor rebutted statements, patient's statements related to issue rejected by jury, and court gave curative instructions).

(n127)Footnote 1. *Beck v. Wings Field, Inc., 122 F.2d 114, 117 (3d Cir. 1941)* .

(n128)Footnote 2. *Stamps v. United States, 406 F.2d 925, 928-929 (9th Cir. 1969)* .

(n129)Footnote 3. *Phillips v. Crown Cent. Petroleum Corp., 556 F.2d 702, 705 (4th Cir. 1977)* , *cert. denied, 444 U.S. 1074 (1980)* (abuse of discretion for court to consider witness' testimony after proof submitted that witness committed perjury, and court did not determine extent of perjury).

(n130)Footnote 4. *Malandris v. Merrill Lynch, 703 F.2d 1152, 1178-1179 (10th Cir. 1981)* .

(n131)Footnote 5. *Garland Coal Mining Co., v. Few, 267 F.2d 785, 791-792 (10th Cir. 1959)* .

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
B. GROUNDS FOR ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure § 24.22

§ 24.22 Grounds for New Trial in Case Tried to Courtn*

[1] General Grounds for New Trial in Case Tried to Court

On motion of any party after a nonjury trial, the court may grant a new trial on all or some of the issues for any of the reasons for which a court would grant a rehearing in suits in equity in the federal courts at common law. n1 There are three grounds for granting a new trial after a nonjury trial: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. n1.1 Some courts have stated that the harmless error rule n2 sets out a workable test for when to grant a new trial in a nonjury case. n3 Thus, no error is ground for granting a new trial in such a case unless refusal to take such action appears to the court inconsistent with substantial justice. n4 Therefore, the trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier decision would work a manifest injustice. n5 In any event, a trial court should not grant a new trial simply because the losing party may be able to present a better case if afforded another chance. It thus appears that a new trial in a nonjury case may be granted for the same grounds that it may be granted in a jury case. For example, newly discovered evidence constitutes a recognized ground for a new trial in a nonjury case. n6

When a party files a motion for a new trial in a nonjury case, the court has discretion to open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. n7

[2] Inability of Judge to Continue

When a judge becomes unable to proceed after the commencement of a case, any other judge may proceed with the case after certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. n1 If a successor judge determines that he or she cannot preside over a continuation of the original action for any reason, the successor judge has the option to order a new trial. If the original judge dies or becomes disabled after a bench trial is commenced, but before findings of fact and conclusions of law are rendered, a mistrial should be declared, unless the successor judge certifies that he or she can make findings and conclusions based on the written evidence and record in the action, or unless all of the parties consent to the substitution of the successor. n2 The successor also must

grant a party's request to recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. If a successor takes over after findings and conclusions have been made, there is no duty to recall witnesses. n3 For complete discussion of Rule 63 motions, see Ch. 23, *Trial to Court; Inability of Judge to Proceed*.

[3] Inadequate Findings of Fact and Conclusions of Law

The trial court in a nonjury trial is required to make adequate findings of fact and conclusions of law, and if it fails to do so, an appellate court may order a new trial in exigent circumstances. n1 However, the appellate court does not ordinarily overturn the judgment of the trial court merely because of a lack of findings and conclusions. Usually, the appellate court will vacate a judgment with inadequate findings or conclusions and remand the case to give the judge an opportunity to make the necessary findings and conclusions. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.13[3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(a)(1)(B).*

(n3)Footnote 1.1. *In re Morris, 365 B.R. 613, 618 (Bankr. E.D. Va. 2007)* .

(n4)Footnote 2. *Fed. R. Civ. P. 61.*

(n5)Footnote 3. *LiButti v. United States 178 F.3d 114, 119 (2d Cir. 1999)* .

(n6)Footnote 4. *Ball v. Interoceanica Corp., 71 F.3d 73, 76 (2d Cir. 1995)* , *cert. denied, 519 U.S. 863 (1996)* (in nonjury actions, reasons for granting motion must be substantial); *Hager v. Paul Revere Life Ins. Co., 489 F. Supp. 317, 321 (E.D. Tenn. 1977)* , *aff'd without op., 615 F.2d 1360 (6th Cir. 1980)* (substantial reasons required to set aside judgment in nonjury case).

(n7)Footnote 5. *LiButti v. United States 178 F.3d 114, 119 (2d Cir. 1999)* ; *Arizona v. California, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)* .

(n8)Footnote 6. *LiButti v. United States 178 F.3d 114, 119 (2d Cir. 1999)* .

(n9)Footnote 7. *Fed. R. Civ. P. 59(a)(2)*; *see Halper v. Browning, King & Co., 325 F.2d 644, 645 (D.C. Cir. 1963)* (when parties incorrectly proceeded on relative burdens of proof, court could open judgment to take new testimony and make new findings and conclusions).

(n10)Footnote 1. *Fed. R. Civ. P. 63.*

(n11)Footnote 2. *Patelco Credit Union v. Sahni, 262 F.3d 897, 905-907 (9th Cir. 2001)* .

(n12)Footnote 3. *Fed. R. Civ. P. 63*, Committee Notes to 1991 Amendments.

(n13)Footnote 1. *Olle v. Henry & Wright Corp., 910 F.2d 357, 361 (6th Cir. 1990)* (new trial order is proper when judge dies before preparing findings of fact); *see Fed. R. Civ. P. 63*; *see also* [3], *above*.

(n14)Footnote 2. *Campbell v. Hewitt, Coleman & Assocs., Inc., 21 F.3d 52, 55-56 (4th Cir. 1994)* (district court ordered to make its findings and conclusions on remand).

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PART VI Trial and Judgment
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3-24 Moore's Manual--Federal Practice and Procedure § 24.23

§ 24.23 Partial New Trialn*

[1] New Trial on Less Than All Issues

[a] Discretion of Court to Order New Trial On Some Issues

After entry of judgment, a trial court has discretion on motion of a party to grant a new trial on some of the issues in the same manner and on the same grounds for which a complete new trial could be granted. n1 The court may order a retrial on a particular issue when it clearly appears that (1) the issue is sufficiently distinct and separable from the other issues and (2) the retrial of that issue alone may be held without injustice. n2 Thus, the court may order a partial new trial on a single, distinct issue that comprises one of the elements necessary to establish liability. For example, in patent infringement litigation, the court ordered a new trial on the issue of "obviousness," which is a crucial element of whether the claimed invention was validly patented or not. n3 On the other hand, the court may not order a partial new trial on an issue that is interdependent, rather than independent, of the other issues in a case. n4 When a party makes a motion for a partial new trial on one or more issues involved in an action, the motion tolls the appeal period for all issues in the case. n5

[b] Jury Trial

The federal rules give the trial court discretion to order a partial new trial on some of the legal issues after a jury verdict on any of the grounds for which a complete new trial may be granted. n6 A partial new trial is typically ordered in a jury case when the liability of the defendant has been properly determined by the jury but grounds for a retrial arise with regard to the award of damages. In that case, the court must determine whether the issue of damages is sufficiently separate and distinct to warrant a partial new trial solely on the issue of damages. n7

A partial new trial may be granted solely on the issue of damages only when the court is satisfied that liability has been properly determined. n8 However, when the jury appears to have made an improper damage award because of problems with the liability issue, the court should grant a new trial on both liability and damages issues. n9

The court may not grant a partial new trial merely to afford the plaintiff the opportunity to argue for the liability of the

defendant based on a new legal theory involving different facts and amounting in effect to a new cause of action. n10 A plaintiff wishing to address a new theory for liability must move to amend the complaint to allege the new claim for relief. n11

[c] Trial to Court

The federal rules give the trial court discretion to order a partial new trial on some of the equitable issues after a bench trial on any of the grounds for which a complete new trial may be granted. n12 On motion for a partial new bench trial, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment. n12.1 For example, in one case the court ordered a partial new trial to allow the parties to present evidence relevant to the measure of damages when neither party had anticipated that the trial court would use that measure to calculate damages at the end of the bench trial. n13

[2] New Trial for Less Than All Parties

The federal rules give the trial court discretion to order a partial new trial with respect to less than all of the parties. n1 Therefore, in an action with multiple parties, the trial court has the discretion to grant a new trial to some but not all of the parties, as required by the interests of justice. When a court does grant a new trial for less than all parties, the judgment or verdict stands as to the unaffected parties. Thus, it is not error for a court to grant a new trial to those defendants found liable while allowing the verdict to stand as to another defendant found not liable. n2 However, a new trial may be granted only to a party prejudiced by the judgment or verdict. n3 In making a determination whether to grant a new trial with respect to less than all parties, the court must determine if the liability of each party is independent or interrelated. Only if one party's case is separable from, or is not intertwined with, those of other parties does basic fairness allow that a new trial may be granted as to less than all parties. n4 The court may not grant a new trial to less than all parties when liability is so interrelated that it is impossible to separate. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(a)(1)*; *Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931)* ; *see Foraker v. Chaffinch, 501 F.3d 231, 244 (3d Cir. 2007)* (party should have moved for partial new trial due to change in law affecting less than all issues).

(n3)Footnote 2. *Armstrong v. Burdette Tomlin Mem'l Hosp., 438 F.3d 240, 253 (3d Cir. 2006)* .

(n4)Footnote 3. *Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1287 (Fed. Cir. 2000)* .

(n5)Footnote 4. *Kuehne & Nagel, Co. v. Geosource, Inc., 874 F.2d 283, 293 (5th Cir. 1989)* (issues were too interdependent for partial new trial because of corporate "alter ego" issue).

(n6)Footnote 5. *Fed. R. App. P. 4(a)(4)(A)(v)*; *see Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 150, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)* (appeal of all issues in case was timely when appeal was filed within 60 days of denial of motion for new trial, even though moving party had moved for new trial of only one issue).

(n7)Footnote 6. *Fed. R. Civ. P. 59(a)(1)(A)*; *see McCabe v. Mais, 580 F. Supp. 2d 815, 830 (N.D. Iowa 2008)* (partial new trial solely on issue of damages).

(n8)Footnote 7. *Boucher v. United States Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996)* (partial trial regarding past and future lost earnings was appropriate because issues were distinct and separable from others at trial).

(n9)Footnote 8. *Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181, 185 (2d Cir. 1977)* (new trial solely on damages appropriate if court is satisfied that liability has been established).

(n10)Footnote 9. *See Wharf v. Burlington N. R.R., 60 F.3d 631, 638 (9th Cir. 1995)* (court may order new trial on issue of liability when new trial on damages alone would result in injustice).

(n11)Footnote 10. *Popovitch v. Kasperlik, 76 F. Supp. 233, 237-239 (W.D. Pa. 1947)* .

(n12)Footnote 11. *See Fed. R. Civ. P. 15*, discussed in Ch. 9, *Pleadings and Motions in General*.

(n13)Footnote 12. *Fed. R. Civ. P. 59(a)(1)(B)*.

(n14)Footnote 12.1. *Fed. R. Civ. P. 59(a)(2)*; *Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-929 (9th Cir. 1999)* .

(n15)Footnote 13. *Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144-145 (2d Cir. 1998)* .

(n16)Footnote 1. *Fed. R. Civ. P. 59(a)*; *see Foraker v. Chaffinch, 501 F.3d 231, 244 (3d Cir. 2007)* .

(n17)Footnote 2. *Ward v. Hickey, 996 F.2d 448, 452 fn.5 (1st Cir. 1993)* ; *Channel 20, Inc. v. World Wide Towers Servs., 607 F. Supp. 551, 558 (S.D. Tex. 1985)* (citing **Moore's Federal Practice**).

(n18)Footnote 3. *Somerville v. Capital Transit Co., 192 F.2d 413, 415 (D.C. Cir. 1951)* , *cert. denied, 342 U.S. 941 (1952)* .

(n19)Footnote 4. *Lowery v. Clouse, 348 F.2d 252, 256 (8th Cir. 1965)* (citing **Moore's Federal Practice**).

(n20)Footnote 5. *Continental Cas. Co., v. United States, 167 F.2d 107, 109 (9th Cir. 1948)* , *cert. denied, 337 U.S. 940 (1949)* .

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
B. GROUNDS FOR ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure §§ 24.24through 24.39

[Reserved]

§§ 24.24[Reserved]

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART I. NEW TRIAL
C. PROCEDURES FOR MOTION AND ORDER FOR NEW TRIAL

3-24 Moore's Manual--Federal Practice and Procedure § 24.40

§ 24.40 Requirements for Motion by Partyn*

[1] Contents and Form of Motion

A party must file a motion for a new trial no later than 28 days after the entry of the judgment. n1 The use of the term "file" was used by the drafters to make it clear that post judgment motions for relief under Rules 50, 52, and 59 must be filed, rather than merely served, during the 28 day period after entry of judgment. The term "file" was also used because the date of filing may be determined with certainty from court records. n2

With respect to content, a motion for new trial must state with particularity the grounds for the motion and the relief or order sought. n3 Thus a party's grounds in its motion for a new trial must be reasonably specific in order to comply with the particularity requirement imposed by Rule 7. n4 This rule has been designed to provide the court and the opposing party with notice of the substance of the basis for the requested order, and the rule does not require formalistic, technical, or ritualistic detail. n5 However, if the particularity requirement is not met to the court's satisfaction, the court should deny the motion. n6 Furthermore, if counsel decides to make an oral motion, which is not advised, the motion must contain the substantive grounds and the relief requested, and it must be made a part of the record. n7

[2] Court's Discretion to Initiate or Define Scope of Motion

The authority of the court to order a new trial is not restricted to the parameters specified in a motion by one or more of the parties. First, the trial court may order a new trial on its own initiative for any reason that would justify granting a new trial on a party's motion. n1 Second, when a motion for new trial is made by one party, the court must consider the grounds made in the motion but may also consider any other grounds or issues related to a new trial that have been made by any party. n2 However, before the court may order a new trial for reasons not stated in a motion by a party, the court must give the parties notice and an opportunity to be heard on the new trial issues. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureJudgmentsRelief From

JudgmentMotions for New Trials

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 59(b)*, Advisory Committee Note to 1995 Amendments.

(n4)Footnote 3. *Fed. R. Civ. P. 7(b)(1)*; *see Fed. R. Civ. P. 59(a)(1).*

(n5)Footnote 4. *Intera Corp. v. Henderson, 428 F.3d 605, 612 (6th Cir. 2005)* .

(n6)Footnote 5. *Registration Control Sys., Inc. v. Compusystems, Inc., 922 F.2d 805, 807-808 (Fed. Cir. 1990)* (citing **Moore's Federal Practice** for proposition that particularity requirement of Rule 7 is flexible, and even arguably non-particularized motions permitted when opposition knew or had notice of grounds relied on in motion).

(n7)Footnote 6. *Snellman v. Ricoh Co., 836 F.2d 528, 532 (Fed. Cir. 1987)* (issues not adequately specific to seek new trial on counterclaim).

(n8)Footnote 7. *Witt v. Merrill, 208 F.2d 285, 286 (4th Cir. 1953)* (new trial motion sufficient when made in open court and entered on record immediately after rendition of verdict).

(n9)Footnote 1. *Fed. R. Civ. P. 59(d)*; *see Rice v. Community Health Ass'n, 203 F.3d 283, 285 (4th Cir. 2000)* (court may on its own initiative grant new trial if miscarriage of justice otherwise would result, even despite lack of proper motion); *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1452 (9th Cir. 1988)* (excessive damage award; order for new trial was within court's discretion).

(n10)Footnote 2. *Fed. R. Civ. P. 59(d)*, Advisory Committee Note to 1993 Amendments; *Varley v. Tampax, Inc., 855 F.2d 696, 699 (10th Cir. 1988)* (motion opens earlier judgment and permits court to enlarge on issues specified by motion).

(n11)Footnote 3. *Fed. R. Civ. P. 59(d)*; *Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149, 155 (4th Cir. 1989)* (when court grants new trial on counterclaim not mentioned in motion, court must give opposition notice of reconsideration of counterclaim and opportunity to address sufficiency or appropriateness of verdict).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.41

§ 24.41 Time Limitations Related to Motion for New Trialn*

[1] Computation of Time

The 28-day time period for making a motion for new trial n1 is generally governed by the Rule 6 provisions for computation of time periods. n2 Thus, intermediate Saturdays, Sundays, and legal holidays are now counted in the 28-day period n3 unless the last day falls on a Saturday, Sunday, or legal holiday; if so, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. n4 Rule 6(b) expressly prohibits the district court from extending the 28 day filing period of a Rule 59 motion for new trial and also the period in which the court may act on its own motion to order a new trial. n5 Additionally, the provision of Rule 6(d), providing a three day extension under Rule 6 when service is by other than had delivery, n6 does not apply to a Rule 59 motion for new trial, and does not enlarge the 28-day period, because the time period for the motion is not triggered by service, but by entry of judgment. n7 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

[2] Time Limit for Motion for New Trial

A motion for a new trial must be filed no later than 28 days after the entry of judgment. n1 For time calculation purposes, a judgment is a decree or any order that is appealable, n2 and the judgment becomes effective only when set out on a separate document and entered in the civil docket in the manner prescribed by Rule 79(a). n3 The date of entry of the judgment triggers the deadline regardless of when, or if, the parties received notice of the entry of the judgment. n4 Additionally, the time of the "filing" of the motion controls whether the 28-day deadline is satisfied because Rule 59 was amended in 1995 to clarify that the date of service does not control. n5

The 28-day filing period is mandatory and jurisdictional, which means that the court may not enter an order for new trial in response to a late motion and that the period may not be extended by the court or by stipulation or waiver of the parties. n6 However, in certain circumstances, the court may treat a late motion for a new trial as a Rule 60 motion for relief from judgment. n7 It should be noted that a party may file a motion for new trial before the actual entry of judgment, because the rule requires that the motion be filed "no later than" 28 days after judgment, rather than "within" 28 days of judgment. n8

[3] Time Limit for Court to Order New Trial on Its Own Initiative

On its own initiative, the court may order a new trial for any reason that would justify granting one on a party's motion, provided the court makes the order no later than 28 days after the entry of judgment. n1 This time period is jurisdictional and may not be extended by the court. n2 However, if a motion for new trial is already pending, the court may grant the motion beyond the 28-day period, even for reasons not stated in the motion, provided that the motion was timely and the court gives the parties notice and an opportunity to be heard. n3 Additionally, when the court grants a new trial for reasons not stated in the motion of a party, the court must specify in its order the grounds for granting the motion. n4

[4] Treatment of Late Motion as One for Relief From Judgment

When the facts of a particular new trial motion qualify, a court may treat an untimely motion under Rule 59 as a motion under Rule 60(a) to correct clerical mistakes in judgments, orders, or other parts of the record, or to correct errors arising from oversight or omission. n1 Additionally, a motion under Rule 59 that is filed more than 28 days after entry of judgment may be treated as a Rule 60(b) motion for relief from judgment. n2

However, a party may not characterize a motion as one under Rule 60 to avoid the strict time limitations of Rule 59 if the motion is substantively one that should properly be made under Rule 59. n3 Furthermore, a Rule 60(b) motion to vacate a judgment is an extraordinary remedy and may be granted only in exceptional circumstances. n4 Unlike timely Rule 59 motions, Rule 60 motions do not have any tolling effect on the right to appeal from the challenged judgment. Therefore, the time to appeal continues to run from the entry of the judgment that the Rule 60 motion challenges. n5

[5] Time Limits for Supporting Papers

Rule 59 does not specify a time limit for the filing of briefs in support of a motion for a new trial. Consequently, the court may approve a briefing schedule that allows the moving party to file a brief after the 28-day period for filing the motion for new trial itself, provided that the notice of motion states the grounds for the motion with particularity sufficient to notify the opposition of the new trial motion and the grounds for that motion. Such a briefing schedule may be necessary to enable the parties to review the trial transcript. n1

When a motion for new trial is based on affidavits, they must be filed with the motion. n2 A court has discretion for good cause shown to extend the period for filing affidavits under Rule 6(b): (1) if the request for extension is made at the time of filing the motion for new trial, the court may order an extension with or without motion or notice; and (2) if the request is made after the filing of the motion, the court may, on motion, order an extension, provided that the failure to act was the product of excusable neglect. n3 The rationale for allowing extensions is that, because a motion for a new trial is pending, the judgment is no longer final and thus an extension does not disrupt the finality of a judgment. If the court grants the moving party an extension of time within which to serve supporting affidavits, fairness requires that the opponent should also have additional time after being served with those affidavits within which to serve opposing affidavits. n4

The opposing party has 14 days after the party is served with the motion for new to file opposing affidavits. n5 The filing period may be further enlarged under Rule 6(b), n6 based on the reasoning that, once a motion for a new trial is made, the extension of time does not disturb finality, because the judgment is no longer final. If the court grants the moving party an extension of time within which to serve supporting affidavits, fairness dictates that the opponent should have additional time after being served with the supporting affidavits within which to serve opposing affidavits. n7 Finally, although not required, the court may permit the filing of reply affidavits. n8 Rule 59 does not prescribe a time limit for the filing of a reply, but the court may set time limits, and may subsequently enlarge those time limits. n9

[6] Effect on Time for Appeal by Filing Motion for New Trial

[a] Effect Depends on Timeliness of Motion

A timely filed motion for new trial under Rule 59 destroys the finality of the judgment and tolls the time for filing an appeal. n1 Furthermore, the filing of a timely new trial motion nullifies any notice of appeal filed before the disposition of the motion for new trial. n2 On the other hand, if a party files an untimely motion for a new trial under Rule 59, the motion has no effect on the time for appeal. Even if the untimely new trial motion is treated as a Rule 60(b) motion for relief from judgment, the motion does not have any tolling effect on the right to appeal from that judgment. n3 However, there is an exception to this rule under the "unique circumstances" doctrine. n4

[b] Unique Circumstances Exception

Under the "doctrine of unique circumstances," enforcement of the strict federal deadlines that apply to appeal to the circuit court may be relaxed in the unique circumstance in which a party has performed an act which, if properly done, would postpone the deadline for filing its appeal and has received specific assurance by a judicial officer that this act has been properly done. n5 This doctrine may apply to permit an untimely Rule 59 motion for new trial to extend the time for filing an appeal when the district court has erroneously but in good faith enlarged the filing period for the motion against the prohibition against enlargement specified in Rule 6(b). The doctrine applies if (1) a party performs an act that, when properly performed, would extend the deadline for filing an appeal, and (2) the party reasonably relies on the district court's conclusion that the act was properly performed. n6

However, the doctrine may not be used to extend the initial deadline for filing the new trial motion in the district court. n7 Thus, the exception for unique circumstances applies only to situations in which the late filing of an appeal is at issue, and the filing would have been timely if the period in which to file the appeal had been tolled or suspended by a properly made motion for new trial. n8 However, the appellate court may extend a deadline if the court finds that the failure to file a timely notice of appeal resulted from excusable neglect. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(b)*; *see* [2], *below*.

(n3)Footnote 2. *See Hart v. Sheahan, 396 F.3d 887, 889 (7th Cir. 2004)* (former version of Rule 6); *see also Fed. R. Civ. P. 6(a)*.

(n4)Footnote 3. *Fed. R. Civ. P. 6(a)(1)(B)*.

(n5)Footnote 4. *Fed. R. Civ. P. 6(a)(1)(C)*.

(n6)Footnote 5. *Fed. R. Civ. P. 6(b)(2), 59(d)*; *see Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 230 (2d Cir. 2000)* (construing former version of Rule 6).

(n7)Footnote 6. *See Fed. R. Civ. P. 6(d)*.

(n8)Footnote 7. *Parker v. Board of Pub. Utils., 77 F.3d 1289, 1291 (10th Cir. 1996)* (construing former version of Rule 6); *see Fed. R. Civ. P. 6(d)*.

(n9)Footnote 1. *Fed. R. Civ. P. 59(b).*

(n10)Footnote 2. *See Wendy's Int'l v. Nu-Cape Constr., 169 F.R.D. 680, 685 (M.D. Fla. 1996)* .

(n11)Footnote 3. *Atlantic Richfield Co. v. Monarch Leasing Co., 84 F.3d 204, 206-207 (6th Cir. 1996)* ; *see Fed. R. Civ. P. 58*, *79(a)*. For discussion of Rule 58, and the entry of judgments, see Ch. 25, *Judgment*.

(n12)Footnote 4. *Shults v. Henderson, 110 F.R.D. 102, 104B105 (W.D.N.Y. 1986)* .

(n13)Footnote 5. *Fed. R. Civ. P. 59(b)*, Advisory Committee Note to 1995 Amendments.

(n14)Footnote 6. *Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 230 (2d Cir. 2000)* ; *see Fed. R. Civ. P. 6(b)(2)*; *see also* [1], *above*.

(n15)Footnote 7. *See* [4], *below*.

(n16)Footnote 8. *See Larez v. Los Angeles, 946 F.2d 630, 636 (9th Cir. 1991)* (citing **Moore's Federal Practice**); *Fed. R. Civ. P. 59(b)*; Committee Note to 1995 Amendments.

(n17)Footnote 1. *Fed. R. Civ. P. 59(d).*

(n18)Footnote 2. *Fed. R. Civ. P. 6(b)(1)*; *see AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000)* ; *Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 230 (2d Cir. 2000)* .

(n19)Footnote 3. *Fed. R. Civ. P. 59(d)*; *see § 24.43*.

(n20)Footnote 4. *Fed. R. Civ. P. 59(d).*

(n21)Footnote 1. *United States v. Kellogg (In re W. Tex. Mktg. Corp.), 12 F.3d 497, 503 (5th Cir. 1994)* ; *Boston Car Co. v. Acura Auto. Div. American Honda Motor Co., 971 F.2d 811, 814-815 (1st Cir. 1992)* ; *see Fed. R. Civ. P. 60(a).*

(n22)Footnote 2. *United States v. Martin, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000)* (construing former time periods).

(n23)Footnote 3. *United States v. Contents of Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974, 987 (3d Cir. 1992)* .

(n24)Footnote 4. *Rutledge v. United States, 230 F.3d 1041, 1052 (7th Cir. 2000)* .

(n25)Footnote 5. *Helm v. Resolution Trust Corp., 43 F.3d 1163, 1166-1167 (7th Cir. 1995)* .

(n26)Footnote 1. *Parojcic v. Bethlehem Steel Corp., 170 F.R.D. 14, 14-15 (N.D. Ind. 1996)* , *rev'd on other grounds, 128 F.3d 601 (7th Cir. 1997)* .

(n27)Footnote 2. *Fed. R. Civ. P. 59(c).*

(n28)Footnote 3. *See Fed. R. Civ. P. 6(b)(1).*

(n29)Footnote 4. *Fed. R. Civ. P. 6(b)*, Advisory Committee Note to 1946 Amendments.

(n30)Footnote 5. *Fed. R. Civ. P. 59(c).*

(n31)Footnote 6. *Fed. R. Civ. P. 6(b).*

(n32)Footnote 7. *Fed. R. Civ. P. 6(b)*, Advisory Committee Note to 1946 Amendments.

(n33)Footnote 8. *Fed. R. Civ. P. 59(c)*.

(n34)Footnote 9. *Fed. R. Civ. P. 6(b)*, Advisory Committee Note to 1946 Amendments.

(n35)Footnote 1. *Stone v. INS, 514 U.S. 386, 402-403, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)* ; *Osterneck v. Ernst & Whinney, 489 U.S. 169, 175, 178-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

(n36)Footnote 2. *Fed. Rule App. P. 4(a)(4)(v)*; *see Osterneck v. Ernst & Whinney, 489 U.S. 169, 177-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* (Rule 4(a)(4) provides that, when any party files Rule 59 motion, any notice of appeal filed before disposition of motion has no effect).

(n37)Footnote 3. *Helm v. Resolution Trust Corp., 43 F.3d 1163, 1166-1167 (7th Cir. 1995)* .

(n38)Footnote 4. *See* [b], *below*.

(n39)Footnote 5. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

(n40)Footnote 6. *Mendes Junior Int'l Co. v. Banco Do Brasil, S.A., 215 F.3d 306, 315 (2d Cir. 2000)* .

(n41)Footnote 7. *See Mendes Junior Int'l Co. v. Banco Do Brasil, S.A., 215 F.3d 306, 315 (2d Cir. 2000)* ; *Bailey v. Sharp, 782 F.2d 1366, 1368-1374 (7th Cir. 1986)* , *modified on other grounds, 811 F.2d 366 (7th Cir. 1987)* .

(n42)Footnote 8. *Long Island Radio Co. v. NLRB, 841 F.2d 474, 478-479 (2d Cir. 1988)* (district court may not extend 10-day period or enlarge its own jurisdiction).

(n43)Footnote 9. *Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1563-1564 (7th Cir. 1990)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.42

§ 24.42 Amendment of Motion for New Trialn*

Courts generally permit the amendment of a timely Rule 59 motion for new trial within the 28-day filing period of Rule 59(b). n1 However, courts have split on whether or not to permit amendment after the 28-day period. Some courts have held that a timely Rule 59 motion may be amended after the expiration of the 28-day initial filing period, n2 using the rationale that a timely motion suspends the finality of the judgment, and therefore the district court has discretion to determine whether justice requires the consideration of an amendment to a timely motion. n3 Some circuits have held that if the motion is timely, an amendment that expands on the original grounds for a new trial is allowable. n4 On the other hand, some circuits have held that the district court may not grant a new trial for any grounds presented to the district court after the expiration of the 28-day initial period. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.16 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir. 1985)* (construing former time periods); *Fed. R. Civ. P. 59(b).*

(n3)Footnote 2. *See Meriwether v. Coughlin, 879 F.2d 1037, 1040-1042 (2d Cir. 1989)* (construing former time periods); *Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1085-1086 (11th Cir. 1987)* (citing **Moore's Federal Practice**; construing former time periods).

(n4)Footnote 3. *See Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1085-1086 (11th Cir. 1987)* (construing former time periods).

(n5)Footnote 4. *See Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir. 1985)* (construing former time periods).

(n6)Footnote 5. *Conrad v. Graf. Bros., Inc. 412 F.2d 135, 137 (1st Cir. 1969)* , *cert. denied*, *396 U.S. 902 (1964)* (construing former time periods).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.43

§ 24.43 Requirements of Notice and Hearingn*

A motion for a new trial must be noticed and set for hearing in the ordinary manner. n1 With respect to contents, a motion for new trial must state with particularity the grounds for the motion n2 and the relief or order sought. n3 This rule is followed to provide the court and the opposing party with notice of the substance of the basis for the requested new trial. n4

When a court grants a new trial on its own motion, or on a ground not stated in a timely motion, the court must give the parties notice and an opportunity to be heard. n5 On motion for a new trial after a nonjury trial, the court may: n6 open the judgment even if one has already been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, n7 and direct the entry of a new judgment. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.17 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 6(c), (d).*

(n3)Footnote 2. *Fed. R. Civ. P. 7(b)(1)(B).*

(n4)Footnote 3. *Fed. R. Civ. P. 7(b)(1)(C).*

(n5)Footnote 4. *Registration Control Sys. v. Compusystems, Inc., 922 F.2d 805, 807-808 (Fed. Cir. 1990)* (citing **Moore's Federal Practice** for proposition that particularity requirement of Rule 7 is flexible and even arguably non-particularized motions permitted when opposition knew or had notice of grounds relied on in motion).

(n6)Footnote 5. *Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149, 156 (4th Cir. 1989)* (citing **Moore's Federal Practice** and reversing new trial order because district court did not give notice or opportunity to be heard).

(n7)Footnote 6. *Fed. R. Civ. P. 59(a)(2) GenCorp, Inc. v. Olin Corp., 477 F.3d 368, 372 (6th Cir. 2007)* (options after judgment).

(n8)Footnote 7. *See Fed. R. Civ. P. 52(b).*

(n9)Footnote 8. *Fed. R. Civ. P. 59(a)(2).*

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PART I. NEW TRIAL
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3-24 Moore's Manual--Federal Practice and Procedure § 24.44

§ 24.44 Order Regarding New Trialn*

[1] Contents of Order

When the district court enters an order granting a new trial which is based on the grounds and issues expressed in a motion for new trial, the grounds for the motion may be ascertainable. However, the trial court should nevertheless clearly state its reasons for granting the motion n1 because appellate review is more readily facilitated, even if the parties are already on notice of the basis of the court's order for new trial. n2 This is especially important when the motion for new trial is combined with another motion, such as a motion for judgment as a matter of law, in the event the decision on the other motion is later vacated or reversed. n3

When the district court orders a new trial on the court's own initiative or grants a motion for a new trial for a reason not stated in the motion for new trial, the court must precisely specify the grounds for granting the new trial in its order. n4 When the court acts on its own initiative in either situation, the parties may not know the grounds for the court's order. Therefore, this disclosure requirement provides necessary information to the parties. n5 Courts have split on whether a trial court's failure to specify the grounds for granting a new trial in the order is merely a procedural matter n6 or rather is jurisdictional and may result in vacation of the order. n7

[2] Effect of Order Granting or Denying Motion for New Trial

When a district court grants a Rule 59 new trial motion, the judgment previously entered becomes ineffective, and the new ruling supercedes that judgment. However, to grant a new trial, the court must enter a separate, written order. n1 The court and the parties may not waive this requirement. Thus, until it enters an order granting a new trial, the court has no jurisdiction to proceed with a retrial of the case. n2

On the other hand, when a court denies a Rule 59 new trial motion, the previously entered judgment is not affected, and the court is not required to issue a new judgment or enter a separate, written order. n3 For discussion of appellate review of new trial orders, see *§ 24.60* et seq.

[3] Reconsideration of Order

When a court enters an order that grants a new trial, the order is interlocutory and destroys the finality of the judgment; therefore, the judgment may not be appealed. n1 A district court has plenary power to reconsider, revise, alter, or amend an interlocutory order, and therefore the court has the power to take any action with respect to an order granting a new trial, including the reconsideration of the order. n2

When a party files a timely motion for new trial under Rule 59, the filing destroys the finality of the judgment, and tolls the time for filing an appeal. n3 However, when a trial court denies a motion for a new trial, the finality of the judgment is restored and the appeal time begins to run from the date the order is entered. n4 If a party files a motion for reconsideration within the 10-day period following the original order, the court may hear the motion for reconsideration. When the 10-day period has expired after the court has denied the motion for new trial, a motion to reconsider the denial is inappropriate. n5 However, the court may make an exception if the order denying a new trial was inadvertent and may be corrected under Rule 60(a). n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.18 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 59(d).*

(n3)Footnote 2. *See Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 17-18 (1st Cir. 2008)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 50(c)* (conditional grant or denial of new trial).

(n5)Footnote 4. *Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1086 (11th Cir. 1987)* .

(n6)Footnote 5. *Fed. R. Civ. P. 59(d).*

(n7)Footnote 6. *Cherokee Labs., Inc. v. Pierson, 415 F.2d 85, 91 (10th Cir. 1969)* , *cert. denied, 396 U.S. 1059 (1970)* (failure to specify grounds is not sufficient basis to set aside judgment after new trial).

(n8)Footnote 7. *Central Microfilm Serv. Corp. v. Basic/Four Corp., 688 F.2d 1206, 1211 (8th Cir. 1982)* , *cert. denied, 459 U.S. 1204 (1983)* (order that does not specify grounds may be reversed).

(n9)Footnote 1. *Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994)* (grant of new trial requires entry of new order).

(n10)Footnote 2. *Copper v. City of Fargo, 184 F.3d 994, 997-998 (8th Cir. 1999)* , *cert. denied, 529 U.S. 1017 (2000)* (once it has entered final judgment, district court has no jurisdiction to relitigate case unless court first issues order for new trial).

(n11)Footnote 3. *Copper v. City of Fargo, 184 F.3d 994, 998 (8th Cir. 1999)* (previous judgment is unaffected by denial of new trial, and district court need not enter new judgment or separate written order denying new trial); *Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994)* (denial of new trial does not require entry of new order).

(n12)Footnote 1. *Stone v. INS, 514 U.S. 386, 402-403, 115 S. Ct 1537, 131 L. Ed. 2d 465 (1995)* .

(n13)Footnote 2. *Hardin v. Hayes, 52 F.3d 934, 938 (11th Cir. 1995)* ; *Gallimore v. Missouri P. R. Co., 635 F.2d*

1165, 1171 (5th Cir. 1981) .

(n14)Footnote 3. *Stone v. INS, 514 U.S. 386, 402-403, 115 S. Ct 1537, 131 L. Ed. 2d 465 (1995)* .

(n15)Footnote 4. *Larez v. Los Angeles, 946 F.2d 630, 636 (9th Cir. 1991)* (appeal from denial of motion filed within 30 days was timely).

(n16)Footnote 5. *Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1139 (7th Cir. 1986)* , *cert. denied, 486 U.S. 1026 (1988)* (motion for reconsideration made more than 10 days after judgment is untimely).

(n17)Footnote 6. *Burnam v. Amoco Container Co., 738 F.2d 1230, 1231-1232 (11th Cir. 1984)* .

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3-24 Moore's Manual--Federal Practice and Procedure §§ 24.45through 24.59

[Reserved]

§§ 24.45[Reserved]

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PART I. NEW TRIAL
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3-24 Moore's Manual--Federal Practice and Procedure § 24.60

§ 24.60 Appeal of Order Granting New Trialn*

[1] Order Generally Not Appealable

An order granting a motion for new trial is interlocutory and, because it destroys the finality of the judgment, is generally not appealable. n1 Also, an order that conditionally grants a new trial, on condition that the plaintiff rejects a remittitur, is a nonappealable interlocutory order if the plaintiff rejects the remittitur, requiring a new trial on damages. In such a case, neither party ordinarily may appeal until after a final judgment is entered on retrial. n2 However, in some circumstances courts have deemed the grant of a new trial as a final appealable order when the court's authority to issue the new trial order is questioned. n3 This line of authority undermines the concept of finality, however, and it appears that the better view is that appellate review should be available, if at all, only through an extraordinary writ, if the losing party does not wish to wait for the subsequent entry of a final judgment. An extraordinary writ enables the appellate court to review orders granting a new trial that are not appealable, as discussed in [3], *below*.

If a trial court vacates its order granting a new trial, the vacating order is the equivalent of a denial and restores the finality of the judgment; furthermore, the time to appeal runs from the date of the entry of the order vacating the order for a new trial. n4

[2] Appeal of Original Judgment Postponed Until Final Judgment in New Trial

When the district court enters an order granting a motion for new trial, the order may be reviewed when the final judgment is entered following the new trial. n1 However, under older authority, an order granting a new trial is appealable if the district court lacked the jurisdiction to grant it. n2 Furthermore, in unusual circumstances, the appellate court may grant an extraordinary writ to hear an appeal when the court exceeds its authority to grant a new trial. n3

[3] Use of Extraordinary Writ to Hear Appeal

An appellate court may use an extraordinary writ to hear an appeal of an order granting a new trial that is not otherwise appealable. n1 As it name suggests, the writ is proper only in exceptional circumstances and is rarely granted. n2 However, the appellate court may use an extraordinary writ if the district court exceeded its authority in granting a new

trial. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.50 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Stone v. INS, 514 U.S. 386, 115 S. Ct 1537, 1548, 131 L. Ed. 2d 465 (1995)* .

(n3)Footnote 2. *Ortiz-Del Valle v. NBA, 190 F.3d 598, 599-600 (2d Cir. 1999)* (conditional grant is effectively grant of new trial if plaintiff rejects remittitur).

(n4)Footnote 3. *National Passenger R.R. Corp. v. Maylie, 910 F.2d 1181, 1182-1183 (3d Cir. 1990)* (grant of new trial that exceeds district court's jurisdiction because it was made after deadline should be treated as final for purposes of appeal because new trial is challenged as beyond district court's authority).

(n5)Footnote 4. *See Fed. R. App. P. 4(a)(4)(A)* (if any party files a timely motion for a new trial, time for appeal for all parties runs from entry of order disposing of last such motion outstanding); *cf. Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1561-1562 (7th Cir. 1990)* (time for filing appeal begins to run when court enters judgment denying Rule 59 motion); *see also § 24.61[2].*

(n6)Footnote 1. *Richardson v. Communications Workers of Am., 469 F.2d, 333, 334 (8th Cir. 1972)* , *cert. denied, 414 U.S. 818 (1973)* (citing **Moore's Federal Practice**).

(n7)Footnote 2. *See National Passenger R.R. Corp. v. Maylie, 910 F.2d 1181, 1182-1183 (3d Cir. 1990)* .

(n8)Footnote 3. *See* [3], *below.*

(n9)Footnote 1. *See 28 U.S.C. § 1651.*

(n10)Footnote 2. *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)* .

(n11)Footnote 3. *Bailey v. Sharp, 782 F.2d 1366, 1367 (7th Cir. 1986)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.61

§ 24.61 Appeal of Order Denying New Trialn*

[1] Order Generally Not Appealable

Generally, a district court's denial of a motion for a new trial under Rule 59(a) is not appealable. n1 Thus, rather than appealing the denial of new trial, the party may appeal from the underlying final judgment. n2 However, even though the denial of a motion for new trial is not ordinarily subject to appeal, the denial is immediately appealable when the motion is based on new matters that have arisen after the entry of judgment, for example if grounds for the motion for new trial are newly discovered evidence. n3

[2] Time to Appeal Underlying Judgment

A timely motion for a new trial tolls the deadline for appealing the underlying judgment until the motion is decided. n1 If the new trial motion is denied, the time to appeal runs from the entry of the order denying the motion for new trial. n2 The time to appeal is not tolled again by a motion to reconsider or vacate the order. n3

After a party has filed a Rule 59 motion for new trial, counsel should wait for the court's determination of that motion, and then file a notice of appeal within the allowable time measured from the date the motion was decided. If a notice of appeal is filed before the motion for new trial is decided, or even while the motion is pending, the notice is a nullity. n4 Further, a premature notice of appeal has no effect. A new notice of appeal must be filed after the disposition of a motion for new trial if the notice of appeal is to be effective. n5 If a party files a timely Rule 59 motion for new trial after the notice of appeal is filed, the underlying judgment loses its finality and the appellate court loses its jurisdiction. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.50 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Government Fin. Servs. v. Peyton Place, 62 F.3d 767, 774 (5th Cir. 1995)* .

(n3)Footnote 2. *McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652, 659 (8th Cir. 1982)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Government Fin. Servs. v. Peyton Place, 62 F.3d 767, 774 (5th Cir. 1995)* (only exception to rule of nonappealability is when motion is based on newly discovered evidence); *Fallen v. United States, 249 F.2d 94, 95 (5th Cir. 1957)* (denial of motion for new trial on ground of newly discovered evidence is itself appealable).

(n5)Footnote 1. *Fed. R. App. P. 4(a)(4)(A)(v).*

(n6)Footnote 2. *Fairley v. Jones, 824 F.2d 440, 441-443 (5th Cir. 1987)* (when timely Rule 59 motion for new trial is filed, time for appeal runs from entry of order denying new trial).

(n7)Footnote 3. *Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1456-1457 (5th Cir. 1991)* .

(n8)Footnote 4. *Fellow v. Colonial Sav. & Loan Ass'n (In re Fellows), 19 F.3d 245, 246-247 (5th Cir. 1994)* (notice of appeal filed before disposition of motion has no effect).

(n9)Footnote 5. *Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 60, 61, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982)* (citing **Moore's Federal Practice**).

(n10)Footnote 6. *Stone v. INS, 514 U.S. 386, 402-403, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.62

§ 24.62 Standard of Appellate Reviewn*

[1] Abuse of Discretion Standard in General

The district court has considerable discretion whether to grant or deny a motion for a new trial. n1 This broad allowance of discretion is accorded to the trial court because of the trial court's close proximity to the circumstances and evidence in the case and the need for the trial court to effectively manage the case and maintain its authority. n2 Furthermore, deference by the appellate court deters excessive appeals. n3

Due to this broad discretion related to new trial motions, the district court's grant or denial of a motion for a new trial is reversible only if the appellate court finds that the trial court failed to exercise its discretion, abused its discretion, or made a mistake of law. n4 In addition, an appellate court may review the trial court's decision and order the trial court to exercise its discretion if the trial court mistakenly believed that it did not have the power to so exercise that discretion. n5 Thus, when a trial court erroneously fails to exercise its discretion to decide a motion for new trial, the reviewing court may remand the case, or decide the issue itself, provided that the record is sufficiently developed on the issue. n6

[2] Abuse of Discretion Standard Applied to Particular New Trial Orders

[a] Clear Weight of Evidence

When the motion for new trial is based on the assertion that the jury verdict is against the clear weight of evidence, appellate courts exercise a heightened standard of review to the grant of a new trial under Rule 59. The rationale behind this standard is that the broad discretion given to the trial court n1 is slightly restricted by the deference due to the jury. The appellate court must ensure that the evaluation of the credibility of witness' testimony remains the sole domain of the jury. n2 In contrast, when the trial court denies a Rule 59 motion based on the claim that the verdict is against the clear weight of evidence, that determination is virtually not subject to challenge on appeal. n3

[b] Excessive or Inadequate Damages

An appellate court may review a district court's decision denying a new trial based on the grounds of excessive or

inadequate damage. Thus, a court of appeals may review a district court's denial of a motion to set aside a verdict because of excessive damages. n4 When reviewing a trial court's decision denying a new trial or remittitur based on the excessiveness or inadequacy of a jury award, appellate courts review for abuse of discretion. n5 If the appellate court finds reversible error in the trial court record, the appellate court may order a new trial, or it may condition denial of a new trial order on plaintiff's acceptance of remittitur. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.54 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Douglas County Bank & Trust Co. v. United Fin. Inc., 207 F.3d 473, 478 (8th Cir. 2000)* ; *Atkins v. New York City, 143 F.3d 100, 102 (2d Cir. 1998)* .

(n3)Footnote 2. *See Knoll v. AT&T, 176 F.3d 359, 362-63 (6th Cir. 1999)* .

(n4)Footnote 3. *Ball v. Interoceanica Corp., 71 F.3d 73, 76 (2d Cir. 1995)* , *cert. denied, 519 U.S. 863 (1996)* (district court had broad discretion to decide motion for new trial).

(n5)Footnote 4. *Gasperini v. Center for Humanities, 518 U.S. 415, 435-437, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* ; *Belk v. City of Eldon, 228 F.3d 872* , ** (8th Cir. 2000) (grant or denial of motion for new trial under Rule 59(a) is reviewed with great deference to district court's ruling and will not be reversed in absence of clear abuse of discretion; key question is whether new trial should have been granted to avoid miscarriage of justice).

(n6)Footnote 5. *Gates v. L.G. De Witt, Inc., 528 F.2d 405, 410 (5th Cir. 1976)* , *modified on other grounds, 532 F.2d 1052 (5th Cir. 1976)* .

(n7)Footnote 6. *Wharf v. Burlington N. R.R., 60 F.3d 631, 637-638 (9th Cir. 1995)* (appellate court ruled new trial should have been granted, relying on findings of fact after evidentiary hearing).

(n8)Footnote 1. *Czajka v. Black, 901 F.2d 1484, 1485 (8th Cir. 1990)* .

(n9)Footnote 2. *Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 186 (4th Cir. 1994)* (abuse of discretion standard applies to weight of evidence cases); *Scott v. Monsanto Co., 868 F.2d 786, 789 (5th Cir. 1989)* (jury's verdict must be against great, not merely greater, weight of evidence).

(n10)Footnote 3. *Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 929 (1st Cir. 1997)* (denial of new trial motion will be reversed only if verdict is so seriously mistaken, so clearly against the law or the evidence, as to constitute a miscarriage of justice; strict standard of review is particularly appropriate if motion for new trial is based on claim that verdict is against weight of evidence).

(n11)Footnote 4. *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 434-437, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* .

(n12)Footnote 5. *Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18-20 (2d Cir. 1996)* (district court's determination that $5 million award for loss of society and $9 million award for loss of support are not excessive and refusal to vacate or reduce are not abuses of discretion); *Snellman v. Ricoh Co., 836 F.2d 528, 532-534 (Fed. Cir. 1987)* , *cert. denied, 491 U.S. 910 (1989)* .

(n13)Footnote 6. *Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 305-306 (4th Cir. 1998)* (on determination that jury's award of compensatory or punitive damages is excessive, court of appeals may grant conditional new trial, which gives plaintiff option of accepting remittitur or submitting to new trial); *Katch v. Speidel, Div. of Textron, Inc., 746 F.2d 1136, 1140-1144 (6th Cir. 1984)* (because of wrongful jury instructions, court of appeals ordered remittitur).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.63

§ 24.63 Motion for New Trial Not Prerequisite to Appellate Reviewn*

A motion for a new trial is not required to preserve properly made objections for appellate review and is therefore not a prerequisite to an appeal from the judgment. n1 However, although not a prerequisite to an appeal, it is recommended that counsel bring any alleged errors to the trial court's attention by moving for a new trial, to avoid the time and expense of an appeal before a new trial is ordered by the appellate court. Any ground for new trial that is reviewable for abuse of discretion should be presented to the trial court to urge the court to exercise that discretion. Grounds for new trial that arise solely in the context of post trial proceedings must be presented to the trial court for consideration by a motion for new trial, and the failure to do so that deprives the appellate court from any record may be reviewed for error. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.55 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Elmore v. United States, 843 F.2d 1128, 1131, n.7 (8th Cir. 1988)* (citing **Moore's Federal Practice**); *Sherrill v. Royal Indus., Inc., 526 F.2d 507, 509 n.2 (8th Cir. 1975)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Cf. Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1284 (Fed. Cir. 2000)* (party preserved its right to seek relief from verdict by making motion for new trial, which magistrate judge denied).

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3-24 Moore's Manual--Federal Practice and Procedure §§ 24.64through 24.79

[Reserved]

§§ 24.64[Reserved]

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3-24 Moore's Manual--Federal Practice and Procedure § 24.80

§ 24.80 Function of Alteration or Amendment of Judgmentn*

[1] Purpose

The federal rules expressly provide for a motion to alter or amend a judgment n1 to provide the district court with a procedure for use in the period immediately following the entry of judgment so that the court may rectify any mistakes made at trial. n2 Under this rule, the court may correct either factual errors or errors of law. n3 A Rule 59(e) motion to alter or amend a judgment permits the moving party to bring to the district court's attention a manifest error of law or fact or newly discovered evidence. The rule does not provide a vehicle for a party to correct its own procedural failures or to allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment. n4

[2] Nature of Motion to Alter or Amend Judgment

A Rule 59(e) motion to alter or amend a judgment is commonly used with a wide variety of other post-judgment motions, and they are sometimes difficult to distinguish. However, the Supreme Court has developed a test designed to determine whether a motion is a Rule 59(e) motion to alter or amend: a Rule 59(e) motion involves the rehearing of matters properly encompassed in a decision on the merits. n1 A motion to alter or amend a judgment must seek a substantive alteration of the judgment, rather than merely a clerical correction. n2 Note that a post-judgment motion to amend the judgment to provide for discretionary prejudgment interest constitutes a Rule 59(e) motion. This is so because the motion involves the rehearing of matters encompassed within the merits of the judgment and because prejudgment interest is an element of a plaintiff's complete compensation. n3

The Federal Rules of Civil Procedure do not include a motion titled a "motion for reconsideration" of a judgment. However, it is the substance, and not a party's label, that is determinative of the effect of a motion. Courts have generally stated that, regardless of the title, if it otherwise qualifies, any motion for reconsideration is treated as either: n4 a motion to alter or amend the judgment under Rule 59(e) (which must be filed no later than 28 days after judgment); n5 or a motion requesting relief from judgment under Rule 60(b) (which need only be filed within a reasonable time). n6 The distinction between whether the motion is treated as a Rule 59(e) motion or Rule 60(b) motion may be significant in determining the timeliness of a notice of appeal: Rule 59(e) motions toll the 30-day period for appeal while Rule 60(b) motions do not. n7

[3] Use in Connection With Other Motions

[a] Motion to Amend Complaint After Judgment

A party may make a motion to amend a complaint following the entry of judgment under Rule 15(a). n1 However, the party must first have the judgment reopened under Rule 59(e) or Rule 60(b). n2 Even though Rule 15 generally allows the liberal amendment of pleadings and mandates that leave to amend must be freely granted when justice so requires, justice clearly may require something more in post-judgment situations rather than prejudgment situations. For a complete discussion of Rule 15 motions, see Ch. 9, *Pleadings and Motions in General*.

[b] Motion to Amend or Add Findings in Court Actions

A court must make findings of fact and state conclusions of law in all actions tried on the facts without a jury or advisory jury. n3 Rule 52(b) permits a court to amend its findings of fact or make additional findings and then amend the judgment accordingly on the motion of a party made within 28 days of entry of judgment. Such a motion may accompany a motion for a new trial under Rule 59(e). n4 Rules 52(b) and 59(e) both allow a party to move in the district court for an amendment of its findings. However, a Rule 59(e) motion seeks an alteration or amendment of a judgment, often by way of the court's finding of additional facts. n5 In contrast, a Rule 52(b) motion seeks only the correction of findings or the finding of additional facts without the amendment of the judgment. n6 For complete discussion of Rule 52, see Ch. 23, *Trial to Court; Inability of Judge to Proceed*.

[c] Motion for Relief From Judgment

A party may make a motion for relief from a final judgment, order, or proceeding for several specified reasons. n7 A motion for relief under Rule 60(b) must conform to one of the specific grounds for modification or reversal enumerated in the rule: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in exercise of due diligence in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) a judgment that is void; (5) a judgment that has been satisfied, released, or discharged, or a prior judgment on which it is based that is reversed or otherwise vacated, or a judgment for which it is no longer equitable to give prospective application; or (6) any other reason justifying relief from the operation of the judgment. n8 A party may move for this last catchall basis for relief only if none of the other more specific bases set out in Rules 60(b)(1)-(5) are applicable, and only if the movant establishes extraordinary circumstances. n9

A party that is subject to an adverse ruling may file a Rule 60(b) motion seeking relief from judgment and in the alternative a Rule 59(e) motion to alter or amend the judgment. n10 However, the rules are not interchangeable. An assertion that the court misapplied the law does not justify relief under Rule 60(b); rather, this argument should ordinarily be raised in a timely Rule 59(e) motion or in a direct appeal. n11 On the other hand, while motions under Rule 59(e) may be used only to alter or amend a "judgment," a "motion for reconsideration" of a nonfinal order is properly classified as a motion for relief under Rule 60(b), because Rule 60(b) includes motions filed in response to nonfinal orders, as well as judgments. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.30 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 59(e).*

(n3)Footnote 2. *White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451-452, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* ; *Ajinomoto Co. v. Archer-Daniels-Midland Co., 228 F.3d 1338, 1350 (Fed. Cir. 2000)* .

(n4)Footnote 3. *Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997)* (Rule 59(e) motion may be granted to correct manifest errors of law or to present newly discovered evidence); *Norman v. Arkansas Dep't of Educ., 79 F.3d 748, 750 (8th Cir. 1996)* (Rule 59(e) appropriate when court order based on factual error).

(n5)Footnote 4. *Lionel Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000)* .

(n6)Footnote 1. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 174-177, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* ; *see Phelps v. Hamilton, 122 F.3d 1309, 1323-1324 (10th Cir. 1997)* .

(n7)Footnote 2. *United States v. Deutsch, 981 F.2d 299, 300-301 (7th Cir. 1992)* .

(n8)Footnote 3. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 174-177, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

(n9)Footnote 4. *Auto Servs. Co. v. KPMG, LLP, 537 F.3d 853, 855-856 (8th Cir. 2008)* .

(n10)Footnote 5. *Fed. R. Civ. P. 59(e).*

(n11)Footnote 6. *Fed. R. Civ. P. 60(b)*; *see Fed. R. Civ. P. 60(c)(1).*

(n12)Footnote 7. *See* Ch. 26, *Post-Judgment Procedures*.

(n13)Footnote 1. *Fed. R. Civ. P. 15(a).*

(n14)Footnote 2. *Diersen v. Chicago Car Exch., 110 F.3d 481, 488-489 n.6 (7th Cir. 1997)* , *cert. denied, 522 U.S. 868 (1997)* (Rule 15(a) requires open judgment).

(n15)Footnote 3. *Fed. R. Civ. P. 52(a).*

(n16)Footnote 4. *Fed. R. Civ. P. 52(b)*; *see United States v. Martin, 226 F.3d 1042, 1047 n6 (9th Cir. 2000)* (in addition to Rule 59(e), Rule 52(b) is also a express source of authority for motion to amend judgment in nonjury case).

(n17)Footnote 5. *Fed. R. Civ. P. 59(e).*

(n18)Footnote 6. *Fed. R. Civ. P. 52(b).*

(n19)Footnote 7. *Fed. R. Civ. P. 60(b).*

(n20)Footnote 8. *Fed. R. Civ. P. 60(b)*; *see Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc., 169 F.R.D. 680, 686-687 (M.D. Fla. 1996)* (Rule 60(b) motion must be based on prescribed grounds).

(n21)Footnote 9. *Gonzalez v. Crosby, 545 U.S. 524, 534-535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)* .

(n22)Footnote 10. *See Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69, 77-78 (2d Cir. 2000)* .

(n23)Footnote 11. *Van Skiver v. United States, 952 F.2d 1241, 1243-1244 (10th Cir. 1991)* , *cert. denied, 506 U.S. 828 (1992)* .

(n24)Footnote 12. *Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.81

§ 24.81 Motion to Alter or Amend Judgment Must Be in Writingn*

A party should make a written motion to alter or amend a judgment after its entry. n1 A motion to alter or amend a judgment must demonstrate why the court should reconsider its previous decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision. n2 In this regard, Rule 7(b) requires that the motion for amendment or alteration must state with particularity the grounds for the motion and the relief or order sought. n3 In considering whether or not a given ground has been stated by the motion, the court should consider that the particularity required in stating the grounds for a new trial motion is the same as that required for all motions under Rule 7(b)(1)--in other words, "ritualistic" detail is not required but rather a fair indication to court and counsel of the substance of the grounds relied on. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.30 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Fed. R. Civ. P. 59(e)*; *Dave Kohel Agency, Inc. v. Redshaw, Inc., 149 F.R.D. 171, 176-177 (E.D. Wis. 1993)* (Rule 59(e) motions must be in writing).

(n3)Footnote 2. *Intera Corp. v. Henderson, 428 F.3d 605, 613-614 (6th Cir. 2005)* (particularity may require details of factual or legal nature or both).

(n4)Footnote 3. *Fed. R. Civ. P. 7(b).*

(n5)Footnote 4. *Fed. R. Civ. P. 59(b)*, Advisory Committee Note to 1966 Amendments; *see Fed. R. Civ. P. 7(b)(1).*

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3-24 Moore's Manual--Federal Practice and Procedure § 24.82

§ 24.82 Grounds for Motion to Alter or Amend Judgmentn*

A proper motion to alter or amend a judgment must be based on any one of four of the following major grounds: n1

1. An intervening change in controlling law. Whether it appears that a new law is favorable or unfavorable to the moving party, the party may make a motion to alter or amend a judgment when there has been an intervening change in the controlling law. n2

2. The availability of new evidence that was not available previously. Thus, Rule 59(e) does not permit the submission of matters already available or known to the party submitting them as "new evidence." n3 When evaluating this ground, the court should consider, among other things, the reasons for the moving party's failure, the importance of the omitted evidence to the moving party's case, whether the omitted evidence was available before the moving party responded to the summary judgment motion, and the likelihood of prejudice to the nonmoving party if the case is reopened. n4

3. The need to correct clear error. A Rule 59(e) motion to alter or amend a judgment may be granted when the court commits clear legal error; which means that the error may be a mistake in either law or fact. n5

4. The necessity to prevent manifest injustice. The court may grant a Rule 59(e) motion to alter or amend a judgment when, without the alteration or amendment, the judgment would create or result in manifest injustice. n6 This ground is considered a catch-all ground for relief. For example, this ground may include the misconduct of counsel as the basis of a Rule 59(e) motion. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.30 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Ajinomoto Co., Inc. v. Archer-Daniels-Midland Co., 228 F.3d 1338, 1350 (Fed. Cir. 2000)* .

(n3)Footnote 2. *Quinones-Ruiz v. United States, 873 F. Supp. 359, 362 (S.D. Cal. 1995)* (motion to amend was appropriate even when new law was unfavorable to moving party, because moving party entitled to argue how new rule should apply); *Database Am., Inc. v. Bellsouth Adver. & Pub. Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993)* .

(n4)Footnote 3. *Waltman v. Int'l Paper Co., 875 F.2d 468, 473-474 (5th Cir. 1989)* (evidentiary materials submitted with motion that were available before party filed losing opposition were not newly discovered evidence).

(n5)Footnote 4. *Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990)* , *cert. denied, 510 U.S. 859 (1993)* .

(n6)Footnote 5. *Norman v. Arkansas Dep't of Educ., 79 F.3d 748, 750 (8th Cir. 1996)* (Rule 59(e) motion proper only when manifest error affects legal propriety of judgment, such as when court bases order on factual error); *see EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997)* (Rule 59(e) motion properly granted because order denying enforcement of subpoena was based on court's erroneous understanding of relevance of information sought).

(n7)Footnote 6. *Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993)* .

(n8)Footnote 7. *Dale & Selby Superette & Deli v. United States Dep't of Agric., 838 F. Supp. 1346, 1347-1348 (D. Minn. 1993)* (motion to amend in nonjury case may be granted when counsel's improper conduct affects result).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.83

§ 24.83 Time Limitations Related to Motion to Alter or Amend Judgmentn*

[1] Time Limit for Motion to Alter or Amend Judgment

A motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment; n1 This time period may not be extended. n2 For purposes of a Rule 59(e) motion, a judgment is a decree or any other order that is appealable, n3 and the judgment becomes effective only when set out on a separate document and entered in the civil docket in the manner prescribed by Rule 79(a). n4 In determining the timeliness of a Rule 59(e) motion, the date of filing the motion controls, rather than the date of service. n5 Rule 59 was amended in 1995 to clarify that the filing date controls and to eliminate confusion between the operation of Rules 50, 52, and 59(e). n6

The 28-day time period for making a motion for to alter or amend a judgment n7 is generally governed by the Rule 6 provisions for computation of time periods. n8 Thus, intermediate Saturdays, Sundays, and legal holidays are now counted in the 28-day period. n9 unless the last day falls on a Saturday, Sunday, or legal holiday; if so, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. n10 However, the provision of Rule 6(d), providing a three-day extension under Rule 6 when service is by other than hand delivery, n11 does not apply to a Rule 59 motion to alter or amend the judgment, and does not enlarge the 28-day period, because the time period for the motion is not triggered by service, but by entry of judgment. n12 For a complete discussion of the computation of time periods for motions under Rule 6, see Ch. 9, *Pleadings and Motions in General*.

[2] Court May Not Extend Time Limitation

Rule 6(b) expressly prohibits the district court from extending the 28-day filing period of a Rule 59(e) motion to alter or amend judgment. n1 Therefore, the 28-day period may not be altered, waived, or amended. n1.1 The specified time periods for filing a Rule 59(e) motion are mandatory and jurisdictional; therefore, the failure to meet the 10-day deadline to alter or amend a judgment is absolutely determinant and compels the denial of the Rule 59(e) motion. n2 Additionally, an untimely Rule 59(e) motion may not be salvaged on the grounds that the opposing party filed a timely motion, n3 or because a co-party filed a timely motion. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.31 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 59(e).*

(n3)Footnote 2. *Fed. R. Civ. P. 6(b)(2)*; *see* [2], *below.*

(n4)Footnote 3. *Fed. R. Civ. P. 54(a)*; *see Wendy's Int'l v. Nu-Cape Constr., 169 F.R.D. 680, 685 (M.D. Fla. 1996)* (award of attorney's fees and costs as sanctions is final when order issued).

(n5)Footnote 4. *Atlantic Richfield Co. v. Monarch Leasing Co., 84 F.3d 204, 206-207 (6th Cir. 1996)* ; *see Fed. R. Civ. P. 58*, *79(a)*. For discussion of Rule 58, and the entry of judgments, see Ch. 25, *Judgment*.

(n6)Footnote 5. *Long v. Simmons, 77 F.3d 878, 879 (5th Cir. 1996)* .

(n7)Footnote 6. *Fed. R. Civ. P. 59(e)*, Advisory Committee Note to 1995 Amendments.

(n8)Footnote 7. *Fed. R. Civ. P. 59(e).*

(n9)Footnote 8. *See Benzon v. Morgan Stanley Distribs., 420 F.3d 598, 613 (6th Cir. 2005)* (former version of Rule 6); *Fed. R. Civ. P. 6(a).*

(n10)Footnote 9. *Fed. R. Civ. P. 6(a)(1)(B).*

(n11)Footnote 10. *Fed. R. Civ. P. 6(a)(1)(C).*

(n12)Footnote 11. *See Fed. R. Civ. P. 6(d).*

(n13)Footnote 12. *See Fed. R. Civ. P. 6(d).*

(n14)Footnote 1. *Fed. R. Civ. P. 6(b)(2)*, *59(e).*

(n15)Footnote 1.1. *FHC Equities, L.L.C. v. MBL Life Assur. Corp., 188 F.3d 678, 681-683 (6th Cir. 1999)* .

(n16)Footnote 2. *Cole v. Altieri, 534 F. Supp. 165, 168 (E.D. Pa. 1981)* .

(n17)Footnote 3. *Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc., 848 F.2d 179, 181-182 (Fed. Cir. 1988)* , *cert. denied, 488 U.S. 1009 (1989)* ; *Hidle v. Geneva County Bd. of Educ., 792 F.2d 1098, 1100 (11th Cir. 1986)* , *cert. denied, 479 U.S. 1088 (1987)* .

(n18)Footnote 4. *Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1129-1133 (11th Cir. 1994)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.84

§ 24.84 Effects of Motion to Alter or Amend Judgmentn*

A timely filed motion to alter or amend a judgment has several effects:

1. The filing eliminates the finality of and reopens the earlier judgment. n1 Note, however, a timely motion does not permit the nonmoving party to make an untimely request to alter the judgment on entirely independent grounds. n2

2. The filing tolls the time for appeal, provided that the motion is substantive and filed within 10 days of the entry of judgment. n3 On the other hand, an untimely Rule 59(e) motion has no effect on the time for appeal; an untimely motion is treated as one to set aside the judgment under Rule 60(b), which does not affect the finality of the judgment or toll the time to appeal. n4 Thus, a subsequent Rule 59(e) motion, filed after denial of the initial motion but more than 10 days after entry of judgment, does not toll the time for appeal. n5

3. The filing nullifies any notice of appeal previously filed by the parties. n6 A party seeking appellate review must file a new notice of appeal after the entry of the order disposing of the Rule 59(e) motion. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.31 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Mendes Junior Int'l Co. v. Banco Do Brasil, S.A., 215 F.3d 306, 313-314 (2d Cir. 2000)* ; *United States v. Hollis, 424 F.2d 188, 191 (4th Cir. 1970)* (timely post-judgment motion opens earlier judgment and permits courts to enlarge on issues delineated by motion).

(n3)Footnote 2. *Sun-Tek Indus. v. Kennedy Sky Lites, Inc., 848 F.2d 179, 181-182 (Fed. Cir. 1988)* .

(n4)Footnote 3. *Ramsey v. Colonial Life Ins. Co. of Am., 12 F.3d 472, 477-478 (5th Cir. 1994)* (Rule 59(e) motion tolls time to appeal until court disposes of motion).

(n5)Footnote 4. *Fed. R. App. P. 4(a)(4)*; *Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7, 264-265, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)* .

(n6)Footnote 5. *Aybar v. Crispin-Reyes, 118 F.3d 10, 13-14 (1st Cir. 1997)* .

(n7)Footnote 6. *Fed. R. App. P. 4(a)(4)*; *see Pub. Serv. Co. v. Hudson Light & Power Dep't, 938 F.2d 338, 340 (1st Cir. 1991)* .

(n8)Footnote 7. *Tinsley v. Borg, 895 F.2d 520, 523 (9th Cir. 1990)* (time to file notice of appeal begins to run after entry of order granting or denying motion).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.85

§ 24.85 Sua Sponte Authority of Court to Alter or Amend Judgmentn*

Rule 59(e) does not expressly authorize the district court to alter or amend a judgment on its own initiative, as is the case for a new trial under Rule 59(d), which authorizes the court to grant a new trial on its own initiative. n1 Case precedent indicates a court does have the power to alter or amend its judgment on its own initiative. n2 There are two general requirements for the court to alter or amend its own judgment without motion: (1) the court makes the order within 28 days of the judgment; n3 and (2) the court provides the parties with notice and opportunity to be heard on any alteration or amendment. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.33 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Compare Fed. R. Civ. P. 59(d) with Fed. R. Civ. P. 59(e).*

(n3)Footnote 2. *Bryant v. New Jersey DOT, 998 F. Supp. 438, 442 (D.N.J. 1998)* (court on its own initiative reconsidered its judgment dismissing complaint when decision of United States Supreme Court, filed after original district court judgment, compromised validity of judgment.).

(n4)Footnote 3. *Dunn v. Savage (In re Saffady), 524 F.3d 799, 803 (6th Cir. 2008)* ; *Burnam v. Amoco Container Co., 738 F.2d 1230, 1232 (11th Cir. 1984)* (court may act sua sponte within period specified by Rule 59(e) for making motion; citing **Moore's Federal Practice**).

(n5)Footnote 4. *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo, 465 F.3d 33, 37 (1st Cir. 2006)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.86

§ 24.86 Use of Affidavits in Support of Motionn*

Although Rule 59(e) does not expressly provide for service of affidavits in support of a motion to alter or amend a judgment, n1 it is clear that affidavits should be used in the manner specified in Rule 59(c). n2 Thus, if a party wishes to support or oppose such a motion by affidavits, service should be in accordance with the general provisions of Rule 6(d). n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.34 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 59(e).*

(n3)Footnote 2. *See Fed. R. Civ. P. 59(c)*; *see also United States v. Dailide, 227 F.3d 385, 407 (6th Cir. 2000)* (citing **Moore's Federal Practice** for proposition that any evidence that would be admissible at trial can be presented in an affidavit in Rule 59(e) motion).

(n4)Footnote 3. *See Fed. R. Civ. P. 6(d).*

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3-24 Moore's Manual--Federal Practice and Procedure § 24.87

§ 24.87 Court's Decision on Motion to Alter or Amend Judgmentn*

The district court has considerable discretion in determining whether to grant or deny a motion to alter or amend. n1 However, this discretion is limited: the reconsideration of a previous order is an extraordinary remedy and, to promote the interests of finality and conservation of judicial resources, must be used infrequently. n2 The court may deny the Rule 59(e) motion to alter or amend a judgment if it is being used to relitigate the same matters already determined by the court. n3 Furthermore, the court may deny a motion to alter or amend that is used to present arguments or evidence that could reasonably have been presented before the entry of judgment and may also deny a motion seeking relief that is entirely collateral to the judgment. n4 Additionally, the grounds of clerical error or the correction of procedural problems do not support a motion to alter or amend and will be denied. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.34 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 355-356 (5th Cir. 1993)* (court's broad discretion must be balanced against need for finality and justice based on all facts).

(n3)Footnote 2. *In re Prince, 85 F.3d 314, 324 (7th Cir. 1996)* (decision to grant or deny Rule 59(e) motion is discretionary).

(n4)Footnote 3. *Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993)* .

(n5)Footnote 4. *Buchanan v. Stanships, Inc., 485 U.S. 265, 268, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* (post-judgment application for allowance of costs under *Fed. R. Civ. P. 54(d)* is collateral).

(n6)Footnote 5. *United States v. Deutsch, 981 F.2d 299, 300-301 (7th Cir. 1992)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.88

§ 24.88 Effect of Order Granting or Denying Motion to Alter or Amend Judgmentn*

When a district court grants a Rule 59(e) motion to substantively alter or amend a judgment, a new judgment is entered, and the previous judgment no longer exists. A significant modification in a judgment starts the time periods again that are triggered by entry of a judgment, such as the time periods for postjudgment motions. n1 Consequently, the parties then have 21 days from the entry of the new judgment in which to file a motion to alter or amend that judgment. n2

On the other hand, when a trial court denies a motion to alter or amend a judgment, the finality of the judgment is restored and the appeal time begins to run from the date the order is entered. n3 After the 28-day time period has expired and the court has denied the Rule 59(e) motion, the court will not hear another Rule 59 motion. n4 For discussion of appellate review of Rule 59(e), see *§ 24.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.35 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986)* (construing former time periods).

(n3)Footnote 2. *See McNabola v. Chicago Transit Auth., 10 F.3d 501, 520-521 (7th Cir. 1993)* (construing former time periods).

(n4)Footnote 3. *Fed. R. App. P. 4(a)(4)(A)(iv).*

(n5)Footnote 4. *Otto v. Variable Annuity Life Ins., 814 F.2d 1127, 1139 (7th Cir. 1986) , cert. denied, 486 U.S. 1026 (1988)* (construing former time periods).

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3-24 Moore's Manual--Federal Practice and Procedure § 24.89

§ 24.89 Principle of Harmless Error Applicable to Motion to Alter or Amend Judgmentn*

The Federal Rules of Civil Procedure require a court to disregard a harmless error, which is any error or defect in the course of the litigation that does not affect the substantial rights of the parties. n1 Therefore, no error is a sufficient ground to alter or amend a judgment under Rule 59 unless the court deems that its refusal to alter or amend the judgment would be inconsistent with substantial justice. n2 Furthermore, if the party does not make a timely objection, even substantial errors are deemed waived and do not constitute grounds for a motion to alter or amend unless a miscarriage of justice would result from the denial of the motion. n3 For discussion of the harmless error principle, as specified in Rule 61, see Part III. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.02 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 61.*

(n3)Footnote 2. *Fed. R. Civ. P. 61*; *see, e.g., Bains v. Cambra, 204 F.3d 964, 971-972 (9th Cir. 2000) .*

(n4)Footnote 3. *See Rutledge v. United States, 230 F.3d 1041, 1052 (7th Cir. 2000) .*

(n5)Footnote 4. *See* 24.100 et seq.

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART II. ALTERATION OR AMENDMENT OF JUDGMENT

3-24 Moore's Manual--Federal Practice and Procedure § 24.90

§ 24.90 Appellate Review of Order Granting or Denying Motion to Alter or Amend Judgmentn*

[1] Order Granting Alteration or Amendment of Judgment

When a party files a timely motion to alter or amend a judgment, the motion suspends the finality of the judgment. n1 Then, if the court grants the order, a new judgment must be entered in conformity with the grounds for granting the motion. This judgment then is final and appealable on entry. n2

[2] Order Denying Alteration or Amendment of Judgment

A timely motion to alter or amend a judgment suspends the finality of the judgment. n1 Then, if the motion is denied, the underlying judgment is final and appealable; therefore, the aggrieved party should take an appeal from the underlying judgment rather than from the order denying relief under Rule 59(e). n2 Thus, when the court enters an order denying a motion to alter or amend under Rule 59(e), the court must enter a new judgment in conformity with the grounds for denying the motion. This judgment then is final and appealable on entry. n3

[3] Standard of Review

When the district court makes an appealable Rule 59(e) order, that order granting or denying alteration or amendment of a judgment is reviewed for an abuse of discretion, n1 which is essentially the same standard of review applied to orders granting or denying a new trial. Thus, the appellate court will not reverse the trial court unless there is a clear abuse of discretion. n2 However, there is an exception for summary judgment orders; if the motion for alteration or amendment sought reconsideration of a grant of summary judgment, the appellate court must review the matter de novo. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 59.54 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 177-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

(n3)Footnote 2. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 40 (2d Cir. 1982)* .

(n4)Footnote 1. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 177-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

(n5)Footnote 2. *Lawson v. Singletary, 85 F.3d 502, 507 (11th Cir. 1996)* .

(n6)Footnote 3. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 40 (2d Cir. 1982)* .

(n7)Footnote 1. *Lionel Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000)* .

(n8)Footnote 2. *Britton v. Swift Transp. Co., Inc., 127 F.3d 616, 618-619 (7th Cir. 1997)* ; *Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997)* .

(n9)Footnote 3. *Wilkins v. Baptist Healthcare Sys., Inc., 150 F.3d 609, 613 (6th Cir. 1998)* (although denial of Rule 59(e) motion is ordinarily reviewed for abuse of discretion, if motion seeks reconsideration of grant of summary judgment, review will be de novo).

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3-24 Moore's Manual--Federal Practice and Procedure §§ 24.91through 24.99

[Reserved]

§§ 24.91[Reserved]

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PART VI Trial and Judgment
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PART III. HARMLESS ERROR
A. SCOPE AND PURPOSE OF HARMLESS ERROR RULE

3-24 Moore's Manual--Federal Practice and Procedure § 24.100

§ 24.100 Statement of Harmless Error Rulen*

The harmless error rule states that, at the appellate level, a court should review cases for errors of law without regard to errors that do not affect the parties' substantial rights. n1 Similarly, at the trial level, the court should not grant a new trial, set aside a jury verdict or vacate, modify, or otherwise disturb a judgment or order on the grounds of error unless just requires otherwise. This rule applies to an error in either the admission or the exclusion of evidence, an error in any ruling or order, or an error in any other act or omission by the court or by any of the parties. At all stages of a proceeding, the trial court must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties. n2

Under the harmless error rule, the integrity of verdicts, orders, and judgments is the general rule, and their disturbance is the exception. The rule has been adopted by the Supreme Court and Congress to ensure that courts should exercise judgment regarding errors, rather than requiring automatic reversal based on technicalities, and should ignore errors that do not affect the essential fairness of the trial. n3 This means that courts should not use presumptions in determinations regarding harmless error to the extent such presumptions may lead courts to find an error harmful when, in fact, the error is harmless in the particular circumstances before the court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 2111*; see *Shinseki v. Sanders, ___ U.S. ___, 129 S. Ct. 1696, 173 L. Ed. 2d 532, 544 (2009)* .

(n3)Footnote 2. *Fed. R. Civ. P. 61*; *see, e.g., Henderson v. Walled Lake Consol. Sch., 469 F.3d 479, 495 (6th Cir. 2006)* .

(n4)Footnote 3. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553-554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* .

(n5)Footnote 4. *Shinseki v. Sanders, ___ U.S. ___, 129 S. Ct. 1696, 173 L. Ed. 2d 532, 544 (2009)* .

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A. SCOPE AND PURPOSE OF HARMLESS ERROR RULE

3-24 Moore's Manual--Federal Practice and Procedure § 24.101

§ 24.101 Applicability of Harmless Error Rulen*

The harmless error rule applies to all rulings and actions of the trial court at all stages of the proceedings and also to anything done or omitted by the court or by any of the parties. n1 Although the Federal Rules of Civil Procedure, by definition, govern procedure only in the district courts, n2 the standards for the application of Rule 61 in the district court are, by statute, substantially the same as those utilized in the courts of appeal and the Supreme Court. n3 Thus, a reviewing court must ignore errors or defects that do not affect the substantial rights of the parties, and render judgment accordingly after an examination of the complete record. n4

The determination of what constitutes harmless error is a procedural matter governed by federal law. n5 Review for harmless error is fact specific and must therefore be determined on a case-by-case basis. The court must consider the unique context of the particular case, including whether the error pertains to an issue that is one sided or closely balanced, and how it relates to the ultimate determination in the case. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 61.*

(n3)Footnote 2. *See Fed. R. Civ. P. 1.*

(n4)Footnote 3. *28 U.S.C. § 2111.*

(n5)Footnote 4. *Shinseki v. Sanders, ___ U.S. ___, 129 S. Ct. 1696, 173 L. Ed. 2d 532, 544 (2009) .*

(n6)Footnote 5. *Sokol Crystal Products, Inc., v. DSC Communications Corp., 15 F.3d 1427, 1431 (7th Cir. 1994)* .

(n7)Footnote 6. *Phoenix Associates III v. Stone, 60 F.3d 95, 105 (2d Cir. 1995)* .

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A. SCOPE AND PURPOSE OF HARMLESS ERROR RULE

3-24 Moore's Manual--Federal Practice and Procedure § 24.102

§ 24.102 Raising Issue of Harmless Errorn*

The principle of harmless error is typically brought into issue by a party asserting that the court or other party has committed some error in the proceedings; however, the court may raise the issue on its own initiative when the court discovers an error. n1 The party requesting relief from the order or judgment in question has the has the burden of persuading the court that the error substantially affected the party's rights. n2 A "substantial right" is affected only if it is likely that factfinder's judgment was swayed in some material respect by the error. n3

The standard of proof is not precise, n4 but the Supreme Court has said that if a court is sure that the error did not influence the jury, or had but a very slight effect, the verdict and the judgment should generally stand; on the other hand, if the court may not say, with fair assurance considering all of the circumstances that the judgment was not substantially swayed by the error, it is not harmless error because substantial rights were affected. n5 Therefore, the party claiming error must show that it is highly probable that the error affected the party's rights, n6 that the error affected a party's rights to a substantial degree, n7 or that the verdict more probably than not was tainted. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.02 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Prevatte v. French, 547 F.3d 1300, 1305 (11th Cir. 2008)* .

(n3)Footnote 2. *Shinseki v. Sanders, ___ U.S. ___, 129 S. Ct. 1696, 173 L. Ed. 2d 532, 545 (2009)* .

(n4)Footnote 3. *Costantino v. Herzog, 203 F.3d 164, 174 (2d Cir. 2000)* .

(n5)Footnote 4. *See Renz v. Grey Adver., Inc., 135 F.3d 217, 223-224 (2d Cir. 1997)* (citing **Moore's Federal**

Practice, and noting that there are various formulations of standard of proof); *see also Jones v. Lincoln Elec. Co., 188 F.3d 709, 725 (7th Cir. 1999)* , *cert. denied, 529 U.S. 1067 (2000)* (citing Rule 61 and Evidence Rule 103 for proposition that trial court may not reverse jury verdict if error is harmless; error must have affected party's substantial rights).

(n6)Footnote 5. *Kotteakos v. United States, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)* .

(n7)Footnote 6. *McQueeney v. Wilmington Trust Co., 779 F.2d 916, 927 (3d Cir. 1985)* .

(n8)Footnote 7. *Smith v. Chesapeake & Ohio Ry. Co., 778 F.2d 384, 389 (7th Cir. 1985)* .

(n9)Footnote 8. *Haddad v. Lockheed California Corp., 720 F.2d 1454, 1459 (9th Cir. 1983)* .

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3-24 Moore's Manual--Federal Practice and Procedure §§ 24.103through 24.119

[Reserved]

§§ 24.103[Reserved]

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B. APPLICATION OF HARMLESS ERROR RULE TO PARTICULAR DETERMINATIONS

3-24 Moore's Manual--Federal Practice and Procedure § 24.120

§ 24.120 Admission of Evidencen*

[1] Admission of Evidence

If a court commits an error by admitting inadmissible evidence, the court is not required to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order unless justice requires that it do so. Thus, as in other stages of litigation, a court must disregard all errors and defects at trial that do not affect any party's substantial rights. n1 The party seeking to prove that the error in allowing the introduction of inadmissible evidence was reversible error has the burden of showing that there was a significant probability that the admission affected the result of the trial. n2

[2] Exclusion of Evidence

The improper exclusion of competent evidence is harmless error unless a substantial right of a party is affected. n1 Furthermore, erroneous exclusion is not reversable unless the evidence excluded would have affected the outcome of the case. n2 The following are typical examples when the improper exclusion of evidence is held to be harmless error:

1. When the evidence excluded would have been cumulative. n3

2. When the excluded evidence would be part of the record from some other source. n4

3. When the excluded evidence would not have affected the outcome based on the jury's finding. n5

[3] Curative Instruction

If the trial court gives the jury a sufficiently curative instruction after the admission of improper evidence, n1 the erroneous admission of the improper evidence is harmless. n2 For example, when a hearsay objection has been made and the proponent contends that it is admissible under the co-conspirator rule, the statement may be conditionally admitted into evidence. However, at the conclusion of all the evidence, the trial court must make an explicit decision for the record about the admissibility of the statement. If the proponent of the statement fails to prove a conspiracy involving the declarant and the parties opponent, the trial must give a curative instruction. n3

[4] Availability of Evidence From Another Source

Even if the exclusion or admission of particular evidence is erroneous, the error is harmless if there is other sufficient, admissible, and proper evidence to support the jury verdict. n1 In other words, whether the erroneous admission or exclusion of that particular evidence is harmless depends on its consideration in the context of any other related properly admitted evidence. n2 For example, it was harmless error for the court to admit an expert's improper testimony regarding an ultimate legal conclusion in a case, when there was greater admissible testimony and other evidence in the case that strongly supported the conclusion that the defendant in a civil rights action used excessive force. n3

Another source of alternative evidence is from an opposition party itself. Thus, if the admission of evidence by the court is erroneous, that error is harmless and must be disregarded if the party that is asserting error was the party that initially introduced the subject matter of the improper evidence. For example, it was harmless error for the court to admit testimony from plaintiff's design expert regarding faulty design in a products liability case, when this testimony was first elicited by the party who later objected. n4

[5] Errors in Trial to Court

When a case is tried to the court, rather than to a jury, error in the admission or exclusion of evidence is usually held harmless error because a trial judge sitting without a jury is entitled to greater latitude in the admission or exclusion of evidence. n1 Reversal is required only if all of the competent evidence is insufficient to support the judgment, if it appears that the trial court used the improperly admitted evidence to make an essential finding that it otherwise would not have made, n2 or if the trial court excluded and simply chose to ignore highly relevant evidence. n3 Thus, in the following circumstances, appellate courts ruled that the improper admission of evidence was harmless error during the course of nonjury trials:

1. Where the district court did not rely on the improper testimony and specifically stated that, based on other properly admitted testimony, it would have reached the same conclusion. n4

2. Where the district court did not place any substantial reliance on the improperly admitted testimony. n5

3. Where there was other admissible evidence to support the district court's findings. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral OverviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error RuleEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.06 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 61*; *see Brumley v. Wingard, 269 F.3d 629, 645-646 (6th Cir. 2001)* .

(n3)Footnote 2. *Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1498 (11th Cir. 1989)* (admission into evidence of personal reference from a non-appearing witness in bank employee's action for wrongful discharge was harmless error); *Bankcard America, Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 482 (7th Cir. 2000)* (not plain error to admit cumulative evidence because it would not affect outcome).

(n4)Footnote 1. *Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 271 (5th Cir. 1994)* (erroneous exclusion

of evidence does not require reversal unless a substantial right of party is affected, and district court is accorded considerable deference in evidentiary rulings).

(n5)Footnote 2. *Heyne v. Caruso, 69 F.3d 1475, 1481 (9th Cir. 1995)* (in sexual harassment case, exclusion of evidence of other female employees who claimed to have been sexually harassed was reversable and not harmless error); *Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1544 (11th Cir. 1994)* (exclusion of only evidence offered by insurance company to support its position that company would not have given policy to insured but for misrepresentation by insured would effect outcome of case and therefore was not harmless error).

(n6)Footnote 3. *Mason v. Southern Illinois University at Carbondale, 233 F.3d 1036, 1047 (7th Cir. 2000)* (when it was unlikely that excluding cumulative evidence would have caused jury to find differently, erroneous exclusion of cumulative evidence was harmless error).

(n7)Footnote 4. *Peters v. Five Star Marine Service, 898 F.2d 448, 450 (5th Cir. 1990)* (any error in excluding accident reports was harmless because all information contained in reports was given to jury through testimony of people who provided information for reports and people who prepared reports).

(n8)Footnote 5. *Mason v. Southern Illinois University at Carbondale, 233 F.3d 1036, 1047 (7th Cir. 2000)* (exclusion of witness testimony harmless error, when witness's credibility with jury would have been low once opposition party cross-examined her with her unequivocally contradictory affidavit.).

(n9)Footnote 1. *Doe, By & Through G.S. v. Johnson, 52 F.3d 1448, 1458 (7th Cir. 1995)* (judge gave limiting instruction after admission of improper evidence).

(n10)Footnote 2. *Okraynets v. Metro. Transp. Auth., 555 F. Supp. 2d 420, 427 (S.D.N.Y. 2008)* .

(n11)Footnote 3. *Qualley v. Clo Tex Int'l, Inc., 212 F.3d 1123, 1130 n. 13 (8th Cir. 2000)* .

(n12)Footnote 1. *Mason v. Southern Illinois University at Carbondale, 233 F.3d 1036, 1047 (7th Cir. 2000)* (exclusion of one witness' testimony harmless error when fact was proved by testimony from several other witnesses).

(n13)Footnote 2. *Frank v. Barnhart, 326 F.3d 618, 622 (5th Cir. 2003)* ; *Nelson v. Apfel, 131 F.3d 1228, 1237 (7th Cir. 1997)* .

(n14)Footnote 3. *Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)* .

(n15)Footnote 4. *McDonald v. Federal Laboratories, Inc., 724 F.2d 243, 245 (1st Cir. 1984)* .

(n16)Footnote 1. *Southern Pacific Transp. Co. v. Chabert, 973 F.2d 441, 448 (5th Cir. 1992)* .

(n17)Footnote 2. *Southern Pacific Transp. Co. v. Chabert, 973 F.2d 441, 448 (5th Cir. 1992)* (any error by district court in admission of certain evidence was harmless because of other competent evidence sufficient to uphold court's findings of fact and conclusions of law).

(n18)Footnote 3. *See Belk v. Charlotte-Mecklenburg Board of Education, 233 F.3d 232 (4th Cir. 2000)* .

(n19)Footnote 4. *E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994)* (admission of testimony regarding sexual harassment and limitation of rebuttal evidence on that issue was harmless error because disputed testimony did not in any way influence result of trial).

(n20)Footnote 5. *Jones v. Western Geophysical Co., 761 F.2d 1158, 1161 (5th Cir. 1985)* (in employment discrimination claim, any error in allowing testimony of witness previously not produced for deposition was harmless because no substantial reliance was placed on testimony).

(n21)Footnote 6. *Figgs v. Quick Fill Corp., 766 F.2d 901, 903 (5th Cir. 1985)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.121

§ 24.121 Errors Regarding Juryn*

[1] Denial of Jury Trial

If the court has made an erroneous order that a party is not entitled to a jury trial, that error is harmless provided that the evidence meets the standard for a judgment as a matter of law. n1 Thus, the error is harmless if a reasonable jury could not have a legally sufficient evidentiary basis to find for the party. n2 On the other hand, if a reasonable jury could have decided in favor of the party which made the jury demand, the error was not harmless. n3 In other words, if there were only questions of law to be resolved or, if it turned out that a jury verdict would have to have been set aside in any event because of lack of substantial evidence, it was harmless error to deny a jury trial. n4

[2] Jury Selection

When a potential juror does not honestly answer a question on voir dire, and then becomes a juror, the error is harmless unless the party seeking a new trial can demonstrate that the juror's failure to answer honestly precluded recognition of a valid basis for a challenge for cause. A party is entitled to a fair, but not necessarily perfect, trial. Therefore, the harmless error principles of Rule 61 are applied to errors in jury selection, so that errors that do not effect the essential fairness of the trial are ignored. n1 This harmless error analysis applies to several aspects of jury selection and deliberation, including voir dire, use of alternate jurors, the method of seating jurors, and the determination of the number of jurors deliberating a case. n2

Any error regarding jury selection is harmless unless the substantial rights of the parties are affected by the error. n3 Selecting an alternate juror by lottery in violation of Rule 47(b) n4 has been held to be harmless error when the substantial rights of the parties were not affected by the error. n5 On the other hand, denying counsel's peremptory challenge regarding an alternate juror who ultimately replaced another juror and rendered a verdict is considered reversible error because it could have changed the outcome. n6

[3] Jury Instructions

If the court makes any errors in its instructions to the jury, such as a misstatement of the law, the errors are subject to

harmless error analysis. n1 If the instruction is erroneous, the court must order a new trial only if the error was prejudicial based on the entire record. n2 After the court has examined the entirety of the proceedings, including the jury instructions as a whole, the court must determine the error was harmless, and deny a new trial, unless the errors in the instructions clearly misled the jury. n3

Failure to give an instruction is subject to the same harmless error analysis. Thus, if the court fails to give a particular instruction requested by a party that is correct, the error is harmless unless the instructions that were actually given mislead the jury or give the jury an inadequate representation of the law. n4 Erroneous instructions will also be harmless error if, in light of the jury's verdict they were irrelevant. n5 For example, an error in the definition of damages is harmless if the jury finds no liability. n6

An appellate court reviewing a trial court's instructions to the jury should consider them as a whole, in the context not only of the court's entire charge to the jury, but also in light of the allegations in the complaint, the opening statement, the closing argument and the evidence contained in the record. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* §§ 61.04, 61.07 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 50(a)(1)*; *see § 22.71* (standard for judgment as matter of law).

(n4)Footnote 3. *Solis v. Los Angeles, 514 F.3d 946, 958 (9th Cir. 2008)* .

(n5)Footnote 4. *King v. United Ben. Fire Ins. Co., 377 F.2d 728, 731 (10th Cir. 1967)* , *cert. denied, 389 U.S. 857 (1967)* (harmless error to deny jury trial in contracts case where issues related to execution of contract and whether any indemnity was owed).

(n6)Footnote 1. *McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* (juror's mistaken answer to question during voir dire did not amount to reversible error); *see Fed. R. Civ. P. 61.*

(n7)Footnote 2. *See Hanson v. Parkside Surgery Center, 872 F.2d 745, 749 (6th Cir. 1989)* (number of jurors); *Heath v. Cast, 813 F.2d 254, 257 (9th Cir. 1987)* (alternate jurors); *Rodriguez v. Quarterman, 535 F. Supp. 2d 820, 833 (S.D. Tex. 2007)* (voir dire).

(n8)Footnote 3. *See 28 U.S.C. § 2111*; *Fed. R. Civ. P. 61.*

(n9)Footnote 4. *See Fed. R. Civ. P. 47(b).*

(n10)Footnote 5. *Heath v. Cast, 813 F.2d 254, 257 (9th Cir. 1987)* .

(n11)Footnote 6. *Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992)* .

(n12)Footnote 1. *Pivnick v. White, 552 F.3d 479, 488 (6th Cir. 2009)* .

(n13)Footnote 2. *Clem v. Lomeli, 566 F.3d 1177 (9th Cir. 2009)* (error in instruction is harmless if party

supporting judgement demonstrates that it is more probable than not that jury would have reached same verdict had it been properly instructed); *Malone v. ReliaStar Life Ins. Co., 558 F.3d 683, 694 (7th Cir. 2009)* (prejudicial effect of combined errors).

(n14)Footnote 3. *Environ Products, Inc. v. Furon Co., 215 F.3d 1261, 1266-1267 (Fed. Cir. 2000)* .

(n15)Footnote 4. *Davignon v. Hodgson, 524 F.3d 91, 109 (1st Cir. 2008)* .

(n16)Footnote 5. *Bogle v. McClure, 332 F.3d 1347, 1357 (11th Cir. 2003)* .

(n17)Footnote 6. *Patel v. Gayes, 984 F.2d 214, 220 (7th Cir. 1993)* .

(n18)Footnote 7. *FDIC v. Mijalis, 15 F.3d 1314, 1318 (5th Cir. 1994)* ; *General Leaseways v. National Truck Leasing Ass'n, 830 F.2d 716, 725 (7th Cir. 1987)* .

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3-24 Moore's Manual--Federal Practice and Procedure § 24.122

§ 24.122 Errors in Procedural Rulingsn*

The parties and the court have considerable discretion in forming the pleadings. Thus, trial court rulings pertaining to amendments to pleadings and adding parties, premature dismissals of the complaint, or failures to dismiss a complaint or counterclaim are subject to the harmless error rule. n1 Thus, procedural errors are rarely held to be prejudicial to the extent that they affect substantial rights. n2 Furthermore, a trial court's failure to strictly adhere to all procedural formalities is harmless error unless prejudicial. For example, it was harmless error when the trial court converted a motion to dismiss pursuant to Rule 12(b) to a motion for summary judgment without the required 10-day notice. n3 An error in the court's denial of a continuance is also harmless unless the party moving for the continuance establishes how their substantial rights were prejudiced by the denial. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice*, § 61.03 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hunt v. Department of Air Force, Div. of USA, 29 F.3d 583, 588 (11th Cir. 1994)* (error in denying motion to amend harmless because even allowing amendment would not have cured defective service); *Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 924 (7th Cir. 1992)* (plaintiff's complaint alleging RICO claim failed to meet particularity requirement of Rule 9(b)).

(n3)Footnote 2. *Bulgo v. Munoz, 853 F.2d 710, 714 (9th Cir. 1988)* (any error in failing to dismiss counterclaim was harmless in light of jury verdict for defendant).

(n4)Footnote 3. *Denis v. Liberty Mut. Ins. Co., 791 F.2d 846, 850 (11th Cir. 1986)* ; *see Fed. R. Civ. P. 12(b)*.

(n5)Footnote 4. *Fontenot v. Upjohn, Co., 780 F.2d 1190, 1194 (5th Cir. 1986)* (appellate court refused to substitute its judgment concerning necessity of continuance for that of district court, because determination was for trial judge and because no resultant prejudice was shown); *Northern Indiana Pub. Serv. v. Carbon County Coal, 799 F.2d 265, 279 (7th Cir. 1986)* (unless there was reasonable probability that it caused plaintiff to lose case, it was not reversible error to deny request for continuance to allow more time for parties to conduct discovery).

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PART VI Trial and Judgment
CHAPTER 24 NEW TRIALS AND HARMLESS ERROR
PART III. HARMLESS ERROR
B. APPLICATION OF HARMLESS ERROR RULE TO PARTICULAR DETERMINATIONS

3-24 Moore's Manual--Federal Practice and Procedure § 24.123

§ 24.123 Court's Conduct of Trialn*

If a trial judge erroneously makes a judicial comment during the trial, the error is harmless unless the complaining party makes a clear and precise showing of the prejudice that resulted from the judge's comments. n1 Similarly, a trial judge's improper conduct will be held harmless error unless the appellant demonstrates substantial prejudice caused by the conduct. n2

A judge's failure to recuse himself or herself from a particular case is also subject to the harmless error rule. Three factors are to be considered when determining whether a judge's erroneous failure to recuse is harmless error: n3 (1) the risk of injustice to the parties in the particular case; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process. For example, after consideration of the three factors, it was held that the failure of a judge to recuse himself was harmless error even though the judge's law clerk was the son of a partner in the law firm which tried the case. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.10 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Vaughn v. Willis, 853 F.2d 1372, 1376 (7th Cir. 1988)* (because there was sufficient evidence of liability, any error in improper comments of judge during jury instructions was harmless).

(n3)Footnote 2. *Hansen v. C.I.R., 820 F.2d 1464, 1467 (9th Cir. 1987)* (trial judge's erroneous comments, when calculated toward facilitating an orderly trial, are not necessarily prejudicial).

(n4)Footnote 3. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 873, 108 S. Ct. 2194, 100 L. Ed. 2d*

855 (1988) (judge should have known disqualifying facts and recused himself from case because judge's impartiality might reasonably have been questioned).

(n5)Footnote 4. *Parker v. Connors Steel Co., 855 F.2d 1510, 1526 (11th Cir. 1988)* .

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PART VI Trial and Judgment
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PART III. HARMLESS ERROR
B. APPLICATION OF HARMLESS ERROR RULE TO PARTICULAR DETERMINATIONS

3-24 Moore's Manual--Federal Practice and Procedure § 24.124

§ 24.124 Misconduct by Attorneyn*

Misconduct by opposition attorneys is evaluated under the harmless error rule. n1 Thus, if opposition counsel makes improper comments, the error requires reversal of a judgment only if the comments are so prejudicial that they cast doubt on the justice of the verdict. The court must use a harmless error analysis whether the impropriety occurs during the opening argument, the presentation of evidence at trial, or the closing argument. n2

Even if an attorney's conduct is prejudicial because that conduct could improperly influence the outcome of the jury's verdict, that error is harmless if the court provides a sufficient curative instruction. n3 Additionally, if an attorney for a party has caused the court to commit an error, the party may not object to that error, and even if harmful, the error will not subject the verdict or judgment to reversal on appeal. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 61.11 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Abromson v. American Pac. Corp., 114 F.3d 898, 903 (9th Cir. 1997)* .

(n3)Footnote 2. *Gruca v. Alpha Therapeutic Corp., 51 F.3d 638, 644 (7th Cir. 1993)* ; *cf. Gilaj v. Gonzales, 408 F.3d 275, 290 (6th Cir. 2005)* (impropriety during opening or closing controlled by harmless error rule).

(n4)Footnote 3. *Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 340 (2d Cir. 1993)* (court gave curative instruction to nullify improper remarks made during closing argument).

(n5)Footnote 4. *McDonald v. Federal Laboratories, Inc., 724 F.2d 243, 245 (1st Cir. 1984)* (testimony from

plaintiff's design expert regarding faulty design in products liability case was first elicited by party who later objected to testimony).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure 25.syn

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
A. FUNCTION AND FORM OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.01

§ 25.01 Definition of Judgmentn*

[1] Judgment is Appealable Order

Under the federal rules, the term "judgment" includes any order from which an appeal lies. n1 Thus, the term judgment includes any appealable orders n2 that are of the following three primary types:

1. An order that constitutes a final judgment, which is an order that conclusively determines particular rights of the parties to the litigation and leaves nothing for the court to do but execute the order or resolve collateral issues. However, certain postjudgment motions automatically operate to postpone the finality of a court's judgment, pending the court's further determination whether the judgment should be modified to alter its adjudication of the rights of the parties. n3 These include motions for judgment as a matter of law under Rule 50(b), motions for amended or additional findings under Rule 52(b), or motions for alteration or amendment of a judgment under Rule 59(e). n4

2. An order that is otherwise made appealable by statute on an interlocutory basis, such as an order relating to an injunction, a receivership, or admiralty cases. n5

3. An order that, even though interlocutory, is the subject of a permissive appeal by the circuit court of appeals. n6

When an order is appealable, the order is a "judgment" under Rule 54(a), and all of the provisions of the federal rules relating to judgments are applicable to it. n7 Accordingly, Rule 54(a)'s definition of "judgment" affects the interpretation of several other rules, most notably Rule 50, Rule 52, and Rule 59. For example, when one of these rules specifies a deadline in terms of "after the entry of the judgment," the time for filing a Rule 59 motion does not begin to run until an appealable judgment is entered. n8

[2] Judgment May be Legal or Equitable Order

The term "judgment," as used in the Federal Rules of Civil Procedure, includes a "decree," n1 which was the traditional common-law term used to describe the final decision of a federal court sitting in equity and which is still used typically by many to describe a final court order that grants injunctive relief. n2 Consequently, the requirements applicable to

judgments under the federal rules apply to final, appealable orders in all actions, whether formerly at law or in equity. n3

[3] Related Terms

There are several terms which courts commonly use that are related to, but not necessarily synonymous with, the term "judgment." To avoid confusion, courts and attorneys must clearly define each term in the context it is used. "Rendition of judgment," for example, is defined as the pronouncement or annunciation of the adjudication or judgment of the court, including an appellate court. n1 Rendition does not mean the filing, entry, or recordation of the judgment, which are ministerial acts. n2 Similarly, an "opinion" does not itself constitute a judgment, n3 even if it contains conclusions of fact or law and states how the court intends to dispose of the case. Thus, an "opinion" is the written expression of the court's reasoning for a judgment, and an opinion normally is issued following entry of judgment. n4

"Entry of judgment" occurs when the clerk makes the notation of the judgment on the civil docket or the official public record; n5 entry is thus the notation of the submission of the particular judgment as provided by Rule 79(a). n6 The entry of judgment must be brief and must show the substance of each judgment of the court. n7"Recordation of judgment" is performed by the clerk under Rule 79(b), which provides that the clerk is to keep a correct copy of every final judgment or appealable order. n8"Filing of judgment" means delivery of the instrument into the actual custody of the proper officer, the clerk and implies deposit for permanent preservation. n9

The finality of judgment statute indicates that the term "decision" may actually be used as the equivalent of a "judgment" as defined in Rule 54(a). Thus, the finality statute refers to appeals from final "decisions," n10 which under the collateral-order doctrine include interlocutory decrees that are appealable and actually occur in advance of final "judgments." n11 On the other hand, the term "decision" is also often used to describe the findings of fact and conclusions of law made by the court in a case tried without a jury. When used in this sense, "decision" must be distinguished from "judgment," which must follow and be entered on the decision. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(a).*

(n3)Footnote 2. *Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161 (D.C. Cir. 2005)* .

(n4)Footnote 3. *Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 688 (6th Cir. 2005)* (citing **Moore's Federal Practice).**

(n5)Footnote 4. *See Weyant v. Okst, 198 F.3d 311, 315 (2d Cir. 1999)* .

(n6)Footnote 5. *See 28 U.S.C. § 1292(a).*

(n7)Footnote 6. *See 28 U.S.C. § 1292(b).*

(n8)Footnote 7. *TMF Tool Co. v. Muller, 913 F.2d 1185, 1188 (7th Cir. 1990)* (when order granting or denying Rule 11 sanctions is appealable, order is "judgment" under Rule 54(a)).

(n9)Footnote 8. *Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466-467 (9th Cir. 1989)* .

(n10)Footnote 1. *Fed. R. Civ. P. 54(a).*

(n11)Footnote 2. *See, e.g., Franklin v. District of Columbia, 163 F.3d 625, 628 (D.C. Cir. 1998)* (in class action by Spanish-speaking prisoners incarcerated in District of Columbia correctional institutions, court issued injunction in broad "decree" that ordered District to provide interpreters at all stages of disciplinary, classification, housing, adjustment, and parole hearing process).

(n12)Footnote 3. *Fed. R. Civ. P. 54(b)*, Committee Note to 1946 Amendments.

(n13)Footnote 1. *Dudley v. Penn-America Ins. Co., 313 F.3d 662, 669 (2d Cir. 2004)* .

(n14)Footnote 2. *See Fed. R. Civ. P. 79(a)(2)(C).*

(n15)Footnote 3. *Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 834-836 (4th Cir. 1987)* , *cert. denied, 488 U.S. 1042 (1989)* (although it frequently used word "judgment," document which combined dispository language with explanation of court's reasoning was not judgment).

(n16)Footnote 4. *Chambers v. American Trans Air, Inc., 990 F.2d 317, 319 (7th Cir. 1993)* .

(n17)Footnote 5. *National Sav. Bank v. Jefferson Bank, 127 F.R.D. 218, 223 (S.D. Fla. 1989)* (entry occurs when judgment placed on docket sheet, not when signed by court or date stamped by clerk).

(n18)Footnote 6. *See Fed. R. Civ. P. 79(a)(2)(C), (a)(3).*

(n19)Footnote 7. *United States v. Henry Brothers Partnership, 214 B.R. 192, 195 (8th Cir. 1997)* (entry of judgment is sometimes referred to as "docketing" because official notation is made on docket kept by clerk and must show date entry is made); *see Otis v. City of Chicago, 29 F.3d 1159, 1167-1168 (7th Cir. 1994)* ("entry" of judgment means its recording on docket of court; consequently, party entitled to appeal under collateral order doctrine must act within 30 days).

(n20)Footnote 8. *See Fed. R. Civ. P. 79(b).*

(n21)Footnote 9. *See Fed. R. Civ. P. 79(a)(2)*; *see also Diamond Shamrock Oil & Gas Corp. v. Commissioner of Revenues 422 F.2d 532, 534 (8th Cir. 1970)* .

(n22)Footnote 10. *See 28 U.S.C. § 1291.*

(n23)Footnote 11. *See Pratt v. Ventas, Inc., 365 F.3d 514, 521 (6th Cir. 2004)* .

(n24)Footnote 12. *Marsh-McBirney, Inc. v. Montedoro-Whitney Corp., 882 F.2d 498, 502-503 (Fed. Cir. 1989)* , *vacated on other grounds, 498 U.S. 1061 (1991)* (appellate court without jurisdiction because district court's oral findings and minute order not properly entered as judgment).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
A. FUNCTION AND FORM OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.02

§ 25.02 Form of Judgmentn*

[1] Separate Written Document

[a] Statement of Requirement

Generally, each judgment and amended judgment must be set out on a separate document. n1 However, the separate document requirement does not apply to orders granting or denying the following motions (even though such orders may otherwise be appealable as a final judgment): n2 a motion for judgment under Rule 50(b); n3 a motion to amend or make additional findings of fact under Rule 52(b); n4 a motion for attorney's fees under Rule 54(d)(2); n5 a motion for new trial or to alter or amend a judgment under Rule 59; n6 and a motion for relief from judgment under Rule 60. n7

The term "separate," as used in the separate document requirement, means that th e contents of the judgment should not be included with another document , such as an opinion, which contains the reasoning of the court. n8 Official forms have been promulgated pursuant to the Federal Rules, n9 to assist courts in the preparation of separate document judgments. However, the separate document does not need to take any particular form, provided that it is a self-contained written order specifying the disposal of all claims and any relief to which any prevailing parties are entitled. n10 A judgment may even be drafted by one or more of the attorneys, provided that the court has directed the attorney to prepare the draft, approved the form and contents of the judgment, and the decision to enter that judgment has actually been made by the court. n11

[b] Purpose of Requirement

The purpose of the separate document requirement is to specify when a judgment has been entered, so that the parties know precisely when they must prepare post-judgment motions or appeals. n12 In light of this purpose, recent amendments to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure make clear that a technical violation of Rule 58's separate document requirement do not invalidate an otherwise proper appeal from that judgment. n13 Furthermore, an appellant may waive the separate document requirement. n14 Any party may request that judgment be set forth on a separate document. n15

[c] Label On Document Does Not Control Effect

The label on a document does not necessarily control its effect as a judgment or other type of order, although the label may be helpful as an indication of its intended purpose. n16 It is the effect of a document, based on its contents, that controls whether it constitutes a final, appealable adjudication between the parties. n17 Thus, even if labeled "judgment" it may not have that effect if it fails to set out the required elements. n18 Conversely, the document need not be labeled judgment to have that effect. n19 For example, even a document labeled as an "order" by the court may constitute a judgment provided that it satisfies the requirements of the federal rules, n20 and thus indicates the court's intention to adjudicate the dispute with finality. n21

[2] Contents of Judgment

At a minimum, a judgment must be a self-contained document stating who has won and whether any relief has been awarded. The judgment must omit the reasons for the disposition, which should appear in the court's opinion. n1 If no relief is awarded, the judgment must state so n2 and must state the disposition of all outstanding claims against all parties. n2.1 The judgment must clearly indicate that the court intends to adjudicate the dispute with finality, n2.2 in that it conclusively determines the rights of the parties to the extent it leaves nothing for the court to do but execute the order or resolve collateral issues. n3 It is advisable for a judgment to state the names of the parties affected by it in a manner that clearly identifies them, particularly when there is a judgment debtor, although it is not absolutely necessary to include names when the parties are otherwise sufficiently identified. n4 Furthermore, the judgment should state the residence or business address of the parties as a means of identification. n5 A proper judgment may also include identification of particular parties as the prevailing parties for purposes of recovery of costs under Rule 54(d), or may provide that there is no prevailing party and that each party is required to bear the party's own fees and costs. n6

[3] Prohibition Against Extraneous Information

A judgment must be set out in a document separate from the analysis and reasoning. n1 Therefore, the court should not include in that judgment extraneous information, such as a recital of the pleadings, the report of a master, or the record of prior proceedings. n1.1 Even though the rule is phrased in mandatory terms, the inclusion of such extraneous information does not necessarily invalidate the judgment, because the requirements of form may be waived by the parties n2 and because, if the judgment contains the necessary specifications of relief and intent to adjudicate, extraneous matter that does not conflict with such a disposition may be ignored. n3 However, a document is not effective as a final judgment if it contains extraneous reasoning or analysis which creates the very ambiguity that Rule 54(a) was enacted to avoid. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.03* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 58(a).*

(n3)Footnote 2. *Fed. R. Civ. P. 58(a)(1)-(5).*

(n4)Footnote 3. *See Fed. R. Civ. P. 50(b).*

(n5)Footnote 4. *See Fed. R. Civ. P. 52(b).*

(n6)Footnote 5. *See Fed. R. Civ. P. 54(d)(2).*

(n7)Footnote 6. *See Fed. R. Civ. P. 59.*

(n8)Footnote 7. *See Fed. R. Civ. P. 60.*

(n9)Footnote 8. *Chambers v. American Trans Air, Inc., 990 F.2d 317, 319 (7th Cir. 1993)* ; *see* [3], *below* (effect of inclusion of extraneous matters).

(n10)Footnote 9. *See* [2], *below.*

(n11)Footnote 10. *Stamatakis Indus. v. J. Walter Thompson, Inc., 944 F.2d 382, 384 (7th Cir. 1991)* ; *see* [2], *below* (required contents of judgment).

(n12)Footnote 11. *In re Colony Square Co., 819 F.2d 272, 276-277 (11th Cir. 1987)* , *cert. denied, 485 U.S. 977 (1988)* ; *see § 25.14[4].*

(n13)Footnote 12. *ABF Capital Corp. v. Osley, 414 F.3d 1061, 1064-1065 (9th Cir. 2004)* ; *see Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* (citing **Moore's Federal Practice**).

(n14)Footnote 13. *See Fed. R. App. p. 4(a)(7)(B).*

(n15)Footnote 14. *See Yates v. District of Columbia, 324 F.3d 724, 725 (D.C. Cir. 2003)* ; *see also § 25.41[4].*

(n16)Footnote 15. *See Fed. R. Civ. P. 58(d)*; *see also Utah v. Norton, 396 F.3d 1281, 1287 (10th Cir. 2005)* ; *Fed. R. Civ. P. 58(d)*, Committee Note to 2002 Amendments.

(n17)Footnote 16. *Saturn Distrib. Corp. v. Paramount Saturn, Ltd., 326 F.3d 684, 686-687 (5th Cir. 2003)* .

(n18)Footnote 17. *See Montano v. City of Chicago, 375 F.3d 593, 598 (7th Cir. 2004)* (document labeled "order" appealable as "final" judgment because it effectively ended litigation in particular respect).

(n19)Footnote 18. *See Fed. R. Civ. P. 54(b)*; *Dudley v. Penn-America Ins. Co., 313 F.3d 662, 670 (2d Cir. 2002)* (even paper labeled "judgment" may not have effect as judgment); *see also* [2], *below* (required contents of judgment).

(n20)Footnote 19. *Webb v. Ada County, 285 F.3d 829, 836 (9th Cir. 2002)* , *cert. denied, 154 L. Ed. 2d 292 (2002)* .

(n21)Footnote 20. *Pozzi v. Smith, 171 F.R.D. 175, 177-178 (E.D. Pa. 1997)* (document named by court as "Findings and Order" nevertheless qualified as judgment when it satisfied requirement that court set out particulars of judgment on separate document that contained court's order of relief disposing of all outstanding claims against all parties).

(n22)Footnote 21. *Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994)* .

(n23)Footnote 1. *Dudley v. Penn-America Ins. Co., 313 F.3d 662, 669-670 (2d Cir. 2002)* .

(n24)Footnote 2. *TDK Elecs. Corp. v. Draiman, 321 F.3d 677, 679 (7th Cir. 2003)* .

(n25)Footnote 2.1. *Pozzi v. Smith, 171 F.R.D. 175, 177-178 (E.D. Pa.1997)* .

(n26)Footnote 2.2. *Saturn Distrib. Corp. v. Paramount Saturn, Ltd., 326 F.3d 684, 686-687 (5th Cir. 2003)* .

(n27)Footnote 3. *See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201-203 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* .

(n28)Footnote 4. *Witty v. Dukakis, 3 F.3d 517 (1st Cir. 1993)* (although judgment made no particular mention of intervenors, circuit court held that judgment was final and binding on intervenors because intervenors had intervened as parties plaintiff and their substantive claims matched those of original plaintiffs).

(n29)Footnote 5. *See* 20A *Moore's Federal Practice, § 349.05* (Matthew Bender 3d ed.), Form 5, Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel.

(n30)Footnote 6. *Zenith Insurance Co. v. Breslaw, 108 F.3d 205, 206-207 (9th Cir. 1997)* .

(n31)Footnote 1. *See Employers' Ins. of Wausau v. Titan Int'l, 400 F.3d 486, 488 (7th Cir. 2005)* .

(n32)Footnote 1.1. *Fed. R. Civ. P. 54(a)*, Committee Note.

(n33)Footnote 2. *Scola v. Boat Frances, R., Inc., 618 F.2d 147, 151 (1st Cir. 1980)* (if plaintiff appeals from "judgment" notated at end of magistrate's adopted recommended disposition, and defendant does not object, defect in form of judgment is waived).

(n34)Footnote 3. *Pemberton v. State Farm Mut. Auto Ins., 996 F.2d 789, 791 (5th Cir. 1993)* .

(n35)Footnote 4. *Reich v. ABC/York-Estes Corp., 64 F.3d 316, 319 (7th Cir, 1995)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
A. FUNCTION AND FORM OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure §§ 25.03through 25.09

[Reserved]

§§ 25.03[Reserved]

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.10

§ 25.10 District Court May Adjudicate Fewer Than All Claimsn*

The district court has authority to direct the entry of a final judgment as to one or more but fewer than all of the claims or parties in any action when more than one claim for relief is presented in the action, or when multiple parties are involved, provided the court makes an express determination that there is no just reason for delay and an express direction for the entry of the judgment. n1 If the court has not made such an express determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. n2

Rule 54(b) deals with two situations: an action that involves multiple claims or multiple parties. It has no effect on the appealability of a collateral order, n3 even if made in a multiple claims or parties action; nor does it affect interlocutory review. n4 Rule 54(b) may be used in single claim actions if multiple parties are involved. Thus, an appeal lies from an order in a single claim action dismissing one or more but fewer than all of the parties, provided the court makes its required determination and direction. Such determination that there is no reason for delay and direction for entry of judgment is referred to by courts as Rule 54(b) certification. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(b)*; *see O'Bert v. Vargo, 331 F.3d 29, 40-42 (2d Cir. 2003)* (discussing policy considerations involved in district court's decision to permit partial judgment); *ITOFCA, Inc. v. MegaTrans Logistics, Inc., 235 F.3d 360, 364-365 (7th Cir. 2000)* (Rule 54(b) authorizes district court to make immediately appealable judgment that disposes with finality of one or more but less that all claims, even though other claims remain pending in

district court, so that suit as whole has not been finally disposed of by that court).

(n3)Footnote 2. *Fed. R. Civ. P. 54(b).*

(n4)Footnote 3. *Petties v. District of Columbia, 227 F.3d 469, 472-473 (D.C. Cir. 2000)* ; *see In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1117-1118 (7th Cir. 1979)* (despite district court's refusal to enter Rule 54(b) judgment, order approving partial settlement of class action appealable as collateral order); *see also 28 U.S.C. § 1291.*

(n5)Footnote 4. *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367 (11th Cir. 1987)* (although the district court had not disposed of all of plaintiff's claims for relief, court of appeals had jurisdiction over defendant's appeal of grant of permanent injunctive relief under *28 U.S.C. § 1292(a)(1)*).

(n6)Footnote 5. *Good v. Ohio Edison Co., 104 F.3d 93, 95 (6th Cir. 1997)* (Rule 54(b) certification is intended to strike balance between undesirability of more than one appeal in single action and need for making review available in multiple-party or multiple-claim situations at time that best serves needs of parties).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.11

§ 25.11 Purpose of Rule Allowing Partial Judgmentsn*

Technical pleading rules have been replaced in the federal system n1 by provisions that allow unrestricted joinder of claims n2 and liberalized joinder of parties. n3 Other provisions give a district court increased authority to structure the litigation and conduct separate trials as justice or convenience require. n4 Although the increased opportunity for joinder, combined with these case management techniques, increases efficiency in the district court, they also create a substantial potential for prejudice from the delay in final disposition and appeal of what may constitute entirely distinct claims. Therefore, the purpose of Rule 54(b) is designed to permit just such an immediate appeal of an otherwise final decision in a multi-claim or multi-party action. n5 While the increased opportunity for joinder of claims and parties allowed by the federal rules demonstrated a need for relaxing the restrictions on what should be treated as a judicial unit for purposes of appellate jurisdiction, sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that in multiple claim or party actions that some final decisions on less than all of the claims should be appealable without waiting for a final decision on all of the claims. n6

Rule 54(b) certification is intended to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the parties. n7 Although the rule does not refer to certification, many courts often refer to the procedure under Rule 54(b) as "certifying" a judgment for appeal, n8 or issuing a "certificate" making an otherwise unappealable decision appealable. n9 However, even though the rule does not require a formal certification, it must be established that the court has made an express determination that there is no just reason for delay. n10 In this regard, although courts of appeals have not insisted that the determination be made in the words of Rule 54(b), there are cases in which a mere statement by the district court that it is certifying an appeal has been held sufficient for appeal under Rule 54(b). n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.21* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Registration Control Sys. v. Compusystems, Inc., 922 F.2d 805, 807-808 (Fed. Cir. 1990)* (rules do not require formalistic, technical, or ritualistic detail).

(n3)Footnote 2. *See Fed. R. Civ. P. 18.*

(n4)Footnote 3. *See Fed. R. Civ. P. 20.*

(n5)Footnote 4. *See Fed. R. Civ. P. 42.*

(n6)Footnote 5. *ITOFCA, Inc., Plaintiff-Appellant, v. MegaTrans Logistics, Inc., 2000 U.S. App. LEXIS 33125, *11 (7th Cir. 2000)* (Rule 54(b) authorizes district court to make immediately appealable judgment that disposes with finality of one or more but less that all claims).

(n7)Footnote 6. *Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432, 76 S. Ct. 895, 100 L. Ed. 1297 (1956)* ; *General Acquisition v. GenCorp, Inc., 23 F.3d 1022, 1026 (6th Cir. 1994)* (Rule 54(b) is designed to facilitate entry of judgment on final disposition of fewer than all claims or as to fewer than all parties in case).

(n8)Footnote 7. *Good v. Ohio Edison Co., 104 F.3d 93, 95 (6th Cir. 1997)* .

(n9)Footnote 8. *See, e.g., Shintom Am., Inc. v. Car Telephones, Inc., 45 F.3d 1107, 1110-1111 (7th Cir. 1995)* (court properly considered issue of plaintiff's potential insolvency in "certifying" judgment under Rule 54(b)).

(n10)Footnote 9. *Prudential Securities, Inc. v. Yingling, 226 F.3d 668, 670-671 (6th Cir. 2000)* (Rule 54(b) "certificate" had not been issued by district court, and, absent an interlocutory appeal or Rule 54(b) certificate, permanent injunction issued by district court remained part of case pending before district court until it issued its final judgment disposing of all claims).

(n11)Footnote 10. *Willhelm v. Eastern Airlines, Inc., 927 F.2d 971, 974 (7th Cir. 1991)* .

(n12)Footnote 11. *See Fox v. Baltimore City Police Dep't, 201 F.3d 526, 531-532 (4th Cir. 2000)* (even though district court did not state reasons for its decision to certify partial judgment under Rule 54(b) for immediate appeal, failure did not invalidate affirmative certification).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.12

§ 25.12 Prerequisites to Partial Judgmentn*

[1] Requirement of Multiple Claims or Multiple Parties

[a] Rule Inapplicable to Single Claim Between Two Parties

Under Rule 54(b), the district court may direct the entry of judgment only in those cases in which either more than one claim for relief is presented or multiple parties are involved. Consequently, if an action involves only a single claim for relief asserted by only one plaintiff against one defendant, Rule 54(b) is not applicable. n1 This prerequisite is applied because Rule 54(b) does not relax the requirement of finality of judgment; any order that finally disposes of the single claim in such an action is appealable as a final judgment under *28 U.S.C. § 1291* in any event, and no certification under Rule 54(b) is necessary. n2 For the same reason, any order that adjudicates the entirety of a multi-claim or multi-party action is appealable without the necessity of a certificate under Rule 54(b). n3

[b] Practical Test for Multiple Claims

Unless multiple parties are involved, n4 Rule 54(b) is limited by its terms to those cases in which more than one claim for relief is presented. n5 In this regard, courts have not developed a formal test but apply a practical analysis to determine whether the action presents multiple claims for relief. n6 If the pleadings rely on entirely separate factual allegations, the claims arising from those allegations, constitute multiple claims for the purposes of Rule 54(b). n7 In most cases, however, there is some factual overlap between the adjudicated and unadjudicated claims, and the critical question is what degree of overlapping necessitates a finding that the factual allegations present one claim for relief. Multiple causes of action do not necessarily equate to multiple claims for purposes of Rule 54(b). n8 Furthermore, the mere fact that the plaintiff has requested relief under different sources of law or different legal theories does not necessarily mean that multiple claims are presented. n9

However, if the causes of action depend on proof of different facts or have different burdens of proof, they may be considered separate claims for purposes of Rule 54(b) even if factual overlap is present. n10 Similarly, if the causes of action or factual allegations asserted permit only one recovery, only one claim for relief is presented. n11 If, however, separate recovery is likely, courts have held that separate claims are presented under Rule 54(b). n12

The Supreme Court has clearly stated that if a claimant requests several different types of relief, but asserts only one set of facts and one legal theory, the assertion does not present multiple claims under Rule 54(b). n13 Therefore, if the claimant seeks several kinds of damages arising from the same set of facts, an order disposing of only some of the claims for damages may not be made into a judgment under Rule 54(b). Similarly, if the claimant seeks both declaratory relief and damages, the granting of declaratory relief is not an appealable judgment under Rule 54(b) if the prayer for damages remains unadjudicated. n14

Rule 54(b) provides that if multiple claims are presented, a final judgment may be entered on any of the claims, whether they are presented as a claim, counterclaim, cross-claim or third-party claim. n15 The Supreme Court has concluded that the amendment adopting this language has eliminated the prior test requiring the claims to arise from the same transaction or occurrence and, therefore, that a claim and a compulsory counterclaim may be multiple claims for the purposes of Rule 54(b). A district court has the power to enter judgment on a claim even if a compulsory counterclaim remains for adjudication. n16

[c] Disposition of Claims Involving Multiple Parties

In addition to the context of multiple claims, a court may also order a partial judgment under Rule 54(b) when multiple parties are involved and the court has made a final adjudication as to one or more of those multiple parties. n17 This provision ensures that the disposition of the entire interest of one of those multiple parties is treated in the same fashion under Rule 54(b) regardless of the joint or distinct nature of the liability asserted. n18 Under the rule, a court may direct the entry of a final judgment as to one or more but fewer than all of the parties. This language has been interpreted to require a final adjudication of all of the rights and liabilities of at least one party before judgment may be directed with respect to that party; thus, the complete interest of the party must be finally adjudicated. n19 A common application of the rule to multiple party actions is the dismissal, summary judgment, or other adjudication of all of the claims asserted against one or more of multiple defendants. n20 A Rule 54(b) judgment as to one of multiple parties must dispose of the entire interest of that party. If claims by or against the party remain pending in the district court, the Rule 54(b) judgment is generally improper. If the judgment disposes of one of multiple claims by or against that party, however, the presence of pending claims involving that party does not necessarily make the judgment improper, because the case presents both multiple claims and multiple parties. n21 However, the fact that the parties remain adversaries on pending claims in the district court is a factor that weighs against the exercise of the court's discretion to enter judgment under Rule 54(b). n22

[2] Requirement of Complete Adjudication of At Least One Claim

An order partially adjudicating a multi-party or multi-claim action may be certified for appeal under Rule 54(b) only if the order meets Section 1291's n1 standard of finality as to the matters adjudicated. Stated another way, a district court has the power to enter a Rule 54(b) judgment only if the adjudication is a "final decision" under Section 1291. n2 A district court must first determine that it is dealing with a "final judgment." Therefore, the adjudication must be a "judgment" in the sense that it is a decision on a cognizable claim for relief and must be "final" in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action. n3 If the district court enters judgment on something less than a final disposition of an entire claim, the Rule 54(b) judgment is improper, and the court of appeals is without jurisdiction to hear the appeal. For example, if an order adjudicates liability without an assessment of damages or other relief, the order is not "final" under Section 1291 and, therefore, may not be made appealable by certification under Rule 54(b). n4 It should be noted that the inapplicability of Rule 54(b) to these orders does not mean that the orders may not be reviewed at all. If truly collateral to the merits, the order may be reviewable under the collateral order doctrine. n5

In addition to being final, an order must be a judgment in the sense that it is a decision on a cognizable claim for relief. n6 Consequently, the order must affirmatively decide the claims certified. An order on a collateral issue such as the

manner of the adjudication of the claim may not be a judgment under Rule 54(b), and the court does not have authority to certify it as a judgment under the rule. n7 For example, an order striking a jury demand only decides how a claim will be resolved and does not decide the claim itself and so may not be made a judgment under Rule 54(b). n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.22* (Matthew Bender 3d ed.).

(n2)Footnote 1. *General Acquisition v. GenCorp, Inc., 23 F.3d 1022, 1027-1028 (6th Cir. 1994)* (in case with only single plaintiff and single defendant, Rule 54(b) applicable only if multiple claims were presented; request for different types of relief for same injury did not constitute multiple claims); *Monument Management Ltd. Partnership I v. City of Pearl, 952 F.2d 883, 885 (5th Cir. 1992)* (partial summary judgment not allowed because case presented only single claim).

(n3)Footnote 2. *Brown v. United States, 976 F.2d 1104, 1107 (7th Cir. 1992)* (even though case was consolidated with others, it retained separate character, so that only order disposing of entire claim was final and appealable absent Rule 54(b) certificate).

(n4)Footnote 3. *See Production & Maintenance Employees' Local No. 504 v. Roadmaster Corp., 954 F.2d 1397, 1402 (7th Cir. 1992)* .

(n5)Footnote 4. *See* [c], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 54(b)*.

(n7)Footnote 6. *Continental Airlines v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987)* (citing **Moore's Federal Practice** for notion that Rule 54(b) requires pragmatic approach focusing on severability and efficient judicial administration).

(n8)Footnote 7. *Hudson River Sloop Clearwater, Inc. v. Department of Navy, 891 F.2d 414, 418 (2d Cir. 1989)* .

(n9)Footnote 8. *NAACP v. American Family Mutual Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992)* , *cert. denied, 508 U.S. 907 (1993)* (one set of facts producing one injury creates one claim for relief, no matter how many laws defendant's deeds allegedly violate).

(n10)Footnote 9. *General Acquisition v. GenCorp, Inc., 23 F.3d 1022, 1029 (6th Cir. 1994)* (three different liability theories asserted by securities plaintiff did not satisfy multiple claims requirement of Rule 54(b)).

(n11)Footnote 10. *Gregorian v. Izvestia, 871 F.2d 1515, 1519 (9th Cir. 1989)* , *cert. denied, 493 U.S. 891 (1989)* (adjudicated libel claim depended on facts for proof different from pending claim for intentional infliction of emotional distress, so claims were separate under Rule 54(b)).

(n12)Footnote 11. *In re Southeast Banking Corp., 69 F.3d 1539, 1549-1550 (11th Cir. 1995)* .

(n13)Footnote 12. *Samaad v. City of Dallas, 940 F.2d 925, 932 (5th Cir. 1991)* (because equal protection and takings claims were premised on separate facts and separate recovery on each was permissible, multiple claims were presented and court had authority to issue Rule 54(b) judgment).

(n14)Footnote 13. *Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742-743, 96 S. Ct. 1202, 47 L. Ed. 2d 435*

(1976) .

(n15)Footnote 14. *Landry v. G.B.A., 762 F.2d 462, 463-464 (5th Cir. 1985)* .

(n16)Footnote 15. *Fed. R. Civ. P. 54(b).*

(n17)Footnote 16. *Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445, 451-453, 76 S. Ct. 904, 100 L. Ed. 1311 (1956)* (whether counterclaim was compulsory or permissive was irrelevant, because Rule 54(b) does not preclude entry of judgment even if unadjudicated claims arise from same transaction or occurrence); *In re Southeast Banking Corp., 69 F.3d 1539, 1547 (11th Cir. 1995)* (factual allegations arising from same transaction or occurrence may present separate claims for purposes of Civil 4(b)).

(n18)Footnote 17. *Fed. R. Civ. P. 54(b).*

(n19)Footnote 18. *Fed. R. Civ. P. 54(b)*, Advisory Committee Note to 1961 Amendments.

(n20)Footnote 19. *Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995)* .

(n21)Footnote 20. *Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 579 (1st Cir. 1994)* (summary judgment completely disposing of plaintiff's claims against two defendants may be entered as final judgment under Rule 54(b)).

(n22)Footnote 21. *Davis v. Mann, 882 F.2d 967, 972, n.15 (5th Cir. 1989)* (plaintiff's due process claim was distinct from *First Amendment* claim, so that Rule 54(b) judgment was proper despite fact that latter claim remained pending against all defendants).

(n23)Footnote 22. *Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1336 (4th Cir. 1993)* .

(n24)Footnote 1. *28 U.S.C. § 1291.*

(n25)Footnote 2. *Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 869, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)* (definition of finality).

(n26)Footnote 3. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n27)Footnote 4. *Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1336-1338 (4th Cir. 1993)* (because damages on state claims could not be computed until federal claims were resolved, judgment under Rule Civil 54(b) on state claims was improper).

(n28)Footnote 5. *Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550, 555-556 (5th Cir. 1992)* ; *see* Ch. 27, *General Principles of Appeal*.

(n29)Footnote 6. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n30)Footnote 7. *Perera v. Siegel Trading Co., 951 F.2d 780, 785 (7th Cir. 1992)* (order requiring arbitration does not decide claim and is therefore not "judgment" under Rule 54(b)).

(n31)Footnote 8. *Howard v. Parisian, Inc., 807 F.2d 1560, 1566 (11th Cir. 1987)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.13

§ 25.13 Discretion of District Court to Enter Partial Judgmentn*

[1] Discretionary Nature of District Court's Authority

If the district court enters an order finally disposing of one or more claims or the claims by or against one or more parties and that order would be appealable in an action presenting only those claims, the district court has the discretion to enter an order for immediate appeal of the claims. The district court may employ its discretion to dispatch an order for immediate appeal under Rule 54(b) only by making an express determination that there is no reason for delay and by expressly directing the entry of judgment. n1 The combination of the direction and determination is often referred to as certification of the order under Rule 54(b). n2 In the absence of such certification, the order is unappealable. n3

The purpose of the express determination and direction requirement is to ensure that the parties can judge the effect of the order entered, including the right of, or obligation to, appeal. n4 Thus, the time to appeal from an order disposing of part of a case does not begin to run until the district court certifies that order as a final judgment under Rule 54(b). n5 When the district court exercises its discretion to permit immediate appeal, the court of appeals must review the district court's decision to do so, considering the preference for a single appeal. If the district court has certified the order for appeal despite the likelihood that the certification will lead to multiple appeals rasing the same issues, the court of appeals may reject the certification as an abuse of discretion and refuse to accept jurisdiction over the appeal. n6

[2] Factors Considered by Court in Exercise of Discretion

[a] Summary of Factors

The district court may look to all the facts and circumstances of the case in determining whether there is just reason for delaying the entry of judgment under Rule 54(b). n1 The propriety of a Rule 54(b) certification thus turns on a number of factors, including: n2 (1) whether the disputed ruling is final, n3 (2) the extent to which disputed ruling raises legal or factual issues that overlap with any claims still pending in the district court, n4 and (3) how equities and efficiencies of piecemeal review would compare to those in single proceeding. Although the district court has the power under Rule 54(b) to enter a final judgment disposing of one or more, but fewer than all, of the claims or parties in a multi-claim or multi-party action, it has discretion in deciding whether to exercise it. Because of this discretion, the failure of the

district court to enter a Rule 54(b) judgment may not be challenged by an immediate appeal. n5 Of the three factors above, the most important is the third, which is stated in the rule as the court's determination that the court makes an "express determination that there is no just reason for delay." n6 In this regard, the Supreme court has stated that once the district court has determined that the order is eligible for certification under Rule 54(b), because there are multiple claims or multiple parties and because the order involved finally disposes of a cognizable claim for relief, the court must then determine whether there is any just reason for delay in entering the order as a judgment. n7 This means that the district court should exercise its discretion in such a way that application of Rule 54(b) effectively preserves the historic federal policy against piecemeal appeals. n8

[b] Determination of Relation Among Claims

The closeness of the relationship between the claims is the essence of two of the important factors in the court's determination: the extent to which the disputed order raises legal or factual issues that overlap with any claims still pending in the district court and how the equities and efficiencies of piecemeal review would compare to those in a single proceeding. In other words, if the claims are closely related the court should deny entry of partial judgment under Rule 54(b); if the claims are distinct, the court should enter partial judgment when partial judgment would promote justice. n9 Thus, the district court should consider whether the claims under review were separate from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals. n10 For example, if the correctness of the judgment might be mooted by a later decision of the unadjudicated claims, the court of appeals will not review the certified judgment, because the court of appeals would be rendering nothing but an advisory opinion. n11 On the other hand, if the claims are sufficiently distinct so that duplicative appellate review will be avoided, the court of appeals will generally find that entry of a Rule 54(b) judgment did not constitute an abuse of discretion. n12

There is one further qualification. If the adjudicated and unadjudicated claims are distinct, the district court still should not exercise its discretion to enter judgment under Rule 54(b) unless doing so will alleviate some hardship or injustice that would result from the delay in the entry of judgment. n13 If a Rule 54(b) judgment is requested by motion, the moving party must make an affirmative showing of the hardship or injustice that would result if judgment is not entered. n14

The court should not enter judgment routinely n15 or as an accommodation to counsel. n16 Furthermore, judgment may not be entered under Rule 54(b) merely because all the parties have stipulated or otherwise agreed to that procedure. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.23* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(b).*

(n3)Footnote 2. *See § 25.11.*

(n4)Footnote 3. *Prudential Securities, Inc. v. Yingling, 226 F.3d 668, 670-671 (6th Cir. 2000)* (Rule 54(b) "certificate" had not been issued by district court; therefore, permanent injunction remained part of case until court issued its final judgment disposing of all claims); *Harris v. United States, 175 F.3d 1318, 1320 (11th Cir. 1999)* (entry of final judgment against fewer than all parties is deemed certification of judgment under Rule 54(b) when district court had expressly granted motion to certify judgment pursuant to Rule 54(b) and entry of final judgment as to fewer than all

parties could only have been made under Rule 54(b) because no final judgment had been rendered with regard to remaining parties in case).

(n5)Footnote 4. *Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220-1221 (5th Cir. 1990)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. *Wilson v. Navistar Int'l Transp. Corp., 193 F.3d 1212, 1213 (11th Cir. 1999)* .

(n7)Footnote 6. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* (court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units).

(n8)Footnote 1. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 9-10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n9)Footnote 2. *Britton v. Maloney, 196 F.3d 24, 27 n.1 (1st Cir. 1999)* .

(n10)Footnote 3. *See* 25.12[2].

(n11)Footnote 4. *See* 25.12[1].

(n12)Footnote 5. *McCall v. Deeds, 849 F.2d 1259, 1259 (9th Cir. 1988)* .

(n13)Footnote 6. *See Fed. R. Civ. P. 54(b).*

(n14)Footnote 7. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n15)Footnote 8. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* (proper for district judge to consider such factors as whether claims under review were separate from others remaining to be adjudicated and whether nature of claims already determined was such that no appellate court would have to decide same issues more than once even if there were subsequent appeals).

(n16)Footnote 9. *Britton v. Maloney, 196 F.3d 24, 27-28 (1st Cir. 1999)* (court of appeals affirmed district court's certification under Rule 54(b) because certified judgment completed plaintiff's case against one defendant, judgment's issues were analytically distinct from those in plaintiff's case against remaining defendant, and there was only slight probability of prejudice from immediate appellate review).

(n17)Footnote 10. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n18)Footnote 11. *Interstate Power Co. v. Kansas City Power, 992 F.2d 804, 807 (8th Cir. 1993)* (district court abused its discretion in ordering judgment under Rule 54(b) on third-party claim for contribution because outcome of main action might entirely moot judgment entered).

(n19)Footnote 12. *Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995)* .

(n20)Footnote 13. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 16-17 (2d Cir. 1997)* (judicial efficiency was promoted by certifying appealability of dismissed claims because if dismissed claims were to be reinstated, immediate appeal would allow them to be tried together with other claims in suit, and piecemeal appeals would not impair judicial efficiency in that appeal of dismissed claims presented virtually no overlapping issues with possible subsequent appeals of other claims).

(n21)Footnote 14. *Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1337 (4th Cir. 1993)* .

(n22)Footnote 15. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10, 100 S. Ct. 1466, 64 L. Ed. 2d 1 (1980)* .

(n23)Footnote 16. *See Burlington N. R. Co. v. Bair, 754 F.2d 799, 800 (8th Cir. 1985)* .

(n24)Footnote 17. *In re Lindsay, 59 F.3d 942, 951-952 (9th Cir. 1995)* , *cert. denied, 516 U.S. 1074 (1996)* (although attorneys agreed to entry of judgment under Rule 54(b), district court should have stricken that language from orders because court made no findings to support Rule 54(b) determination).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.14

§ 25.14 Procedures for District Court's Decision to Enter Partial Judgmentn*

[1] Initiation of Partial Judgment

The district court may exercise its discretion to enter a Rule 54(b) judgment on the court's own initiative or by motion of a party, n1 and it may also be raised sua sponte by the court of appeals. n2 If a district order grants affirmative relief on a claim, the claimant will often seek to have the order entered as a judgment so that it may be enforced, while the defendant may request entry of a judgment in order to facilitate its appeal. Thus, parties frequently file a joint or stipulated motion seeking a Rule 54(b) judgment. Even though the parties might agree to that disposition, the motion still calls for the exercise of the court's discretion, and the court should make its own independent determination of whether entry of the judgment is appropriate. The judgment should not be entered merely because the parties agree to it. n3

[2] Court's Statement of Reasons for Partial Judgment

Even though Rule 54(b)'s requirement that the district court must make an express determination that there is no just reason for delay does not require a formal statement of the reasoning for making the judgment, n1 it has been held the court should state its reasons. n2 The rule calls for the exercise of the court's discretion and if that exercise is to be subject to meaningful appellate review, the court of appeals must be informed of the basis for the court's certification of the judgment. n3 A statement of reasons is also required to ensure that the district court actually intended to enter judgment under Rule 54(b). n4 The district court should not simply declare that there is no just reason for delay but should set forth the justification for that determination. n5 Conversely, if the justification offered is sufficient, the district court need not recite the language of the rule that there is no just reason for delay. n6

If the district court fails to set forth sufficient reasons for certification, the court of appeals may either dismiss the appeal n7 or remand the action to permit the district court to give its justification for the certification. n8 However, a failure to explain the judgment is not a jurisdictional defect, n9 and the court of appeals may examine the record to determine whether reasons are apparent. If some justification is apparent, the failure of the district court to identify it is not fatal to the judgment, n10 because a dismissal or remand of the appeal would accomplish nothing but delay the court of appeals' ultimate review of the judgment. n11 A failure of the district court to justify its certification decision

will result in greater scrutiny of that decision, however, because the deference normally due the court's exercise of its discretion is nullified by its failure to explain its exercise of discretion. n12

[3] Retroactive Certification

Frequently, a party will take an appeal from an asserted final order on one of multiple claims or as to one of multiple parties, even though the district court has not yet certified the order when the notice of appeal is filed. While a complete lack of certification under Rule 54(b) will prevent the circuit court from taking such an appeal, n1 a lack of certification at the time the notice of appeal is filed is not necessarily fatal, because the district court may subsequently make the certification, thus establishing appellate jurisdiction nunc pro tunc. In other words, unless the appellee would be prejudiced, a subsequent Rule 54(b) certification validates an otherwise premature notice of appeal. n2

This rule is consistent with, though not necessarily required by, Appellate Rule 4(a)(2), which provides that a notice of appeal filed after the court announces a decision, but before the entry of judgment, is treated as if filed on the date of entry of judgment. n3 If the court of appeals has knowledge of a lack of certification, the court has discretion to either stay the appeal to permit the appellant to obtain the necessary certification from the district court, n4 or may simply dismiss the appeal. n5 Even if the appeal ultimately proceeds to finality without the necessary certification, the decisions of both the court of appeals and the district court are nevertheless valid and entitled to preclusive effect. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.24* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Samaad v. City of Dallas, 940 F.2d 925, 930 (5th Cir. 1991)* (existence of multiple claims is jurisdictional prerequisite to judgment under Rule 54(b) and may be raised sua sponte).

(n3)Footnote 2. *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 706 (1st Cir. 1996)* (although no party challenged Rule 54(b) certifications, court of appeals determined that it was bound to consider matter sua sponte as it affected scope of appellate jurisdiction).

(n4)Footnote 3. *Stamatakis Indus. v. J. Walter Thompson, 944 F.2d 382, 383 (7th Cir. 1991)* (district court erred in certifying judgment under Rule 54(b) merely because parties all agreed to that course of action).

(n5)Footnote 1. *See United States v. Ettrick Wood Prods., Inc., 916 F.2d 1211, 1218 (7th Cir. 1990)* (if judgment is otherwise proper, failure to expressly mention Rule 54(b) is not fatal to judgment).

(n6)Footnote 2. *Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1337 (4th Cir. 1993)* .

(n7)Footnote 3. *HBE Leasing Corp. v. Frank, 48 F.3d 623, 631 (2d Cir. 1995)* (because justification for judgment is required, entry of judgment without mentioning rule's standard is improper); *Waldorf v. Borough of Kenilworth, 959 F. Supp. 675, 677-678 (D.N.J. 1997)* (district court's failure to explain its reasoning for Rule 54(b) certification may result in dismissal of appeal for lack of appellate jurisdiction).

(n8)Footnote 4. *Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1221 (5th Cir. 1990)* .

(n9)Footnote 5. *Knafel v. Pepsi Cola Bottlers of Akron, Inc., 850 F.2d 1155, 1159 (6th Cir. 1988)* .

(n10)Footnote 6. *AFGE Local 1533 v. Cheney, 944 F.2d 503, 505, n.3 (9th Cir. 1991)* .

(n11)Footnote 7. *Mooney v. Frierdich, 784 F.2d 875, 876 (8th Cir. 1986)* .

(n12)Footnote 8. *Auriemma v. City of Chicago, 906 F.2d 312, 313 (7th Cir. 1990)* .

(n13)Footnote 9. *Carter v. City of Philadelphia, 181 F.3d 339, 343-346 (3d Cir. 1999)* , *cert. denied, 120 S. Ct. 499, (1999)* ; *Alcan Aluminum Corp v. Carlsberg Financial Corp., 689 F.2d 815, 817 (9th Cir. 1982)* .

(n14)Footnote 10. *Fox v. Baltimore City Police Dep't, 201 F.3d 526, 531-532 (4th Cir. 2000)* (district court's failure to state rationale for its decision to certify partial judgment does not invalidate certification).

(n15)Footnote 11. *Feinstein v. Resolution Trust Corp., 942 F.2d 34, 39 (1st Cir. 1991)* (sufficient reasons for certification were specified in movant's brief accompanying motion, so district court's failure to state reasons did not prevent appellate jurisdiction).

(n16)Footnote 12. *Little Earth of United Tribes, Inc. v. United States Dept. of Housing & Urban Dev., 738 F.2d 310, 313 (8th Cir. 1984)* .

(n17)Footnote 1. *See § 25.10*.

(n18)Footnote 2. *Clausen v. Sea-3, Inc., 21 F.3d 1181, 1184-1185 (1st Cir. 1994)* ; *see Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645 (10th Cir. 1988)* (notice of appeal effective where appellant obtains certification or final adjudication before appeal considered on merits).

(n19)Footnote 3. *Fed. R. App. P. 4(a)(2)*.

(n20)Footnote 4. *Penton v. Pompano Constr. Co., 963 F.2d 321, 322 (11th Cir. 1992)* (allowing 30 days to obtain proper judgment and certification).

(n21)Footnote 5. *Winfrey v. School Bd. of Dade County, 59 F.3d 155, 157-158 n.3 (11th Cir. 1995)* .

(n22)Footnote 6. *O'Reilly v. Malon, 747 F.2d 820, 822-823 (1st Cir. 1984)* .

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PART VI Trial and Judgment
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3-25 Moore's Manual--Federal Practice and Procedure § 25.15

§ 25.15 Effect of Lack of Certification of Partial Judgmentn*

[1] Order Is Not Appealable

If the district court has not made an express direction for the entry of judgment and an express determination that there is no just reason for delay, any order that does not dispose of the entire action remains open and subject to revision at any time before entry of final judgment. n1 This means that parties aggrieved by an order not certified under Rule 54(b) need not appeal the order until the court disposes of the entire case. n2 In other words, any order that disposes of fewer than all of the claims or parties must be certified under Rule 54(b) in order to be appealable. In the absence of proper certification, the order is unappealable until the entry of a final judgment disposing of all the claims and parties. n3

[2] Order Is Appealable if Remaining Claims Dismissed

In a multi-claim or multi-party action, an order with respect to fewer than all claims is not appealable without certification under Rule 54(b) but may become appealable if pending claims are dismissed or otherwise disposed of by the court. n1 Most authority agrees that such a dismissal permits appeal of the earlier adjudication, even if the dismissal comes after the filing of the notice of appeal. n2 The decisions generally restrict this principle to a dismissal with prejudice, n3 On the theory that a dismissal without prejudice would leave the parties free to reinstate the claims at a later date, thus making an end run around the restrictions of the final judgment rule and Rule 54(b). n4 Furthermore, this principle does not apply when the remaining claims are merely transferred to another court. Rather, the potential for appellate review of a one-claim dismissal is transferred along with the rest of case, with any review occurring in the transferee circuit when and if prerequisites of ordinary appellate review are satisfied. n5

[3] Order May Be Reconsidered

If the district court adjudicates a discrete portion of a multi-party or multi-claim action, but does not certify it under Rule 54(b), the court may reconsider the partial adjudication at any time prior to a judgment disposing of the entire action. n1 This result follows from the provision of the rule that provides that such an order is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. n2 However, the fact that the district court has the power to reconsider the uncertified order does not mean that the court must or even

should do so. When the court declines to certify an adjudication under Rule 54(b), it need not reconsider that adjudication unless doing so is consistent with the guidelines of the law of the case doctrine, n3 such as when new evidence is presented that might alter the earlier ruling. n4 Furthermore, before exercising its power to set aside a prior order not certified under Rule 54(b), the court should consider the potential for prejudice to the parties from reconsidering that order. n5

[4] Order May Be Appealed at Time All Claims Are Finally Adjudicated

Because an order disposing of fewer than all of the claims or parties in an action is not appealable in the absence of certification under Rule 54(b), the order merges into the final judgment that disposes of all the claims and parties and becomes appealable at the time of entry of that final judgment. n1 However, when an order is certified under Rule 54(b), the judgment must be appealed within the time permitted by the federal rules, and the aggrieved party does not have the option of waiting until entry of the final judgment of the other remaining claims in the case. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.25* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(d)*; *Anjelino v. New York Times Co., 200 F.3d 73, 86-87 n.1 (3d Cir. 1999)* (in absence of Rule 54(b) certification, order that disposes of fewer than all claims or parties is not appealable until entry of final judgment disposing of all claims and all parties in case).

(n3)Footnote 2. *Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435-436, 76 S. Ct. 895, 100 L. Ed. 1297 (1956)* .

(n4)Footnote 3. *Reiter v. Cooper, 507 U.S. 258, 271, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)* ; *Joseph v. City of New Orleans, 110 F.3d 252, 253 (5th Cir. 1997)* , *cert. denied, 522 U.S. 1058 (1998)* .

(n5)Footnote 1. *Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645 (10th Cir. 1988)* (if district court adjudicates remaining claims before court of appeals acts, notice of appeal is proper even in absence of Rule 54(b) certification).

(n6)Footnote 2. *McManus v. Gitano Group, Inc., 59 F.3d 382, 383-384 (2d Cir. 1995)* (dismissal of defendant with prejudice after filing of notice of appeal retroactively vested jurisdiction in court of appeals despite absence of Rule 54(b) certification as to summary judgment for other defendant).

(n7)Footnote 3. *West v. Macht, 197 F.3d 1185, 1188-1190 (7th Cir. 1999)* (interlocutory orders as to some claims are not made final by plaintiff's voluntary dismissal of remaining claims, unless dismissal is with prejudice).

(n8)Footnote 4. *Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1075-1076 (9th Cir. 1994)* (stipulation of dismissal without prejudice of remaining claims did not permit appeal of order not certified under Rule 54(b), because stipulation expressly reserved parties' rights to resurrect claims after appeal).

(n9)Footnote 5. *Hill v. Henderson, 195 F.3d 671, 672-678 (D.C. Cir. 1999)* (order dismissing one of plaintiff's multiple claims against defendant does not become immediately appealable, in absence of Rule 54(b) certification, simply because district court transfers remainder of case to another district court in another circuit).

(n10)Footnote 1. *Anixter v. Home-Stake Production Co., 977 F.2d 1533, 1547-1548 (10th Cir. 1992)* ; *Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1469-1472 (4th Cir. 1991)* .

(n11)Footnote 2. *Fed. R. Civ. P. 54(b).*

(n12)Footnote 3. *Virgin Atl. Airways v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)* .

(n13)Footnote 4. *Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1547-1548 (10th Cir. 1992)* .

(n14)Footnote 5. *Bennett v. Pippin, 74 F.3d 578, 586-588 (5th Cir. 1996)* (district court erred in reinstating county as defendant only one hour before trial was set to begin because county's trial preparation was prejudiced).

(n15)Footnote 1. *Haskell v. Washington Township, 891 F.2d 132, 133 (6th Cir. 1989)* .

(n16)Footnote 2. *In re Lindsay, 59 F.3d 942, 951-952 (9th Cir. 1995)* , *cert. denied, 516 U.S. 1074 (1996)* .

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PART VI Trial and Judgment
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3-25 Moore's Manual--Federal Practice and Procedure § 25.16

§ 25.16 Effect of Proper Certification of Partial Judgmentn*

[1] Partial Judgment Certified Under Rule is Judgment for All Purposes

If the court makes an order disposing of fewer than all of the claims or parties in a multi-claim or multi-party action, an express determination that there is no just reason for delay, and an express direction for the entry of the order as a judgment, that judgment is a judgment for all purposes. Because a Rule 54(b) judgment is a judgment for all purposes, all of the federal rules applicable to judgments in general are also applicable to judgments under Rule 54(b). Any timely post-judgment motion challenging the substance of the judgment, therefore, suspends the finality of that judgment until the motion is disposed of. n1 If the court materially alters or amends the Rule 54(b) judgment, the time to appeal runs from entry of the amended judgment, not the original judgment. n2 Similarly, because a Rule 54(b) judgment is a final judgment for appeal purposes, the denial of a post-judgment motion relating to such a judgment is immediately appealable, even if the district court does not expressly certify its order denying the motion. n3

[2] Certified Partial Judgment Starts Time Limits for Appeal

A final judgment certified and entered under the authority of Rule 54(b) starts the running of all the time limits contained in the federal rules that run from the entry of judgment, most significantly the time to appeal the judgment. n1 Thus, a party challenging the judgment must appeal a Rule 54(b) judgment within the time permitted by Appellate Rule 4(a) and may not seek review of the judgment after the remaining claims have been adjudicated. n2 A Rule 54(b) judgment begins the running of the time to appeal regardless of the propriety of the entry of that judgment. In other words, whether or not the court abused its discretion in certifying and entering the judgment under Rule 54(b) is irrelevant to the parties' obligation to appeal within the period started by that judgment. n3 However, if the Rule 54(b) judgment was beyond the power of the district court or was not properly set forth as a judgment, the parties need not take an immediate appeal and may challenge the partial adjudication on appeal from the final judgment. n4

[3] Res Judicata Applies to Certified Partial Judgment

If the district court has certified and entered a final judgment under the authority of Rule 54(b), the judgment is res judicata as to the claims adjudicated, and the judgment may be offered for its preclusive effect in other litigation. n1

Additionally, when pending parallel litigation may result in inconsistent outcomes, a final judgment may be entered under Rule 54(b) precisely to permit the application of res judicata. n2 Also, because a Rule 54(b) judgment is res judicata, the district court may issue an injunction to protect the efficacy of the judgment. n3 However, if an order has not been properly certified under Rule 54(b) it does not have preclusive effect because the rule's reservation of the court's right to reconsider the order at any time n4 deprives the order of the requisite finality for res judicata purposes. n5

[4] Interest Accrues From Entry of Certified Partial Judgment

Interest accrues on a final judgment certified and entered under the authority of Rule 54(b) in the same manner that it would on any other judgment. Furthermore, by statute, n1 post-judgment interest accrues not only on final, appealable judgments but also on partial, non-appealable judgments. n2 Therefore, the entry of a partial judgment, whether or not certified for immediate appeal under Rule 54(b), triggers the accrual of post-judgment interest on claims encompassed in that judgment. n3 However, if the court does not enter judgment on the order, interest generally does not run until entry of final judgment disposing of all of the claims and parties. n4

[5] Enforcement of Certified Partial Judgment

A party may obtain execution on a Rule 54(b) judgment which has been properly certified and entered by the district court, provided that the 10-day stay of execution specified in Rule 62(a) has expired. n1 However, the district court has the option to stay execution of any judgment entered under Rule 54(b). n2 If a party requests execution of judgment outside the district, the requesting party may register a Rule 54(b) judgment in another district when the judgment has become final by appeal or by expiration of the time to appeal. n3 Additionally, any federal judgment has the same effect as a lien on the judgment debtor's property as a judgment of a state court. Thus, as a valid judgment of the district court, a Rule 54(b) judgment has the same lien implications as a judgment of the state court. n4

[6] Appealability of Order

[a] Appellate Jurisdiction Not Controlled by Partial Judgment Rule

The appellate jurisdiction of the courts of appeals is established and controlled by statute, which provides for review of "final decisions" of the district courts n1 and also permits review of certain interlocutory orders made by the district courts. n2 The Rules Enabling Act n3 and Rule 82 prohibit any alteration by civil rule of the jurisdiction of the federal appellate courts; n4 therefore, Rule 54(b) may not extend or limit the jurisdiction of the courts of appeals, and the rule does not in any way relax the requirement of Section 1291 that the order appealed be final, n5 nor does the rule otherwise expand or limit the statutory jurisdiction of the courts of appeals. n5.1 In other words, the district court may not, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of Section 1291. n6

[b] Appeal of Interlocutory Orders

An order that is inherently interlocutory is not final and not eligible for entry as a judgment, unless it fits into a statutory exception; furthermore, such an interlocutory order does not become appealable if it is erroneously entered under Rule 54(b). n7 The most important exceptions to the final judgment rule are specified in Section 1292. Subsection (a) permits appeals as of right from certain interlocutory orders, n8 and subsection (b) permits appeals from such orders when the district court and court of appeals agree to permit the appeal. n9 Because Rule 54(b) does not restrict appellate jurisdiction, any order that is already appealable on an interlocutory basis need not be certified as a prerequisite to appeal. Thus, orders relating to injunctive relief may be appealed under Section 1292(a)(1), n10 irrespective of whether the order could have been entered as a judgment under Rule 54(b). n11 Additionally, in receivership cases, orders appealable under Section 1292(a)(2) may be appealed regardless of the provisions of Rule 54(b). n12

Permissive appeals under Section 1292(b), n13 are similar to Rule 54(b) appeals because both involve appeals by

permission through district court certification. However, even though both Rule 54(b) and § 1292(b) require certification by the district court, the procedures are quite distinct. Significantly, Rule 54(b) is restricted in its application to an order in a multi-claim or multi-party action that is a final order as to at least one of the claims or parties. n14 Section 1292(b), on the other hand, applies in any action in which an appeal may be taken to the court of appeals. More importantly, when the statutory standard is met, Section 1292(b) is intended to permit appeal of any otherwise unappealable order, including inherently interlocutory orders that may not be reviewed under Rule 54(b). n14.1 In other words, Rule 54(b) applies to a final order on a claim for relief, and Section 1292(b) applies to a "controlling question of law" encountered in resolving a claim for relief. n15

The scope of appellate review also differs under the two certification procedures. The circuit court has appellate jurisdiction over all interlocutory orders leading to Rule 54(b) judgment, but appellate jurisdiction over a Section 1292(b) order extends only to the particular interlocutory order certified by the district court. n16 Sometimes, a question arises as to which procedure applies: n17 whether a particular order is a final adjudication of a separate claim, to which Rule 54(b) would apply, or an interlocutory order on an issue of law forming the basis of a claim, to which Section 1292(b) would apply. n18 Because Rule 54(b) and Section 1292(b) share a common purpose, which is to permit immediate review of otherwise unappealable orders in the interest of sound judicial administration, n19 the courts of appeals may grant review whenever those purposes would be furthered, even if the district court failed to invoke the proper basis for review of the order. For example, a certification under Section 1292(b) may be deemed an entry of judgment under Rule 54(b), provided that the certified order could have been entered as a judgment under Rule 54(b). n19.1

[c] Certification Not Necessary If Order Is Appealable Under Collateral Order Doctrine

The collateral order doctrine is an exception to the rule that only final judgments are appealable. n20 To qualify under the doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from the final judgment. n21

The collateral order doctrine and Rule 54(b) apply to completely distinct types of orders: the doctrine applies only to orders entirely separate from the merits of the claims for relief, and the rule applies only to orders that resolve the merits of one or more of those claims. Rule 54(b), therefore, does not limit review of orders that are appealable under the collateral order doctrine. If the doctrine makes the order appealable, a Rule 54(b) judgment is not necessary to appeal the order, even in a multi-party or multi-claim action. n22 Conversely, if the order does not qualify for appeal under the collateral order doctrine, certification under Rule 54(b) makes the order reviewable only if the prerequisites of that rule are satisfied. n23

[d] Certification Not Necessary If Order Is Reviewable by Extraordinary Writ

By statute, a court of appeals has the power through the issuance of an extraordinary writ to review any order that is not otherwise immediately appealed. n24 However, an extraordinary writ is generally not available when the aggrieved party has an adequate remedy through appeal at final disposition of the case. n24.1 Because an order that could have been, but was not, certified under Rule 54(b) is reviewable on appeal from the final judgment, an extraordinary writ such as mandamus is generally unavailable to compel the district court to certify the judgment for immediate appeal under Rule 54(b). n25 Conversely, the refusal of the district court to enter a Rule 54(b) judgment does not protect the order from review by extraordinary writ if the remedy of later appeal is shown to be inadequate, and the other prerequisites to a writ under Section 1651 have been established. n26 For a further discussion of extraordinary writs, see Ch. 27, *General Principles of Appeal*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 54.26, 54.27* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See, e.g., Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 925 F.2d 812, 814-815 (5th Cir. 1991) , cert. denied, 501 U.S. 1262 (1991)* (Rule 54(b) judgment is subject to filing of Rule 59(e) motion that suspends finality).

(n3)Footnote 2. *See Christensen v. Equitable Life Assurance Soc., 767 F.2d 340, 342 n.2 (7th Cir. 1985)* (clerical correction made in March to January judgment made April appeal timely as to all issues).

(n4)Footnote 3. *Gencorp., Inc. v. American Int'l Underwriters, 178 F.3d 804, 832-833 (6th Cir. 1999)* (denial of motion to alter or amend Rule 54(b) judgment under Rule 59(e) is immediately appealable; there is no reason to require separate certification for Rule 59(e) ruling that relates to judgment that has been made appealable by certification under Rule 54(b)).

(n5)Footnote 1. *Smith v. Mine Safety Appliances Co., 691 F.2d 724, 725 (5th Cir. 1982)* (must appeal within 30 days of Rule 54(b) judgment); *Fed. R. App. P. 4(a).*

(n6)Footnote 2. *Smith v. Mine Safety Appliances Co., 691 F.2d 724, 725 (5th Cir. 1982)* (party must appeal within 30 days of Rule 54(b) judgment).

(n7)Footnote 3. *In re Lindsay, 59 F.3d 942, 951-952 (9th Cir. 1995) , cert. denied, 516 U.S. 1074 (1996)* (whether Rule 54(b) determination was right or wrong, entry of such judgment starts the time for appeal running).

(n8)Footnote 4. *Willhauck v. Halpin, 953 F.2d 689, 701-702 (1st Cir. 1991)* (purported partial adjudication which was not set forth on separate document was not proper Rule 54(b) judgment; consequently, appeal from final judgment properly brought up all issues including partial adjudication).

(n9)Footnote 1. *Recoveredge L.P. v. Pentecost, 44 F.3d 1284, 1290-1297 (5th Cir. 1995) .*

(n10)Footnote 2. *Shamley v. ITT Corp., 869 F.2d 167, 170-171 (2d Cir. 1989)* (court properly entered Rule 54(b) judgment so that defendant could argue res judicata in state court proceedings).

(n11)Footnote 3. *Rutledge v. Scott Chotin, Inc., 972 F.2d 820, 825 (7th Cir. 1992) .*

(n12)Footnote 4. *Fed. R. Civ. P. 54(b).*

(n13)Footnote 5. *See Anixter v. Home-Stake Production Co., 977 F.2d 1533, 1547-1548 (10th Cir. 1992)* (court's right to reconsider partial judgment that has not been certified).

(n14)Footnote 1. *28 U.S.C. § 1961(a).*

(n15)Footnote 2. *Skalka v. Fernald Envtl. Restoration Mgmt. Corp., 178 F.3d 414, 428-429 (6th Cir. 1999)* (post-judgment interest statute does not refer only to final judgments).

(n16)Footnote 3. *Skalka v. Fernald Envtl. Restoration Mgmt. Corp., 178 F.3d 414, 428-429 (6th Cir. 1999)* (post-judgment interest begins to accrue on particular claim when district court enters judgment on that claim, even if court has not certified that judgment for appeal while other claims remain pending).

(n17)Footnote 4. *Hooks v. Washington Sheraton Corp., 642 F.2d 614, 616-617 (D.C. Cir. 1980)* (because court

did not direct entry of judgment under Rule 54(b), interest would not run on jury verdict until judgment disposing of all claims was entered).

(n18)Footnote 1. *See Fed. R. Civ. P. 62(a).*

(n19)Footnote 2. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 13 n.3, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* (noting also that, under Rule 62(h), court may require judgment loser to deposit amount of judgment with court in order to protect against possible insolvency or other potential economic hardship).

(n20)Footnote 3. *28 U.S.C. § 1963.*

(n21)Footnote 4. *See 28 U.S.C. § 1962.*

(n22)Footnote 1. *See Acton v. City of Columbia, 436 F.3d 969, 973-974 (8th Cir. 2006)* .

(n23)Footnote 2. *28 U.S.C. § 1291.*

(n24)Footnote 3. *28 U.S.C. § 2072.*

(n25)Footnote 4. *Fed. R. Civ. P. 82.*

(n26)Footnote 5. *Roebuck & Co. v. Mackey, 351 U.S. 427, 437, 76 S. Ct. 895, 100 L. Ed. 1297 (1956)* .

(n27)Footnote 5.1. *Ultra-Precision Mfg. v. Ford Motor Co., 338 F.3d 1353, 1357-1358 (Fed. Cir. 2005)* .

(n28)Footnote 6. *Petties v. District of Columbia, 227 F.3d 469, 472 (D.C. Cir. 2000)* (Rule 54(b) does not relax finality required of each determination of court, as an individual claim, to render it appealable; rule merely permits appeal of claim as to which district court has reached final judgment while other claims remain to be resolved in the district court).

(n29)Footnote 7. *Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 743-744, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976)* ; *see Acton v. City of Columbia, 436 F.3d 969, 973 (8th Cir. 2006)* .

(n30)Footnote 8. *See 28 U.S.C. § 1292(a).*

(n31)Footnote 9. *See 28 U.S.C. § 1292(b).*

(n32)Footnote 10. *See 28 U.S.C. § 1292(a)(1).*

(n33)Footnote 11. *HBE Leasing Corp. v. Frank, 48 F.3d 623, 630-633 (2d Cir. 1995)* .

(n34)Footnote 12. *See State Street Bank & Trust Co. v. Brockrim, Inc., 87 F.3d 1487, 1490-1491 (1st Cir. 1996)* ; *see also 28 U.S.C. § 1292(a)(2).*

(n35)Footnote 13. *See 28 U.S.C. § 1292(a)(1).*

(n36)Footnote 14. *Fed. R. Civ. P. 54(b).*

(n37)Footnote 14.1. *Ultra-Precision Mfg. v. Ford Motor Co., 338 F.3d 1353, 1358-1359 (Fed. Cir. 2005)* .

(n38)Footnote 15. *ITOFCA, Inc. v. MegaTrans Logistics, Inc., 235 F.3d 360, 365 (7th Cir. 2000)* .

(n39)Footnote 16. *Doctor's Hosp. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 307 n.10 (5th Cir. 1997)* .

(n40)Footnote 17. *Philip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 328-330 (D. Mass. 1997)* (depending on facts, either or both procedures may be applicable).

(n41)Footnote 18. *See Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1336, n.4 (4th Cir. 1993)* .

(n42)Footnote 19. *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1071 (7th Cir. 1981)* .

(n43)Footnote 19.1. *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d 1065, 1071 (7th Cir. 1981)* .

(n44)Footnote 20. *Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836, 2006 U.S. LEXIS 911, *10 (2006)* (rather than exception to final decision rule set out in Section 1291, collateral order doctrine is practical application of that rule); *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-547, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n45)Footnote 21. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* ; *Petties v. District of Columbia, 227 F.3d 469* . --6 (D.C. Cir. 2000).

(n46)Footnote 22. *Petties v. District of Columbia, 227 F.3d 469* . --7 (D.C. Cir. 2000).

(n47)Footnote 23. *Howard v. Parisian, Inc., 807 F.2d 1560, 1566 (11th Cir. 1987)* .

(n48)Footnote 24. *28 U.S.C. § 1651.*

(n49)Footnote 24.1. *In re Urohealth Sys., 252 F.3d 504, 507 (1st Cir. 2001)* .

(n50)Footnote 25. *Askew v. United States Dist. Court for Cent. Dist. of Calif., 527 F.2d 469, 470-471 (9th Cir. 1975)* (citing **Moore's Federal Practice** for proposition that extraordinary writs are available only if appeal is clearly inadequate).

(n51)Footnote 26. *In re Food Lion, Inc., 73 F.3d 528, 531-533 (4th Cir. 1996)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure § 25.17

§ 25.17 Appeal of District Court's Entry of Partial Judgmentn*

[1] Scope of Appeal

If the court of appeals determines that the judgment entered under Rule 54(b) was within both the power and the discretion of the district court, an immediate appeal is proper. n1 Because a Rule 54(b) judgment is a judgment for all purposes, a timely notice of appeal from the judgment invokes the mandatory appellate jurisdiction of the court of appeals under the final judgment statute. n2 On appeal of a judgment properly entered under Rule 54(b), the court of appeals may review any matter implicated by the judgment, n3 but should not review any reach beyond the bounds of that judgment and may not consider orders that were not certified for immediate appeal or to review issues still pending in the district court. n4 Furthermore, the court of appeals may not exercise pendent appellate jurisdiction over any other orders except for those subsumed within the judgment certified under Rule 54(b), unless review of those orders is necessary to ensure meaningful review of the Rule 54(b) judgment, or the orders are "inextricably intertwined" with the Rule 54(b) judgment. n5 However, the court of appeals may review any order or issue as to which there is an independent basis for an immediate appeal. n6

[2] Dismissal of Appeal When District Court Lacks Authority to Enter Partial Judgment

If the district court purports to enter a judgment under Rule 54(b) on an order that is either not final n1 or does not dispose of at least one claim for relief, n2 or dispose all of the claims by or against at least one party, n3 the entry of judgment exceeds the authority of the district court, and the court of appeals must dismiss any appeal from the judgment, n4 unless there is some other, independent basis for appeal of the order. n5 The court of appeals reviews this issue de novo. n6 Furthermore, because this requirement is jurisdictional, the court of appeals may raise the propriety of a Rule 54(b) judgment sua sponte. n7

[3] Dismissal of Appeal When District Court Abuses Discretion

The district court has discretion to enter judgment under Rule 54(b) by making an express determination that there is no just reason for delay and making an express direction for the entry of judgment. n1 The district court's determination that there is no just reason for delay is reviewed for abuse of discretion. In making the determination that there is no

reason for delay, the courts must consider judicial administrative interests, as well as the equities involved. The discretionary determination of the district court should be given substantial deference, for that court is the one most likely to be familiar with the case and with any justifiable reasons for delay. The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable. n2 If the court of appeals finds that the district court abused its discretion in entering judgment under Rule 54(b), the court of appeals should dismiss the appeal unless there is some other grounds for immediate appeal. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.28* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 54(b).*

(n3)Footnote 2. *28 U.S.C. § 1291.*

(n4)Footnote 3. *Bowdry v. United Airlines, Inc., 58 F.3d 1483, 1488-1489 (10th Cir. 1995)* (timely notice of appeal brings up for review all interlocutory decisions and orders implicated by the judgment).

(n5)Footnote 4. *United Indus., Inc. v. EIMCO Process Equip. Co., 61 F.3d 445, 448 (5th Cir. 1995)* (on appeal of Rule 54(b) judgment dismissing certain claims, court of appeals lacked appellate jurisdiction to address dismissal of RICO claims or denial of motion to compel because those orders were not included in certified Rule 54(b) judgment).

(n6)Footnote 5. *Cooper v. Town of E. Hampton, 83 F.3d 31, 35-36 (2d Cir. 1996) .*

(n7)Footnote 6. *In re City of Philadelphia Litig., 49 F.3d 945, 956-957 (3d Cir. 1995) .*

(n8)Footnote 1. *Petties v. District of Columbia, 227 F.3d 469 .* --6-7 (D.C. Cir. 2000).

(n9)Footnote 2. *Tolson v. United States, 732 F.2d 998, 1002-1003 (D.C. Cir. 1984) .*

(n10)Footnote 3. *Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995) .*

(n11)Footnote 4. *Street Bank & Trust Co. v. Brockrim, Inc., 87 F.3d 1487, 1490 (1st Cir. 1996) .*

(n12)Footnote 5. *FDIC v. Geldermann, Inc., 975 F.2d 695, 697 (10th Cir. 1992)* (order that precluded particular defendants from seeking indemnity or contribution was improperly certified under Rule 54(b) because it did not dispose of any claim; however, order was nevertheless appealable as injunction under Section 1292(a)(1)).

(n13)Footnote 6. *State Street Bank & Trust Co. v. Brockrim, Inc., 87 F.3d 1487, 1489 (1st Cir. 1996)* ; *ODC Communications Corp. v. Wenruth Investments, 826 F.2d 509, 512 (7th Cir. 1987) .*

(n14)Footnote 7. *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 705-706 (1st Cir. 1996) .*

(n15)Footnote 1. *Fed. R. Civ. P. 54(b); see § 25.10*

(n16)Footnote 2. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7-13, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980) .*

(n17)Footnote 3. *PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 81 F.3d 1412, 1421 (5th Cir. 1996)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
B. PARTIAL JUDGMENT OF MULTIPLE CLAIMS OR MULTIPLE PARTIES

3-25 Moore's Manual--Federal Practice and Procedure §§ 25.18through 25.29

[Reserved]

§§ 25.18[Reserved]

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
C. DEMAND FOR JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.30

§ 25.30 Requirement of Demand for Judgmentn*

Every final judgment that is not a default judgment must grant the relief to which the prevailing party is entitled, even if the party has not demanded such relief in the party's pleadings. n1 When a default judgment is entered, the judgment may not be different in kind from or exceed in amount the relief prayed for in the demand for judgment. n2 Such a demand for judgment is expressly required by Rule 8(a), which provides that any pleading setting forth a claim for relief must contain a demand for judgment for the relief the pleader seeks. n3 The effects of the combination of Rule 8(a)(3) and Rule 54(c) is that a party making a claim for relief in its pleading should always include a demand for judgment that includes all of the possible kinds and amounts of relief that could be awarded, because in the event a default judgment is entered the party will be limited to that demand, n4 and also because some type of demand for judgment is always required by Rule 8(a). n5

In the event a contested judgment is ultimately entered, the court is free to grant any kind of relief appropriate, even though not requested by the claimant. n6 For example, the mooting of a complaint's request for injunctive relief does not require dismissal of the suit if monetary damages would be available on the claim, even if the monetary relief was not requested. n7 The district court should dismiss only if it appears to a legal certainty that the pleader can prove no set of facts that would entitle the pleader to any relief. n8

When the amendment of pleadings to conform to the proof is appropriate, Rule 54(c) must also be read in conjunction with Rule 15's liberal policy regarding amendments. Thus, an amendment to the pleadings is allowed whenever issues not raised in those pleadings are tried by the express or implied consent of the parties. n9 The pleadings may be amended in such cases to reflect the introduction of the issues or claims, and appropriate relief may be awarded under Rule 54(c). n10 Furthermore, the introduction of the issues or claims is effective whether or not the pleadings are actually amended by the party to reflect that introduction. n11 Consequently, when such issues are tried with the consent of the parties, relief other than that requested by the pleadings may be awarded under Rule 54(c) regardless of whether the pleadings are technically amended. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.70* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(c).*

(n3)Footnote 2. *Fed. R. Civ. P. 54(c)*; *see § 25.100* et seq.

(n4)Footnote 3. *Fed. R. Civ. P. 8(a)(3).*

(n5)Footnote 4. *See Fed. R. Civ. P. 54(c).*

(n6)Footnote 5. *Fed. R. Civ. P. 8(a)(3).*

(n7)Footnote 6. *Fed. R. Civ. P. 54(c)*; *see Jacobs v. City of Chicago, 215 F.3d 758, 774 (7th Cir. 2000)* (even though qualified immunity defeated particular remedy of money damages, court could award any other available relief).

(n8)Footnote 7. *Z Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1340-1341 (9th Cir. 1991)* (although only declaratory and injunctive relief were sought in complaint, and any claim to that relief was moot, possible recovery of damages not demanded under Rule 54(c) constituted current controversy).

(n9)Footnote 8. *See Fuller v. Johannessen, 76 F.3d 347, 349-350 (11th Cir. 1996)* .

(n10)Footnote 9. *Fed. R. Civ. P. 15(b).*

(n11)Footnote 10. *D. Federico Co. v. New Bedford Redevelopment Auth., 723 F.2d 122, 126 (1st Cir. 1983)* (even though theory of unjust enrichment was not included in pleadings, it was raised and litigated by consent of parties, so court could permit amendment and grant relief on that theory).

(n12)Footnote 11. *Fed. R. Civ. P. 15(b).*

(n13)Footnote 12. *Kaszuk v. Bakery & Confectionery Union, 791 F.2d 548, 559 (7th Cir. 1986)* (failure to amend pleadings to include request for injunctive relief does not preclude award of that relief under Rule 54(c)).

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PART VI Trial and Judgment
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C. DEMAND FOR JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.31

§ 25.31 Demand for Judgment in Contested Casesn*

[1] Proof Rather Than Pleading Generally Controls

Every judgment, other than one for default, must award to the prevailing party all the relief to which the party is entitled, irrespective of whether the pleadings demanded that relief. n1 The purpose of Rule 54(c) is to ensure that the demand for judgment n2 will not be read to control too rigidly the relief that is ultimately awarded in the action and that the substance of the case will prevail over the form. n3 If the litigation establishes that relief of a particular kind or amount is warranted, that relief should be awarded, regardless of the state of the pleadings. Thus, the availability of relief is determined by the proof, not by the pleadings, and it is the duty of the court to grant all relief to which a party is entitled on that proof. n4

If the claimant proves all of the elements of a claim, any remedy appropriate to that claim may be ordered, even if the plaintiff erred in designating the claim in the pleadings. In other words, legal error in identifying the source of the claim is not fatal provided that all the elements of the claim are proven. n5 However, Rule 54(c) does not allow a party to introduce additional claims not established by the evidence or the record. n6 The rule permits an award of all available relief when liability has already been established by the proof; it does not permit a readjudication of liability on the basis of the record in the action. n7 Furthermore, it does not allow the court to grant relief based on an issue that was never properly presented to the court for resolution. n8

The court should not grant relief beyond the pleadings under Rule 54(c) if the party's failure to specifically request a particular form of relief has prejudiced the opposing party in its defense of the claims asserted. n9 Prejudice may result merely from delay in seeking the relief, n10 and when the delay is to an extent that the relief in question is never mentioned until after trial, the court will probably find prejudice. n11 The court will also likely deny relief under Rule 54(c) when the party has earlier expressly disclaimed any request for the relief, but, after trial, requests the relief under the rule. n12

[2] Judgment May Award Different Amount of Relief Than That Demanded

Because available relief is determined by the proof adduced at trial, and not restricted by the pleadings, n1 the court

should award the amount established by the evidence at trial rather that the amount set forth in the prayer for relief. n2 Regarding damages, this scenario is rarely encountered in practice, because the pleading of a specific amount of damages is not generally required. However, if the pleading party does pray for a specific amount of claimed damages, that prayer is not an upper limit on the amount that may be awarded. n3 Similarly, if the pleading party requests particular equitable relief, but the proof establishes a right to a more extensive scope of relief, the court should award the relief proven. n4

[3] Judgment May Award Different Type of Relief Than That Demanded

If a party demands a particular kind of relief, the demand does not limit the court to awarding that relief, and any remedy supported by the record may be awarded under Rule 54(c). If the demand seeks only damages, equitable relief may be awarded when justified by the proof. n1 Conversely, if the complaint seeks equitable relief only, the court may award damages, n2 provided that the party has established sufficient proof of those damages. n3 Even in the event that the demand for judgment is improper because it requests some form of relief that may not be granted, the court should award whatever relief is established by the proof. n4

[4] Judgment May Award Undemanded Attorney's Fees or Interest on Claim

If a party proves the elements of a claim for relief, the court may order any incidental relief appropriate to that claim, even if the party did not request the incidental relief in the pleadings. This doctrine extends to such incidental relief as attorney's fees and interest. n1 Thus, the failure to request attorney's fees in the pleadings does not act as a bar to that relief; instead, the court should award attorney's fees under Rule 54(c) whenever that relief is appropriate under the law and the facts proven and a timely and properly documented motion for fees is filed under Rule 54(d)(2). n2

[5] Federal Rule Prevails in Diversity Action Over Contrary State Procedure

In a diversity action, Rule 54(c) prevails over any contrary state procedure that limits the availability of relief to that demanded in the judgment. The general rule in a diversity action, is that the applicable substantive law is that of the state and that federal law governs questions of procedure. Therefore, whether a particular remedy is available on the facts proven is a matter of state substantive law in a diversity action. n1 However, any procedural requirements imposed by the state to invoke the available remedy are not binding in a diversity action. In practice, this is not frequently a problem because most states have adopted rules of procedure that contain relief provisions similar to Rule 54(c). But a state law, other than a substantive limitation, that purports to restrict the available relief to that demanded in the complaint is superceded in federal actions by Rule 54(c), and the court may award any of the relief authorized by the state substantive law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.72* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(c).*

(n3)Footnote 2. *Fed. R. Civ. P. 8(a)(3).*

(n4)Footnote 3. *Mark Andy, Inc. v. Hartford Fire Insurance Company, 229 F.3d 710, 718-719 (8th Cir. 2000)* (in insurance case, fairness rather than pleadings dictated that insured business should be allowed to recover for

business-interruption losses).

(n5)Footnote 4. *Jacobs v. City of Chicago, 215 F.3d 758, 774 (7th Cir. 2000)* (even though qualified immunity defeated particular remedy of money damages, court could award any other available relief).

(n6)Footnote 5. *In re Hannover Corp., 67 F.3d 70, 75 (5th Cir. 1995)* (although plaintiff asserted only one particular state statute as basis for recovery in complaint, other statute was established on factual evidence; thus, judgment awarding relief under second statute was proper under Rule 54(c)).

(n7)Footnote 6. *See* [2], *below*.

(n8)Footnote 7. *Dopp v. HTP Corp., 947 F.2d 506, 517-518 (1st Cir. 1991)* (defendant not entitled to use Rule 54(c) to assert cross-claim against co-defendant after entry of judgment).

(n9)Footnote 8. *Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895, 903-904 (4th Cir. 1996)* (Rule 54(c) allows undemanded relief only when all factual conclusions necessary to relief have been found by trier of fact; therefore, omission of master's necessary findings of proximate causation and damages precluded relief under state deceptive trade practices act).

(n10)Footnote 9. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 716-717 (4th Cir. 1983)* .

(n11)Footnote 10. *Albemarle Paper Co. v. Moody, 422 U.S. 405, 423-425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)* .

(n12)Footnote 11. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 716-717 (4th Cir. 1983)* .

(n13)Footnote 12. *Walker v. Anderson Elec. Connectors, 944 F.2d 841, 844 (11th Cir. 1991)* , *cert. denied, 506 U.S. 1078 (1993)* (when plaintiff expressly rejected any request for equitable relief in pretrial order, it could not later request that relief under Rule 54(c)).

(n14)Footnote 1. *See* [1], *above*.

(n15)Footnote 2. *Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 683-684 (2d Cir. 1993)* .

(n16)Footnote 3. *Stineman v. Fontbonne College, 664 F.2d 1082, 1088 (8th Cir. 1981)* (prayer seeking $300,000 did not limit plaintiff to recovery of that amount).

(n17)Footnote 4. *Donovan v. Burger King Corp., 675 F.2d 516, 519-520 (2d Cir. 1982)* (even though government requested limited injunctive relief, broad-based injunction that was supported by evidence was proper under Rule 54(c)).

(n18)Footnote 1. *Jacobs v. City of Chicago, 215 F.3d 758, 774 (7th Cir. 2000)* (even though qualified immunity defeated particular remedy of money damages, court could award available equitable relief).

(n19)Footnote 2. *Hurd v. Romeo, 752 F.2d 68, 70-71 (3d Cir. 1985)* (dismissal of complaint improper when allegations would support claim for damages, even though complaint did not actually request damages).

(n20)Footnote 3. *In re Rivinius, Inc., 977 F.2d 1171, 1177 (7th Cir. 1992)* .

(n21)Footnote 4. *Kirby v. United States Dept. of Housing & Urban Dev., 745 F.2d 204, 207-208 (3d Cir. 1984)* .

(n22)Footnote 1. *O'Hare v. General Marine Transp. Corp., 740 F.2d 160, 170-171 (2d Cir. 1984)* (attorney's fees and interest were properly awarded in judgment yet never demanded in pleadings).

(n23)Footnote 2. *Stroud v. B-W Acceptance Corp., 372 F.2d 185, 188-189 (10th Cir. 1967)* (even though not requested in complaint, fees authorized by contract properly awarded).

(n24)Footnote 1. *McLeod v. Stevens, 617 F.2d 1038, 1041 (4th Cir. 1980)* (because state law required plaintiff to elect between equitable and legal remedies for tort, court erred in ordering punitive damages when plaintiff sought only equitable remedies).

(n25)Footnote 2. *Guillen v. Kuykendall, 470 F.2d 745, 747-748 (5th Cir. 1972)* (state law requiring separate pleading of punitive tort damages inapplicable in federal diversity case).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
C. DEMAND FOR JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.32

§ 25.32 Demand for Judgment in Cases of Default Judgmentn*

A default judgment may not be different in kind from, or exceed in amount, the relief demanded in the pleadings. n1 In other words, when a judgment entered is a default judgment, the pleadings control the relief that may be awarded, both as to the kind of relief and its scope. n2 A default judgment that impermissibly grants relief beyond the pleadings is void and must be set aside under Rule 60(b)(4). n3 The rationale for applying a different rule in contested cases and in default judgment cases is that a default in essence constitutes a consent to the entry of judgment, but this consent is effective only to the extent that it was made with the information provided by the claimant. Thus, if greater relief had been demanded by the claimant, the defendant might have entered the action and defended on the merits, both as to liability and the requested relief. It would therefore be unjust to award relief greater or of a different type than that demanded in the judgment by default. n4 For a complete discussion of default judgment procedure and entry, see *§ 25.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, § 54.71* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(c).*

(n3)Footnote 2. *Marina B. Creation S.A. v. Maurier, 685 F. Supp. 910, 912-913 (S.D.N.Y. 1988)* (damages on patent claim could not be trebled in default judgment when neither pleadings nor motion for default judgment mentioned that relief).

(n4)Footnote 3. *Compton v. Alton S.S. Co., 608 F.2d 96, 106 (4th Cir. 1979)* (default judgment that included statutory penalty set aside when pleadings did not request that relief); *see Fed. R. Civ. P. 60(b)(4).*

(n5)Footnote 4. *In re Dierschke, 975 F.2d 181, 185 (5th Cir. 1992)* (Rule 54(c) and fundamental fairness require that default judgment operate as admission only as to relief requested in complaint).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
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3-25 Moore's Manual--Federal Practice and Procedure §§ 25.33through 25.39

[Reserved]

§§ 25.33[Reserved]

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
D. ENTRY OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.40

§ 25.40 Status of Order as Judgmentn*

Under the federal rules, the term "judgment" includes any decree and any order from which an appeal lies. n1 A "decree" is the traditional common-law term used to describe the final decision of a federal court sitting in equity and is still used typically by many to describe a final court order that grants injunctive relief. n2 The term "judgment" also includes a "final order" n3 and any other order that is otherwise made appealable by statute on an interlocutory basis, such as an order relating to an injunction n4 or an interlocutory order as to which the court of appeals has granted leave to appeal. n5

A final order is one that disposes of all issues in dispute. n6 Thus, a denial of relief "at this time" is not final and therefore is not appealable n7 nor is the dismissal of a complaint, if the plaintiff may under specified conditions be entitled to replead. n8 If an order merely determines liability or awards damages but fails to specify the amount due, the order does not dispose of all issues and is not a final and appealable order; therefore, it does not qualify as a judgment. n9 It has also been held that an order denying a motion for summary judgment is not a final, appealable, order and, therefore, is not a "judgment." n10 Additionally, findings of fact and conclusions of law made by a court are often referred to as a decision or an opinion. However, such a decision or an opinion is not a "judgment," but rather a statement of the reasons supporting the judgment. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 58.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(a).*

(n3)Footnote 2. *See, e.g., Franklin v. District of Columbia, 163 F.3d 625, 628 (D.C. Cir. 1998)) .*

(n4)Footnote 3. *28 U.S.C. § 1291.*

(n5)Footnote 4. *See 28 U.S.C. § 1292(a)(1).*

(n6)Footnote 5. *See 28 U.S.C. § 1292(b).*

(n7)Footnote 6. *Massey Ferguson Div. of Varity Corp. v. Gurley, 51 F.3d 102, 104-105 (7th Cir. 1995)* ; *McCalden v. California Library Ass'n, 955 F.2d 1214, 1218 (9th Cir. 1990)* , *cert. denied, 504 U.S. 957 (1992)* .

(n8)Footnote 7. *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms, 812 F.2d 1044, 1045-1046 (7th Cir. 1987)* .

(n9)Footnote 8. *Brill v. McDonald's Corp., 28 F.3d 633, 634 (7th Cir. 1994)* .

(n10)Footnote 9. *Stamatakis Indus. v. J. Walter Thompson, 944 F.2d 382, 383 (7th Cir. 1991)* (order that does not specify relief that parties are entitled to is not final order).

(n11)Footnote 10. *Abbs v. Sullivan, 963 F.2d 918, 923 (7th Cir. 1992)* .

(n12)Footnote 11. *See Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 834-836 (4th Cir. 1987)* , *cert. denied, 488 U.S. 1042 (1989)* (although it frequently used word "judgment," document which combined dispository language with explanation of court's reasoning was not judgment).

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PART VI Trial and Judgment
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D. ENTRY OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.41

§ 25.41 Entry of Judgment in Separate Documentn*

[1] Court Must Generally Set Forth Judgment on Separate Document

The district court must generally set forth every judgment and amended judgment in a separate document; n1 however, a separate document is not required for an order disposing of any of the following motions: n2

1. Motion for judgment under Rule 50(b). n3

2. Motion to amend or make additional factual findings under Rule 52(b). n4

3. Motion for attorney's fees under Rule 54. n5

4. Motion for a new trial, or to alter or amend the judgment, under Rule 59. n6

5. Motion for relief under Rule 60 n7.

The separate document requirement applies both to judgments prepared by the clerk without direction by the court pursuant to Rule 58(b)(1), n8 and to more complex judgments requiring court approval of the form of the judgment, pursuant to Rule 58(b)(2). n9

[2] Purpose of Separate Document Requirement

The purpose of the separate document requirement is to establish with certainty when the time for appeal begins to run. n1 Thus, the separate document requirement was designed to work in conjunction with the "final judgment" rule of appealability set by statute. n2 Thus, the separate-document requirement is the primary means for the district court and the court of appeals to ensure a definitive time of the judgment for purposes of appeal. n3 The filing of the judgment on a separate document avoids any confusion that could result from the utilization of docket entries to determine a date of final judgment. n4

[3] Satisfaction of Separate Document Requirement

A judgment satisfies the separate document requirement only if it does not contain matters other than the judgment itself and is a self-contained specification of the prevailing party and relief the court has awarded. n1 Rule 58 does not require that any formal or specific terminology be used in the separate document. The rule requires only a simply phrased judgment as exemplified in the Official Forms, n2 Form 70, Judgment on a Jury Verdict; and Form 71, Judgment by the Court without a Jury. n3 The requirement of a separate document means that the judgment itself must be entirely separate from any order of the court or any opinion or memorandum. n4 The "self-containment" requirement means that the judgment may not rely on references to other proceedings or other documents. n5

[4] Party's Request for Judgment in Separate Document

Either party may make a motion that the court set forth and enter judgment on a separate document as required by Rule 58(a)(1). n1 This provision of Rule 58(d) allows any party to move for entry of judgment on a separate document and protects all concerns for prompt commencement of the periods for motions, appeals, and execution or other enforcement. n2 Allowing any party to move for entry on a separate document avoids any delays that would be caused by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also avoids any problems of inept drafting in attorney prepared judgments. n3

[5] Waiver of Separate Document Requirement

The parties to a case may waive the separate document requirement for a judgment by failing to object to the judge's failure to set forth the judgment on a separate document. Such a waiver means that an appeal of the judgment may not be challenged on the ground that the judgment was not set forth in a separate document. n1 The waiver rule has been promulgated because the separate document requirement is designed to establish a certain time when the time limits for an appeal begin, and to eliminate uncertainties regarding exactly when a "judgment" is entered. If the court and the appellant regard an order as final and appealable, the purpose of the rule is satisfied, n2 and requiring a remand for the entry of judgment on a separate document would merely cause delay in the disposition of the appeal. n3 Therefore, appellate courts consider the issue of waiver of the separate document requirement in the manner designed to protect the right to appeal, not in a way to defeat the right. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice*, *§ 58.05* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 58(a)*.

(n3)Footnote 2. *Fed. R. Civ. P. 58(a)*; *see Fed. R. Civ. P. 58(a)*, Committee Notes to 2002 Amendments (such orders need not be set forth in separate document whether or not they are "final judgments" for appeal purposes).

(n4)Footnote 3. *Fed. R. Civ. P. 58(a)(1)*; *see Fed. R. Civ. P. 50(b)*.

(n5)Footnote 4. *Fed. R. Civ. P. 58(a)(2)*; *see Fed. R. Civ. P. 52(b)*.

(n6)Footnote 5. *Fed. R. Civ. P. 58(a)(3)*; *see Fed. R. Civ. P. 54(d)(2)(B)*.

(n7)Footnote 6. *Fed. R. Civ. P. 58(a)(4)*; see *Fed. R. Civ. P. 59(a)*, *(e)*.

(n8)Footnote 7. *Fed. R. Civ. P. 58(a)(5)*; *see Fed. R. Civ. P. 60(a),(b)*.

(n9)Footnote 8. *See Fed. R. Civ. P. 58(b)(1)*, discussed in *§ 25.42[2]*.

(n10)Footnote 9. *United States v. Indrelunas, 411 U.S. 216, 221-222, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1973)* (citing **Moore's Federal Practice**); *see Fed. R. Civ. P. 58(b)(2)*, discussed in *§ 25.42[3]*.

(n11)Footnote 1. *Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* ; *Bogaerts v. Shapiro (In re Litas Int'l, Inc.), 316 F.3d 113, 118-119 (2d Cir. 2003)* .

(n12)Footnote 2. *See 28 U.S.C. § 1291*; *see also Bogaerts v. Shapiro (In re Litas Int'l, Inc.), 316 F.3d 113, 118 (2d Cir. 2003)* (Rule 58 designed to avoid uncertainties as to the date on which a judgment is entered, for purposes of time limits allowed for appeal).

(n13)Footnote 3. *See Chambers v. City of Fordyce, 508 F.3d 878, 881 (8th Cir. 2007)* .

(n14)Footnote 4. *Colon-Santiago v. Rosario, 438 F.3d 101, 106 (1st Cir. 2006)* .

(n15)Footnote 1. *Dudley v. Penn-America Ins. Co., 313 F.3d 662, 670 (2d Cir. 2002)* .

(n16)Footnote 2. *Stamatakis Indus. v. J. Walter Thompson, Inc., 944 F.2d 382, 384 (7th Cir. 1991)* .

(n17)Footnote 3. *See* Appendix of Forms, Appendix to Ch. 26, Post-Judgment Procedures; *see also* Moore's Federal Practice, Rules Pamphlet Part 1, Official Forms (Matthew Bender).

(n18)Footnote 4. *Allison v. Bank One-Denver, 289 F.3d 1223, 1232-1233 (10th Cir. 2002)* .

(n19)Footnote 5. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 646 (7th Cir. 2002)* .

(n20)Footnote 1. *See Fed. R. Civ. P. 58(d)*.

(n21)Footnote 2. *Fed. R. Civ. P. 58(d)*.

(n22)Footnote 3. *See Fed. R. Civ. P. 58*, Committee Note to 2002 Amendments.

(n23)Footnote 1. *Fed. R. App. p. 4(a)(7)(B)*; *see Yates v. District of Columbia, 324 F.3d 724, 725 (D.C. Cir. 2003)* .

(n24)Footnote 2. *See Fed. R. App. p. 4(a)(7)(B)* Committee Note to 2002 Amendments; *Yates v. District of Columbia, 324 F.3d 724, 725 (D.C. Cir. 2003)* .

(n25)Footnote 3. *Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* (citing **Moore's Federal Practice**); *Bogaerts v. Shapiro (In re Litas Int'l, Inc.), 316 F.3d 113, 117-118 (2d Cir. 2003)* .

(n26)Footnote 4. *See Bogaerts v. Shapiro (In re Litas Int'l, Inc.), 316 F.3d 113, 118-119 (2d Cir. 2003)* .

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PART VI Trial and Judgment
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3-25 Moore's Manual--Federal Practice and Procedure § 25.42

§ 25.42 Procedural Requirements for Entry of Judgment

[1] Clerk's Responsibility to Enter Judgment on Civil Docket

[a] Clerk's Duty of Entry

The clerk of the district court must maintain a civil docket in which all judgments are noted chronologically. n1 The judgment entries must be brief and must show the substance of each judgment and the date the entry was made. n2 The time of "entry" of a judgment or final order is important because it starts the time to file a notice of appeal or to file certain postjudgment motions. A judgment generally is deemed "entered" for this purpose when it is set forth on a separate document, if required, n2.1 and entered in the civil docket under Rule 79(a). n2.2 However, if the judgment is never set forth in a separate document, even though required, the judgment will be deemed "entered" 150 days after its entry in the civil docket. n2.3

Certain orders disposing of postjudgment motions are not required to be set forth on a separate document; n2.4 these orders are deemed "entered" when the clerk enters them in the civil docket. n2.5 Any entry on the civil docket by the clerk requires a proper notation in the docket and not mere filing. n2.6

It should be noted that entry of the judgment by the clerk does not constitute the actual judgment, which is the substance of the court's decision as stated in the separate document. Thus, the docket entry is not per se a judgment, because the court must render the judgment; the clerk only enters a judgment on the court records. For purposes of determining whether a final judgment had been entered from which a party may appeal, and the substance of the judgment, the separate document controls, and not the clerk's entry. n3

[b] Clerk's Entry Must Be Prompt

Without waiting for the court's direction, the clerk must promptly enter a judgment unless the court orders otherwise for a simple case: when the jury returns a general verdict, when the court awards only costs or a specific sum, or when the court denies all relief. n4 In other cases, including when the jury returns a special verdict or a general verdict accompanied by interrogatories, the court must promptly approve the form of judgment, which the clerk must then

promptly enter. n5 The requirements specified in Rule 58 must be met regardless of any conflicting local district court rule. Local rules may supplement Rule 58, but only to the extent that they are consistent with it. n6

In addition to entering the judgment, the clerk is also required to notify the parties of the entry of the judgment; n7 however, notice of entry is not necessary to start the clock running on the time for appeal; thus, lack of notice of the entry by the clerk does not affect the time to appeal or relieve, or authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted in *Rule 4(a) of the Federal Rules of Appellate Procedure*. n8

[2] Entry of Judgment Without Court Approval

Unless a judgment is a partial judgment n1 or the court orders otherwise, the clerk must enter the judgment without court approval in three situations. The court clerk is required to promptly prepare, sign, and enter a judgment without waiting for the court's direction in any of the following three situations:

1. If the jury returns a general verdict; n2

2. When the court awards only costs or a sum certain; n3 or

3. When the court denies all relief. n4

If the judgment is more complex, the form of the judgment requires approval of the court before it is entered. n5

Under this provision the court retains the power to order the clerk not to enter a judgment. n6 However, the court should exercise the power sparingly to avoid delay and confusion. For example, the court may order a postponement in entry of judgment when the court has reserved decision on a motion for a directed verdict made at the close of evidence, n7 or when a motion for a new trial has been made after a verdict. In such circumstances, it may be appropriate to postpone entry of judgment until the motion is decided, although the clerk should not do so unless the court makes that order. n8

[3] Entry of Judgment With Court Approval Required

The court has the obligation to promptly approve the judgment in two situations in which the judgment is more complex than those described in [2], *above*. n1 Thus, the court must approve the form of a judgment, and the clerk must promptly enter the approved judgment, in either of the following two situations:

1. When the jury returns a special verdict or a general verdict accompanied by interrogatories; n2 or

2. When the court grants relief other than costs or a sum certain, as described in Rule 58(a)(2). n3

Entry of a complex judgment is subject to Rule 54(b) regarding partial judgments in actions involving multiple claims or parties. n4

[4] Entry of Partial Judgment In Cases With Multiple Claims and Parties

In an action involving multiple claims or multiple parties, the court has the option to enter a final judgment for some but not all parties. The provisions of Rule 58(a)(2) involving the entry of judgment are subject to this provision of Rule 54(b). n1 Consequently, if a judgment adjudicates some but not all claims or claims relating to fewer than all parties, the clerk must await further action by the court before entering judgment. Under Rule 54(b), the court may certify such a judgment as final and direct the clerk to enter it if there is no just reason for delay. n2 However, the Rule 58 requirement of a separate document and proper entry pursuant to Rule 79(a) must still be satisfied. n3

[5] Time of Entry of Judgment

The date of "entry" of a judgment controls for purposes of deadlines related to notice of appeal and postjudgment motions. n1 The date of entry under the rules depends on whether a separate document is necessary for the judgment, as stated in Rule 58(a)(1). n2 Thus, judgment is deemed entered under the Civil and Appellate Rules as follows: n3

1. If Rule 58(a)(1) does not require a separate document, n4 the date of entry is when it is entered in the civil docket under Rule 79(a); n5 or

2. If Rule 58(a)(1) requires a separate document, n6 the date of entry is when it is entered in the civil docket under Rule 79(a), and when the earlier of the following events occurs: n7

a. when it is set forth on a separate document; n8 or

b. when 150 days have run from entry in the civil docket under Rule 79(a). n9

Amended Rule 58(b) discards the attempt of the former version of the rule to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment in terms of an "order from which an appeal lies," the former version Rule 58 definition of "effectiveness" would cause confusion in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) therefore replaces the definition of "effectiveness" with a new provision that defines the time when judgment is "entered," which is the crucial time in any event, because the timing provisions of the other rules all focus on the "entry" of judgment. n10

This new all-purpose definition of the "entry of judgment" must be applied with common sense to other questions that may turn on the time when judgment is "entered." Therefore, if the 150-day provision in Rule 58(b)(2)(B), which is designed to integrate the time for post-judgment motions with appeal time, serves no purpose or would defeat the purpose of another rule, it should be disregarded. For example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under the collateral-order doctrine. However, appealability under the collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document, because there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to the creation of a separate document and without awaiting the expiration of the 150 days. n11

[6] Entry of Judgment Nunc Pro Tunc

The Latin phrase "nunc pro tunc" literally means "now for then." A nunc pro tunc order creates a legal fiction that the a judgment or order exist as of the date to which it is made effective. Court orders entered nunc pro tunc are normally used for the purpose of rectifying an omission from the court records and, therefore, are deemed to have retroactive effect. n0.1 In reference to the entry of judgment, nunc pro tunc means that the judgment relates back to a designated past date and that entry of the judgment is to be given certain retroactive effects. n1 A nunc pro tunc judgment is an equitable remedy traditionally available to promote fairness to the parties and as justice may require. n2 The entry nunc pro tunc, however, must have a proper factual basis and may not be used by the lower court as a device to amend a judgment which properly reflected the decision of the court, but which was later found to be erroneous, or to otherwise amend an unalterable record. n3

In the context of the clerk's duty, for example, a court may make a judgment nunc pro tunc when a judgment has been rendered but the clerk has failed to perform the ministerial task of entry. n4 An entry of a judgment nunc pro tunc also has been upheld when a party has erroneously assumed that the judgment rendered has been entered and has consequently appealed from the unentered judgment. n5 Similarly, a district court may enter a nunc pro tunc order

making the express determination and the express direction, required by Rule 54(b) to give finality to an adjudication of one or more, but less than all, of the multiple claims in an action in order to cure the deficiency in an appeal from an order that lacks finality in the absence of the "express determination" and the "express direction" by the district court. n6

[7] Delay of Entry Not Allowed to Tax Costs or Award Fees

Even though the court is permitted to delay entry of judgment in certain circumstances to promote the efficient administration of the court proceedings, n1 Rule 58 expressly provides that entry of a judgment generally may not be delayed for the taxing of costs or awarding of fees. n2 The requirement that judgment not be delayed to tax costs or award fees is in accord with the general purpose of Rule 58 to facilitate appeals. However, at times it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award may be heard at the same time as appeals relating to the merits of the case. n3

If a party files a timely motion for attorney's fees under Rule 54(d)(2) n4 and no notice of appeal has been filed or has become effective, the court may order that the motion have the same effect under *Rule 4(a)(4) of the Federal Rules of Appellate Procedure* as a timely motion under Rule 59. n5 This means that the time for appeal will run from the entry of the order entirely disposing of the Rule 54(d)(2) motion. n6 If the court does extend the time to appeal, a notice of appeal filed after entry of judgment is ineffective until disposition of the Rule 54(d)(2) motion, with respect only to the motion of the party designated in the order. The filing of a fees motion by any other party will not extend the time for appeal. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt Records

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 79(a)(2)(C)*; *see Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994)* .

(n2)Footnote 2. *Fed. R. Civ. P. 79(a)(3)*; *see United States v. Indrelunas, 411 U.S. 216, 221, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1973)* .

(n3)Footnote 2.1. *Fed. R. Civ. P. 58(a)*; *see § 25.41[1]*.

(n4)Footnote 2.2. *Fed. R. Civ. P. 58(c)(2)(A)*; *see Fed. R. App. P. 4(a)(7)(A)(ii)*.

(n5)Footnote 2.3. *Fed. R. Civ. P. 58(c)(2)(B)*; *see Fed. R. App. P. 4(a)(7)(A)(ii)*.

(n6)Footnote 2.4. *Fed. R. Civ. P. 58(a)*; *see § 25.41[1]* (list of orders not requiring separate document).

(n7)Footnote 2.5. *Fed. R. Civ. P. 58(c)(1)*; *see Fed. R. App. P. 4(a)(7)(A)(i)*.

(n8)Footnote 2.6. *Herrera v. First N. Sav. & Loan Ass'n, 805 F.2d 896, 898 (10th Cir. 1986)* .

(n9)Footnote 3. *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 995-996 (9th Cir. 2000)* (when clerk's designation conflicted with judgment itself, judgment controlled).

(n10)Footnote 4. *Fed. R. Civ. P. 58(b)(1)*; *see* [2], *below*.

(n11)Footnote 5. *Fed. R. Civ. P. 58(b)(2)*; *see* [3], *below*.

(n12)Footnote 6. *McKee v. Bi-State Dev. Agency, 801 F.2d 1014, 1017-1018 (8th Cir. 1986)* (local court rule that

provided that judgment on merits was not final until court ruled on attorney's fees was invalid because it conflicted with rule that time for appeal begins to run from date of entry of judgment).

(n13)Footnote 7. *Fed. R. Civ. P. 77(d)(1).*

(n14)Footnote 8. *Fed. R. Civ. P. 77(d)(2)*; *see Fed. R. App. P. 4(1)*; *see also Clark v. Lavallie, 204 F.3d 1038, 1041 (10th Cir. 2000)* .

(n15)Footnote 1. *See* [4], *below*.

(n16)Footnote 2. *Fed. R. Civ. P. 58(b)(1)(A)*; *see* Official Form 70, "Judgment on Jury Verdict."

(n17)Footnote 3. *Fed. R. Civ. P. 58(b)(1)(B).*

(n18)Footnote 4. *Fed. R. Civ. P. 58(b)(1)(C).*

(n19)Footnote 5. *See* [3], *below*.

(n20)Footnote 6. *Fed. R. Civ. P. 58(b)(1).*

(n21)Footnote 7. *See Fed. R. Civ. P. 50(b).*

(n22)Footnote 8. *See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994)* .

(n23)Footnote 1. *Fed. R. Civ. P. 58(b)(2)*; *see EOI Electronics, Inc. v. Xebec, 785 F.2d 391, 398 (2d Cir. 1986)* (judgment not properly entered because court did not approve of form of judgment).

(n24)Footnote 2. *Fed. R. Civ. P. 58(b)(2)(A)*. When the jury returns a special verdict, the court has the duty to render a final judgment based on the jury's findings (*Fed. R. Civ. P. 49(a)*) and then to promptly approve the form of the judgment. *Robles v. Exxon Corp., 862 F.2d 1201, 1204 (5th Cir. 1989)* , *cert. denied*, *490 U.S. 1051 (1989)* . If the answers to written questions accompanying a general verdict are consistent with the verdict, the court should promptly approve an appropriate form of judgment (*Fed. R. Civ. P. 49(b)*). The consequences of inconsistent verdicts and answers are discussed in Chapter 22, *Trial by Jury*.

(n25)Footnote 3. *Fed. R. Civ. P. 58(b)(2)(B).*

(n26)Footnote 4. *Fed. R. Civ. P. 58(b)(2)*; *see Fed. R. Civ. P. 54(b)*; *see also* [4], *below*.

(n27)Footnote 1. *Fed. R. Civ. P. 58(b)*; *see Fed. R. Civ. P. 54(b).*

(n28)Footnote 2. *Fed. R. Civ. P. 54(b).*

(n29)Footnote 3. *Willhauck v. Halpin, 953 F.2d 689, 701-702 (1st Cir. 1991)* ; *see Fed. R. Civ. P. 58(a)(1).*

(n30)Footnote 1. *Fed. R. Civ. P. 58*, Committee Note to 2002 Amendments.

(n31)Footnote 2. *Fed. R. Civ. P. 58(c)*; *see Fed. R. Civ. P. 58(a)*; *see also* [1], *above*.

(n32)Footnote 3. *See Fed. R. Civ. P. 58(c)*; *Fed. R. App. P. 4(a)(7).*

(n33)Footnote 4. *See Fed. R. Civ. P. 58(a)*; *see also* [1], *above*.

(n34)Footnote 5. *Fed. R. Civ. P. 58(c)(1)*; *see Fed. R. Civ. P. 79(a)(2)(C).*

(n35)Footnote 6. *See Fed. R. Civ. P. 58(a)*; *see also* [1], *above*.

(n36)Footnote 7. *Fed. R. Civ. P. 58(c)(2)*; see *Fed. R. Civ. P. 79(a)(2)(C)*.

(n37)Footnote 8. *Fed. R. Civ. P. 58(c)(2)(A)*.

(n38)Footnote 9. *Fed. R. Civ. P. 58(c)(2)(A)*.

(n39)Footnote 10. *Fed. R. Civ. P. 58*, Committee Note to 2002 Amendments.

(n40)Footnote 11. *Fed. R. Civ. P. 58(b)*, Committee Notes to 2002 Amendments.

(n41)Footnote 0.1. *Patton v. Denver Post Corp., 326 F.3d 1148, 1153-1154 (10th Cir. 2003)* .

(n42)Footnote 1. *Sierra Club v. Whitman, 285 F.3d 63, 67-68 (D.C. Cir. 2002)* .

(n43)Footnote 2. *Ethyl Corp. v. Browner, 67 F.3d 941, 945 (D.C. Cir. 1995)* (in context of agency orders, nunc pro tunc relief is available when necessary to put victim of agency error in economic position it would have occupied but for erroneous order).

(n44)Footnote 3. *Chambers v. American Trans Air, Inc., 990 F.2d 317, 318 (7th Cir. 1993)* .

(n45)Footnote 4. *Hull v. United States, 971 F.2d 1499, 1507-1508 (10th Cir. 1992)* , *cert. denied, 507 U.S. 1030 (1993)* (months after making findings of fact and conclusions of law and awarding damages, district court issued order nunc pro tunc directing clerk to enter findings and conclusions as judgment, but judgment not considered entered for purposes of accrual of interest on award until entry of nunc pro tunc order, which satisfied separate document requirement).

(n46)Footnote 5. *Martin v. Staples, 164 F.2d 106 (D.C. Cir. 1947)* (appellate court may find that justice would be served by entry nunc pro tunc, as of the date that the entry should have been made).

(n47)Footnote 6. *Ross v. City of Waukegan, 5 F.3d 1084, 1089 (7th Cir. 1993)* .

(n48)Footnote 1. *See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994)* .

(n49)Footnote 2. *Fed. R. Civ. P. 58(e)*; *see Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-201, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* ; *Deboard v. Sunshine Mining & Ref. Co., 208 F.3d 1228, 1236 n.4 (10th Cir. 2000)* .

(n50)Footnote 3. *Fed. R. App. P. 4*, Committee Note to 1993 Amendments.

(n51)Footnote 4. *Fed. R. Civ. P. 54(d)(2)*.

(n52)Footnote 5. *Fed. R. Civ. P. 58(e)*.

(n53)Footnote 6. *Fed. R. App. P. 4(a)(4)(A)(iii)*.

(n54)Footnote 7. *Deboard v. Sunshine Mining & Ref. Co., 208 F.3d 1228, 1236 n. 4 (10th Cir. 2000)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
D. ENTRY OF JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.43

§ 25.43 Effect of Proper Entry of Judgmentn*

The time of proper completion of "entry" of a judgment or final order is significant procedurally because it starts the time to file a notice of appeal n1 or to file certain postjudgment motions. n2 A judgment generally is deemed "entered" for these purposes when it is set forth on a separate document, if required, n3 and entered in the civil docket under Rule 79(a). n4 However, if a judgment is never set out on a separate document, even though required, the judgment is nevertheless deemed to be "entered" 150 days after its entry in the civil docket. n5 Certain orders disposing of postjudgment motions are not required to be set forth on a separate document. n6 These orders are deemed "entered" when the clerk enters them in the civil docket. n6.1 Entry on the civil docket by the clerk requires a proper notation in the docket; it is not sufficient for entry that the clerk merely receives the judgment or order, or that the clerk marks it as "filed.". n6.2 The court of appeals may raise on its own initiative the issue of whether the entry conforms to Rule 58 requirements for purposes of commencing the time limit to initiate an appeal. n6.3

The consequences of the district court's failure to comply with Rule 58 are generally that time limits that take effect on entry of a judgment do not begin to run. n6.4 Thus, if the district court does not enter its final judgment on a separate document when required, the time to appeal does not begin to run, n6.5 unless it is ultimately properly entered on the civil docket, and then the time does not begin to run until 150 days after the entry on the civil docket. n6.6 Even though technically a party should not file a notice of appeal until after entry of judgment, the rules provide that when a party files a notice of appeal after rendition of judgment, but before entry of judgment by the clerk, the notice of appeal must be deemed to have been filed immediately following entry, once the clerk properly enters the judgment. n6.7 However, if a party files a notice of appeal after rendition of judgment, but before entry of judgment by the clerk, the notice is treated as if it had been filed immediately following entry, once the clerk properly enters the judgment. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 58.03* (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States v. Indrelunas, 411 U.S. 216, 218, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1973)* (citing **Moore's Federal Practice**); *see Fed. R. App. P. 4(a)(1).*

(n3)Footnote 2. See *Fed. R. Civ. P. 60(b).*

(n4)Footnote 3. *See § 25.41[1].*

(n5)Footnote 4. *Fed. R. Civ. P. 58(c)(2)(A)*; *see Fed. R. App. P. 4(a)(7)(A)(ii).*

(n6)Footnote 5. *Fed. R. Civ. P. 58(c)(2)(B)*; *see Fed. R. App. P. 4(a)(7)(A)(ii).*

(n7)Footnote 6. *Fed. R. Civ. P. 58(a)*; *see § 25.41[1]* (list of orders not requiring separate document).

(n8)Footnote 6.1. *Fed. R. Civ. P. 58(c)(1)*; *see Fed. R. App. P. 4(a)(7)(A)(i).*

(n9)Footnote 6.2. *Herrera v. First N. Sav. & Loan Ass'n, 805 F.2d 896, 898 (10th Cir. 1986) .*

(n10)Footnote 6.3. *Production & Maintenance Employees' Local 504, Laborers' Int'l Union v. Roadmaster Corp., 954 F.2d 1397, 1402 (7th Cir. 1992) .*

(n11)Footnote 6.4. *See § 25.44.*

(n12)Footnote 6.5. *Quinn v. Haynes, 234 F.3d 837, 843 (4th Cir. 2001) .*

(n13)Footnote 6.6. *Fed. R. Civ. P. 58(c)(2)(B)*; *see Green v. Nevers, 196 F.3d 627, 630-631 & n.3 (6th Cir. 1999) .*

(n14)Footnote 6.7. *Fed. R. App. P. 4(a)(2)*; *see Barber v. Whirlpool Corp., 34 F.3d 1268, 1273-1275 (4th Cir. 1994) .*

(n15)Footnote 7. *Fed. R. App. P. 4(a)*; *see Barber v. Whirlpool Corp., 34 F.3d 1268, 1273-1275 (4th Cir. 1994) .*

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
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3-25 Moore's Manual--Federal Practice and Procedure § 25.44

§ 25.44 Effect of Failure to Enter Judgmentn*

Until one of the events constituting entry of judgment occurs, n1 the time for filing a notice of appeal does not begin to run. n1.1 The result of failure to enter judgment on a separate document also means that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. n1.2 However, when the court and clerk have failed to properly enter judgment on a separate document, any party, usually the prevailing party, may request the court to set forth and enter the judgment on a separate document as required by Rule 58(a)(1), n1.3 and thus start the deadline time running to file an appeal. n2

Furthermore, the satisfaction of Rule 58's requirements is not a jurisdictional prerequisite to an appeal of a final judgment, n3 provided that the district court has made clear its intent to dispose of all issues n4 and has in fact divested itself of all remaining subject matter jurisdiction. n5 Therefore, "finality," is the jurisdictional prerequisite n6 and not Rule 58's requirements of a separate document and entry by the clerk. n7 When the intent of the court to make a final disposition is unclear, an appellate court must dismiss any appeal for lack of jurisdiction, n8 remanding to the district court for clarification when required. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 58.06* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 25.42[5].*

(n3)Footnote 1.1. *Fed. R. Civ. P. 58(a)-(c)*, Committee Notes to 2002 Amendments; *see Fed. R. App. P. 4(a).*

(n4)Footnote 1.2. *Fed. R. Civ. P. 58(a)-(c)*, Committee Notes to 2002 Amendments; *see Fed. R. Civ. P. 50*, *52*, *54*,

59, and *60*.

(n5)Footnote 1.3. *Fed. R. Civ. P. 58(d)*.

(n6)Footnote 2. *Fed. R. Civ. P. 58(a)-(c)*, Committee Notes to 2002 Amendments.

(n7)Footnote 3. *See Transit Management of Southeast La., Inc. v. Group Ins. Admin., Inc., 226 F.3d 376, 382 (5th Cir. 2000)* ; *Cook v. Powell Buick, Inc., 155 F.3d 758, 761 n.8 (5th Cir. 1998)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1 (2002)* (unlike Rule 54(b) certification, separate document requirement of Rule 58 is not jurisdictional and may be waived).

(n8)Footnote 4. *Nunez-Soto v. Alvarado, 956 F.2d 1, 2 (1st Cir. 1992)* .

(n9)Footnote 5. *Corion Corp. v. Chen, 964 F.2d 55, 56-57 (1st Cir. 1992)* .

(n10)Footnote 6. *In re Slimick, 928 F.2d 304, 307 (9th Cir. 1990)* .

(n11)Footnote 7. *See Lower Elwha Band of S'Klallams v. Lummi Indian Tribe, 235 F.3d 443, 448-449 (9th Cir. 2000)* .

(n12)Footnote 8. *Benjamin v. United States, 833 F.2d 669, 671-672 (7th Cir. 1987)* .

(n13)Footnote 9. *United States v. Woods, 885 F.2d 352, 353-354 (6th Cir. 1989)* (remanding for district court to clarify, explain, and give reasons for its margin order granting summary judgment).

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PART VI Trial and Judgment
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3-25 Moore's Manual--Federal Practice and Procedure §§ 25.45through 25.59

[Reserved]

§§ 25.45[Reserved]

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
E. COSTS RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.60

§ 25.60 Nature and Scope of Recoverable Costsn*

[1] Provision for Costs

The district court should allow costs other than attorney's fees as a matter of course to the prevailing party, n1 except in three situations: n2 (1) when the court expressly directs that the prevailing party is not entitled to costs; n3 (2) when an express provision for costs is made either in a federal statute or rule; n4 or (3) costs may be imposed only to the extent permitted by law against the United States, its officers, and agencies. n5 An award of costs under Rule 54(d)(1) falls within the discretion of the trial court, meaning that even if a party satisfies the definition of a "prevailing party," the district court retains broad discretion as to how much costs to award, if any. n6 Under the *Erie* doctrine, a federal court sitting in diversity is required to apply the substantive law of the state, but the procedure in such actions is governed by federal law. n7 The issue of whether and what amount of costs may be awarded incident to the judgment is a procedural issue under the *Erie* doctrine. Therefore, in diversity actions, federal law governs the award and prevails over contrary state costs provisions. n8

[2] Nature of Recoverable Costs

As used in Rule 54(d)(1), "costs" is a term of art that refers only to those particular expenses that a court may tax to an opposing party based on specific statutory authority n1 as an incident of the judgment in the action. n2 Although the court generally should make an award of "costs" to the prevailing party, n3 the prevailing party is not necessarily entitled to recover all of the various types of litigation expenses, because the term "costs" is not synonymous with litigation expenses. Often the largest expense incurred by a prevailing party is the amount of compensation paid to the party's attorneys; however, that expense is not taxable as a "cost" in the action n4 and generally may not be recovered under the American Rule, which prohibits the shifting of litigation expenses. Thus, attorney's fees may generally be recovered only by statute or by contractual provision. n5

Rule 54(d)(1) allows prevailing parties to receive only costs other than attorneys' fees. n6 As noted in the Rule, the discretion of the district court to award costs is subordinated to Congress's dictates when express provisions are made in federal statutory authority. Congress has displaced or modified district courts' discretion in a variety of contexts, particularly where costs are taxed against the United States and its officers, However, the most significant provisions

are in a statute that enumerates the categories of costs and fees that a judge or the clerk of the court may tax. n7 As the Supreme Court has explained, absent explicit statutory or contractual authorization, federal courts are bound by the limitations set out in *28 U.S.C. § 1920*. n8 The district court may tax only those costs explicitly authorized by statute and only for the amounts authorized in the statute. Thus, the discretion granted by Rule 54(d)(1) permits the court only to decline to tax allowable costs, not to tax costs in the absence of statutory authorization. n9 The costs that the district court may award under Rule 54(d)(1) are comprehensively listed in the *28 U.S.C. Section 1920*, and a district court may not award other costs or exceed the amounts provided without some other explicit statutory authorization. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.103* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 25.61*.

(n3)Footnote 2. *Fed. R. Civ. P. 54(d)(1)*.

(n4)Footnote 3. *See § 25.61*.

(n5)Footnote 4. *See § 25.62*.

(n6)Footnote 5. *See § 25.63*.

(n7)Footnote 6. *Ruiz v. A.B. Chance Co., 234 F.3d 654, 670 (Fed. Cir. 2001)* .

(n8)Footnote 7. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n9)Footnote 8. *Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167-1168 (9th Cir. 1995)* (taxation of expert witness fees is issue of trial procedure governed by federal law, so district court erred in awarding reimbursement for expert under state law).

(n10)Footnote 1. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526, 2006 U.S. LEXIS 5162, *13 (2006)* .

(n11)Footnote 2. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* (Rule 54(d) does not grant court discretion to award any type of cost court sees fit, because Section 1920 defines the term costs as used in Rule 54(d)).

(n12)Footnote 3. *Fed. R. Civ. P. 54(d)(1)*; *see § 25.61*.

(n13)Footnote 4. *See Fed. R. Civ. P. 54(d)(1), (2)* (costs and attorney's fees treated separately).

(n14)Footnote 5. *Jannotta v. Subway Sandwich Shops, Inc., 225 F.3d 815, 817-818 (7th Cir. 2001)* ; *see Fed. R. Civ. P. 54(d)(2)*; *see also § 25.80* et seq.

(n15)Footnote 6. *Fed. R. Civ. P. 54(d)(1)*.

(n16)Footnote 7. See *28 U.S.C. § 1920*.

(n17)Footnote 8. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526, 2006 U.S. LEXIS 5162, *13-*14 (2006)* (under Individuals with Disabilities Education Act, plaintiff could not recover as "costs" expenses and fees paid to expert witnesses because such expenses were not specified as costs either in IDEA or in Section 1920).

(n18)Footnote 9. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n19)Footnote 10. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526, 2006 U.S. LEXIS 5162, *13-*14 (2006)* .

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PART VI Trial and Judgment
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PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
E. COSTS RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.61

§ 25.61 Costs Generally Recoverable by Prevailing Partyn*

[1] Court's Discretion to Award Costs to Prevailing Party

A court must allow statutory costs as a matter of course to the prevailing party unless the court specifically directs otherwise. Courts have construed "otherwise direct" language of the rule as a grant of discretion to the district court to limit or deny otherwise taxable costs to the prevailing party, but not to exceed statutory limitations on taxable costs. n1 However, that language also creates a strong presumption that the prevailing party is entitled to recover costs under Rule 54(d). n2 This presumption means that if the judgment entered by the district court makes no mention of costs at all, the judgment is presumed to be one allowing costs. n3 The presumption applies even if the costs were actually paid by a third party, such as an insurer and not by the prevailing party. n4 Furthermore, because the prevailing party is presumptively entitled to an award of costs the district court may not deny costs to the prevailing party unless the court explains the reasons for the denial, n5 or unless the circumstances justifying denial of costs are clearly evident from the record. n6 For a discussion of the meaning of the term "prevailing party," see [2], *below*.

The presumption that the prevailing party is entitled to costs must be overcome by some showing that an award would be inequitable under all the circumstances, and the losing party bears the burden of making the showing of inequity. n7 A district court has the discretion to refuse to award costs to the prevailing party when it would be inequitable under all the circumstances in the case to do so. For example, the district court may use its discretion to deny costs when the prevailing party's expenditures are unreasonably large, when the prevailing party prolonged the litigation or raised frivolous issues, when the claims are close or difficult, when the prevailing party's recovery is insignificant, n8 or when a party prevails technically without obtaining recovery. n9 When the prevailing party is guilty of some significant misconduct that warrants sanctions, the court may even exercise its discretion under Rule 54(d)(1) and order the prevailing party to pay some or all of the costs of the action. n10

The court must consider all factors and may not justify a denial of costs solely based on one factor. The court also has discretion to allocate costs. Thus, in assessing costs in a discrimination case, it was held that the district court may consider plaintiff's financial resources, but that factor alone would not be sufficient basis to deny costs entirely to a prevailing defendant. n11 Similarly, a district court's disapproval of a prevailing defendant's conduct that was the basis

for plaintiff's claim is not by itself a sufficient basis to deny costs to the prevailing defendant. n12 Additionally, the mere fact that the losing party's position had merit or that the case presented close and difficult issues is not a sufficient ground to totally deny costs to the prevailing party. n13

It should be noted that some federal statutes either mandate or prohibit an award of costs in particular circumstances, removing the court's discretion under Rule 54(d)(1). n14 In this regard, statutes that mandate costs are substantially more common than those prohibiting them. Many of the statutes that mandate costs are those which are based on public interest factors, such as antitrust actions, n15 or consumer protection or consumer safety actions. n16

[2] Prevailing Party for Purposes of Costs

The "prevailing party" for purposes of the party generally entitled to an award of costs n1 is the party in whose favor judgment was entered, n1.1 even if that judgment does not fully vindicate all of that party's positions and assertions in the case. n2 This test is known as the judgment-winner test and is generally applied for purposes of cost awards. By contrast the "prevailing party" standard for awarding attorney's fees under Rule 54(d)(2) is more stringent. n3 The simple judgment-winner test relies on the formalities of the judgment entered and is mechanical in its operation, not allowing for any consideration of the practical effect of the litigation. n4 On the other hand, the prevailing party inquiry in the context of attorney's fees focuses primarily on that practical effect of the litigation, not necessarily on the technical judgment victor. n5

[3] Particular Types of Costs Recoverable as Matter of Course to Prevailing Party

The following are costs that the court may award as a matter of course to the prevailing party: n1

1. Fees of the clerk and marshal. n2 The fees charged by the clerk and the marshal are governed by separate sections of the Judicial Code. The clerk's fees are established by Section 1914, which permits the clerk to charge a filing fee in every civil action and to collect other fees as authorized by the Judicial Conference of the United States. n3 The fees charged by the marshal are established by Section 1921, which provides principally for the collection of fees and mileage for the service of process, writs of execution, or other papers, and fees for the seizure, custody, or sale of property. n4

2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case. n5 This provision has also been interpreted to include expenses of necessary videotaping. n6 Its primary application, however, is to transcripts of in-court proceedings prepared by the official court reporter for the district court. n7

3. Fees and disbursements for printing and witnesses. n8 In conjunction with the other express items of costs listed here, this item has been held as a basis for including in costs all expenses related to depositions. n9 Witnesses are entitled to a daily attendance fee, travel expenses, and a subsistence allowance. n10 This item does not include fees for compensation or preparation of expert witnesses because such fees are not explicitly provided as costs by the general cost statute. n11

4. Fees for exemplification and copies of papers necessarily obtained for use in the case. n12 In this category, expenses of documentary and other non-testimonial evidence generally are taxable costs. n13 An "exemplification" is a physical, demonstrative aid, such as an exhibit or model, that materially aids the trier of fact's understanding of the claims or issues in a case. An exhibit or physical model does not qualify as an exemplification if it is essentially argumentative, serving merely as an aid to the argument of an attorney or the position of an expert witness. Furthermore, if the exhibit or model at issue requires the input of attorneys or experts, the expenses of those persons as professionals in producing the item may not be included in any award of costs. n14

5. Docket fees. n15 These fees may include the docket fees for trial or final hearing in the case. n16

6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under Judicial Code Section 1828. n17 Fees for translation of depositions or other documents may also be taxed. n18 Although § 1920(6) does not expressly require that the translation services be "necessary," the district court may exercise its discretion to decline to tax costs for an interpreter when the translation is unnecessary. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal FeesCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.103* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n3)Footnote 2. *Power Mosfet Techs., L.L.C. v. Siemens AG, 378 F.3d 1396, 1407 (Fed. Cir. 2004)* .

(n4)Footnote 3. *Congregation of the Passion v. Touche, Ross & Co., 854 F.2d 219, 221 (7th Cir. 1988)* .

(n5)Footnote 4. *Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 638-639 (11th Cir. 1991)* .

(n6)Footnote 5. *Krocka v. City of Chicago, 203 F.3d 507, 518-519 (7th Cir. 2000)* (circuit court remanded case for district court to explain on record its reasons for denying costs to defendant in whose favor final judgment was entered); *Aerotech, Inc. v. Estes, 110 F.3d 1523, 1526-1527 (10th Cir. 1997)* (district court must provide valid reason for not awarding costs to prevailing party).

(n7)Footnote 6. *See, e.g., Sheets v. Yamaha Motors Corp., 891 F.2d 533, 539-540 (5th Cir. 1990)* .

(n8)Footnote 7. *National Information Servs. v. TRW, Inc., 51 F.3d 1470, 1472 (9th Cir. 1995)* .

(n9)Footnote 8. *Andretti v. Borla Performance Indus., 426 F.3d 824, 836 (6th Cir. 2005)* .

(n10)Footnote 9. *DiGiore v. Ryan, 172 F.3d 454, 466-467 (7th Cir. 1999)* .

(n11)Footnote 10. *Sheets v. Yamaha Motors Corp., 891 F.2d 533, 539-540 (5th Cir. 1990)* .

(n12)Footnote 11. *In re Paoli Railroad Yard PCB Litigation, 221 F.3d 449, 453-454 (3d Cir. 2000)* (discussing extent to which court may consider relative indigence of losing party in determining amount of costs award); *Association of Mexican-Am. Educators v. California, 195 F.3d 465, 493-495 (9th Cir. 1999)* (if prevailing defendant has done nothing to deserve punishment, court may not deny costs entirely because of lack of resources of loser).

(n13)Footnote 12. *Zeran v. Diamond Broad., Inc., 203 F.3d 714, 722 (10th Cir. 2000)* .

(n14)Footnote 13. *Association of Mexican-American Educators v. California, 183 F.3d 1055, 1080-1081 (9th Cir. 1999)* .

(n15)Footnote 14. *United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 539 (5th Cir. 1987) , cert. denied, 485 U.S. 976 (1988)* (district court properly denied costs to prevailing claimant in forfeiture proceeding, because *28 U.S.C. § 2465* provides that costs should not be awarded if there was reasonable cause for seizure, thus displacing court's discretion to award costs under Rule 54(d)).

(n16)Footnote 15. *15 U.S.C. § 15* (any person who is injured in business or property by reason of violation of antitrust laws is entitled to recover treble damages and costs of suit).

(n17)Footnote 16. *15 U.S.C. § 1691e(d)* (under Equal Credit Opportunity Act, costs of action must be added to any damages awarded by court to prevailing party).

(n18)Footnote 1. *See Fed. R. Civ. P. 54(d)(1)*; *see also* [1], *above*.

(n19)Footnote 1.1. *Andretti v. Borla Performance Indus., 426 F.3d 824, 835-836, (6th Cir. 2005) .*

(n20)Footnote 2. *See, e.g., Slane v. Mariah Boats, Inc., 164 F.3d 1065, 1068 (7th Cir. 1999) , cert. denied, 119 S. Ct. 2342 (1999)* (when one party gets substantial relief it "prevails" even if it does not win on all claims).

(n21)Footnote 3. *Byers v. Dallas Morning News, Inc., 209 F.3d 419, 430 (5th Cir. 2000) .*

(n22)Footnote 4. *Firefighters' Institute for Racial Equality v. City of St. Louis, 220 F.3d 898 (8th Cir. 2000) .*

(n23)Footnote 5. *See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 430 (5th Cir. 2000) .*

(n24)Footnote 1. *Fed. R. Civ. P. 54(d)(1)*; *see Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* ; *see also 28 U.S.C. § 1920*.

(n25)Footnote 2. *28 U.S.C. § 1920(1)*.

(n26)Footnote 3. *28 U.S.C. § 1914*.

(n27)Footnote 4. *See 28 U.S.C. § 1921*.

(n28)Footnote 5. *28 U.S.C. § 1920(2)*.

(n29)Footnote 6. *Cherry v. Champion Int'l Corp., 186 F.3d 442, 448-449 (4th Cir. 1999) .*

(n30)Footnote 7. *28 U.S.C. § 753(b)* (any party may obtain transcript of all or part of proceedings from official court reporter by requesting transcript and paying required transcription fees).

(n31)Footnote 8. *28 U.S.C. § 1920(3)*.

(n32)Footnote 9. *See West Wind Africa Line v. Corpus Christi Marine Servs., 834 F.2d 1232, 1236-1238 (5th Cir. 1988) .*

(n33)Footnote 10. *28 U.S.C. § 1821*.

(n34)Footnote 11. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526, 2006 U.S. LEXIS 5162, *13-*14 (2006) .*

(n35)Footnote 12. *28 U.S.C. § 1920(4)*.

(n36)Footnote 13. *Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988)* (Section 1920(4) embraces expenses of producing photographic and other types of demonstrative evidence, provided that items

are necessarily obtained for use in case).

(n37)Footnote 14. *Summit Tech., Inc. v. Nidek Co., 435 F.3d 1371, 1377-1378 (Fed. Cir. 2006)* (citing **Moore's Federal Practice**).

(n38)Footnote 15. *28 U.S.C. § 1920(5)*; *see 28 U.S.C. § 1923*.

(n39)Footnote 16. *Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 486 (9th Cir. 1983)* .

(n40)Footnote 17. *28 U.S.C. § 1920(6)*; *see 28 U.S.C. § 1828*.

(n41)Footnote 18. *Chore-Time Equip. v. Cumberland Corp., 713 F.2d 774, 782 (Fed. Cir. 1983)* .

(n42)Footnote 19. *BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415, 419 (6th Cir. 2005)* (even though translating costs are not listed in section 1920(4), costs related to translation fit under it because definition of "interpret" expressly includes "translation" into intelligible or familiar language).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
E. COSTS RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.62

§ 25.62 Special Federal Statutes and Rules Providing for Award of Costsn*

[1] Statutes Authorizing Award of Costs to Person Other Than Prevailing Party

Several federal statutes authorize the court to award costs to a person other than the prevailing party, including the following:

1. When an action is dismissed for lack of jurisdiction. Whenever any action or suit is dismissed for lack of jurisdiction in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, the court may order the payment of just costs. n1 Any other federal courts presumably are subject to the common-law rule that costs may not be awarded when subject-matter jurisdiction is lacking. n2

2. Against the plaintiff in a diversity case who recovers less than the jurisdictional minimum amount in controversy. When a diversity plaintiff prevails, but fails to recover the jurisdictional minimum amount, the court may assess the costs of the action against the plaintiff. n3 Even though proper pleading of the jurisdictional minimum is a prerequisite to diversity jurisdiction, the failure to actually prove the requisite injury does not deprive the court of jurisdiction; rather, Section 1332(b) provides for a discretionary denial of costs as a penalty for bringing of inflated state law claims into federal court. The mere fact that the action was brought in good faith does not deprive the district court of discretion to deny costs. n4

3. Against an attorney for abuse of process. Any attorney practicing in federal court who multiplies the proceedings in any case unreasonably and vexatiously may be taxed the excess costs, expenses, and attorney's fees incurred because of the wrongful conduct. n5 Sanctions under Section 1927 may be made against an attorney, not the client. Furthermore, sanctions are proper only when the attorney multiplies the proceedings in bad faith and only for the amount of extra expense caused by that conduct. n6

4. As compensation for delay caused by an appeal. When an appeal is affirmed by the Supreme Court or

a court of appeals, the court may award the appellee just damages for the delay caused by the appeal in the amount of single or double costs. n7 This statute is used as alternative authority, because both the Appellate Rules and the Supreme Court Rules have provisions that specifically govern the awarding of costs on appeal. n8

[2] Federal Rules Authorizing Award of Costs to Person Other Than Prevailing Party

[a] Costs Caused by Failure to Comply With Request for Waiver of Service of Process

Any defendant located within the United States who receives a proper request for waiver of service under Rule 4 has a duty to avoid unnecessary costs of effecting service of process. If the defendant breaches this duty by failing to waive service and, as a result, the plaintiff is required to make formal service of process, the court is required to impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. n1 The mandatory costs include those subsequently incurred in effecting service together with the costs of any motion required to collect the costs of service. n2

[b] Costs Under Disclosure and Discovery Rules

Several provisions of the rules governing the disclosure and discovery process permit an award of costs or expenses. Many of these provisions permit an award against a party who violates the discovery rules, for example, for failing to make disclosure or cooperate in discovery. n3 Other provisions permit the party complying with a discovery request to obtain an award of costs from the party seeking the discovery. For example, when discovery is sought from a party's expert witnesses, the party seeking the discovery must pay to the party or expert a reasonable fee for complying. n4

[c] Costs of Previously Dismissed Action

If a plaintiff has previously dismissed the same claim against the same defendant in any court, state or federal, the federal court may require the plaintiff to pay some or all of the costs of the previously dismissed action. If the federal court makes such an order, the court may stay the action until the plaintiff has complied with the order to pay the costs of the prior action. n5

[d] Costs of Appointed Master or Interpreter

When the district court appoints a special master to assist the court in the disposition of an action or the measurement of damages, the compensation of the master must be fixed by the court and will be charged to the parties as the court may direct. n6 This provision gives substantial discretion in the district court to apportion the costs of the master. n7 Similarly, when the district court appoints a special master to assist the court in translation when a witness or other participant in the trial may be unable to speak English, the expense of the interpreter may be assessed or divided among the parties as the court directs and may be taxed as costs against the losing party. n8

[e] Costs When Judgment for Plaintiff Is Not More Favorable Than Offer by Defendant

To encourage settlement, if the defendant makes an offer of judgment and plaintiff rejects the offer and subsequently recovers a judgment that is not more favorable than the offer, the plaintiff must pay the costs incurred by the defendant following the offer. n9 This rule is inapplicable if judgment is rendered for the offering defendant. n10 As used in Rule 68, the term "costs" refers to all costs properly awardable under the relevant substantive statute or other authority. n11 In other words, all costs properly awardable in an action are to be considered within the scope of the rule and, if the substantive statute at issue explicitly defines attorney's fees as part of the costs to be awarded, the costs to be awarded under Rule 68 include the post-offer attorney's fees. n12

[f] Costs in Condemnation Actions

Costs in condemnation actions from the coverage of Rule 54(d)(1) does not apply. n13 The rationale behind this rule is that the government is virtually always the "prevailing party" in a condemnation proceeding, because the government will virtually always obtain the condemned property. Consequently, the only actual issue in condemnation actions is not the government's right to the land, but the measure of just compensation for the taking of the land. Thus, costs should not be routinely available to the government as a prevailing party, because such an assessment of costs would effectively reduce that just compensation. n14 Because Rule 54(d)(1) does not apply, the "prevailing party" in the case of eminent domain proceedings means the party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government. n15

[g] Costs of Court Appointed Guardian Ad Litem

The federal court may appoint a guardian ad litem to represent an infant or incompetent person without a formally appointed representative, and when the court appoints such a guardian ad litem the costs and expenses of the guardian ad litem may be charged to the parties as the court orders. n16 However, If the guardian ad litem is also the attorney representing the infant or incompetent, attorney's fees may not be taxed as costs. Although the costs of the guardian may be taxed under Rule 54(d)(1), those costs may not include services that the guardian ad litem performs as the attorney to the incompetent. n17

[h] Costs Related to Sanctions Motions

The court may make an award of expenses to either party who prevails on a Rule 11 sanctions motion when the court determines it is warranted. The award may cover the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. n18 Furthermore, a sanction may be imposed for violation of Rule 11 but must be limited to what is sufficient to deter repetition of the sanctionable conduct or comparable conduct by others similarly situated. The sanction may consist of an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation, provided it is imposed on motion and warranted for effective deterrence. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.102* (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1919.*

(n3)Footnote 2. *Johns-Manville v. United States, 893 F.2d 324, 327 (Fed. Cir. 1989)* (Claims Court could not award costs under Section 1919 because statute in effect at that time did not include that court).

(n4)Footnote 3. *28 U.S.C. § 1332(b).*

(n5)Footnote 4. *Cosgrove v. Bartolotta, 150 F.3d 729, 734 (7th Cir. 1998)* (district court has discretion to award or deny costs to prevailing plaintiff who recovers less than jurisdictional minimum).

(n6)Footnote 5. *28 U.S.C. § 1927.*

(n7)Footnote 6. *See Salovaara v. Eckert, 222 F.3d 19 (2d Cir. 2000) .*

(n8)Footnote 7. *28 U.S.C. § 1912*.

(n9)Footnote 8. *See* Ch. 27, General Principles of Appeal; Ch. 28, *Appeal to Court of Appeals*; and Ch. 29, *Appeal to Supreme Court*.

(n10)Footnote 1. *Fed. R. Civ. P. 4(d)(2)*.

(n11)Footnote 2. *Fed. R. Civ. P. 4(d)(2)(A), (B)*; *see Menke v. Monchecourt, 17 F.3d 1007, 1010-1012 (7th Cir. 1994)* (affirming award for cost of hiring process server).

(n12)Footnote 3. *Fed. R. Civ. P. 37(a)-(d)*.

(n13)Footnote 4. *Fed. R. Civ. P. 26(b)(4)(C)*.

(n14)Footnote 5. *Fed. R. Civ. P. 41(d)*.

(n15)Footnote 6. *Fed. R. Civ. P. 53(a)*.

(n16)Footnote 7. *Alberti v. Klevenhagen, 46 F.3d 1347, 1363-1364 (5th Cir. 1995)* (not abuse of discretion to charge 90 percent of master's costs against party whose conduct was primarily responsible for conditions that necessitated appointment).

(n17)Footnote 8. *Fed. R. Civ. P. 43(d)*.

(n18)Footnote 9. *Fed. R. Civ. P. 68*.

(n19)Footnote 10. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352-353, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

(n20)Footnote 11. *Marek v. Chesny, 473 U.S. 1, 9-10, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

(n21)Footnote 12. *Marek v. Chesny, 473 U.S. 1, 9-10, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* (attorney's fees under *42 U.S.C. § 1988* are part of "costs" under Rule 68, so civil rights plaintiff whose recovery is less than offer is not entitled to post-offer attorney's fees).

(n22)Footnote 13. *Fed. R. Civ. P. 71.1*(*l*).

(n23)Footnote 14. *Fed. R. Civ. P. 71.1*(*l*), Advisory Committee Note.

(n24)Footnote 15. *28 U.S.C. § 2412(d)(2)(H)*; *see* United States v. 50. *50 Acres of Land, 931 F.2d 1349, 1358-1359 (9th Cir. 1991)* (district court erroneously awarded costs to landowner when ultimate valuation of land was closer to testimony offered by government than to testimony offered by landowner).

(n25)Footnote 16. *Fed. R. Civ. P. 17(c)(2)*.

(n26)Footnote 17. *Kollsman, A Division of Sequa Corp. v. Cohen, 996 F.2d 702, 706 (4th Cir. 1993)* .

(n27)Footnote 18. *Fed. R. Civ. P. 11(c)(2)*.

(n28)Footnote 19. *Fed. R. Civ. P. 11(c)(4)*.

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
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3-25 Moore's Manual--Federal Practice and Procedure § 25.63

§ 25.63 Award of Costs Involving Government as Partyn*

[1] Award of Costs to Federal or State Government

If the federal government is the prevailing party in a civil action, it may collect costs to the same extent as any private party, n1 unless a statute, rule, or regulation specifically precludes the government from a cost recovery. n2 This common-law rule is now expressly set forth in a statute, which provides that a judgment for the costs specified in Section 1920, n3 may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of the action. n4 Any state governmental entity that is a party to litigation in federal court may collect costs on the same basis as any other prevailing party under Rule 54(d)(1). n5

[2] Award of Costs Against Federal Government

A court may tax costs against the federal government, only to the extent permitted by law. Although at common law the United States enjoyed sovereign immunity from taxation of costs, even if the government brought the action and lost, n1 the common-law rule was abrogated by a statute which provides express authority for the taxation of costs against the government in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. n2 This provision essentially places the federal government and private parties on an equal footing with respect to an award of costs. As with an award of costs against a private party, an award against the government is not mandatory but may be made in the discretion of the district court. n3 The Rule 54(d)(1) provision for costs is based on a presumption that the prevailing party will be awarded costs; n4 that presumption similarly applies under Section 2412(a) when a private party prevails against the government. n5 However, if the government prevails in the action, a court does not have the discretion to tax costs against the government, because Section 2412(a) is a waiver of sovereign immunity and must be narrowly construed. n6

[3] Award of Costs Against State Government

A district court may tax costs against a state entity under Rule 54(d)(1) in cases in which a private party has prevailed against the state; neither the *Eleventh Amendment* nor the doctrine of sovereign immunity protect a state from the

imposition of costs. n1 The Supreme Court has stated that an award of costs is not the kind of retroactive relief prohibited by the *Eleventh Amendment* but, instead, is awarded as incidental to the judgment against the state. Thus, the discretion accorded to the district court to tax costs in favor of the prevailing party is not at all curtailed by the fact that a state would be required to pay those costs. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsFederal GovernmentClaims By & Against

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.104[2]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(d)(1)*; *see Pine River Logging & Improvement Co. v. United States, 186 U.S. 279, 296, 22 S. Ct. 920, 46 L. Ed. 1164 (1902)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 54(d)(1).*

(n4)Footnote 3. *28 U.S.C. § 1920.*

(n5)Footnote 4. *28 U.S.C. § 2412(a)(1).*

(n6)Footnote 5. *See Association of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000)* ; *cf. Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 679 n.20 (S.D.N.Y. 1996)* ; *see also Fed. R. Civ. P. 54(d)(1).*

(n7)Footnote 1. *Walling v. Norfolk Southern Ry., 162 F.2d 95, 96 (4th Cir. 1947)* (courts could not enter against the government a judgment for costs which would require the payment of moneys from the public treasury, unless they are expressly authorized by Congress to do so).

(n8)Footnote 2. *28 U.S.C. § 2412(a)(1).*

(n9)Footnote 3. *United States v. Kemper Money Market Fund, 781 F.2d 1268, 1279 (7th Cir. 1986)* .

(n10)Footnote 4. *See Association of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000)* .

(n11)Footnote 5. *Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 926 (3d Cir. 1985)* ; *see In re Paoli Railroad Yard PCB Litigation, 221 F.3d 449 (3d Cir. 2000)* .

(n12)Footnote 6. *Worsham v. United States, 828 F.2d 1525, 1527 (11th Cir. 1987)* .

(n13)Footnote 1. *Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794, 800 (11th Cir. 1988)* (judgment for costs against state does not violate *Eleventh Amendment*, because courts have power to tax costs against state in same manner as other parties).

(n14)Footnote 2. *Hutto v. Finney, 437 U.S. 678, 695-698, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978)* (award of costs does not compensate injury, but instead reimburses litigation expenses, so costs award is not retroactive relief that would be prohibited by *Eleventh Amendment*)).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
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3-25 Moore's Manual--Federal Practice and Procedure § 25.64

§ 25.64 Procedures for Award of Costsn*

[1] Motion for Costs

[a] Requirements of Motion

A party should request the taxation of costs by the court with a "motion for costs." Even though parties frequently move for costs in the same motion as attorney's fees, n1 practitioners should note that the procedures are quite different; the provisions relating to a motion for costs are comparatively flexible, while there are explicit and detailed procedures for obtaining attorney's fees. n2 Thus, Rule 54(d)(1) does not provide any specific time period or method for requesting costs. n3 Because a motion for costs does not seek any alteration or modification of the judgment, it is not a post-judgment motion under Rule 59, and therefore the 28 day period for filing motions under Rule 59 is inapplicable to a motion for costs. n4 Because there is no uniform time period specified by the Federal Rules of Civil Procedure, the matter is left to the local rules of the district courts. n5 Such a time limit provided in a local rule for filing a motion for costs or for a bill of costs is not jurisdictional. Thus, the district court may extend the time or may choose to permit an untimely motion or bill. n6 If the local rules do not specify a time limit, a motion for costs is not subject to any particular time limitation but must be filed within a reasonable time. n7

A party should not file a motion for costs until a judgment has been entered establishing which parties have prevailed, because costs are usually awarded to the "prevailing party". n8 Once a judgment has been entered, the prevailing party may move for costs at any time, n9 provided that any delay is reasonable and does not prejudice the opposing party. It is not unreasonable to wait until after affirmance on appeal to file a motion for costs. n10 A motion for costs after judgment under Rule 54(d)(1) is not a motion seeking to alter or amend the judgment under Rule 59(e) and consequently does not suspend the time to appeal the judgment on the merits, nor does it invalidate an earlier filed notice of appeal. n11 Because the costs issue is completely collateral to the merits, the filing of a notice of appeal does not deprive the district court of jurisdiction to tax costs or to review the clerk's taxation of costs under Rule 54(d)(1). n12

[b] Security for Costs Generally Not Required

Rule 54(d)(1) does not make any express requirement that a moving party post security in order to satisfy any potential judgment for costs. While some other rules require the posting of security in certain particular situations, such as a provision requiring the posting of security for costs as a condition for the issuance of a temporary restraining order or preliminary injunction, n13 nothing in either Rule 54 or the other rules generally requires the posting of security for costs in civil actions. n14 Because the requirement is not specified in the rules, some district courts have properly promulgated local rules requiring security for costs in specific circumstances. n15 Even if no local rule requires or permits the district court to impose a security requirement, the district court has the inherent power to do so. n16 It should also be noted that, in diversity actions, a substantive state statute may apply that requires the posting of security as justified by a substantive policy that goes beyond ensuring compliance with a potential judgment for costs. n17

Any security requirement imposed under a federal or state statute, or local rule of the district court, must be reasonable under the circumstances. The court should consider the risk to the defendant if security is not posted, and the plaintiff's ability to post the security should also be considered, for the bond may not be made so burdensome as to deprive the plaintiff of the opportunity to litigate the action. n18 If an order to post security is properly entered, the action may be dismissed if the bond is not posted. n19

[2] Bill of Costs

A "bill of costs" is a specification of the total amount of costs requested by a party in its motion for costs, with an itemization of the details of the expenses. n1 Although pleadings and other papers filed with the court generally are not required to be verified, n2 a bill of costs is expressly required by statute to be verified by the party, the party's attorney, or the party's authorized agent. n3 The moving party must file the bill of costs with the court, and when allowed by the court, the bill is included in the judgment. n4 However, the failure to file a verified bill of costs is sufficient ground for the court to deny any claimed costs; the court may also deny costs for any items not detailed in a bill of costs. n5

[3] Notice of Taxation of Costs

After the motion for costs and verified bill of costs have been filed, the clerk may tax costs on 14 days' notice to the parties. n1 The purpose of this provision requiring notice is to allow the parties to object to the taxation of any of the items of costs requested. n2 If costs are taxed by the clerk without giving the opponent a meaningful opportunity to oppose the bill of costs, the clerk's action is not entitled to any deference on review by either the district court or the court of appeals. n3 Because a taxation of costs is a judgment for money, *28 U.S.C. § 1961* applies and the clerk must award interest on the judgment from the date of the original judgment on the merits. n4

[4] Review by District Court

A party may file an objection with the clerk's taxation by filing and serving a motion within 7 days of the clerk's action. n1 If the party fails to file a timely objection to the clerk's taxation of costs, the district court may consider the objection waived, and is not obliged to review the taxation of costs. n2 The expiration of the 7-day period generally must be calculated pursuant to Rule 6. n3 However because the time for filing the motion is measured from the date of the clerk's action, rather than from service of the notice of the action, Rule 6(d) does not apply, and three days are not added to the 7-day time limit even if notice of the clerk's action is received by mail. n4

As noted above, compliance with the 7-day object period is also important to preserve appeal on the issue. n5 However, the 7-day period is not jurisdictional, and the district court may extend the deadline for filing objections or may, in its discretion, consider untimely objections. n6 On timely objection to a bill of costs, the district court must make a de novo determination of the costs issue. If the verified bill of costs is adequately supported, however, the party objecting to the taxation of costs has the burden of demonstrating that the claimed costs should not be allowed. n7

[5] Appeal of Taxation of Costs

[a] Appeal Procedure

A judgment awarding costs is appealable independently of the judgment on the merits. Thus, an appeal of a judgment for costs does not bring up the underlying merits judgment for review. n1 The fact that a judgment for costs is separately appealable is confirmed by the fact that the Supreme Court has in fact reviewed such judgments, without ever questioning the procedure. n2 Furthermore, it is not uncommon for costs to be taxed after the appeal of the merits has been concluded and, therefore, if such an award of costs is to be reviewed at all, it must be appealable separately from the judgment on the merits. n3 Although an award of costs is separately appealable from a merits judgment, an appeal may not be taken until the award is a final decision. For example, a decision that a party is entitled to costs is not appealable until the amount of the award of costs has been set. n4

If the case underlying a taxation of costs is reversed, the "prevailing party" is altered or may be altered after the district court has resolved any remanded portion of the case. Consequently, a reversal on the merits also operates as a reversal of any taxation of costs. n5

[b] Standard of Review

The appellate court generally must review an award or denial of costs only for an abuse of discretion. n6 The district court must explain a decision to deny costs to a prevailing party and the failure to do so is a per se abuse of discretion. n7 Additionally, the district court's reason for denying the costs must be adequate; otherwise, the denial will be found to be an abuse of discretion. n8 On the other hand, because Rule 54(d)(1) provides for a cost award to the prevailing party "as a matter of course," the district court need not specifically itemize costs and address every argument raised by parties regarding each item. n9

[6] Costs and Indigency

By statute, the court may permit a party to proceed in forma pauperis if the party submits a sufficient affidavit proving the party's indigency. n1 When the court grants in forma pauperis status in whole or in part, the pauper is excused from the initial payment of the filing fees otherwise applicable to the action. In addition, service of any process on behalf of the pauper is to be accomplished by the marshal without charge to the pauper. n2 To proceed in forma pauperis, an individual need not be destitute. If the payment of the fees and costs would be unduly burdensome, the affidavit is sufficient. n3

Even though a party proceeding in forma pauperis is excused from the prepayment of fees and costs in the case, any judgment for costs at the end of the case may be rendered as in other cases. n4 This means that merely because a losing party may not be able to afford to pay costs, that party is not automatically exempted from the taxation of costs. On the contrary, Section 1915(e) and cases decided under that statute make clear that costs may be taxed against a party who is permitted to proceed in forma pauperis. However, these cases recognize that a district court may consider a losing party's indigency in applying Rule 54(d)(1). Thus, a party may be exempted from costs if the party is in fact indigent, if the party has adduced evidence that the party is indigent, and if the district court sees fit to reduce the costs award imposed for reasons of equity. n5 The rationale behind this rule is that the basis of Rule 54(d)(1) is a presumption that the prevailing party will recover costs; this presumption is still applicable even if one or more of the parties is proceeding in forma pauperis. The fact that an in forma pauperis party is initially excused from paying fees and costs does not immunize that party from an assessment of costs at the conclusion of the case. n6 On the other hand, the losing party's indigency is a proper consideration in deciding whether to tax costs and in what amount. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, §§ 54.100*, *54.104*, *54.105* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See, e.g., Breaux v. Am. Family Mut. Ins. Co., 554 F.3d 854, 857 (10th Cir. 2009)* .

(n3)Footnote 2. *See § 25.87.*

(n4)Footnote 3. *See Fed. R. Civ. P. 54(d)(1).*

(n5)Footnote 4. *Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* ; *see White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 453, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

(n6)Footnote 5. *Congregation of the Passion v. Touche, Ross & Co., 854 F.2d 219, 221-223 (7th Cir. 1988)* .

(n7)Footnote 6. *Hernandez v. George, 793 F.2d 264, 267-268 (10th Cir. 1986)* .

(n8)Footnote 7. *White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

(n9)Footnote 8. *Friends For All Children, Inc. v. Lockheed Aircraft Corp., 725 F.2d 1392, 1399 (D.C. Cir. 1984)* .

(n10)Footnote 9. *Hadix v. Johnson, 322 F.3d 895, 896 (6th Cir. 2003)* .

(n11)Footnote 10. *Popeil Bros., Inc. v. Schick Elec., Inc., 516 F.2d 772, 776-777 (7th Cir. 1975)* .

(n12)Footnote 11. *Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* (motion for costs is wholly collateral to judgment on merits).

(n13)Footnote 12. *Lorenz v. Valley Forge Ins. Co., 23 F.3d 1259, 1260 (7th Cir. 1994)* .

(n14)Footnote 13. *See Fed. R. Civ. P. 65(c).*

(n15)Footnote 14. *See Fed. R. Civ. P. 54(d)(1).*

(n16)Footnote 15. *Ehm v. Amtrak Bd. of Directors, 780 F.2d 516, 517 (5th Cir. 1986)* .

(n17)Footnote 16. *In re American President Lines, Inc., 779 F.2d 714, 716-717 (D.C. Cir. 1985)* ; *but see 28 U.S.C. § 2408* (security for costs may not be required of United States or subdivision on issuance of process or institution of any proceeding).

(n18)Footnote 17. *See Merrill Lynch Relocation Mgmt., Inc., 812 F.2d 1116, 1121 (9th Cir. 1987)* (state statute making attorney personally liable for defendant's costs was an integral part of state substantive policy that applied in diversity action).

(n19)Footnote 18. *Murphy v. Ginorio, 989 F.2d 566, 569 (1st Cir. 1993)* (dismissal for failure to file $75,000 cost bond required by local rule was vacated because district court never considered ability of plaintiff to post bond).

(n20)Footnote 19. *Montserrat Overseas Holdings, S.A. v. Larsen, 709 F.2d 22, 24-25 (9th Cir. 1983)* .

(n21)Footnote 1. *See Craftsmen Limousine, Inc. v. Ford Motor Co., 579 F.3d 894, 896-897 (8th Cir. 2009)* .

(n22)Footnote 2. *See Fed. R. Civ. P. 11(a).*

(n23)Footnote 3. *28 U.S.C. § 1924.*

(n24)Footnote 4. *28 U.S.C. § 1920.*

(n25)Footnote 5. *See Marmo v. Tyson Fresh Meats, 457 F.3d 748, 764 (8th Cir. 2006)* .

(n26)Footnote 1. *Fed. R. Civ. P. 54(d)(1).*

(n27)Footnote 2. *See Majeske v. City of Chicago, 218 F.3d 816, 824 (7th Cir. 2000)* ; *see also* [4], *below.*

(n28)Footnote 3. *United States v. Carson, 52 F.3d 1173, 1190 (2d Cir. 1995)* .

(n29)Footnote 4. *28 U.S.C. § 1961*; *Devex Corp. v. General Motors Corp., 749 F.2d 1020, 1026 (3d Cir. 1984)* , *cert. denied, 474 U.S. 819 (1985)* .

(n30)Footnote 1. *Fed. R. Civ. P. 54(d)(1).*

(n31)Footnote 2. *See Corwin v. Walt Disney World Co., 475 F.3d 1239, 1249 (11th Cir. 2007)* (court may consider untimely objection only if it is excusable).

(n32)Footnote 3. *See Fed. R. Civ. P. 6(a).*

(n33)Footnote 4. *See Lorenz v. Valley Forge Ins. Co., 23 F.3d 1259, 1261 (7th Cir. 1994)* (construing former time periods); *Fed. R. Civ. P. 6(d).*

(n34)Footnote 5. *See Walker v. California, 200 F.3d 624, 626 (9th Cir. 1999)* (party may demand judicial review of cost award only if that party has filed proper motion of objection within time period specified in Rule 54(d)(1); construing former time periods).

(n35)Footnote 6. *See Soberay Mach. & Equip. Co. v. MRF Ltd., Inc., 181 F.3d 759, 771 (6th Cir. 1999)* (construing former time periods).

(n36)Footnote 7. *BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005)* .

(n37)Footnote 1. *Newton v. Consolidated Gas Co., 265 U.S. 78, 82, 44 S. Ct. 481, 68 L. Ed. 909 (1925)* .

(n38)Footnote 2. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* (reviewing two consolidated decisions of Fifth Circuit that addressed solely issue of costs).

(n39)Footnote 3. *Lorenz v. Valley Forge Ins. Co., 23 F.3d 1259, 1260 (7th Cir. 1994)* .

(n40)Footnote 4. *Carter v. General Motors Corp., 983 F.2d 40, 42 (5th Cir. 1993)* .

(n41)Footnote 5. *Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1056 (7th Cir. 1998)* (when reversing judgment on merits of particular claim, circuit court must also vacate costs award on that claim, since reversal on merits means that party in whose favor judgment had been rendered is no longer prevailing party).

(n42)Footnote 6. *Smith v. Southeastern Penn. Transp. Auth., 47 F.3d 97, 99-100 (3d Cir. 1995)* .

(n43)Footnote 7. *Cengr v. Fusibond Piping Sys., Inc., 135 F.3d 445, 453-454 (7th Cir. 1998)* .

(n44)Footnote 8. *National Information Servs. v. TRW, Inc., 51 F.3d 1470, 1472-1473 (9th Cir. 1995)* .

(n45)Footnote 9. *Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 946 (7th Cir. 1997)* .

(n46)Footnote 1. *28 U.S.C. § 1915(a)*; *see Pothier v. Rodman, 261 U.S. 307, 309, 43 S. Ct. 374, 67 L. Ed. 670 (1923)* .

(n47)Footnote 2. *28 U.S.C. § 1915(c)*; *Puett v. Blandford, 912 F.2d 270, 273 (9th Cir. 1990)* (in forma pauperis plaintiff entitled to rely on marshal for proper service of process).

(n48)Footnote 3. *Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339-340, 69 S. Ct. 85, 93 L. Ed. 43 (1948)* .

(n49)Footnote 4. *28 U.S.C. § 1915(e)*.

(n50)Footnote 5. *In re Paoli Railroad Yard PCB Litigation, 221 F.3d 449 (3d Cir. 2000)* (discussing extent to which court may consider relative indigence of losing party in determining amount of costs award).

(n51)Footnote 6. *Flint v. Haynes, 651 F.2d 970, 973-974 (4th Cir. 1981)* , *cert. denied, 454 U.S. 1151 (1982)* .

(n52)Footnote 7. *In re Paoli Railroad Yard PCB Litigation, 221 F.3d 449 (3d Cir. 2000)* ; *Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1165 (7th Cir. 1983)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
E. COSTS RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure §§ 25.65through 25.79

[Reserved]

§§ 25.65[Reserved]

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.80

§ 25.80 American Rule Prohibits Recovery of Attorney's Fees as Matter of Coursen*

When a federal court is considering the award of attorney's fees, it begins its analysis with the "American Rule," which provides that each litigant generally pays its own attorney's fees, win or lose, unless a statute or contract provides otherwise. n1 This rule is known as the American Rule because it contrasts with most of the other nations of the world, where a winning party generally recovers attorney's fees from the opponent as a matter of course. n2

The American Rule is still generally applied as a starting point in every case. However, Congress has enacted many statutes that explicitly alter the effect of the American Rule. These "fee shifting" statutory provisions permit a court to award attorney's fees to a party that prevails or otherwise succeeds in the litigation. n3 Additionally, even though the American Rule provides that parties must generally bear their own legal expenses, courts will not apply that rule when the parties have made an express contract, settlement, or release which provides for a particular award of fees. n4 Finally, a court may make exceptions to the American Rule when required by equitable considerations in appropriate circumstances. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.170* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1008 (2010)* .

(n3)Footnote 2. *Fogerty v. Fantasy, Inc., 510 U.S. 517, 523 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)* .

(n4)Footnote 3. *Perdue v. Kenny A., ___ U.S. ___, ___, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 504 n.3 (2010)* ;

Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 601-603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) ; *see §§ 25.81*, *25.82*.

(n5)Footnote 4. *Rissman v. Rissman, 229 F.3d 586, 588 (7th Cir. 2000)* ; *see § 25.83*.

(n6)Footnote 5. *Chambers v. NASCO, Inc., 501 U.S. 32, 45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* ; *see § 25.84*.

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.81

§ 25.81 Attorney's Fees Recoverable by Federal Statute and Procedural Rulen*

[1] Fee-Shifting Statutes That Further Congressional Policy

[a] Nature and Purpose of Fee-Shifting Statutes

The United States Code contains numerous statutes that expressly provide for the award of attorney's fees. The courts deem these statutes to be express exceptions to the American Rule discussed in *§ 25.80*. n1 These statutory exceptions are often referred to as "fee-shifting" statutes, n2 because they shift the cost of the legal representation in the action to the losing party. n3 The two major purposes of fee-shifting statutes are to promote private enforcement of Congressional policies and to deter and punish abuse of the judicial process by certain classes of parties, such as, those that engage in unwarranted litigation. n4 Policy fee-shifting statutes are in contrast to other federal fee-shifting statutes that do not permit recovery of all fees in the litigation but only those incurred as a result of some wrongful action of one of the parties. n5

Although most of the federal fee-shifting statutes provide for either a mandatory or discretionary award of fees to the "prevailing party," n6 some statutes n7 provide that the court may award attorney's fees to "any party," to "either party," or to the party that is "appropriate." Others permit a "successful" litigant to obtain fees. Still others authorize district courts to award attorney's fees in the discretion of the district court, or to award fees when "appropriate." n8 The Supreme Court has held that when a party falls within any of these categories, the court may award the party attorneys fees even though the party does not qualify within the legal term of art "prevailing party," as discussed in [b], below. All that is necessary is that the party achieve some degree of success on the merits of the litigation, even if it is not a major success or a substantial success. On the other hand, a claimant does not satisfy that requirement by achieving merely a trivial success on the merits or a purely procedural victory. n9

[b] Requirement of Prevailing Party

[i] All Prevailing Party Statutes Construed Consistently

Federal policy fee-shifting statutes generally condition an award of attorney's fees to a particular party on the

requirement that the party prevails in the litigation. Thus, the most common requirement of the statutes is that only a "prevailing party" is entitled to collect fees. n10 For the purposes of imposing attorney's fees, and in designating those parties eligible for an award of attorney's fees, Congress has employed the expression "prevailing party," which is a legal term of art. n11 Consequently, the term "prevailing party" must be given a uniform interpretation, n12 regardless of the particular fee-shifting statute in which the term appears. n13

However, a plaintiff is not automatically entitled to attorney's fees by showing that the plaintiff is a prevailing party; the prevailing party plaintiff must also demonstrate that he or she has complied with any of the attorney's fee requirements under the particular fee-shifting statute at issue, n14 and then must prove a reasonable amount for the fee. n15 Most fee-shifting statutes are discretionary; a prevailing party need not recover fees in every circumstance. However, some fee-shifting statutes provide that a prevailing party "shall" recover attorney's fees, which makes an award by the court mandatory. n16

[ii] When Plaintiff Qualifies as Prevailing Party

A plaintiff is the "prevailing party" if the plaintiff succeeds on any significant issue in the litigation which achieves some of the benefit the plaintiff sought in bringing suit. n17 A plaintiff must obtain relief on the merits of a claim, either pendente lite or at the conclusion of the litigation. n18 A plaintiff does not satisfy that requirement by achieving trivial success on the merits or a purely procedural victory. n19

For a court to award attorney's fees to the prevailing party under a federal fee-shifting statute, the party must gain judicial recognition, in that it has been awarded some relief sought by the action. The Supreme Court has held that unless there is a judicially recognized change in the parties' legal relationship, the plaintiff may not obtain attorney's fees under a fee-shifting statute. Thus, the Supreme Court has expressly rejected the "catalyst theory," which formerly provided that a party could obtain an award of fees, even when the party failed to secure a judgment, if the party had nonetheless achieved a desired result because the civil action had brought about a voluntary change in the defendant's conduct. n20

Therefore, to obtain an award of fees as a prevailing party under any of the federal fee-shifting statutes, such as the Fair Housing Act, n21 the Americans with Disabilities Act, n22 the Civil Rights Act, n23 or the Voting Rights Act, n24 the parties must have the provision for fees recognized in judicially sanctioned change in their legal relationship, such as in an award in a judgment by the court or as a settlement agreement incorporated in a consent decree. n25 However, the Supreme Court has stated that interim relief insufficient is insufficient to support the status of prevailing party. For example a plaintiff who has obtained a preliminary injunction, but who is denied a permanent injunction after a dispositive adjudication on the merits, does not qualify. n26

To qualify as a prevailing party, the plaintiff need not litigate a case at trial or obtain a judgment on the merits for the plaintiff. In this regard, a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the illegality of the practice, unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. n27 Once the court has approved this determination through a formal judgment finding the defendant liable, or through a court approved consent decree, the court may award attorney's fees to the plaintiff as the prevailing party. n28 However, if a defendant agrees to settle solely because of the nuisance value of the suit, and not the suit's merits, prevailing party status may be denied to the plaintiff if the suit was frivolous, unreasonable or groundless, and the defendant's actions in settling the suit were entirely gratuitous. n29

[iii] When Defendant Qualifies as Prevailing Party

The defendant is the "prevailing party" if the plaintiff does not qualify as the prevailing party. Thus, the defendant is a prevailing party only if the plaintiff obtains no relief whatsoever from the litigation. n30 If, for example, the case is litigated to judgment on the merits in favor of the defendant, the defendant is the prevailing party. n31 A different

rationale is used when the case is disposed of before judgment on the merits--for example, if the plaintiff voluntarily dismisses the action under Rule 41(a). n32

If the dismissal is with prejudice, it is an adjudication on the merits that changes the legal relationship between the plaintiff and the defendant, abolishing completely whatever claim the plaintiff might have had against the defendant. Consequently, a dismissal with prejudice makes the defendant a prevailing party. n33 On the other hand, a dismissal that is without prejudice, which leaves the plaintiff free to refile the action at a later date and does not in any way alter the legal relationship between the parties, does not render the defendant a prevailing party for purposes of the fee-shifting statutes. n34 When a claim is dismissed for lack of subject matter jurisdiction, the defendant is not a prevailing party and may not collect attorney's fees under a fee-shifting statute, because the decision is not on the merits and the absence of jurisdiction over the action also precludes the court from making any fee award under the statute. n35

[c] Examples of Policy Fee-Shifting Statutes Requirement of Prevailing Party

The United States Code contains hundreds of fee-shifting statutes that provide for the award of attorney's fees in particular areas of substantive law--they are too numerous to list here. A complete list of these statutes is contained in 12 *Moore's Federal Practice, § 54.171[3]* (Matthew Bender 3d ed.) and in 1 *Court Awarded Attorney's Fees, § 5.03* (Matthew Bender.). The following is a list of the attorney's fees provisions that are the most significant and the most frequently litigated:

1. Civil Rights. Attorney's fees provisions that provide for fee shifting in cases involving civil liberties, due process, equal protection, and cases involving civil rights litigation, including discrimination on the basis of race, sex, age, handicap, or other suspect classifications. n36

2. Labor and Employment. Under the Fair Labor Standards Act, n37 a court may award attorney's fees for a prevailing plaintiff only. n38 Thus, after an employee's successful action in state or federal court to recover unpaid minimum wages or unpaid overtime compensation, the employee is entitled to recover mandatory attorney's fees. n39 The Employee Retirement Income Security Act, provides for a discretionary award of fees to "either party." n40 The statute, however, is expressly limited to actions brought "by a participant, beneficiary, or fiduciary." If an ERISA action is brought by some other party, no fee award is permitted.

3. Consumer Protection and Consumer Safety. Under the fee-shifting statutes relating to consumer protection and safety, an award of fees is mandatory but only when the award is made to a prevailing consumer. If a defendant prevails under the consumer protection statutes, the defendant is eligible for a fee award, if at all, only if the defendant shows that the consumer plaintiff's action was frivolous, unreasonable, or without foundation. For example, a defendant may not recover fees for a claim pursuant to the Fair Debt Collection Practices Act unless the suit was brought in bad faith. n41

4. Environment. For claims by private parties to enforce federal environmental protection statutes, the statutes general permit the court to award fees at the time of final adjudication. Most statutes authorize fees to a prevailing party. n42

5. Intellectual Property. The fee-shifting provision of the Patent Act provides for an award of attorney's fees to the prevailing party in exceptional cases. n43 Congress has also expressly provided for an award of attorney's fees to the prevailing party in trademark litigation in exceptional cases. n44 Unlike the patent and trademark fee-shifting statutes, the Copyright Act does not require that a case be "exceptional" to justify fee shifting. Rather, the copyright statute provides merely that the court may award reasonable attorney's fees to the prevailing party as part of the costs. n45

6. Antitrust. Any person injured by reason of a violation of the antitrust laws may sue for the violation and, in addition to the triple damages sustained by the party, may recover a reasonable attorney's fee. n46 Therefore, it is mandatory that the court award attorney's fees to an antitrust plaintiff who shows the requisite injury. n47 A separate fee-shifting statute permits attorney's fees recovery when an antitrust plaintiff obtains only injunctive relief. n48

7. Securities Laws. Congress has provided that in certain private causes of action to enforce the securities laws the court may award attorney's fees. For example, the Securities Act of 1933 provides for fees to the prevailing party in certain actions for securities fraud if the opponent's suit or defense was without merit. n49

[2] Fee-Shifting Federal Statutes That Deter Abuse of Litigation

[a] Vexatious Multiplication of Proceedings

The United States Code allows the district court to impose excess costs, expenses, and attorney's fees on an attorney or other person admitted to conduct cases in federal court who unreasonably and vexatiously multiplies the proceedings in the action. n1 By its express terms, this statute applies only to attorneys; therefore, the court may not sanction the client but must impose them on the attorney personally. n2 There are three essential requirements for an award of attorneys fees or costs under Section 1927: (1) the attorney must have engaged in unreasonable and vexatious conduct; (2) that conduct must have multiplied the proceedings; and (3) the dollar amount of the award must be financially related to the excess proceedings, which means that the award may not exceed the costs, expenses, and attorneys' fees reasonably incurred because of the attorney's conduct. An attorney multiplies proceedings "unreasonably and vexatiously" within the meaning of the statute only when the attorney's conduct is so egregious that it is tantamount to bad faith. Such bad faith is not based on the attorney's subjective intent, but on the attorney's objective conduct. n3

Any award of fees under Section 1927 must be narrowly tailored to compensate the aggrieved party for only those fees resulting from the attorney's bad faith conduct, and the court may not award fees that would have been expended even in the absence of the wrongful conduct. n4 Furthermore, the court may make such an award only to the opposing party; it does not authorize the court to sanction an attorney by imposing a monetary fine payable to the court. n5

[b] Attorney's Fees Caused by Removal

If a removed case is remanded back to state court, the order remanding the case may require the payment of just costs and any actual expenses including attorney's fees incurred as a result of the removal, n6 irrespective of the basis for the order of remand. n7 In exercising its discretion, the court's primary consideration should be whether the removing party knew or should have known that the removal was improper. n8

[c] Internal Revenue Code Case Appeals

A circuit court or the United Supreme Court may require a taxpayer to pay a penalty to the government if a decision of the Tax Court is affirmed and it appears that the appeal was intended to delay, or is frivolous or groundless. n9 For purposes of this statute, the term "penalty" has been held to include an award of attorney's fees to the government if the taxpayer's appeal is frivolous or meant to delay concluding the case. n10

[3] Fee-Shifting Federal Rules That Deter Abuse of Litigation

[a] Purpose of Fee-Shifting Rules

Many of the Federal Rules of Civil Procedure provide for an award of attorney's fees against those who have violated

the rules or have otherwise abused the litigation process. These abuse of process fee provisions permit an award of attorney's fees for several purposes. First, a party who abuses the judicial process should be punished for the violation. Second, the award of fees serves as a deterrent, both to the party being sanctioned and to others who might be tempted to commit similar abuses in the future. n1 Third, an award of attorney's fees to the litigation opponent serves to compensate the opposition party who has been victimized by the abuse of judicial process and who have been required to make additional expenditures to respond to such abusive conduct. Accordingly, it is appropriate to compensate the victims of wrongdoing by awarding them the attorney's fees incurred in responding to the wrongful conduct. n2

[b] Attorney's Fees Expended in Motions for Sanctions Regarding Pleadings and Representations to Court

When it makes its determination on a Rule 11 motion for sanctions for misrepresentation regarding pleadings, the district court has discretion to award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. n3 The purpose of sanctions under Rule 11(c) is to deter sanctionable conduct and must be limited to what is sufficient to achieve deterrence. n4 The court has considerable discretion to impose fees on the attorneys, law firms, or parties that have violated the rule or are responsible for the violation, in order to deter further violations. n5

[c] Attorney's Fees Expended in Rectification of Disclosure and Discovery Violations

Rule 26 permits the recovery of fees incurred in obtaining or opposing certain discovery orders and for improper disclosure and discovery papers. In particular, Rule 26(g) provides that the court may order sanctions for a party's failure to properly certify any required disclosure or any discovery request, and that such sanctions may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. The rule mandates sanctions for violations when the certification is made without substantial justification, and sanctions may be imposed on the signer of the certification, the party on whose behalf the signer was acting, or both. n6 Although a sanction is mandatory when a violation of Rule 26(g) has occurred, the nature and extent of the sanction is left to the discretion of the district court. n7 In addition to discovery certification requirements, Rule 26 also authorizes the court to award attorney fees incurred in making or opposing a motion to compel the discovery of a prior statement n8 and incurred in making or opposing a motion for a protective order. n9

Rule 30 allows a party to recover attorney's fees that the party must pay because of an abuse of the deposition process. In particular, if a party has noticed a deposition but the deposition does not proceed because either (1) the noticing party does not attend, or (2) the witness does not appear because the noticing party failed to subpoena the witness, the court may order the party noticing the deposition to pay the expenses incurred by the other parties in attending the noticed deposition, including reasonable attorney's fees. n10

Rule 37 provides a general authorization for sanctions relating to abuses regarding disclosure and discovery. Thus, the court has discretion to award fees to the party prevailing on a motion to compel discovery. n11 Similarly, any fees incurred as a result of a party's failure to obey a court order requiring disclosure or discovery may be awarded to an opposing party. n12 Additionally, under Rule 37(c), (d), and (g), the fees incurred as a result of a party's violation of certain discovery rules may be recovered by the opposition even if there has been no prior court order requiring compliance with the rules. n13 Finally, Rule 36(a) provides that if a party has served proper requests for admission and is dissatisfied with the answers and objections received, the party may move for an order challenging the sufficiency of the answers and objections. When that motion is ruled upon, the provisions of Rule 37(a)(5) are applicable, which provide for an award of fees to a party prevailing on a motion to compel discovery. Thus, a party prevailing on a motion under Rule 36(a) is entitled to an award for attorney's fees reasonably incurred in bringing or opposing the motion. n14

[d] Attorney's Fees Recoverable From Defendant Who Wrongfully Fails to Waive Service

If a defendant that has received a proper request for waiver of service breaches its duty to avoid unnecessary costs of

effecting service of process by waiving service, the defendant may be charged the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses, n15 unless good cause for the failure is shown by the defendant. n16

[e] Attorney's Fees Recoverable for Opposition's Failure to Attend or Participate in Pretrial Conference

The court may order the attorneys and parties to convene for pretrial conferences and may enter pretrial orders and a scheduling order to govern the times of subsequent proceedings. The court may assess reasonable attorney's fees against any party or attorney as a result of the party or attorney's failure to obey a scheduling or pretrial order; the failure of a party to appear by representation at a scheduling or pretrial conference; the party or attorney's substantial lack of preparation to participate in the conference; or the party or attorney's failure to participate in good faith at the conference. n17 Rule 16(f) provides that the award of expenses incurred is mandatory unless the failure to comply was substantially justified or other circumstances make an award unjust. n18

[f] Attorney's Fees Recoverable for Opposition's Subpoena That Imposes Undue Burden or Expense

An attorney, as an officer of the court, has the power to subpoena persons for attendance at deposition or trial and produce discovery, n19 but the attorney is subject to liability for misuse of that power. Therefore, a party or an attorney responsible for the issuance and service of a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court issuing a subpoena on behalf of the attorney or party must enforce the subpoena and impose on the attorney or party in breach an appropriate sanction, which may include reasonable attorney's fees. n20 Because the Rule states that the court "must" impose a sanction, but that the sanction "may" include a reasonable attorney's fee, imposition of sanctions is mandatory, n21 but the particular sanction of attorney's fees is discretionary. n22

[g] Award of Fees for Filing of Summary Judgment Affidavits in Bad Faith

If the court determines that a summary judgment affidavit was presented in bad faith or solely for the purpose of delay, the court must order the offending party to pay the expenses of the opposing party in contesting the affidavits, including reasonable attorney's fees. n23 As its terms indicate, attorney's fees may be awarded only for affidavits that are submitted either to delay the proceedings or that are otherwise in bad faith. n24 Therefore, for example, a district court sanctions order was reversed when the defendant's affidavits were not in bad faith, in that their position was not entirely unwarranted. n25

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.171[3], [4]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 602-603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)* .

(n3)Footnote 2. *Citizens for a Better Environment v. The Steel Company, 230 F.3d 923, 931 (7th Cir. 2000)* ("fee-shifting" provisions of environmental statutes that promote private enforcement should be applied in same manner as civil rights fee-shifting statute).

(n4)Footnote 3. *Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)* .

(n5)Footnote 4. *See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)* .

(n6)Footnote 5. *See* [2], *below*.

(n7)Footnote 6. *See* [b], *below*.

(n8)Footnote 7. *30 U.S.C. § 1270(d)* (Surface Mining Control and Reclamation Act).

(n9)Footnote 8. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1008 (2010)* ; *see Ruckelshaus v. Sierra Club, 463 U.S. 680, 683, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983)* ; *Loggerhead Turtle v. County Council, 307 F.3d 1318, 1322-1323 n.5 (11th Cir. 2002)* (citing examples).

(n10)Footnote 9. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1008-1009 (2010)* .

(n11)Footnote 10. *See, e.g., Ruiz v. A.B. Chance Co., 234 F.3d 654, 669 (Fed. Cir. 2000)* (*35 U.S.C. § 285* provides for award of reasonable attorney's fees to "prevailing party" in exceptional patent infringement cases).

(n12)Footnote 11. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 602-603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)* (based on distillation of Supreme Court cases, term of art "prevailing party" defines as party in whose favor judgment is rendered, regardless of amount of damages awarded; also defined as successful party and party who has been awarded some relief by court).

(n13)Footnote 12. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 603 n.4, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)* (similar fee-shifting provisions must be interpreted consistently).

(n14)Footnote 13. *Hensley v. Eckerhart, 461 U.S. 424, 433 n.7, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* (standards are generally applicable in all cases in which Congress has authorized award of fees to "prevailing party").

(n15)Footnote 14. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1006 (2010)* (noting five factors potentially applicable to ERISA case).

(n16)Footnote 15. *Perdue v. Kenny A., ___ U.S. ___, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 504-505 (2010)* .

(n17)Footnote 16. *See Malden Mills Indus. v. ILGWU Nat'l Retirement Fund, 766 F. Supp. 1202, 1204 (D. Mass. 1991)* .

(n18)Footnote 17. *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n19)Footnote 18. *Hewitt v. Helms, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987)* ; *see Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 793, 109 S. Ct. 1486 (1989)* (to be deemed prevailing party, plaintiff must be able to point to resolution of disputed issue which changes legal relationship between itself and defendant).

(n20)Footnote 19. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1009 (2010)* .

(n21)Footnote 20. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532*

U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (rejecting catalyst theory).

(n22)Footnote 21. *See 42 U.S.C. § 3613(c)(2).*

(n23)Footnote 22. See *42 U.S.C. § 12205.*

(n24)Footnote 23. See *42 U.S.C. § 2000e-5(k).*

(n25)Footnote 24. See *42 U.S.C. § 1973l(e).*

(n26)Footnote 25. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 605-606, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) .*

(n27)Footnote 26. *Sole v. Wyner, 551 U.S. 74, 82-86, 127 S. Ct. 2188, 167 L. Ed. 2d 1069, 1077-1079 (2007) .*

(n28)Footnote 27. *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 193-194, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* ; *Maher v. Gagne, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980) .*

(n29)Footnote 28. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 604-605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) .*

(n30)Footnote 29. *Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 793, 109 S. Ct. 1486 (1989) .*

(n31)Footnote 30. *See Fox v. Vice, 594 F.3d 423, 427 (5th Cir. 2010) .*

(n32)Footnote 31. *American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 569 (8th Cir. 1984)* (fee award to defendant affirmed when jury had returned verdict for defendant).

(n33)Footnote 32. *Fed. R. Civ. P. 41(a).*

(n34)Footnote 33. *Riviera Distribs. v. Jones, 517 F.3d 926, 928 (7th Cir. 2008) .*

(n35)Footnote 34. *Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987).*

(n36)Footnote 35. *Torres-Negron v. J & N Records, LLC, 504 F.3d 151, 164 & n.9 (1st Cir. 2007) .*

(n37)Footnote 36. *See 42 U.S.C. § 1988(b)* (Civil Rights Attorney's Fees Awards Act applicable to proceedings in vindication of civil rights).

(n38)Footnote 37. *29 U.S.C. § 216(b).*

(n39)Footnote 38. *Fegley v. Higgins, 19 F.3d 1126, 1135 (6th Cir. 1994) , cert. denied, 115 S. Ct. 203 (1994)* (even though defendant made offer of judgment greater than plaintiff's recovery, defendant could not be prevailing party, and district court did not err in granting fees to plaintiff for post-offer fees).

(n40)Footnote 39. *29 U.S.C. § 216(b).*

(n41)Footnote 40. *29 U.S.C. § 1132(g)(1).*

(n42)Footnote 41. *15 U.S.C. § 1692k(a)(3);* *Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 940 (9th Cir. 2007)* .

(n43)Footnote 42. *See 42 U.S.C. § 11046(f)* (Clean Air Act); *Citizens for a Better Env't v. Steel Co., 230 F.3d 923,*

930-931 (7th Cir. 2000) (fee-shifting environmental statutes applied in same manner as fee-shifting civil rights statutes).

(n44)Footnote 43. *See 35 U.S.C. § 285.*

(n45)Footnote 44. *See 15 U.S.C. § 1117(a).*

(n46)Footnote 45. *17 U.S.C. § 505.*

(n47)Footnote 46. *15 U.S.C. § 15.*

(n48)Footnote 47. *Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 261, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* .

(n49)Footnote 48. *15 U.S.C. § 26.*

(n50)Footnote 49. *15 U.S.C. § 77k(e).*

(n51)Footnote 1. *28 U.S.C. § 1927.*

(n52)Footnote 2. *Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1190 (3d Cir. 1989)* .

(n53)Footnote 3. *Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239 (11th Cir. 2006)* .

(n54)Footnote 4. *Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624, 645-646 (6th Cir. 2009)* ; *Peterson v. BMI Refractories, Inc., 124 F.3d 1386, 1396 (11th Cir. 1997)* .

(n55)Footnote 5. *Prosser v. Prosser, 186 F.3d 403, 407 (3d Cir. 1999)* .

(n56)Footnote 6. *28 U.S.C. § 1447(c).*

(n57)Footnote 7. *LaMotte v. Roundy's, Inc., 27 F.3d 314, 315 (7th Cir. 1994)* .

(n58)Footnote 8. *Moore v. Permanente Medical Group, 981 F.2d 443, 445-446 (9th Cir. 1992)* (merits of decision to remove and order of remand must be considered in reviewing decision to impose fees).

(n59)Footnote 9. *26 U.S.C. § 7482(c)(4).*

(n60)Footnote 10. *Stelly v. Commissioner, 761 F.2d 1113, 1115 (5th Cir. 1985)* ; *Clark v. Commissioner, 744 F.2d 1447, 1448 (10th Cir. 1984)* .

(n61)Footnote 1. *National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)* .

(n62)Footnote 2. *Rickels v. City of South Bend, 33 F.3d 785, 787 (7th Cir. 1994)* .

(n63)Footnote 3. *Fed. R. Civ. P. 11(c)(2).*

(n64)Footnote 4. *Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002)* .

(n65)Footnote 5. *See Fed. R. Civ. P. 11(c)(4).*

(n66)Footnote 6. *Fed. R. Civ. P. 26(g)(3)*; *see Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 139-140 (3d Cir. 2009)* (discussion of failure to substantially justify certification).

(n67)Footnote 7. *Fed. R. Civ. P. 26(g)(3)*, Committee Notes to 1983 Amendments; *see R & R Sails, Inc. v. Ins.*

Co., 251 F.R.D. 520, 525 (S.D. Cal. 2008) .

(n68)Footnote 8. *Fed. R. Civ. P. 26(b)(3)(C)*; *see Fed. R. Civ. P. 37(a)(5)*.

(n69)Footnote 9. *Fed. R. Civ. P. 26(c)(3)*; *see Fed. R. Civ. P. 37(a)(5)*.

(n70)Footnote 10. *Fed. R. Civ. P. 30(g)*.

(n71)Footnote 11. *Fed. R. Civ. P. 37(a)(5)*; *see DL v. Dist. of Columbia, 256 F.R.D. 239, 242 (D.D.C. 2009)* .

(n72)Footnote 12. *Fed. R. Civ. P. 37(b)(2)*; *see Novak v. Wolpoff & Abramson LLP, 536 F.3d 175, 178 (2d Cir. 2008)* (burden on disobedient party to avoid fees by showing that his or her failure was justified or that special circumstances make award of expenses unjust.

(n73)Footnote 13. *Fed. R. Civ. P. 37(c)(1)(A)*, *37(c)(2)*, *37(d)(3)*, *37(f)*.

(n74)Footnote 14. *Fed. R. Civ. P. 36(a)(6)*; *see Fed. R. Civ. P. 37(a)(5)*.

(n75)Footnote 15. *Fed. R. Civ. P. 4(d)(2)(B)*.

(n76)Footnote 16. *Fed. R. Civ. P. 4(d)(2)*.

(n77)Footnote 17. *Fed. R. Civ. P. 16(f)(1)*.

(n78)Footnote 18. *Fed. R. Civ. P. 16(f)(2)*; *see Ford v. Alfaro, 785 F.2d 835, 840 (9th Cir. 1986)* (because neither defendant nor defense counsel appeared at pretrial conference, defendant was ordered to pay plaintiff's fees for attending conference).

(n79)Footnote 19. *See Fed. R. Civ. P. 45(a)*.

(n80)Footnote 20. *See Fed. R. Civ. P. 45(c)(1)*.

(n81)Footnote 21. *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 2007 U.S. Dist. LEXIS 53217, at *16 (D. Kan. July 20, 2007)* .

(n82)Footnote 22. *Polo Bldg. Group, Inc. v. Rakita (In re Shubov), 253 B.R. 540, 547 (9th Cir. 2000)* .

(n83)Footnote 23. *Fed. R. Civ. P. 56(g)*.

(n84)Footnote 24. *Stewart v. RCA Corp., 790 F.2d 624, 632 (7th Cir. 1986)* (sanctions not awarded when court not certain that plaintiff acted in bad faith).

(n85)Footnote 25. *Fort Hill Builders v. National Grange Mutual Ins. Co., 866 F.2d 11, 16 (1st Cir. 1989)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.82

§ 25.82 Attorney's Fees Recoverable Under State Lawn*

When a party brings a case that qualifies for diversity jurisdiction, the parties may litigate state law claims in federal court, and the litigation is controlled by the state's substantive law. n1 With respect to fee-shifting statutes enacted as substantive law of the states, such statutes must be applied by federal courts sitting in diversity. n2 Furthermore, state common law regarding attorney's fees is also applicable--federal courts sitting in diversity must apply all of the substantive laws of the state, both statutory law and common law. Therefore, attorney's fees may not be awarded in a diversity suit under a particular exception to the American Rule, such as the equitable common fund or substantial benefit exceptions, unless the applicable state law also recognizes the particular exceptions. n3

It should be noted that a party may bring state law claims in federal court not only under diversity jurisdiction but also as claims within the court's supplemental jurisdiction. n4 If both the state and federal claims in the action are successful and authorize fee shifting, no question of the application of state attorney's fees law is presented, because the fee may be awarded under federal law. However, attorney's fees issues may arise if the federal claims are lost or if the federal claims do not provide for an award of fees. In that circumstance, a plaintiff prevailing on supplemental state claims may rely on a state fee-shifting provision, n5 unless the state fee-shifting provision is preempted or is otherwise contrary to federal policy. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.170* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Chambers v. NASCO, Inc., 501 U.S. 32, 52, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (in diversity cases, federal court's inherent power to award fees may be controlled by state law if state's substantive policy so dictates).

(n3)Footnote 2. *Titan Holdings Syndicate v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990)* (in diversity action, party entitled to fee award under state law).

(n4)Footnote 3. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1317-1318 (6th Cir. 2000)* ; *Wyser-Pratte v. Van Dorn Co., 49 F.3d 213, 218 (6th Cir. 1995)* .

(n5)Footnote 4. *See 28 U.S.C. § 1367*; *Rissman v. Rissman, 229 F.3d 586, 588 (7th Cir. 2000)* .

(n6)Footnote 5. *Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 938 (8th Cir. 1995)* .

(n7)Footnote 6. *Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1336 (9th Cir. 1995)* .

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PART VI Trial and Judgment
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3-25 Moore's Manual--Federal Practice and Procedure § 25.83

§ 25.83 Express Contractual Provision For Award of Attorney's Feesn*

[1] Pre Litigation Contractual Provision

An important exception to the American Rule, which generally states that each party must pay its own attorney's fees, is that the rule may be superceded by express contractual provision. Therefore, in litigation regarding a contract, one party may collect attorney's fees from the loser if the contract expressly provides for that attorneys fees award. n1 The court will enforce a contractual attorney's fees provision according to its terms unless the provision is not enforceable under the principles of contract law. Therefore, the court may make an award of fees only in an amount as provided in the contract. n2 However, even when the parties' contract provides for recovery of reasonable attorney's fee by the prevailing party, the district court has considerable discretion in determining the amount of fees that would be reasonable. n3 A contract between private parties, even with respect to attorney's fees, is governed by the law of the jurisdiction in which the contract is made or in which the contract is to be enforced. The enforceability of a fee-shifting agreement between parties is, therefore, a matter controlled by state law, even if the jurisdictional basis of the action is a federal question and not diversity of citizenship. n4

[2] Attorney's Fees Agreement as Part of Settlement

Frequently, parties to litigation will enter a fee-shifting agreement after commencement of the lawsuit, as part of a settlement or compromise of the underlying action. Typically, the settlement agreement will provide for either a complete waiver of all fees, or for the recovery of a particular amount of fees, conditioned on the waiver of the right to seek a court awarded fee available under a federal statute or an equitable exception. Such a negotiated fee agreement is enforceable. n1 However, a settlement of an action will not be deemed to include a waiver of a statutory claim for attorney's fees unless the settlement agreement explicitly states that the prevailing party's claim for attorney's fees is waived. Thus, if a civil-rights plaintiff executes a settlement agreement that releases "all claims of any kind" against the defendant, but that does not expressly state attorney's fees, the agreement does not preclude the plaintiff from making a motion to recover statutory attorney's fees. n2 Furthermore, a settlement of the fee issue does not preclude a later motion for fees incurred after the agreement if those fees were necessarily incurred in defending the settlement agreement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.171[1]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 1008 (2010)* .

(n3)Footnote 2. *Federal Deposit Ins. Corp. v. Lugli, 813 F.2d 1030, 1034 (9th Cir. 1987)* .

(n4)Footnote 3. *Computrol, Inc. v. Newtrend, L.P., 203 F.3d 1064, 1072 (8th Cir. 2000)* .

(n5)Footnote 4. *In re Sure-Snap Corp. v. Shure, 983 F.2d 1015, 1017 (11th Cir. 1993)* .

(n6)Footnote 1. *Evans v. Jeff D., 475 U.S. 717, 740, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986)* .

(n7)Footnote 2. *Metropolitan Life Ins. Co., 189 F.3d 331, 333-335 (3d Cir. 1999)* (because waiver must be express, extrinsic evidence concerning parties' settlement negotiations or their expectations is irrelevant, at least in absence of claim of fraud, duress, accident, or mistake).

(n8)Footnote 3. *Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 846, 850 (7th Cir. 1993)* .

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PART VI Trial and Judgment
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F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.84

§ 25.84 Award of Attorney's Fees Under Equitable Exceptions to American Rulen*

[1] Common Fund Exception

[a] Existence of Common Fund

The "common fund" exception is probably the most important equitable exception n1 to the American Rule, which generally provides that each party must pay its own attorney's fees. The exception allows the fee movant to obtain recovery of attorney's fees from any fund created, enhanced, protected, or otherwise affected by the litigation. The exception applies when the fund that has been created accrues to the benefit of both the fee movant and other beneficiaries who are not named parties to the action and when a fee assessment against the fund would tend to spread the cost of the litigation among all of those beneficiaries. An important requirement of the common fund exception is that the fee movant's recovery must be drawn exclusively from the fund created n2 and that neither the litigation opponent nor the fund beneficiaries themselves are personally liable for any of the fees. n3 Thus, the common fund exception does not provide for shifting of attorney's fees, but rather it spreads those fees among those benefitting from the fund. The theory of the exception is that because the fund beneficiaries have benefitted from the action, they should be required to share in the action's expense. n4

Consequently, a court may not award attorney's fees under the common fund exception unless the fee movant demonstrates the existence of a common fund, and no common fund is created when the fee movant's recovery does not benefit others, nor when the alleged fund is speculative in nature. n5 Additionally, the attorney's fees must come out of the recovery; the common fund theory is not applicable if it imposes additional liability on the losing defendant. n6 Furthermore, if the litigation does not enhance the fund, but only establishes the priority of the fee movant's claim to the fund, the common fund doctrine is inapplicable. n7 If the action of the attorney's fees movant enhances a pre-existing fund, fee recovery must be limited to that portion of the fund attributable to the movant's efforts. n8

[b] Spread Cost of Litigation Among Fund Beneficiaries

The common fund exception applies only if a fee assessment against the fund would serve to spread the cost of the litigation among the fund beneficiaries. The theory of the exception is that because the fund beneficiaries have

benefitted from the action, they should be required to share in the action's expense. The beneficiaries of the fund must, therefore, be readily identifiable, so that the fees may be charged against their portion of the fund with some exactitude. In the absence of such identifiable beneficiaries the common fund exception is inapplicable. Thus, the common fund doctrine requires identifiable beneficiaries and circumstances that permit proportionate sharing among the beneficiaries with some exactitude. n9 In the absence of such identifiable beneficiaries, such as when the fee movant is litigating a general social grievance, the common fund exception is inapplicable. n10

[2] Substantial Benefit Exception

[a] Purpose of Exception

The substantial benefit exception to the American Rule is similar to the common fund exception. The common fund exception allows the court to assess attorney's fees if the moving party's litigation has created or otherwise affected a fund for the benefit of others and the fee assessment against the fund would serve to spread the costs of the litigation to all those beneficiaries n1 The substantial benefit exception performs the same function in that the litigation benefits others in addition to the moving party; however, it does not create a distinct fund from which the fees may be collected. Any fee award must be satisfied by the losing party, provided that the party moving for fees is a collective representative of the class benefitted by the suit. Accordingly, the substantial benefit exception applies only when: n2 the litigation has created a substantial benefit for a definable class; n3 and the court's personal jurisdiction over a defendant that is a collective representative of the class makes possible an award of fees that will spread the costs proportionately among the class members. n4

[b] Action Must Confer Substantial Benefit on Class of Beneficiaries

The substantial benefit exception applies only when the court determines that the litigation has conferred a substantial benefit on a class of beneficiaries. Whether such a benefit has been conferred is a finding of fact that is reviewable on appeal for clear error. Typical cases are union representation suits or shareholder derivative suits, in which a substantial benefit may be shown merely by proving that the defendant corporation or union violated the law. n5 In other cases, a significant financial benefit to class members is sufficient. Furthermore, a merits recovery by the plaintiff greater than that obtained by the class does not disqualify the plaintiff from fees under the substantial benefit exception. Even if the plaintiff obtains significant personal relief, an award of fees is permitted so long as a substantial benefit is conferred on others. n6

[c] Spread of Cost of Litigation Proportionately Among Class of Beneficiaries

Like the common fund exception, n7 the substantial benefit exception is based on the equitable principle that persons benefitting from a lawsuit should pay their proportionate share of the cost of the litigation. Both exceptions are based on spreading the fee among the beneficiaries, rather than shifting the fees to the opponent. When the fee is assessed against a common fund, the distinction between fee shifting and fee spreading is easy to understand. Under the substantial benefit exception, however, the fee is assessed against the litigation opponent, n8 giving the exception the appearance of fee shifting. To ensure that the exception does not violate the general equitable prohibition against fee shifting, the substantial benefit exception is applicable only when the court's jurisdiction makes possible an award that will operate to spread the costs proportionately among the beneficiaries. n9 For the exception to apply, the court must have personal jurisdiction over some entity, such as a corporation or labor union, that is composed of the class of ascertainable beneficiaries of the suit. The lack of jurisdiction over such a collective entity defeats application of the exception. n10 In essence, the entity should be an alter ego or collective representative of the beneficiaries. By imposing the fees on that entity, the costs of the suit are spread proportionally to all the beneficiaries of the suit. The most common example of an action in which a substantial benefit fee is proper is that of a stockholder derivative suit against a corporation. A plaintiff's successful derivative suit against the directors or officers generally benefits all of the shareholders. Thus, the court can require all of the shareholders share in the cost of the suit by assessing the plaintiff's attorney's fees against the corporations's officers or directors. n11

[3] Bad Faith Exception

[a] Purpose of Exception

If a party or attorney acts in bad faith, vexatiously, wantonly, or for oppressive reasons, the court may employ its inherent equitable powers to award attorney's fees as sanctions. Such a fee award is allowed under the bad faith exception to the American Rule, and its purpose is to compensate the wronged party, punish the wrongdoer, and protect the integrity of the court. Generally, the party itself will be required to pay the award, but the exception also permits the court to impose personal liability on counsel for the party. n1 Whether the fees should be assessed against the attorney or the client under the equitable exception turns on which of the two was most responsible for the bad faith conduct at issue. n2

[b] Existence of Bad Faith

The exception applies only when a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." n3 Because this language clearly focuses on motive, the bad faith exception applies only when the actions at issue were taken in subjective bad faith. n4 This does not mean that the court must determine the party's state of mind at the time the actions were taken; the required bad faith may be inferred from the absolute lack of merit in the litigant's actions. n5 On the other hand, when the party's actions have some merit, no inference of bad faith is permitted. n6 In most cases under the bad faith exception, the prevailing party is the party requesting an award of fees. However, when a prevailing party has been guilty of bad faith in some discrete portion of the litigation, fees may be assessed against the prevailing party under the bad faith exception, and in favor of the losing party. n7

[c] Bad Faith Must Be Related to Litigation Process Itself

In making its equitable determination of whether to award fees for bad faith, the court may not consider all of the conduct of a losing defendant, including the events giving rise to the cause of action or the litigation. Rather, the court must restrict itself to examining the defendant's conduct related to the litigation itself. n8 if a court were to rely on the conduct forming the basis of the cause of action to find the requisite bad faith, the bad faith exception would be a virtual elimination of the American Rule. For example, a defendant found liable for fraud would automatically be guilty of bad faith with respect to the underlying cause of action, thus eliminating the American Rule in all successful fraud actions, and such result is not the purpose of the equitable bad faith exception. n9 The fact that bad faith may be shown only in the conduct relating to the litigation does not mean that the court may look only to conduct occurring after the commencement of the litigation. Once the cause of action has accrued, any subsequent acts of the defendant may form the basis of a finding of bad faith, even if those acts occurred prior to the formal commencement of the action. n10

Because the primary purposes of the bad faith exception are to punish the party for abusing the court and the litigation process, and to compensate the party bearing the cost of the abuse, n11 the fee award under the bad faith exception must be narrowly tailored to punish only the offending conduct related to the litigation, and should compensate only those attorney's fees incurred in response to that conduct. Consequently, when the bad faith is limited to some discrete portion of the case, the fees should be limited to fees related to that portion. n12

[4] Willful Contempt Exception

Another exception to the American Rule requirement that each party pay its own attorney's fees occurs when a party has been adjudged in willful contempt of a court order. In connection with a contempt order, the court has discretion to grant attorney's fees in favor of the party bringing the contempt action as part of the fine levied on the defendant. Thus, any fee imposed incident to a contempt citation is primarily punitive but is also intended to compensate the victim of the contempt for the expenses incurred because of the contempt. The fees awarded should, therefore, be limited to those occasioned by the contempt. n1 A party's willful contempt of a court order also constitutes bad faith. The contempt exception could thus easily be viewed as a specific instance of the bad faith exception. Nevertheless, the Supreme Court

has consistently stated it as a separate exception. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.171[2]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1318 (6th Cir. 2000)* .

(n3)Footnote 2. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1318 (6th Cir. 2000)* .

(n4)Footnote 3. *Knight v. United States, 982 F.2d 1573, 1579 (Fed. Cir. 1993)* .

(n5)Footnote 4. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1318 (6th Cir. 2000)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. *Capital Bancshares v. United States, 957 F.2d 203, 208 (5th Cir. 1992)* (recovery did not create common fund, because plaintiff brought suit solely for its own benefit and recovery did not benefit others not party to action).

(n7)Footnote 6. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1319 (6th Cir. 2000)* .

(n8)Footnote 7. *United States v. 110-118 Riverside Tenants Corp., 5 F.3d 645, 646 (2d Cir. 1993)* .

(n9)Footnote 8. *Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1267 (D.C. Cir. 1993)* .

(n10)Footnote 9. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1319 (6th Cir. 2000)* (citing **Moore's Federal Practice**).

(n11)Footnote 10. *Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)* ; *see, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1123 (9th Cir. 1981)* (action instituted to protect state highway fund from illegal disbursement did not entitle plaintiff to fee award, because fund beneficiaries were all taxpayers of state).

(n12)Footnote 1. *See* [1], *above*.

(n13)Footnote 2. *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)* (attorney's fees awarded where plaintiff was successful in action under Securities Exchange Act, case conferred substantial benefit on shareholders, and court had subject matter jurisdiction).

(n14)Footnote 3. *See* [b], *below*.

(n15)Footnote 4. *See* [c], *below*.

(n16)Footnote 5. *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1159 (2d Cir. 1994)* (union member who establishes violation of union's duty of fair representation confers benefit on union members merely by proving violation); *Smillie v. Park Chem. Co., 710 F.2d 271, 275 (6th Cir. 1983)* (shareholder conferred substantial benefit by proving violation of federal securities law).

(n17)Footnote 6. *Rodonich v. Senyshyn, 52 F.3d 28, 34-35 (2d Cir. 1995)* .

(n18)Footnote 7. *See* [1], *above*.

(n19)Footnote 8. *See* [a], *above*.

(n20)Footnote 9. *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)* .

(n21)Footnote 10. *Sederquist v. Court, 861 F.2d 554, 557 (9th Cir. 1988)* .

(n22)Footnote 11. *O'Neill v. Church's Fried Chicken, Inc., 910 F.2d 263, 265 (5th Cir. 1990)* (shareholder action contributing to increased price per share).

(n23)Footnote 1. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* (federal courts may award attorney's fees against attorneys who willfully abuse judicial process).

(n24)Footnote 2. *Lockary v. Kayfetz, 974 F.2d 1166, 1169, 1170 (9th Cir. 1992)* , *cert. denied, 508 U.S. 931 (1993)* .

(n25)Footnote 3. *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 129, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974)* .

(n26)Footnote 4. *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329 (2d Cir. 1986)* .

(n27)Footnote 5. *Peoro v. Eisenman, 793 F.2d 1048, 1051-1052 (9th Cir. 1986)* .

(n28)Footnote 6. *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, 989 F.2d 1077, 1084 (9th Cir. 1993)* (when arbitrator exceeded authority in entering remedial order, lawsuit challenging order could not have been brought in bad faith).

(n29)Footnote 7. *Square Constr. Co. v. Washington Metro. Area Transit Auth., 800 F.2d 1256, 1267 (4th Cir. 1986)* (remanding for assessment of fees against prevailing party for time party prolonged litigation).

(n30)Footnote 8. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1318 (6th Cir. 2000)* (citing **Moore's Federal Practice**).

(n31)Footnote 9. *See Association of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541 (9th Cir. 1992)* (citing **Moore's Federal Practice**).

(n32)Footnote 10. *Morganroth Morganroth v. DeLorean, 213 F.3d 1301, 1318 (6th Cir. 2000)* .

(n33)Footnote 11. *Hutto v. Finney, 437 U.S. 678, 689 n.14, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978)* .

(n34)Footnote 12. *Strag v. Board of Trustees, 55 F.3d 943, 954-56 (4th Cir. 1995)* .

(n35)Footnote 1. *Halderman v. Pennhurst State School & Hosp., 49 F.3d 939, 941 (3d Cir. 1995)* .

(n36)Footnote 2. *Chambers v. NASCO, Inc., 501 U.S. 32, 45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.85

§ 25.85 Award of Attorney's Fees Against Federal Government Entitiesn*

[1] Sovereign Immunity Generally Precludes Fee Award

The American Rule requirement that each private party pay its own attorney's fees irrespective of which party prevails in the litigation n1 applies with even greater force if fees are sought from the federal government, because the doctrine of sovereign immunity generally precludes the imposition of any type of liability against the federal government. n2 Therefore, the federal government and its agencies, officers and employees have traditionally retained protection from fee liability. However, in some discrete areas of law, Congress has waived the government's immunity from fee assessments. n3 Also, to rectify significant inequity in suits between the government and private parties, and to prevent careless or irresponsible litigation by the federal government lawyers, Congress has adopted the more general waiver found in the Equal Access to Justice Act. n4

[2] Limited Statutory Waiver of Immunity by Federal Government Regarding Attorney's Fees

[a] Waiver Applies in Non-Tort Cases That Involve Federal Entity

The Equal Access to Justice Act (EAJA) creates a limited waiver of the federal government's immunity from an assessment of attorney's fees in actions other than tort actions. n1 The EAJA expressly provides that the federal government may be liable for fees under the common law and, thus, waives sovereign immunity under the equitable exceptions to the American Rule, most notably the bad-faith litigation exception. n2 The EAJA is different than other fee-shifting federal statutes in that it is based on the presence of a federal governmental entity as a party in the action. The effect of the EAJA is to authorize attorney's fees against the federal government provided that the issue of attorney's fees is not exclusively controlled by the substantive law governing the action. The EAJA provides that if the substantive federal law at issue precludes fees, then that more specific law governs. n3 However, if the substantive law also contains a fee-shifting provision and the statute is not explicit that its provision is to be exclusive, then the court may use EAJA provisions to supplement the provisions of the other fee-shifting statute. n4 In such circumstances, the prevailing party should be given the benefit of the more relaxed standard for awarding fees. n5

There are two important exceptions to the applicability of the EAJA. First, the government may not be held liable for

attorney's fees in an action "sounding in tort," n6 whether the case is brought by or against the government. n7 Therefore, for example, a litigant may not recover attorney's fees in an action under the Federal Tort Claims Act, n8 even if the issue on which the private litigant prevailed against the government was completely independent of the tort issue. n9

The second primary exception to application of the EAJA is that it does not apply to individual private litigants who have a net worth exceeding $2,000,000 nor to corporations or other organizations that have a net worth exceeding $7,000,000. n10 Although not specified in the statute, legislative history indicates that valuation should be of the acquisition cost and not of the fair market value. n11

[b] Award of Attorney's Fees to Prevailing Party is Mandatory if Position of Federal Entity Was Not Substantially Justified

The EAJA provides that a successful private litigant against the federal government is entitled to recover the litigants attorneys' fees if: (1) the litigant was a "prevailing party"; (2) the government's position was not "substantially justified"; (3) no special circumstances existed that would make an award unjust; and (4) the litigant filed a timely application with the district court. n12

To qualify as a "prevailing party" under the first requirement, the litigant must succeed on any significant issue in litigation which achieves some of the benefit the litigant sought in bringing suit. However, the plaintiff qualifies as a prevailing party, and thus is entitled to attorney's fees, only if the court makes an actual formal adjudication of liability by the government, or in the case of a settlement, the court approves the settlement through a consent decree. n13

The second requirement for a fee award under the EAJA is that the federal government's position was not substantially justified. n14 A "substantially justified" position means a position that is justified to degree that could satisfy a reasonable person. n15 The "position of the United States" includes not only the position taken by the United States in the civil action, but also the action or failure to act by the agency on which the civil action is based. n16 It is important to note that while the government has the burden of *proof* that its position was substantially justified, the private litigant has the initial burden of *pleading* by allegation that the government's position was *not* substantially justified. n17 The requirement of this burden of pleading is a recognition that the "substantially justified" standard does not mean that there is a presumption that the government position is not substantially justified simply because it lost the case; furthermore, there is no presumption that the government must pay fees each time it loses. n18

The third requirement of the EAJA is that no are no special circumstances regarding the application that would make an award of fees unjust. n19 To establish special circumstances, the defendant must generally show that the award is counter to the purposes of the fee shifting provision or that the balance of equities favors denial of fee. n20

[c] Procedural Considerations Regarding Award of Attorney's Fees Against Federal Entity

In addition to the requirements for an award of attorney's fees discussed above, the following is a list of the other significant procedural attributes of the EAJA:

- Under the EAJA, the federal governmental entity may be assessed fees by a court in any civil action. Generally the term "court" is limited to those courts that are defined as a "court of the United States" under Judicial Code Article III. n21 The term "civil action" includes proceedings for judicial review of agency action n22 but does not include habeas corpus proceedings. n23

- The requirement of an attorney's fee application is not jurisdictional. Consequently, provided that an applicant has made a timely fee application within the 30-day filing period, the applicant may amend the application after the 30-day filing period to cure an initial failure to allege that the government's position

in the underlying litigation lacked substantial justification, and the application as amended qualifies for consideration and determination on the merits. n24

- The fee awarded may not be greater than the amount that the prevailing party was obligated to pay in pursuing the litigation. n25 In other words, the amount the prevailing party has actually paid in attorney's fees constitutes a cap on the statutory fee award. n26 Consequently, a pro se litigant may not recover attorney's fees under the EAJA. n27

- A district court's determination of substantial justification is reviewed under an abuse of discretion standard. n28

- A court may award interest on an attorney's fee award under the EAJA only if government appeals a fee award and the award is affirmed. n29

[3] Other Federal Statutes Providing Fee Award Against Federal Government

Although the EAJA is clearly the most important statute permitting an attorney's fees award against the federal government, n1 there are other statutes that provide for such an award. Probably the most important of these is the fee-shifting provision of the Internal Revenue Code, n2 which permits an award of fees against the government in favor of a prevailing party when the position of the government was not substantially justified, which is precisely the standard employed by the EAJA. The same construction of the "substantially justified" standard is applied under both statutes. n3 However, the Internal Revenue statute contains its own definition of "prevailing party," which requires that the fee movant either: (1) substantially prevail with respect to the amount in controversy; or (2) substantially prevail with respect to the most significant issue or set of issues presented. n4

Several of the other statutes that permit an attorney's fees award against the federal government are narrow enactments, such as the Legal Services Corporation Act, n5 and the Competition in Contracting Act. n6 If one of these statutes is applicable, fees may be awarded only under the terms of that statute, not under the EAJA. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleGovernmentsFederal GovernmentClaims By & AgainstPublic Health & Welfare LawSocial ServicesLegal AidTortsDamagesCosts & Attorney FeesStatutory AvailabilityWorkers' Compensation & SSDISocial Security Disability InsuranceCosts & Attorney Fees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.172* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 602, 121 S. Ct. 1835, 149 L. Ed. 2d 855, 861 (2001)* (under "American Rule," parties must ordinarily bear their own attorney's fees, and federal courts generally do not award fees to prevailing party absent explicit statutory authority).

(n3)Footnote 2. *See FTC v. Kuykendall, 466 F.3d 1149, 1153 (10th Cir. 2006)* .

(n4)Footnote 3. *Slugocki v. United States, 816 F.2d 1572, 1579 (Fed. Cir. 1987)* (waiver of sovereign immunity in Fair Labor Standards Act *29 U.S.C. § 216(b)*).

(n5)Footnote 4. *See* [2], *below*.

(n6)Footnote 1. *28 U.S.C. 2412(b), (d)*; *see Scarborough v. Principi, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)* .

(n7)Footnote 2. *EEOC v. Hendrix Coll., 53 F.3d 209, 211 (8th Cir. 1995)* .

(n8)Footnote 3. *In re Cascade Rds., Inc., 34 F.3d 756, 768 (9th Cir. 1994)* (because Internal Revenue Code contains exclusive fee provision, that provision controls rather than provisions of EAJA).

(n9)Footnote 4. *See United States v. Aisenberg, 358 F.3d 1327, 1340 (11th Cir. 2004)* .

(n10)Footnote 5. *EEOC v. Clay Printing Co., 13 F.3d 813, 817-818 (4th Cir. 1994)* (even though Age Discrimination in Employment Act contains fee-shifting provision that authorizes fees for prevailing plaintiff, that statute is not exclusive; thus, prevailing defendant sued by EEOC could collect fees from government under EAJA when government's position was not substantially justified).

(n11)Footnote 6. *28 U.S.C. § 2412(d)(1)(A)*.

(n12)Footnote 7. *Resolution Trust Corp. v. Gaudet, 192 F.3d 485, 487 (5th Cir. 1999)* .

(n13)Footnote 8. *Andrews v. United States, 122 F.3d 1367, 1374 (11th Cir. 1997)* .

(n14)Footnote 9. *In re Turner, 14 F.3d 637, 640 (D.C. Cir. 1994)* .

(n15)Footnote 10. *28 U.S.C. § 2412(d)(2)(B)*.

(n16)Footnote 11. *See* United States v. 88. *88 Acres of Land, 907 F.2d 106, 107 (9th Cir. 1990)* .

(n17)Footnote 12. *Cunningham v. Barnhart, 440 F.3d 862, 863 (7th Cir. 2006)* ; *see 28 U.S.C. § 2412(d)(1)(A), (B)*; [c], *below* (timeliness of application).

(n18)Footnote 13. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 605-607, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)* (rejecting "catalyst theory" for fee award).

(n19)Footnote 14. *28 U.S.C. § 2412(d)(1)(A)*.

(n20)Footnote 15. *Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* ; *see Lauer v. Barnhart, 321 F.3d 762, 765 (8th Cir. 2003)* (government's position in litigation is not substantially justified for purposes of award of fees under EAJA if position lacks any evidence in its support).

(n21)Footnote 16. *28 U.S.C. § 2412(d)(2)(D)*.

(n22)Footnote 17. *Scarborough v. Principi, 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)* .

(n23)Footnote 18. *Scarborough v. Principi, 541 U.S. 401, 415, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)* .

(n24)Footnote 19. *28 U.S.C. § 2412(d)(1)(A)*.

(n25)Footnote 20. *Democratic Party of Wash. State v. Reed, 388 F.3d 1281, 1285 (9th Cir. 2004)* ; *see Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)* (purposes of fee award to penalize litigants who deliberately advance arguments they know to be untenable and to encourage injured individuals to seek judicial relief).

(n26)Footnote 21. *See 28 U.S.C. § 451*; *see also Bowen v. Commissioner, 706 F.2d 1087, 1088 (11th Cir. 1983)* .

(n27)Footnote 22. *28 U.S.C. § 2412(d)(1)(A).*

(n28)Footnote 23. *Ewing v. Rodgers, 826 F.2d 967, 969-970 (10th Cir. 1987)* (habeas corpus is not civil action for purposes of applying rules of procedure).

(n29)Footnote 24. *Scarborough v. Principi, 541 U.S. 401, 418-420, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)* .

(n30)Footnote 25. *28 U.S.C. § 2412(d)(2).*

(n31)Footnote 26. *Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 967-968 (2008)* (attorney fees and paralegal fees are "incurred" at market rate charged to party, not at cost to attorney to provide service, because amount must be measured from perspective of client rather than attorney).

(n32)Footnote 27. *Krecioch v. United States, 316 F.3d 684, 686-688 (7th Cir. 2003)* .

(n33)Footnote 28. *Abbas Hanoun Al Maleki v. Holder, 558 F.3d 1200, 1206 (10th Cir. 2009)* .

(n34)Footnote 29. *28 U.S.C. § 2412(f).*

(n35)Footnote 1. *See* [b], *above.*

(n36)Footnote 2. *26 U.S.C. § 7430.*

(n37)Footnote 3. *Miller v. Alamo, 983 F.2d 856, 859 (8th Cir. 1993)* .

(n38)Footnote 4. *See 26 U.S.C. § 7430(c)(4)(A)(i).*

(n39)Footnote 5. *42 U.S.C. § 2996e(f).*

(n40)Footnote 6. *31 U.S.C. § 3554(c).*

(n41)Footnote 7. *United States, 34 F.3d 756, 767-769 (9th Cir. 1994)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.86

§ 25.86 Amount of Award of Attorney's Feesn*

[1] Lodestar Method of Calculation Required Under All Federal Fee-Shifting Statutes

All federal fee shifting statutes which authorize an award of attorney fees, such as the EAJA, serve as a penalty, Consequently the amount of such fees are calculated using a lodestar analysis, and are typically subject to a cap on the attorney's compensable hourly rate. n1 On the other hand, if an attorney fee award is made under a statute that is not a fee shifting statute, such as under the Social Security Act, n2 the statute allows an award of fees paid by the client, recognizing the client's obligation to pay counsel a reasonable fee. Such fees are not calculated using a lodestar analysis, and there is no limitation on the attorney's hourly rate. n3

Under the lodestar method of calculation, the court first determines the number of hours that were reasonably expended by the attorneys and the paralegals for the prevailing party. n4 Then the court multiplies the number of hours for each category at a reasonable rate per hour that the court deems appropriate. n5 However, if the prevailing party obtains only nominal damages or otherwise obtains a mere technical victory inappropriate for fees, the court may dispense with calculation of lodestar and may either deny fees or make an award of nominal fees. The Supreme Court has held that when nominal damages are recovered, the only reasonable fee is usually no fee at all. The Court explained that although a judgment for nominal damages does not affect the plaintiff's status as a prevailing party, it does bear on the propriety of the fees awarded, for the degree of success is the most critical factor in determining the reasonableness of a fee award. n6

[2] Hours Reasonably Expended

[a] Determination of Reasonableness

Each motion for attorney's fees must state the amount of fees that the party is applying for or provide a fair estimate of the amount. n1 Evidentiary submissions of the fee movant provide the factual proof of the amount claimed. Therefore, the party moving for imposition of a fee award bears the burden of establishing the hours claimed and submitting adequate documentation of those hours. n2 Documentation should be in the form of contemporaneously prepared time records, although such records are not an absolute prerequisite to a fee award and hours may be proved by a

reconstruction of time records or by other evidence adequate under the circumstances. If the records submitted by the fee movant are inadequate to establish the hours claimed, courts will generally make a percentage reduction of the hours. n3

The Supreme Court has emphasized that the fee movant must demonstrate not only that the claimed hours were actually expended, but also that they were "reasonably" expended. n4 With respect to a determination of excessive hours, courts should consider how long similar tasks have taken in previous cases and the time the fee opponent has devoted to the task. n5 If the court's scrutiny for reasonableness requires a reduction of the claimed hours, the preferred method is for the court to conduct an hour-by-hour review of all the time claimed and to disallow those hours not reasonably expended on the litigation. n6

[b] Hours Must Be Related to Successful Claims

If the fee movant has not succeeded on all claims, the district court should award only an amount that is reasonable in relation to the results of the suit. n7 To establish a reasonable fee when a party has prevailed on some by not all claims, the court should make two inquiries in its equitable discretion: First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which the plaintiff succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? Then the district court may identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. n8

When all of the claims for relief share a common core of facts or are based on related legal theories, it may be difficult to divide counsel's time on a claim-by-claim basis. In that event, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. n9 There is no rule or formula for making a reduction; rather, in its discretion the court may follow either of two methods: (1) apportion the hours and award fees only for those expended on the successful claims; n10 or, if such an apportionment is impossible or impractical, make a percentage reduction to account for the limited success. n11

[c] Types of Hours Compensable

Hours expended by an attorney directly on a successful claim are obviously compensable. n12 Other types of hours that are compensable include the following:

1. Hours expended in administrative proceedings that are prerequisites or preparation for the later litigation are compensable. A fee movant will often seek compensation for the hours spent in pre-litigation administrative proceedings. If a statute provides for recovery of fees in any action or proceeding, the use of the term "proceeding" has been interpreted as disclosing legislative intent to include attorney's fees for administrative proceedings. n13 The movant may also obtain fees from administrative proceedings that are useful and ordinarily necessary to obtain judgment in the federal action. n14

2. Hours expended in other actions and in arbitration proceedings may be compensable. For example, if a federal action is filed, but the district court abstains in deference to an ongoing, potentially dispositive state court action, a fee award made at the conclusion of the federal action may include fees incurred in the state action. n15 Furthermore, fees are allowed for prior arbitration proceedings that were required under the terms of a contract or contributed to the resolution of a later statutory claim, n16 unless such fees are expressly prohibited by the arbitration agreement. n17

3. Hours expended in necessary monitoring of compliance with a judgment are compensable. Courts commonly permit post-judgment attorney's fees awards for necessary monitoring of compliance with a prospective decree to ensure enforcement of the decree. n18 Additionally, if the opposition fails to

comply with the decree, the court may award fees for necessary contempt motions. n19

4. As a general rule, hours expended on the fee issue itself are compensable in the fee award. Time spent establishing entitlement to and the amount of court-awarded attorney's fees is often referred to as "fees on fees." The Supreme Court has held that fees on fees are proper under the Equal Access to Justice Act, n20 and the circuit courts have extended the principle to other federal fee-shifting statutes. n21

[3] Reasonable Hourly Rate

[a] Compensable Amount Is Determined by Prevailing Market Rate in Community

Once the court has determined compensable hours, it must determine the proper rate to multiply by those hours. The appropriate rate for any fee award under a "prevailing party" fee-shifting statute is based on the fees that were "incurred" by the prevailing party in the civil action. n1 Fees and costs "incurred" by a party are calculated under lodestar by the prevailing market rates billed in the community by attorneys for the relevant services, and not by the attorney's actual expense for providing those services. n2

The party making the motion to recover attorney's fees has the burden of establishing that market rate. Thus, a prevailing party requesting fees has the burden of producing sufficient evidence of what constitutes a reasonable market rate in the community for the essential character and complexity of the legal services rendered in order to establish a prima facie case for fees. If that is established, the opposing party then has the burden of producing record evidence that contests that rate. n3 A rate determined in this way is deemed to be reasonable and is referred to for convenience as the prevailing market rate. n4 The relevant community for purposes of the lodestar is the forum community. Thus, if counsel for the fee movant practices in another community, the prevailing market rate should therefore be that of the community in which the court is located, not the community in which the attorney actually practices. n5

Evidence may be presented regarding the following matters:

1. The attorney's customary billing rate. If the fee movant's attorney is in private practice, the most convincing evidence of the market rate is the rate that counsel charges a client in similar actions. n6 As a practical matter, an attorney who has established a usual billing rate will ordinarily recover fees based on that rate. n7 However, when the litigation is outside of the attorney's field of expertise, those rates, while relevant, are not as persuasive in establishing the prevailing market rate, which may then be established by any other competent evidence. n8

2. The prevailing market rate, if the attorney has no customary billing rate. The prevailing market rate may be established from numerous sources, including affidavits of counsel with similar experience regarding the rate they would charge for a similar case, n9 bar surveys of customary rates, the amount charged by counsel for the opposition in the particular case or similar litigation, n10 the amounts awarded counsel with similar experience in similar litigation, and the amounts awarded for the services of counsel in prior litigation. n11

3. The attorney's experience and expertise. An "experience differential" is recognized by the courts in setting an appropriate rate for a lodestar fee award. n12

[b] Rate Cap

Some fee-shifting statutes provide for the rate to be awarded. Thus, a provision of the Equal Access to Justice Act n13 places a presumptive limitation of $125 per hour as the highest fee that may be awarded under the statute; however the court may then adjust that presumptive highest fee if the court determines that an adjustment is justified by an increase

in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved. n14

[4] Deviations From Lodestar Amount

Once a lodestar calculation has been reached, n1 a court may generally not adjust that amount, because the lodestar figure already includes most of the relevant factors constituting a "reasonable" attorney's fee. An enhancement may not be awarded based on a factor that is already included in the lodestar calculation. Therefore, the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are completely reflected in the number of billable hours stated by the attorney. The quality of an attorney's performance also should not be used to enhance the lodestar because considerations concerning the quality of a prevailing party's attorney's representation normally are reflected in the reasonable hourly rate. However an enhancement of the lodestar may be granted in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee. For example, an enhancement of a lodestar amount for superior attorney performance may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; in such exceptional cases, the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses. The burden of proving the necessity of an enhancement of a lodestar amount is on the attorney fee applicant; the applicant must produce specific evidence that supports the enhancement amount. n2

In contrast to enhancements of the lodestar, the lodestar is subject to reduction when appropriate under the factual circumstances. For example, the lodestar amount may be reduced by an amount to account for a "limited success" by a plaintiff. n3 This reduction focuses on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. The reduction may be based on a quantitative analysis, as in the case of a apportionment of success among multiple parties, n4 or on a qualitative analysis, as to whether the plaintiff achieved a high or low degree of success. n5

[5] Percentage of Recovery Method of Fee

[a] Applicability of Formula

Many attorneys that represent clients in federal court work on a contingency basis. Therefore, federal courts at times make analogous fee awards and calculate the amount of fees as a percentage of the recovery obtained. The percentage of the recovery method was formulated in the nineteenth century to calculate fee awards under the equitable exceptions to the American Rule. The percentage method remains an option in cases involving the common fund and substantial benefit exceptions to the American Rule. n1 The use of the percentage of the recovery method, however, is not permitted under federal fee-shifting statutes. n2

As noted above, the current majority rule in the courts of appeals is that a common fund fee may be based either on a lodestar calculation or on a percentage of the recovery. n3 The decision as to which method to use is at the discretion of the district court, which will not be reversed provided that the resulting fee is reasonable. n4 In exercising its discretion, a court may consider many factors, but the primary consideration should be which method will best produce a reasonable fee. n5 However, there is some authority that the percentage method is mandatory when setting the amount of a common fund fee. n6 Those courts that have required the use of the percentage method have done so because they believe that method is automatically superior in establishing a reasonable fee. n7

[b] Calculation of Fee

The amount of any court-awarded fee depends on the facts of each individual case; consequently, there are no strict rules about the appropriate percentage that may be awarded. n8 The primary consideration is of course the amount of the recovery from which the fee will be taken, because the recovery provides the best measure of the reasonableness and

quality of the attorney's representation. n9 Although in many common fund cases the size of the recovery is easily determined, the recovery may be more difficult to evaluate if prospective relief or other nonmonetary relief is granted. In any event, the fee should be based on a percentage of the value of all the relief obtained for the class of beneficiaries, whether monetary or nonmonetary. Furthermore, the fee should be based only on the portion of the recovery attributable to counsel's efforts in the case. n10 Once the court has determined the amount of the recovery, a benchmark of 25 percent is typically used as a reasonable percentage fee. That percentage figure is not required, and a percentage significantly higher or lower may be awarded. n11 However, it has been suggested that 50 percent of the common fund should be considered to be an upper limit on the fee award, absent exceptional circumstances. n12 Whatever percentage is set, the court should articulate specific reasons for selecting that figure, stating all factors on which it relied and how those factors affected the selection of the chosen percentage. n13 Of all the factors considered by the court, the most important is the time expended on the litigation. If the attorney produces a large recovery in a small amount of time, the percentage ordinarily should be reduced to prevent a windfall to the attorney. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationRemediesCosts & Attorney FeesAmountCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil Rights LawPractice & ProcedureCosts & Attorney FeesAward CalculationsLegal EthicsClient RelationsAttorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.190* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *McGraw v. Barnhart, 450 F.3d 493, 497-498 (10th Cir. 2006)* .

(n3)Footnote 2. *See 42 U.S.C. § 406*.

(n4)Footnote 3. *Gisbrecht v. Barnhart, 535 U.S. 789, 808, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002)* .

(n5)Footnote 4. *Gisbrecht v. Barnhart, 535 U.S. 789, 802, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002)* ; *see Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 967-968 (2008)* (paralegal fees); *see also* [2], *below*.

(n6)Footnote 5. *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* ; *see* [3], *below*.

(n7)Footnote 6. *Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)* .

(n8)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(B)(iii)*; *see Fed. R. Civ. P. 54(d)*, Committee Note to 1993 Amendments (estimate need not be supported at time of filing with evidentiary material bearing on the fees); *see also HK Sys., Inc. v. Admiral Ins. Co., 2008 U.S. Dist. LEXIS 7439, at *12-*13 (E.D. Wis. Jan. 17, 2008)* (necessity of estimate).

(n9)Footnote 2. *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n10)Footnote 3. *Johnson v. Hugo's Skateway, 949 F.2d 1338, 1352 (4th Cir. 1991)* .

(n11)Footnote 4. *Hensley v. Eckerhart, 461 U.S. 424, 433-434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n12)Footnote 5. *Lubrizol Corp. v. Exxon Corp., 957 F.2d 1302, 1308 (5th Cir. 1992)* .

(n13)Footnote 6. *Evans v. City of Evanston, 941 F.2d 473, 476-477 (7th Cir. 1991)* .

(n14)Footnote 7. *Abner v. Kan. City S. Ry. Co., 541 F.3d 372, 383 (5th Cir. 2008)* (hours allowed only for time reasonably spent on work in furtherance of claims on which plaintiffs *prevailed*).

(n15)Footnote 8. *Hensley v. Eckerhart, 461 U.S. 424, 433-437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* ; *see Kenny A. v. Perdue, 532 F.3d 1209, 1221 (11th Cir. 2008)* (court may reduce fees by hours actually spent on claims that did not succeed).

(n16)Footnote 9. *Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n17)Footnote 10. *Phetosomphone v. Allison Reed Group., 984 F.2d 4, 7 (1st Cir. 1993)* .

(n18)Footnote 11. *H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (8th Cir. 1991)* .

(n19)Footnote 12. *See* [b], *above*.

(n20)Footnote 13. *New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980)* .

(n21)Footnote 14. *Cullen v. Fliegner, 18 F.3d 96, 105-106 (2d Cir. 1994)* .

(n22)Footnote 15. *Schneider v. Colegio de Abogados, 187 F.3d 30, 32-33 (1st Cir. 1999)* .

(n23)Footnote 16. *Schlobohm v. Pepperidge Farm, Inc., 806 F.2d 578, 580 (5th Cir. 1986)* .

(n24)Footnote 17. *Menke v. Monchecourt, 17 F.3d 1007, 1010 (7th Cir. 1994)* .

(n25)Footnote 18. *Gates v. Rowland, 39 F.3d 1439, 1450-1451 (9th Cir. 1994)* .

(n26)Footnote 19. *Halderman v. Pennhurst State Sch. & Hosp., 49 F.3d 939, 941 (3d Cir. 1995)* .

(n27)Footnote 20. *INS v. Jean, 496 U.S. 154, 165, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990)* .

(n28)Footnote 21. *See, e.g., Thompson v. Gomez, 45 F.3d 1365, 1367 (9th Cir. 1995)* (civil rights statutes).

(n29)Footnote 1. *See 28 U.S.C. § 2412(d)(1)(A)*.

(n30)Footnote 2. *Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 967-969 (2008)* (in determining fees and costs incurred by prevailing party, court must determine rate from perspective of client rather than attorney).

(n31)Footnote 3. *McCutcheon v. America's Servicing Co., 560 F.3d 143, 150 (3d Cir. 2009)* .

(n32)Footnote 4. *Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n33)Footnote 5. *Wayne v. Village of Sebring, 36 F.3d 517, 533 (6th Cir. 1994)* ; *but see Colonial Williamsburg Found. v. Kittinger Co., 38 F.3d 133, 138 (4th Cir. 1994)* (counsel from another community may recover customary fees if local counsel could not have handled case).

(n34)Footnote 6. *Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 967-969 (2008)* .

(n35)Footnote 7. *Islamic Center of Miss. v. City of Starkville, 876 F.2d 465, 469 (5th Cir. 1989)* (if court chooses an hourly rate different from attorney's customary billing rate, court must articulate its reasons).

(n36)Footnote 8. *Buffington v. Baltimore County, 913 F.2d 113, 130 (4th Cir. 1990)* .

(n37)Footnote 9. *Garrity v. Sununu, 752 F.2d 727, 740, n.12 (1st Cir. 1984)* .

(n38)Footnote 10. *McGinnis v. Kentucky Fried Chicken of Cal., 51 F.3d 805, 809 (9th Cir. 1994)* .

(n39)Footnote 11. *Black Grievance Comm. v. Philadelphia Elec. Co., 802 F.2d 648, 652 (3d Cir. 1986)* .

(n40)Footnote 12. *Blum v. Stenson, 465 U.S. 886, 899 n.15, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n41)Footnote 13. *28 U.S.C. § 2412(d)*.

(n42)Footnote 14. *28 U.S.C. § 2412(d)(2)(A)(ii)*; *see Jazz Photo Corp. v. United States, 597 F. Supp. 2d 1364, 1370 (Ct. Intl. Trade 2008)* (cost-of-living adjustment calculated by using Consumer Price Index; hourly rate should only be increased by corresponding Consumer Price Index for each year in which legal work was performed).

(n43)Footnote 1. *See* [1]-[3], *above*.

(n44)Footnote 2. *Perdue v. Kenny A., ___ U.S. ___, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505-508 (2010)* .

(n45)Footnote 3. *Tyler v. Union Oil Co., 304 F.3d 379, 390 (5th Cir. 2002)* .

(n46)Footnote 4. *McCutcheon v. America's Servicing Co., 560 F.3d 143, 151 (3d Cir. 2009)* .

(n47)Footnote 5. *United States ex rel. Thompson v. Walgreen Co., 621 F. Supp. 2d 710, 730 (D. Minn. 2009)* .

(n48)Footnote 1. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 540-541 (3d Cir. 2009)* ; *see § 25.84[1], [2]*.

(n49)Footnote 2. *Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1459 (5th Cir. 1995)* .

(n50)Footnote 3. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 281 (3d Cir. 2009)* .

(n51)Footnote 4. *Rawlings v. Prudential-Bache Properties, 9 F.3d 513, 516 (6th Cir. 1993)* .

(n52)Footnote 5. *Gottlieb v. Barry, 43 F.3d 474, 487 (10th Cir. 1994)* .

(n53)Footnote 6. *Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1269-1270 (D.C. Cir. 1993)* .

(n54)Footnote 7. *Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991)* .

(n55)Footnote 8. *Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991)* .

(n56)Footnote 9. *Court Awarded Attorney's Fees, Report of Third Circuit Task Force, 108 F.R.D. 237 (1985)* .

(n57)Footnote 10. *Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1993)* .

(n58)Footnote 11. *Newby v. Enron Corp. (In re Enron Corp. Sec.), 586 F. Supp. 2d 732, 746 (S.D. Tex. 2008)* (typical benchmark in a common fund case is 25 percent of fund, but in "mega-cases" in which large settlements or awards serve as the basis for calculating percentage, courts have often found considerably lower percentages of recovery to be appropriate).

(n59)Footnote 12. *Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774-775 (11th Cir. 1991)* .

(n60)Footnote 13. *Brown v. Phillips Petroleum Co., 838 F.2d 451, 455 (10th Cir. 1988)* , *cert. denied, 488 U.S.*

822 (1988) .

(n61)Footnote 14. *See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974)* .

Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.87

§ 25.87 Procedure for Award of Attorney's Feesn*

[1] Procedure Controlled by Federal Rules or Statutes

To obtain an award of attorney's fees in federal court, the requesting party must file a timely motion. n1 The proper procedure for the recovery of attorney's fees in federal court is generally controlled by Rule 54(d)(2). However, it must be remembered that under the Rules Enabling Act, n2 Rule 54(d)(2) does not provide the grounds for the recovery of those fees. Rather, the legal grounds for recovery must be determined by the substantive law governing the particular action. n3 The grounds establishing the availability and amount of attorney's fees are discussed in *§§ 25.80 -25.86*.

The following exceptions are instances when the provisions of Rule 54(d)(2) do not apply to claims for attorney's fees:

1. When the substantive law governing the action provides for the recovery of attorney's fees as an element of damages; for example, under the terms of a contract, the fees must be claimed as required by the substantive law and may not be sought by motion after judgment. n4

2. When fees and expenses are sought as sanctions for violations of the Federal Rules of Civil Procedure or other statutes, n5 the provisions of Rule 54(d)(2) do not necessarily apply but are controlled by the particular rule or statute. n6

3. When a federal statute expressly authorizes an independent action to collect attorney's fees, Rule 54(d)(2)(A) does not control; procedure is controlled by the express language of the statute. n7

[2] Party Requesting Fees Must File Motion

To obtain attorney's fees, a party must file a timely motion for the fees. n1 The motion for attorney's fees must specify the judgment entitling the movant to fees, specify the grounds for the fee award, such as the statutory, equitable, or other basis for the award, and state or estimate the amount of the fee sought. n2 If the court directs the party to do so, the party must also disclose the terms of any fee agreement with respect to the services implicated by the motion. Thus, the court may direct the party to include not only the fee agreement between the fee movant and counsel but also

agreements between counsel splitting a fee to be awarded or between opposition parties settling a dispute when the dispute requires court approval, such as, a class action suit or shareholder derivative action. Disclosure of such fee agreements may assist the court in determining the appropriate amount of any attorney's fee. n3

[3] Time Deadlines for Motion

[a] Time Period for Filing and Serving Motion

A party must request attorney's fees by motion that must be filed no later than 14 days after entry of judgment, unless otherwise provided by statute or court order. n1 The party should file the motion as specified in Rule 5, although strict compliance is not always necessary. n1.1 The purpose of the deadline is to ensure that the fee opponent has notice of the fee motion prior to the expiration of the time to appeal. n2 Consequently, the 14-day period to file a fee motion also does not begin to run until judgment has been entered in accordance with Rule 58. n3

[b] Exceptions to Time Period

Even though Rule 54(d)(2) generally requires that any fee motion be filed no later than 14 days after entry of judgment, n4 the rule also provides that a different filing period may be established by statute or court order. n5 The primary statutory exception to the deadline is the Equal Access to Justice Act n6 which contains an extensive alternative procedure for obtaining fees from the federal government, including a different time for filing the fee motion: under the EAJA the prevailing party must move for attorney's fees within 30 days of final judgment in the action. n7 The EAJA provides that the 30-day period does not begin to run until after the expiration of the time to appeal, because the EAJA states that the term "final judgment" means a judgment that is final and not appealable. n8

In addition to the EAJA, the following may specify exceptions to the 14-day time limit:

1. A specification of time period by court order or local rule. A party requesting fees should check local rules and standing orders of the district court to determine if a different filing period is provided. n9

2. If fees are sought as sanctions for violation of any rule or statute, n10 the provisions of Rule 54(d)(2) do not apply, including the 14-day deadline for the filing of the fee motion. n11 Consequently the time period specified in the rule or statue applies, unless no provision is made, in which case the motion must be reasonably prompt. n12

3. If the substantive law governing the action provides for fees as an element of damages to be proved at trial, the 14-day filing period and motion requirement of Rule 54(d)(2) is inapplicable; the filing period is controlled by the substantive law. n13

[4] Notice of Motion

Court-awarded attorney's fee must be paid either by a party or taken from a fund. Consequently, notice of the fee motion is required so that the opposition may prepare its argument. n0.1 When the fee is to be paid by the fee movant's litigation opposition, notice should be given in the form of service of the motion on the other parties in the action. n1 The party must give service under the provisions of Rule 5, which permits service by mailing the motion to counsel of record; and which also permits service by mailing. n2

A motion seeking fees under the common fund exception to the American Rule must be made within 14 days of judgment and served on the other parties as required under Rule 5. n3 However, service on the other parties is not adequate notice of the fee motion, because those parties will not be paying the fee, in that a common fund fee is taken from the fund itself. Therefore, it is the beneficiaries of that fund who are entitled to notice of the fee motion. Anyone who is entitled to share in the common fund should receive notice, even though further claims procedures might be

necessary to determine whether the person is in fact entitled to share in the fund. The basic principle is that if a fund beneficiary's recovery may be reduced by a payment of attorney's fees, that beneficiary should receive notice. n4

[5] Support and Opposition to Motion

[a] Moving Party Has Burden

The party moving for attorney's fees has the burden of establishing entitlement to the fees and also the amount based on the hours claimed and the appropriate hourly rate. n1 The moving party also has the burden to produce adequate evidentiary proof of these matters, and the failure to do so is sufficient ground for the court to deny the fee motion. n2 The best documentation that may be presented by the moving party is contemporaneously prepared time records. However, such records are not an absolute prerequisite to a fee award, and hours may be proved by a reconstruction of time records or by other evidence adequate under the circumstances. n3 With respect to the lodestar element of rate, the evidentiary submissions should establish the hourly rate claimed or provide a basis for the court to set an appropriate rate. The rate awarded should be the prevailing market rate in the relevant community, which is best demonstrated by the attorney's customary rates. n4 If the fee movant's counsel has no regular billing rate, the evidentiary submissions should establish that the requested rate is in line with that prevailing in the community. n5

[b] Opposition Party May Request to Submit Proof

If the party moving for attorney's fees meets its burden of establishing entitlement to the fee and its amount, the burden shifts to the fee opponent to contest the fee with its own evidentiary submissions. n6 On the request of a party or class member, the court must permit adversary submissions of evidence. When a party opposing fees has pertinent evidence, that party should always request the opportunity to respond. Even though the district court has discretion to sua sponte order a response to a motion for attorney's fees or to order an evidentiary hearing even if there is no request, Rule 54 does not require such an order. n7

Adverse evidentiary submissions may oppose the entitlement to a fee, the amount of the fee, or both. Thus, the fee opponent must offer specific factual allegations that either challenge the claimed hours n8 or establish that the prevailing rate is lower than that claimed by the fee movant. n9

[6] Court's Determination of Motion

[a] Matters Determined

After the fee motion has been made, the court should establish a procedure for its resolution, whether by local rule or specific order in the case. The issue of whether the movant is entitled to any fee is generally one of law. The court's determination of this threshold issue will be based primarily on counsel's legal argument and the record established in the case on the merits, rather than on factual proof. Further, the court may determine the issue of liability for fees before receiving evidence on the amount of the fee, n1 especially in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex. n2 The district judge's ultimate determination of the attorney's fees motion must contain findings of fact and conclusions of law as provided in Rule 52(a). n3

[b] Hearing Not Required

The parties may agree to submit a fee motion to the district judge for resolution on the basis of the motion, accompanying briefs, and the evidentiary submissions of the parties, because the general rule is that an evidentiary hearing is not required. n4 In the absence of such an agreement, however, one or both parties may specifically request an evidentiary hearing to resolve the factual issues presented. Although Rule 54(d)(2) expressly gives the fee opponent an opportunity to make adversary evidentiary submissions on the motion, this does not include the right to an evidentiary hearing in every case. n5 A hearing is required only when the court deems it is necessary, or when a

substantial factual dispute is presented on an issue that the court cannot resolve based on the evidentiary submissions or on its own knowledge of the case. n6

The district court also has the option to refer a motion for attorney's fees to a magistrate judge under Rule 72(b). n7 The magistrate judge may not affirmatively decide the fee motion but must make findings of fact and recommendations as to the propriety of a fee award and its amount. n8 Other alternatives are that the district court may adopt local rules that establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. n9 This may a include a rule requiring submissions by affidavit, or adopting schedules of customary fees or factors affecting fees within the community. n10

[7] Appeal of Award or Denial of Attorney's Fees

A judgment awarding or denying attorney's fees in conjunction with a judgment on the merits is a final, appealable judgment, and it may be appealed separately from the judgment on the merits. n1 If the judgment on the merits is a judgment properly entered under Rule 54(b), the corresponding award of attorney's fees is final and appealable when made, despite the existence of other unresolved claims in the action. n2 A judgment awarding costs and attorney's fees for improper removal is also an appealable judgment, despite the fact that the judgment on the merits remanding the action to state court is generally not reviewable. n3

However, a judgment awarding a fee is not appealable until the amount of the fee has been established. When the court chooses to bifurcate the issues of entitlement to fees and amount of fees, it may rule that the fee movant is entitled to fees and may actually enter a judgment to that effect. That judgment is not appealable until later proceedings have been held in which the exact amount of the fee is determined. n4 Once the amount of the fee is set, an appeal from the judgment sets for review both the amount and the earlier decision regarding entitlement to attorney's fees. n5

The court of appeals reviews a district court's award or denial of attorney's fees for an abuse of discretion. n6 However, a determination of the applicability of fees under state law is subject to de novo review. n7

[8] Execution on Award of Attorney's Fees

An award of attorney's fees constitutes a money judgment that may be collected or executed in the same manner as any other money judgment. n1 A writ of execution generally is issued to enforce a money judgment, and the procedure on execution is that established by the law of the state in which the district court sits. n2 Rule 70 provides for equitable remedies to enforce judgments that require specific acts to be performed. n3 A money judgment for attorney's fees may not appear to be the type of judgment that could be enforced through Rule 70. Nevertheless, in extraordinary circumstances, Rule 70 may be invoked. For example, if the fee judgment debtor is a state that refuses to pay the award, an equitable remedy may be available under Rule 70. n4 Because a judgment for attorney's fees is a money judgment, the judgment creditor is also generally entitled to interest on the fee judgment as required by a statute that provides that interest must be allowed on any money judgment in a civil case recovered in a district court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice, § 54.150* et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 54(d)(2)* (claims for attorney's fees and related nontaxable expenses must be made

by motion).

(n3)Footnote 2. *28 U.S.C. § 2072.*

(n4)Footnote 3. *Abrams v. Lightolier Inc., 50 F.3d 1204, 1223 (3d Cir. 1995)* .

(n5)Footnote 4. *Fed. R. Civ. P. 54(d)(2)(A)*; *see Riordan v. State Farm Mut. Auto. Ins. Co., 589 F.3d 999, 1005-1006 (9th Cir. 2009)* (when entitlement to fees is proved by evidence at trial, there is no need to request fees by noticed motion).

(n6)Footnote 5. *See 28 U.S.C. § 1927.*

(n7)Footnote 6. *See Fed. R. Civ. P. 54(d)(2)(E).*

(n8)Footnote 7. *Rosemary B. v. Board of Educ. of Community High School Dist. No. 155, 52 F.3d 156 (7th Cir. 1995)* (Individuals with Disabilities Education Act).

(n9)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(A), (B)(i)* (claims for attorney's fees must be made by motion filed and served no later than 14 days after entry of judgment).

(n10)Footnote 2. *Fed. R. Civ. P. 54(d)(2)(B)(ii)-(iii).*

(n11)Footnote 3. *Fed. R. Civ. P. 54(d)(2)(B)(iv)*, Advisory Committee Note to 1993 Amendments.

(n12)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(B)(i)*; *see Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1257 (9th Cir. 1997)* .

(n13)Footnote 1.1. *Fed. R. Civ. P. 54(d)(2)(B)*, Committee Notes to 2002 Amendments.

(n14)Footnote 2. *Romaguera v. Gegenheimer, 162 F.3d 893, 895-896 (5th Cir. 1998)* (district court's statement, in its findings and conclusions, that separate hearing would be held on party's request for attorney's fees eliminated need for formal motion for attorney's fees, because statement satisfied purpose of motion requirement to ensure that adverse parties receive notice of request for attorney's fees).

(n15)Footnote 3. *Shalala v. Schaefer, 509 U.S. 292, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993)* .

(n16)Footnote 4. *See* [a], *above.*

(n17)Footnote 5. *Fed. R. Civ. P. 54(d)(2)(B).*

(n18)Footnote 6. *See § 25.85.*

(n19)Footnote 7. *28 U.S.C. § 2412(d)(1)(B).*

(n20)Footnote 8. *28 U.S.C. § 2412(d)(2)(G)*; *see In re Production Steel, Inc., 55 F.3d 1232, 1234 (6th Cir. 1995)* (because running of the 30-day period is determined by entry of final judgment as defined by EAJA, 30-day period does not begin to run until after time to appeal has expired.).

(n21)Footnote 9. *Fed. R. Civ. P. 52(d)(2)(B)* (unless provided by statute or order of court, motion for attorney's fees must be filed and served no later than 14 days after entry of judgment); *see Members First Fed. Credit Union v. Members First Credit Union, 244 F.3d 806, 807 (11th Cir. 2001)* (local rule specified that motion for attorney's fees could be filed within time specified by court in scheduling order).

(n22)Footnote 10. *28 U.S.C. § 1927.*

(n23)Footnote 11. *Fed. R. Civ. P. 54(d)(2)(E).*

(n24)Footnote 12. *White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 452-454, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

(n25)Footnote 13. *Fed. R. Civ. P. 54(d)(2)(A), (B).*

(n26)Footnote 0.1. *Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 689-690 (6th Cir. 2005)* .

(n27)Footnote 1. *See Fed. R. Civ. P. 54(d)(2)(A).*

(n28)Footnote 2. *Fed. R. Civ. P. 5.*

(n29)Footnote 3. *Fed. R. Civ. P. 54(d)(2)(B)(i).*

(n30)Footnote 4. *Cf. Knight v. United States, 982 F.2d 1573, 1579 (Fed. Cir. 1993)* (common fund theory does not impose additional liability on losing defendant for attorney's fees).

(n31)Footnote 1. *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n32)Footnote 2. *New Windsor Volunteer Ambulance Corps., Inc v. Meyers, 442 F.3d 101, 116-117 (2d Cir. 2006)* .

(n33)Footnote 3. *Yohay v. City of Alexandria Employees Credit Union, 827 F.2d 967, 974 (4th Cir. 1987)* .

(n34)Footnote 4. *Islamic Center of Miss. v. City of Starkville, 876 F.2d 465, 469 (5th Cir. 1989)* .

(n35)Footnote 5. *Brewer v. Protexall, Inc., 50 F.3d 453, 459 (7th Cir. 1995)* .

(n36)Footnote 6. *Michael A. Cramer, MAI, SRPA, Inc., v. United States, 47 F.3d 379, 382-383 (10th Cir. 1995)* .

(n37)Footnote 7. *New Windsor Volunteer Ambulance Corps., Inc v. Meyers, 442 F.3d 101, 116 (2d Cir. 2006)* (citing **Moore's Federal Practice**).

(n38)Footnote 8. *Donnell v. United States, 682 F.2d 240, 249 (D.C. Cir. 1982)* , *cert. denied, 459 U.S. 1204 (1983)* .

(n39)Footnote 9. *Johnson v. University College, 706 F.2d 1205, 1210 (11th Cir. 1983)* , *cert. denied, 464 U.S. 994 (1983)* .

(n40)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(C).*

(n41)Footnote 2. *Fed. R. Civ. P. 54(d)(2)*, Advisory Committee Note to 1993 Amendments.

(n42)Footnote 3. *Fed. R. Civ. P. 54(d)(2)(C)*; *see United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 282-283 (1st Cir. 2000)* (if district court denies application for attorney's fees without explanation, and record is such that basis for district court's decision is unclear, circuit court must remand so that district court may clarify its reasoning).

(n43)Footnote 4. *Building Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1402 (6th Cir. 1995)* .

(n44)Footnote 5. *Fed. R. Civ. P. 54(d)(2)(D).*

(n45)Footnote 6. *Michael A. Cramer, MAI, SRPA, Inc., v. United States, 47 F.3d 379, 383 (10th Cir. 1995)* .

(n46)Footnote 7. *Fed. R. Civ. P. 54(d)(2)(D)*; *see Fed. R. Civ. P. 72(b)*.

(n47)Footnote 8. *Fed. R. Civ. P. 72(b)*; *Gottlieb v. Barry, 43 F.3d 474, 487 (10th Cir. 1994)* .

(n48)Footnote 9. *Fed. R. Civ. P. 54(d)(2)(D)*.

(n49)Footnote 10. *Fed. R. Civ. P. 54(d)(2)*, Advisory Committee Note to 1993 Amendments; *cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 733, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987)* .

(n50)Footnote 1. *Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* .

(n51)Footnote 2. *Johnson v. Orr, 897 F.2d 128, 130 (3d Cir. 1990)* .

(n52)Footnote 3. *Moore v. Permanente Medical Group, 981 F.2d 443, 445-446 (9th Cir. 1992)* .

(n53)Footnote 4. *Becton Dickinson & Co. v. District 65, UAW, 799 F.2d 57, 61 (3d Cir. 1986)* .

(n54)Footnote 5. *Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986)* .

(n55)Footnote 6. *Cohn v. National Board of Trial Advocacy, 2000 U.S. App. LEXIS 29902, --6 (6th Cir. 2000)* .

(n56)Footnote 7. *Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 873 (2d Cir. 1994)* (de novo review of interpretation of state law on attorney's fees).

(n57)Footnote 1. *See Spain v. Mountanos, 690 F.2d 742, 744-745 (9th Cir. 1982)* .

(n58)Footnote 2. *Fed. R. Civ. P. 69(a)*.

(n59)Footnote 3. *Fed. R. Civ. P. 70*.

(n60)Footnote 4. Cf. *Gary W. v. State of Louisiana, 622 F.2d 804, 805 (5th Cir. 1980)* , *cert. denied, 450 U.S. 994 (1981)* .

(n61)Footnote 5. *28 U.S.C. § 1961*; *see Carter v. Sedgwick County, 36 F.3d 952, 955 (10th Cir. 1994)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART I. REQUIREMENTS FOR JUDGMENT IN ALL CASES
F. ATTORNEY'S FEES RECOVERABLE WITH JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure §§ 25.88through 25.99

[Reserved]

§§ 25.88[Reserved]

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Moore's Manual--Federal Practice and Procedure

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART II. PARTICULAR REQUIREMENTS FOR DEFAULT JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.100

§ 25.100 Nature of Default Judgmentn*

[1] Two-Step Process

Default proceedings in federal court comprise a two-part process that can ultimately result in the entry of a final judgment against a person that fails to appear or defend against a claim for relief filed against that person. n1 Thus, if a defending party on any claim fails to plead or otherwise defend, the clerk must enter a default on the record as the first step. n2 Subsequent provisions of the rule provide for the entry of a default judgment, n3 which is effective as any other judgment, except for a special provision allowing for it to be set aside. n4

[2] When Default Judgment is Available; Defenses

[a] Default for Failure to Plead of Plead or Otherwise Defend

A party that is the object of a claim for relief may be held in default unless that party pleads, or otherwise defends, within the time period specified in the rules or by statute. n1 Responsive pleadings sufficient to avoid default include: an answer to a complaint, a reply to a counterclaim denominated as such, an answer to a cross claim, and an answer to an third party complaint. n2 In most cases, the responsive pleading must be served within 21 days after service of the pleading to which it responds. n3 The principal exceptions to the 21 day limit are when service of summons has been waived under Rule 4(d) n4 and when a United States officer or agency is a defending party. n5 If a party has received an extension of time to plead but fails to plead by the expiration of the extension, default may then be entered against that party. n6

When a party is responding to a claim for relief, the party need not necessarily "plead" in order to avoid a default, but may do so by "otherwise defending" against the claim. n7 Thus, a party may otherwise defend by filing a motion challenging such matters as service, venue, or sufficiency of pleading. n8 For example, the filing of a 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted has been held to be sufficient action to preclude entry of default. n9 Filing a motion for summary judgment has also been held to constitute action intended to otherwise defend a lawsuit within the meaning of Rule 55(a) so as to prevent entry of default. n10 A party in appropriate circumstances may also avoid a default by complying with a directive of the court or a statutory obligation, such as, an obligation to file an affidavit or a statement. n10.1

On the other hand, the mere filing of a notice of appearance in an action does not prevent entry of default; the filing party must also plead or otherwise defend against the claim. n11 However, a notice of appearance does entitle the appearing party to at least 7 days' written notice of the application for the entry of a default judgment, and any judgment of default must be entered by the court, rather than the clerk. n12

[b] Default as Sanction for Wrongful Conduct

In some circumstances, a default may be entered against a party as a sanction, provided that the court and not the clerk enters the default n13 and that default is the least restrictive sanction available. n14 For example, the court may impose a default judgment as a sanction for a party's failure to comply with an order compelling discovery. n15 In addition to authorizing the entry of default judgment as a sanction, Rule 37 authorizes the district court to strike the defensive pleading of an offending party who fails to obey an order to provide or permit discovery. n16 If the court strikes a pleading and a party has not repleaded, the party may be held in default for failing to plead. In such cases, the opposing party may seek the entry of default by filing an affidavit or motion with the clerk. n17 In other examples of the imposition of default as a sanction, n17.1 the court may enter default against a party who fails to obey a scheduling or pretrial order, n18 or a party that is otherwise unprepared to participate in a pretrial conference. n19

Additionally, the court may enter default as a sanction for misconduct arising from failure to obey a court order or failure to appear at trial. n20 Thus, the court may order an entry of default or a default judgment for several types of wrongful conduct: dilatory actions demonstrated by a party's lengthy delays and their obstructive behavior as exemplified by their evasive and incomplete responses that constituted bad faith; failure to comply with the court's order to compel discovery; n21 failure to acquire counsel despite orders by the district court to do so; n22 and the failure to submit legal memoranda of law after several orders to do so. n23 Default may also be entered against a party as a sanction for prosecuting an action without a meritorious claim or conducting a frivolous defense. n24

[3] Applicability of Default Process

The provisions of the federal civil rules regarding default n1 apply to any party against whom a judgment for affirmative relief is requested. n2 In other words, the provisions apply whether the party requesting a default judgment is: a plaintiff, third-party plaintiff, n3 counterclaimant, n4 or cross-claimant. n5 Thus, the rule also applies to defaulting plaintiffs. n6 However, rather than rendering a default judgment against a plaintiff, a courts usually will dismiss the action for failure to prosecute. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 55.02, 55.10* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 55(a), (b)*; *see also New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005)* ; *Vongrabe v. Sprint PCS, 312 F. Supp. 2d 1313, 1318 (S.D. Cal. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 55(a)*; *see § 25.101.*

(n4)Footnote 3. *Fed. R. Civ. P. 55(b)*; *see United States v. $23,000 in United States Currency, 356 F.3d 157, 163-164 (1st Cir. 2004)* (Rule 55(b) judgment by default is final disposition of case and appealable order that has same

effect as judgment rendered after trial on merits); *see also § 25.102*.

(n5)Footnote 4. *Fed. R. Civ. P. 55(c)*.

(n6)Footnote 1. *Fed. R. Civ. P. 55(a)*; *see Finkel v. Romanowicz, 577 F.3d 79, 83 (2d Cir. 2009)* .

(n7)Footnote 2. *Fed. R. Civ. P. 7(a)*.

(n8)Footnote 3. *See Fed. R. Civ. P. 12(a)(1)(A),(B),(C)*.

(n9)Footnote 4. *Fed. R. Civ. P. 12(a)(1)(A)(ii)*; *see Fed. R. Civ. P. 4(d)(3)* (at least 60 days to respond).

(n10)Footnote 5. *Fed. R. Civ. P. 12(a)(2), (3)* (60 days to respond).

(n11)Footnote 6. *Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986)* .

(n12)Footnote 7. *Fed. R. Civ. P. 55(a)*.

(n13)Footnote 8. *See Harrison v. Bornn, Bornn & Handy, 200 F.R.D. 509, 513-514 (D.V.I. 2001)* .

(n14)Footnote 9. *Wickstrom v. Ebert, 101 F.R.D. 26, 33 (E.D. Wis. 1984)* (although defendants had not filed answers to complaint, they had clearly defended, as term is used in Rule 55, by filing their motions to dismiss pursuant to Rule 12(b)).

(n15)Footnote 10. *Rashidi v. Albright, 818 F. Supp. 1354, 1356 (D. Nev. 1993)* .

(n16)Footnote 10.1. *United States v. $23,000 in United States Currency, 356 F.3d 157, 163 (1st Cir. 2004)* .

(n17)Footnote 11. *Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989)* .

(n18)Footnote 12. *Fed. R. Civ. P. 55(b)(2)*; *see United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre, 983 F.2d 128, 130 (8th Cir. 1993)* ; *see also § 25.102[4][c]*.

(n19)Footnote 13. *Jones v. Winnepesaukee Realty, 990 F.2d 1, 6 (1st Cir. 1993)* .

(n20)Footnote 14. *See Silva v. City of Madison, 69 F.3d 1368, 1377 (7th Cir. 1995)* , *cert. denied, 134 L. Ed. 2d 522* (1996).

(n21)Footnote 15. *Fed. R. Civ. P. 37(b)(2)(A)(vi)*; *see SEC v. Homa, 514 F.3d 661, 678 (7th Cir. 2008)* .

(n22)Footnote 16. *Fed. R. Civ. P. 37(b)(2)(A)(iii)*.

(n23)Footnote 17. *See Fed. R. Civ. P. 55(a)*.

(n24)Footnote 17.1. *Rhino Assocs., L.P. v. Berg Mfg. & Sales Corp., 531 F. Supp. 2d 652, 656 (M.D. Pa. 2007)* (Rule 55(a) default may be imposed by party's failure to defending itself).

(n25)Footnote 18. *See Fed. R. Civ. P. 16(f)*.

(n26)Footnote 19. *Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989)* .

(n27)Footnote 20. *Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)* .

(n28)Footnote 21. *United States v. $49,000 Currency, 330 F.3d 371, 376-377 (5th Cir. 2003)* .

(n29)Footnote 22. *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 918-919 (3d Cir. 1992)* ; *Eagle Assoc. v. Bank of Montreal, 926 F.2d 1305, 1308 (2d Cir. 1991)* .

(n30)Footnote 23. *Alameda v. Secretary of HEW, 622 F.2d 1044, 1045 (1st Cir. 1980)* .

(n31)Footnote 24. *Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 244 (2d Cir. 1994)* .

(n32)Footnote 1. *See Fed. R. Civ. P. 55.*

(n33)Footnote 2. *Fed. R. Civ. P. 55*, Committee Notes to 2007 Amendments.

(n34)Footnote 3. *General Contracting & Trading Co. v. Interpole, Inc., 899 F.2d 109, 112 (1st Cir. 1990)* .

(n35)Footnote 4. *Jones v. Winnepesaukee Realty, 990 F.2d 1, 3 (1st Cir. 1993)* .

(n36)Footnote 5. *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408 (9th Cir. 1990)* .

(n37)Footnote 6. *Jones v. Winnepesaukee Realty, 990 F.2d 1, 3 (1st Cir. 1993)* (default granted on counterclaims upheld when plaintiff consistently failed to attend pre-trial hearings and demonstrated bad faith in conducting litigation).

(n38)Footnote 7. *Philips Med. Sys. Int'l v. Bruetman, 8 F.3d 600, 602 (7th Cir. 1993)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART II. PARTICULAR REQUIREMENTS FOR DEFAULT JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.101

§ 25.101 Entry of Defaultn*

[1] Initiation of Default

The clerk or court must enter default when a party's default is made to appear by affidavit or otherwise, n1 including when directed by the court. n2 Thus, the rule requires the clerk to "enter" the default when the fact of default is made known. n3 The clerk will not necessarily be able to tell from the docket that a party is in default, because the time limits refer to when a responsive pleading is served, while the docket does not indicate whether service was made until a certificate of service is filed. Because the court clerk may not independently know when the entry of default is appropriate, the party applying for entry of default must participate by filing an application and supporting affidavit n3.1 or some other document that shows the timing of service of the summons and complaint and avers that an answer or motion was not served within the allotted time. n4

[2] Default May be Entered by Either Court Clerk or by Court

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk must enter the party's default. n1 Therefore, when a default results from nonappearance or failure to plead or otherwise defend, the default may be entered by the clerk of the court on application of a party who seeks to enforce the default provisions. n2 However, courts have also noted their own power to enter default as a sanction or otherwise. n3

Rule 55 does not direct the manner in which default is to be entered in the court records. It appears that the fact of the default must be noted by the clerk on the court docket for use when the moving party subsequently seeks a default judgment. n4

[3] Notice Requirements

Rule 55 does not require that a defending party be notified of the opposition party's application for entry of default. n1 On the other hand, it must be noted that before the court can ultimately enter a default *judgment*, the party against whom the claim has been made must be notified. n2

[4] Effect of Entry of Default

[a] Effects of Entry of Default on Rights of Defaulting Party

Once a default is entered, the defaulting party suffers numerous negative effects, including the following:

1. Loss of the right to present evidence on issues other than unliquidated damages. n1

2. Loss of standing to contest factual allegations in the complaint. n2

3. Loss of the right to receive notice of future proceedings, except when the party had made an appearance in the action. n3

4. If the defaulting party has not appeared, the party is subject to the entry of default judgment, without notice, on motion of the opposition party. n4

[b] Effects on Issues

At the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed admitted. However, plaintiff's conclusions of law are not considered established. n5 This means that the court may grant only the relief for which a sufficient basis is asserted in the opposition's claim for relief. n6 Thus, while a defaulting party loses standing to contest the truth of the facts alleged in support of the plaintiff's claim, the defaulting party may still contest the sufficiency of those facts to state a claim for relief. n7

Following entry of a default, a defaulting party may also contest the measure of unliquidated damages awarded to the plaintiff or other prevailing party. Once the entry of default establishes the fact of damage, the district court has considerable discretion to determine the amount of damages. n8 The court may conduct an evidentiary hearing and consider evidence provided by any party to the action. n9 However, the court's failure to hold a hearing on unliquidated damages does not automatically warrant relief from default. n10

[c] Procedural Effects

In essence, entry of default is primarily a procedural formality in that it is a mandatory prerequisite to the issuance of a default judgment. It merely permits the plaintiff to move for such a judgment under Rule 55(b)(2), assuming that the entry of default is not set aside under Rule 55(c). n11 Entry of default is not a final judgment which is subject to appeal. n12 However, interlocutory appeals of the entry of default are available, if permitted under the partial judgment rule n13 or the interlocutory judgment rule. n14 There is no res judicata effect of an entry of default. Rather, the matter becomes res judicata only on entry of a default judgment. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the Cause

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 55.02*, *55.10* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 55(a).*

(n3)Footnote 2. *See* [2], *below*.

(n4)Footnote 3. *See Fed. R. Civ. P. 55(a)*.

(n5)Footnote 3.1. *Fairman v. Hurley, 373 F. Supp. 2d 227, 231 (W.D.N.Y. 2005)* (citing **Moore's Federal Practice**); *see Mohammed v. Davis County, 2008 U.S. Dist. LEXIS 19178, at *3 (D. Utah Mar. 11, 2008)* .

(n6)Footnote 4. *Fairman v. Hurley, 373 F. Supp. 2d 227, 231 (W.D.N.Y. 2005)* (citing **Moore's Federal Practice** for proposition that party seeking entry of default must show fact of default by evidence establishing circumstances of failure to defend within allotted time).

(n7)Footnote 1. *Fed. R. Civ. P. 55(a)*.

(n8)Footnote 2. *See Fed. R. Civ. P. 55(a)*; *see also Sealift Bulkers, Inc. v. Republic of Arm., 965 F. Supp. 81, 83 (D.D.C. 1997)* (filing of application for entry of default).

(n9)Footnote 3. *Jones v. Winnepesaukee Realty, 990 F.2d 1, 6 (1st Cir. 1993)* (district court properly entered default against plaintiffs for failure to appear at pretrial conference).

(n10)Footnote 4. *Cf. Fed. R. Civ. P. 77(d)*; *see also Connecticut Nat'l Mortg. Co. v. Brandstatter, 897 F.2d 883, 884-885 (7th Cir. 1990)* (although entry of default may properly be made on docket, party's default is not defeated merely because default is not recorded on docket).

(n11)Footnote 1. *Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 512 (9th Cir. 1986)* (rule contains no notice requirement); *see Fed. R. Civ. P. 55(a)*.

(n12)Footnote 2. *See Fed. R. Civ. P. 55(b)(2)*; *see also Jenkens & Gilchrist a Prof'l Corp. v. Groia & Co., 542 F.3d 114, 119 (5th Cir. 2008)* .

(n13)Footnote 1. *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 335-337 (2d Cir. 1986)* (citing **Moore's Federal Practice**).

(n14)Footnote 2. *Taylor v. City of Ballwin, 859 F.2d 1330, 1333, n.7 (8th Cir. 1988)* .

(n15)Footnote 3. *Fed. R. Civ. P. 55(b)(2)*.

(n16)Footnote 4. *FDIC v. Spartan Mining Co., 96 F.R.D. 677, 683 (S.D. W.Va. 1983)* .

(n17)Footnote 5. *Bonilla v. Trebol Motors Corp., 150 F.3d 77, 80 (1st Cir. 1998)* (default judgment bars defaulting party from disputing facts alleged in complaint but preserves for appeal arguments of law made in trial court as to whether facts as alleged state claim).

(n18)Footnote 6. *Cripps v. Life Ins. Co. of N. America, 980 F.2d 1261, 1267 (9th Cir. 1992)* (citing **Moore's Federal Practice**).

(n19)Footnote 7. *Wahl v. McIver, 773 F.2d 1169, 1174 (11th Cir. 1985)* .

(n20)Footnote 8. *Jones v. Winnepesaukee Realty, 990 F.2d 1, 4 (1st Cir. 1993)* .

(n21)Footnote 9. *Sony Corp. v. Elm State Elec., Inc., 800 F.2d 317, 321 (2d Cir. 1986)* .

(n22)Footnote 10. *Williams v. New Orleans Pub. Serv., Inc., 728 F.2d 730, 735 (5th Cir. 1984)* (court's failure to hold hearing on unliquidated damages issue might constitute reversible error but does not automatically warrant reversal of default judgment).

(n23)Footnote 11. *United States v. Di Mucci, 879 F.2d 1488, 1490 (7th Cir. 1989)* .

(n24)Footnote 12. *Enron Oil Corp. v. Masonori Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993)* .

(n25)Footnote 13. *See Fed. R. Civ. P. 54(b).*

(n26)Footnote 14. *See 28 U.S.C. § 1292*; *Shepard Claims Service, Inc., v. William Darrah & Assoc., 796 F.2d 190, 192 (6th Cir. 1986)* (entry of default appealed on certificate of district judge under Section 1292(b)).

(n27)Footnote 15. *Tomai-Minogue v. State Farm Mutual Auto Ins. Co., 770 F.2d 1228, 1232-1234 (4th Cir. 1985)* ; *Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART II. PARTICULAR REQUIREMENTS FOR DEFAULT JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.102

§ 25.102 Default Judgmentn*

[1] Determination of Entry of Default Judgment by Clerk or Court

In certain circumstances, a party is entitled to have a default judgment entered by the clerk of the court after the entry of default against an opposing party. n1 When a default judgment is proper, but does not qualify for entry by the clerk, the default judgment may be entered by the court. n2

[2] Entry of Default Judgment by Clerk

[a] Three-Part Test

For the clerk to enter default judgment all three of the following criteria must be satisfied: n1

1. The claim must be for a sum certain. n2

2. The default must have resulted from a party's failure to appear in the action. n3

3. The defaulting party must not be an infant or incompetent. n4

Where this three-part test is satisfied, the clerk must enter judgment against the defaulting party. The amount of judgment is based on the amount due as affirmed in an affidavit by the party seeking judgment. n5

[b] Claim Must Be for Sum Certain

The clerk may enter a default judgment only if the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain. n6 By contrast, judgment on any claim that consists of a disputed amount must be entered by the court. n7 Certain types of claims have been held to constitute sums certain, such as actions for recovery of a deposit, n8 and actions on mortgages, when the amount of the claim is capable of calculation from the loan documents. n9 On the other hand, examples of claims that have been considered unliquidated damages and, therefore, not sums certain include claims for personal injury n10 and claims based on good will. n11

[c] Default Must Have Been Due to Failure to Appear

The clerk may enter a default judgment without the necessity of judicial supervision only if the default is a result of the party's failure to appear. n12 By contrast, if the default was based on any other grounds, such as the imposition of a sanction, only the court may enter the default judgment. n13

[d] Defaulting Party May Be Neither Infant Nor Incompetent Person

The clerk may enter a default judgment without the necessity of judicial supervision only if the defaulting party is neither an infant nor an incompetent person. n14 In other words, only the court may enter a default judgment against a defaulting infant or an incompetent person. Even then, the court may enter a default judgment only when the infant or incompetent person is represented by a general guardian, committee, conservator, or other representative who has appeared in the action. n15 Rule 55 clearly prohibits the entry of a default judgment against a minor until a guardian has been appointed for him or her and the minor has received notice of the application for judgment by default. n16 For example, the United States Supreme Court has held that a state tax lien default foreclosure procedure violated due process when the municipal official knew that the taxpayer was incompetent at the time the statutory notice was served. n17

[3] Entry of Default Judgment by Court

[a] Court's Discretion to Enter Default Judgment

When a party is entitled to a default judgment but the claim for relief does not qualify for entry of default judgment by the clerk, n1 the party seeking entry of default judgment should apply to the court for the determination and entry of default judgment. n2 However, even if the party fails to file an application for default judgment under the rule, the court may enter the default judgment on its own initiative. n3 Default judgments are generally not favored by the courts, because there is a strong policy that promotes decisions on the merits and discourages resolution of cases through technicalities. n4

The decision whether to enter a default judgment is within the court's sound discretion. n5 Even where a defendant is technically in default, a plaintiff is not entitled to default judgment as a matter of right. n6 The court may consider a variety of factors such as whether the defaulting party's failure to plead or otherwise defend was merely inadvertent or de minimis, n7 whether the default resulted from dilatory tactics or bad faith, n8 the possibility of prejudice to the plaintiff, n9 the merits of the plaintiff's substantive claim, n10 the sufficiency of the complaint, n11 the amount of the claim, n12 and whether the default was due to excusable neglect. n13 In one case, for example, the court held that a party's failure to file a responsive pleading constituted excusable neglect, where the party was unfamiliar with legal matters, was disturbed because of the recent death of her spouse, was in a psychiatrist's care for severe depression, was taking strong psychoactive medications, and was attempting to sell her residence and move herself and her children to another state. n13.1

The court has discretion to hold a hearing to determine the facts regarding the considerations listed above or to establish the truth of any averment in the complaint. n13.2

[b] Only Court May Enter Default Judgment in Certain Types of Cases

Due to the restrictions on entry of a default judgment by the clerk, n14 only the court may enter a default judgment in certain types of cases:

1. Against an incompetent or minor. n15 Even then, the court may enter such a default judgment only when the infant or incompetent person is represented by a general guardian, committee, conservator, or other representative who has appeared in the action. n16

2. When the defaulting party is the United States or an officer or agency of the United States. The court may not enter a default judgment against the United States or an officer or agency unless the claimant establishes a claim or right to relief by evidence that satisfies the court. n17 Therefore, under Rule 55(d), even if the United States government fails to plead or otherwise defend within the time periods permitted, the entry of a default judgment is not authorized, except on a hearing establishing the plaintiff's claim. n18 When the government fails to file a timely answer, the court should enter an order directing an answer to be filed within a specified period, rather than enter a default judgment. With this procedure, the court protects the claiming party's interests without violating Rule 55(d). n18.1

3. When the defaulting party is a natural person, unless an affidavit has been filed indicating that the defaulting party is not currently serving in the military. n19 If the affidavit is not filed, the court may not enter a judgment if the defendant is in military service until after the court has appointed an attorney to represent the defendant and protect his or her interest, and the court on application must make an appointment of an attorney. n20

[c] Restrictions on Entry of Default Judgment By court

Due to the nature of the default procedure, the following restrictions have been placed on the authority of the district court to enter a default judgment:

1. Courts have consistently held that the rules governing default set forth in Rule 55 are inapplicable to habeas corpus proceedings, n20.1 because the rules governing habeas corpus proceedings are not compatible with the default judgment provisions of Rule 55. n21

2. In an action instituted against multiple defendants, if one of the defendants fails to plead or otherwise defend, the court may not enter a default judgment against that defendant if the theory of recovery is one of true joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable. n22

3. In certain admiralty cases initiated by attachment or garnishment, a default judgment may not be entered absent proof by affidavit or otherwise that certain notice provisions have been satisfied and that rules regarding service of process have been strictly followed. If such service requirements are satisfied, the court may enter a default judgment against the defaulting party. n23

[4] Notice Requirements

[a] Notice Requirements Based On Whether Party Has Appeared

The purpose of notice is to provide the defaulting party with an opportunity to avoid a default judgment. Consequently, a defaulting party that has not appeared in the action is not entitled to notice of the entry of a judgment by default, n1 whether entered by the clerk or by the court. n2 Additionally, notice is not required in the following circumstances:

1. If the court bases its entry of a default judgment on its own motion, and not on the application of a party not in default, there is no notice requirement. n3

2. When a default is entered as a sanction against a defending party, the notice requirement does not apply. n4

3. The notice provisions are not required when a statute or rule dispenses with the requirement. n5

[b] Nature of Appearance by Party That Triggers Notice Requirement

Generally, the type of conduct that constitutes an "appearance" for the purposes of triggering the notice requirements of Rule 55(b)(2) n6 is broadly defined n7 and may include a variety of informal acts by a defendant. For example, a simple request for an extension of time to plead may be considered an appearance for the purposes of Rule 55(b)(2). n8 In this regard, an appearance for purposes of Rule 55(b)(2) is much more liberal than an appearance for other purposes, such as, for the purposes of establishing personal jurisdiction. n9 Even under the liberal standard, to constitute an appearance for default notice requirements, the defendant's actions must give the plaintiff a clear indication that the defendant intends to pursue a defense and be responsive to the plaintiff's action. n10

Some courts apply a stricter standard in determining whether an appearance was made by a defaulting corporation or partnership. Because a corporation may appear in an action only through its attorney, n11 the acts or statements of corporate officers that evince an intention to contest a claim will not usually be treated as appearances for purposes of Rule 55(b)(2). n12

[c] Notice Requirements When Party Has Appeared in the Action

A defaulting party who has appeared in an action must be served with written notice of the application for judgment by default at least 7 days prior to the hearing on the application. n13 A court's failure to provide such notice is a procedural error but does not necessarily provide grounds for vacating the default judgment. Rather, courts examine the circumstances on a case by case basis to determine whether the failure to give notice will require that the default judgment be set aside. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 55.02, 55.10* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 55(b)(1)*; *see* [2], *below*.

(n3)Footnote 2. *Fed. R. Civ. P. 55(b)(2)*; *see CFTC v. Vartuli, 228 F.3d 94 (2d Cir. 2000)* ; *see also* [3], *below*.

(n4)Footnote 1. *Fed. R. Civ. P. 55(b)(1)*.

(n5)Footnote 2. *See* [b], *below*.

(n6)Footnote 3. *See* [d], *below*.

(n7)Footnote 4. *See* [b], *below*.

(n8)Footnote 5. *Fed. R. Civ. P. 55(b)(1)*.

(n9)Footnote 6. *Fed. R. Civ. P. 55(b)(1)*.

(n10)Footnote 7. *Fed. R. Civ. P. 55(b)(1)*.

(n11)Footnote 8. *Draisner v. Liss Realty Co., Inc., 211 F.2d 808, 809 (D.C. Cir. 1954)* , *cert. denied, 348 U.S.*

877 (1954) .

(n12)Footnote 9. *HMG Property Investors, Inc. v. Parque Ind. Rio Canas, Inc., 847 F.2d 908, 919 (1st Cir. 1988)* .

(n13)Footnote 10. *Hutton v. Fisher, 359 F.2d 913, 916 (3d Cir. 1966)* .

(n14)Footnote 11. *Davis v. Nat'l Mortg. Corp., 320 F.2d 90, 91-92 (2d Cir. 1963)* .

(n15)Footnote 12. *Fed. R. Civ. P. 55(b)(1).*

(n16)Footnote 13. *Arango v. Guzman, 761 F.2d 1527, 1531 (11th Cir. 1985)* .

(n17)Footnote 14. *Fed. R. Civ. P. 55(b)(1).*

(n18)Footnote 15. *Fed. R. Civ. P. 55(b)(2).*

(n19)Footnote 16. *Hutton v. Fisher, 359 F.2d 913, 915 (3d Cir. 1966)* .

(n20)Footnote 17. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

(n21)Footnote 1. *See* [2], *above*.

(n22)Footnote 2. *Fed. R. Civ. P. 55(b)(2).*

(n23)Footnote 3. *Anilina Fabrique de Colorants v. Aakash Chems. 856 F.2d 873, 877 (7th Cir. 1988)* .

(n24)Footnote 4. *Berthelsen v. Kane, 907 F.2d 617, 620 (6th Cir. 1990)* .

(n25)Footnote 5. *Enron Oil Corp. v. Masonori Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993)* .

(n26)Footnote 6. *Ganther v. Ingle, 75 F.3d 207, 209 (5th Cir. 1996)* .

(n27)Footnote 7. *Murray v. Ford Motor Co., 770 F.2d 461, 463-464 (5th Cir. 1985)* (citing **Moore's Federal Practice**).

(n28)Footnote 8. *Bambu Sales v. Ozak Trading, 58 F.3d 849, 852-854 (2d Cir. 1995)* .

(n29)Footnote 9. *Grandbouche v. Clancy, 825 F.2d 1463, 1468 (10th Cir. 1987)* .

(n30)Footnote 10. *Aldabe v. Aldabe, 616 F.2d 1089, 1092-1093 (9th Cir. 1980)* .

(n31)Footnote 11. *Wahl v. McIver, 773 F.2d 1169, 1174 (11th Cir. 1985)* .

(n32)Footnote 12. *Hutton v. Fisher, 359 F.2d 913, 916 (3d Cir. 1966)* .

(n33)Footnote 13. *Anilina Fabrique de Colorants v. Aakash Chems., 856 F.2d 873, 879 (7th Cir. 1988)* .

(n34)Footnote 13.1. *TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695-699 (9th Cir. 2001)* (district court abused discretion in entering default and denying motion to vacate default when party's default was not culpable and there was no evidence of devious, deliberate, willful, or bad faith failure to respond).

(n35)Footnote 13.2. *Banco Bilbao Vizcaya Argentaria v. Family Rests., Inc. (In re Home Restaurants, Inc.), 285 F.3d 111, 114 (1st Cir. 2002)* .

(n36)Footnote 14. *See* [2], *above*; *see also Fed. R. Civ. P. 55(b)(1).*

(n37)Footnote 15. *Fed. R. Civ. P. 55(b)(2).*

(n38)Footnote 16. *Fed. R. Civ. P. 55(b)(2)*; *see* [2][d], *above*.

(n39)Footnote 17. *Fed. R. Civ. P. 55(d).*

(n40)Footnote 18. *Butts v. Barnhart, 416 F.3d 101, 104-105 (2d Cir. 2005)* ; *see George v. United States, 2008 U.S. Dist. LEXIS 21728, at *1-*2 (N.D. Cal. Mar. 18, 2008)* (rule is designed to protect federal taxpayers).

(n41)Footnote 18.1. *Giampaoli v. Califano, 628 F.2d 1190, 1193-1194 (9th Cir. 1980)* .

(n42)Footnote 19. *50 U.S.C. App. § 520.*

(n43)Footnote 20. *50 U.S.C. App. § 520 (1).*

(n44)Footnote 20.1. *Alder v. Burt, 240 F. Supp. 2d 651, 677 (E.D. Mich. 2003)* .

(n45)Footnote 21. *Bermudez v. Reid, 733 F.2d 18, 22 (2d Cir. 1984)* (citing **Moore's Federal Practice**).

(n46)Footnote 22. *See Gulf Coast Fans, Inc. v. Midwest Elec. Importers, Inc., 740 F.2d 1499, 1512 (11th Cir. 1984)* .

(n47)Footnote 23. *Wong Shing v. M/V Mardina Trader, 564 F.2d 1183, 1187 (5th Cir. 1977)* .

(n48)Footnote 1. *Fed. R. Civ. P. 55(b)(2).*

(n49)Footnote 2. *Walker & Zanger (West Coast) Ltd. v. Stone Design, S.A., 4 F. Supp. 2d 931, 935 (C.D. Cal. 1997)* .

(n50)Footnote 3. *Anilina Fabrique de Colorants v. Aakash Chems., 856 F.2d 873, 877 (7th Cir. 1988)* .

(n51)Footnote 4. *Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141-1142 (9th Cir. 1989)* .

(n52)Footnote 5. *United States v. McCoy, 954 F.2d 1000, 1003 (5th Cir.1992)* .

(n53)Footnote 6. *Fed. R. Civ. P. 55(b)(2).*

(n54)Footnote 7. *See Lutomski v. Panther Valley Coin Exch., 653 F.2d 270, 271 (6th Cir. 1981)* .

(n55)Footnote 8. *Federal Sav. & Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1068 (5th Cir. 1988)* .

(n56)Footnote 9. *Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1546 (D.C. Cir. 1987)* .

(n57)Footnote 10. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc. 840 F.2d 685, 689-690 (9th Cir. 1988)* ; *see SEC v. GetAnswers, Inc., 219 F.R.D. 698, 700 (S.D. Fla. 2004)* (appearance requires more than mere participation in settlement negotiations).

(n58)Footnote 11. *Church of the New Testament v. United States, 783 F.2d 771, 773-774 (9th Cir. 1986)* .

(n59)Footnote 12. *National Ind. Theatre v. Buena Vista Distribution, 748 F.2d 602, 609 (11th Cir. 1984)* , *cert. denied, 471 U.S. 1056 (1985)* .

(n60)Footnote 13. *Fed. R. Civ. P. 55(b)(2).*

(n61)Footnote 14. *Winfield Assoc., Inc. v. Stonecipher, 429 F.2d 1087, 1091 (10th Cir. 1970)* (procedural defect of failure to give notice as required may be sufficient to afford relief from a default judgment on appeal, for relief under Rule 60(b), or, in combination with other irregularities of particular case, may render judgment void; however, failure of notice by itself should not ordinarily be treated as so serious as to render judgment void).

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART II. PARTICULAR REQUIREMENTS FOR DEFAULT JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.103

§ 25.103 Award of Damages in Default Judgmentn*

[1] Damage Award Limited to Amount and Kind Demanded

A judgment by default may not be different in kind from or exceed in amount that prayed for in the demand for judgment. n1 Therefore, a court may not grant equitable relief if none was requested, nor may it assess punitive damages against a defaulting party, if the party not in default did not make that demand. n2 However, when a hearing is held to determine the amount of unliquidated damages and the defaulting party participates in the hearing, the court in the exercise of its discretion may allow the party not in default to amend the pleadings to allow for a larger prayer for relief. n3 However, before permitting amendment of the pleadings, the court must determine the extent of the prejudice to the opposing party, and should grant whatever continuance or adjournment is reasonably necessary to permit the opposing party to prepare to oppose the increased claim. n4

[2] Determination of Damages

[a] No General Requirement of Hearing

After entering a default judgment on a claim for a sum certain, the court may enter the default judgment for the amount stated in the complaint. n1 In addition, if the defaulting party did not appear in the action, and was not an infant, incompetent, or the United States, the clerk of the court may enter the default judgment for the amount stated in the complaint. n2

When the amount of damages is not readily ascertainable, the court must make a determination as to the amount of the judgment. n3 Furthermore, if the court does not already have knowledge of facts sufficient to establish damages, the court must hold a hearing to determine the amount of damages. n4 In other words, the court must hold a hearing only when one is necessary to determine the amount of damages or to establish the truth of any allegations in the pleadings. n5

[b] Requirement of Jury When Required by Statute

When holding a hearing to determine damages, n6 the court must accord a right to trial by jury only when and if

required by any statute of the United States. n7 Thus, a party is not entitled to a jury trial unless there exists a statutory right to a jury on the underlying claim. n8 Furthermore, a party may not preserve a right to a jury trial on the issue of damages in the event of a default by filing a jury demand in the complaint. n9 Rather, the statutory right to a jury trial on the underlying claim must be clear. n10 However, even in cases when a court is not required to grant a jury trial in such cases, the court has the discretion to have a jury assess damages following a default. n11

[c] Presentation of Evidence

A defaulting party is entitled to submit evidence and be heard in opposition at the hearing on the amount of damages. n12 However, the defaulting party must request such right, and a default judgment will not be vacated when a defendant makes no attempt to participate in the assessment of damages. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 55.02, 55.10* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 55(d)(2)(B).*

(n3)Footnote 2. *Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 683 (2d Cir. 1993)* .

(n4)Footnote 3. *O'Brien v. R.J. O'Brien & Assoc., Inc. 998 F.2d 1394, 1404 (7th Cir. 1993)* .

(n5)Footnote 4. *Peitzman v. City of Illmo, 141 F.2d 956, 962 (8th Cir. 1944)* , *cert. denied, 323 U.S. 718 (1944)* .

(n6)Footnote 1. *Fed. R. Civ. P. 55(b)(2).*

(n7)Footnote 2. *Fed. R. Civ. P. 55(b)(1)*; *Taylor v. City of Ballwin, 859 F.2d 1330, 1333 (8th Cir. 1988)* .

(n8)Footnote 3. *Sony Corp. v. Elm State Elec., Inc., 800 F.2d 317, 321 (2d Cir. 1986)* ; *Hunt v. Inter-Globe Energy, Inc., 770 F.2d 145, 148 (10th Cir. 1985)* .

(n9)Footnote 4. *Marc Rich & Co., Inc. v. Action S.A., 951 F.2d 504, 508 (2d Cir. 1991)* (hearing required only when judge does not already have sufficient facts to establish damages; hearing not required when long history of proceedings between parties gave district court basis from which to determine award).

(n10)Footnote 5. *Fed. R. Civ. P. 55(b)(2)(A)-(D).*

(n11)Footnote 6. *See* [a], *above.*

(n12)Footnote 7. *Fed. R. Civ. P. 55(b)(2).*

(n13)Footnote 8. *See, e.g., 28 U.S.C. § 1874* (right to jury trial would exist in actions on bonds when sum is not certain).

(n14)Footnote 9. *Frankart Distributors, Inc. v. Levitz, 796 F. Supp. 75, 76 (E.D.N.Y. 1992)* .

(n15)Footnote 10. *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990)* , *cert. denied, 498 U.S.*

1109 (1991) (corporation against whom default judgment was entered as discovery sanction did not have right to jury trial on damages).

(n16)Footnote 11. *Coleman v. Smith, 814 F.2d 1142, 1145 (7th Cir. 1987)* .

(n17)Footnote 12. *Byrd v. Keene Corp., 104 F.R.D. 10, 12 (E.D. Pa. 1984)* .

(n18)Footnote 13. *Fustok v. Conticommodity Services, 873 F.2d 38, 39 (2d Cir. 1989)* .

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PART VI Trial and Judgment
CHAPTER 25 JUDGMENT
PART II. PARTICULAR REQUIREMENTS FOR DEFAULT JUDGMENT

3-25 Moore's Manual--Federal Practice and Procedure § 25.104

§ 25.104 Setting Aside Default and Default Judgmentn*

[1] Setting Aside Entry of Default

[a] Standard to Set Aside Entry of Default

As noted above, n1 default is a two-step process: entry of default and entry of a default judgment. Each of these steps may be set aside, but each has its own standard and procedure. Because the court may set aside an entry of default before a default judgment ever occurs, the standard to set aside an entry of default is less stringent than setting aside a default judgment. n2 Relief from default is an interlocutory matter while relief from a default judgment involves setting aside a final judicial action, as provided by Rule 60(b). n3 As one court explained, the same considerations exist when deciding whether to set aside either an entry of default or a default judgment, but they are to be applied more liberally when reviewing an entry of default. n4 Under the liberal good cause standard, courts have set aside a default when the default resulted from technical flaws. n5

Under Rule 55(c), a court is authorized to set aside an entry of default merely for good cause shown. n6 To do so, the movant generally must establish a meritorious defense. n7 To show a meritorious defense, a defendant must go further than alleging that a defense exists. Rather, the defendant must allege specific facts that proved at trial would constitute a defense to the claim asserted. n8 One court has indicated that the defendant seeking to open a default should show a fair probability of success on the merits. n9 However, a defendant is not required to make a showing of a meritorious defense in cases in which the defendant was not served with process, because the due process requirement that a defendant receive adequate notice of a lawsuit gives the defendant a constitutional right to set a aside such a default judgment. This right may not be conditioned on a requirement that the defendant show a meritorious defense. n10

Other relevant factors to be considered by the court in deciding the good-cause standard include: (1) whether the default was willful; (2) whether setting aside the default would prejudice the plaintiff; (3) whether the alleged defense was meritorious; n11 (4) the nature of the defendant's explanation for the default; (5) the relative good faith of the parties; (6) the amount of money involved; and (7) the timing of the motion to set aside entry of default. n12 n13-16

[b] Motion to Set Aside Entry of Default

A party in default should make a formal motion under Rule 55(c) to set aside entry of default. However, a motion under another rule or statute is sufficient. In the absence of a formal motion, any document that seeks a resolution of the case on the merits may be construed as a motion to set aside the default. n17

The only time limitation for a motion to set aside the default is that it must be filed within a reasonable time. However, the court should consider the defendant's delay in applying the "good cause shown" standard of Rule 55(c) and may consider the length of time which has elapsed between the default and the defendant's motion to set aside the default. n18 A defendant may also be required to show due diligence in seeking to open a default. n19

[c] Requirement of Security

The court has discretion to require the party seeking to set aside the entry of default to post security for costs, or for the amount of the judgment in appropriate circumstances. n20 A court may also require the defaulting party to pay reasonable expenses incurred by the plaintiff in securing the default and in opposing the motion to set aside the default. n21

[d] Appellate Review of Denial of Motion to Set Aside Entry of Default

When the court of appeals reviews a district court's denial of a motion to set aside an entry of default, it must apply an abuse of discretion standard of review. n22 The more grounds that the district court has for entry of a default judgment, the less likely it will be reversed on appeal for denial of a motion to set aside the default. n23 However, in view of the liberal standard of good cause, and the preference to resolve matters on their merits, any doubts should be resolved in favor of the moving party. n24

[2] Setting Aside Entry of Default Judgment

[a] Standard to Set Aside Default Judgment

As noted above, n1 default is a two step process: entry of default and entry of a default judgment. Each of these steps may be set aside, but each has its own standard and procedure. Because the court may set aside an entry of default before a default judgment ever occurs, the standard to set aside an entry of default is less stringent than setting aside a default judgment. n2 Relief from default is an interlocutory matter while relief from a default judgment involves setting aside a final judicial action, as provided by Rule 60(b). n3 Rule 60(b) requires a showing of excusable neglect, a standard that allows the court to set aside a judgment only when caused by inadvertence, mistake, or intervening circumstances that are beyond the party's control. n4

A stricter standard applies to the default judgment because default judgments are final judgments for all purposes as between the parties and those in privity with them, n5 and therefore, the doctrine of res judicata applies to default judgments. n6

[b] Setting Aside Default Judgment Based on Jurisdictional Defect

A default judgment rendered by a court that had a jurisdictional deficiency it may be set aside in the same manner as other judgments, including on the following basis:

1. Lack of subject matter jurisdiction. If a court renders a judgment without subject matter jurisdiction, whether by default or on the merits, the judgment is void. n7 The issue of subject-matter jurisdiction is always open, and courts at every stage of a proceeding are required to consider the issue even though the parties have failed to raise it. n8

2. Lack of Personal Jurisdiction. A default judgment rendered by a court which lacked personal

jurisdiction over the defendant is void and may be attacked either directly in the rendering court or through collateral attack on enforcement of the judgment. n9 Thus, if there was no service of process on the defaulting party, the default judgment may be set aside. n10 The defendant is not required to show other prerequisites for setting aside a default, such as a meritorious defense, in order to have the default set aside. n11 However, if a defendant appears in an action and fails to challenge the court's personal jurisdiction, the objection is waived. n12

3. Improper venue is not grounds to set aside a default judgment. The issue of personal jurisdiction is different from that of venue. If a defendant has a proper challenge to venue, it must be raised in the court rendering the judgment, and the courts consider permitting an entry of default judgment to constitute a waiver of an objection to improper venue. n13

[c] Other Grounds for Setting Aside Default Judgment

A court may set aside a default judgment for any of the grounds specified in Rule 60(b). n14 Therefore, a court has discretion to relieve a party from a default judgment on such terms as are just for the following reasons: n15

1. Mistake, inadvertence, surprise or excusable neglect.

2. Newly discovered evidence which by due diligence would not have been discovered in time to move for a new trial under *Fed. R. Civ. P. 59(b)*. n16

3. Fraud, misrepresentation, or other misconduct of an adverse party.

4. The judgment is void.

5. The judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is not longer equitable that the judgment should have prospective application.

6. Any other reason justifying relief from the operation of the judgment.

[d] Motion to Set Aside Default Judgment

A party may generally make a motion for relief from a default judgment under Rule 60(b) within a reasonable time. n17 However, motions for relief based on one of the first three of the six grounds n18 must be made within one year after the default judgment, n19 and this deadline may not be extended. n19.1 Further, a party who moves under one of the first three grounds for setting aside default judgments, as provided in Rule 60(b), must do so both within a year and within a reasonable time. Thus, if it is not reasonable for the defendant to wait 11 months before moving, the motion will be denied. n20

Typically, a motion to set aside a default is made by the defaulting party. However, the party not in default may also make such a motion. Under Rule 55(c), a party who has obtained a judgment by default may have it set aside for one of the reasons set forth in Rule 60(b). n21

[e] Requirement of Security

Under Rule 60(b) a court may condition relief from default judgment on such terms as are just. n22 Thus, the court has discretion to require that the defending party comply with specified conditions to obtain relief from the judgment, such as posting a bond to secure its payment of any ultimate judgment. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From Default

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 10 *Moore's Federal Practice, §§ 55.02, 55.10* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 25.100.*

(n3)Footnote 2. *Meehan v. Snow, 652 F.2d 274, 276 (2d Cir. 1981)* .

(n4)Footnote 3. *Fed. R. Civ. P. 55(c)*; *see Fed. R. Civ. P. 60(b)*; *United States v. $23,000 in United States Currency, 356 F.3d 157, 163-164 (1st Cir. 2004)* ; *see also § 25.104[2][a].*

(n5)Footnote 4. *Berthelsen v. Kane, 907 F.2d 617, 620 (6th Cir. 1990)* (while default judgment may be vacated only by satisfying stricter standards applied to final, appealable orders under Rule 60(b), entry of default may be set aside for "good cause shown").

(n6)Footnote 5. *A. C. Samford, Inc. v. United States, 226 F. Supp. 72, 75 (M.D. Ga. 1963)* (summons stated wrong time period within which answer must be filed).

(n7)Footnote 6. *Fed. R. Civ. P. 55(c)*; *see United States v. Real Prop. and All Furnishings Known as Bridewell's Grocery & Video, 195 F.3d 819, 820-822 (6th Cir. 1999)* (court should consideration three factors in good cause determination, whether: (1) plaintiff would be prejudiced: (2) defendant has meritorious defense; and (3) culpable conduct of defendant led to default.).

(n8)Footnote 7. *United States v. $23,000 in United States Currency, 356 F.3d 157, 164 (1st Cir. 2004)* ; *Sony Corp. v. Elm State Elec., Inc., 800 F.2d 317, 320-321 (2d Cir. 1986)* .

(n9)Footnote 8. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp. 843 F.2d 808, 812 (4th Cir. 1988)* .

(n10)Footnote 9. FSLIC v. v. *Kroenke, 858 F.2d 1067, 1071 (5th Cir. 1988)* .

(n11)Footnote 10. *Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85-87, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)* .

(n12)Footnote 11. *United States v. $23,000 in United States Currency, 356 F.3d 157, 164 (1st Cir. 2004)* .

(n13)Footnote 12. *KPS & Assocs. v. Designs by FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2004)* .

(n14)Footnote 13-16. [Reserved]

(n15)Footnote 17. *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 109 F.R.D. 692, 694-695 (S.D.N.Y. 1986)* .

(n16)Footnote 18. *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 336 (2d Cir. 1986)* .

(n17)Footnote 19. *Zuelzke Tool & Engraving Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 230 (7th Cir. 1991)* .

(n18)Footnote 20. *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 109 F.R.D. 692, 698 (S.D.N.Y. 1986)* (as a condition for setting aside default, court ordered defendant to file $500,000 bond to secure any

judgment for plaintiff).

(n19)Footnote 21. *Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1174 (E.D. Mich. 1974)* .

(n20)Footnote 22. *CJC Holdings, Inc. v. Wright & Lato, Inc. 979 F.2d 60, 64 (5th Cir. 1992)* .

(n21)Footnote 23. *See United States v. $23,000 in United States Currency, 356 F.3d 157, 167 (1st Cir. 2004)* .

(n22)Footnote 24. *Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 419-420 (3d Cir. 1987)* .

(n23)Footnote 1. *See § 25.100.*

(n24)Footnote 2. *Meehan v. Snow, 652 F.2d 274, 276 (2d Cir. 1981)* .

(n25)Footnote 3. *Fed. R. Civ. P. 55(c)*; *see Fed. R. Civ. P. 60(b).*

(n26)Footnote 4. *United States v. $23,000 in United States Currency, 356 F.3d 157, 164 (1st Cir. 2004)* (ignorance of rules or mistakes construing rules do not usually constitute excusable neglect).

(n27)Footnote 5. *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 336 (2d Cir. 1986)* .

(n28)Footnote 6. *McDaniel v. Camp, 59 F.3d 548, 554 n.13 (5th Cir. 1995)* .

(n29)Footnote 7. *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda, 877 F.2d 189, 196 (2d Cir. 1989)* .

(n30)Footnote 8. *Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999)* .

(n31)Footnote 9. *General Contracting & Trading Co. v. Interpole, Inc., 899 F.2d 109, 112-113 (1st Cir. 1990)* (judgment entered by court that lacks personal jurisdiction over defendant is nullity that may be attacked at any time).

(n32)Footnote 10. *See Sandoval v. Bluegrass Regional Mental Health-Mental Retardation Board, 2000 U.S. App. LEXIS 17949, *13-*14 (6th Cir. 2000)* .

(n33)Footnote 11. *Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85-87, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)* .

(n34)Footnote 12. *In re State Exch. Fin. Co., 896 F.2d 1104, 1106 (7th Cir. 1990)* .

(n35)Footnote 13. *Orange Theatre Corp. v. Rayhertz Amusement Corp., 130 F.2d 185, 186-187 (3d Cir. 1942)* .

(n36)Footnote 14. *Fed. R. Civ. P. 55(c)*; *see Fed. R. Civ. P. 60(b)*; *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 385 (7th Cir. 2008)* .

(n37)Footnote 15. *Fed. R. Civ. P. 60(b)(1)-(6)*; *see Burda Media, Inc. v. Viertel, 417 F.3d 292, 298 (2d Cir. 2005)* (six independent grounds for setting aside default judgment).

(n38)Footnote 16. *See Fed. R. Civ. P. 59(b).*

(n39)Footnote 17. *Fed. R. Civ. P. 60(c)(1)*; *Days Inns Worldwide, Inc. v. Patel, 445 F.3d 899, 905-906 (6th Cir. 2006)* .

(n40)Footnote 18. *See* [c], *above.*

(n41)Footnote 19. *Fed. R. Civ. P. 60(c)(1).*

(n42)Footnote 19.1. *See Fed. R. Civ. P. 6(b)(2).*

(n43)Footnote 20. *Cf. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610-611 (7th Cir. 1986)* .

(n44)Footnote 21. *Ferraro v. Arthur M. Rosenberg, Co., 156 F.2d 212, 214 (2d Cir. 1946)* .

(n45)Footnote 22. *Fed. R. Civ. P. 60(b).*

(n46)Footnote 23. *See Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L., 115 F. Supp. 2d 367, 368 (S.D.N.Y. 2000)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT

3-25A Moore's Manual--Federal Practice and Procedure 25A.syn

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART I. FUNCTION OF ACTIONS FOR DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.01

§ 25A.01 Description of Declaratory Reliefn*

[1] Declaratory Relief Defined n*

"Declaratory relief" is is a binding adjudication of an actual controversy which specifies the rights and status of litigants even though no compensatory nor injunctive relief is awarded. n1 A "declaratory judgment" is conclusive in a subsequent action between the parties as to the matters declared and, in accordance with the usual rules of issue preclusion, as to any issues actually litigated and determined. n2 The purpose of declaratory relief is to avoid accrual of avoidable damages to a claimant not certain of his or her rights and to afford the claimant an early adjudication, without waiting until the claimant's adversary decides to file a legal action, after damage had accrued. n3

To obtain declaratory relief, a party need not show an accomplished injury. n4 However, even though a judgment is declaratory and not subject to execution because no completed injury has occurred, the Declaratory Judgment Act is applicable only to cases involving an actual controversy, n5 in that the Act falls within the restrictions of the jurisdictional specifications of Article III of the Constitution. n6 When a court does enter a declaratory judgment in an actual controversy, the judgment has the force and effect of a "final judgment" that is reviewable on appeal. n7

[2] Comparison With Injunctive Relief n*

Even though declaratory judgments and injunctions have some similar characteristics and are both considered equitable remedies, n1 declaratory relief differs considerably from injunctive relief. The primary distinction is that while declaratory relief is a statement by the court deciding the legal relationship of the parties, n2 injunctive relief is coercive in that the court orders a party to act or refrain from acting in a particular manner. n3 Because it is not prospective and coercive like an injunction, n4 declaratory relief does not require a showing of the elements necessary for the grant of an injunction, such as, irreparable harm to the applicant. n5

Another distinction is that while an injunction is a purely equitable action, a declaratory judgment is not strictly speaking an equitable remedy but is only equitable in nature. n6 Declaratory relief may be legal or equitable depending on the basic nature of the underlying issues and the remedy sought. n7 In deciding whether a claim for declaratory judgment involves a demand in law or equity, the court must determine how the claim would have arisen had it not been raised in a declaratory judgment action. n8 In view of this distinction, when a plaintiff requests both declaratory and

injunctive relief, the court may decide that the plaintiff is entitled to declaratory relief, while at the same time denying the issuance of injunctive relief on equitable grounds. n9

[3] Comparison With Interpleader n*

An interpleader action, which is basically an action in which an obligor asks the court to determine and declare the obligor's liability to multiple potential obligees, may achieve basically the same result as an action for a declaratory judgment. n1 In both types of actions, the district court has discretion to render interpleader relief or declaratory relief. n2 Thus, if a party includes declaratory relief claims in an interpleader action, the district court may decline to rule on the declaratory relief claim as a matter of discretion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.04 (Matthew Bender 3d ed.)

(n2)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.04[3] (Matthew Bender 3d ed.)

(n3)Footnote 1. *Credit-Based Asset Servicing & Securitization, LLC v. Lichtenfels, 658 F. Supp. 2d 355, 362 (D. Conn. 2009)* ; *see 28 U.S.C. § 2201(a).*

(n4)Footnote 2. *Heartland By-Products, Inc. v. United States, 223 F. Supp. 2d 1317, 1326 (Ct. Int'l Trade 2002)* .

(n5)Footnote 3. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 577 (7th Cir. 1994)* .

(n6)Footnote 4. *United States v Fisher-Otis Co., 496 F.2d 1146, 1149 (10th Cir. 1974)* (declaratory judgment settles actual controversy before controversy has necessarily become violation of law or breach of duty).

(n7)Footnote 5. *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 446, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993)* ; *see § 25A.22[2].*

(n8)Footnote 6. *Bell Atl. Corp. v. MFS Communications Co., 901 F. Supp. 835, 841-842 (D. Del. 1995)* (whether particular circumstances present Article III case or controversy is determined under general inquiry of justiciability, that is power of federal courts to entertain disputes); *see* U.S. Const., Art III, § 2.

(n9)Footnote 7. *28 U.S.C. § 2201(a)*; *see § 25A.49[1].*

(n10)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.07 (Matthew Bender 3d ed.)

(n11)Footnote 1. *Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* (declaratory relief); *Henderson v. Stalder, 112 F. Supp.2d 589, 592-593 (E.D. La. 2000)* (injunctive relief).

(n12)Footnote 2. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 577 (7th Cir. 1994)* .

(n13)Footnote 3. *Heartland By-Products, Inc. v. United States, 568 F.3d 1360, 1367-1368 (Fed. Cir. 2009)* ; *see* Ch. 10A, *Injunctions.*

(n14)Footnote 4. *See Morrow v. Harwell, 768 F.2d 619, 626-627 (5th Cir. 1985)* .

(n15)Footnote 5. *Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1125-1126 (1st Cir. 1981)* (declaratory relief does not require showing of elements necessary for grant of preliminary injunction, such as, irreparable harm, balance of injuries, and public interest).

(n16)Footnote 6. *Dworman v. Mayor & Board of Aldermen, etc., 370 F. Supp. 1056, 1065-1066 (D.N.J. 1974)* (because it is equitable in nature, decisions regarding use of equitable relief are committed to sound discretion of trial court).

(n17)Footnote 7. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* .

(n18)Footnote 8. *Wallace v. Norman Indus., Inc., 467 F.2d 824, 827 (5th Cir. 1972)* .

(n19)Footnote 9. *Historic Preservation Guild v. Burnley, 896 F.2d 985, 992-993 (6th Cir. 1989)* (plaintiff's failure to show substantial likelihood of success on merits does not preclude declaratory judgment).

(n20)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.07 (Matthew Bender 3d ed.)

(n21)Footnote 1. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* ; *see Travelers Indem. Co. v. Crown Cork & Seal Co., 865 F. Supp. 1083, 1087 (S.D.N.Y. 1994)* .

(n22)Footnote 2. *American Airlines, Inc. v. Block, 905 F.2d 12, 14 (2d Cir. 1990)* .

(n23)Footnote 3. *National Union Fire Ins. Co. v. Karp, 108 F.3d 17, 22-23 (2d Cir. 1997)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART I. FUNCTION OF ACTIONS FOR DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.02

§ 25A.02 Purpose of Declaratory Judgment Actionsn*

Actions for declaratory relief serve several purposes. Such an action essentially permits an early adjudication of the rights and legal remedies of the parties involved in an actual dispute regardless of whether claims for damages or injunctive relief have arisen or would otherwise need to be litigated in the future. n1 Thus, a declaratory judgment in federal court is designed to clarify and settle the legal relations in a controversy and to terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to a proceeding or action. n2

Other purposes of declaratory relief include the following benefits:

1. The minimization of the danger of accruing avoidable damages. n3 Thus, declaratory relief is designed to relieve parties of the threat of impending litigation by declaring the rights of the parties prior to any accrual of actual loss. n4

2. The education of both the parties and the public regarding the issues and policies involved in the dispute. Consequently, in addition to clarifying the parties' rights and resolves in the controversy, declaratory relief should always be made with reference to any public interest involved in the case. n5

3. The promotion of judicial efficiency when the grant of declaratory relief would avoid multiple proceedings. n6

4. The provision of a means for parties to avoid threats of litigation or harassment. n7

5. The provision of a potential alternative to injunctive relief. In this regard, it should be noted that there is a lesser showing to obtain declaratory relief than is required to obtain injunctive relief. n8 Therefore, a declaratory judgment may provide relief when legal or equitable remedies are too intrusive or otherwise inappropriate. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.04 (Matthew Bender 3d ed.)

(n2)Footnote 1. *United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986)* ; *Klefstad Cos. v. New Boston Allison Ltd. P'ship, 2000 U.S. Dist. LEXIS 14637, at *36 (S.D. Ind. Sept. 29, 2000)* .

(n3)Footnote 2. *Hartford Cas. Ins. Co. v. BB&T Fin. Corp., 131 F. Supp.2d 752, 754 (W.D.N.C. 2001)* ; *see Kunkel v. Continental Cas. Co., 866 F.2d 1269, 1273-1274 (10th Cir. 1989)* (declaratory judgment designed to enable parties uncertain of their legal rights to seek statement by court regarding such rights before injury or loss occurs).

(n4)Footnote 3. *Rhoades v. Avon Prods., 504 F.3d 1151, 1164 (9th Cir. 2007)* .

(n5)Footnote 4. *United States v. NHC Healthcare Corp., 115 F. Supp.2d 1149, 1156 (W.D. Mo. 2000)* .

(n6)Footnote 5. *Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1112 (9th Cir. 1987)* .

(n7)Footnote 6. *State Auto Ins. Cos. v. Summy, 234 F.3d 131, 134-135 (3d Cir. 2000)* (in deciding whether to hear declaratory judgment action involving insurance coverage issues, district court should consider avoidance of duplicative litigation).

(n8)Footnote 7. *United States v. NHC Healthcare Corp., 115 F. Supp.2d 1149, 1156 (W.D. Mo. 2000)* (declaratory relief designed to relieve parties of threat of impending litigation by declaring their rights prior to any accrual of actual loss or injury); Hal Roach Studios, inc. v. *Richard Feiner & Co., 896 F.2d 1542, 1555-1556 (9th Cir. 1989)* (action requesting court to declare that opposition lacked valid and subsisting copyright).

(n9)Footnote 8. *Steffel v Thompson, 415 U.S. 452, 466-467, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)* (declaratory judgment is less intrusive remedy than injunction and requires lesser showing); *Tierney v. Schweiker, 718 F.2d 449, 457 (D.C. Cir. 1983)* (declaratory relief plaintiffs need not demonstrate irreparable injury for issuance of declaratory judgment).

(n10)Footnote 9. *Dickinson v. Indiana State Election Bd., 933 F.2d 497, 503 (7th Cir. 1991)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART I. FUNCTION OF ACTIONS FOR DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.03

§ 25A.03 Federal Law Applicable to Declaratory Judgmentsn*

[1] Declaratory Judgment Act

The Declaratory Judgment Act n1 is a statute enacted by Congress that specifically established a new procedural remedy for federal courts in the form of an adjudicatory statement rather than an award of damages or the grant of a coercive injunction. n2 It authorizes federal courts to grant litigants declaratory relief similar to that administered in state courts, when the dispute is one that could be brought in federal court. n3 In general, a district court may declare the rights and other legal relations of any interested party seeking declaratory relief, whether further relief is or could be sought. n4 The purpose of the Declaratory Judgment Act is to enable parties to adjudicate their disputes before they suffer significant damage. Thus, the Act is designed to avoid accrual of avoidable damages to a person not certain of his or her rights under the law and to afford the person an early adjudication without waiting until his or her adversary should see fit to begin suit, after damage has accrued. n5 The Act also enables litigants to narrow the issues, speed the decision, and settle the controversy before an accumulation of differences and hostility precipitates a broad and general conflict involving numerous collateral issues. n6

The Act has been declared constitutional by the Supreme Court on the grounds that the Act itself states that it is restricted in application to "cases of actual controversy," which statement shows a manifest intention to restrict the Act to controversies that are such in the constitutional sense. n7 The Court noted that when a concrete case will allow an immediate and definitive determination of the legal rights of the parties in an adversary proceeding on the facts alleged, the judicial function may be appropriately exercised even though the adjudication of the rights of the litigants may not require the payment of damages or other coercive remedy. n8

[2] Federal Rules of Procedure

[a] Rules Govern Procedure for Declaratory Actions

While the authority for federal declaratory judgments is the Declaratory Judgment Act, n1 *Rule 57 of the Federal Rules of Civil Procedure* governs the procedures in such actions. Rule 57 provides generally that the procedure for obtaining a declaratory judgment pursuant to the Declaratory Judgment Act must be in accordance with all of the Federal Rules of Civil Procedure. n2 Therefore, a party must litigate a declaratory action in the same manner as in other civil actions. n3

The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases when such relief is otherwise appropriate. n4 This means that declaratory relief is an alternative or cumulative remedy and not exclusive of any available extraordinary remedy. n5 Section 2202 of the Act gives effect to the cumulative nature of the declaratory device by authorizing a district court to grant additional relief consistent with the underlying declaration even though the right to the relief may arise long after the court has entered its declaratory judgment. n6

[b] Particularly Pertinent Rules

Rule 57 provides that the procedure for declaratory actions is governed by the federal rules in the same manner as in other cases. n7 The following rules are particularly important regarding motions for declaratory relief:

1. A declaratory judgment lawsuit must be initiated in the same manner as every other civil action by the filing of a complaint in compliance with Rule 3. n8 However, when an action for damages or injunctive relief has already been initiated, any appropriate claim for declaratory relief may be made by a proper pleading, such as, a counterclaim or joinder of parties, as noted in items 3 and 4, below.

2. A summons in proper form must be served under the process requirements specified in Rule 4. n9

3. A request for declaratory relief need not always be made by complaint, and a declaratory judgment action may be raised for the first time in subsequent pleadings, such as counterclaims and cross-claims, or by amendment to an original pleading. n10 When raised by counterclaim or cross-claim, an action for declaratory relief must satisfy Rule 13, in addition to the jurisdictional requirements applicable to declaratory judgments. n11

4. As is the case with any other civil action in federal court, all individuals or entities needed for a just adjudication of a controversy must be joined under Rule 19 in an action for a declaratory judgment and other parties may permissively be joined under Rule 20. The issue of which parties are necessary or proper parties to a declaratory relief action is basically the same as with any other action. However, because of the discretionary nature of declaratory relief actions, the remedies available to the court may be limited by issues involving necessary or proper parties. n12

5. The right to a jury trial is expressly preserved for declaratory judgment actions when that right already exists and may be demanded under the circumstances and in the manner provided in Rules 38 and 39. n13 Consequently, Rule 57 must be read in conjunction with Rules 38 and 39, which explain when jury trials are available and the procedures for facilitating requests for jury trials. n14 However, the Declaratory Judgment Act does not provide an independent basis for a jury trial; n15 the Act merely does not take away the right to jury trial from parties who may already claim it. n16 Jury trials in declaratory relief actions are discussed in *§ 25A.46*.

[3] Declaratory Relief Is Procedural Device

The Declaratory Judgment Act is a "procedural device that was designed to provide a new remedy to the federal courts' arsenal" in a case of actual controversy, and it does not confer jurisdiction on the court to hear a particular case; rather, the facts and circumstances of the case must provide federal jurisdiction as in other cases. n1 In other words, the Declaratory Judgment Act does not in itself confer, expand, or limit federal subject matter jurisdiction; therefore a party requesting declaratory relief must establish an independent basis for federal court jurisdiction. n2 Another significant aspect of the characterization of declaratory relief as merely a procedural device is that federal law controls the question of whether the relief is available and the procedure for obtaining it. n3

[4] Federal Law Controls Availability of Declaratory Relief

Because declaratory relief is merely a procedural device, n1 and declaratory judgment actions are controlled by the

Federal Rules of Civil Procedure, n2 whether a federal court may hear a declaratory action in federal court constitutes a federal issue that must be resolved by federal law. n3 Therefore, even in a diversity action, the federal court must decide the standing of a party to demand declaratory relief, n4 and whether an actual controversy exists under federal law. n5 However, even though the applicability and procedure of declaratory relief is determined under federal law, the underlying substantive issues in declaratory relief cases based on diversity jurisdiction are governed by state law. n6

[5] Declaratory Relief Requirements Liberally Interpreted

Courts have consistently stated that the Declaratory Judgment Act should be liberally interpreted and that the interpreting court must bear in mind the remedial character and legislative purposes of the Act. n1 Thus, a federal court's jurisdiction over declaratory judgment actions is limited by only two primary considerations: the court must have subject matter jurisdiction and the action must present an actual case or controversy that is justiciable for disposition. n2 Furthermore, because Rule 57 specifically provides that the procedure for obtaining a declaratory judgment pursuant to the Declaratory Judgment Act must be in accordance with the federal rules of civil procedure, n3 Rule 57 and the Act must be read together and liberally construed to effectuate the objectives of declaratory relief, including the following: n4

1. To enable the courts to economically resolve matters at an earlier, less-complicated stage of the dispute.

2. To provide an expeditious and inexpensive way to adjudicate disputes.

3. When possible, to avoid the need to use coercive remedies.

4. To satisfy a legitimate and genuine need to provide a remedy when an otherwise effective means of redress does not exist.

5. To remove uncertainty from legal relationships before a violation or disruption of that relationship occurs.

In its interpretation of the Act or of Rule 57, a court may use the Uniform Declaratory Judgment Act as a guide to the scope and function of the federal law. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsAppellate ReviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsDiscretionCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsFactorsCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsScope

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.03 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See 28 U.S.C. § 2201 et seq.*

(n3)Footnote 2. *See Elecs. for Imaging, Inc. v. Coyle, 394 F.3d 1341, 1345-1346 (Fed. Cir. 2005) .*

(n4)Footnote 3. *Government Employees Ins. Co. v. Dizol, 108 F.3d 999, 1004 (9th Cir. 1997) .*

(n5)Footnote 4. *See 28 U.S.C. § 2201.*

(n6)Footnote 5. *MarineChance Shipping, Ltd. v. Sebastian, 143 F.3d 216, 219 (5th Cir. 1998) , cert. denied, 525*

U.S. 1055 (1998) ; *see § 25A.02*.

(n7)Footnote 6. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* .

(n8)Footnote 7. *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-240, 57 S. Ct. 461, 81 L. Ed. 617 (1937)* .

(n9)Footnote 8. *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S. Ct. 461, 81 L. Ed. 617 (1937)* .

(n10)Footnote 1. *See* [1], *above*.

(n11)Footnote 2. *Fed. R. Civ. P. 57*.

(n12)Footnote 3. *Kam-Ko Bio-Pharm Trading Co., Ltd. v. Mayne Pharma Inc., 560 F.3d 935, 943 (9th Cir. 2009)* .

(n13)Footnote 4. *Fed. R. Civ. P. 57*.

(n14)Footnote 5. *Fed. R. Civ. P. 57*, Advisory Committee Note.

(n15)Footnote 6. *See Gant v. Grand Lodge, 12 F.3d 998, 1002 (10th Cir. 1993)* , *cert. denied, 511 U.S. 1083 (1994)* .

(n16)Footnote 7. *See Fed. R. Civ. P. 57*; *see* [a], *above*.

(n17)Footnote 8. *Evanston Ins. Co. v. Merin, 598 F. Supp. 1290, 1300 (D.N.J. 1984)* (in declaratory judgment action, federal claim must appear on face of well-pleaded complaint); *Barmat, Inc. v. United States, 159 F.R.D. 578, 582 (N.D. Ga. 1994)* (party must request declaratory judgment by filing complaint or petition); *see 28 U.S.C. § 2201(a)*; *Fed. R. Civ. P. 3*.

(n18)Footnote 9. *See Open LCR.com, Inc. v. Rates Tech., Inc., 112 F. Supp.2d 1223, 1230 (D. Colo. 2000)* (service of process required in declaratory action; in this case, however, misnomer of corporation in summons was immaterial because corporation could not have been misled).

(n19)Footnote 10. *See Fed. R. Civ. P. 13*; *see also Fed. R. Civ. P. 15*.

(n20)Footnote 11. *Super Sack Mfg. Corp. v. Chase Packaging Corp., 57 F.3d 1054, 1058-1060 (Fed. Cir. 1995)* , *cert. denied, 516 U.S. 1093 (1996)* (declaratory judgment counterclaim may be brought to resolve actual controversy between interested parties; however, denial of motion to amend pleadings to include counterclaim for declaratory relief affirmed in this case because movant failed to demonstrate existence of actual controversy); *Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 417-418 (S.D. W. Va. 1994)* (successor employer properly requested declaratory relief by counterclaim against employee); *see also § 25A.44[2]*.

(n21)Footnote 12. *State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co., 518 F.2d 292, 294 (10th Cir. 1975)* ; *see Fed. R. Civ. P. 19*; *see also § 25A.44[1]*.

(n22)Footnote 13. *Fed. R. Civ. P. 57*.

(n23)Footnote 14. *Fed. R. Civ. P. 57*; *see Fed. R. Civ. P. 38*, *39*.

(n24)Footnote 15. *Robinson v. Brown, 320 F.2d 503, 505 (6th Cir. 1963)* , *cert. denied, 376 U.S. 908 (1964)* (Declaratory Judgment Act does not create right to jury trial when underlying action is equitable).

(n25)Footnote 16. *See Kam-Ko Bio-Pharm Trading Co., Ltd. v. Mayne Pharma Inc., 560 F.3d 935, 942-943 (9th Cir. Wash. 2009)* .

(n26)Footnote 1. *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1335 (Fed. Cir. 2008)* ; *see § 25A.21.*

(n27)Footnote 2. *NAP, Inc. v. Shuttletex, Inc., 112 F. Supp.2d 369, 374 (S.D.N.Y. 2000)* ; *see § 25A.21.*

(n28)Footnote 3. *Icarom, PLC v. Howard County, 904 F. Supp. 454, 458 (D. Md. 1995)* (citing **Moore's Federal Practice**); *see* [4], *below.*

(n29)Footnote 1. *Grace Holdings, L.P. v. Sunshine Mining & Ref. Co., 901 F. Supp. 853, 857 (D. Del. 1995)* ; *see* [3], *above.*

(n30)Footnote 2. *Fed. R. Civ. P. 57.*

(n31)Footnote 3. *See Tex. First Nat'l Bank v. Wu, 347 F. Supp. 2d 389, 396 (S.D. Tex. 2004)* .

(n32)Footnote 4. *Frissell v. Rizzo, 597 F.2d 840, 843 (3d Cir. 1979)* ; *see § 25A.22[4].*

(n33)Footnote 5. *Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345, 351-352 (3d Cir. 1986)* (citing **Moore's Federal Practice**); *Republic Servs., Inc. v. Texas Ecological Servs., Inc., 118 F. Supp.2d 775, 777 (S.D. Tex. 2000)* (cases that interpret Texas Declaratory Judgment Act have no relevance to determine declaratory remedy which may be given by federal courts; that particular federal declaratory relief may not be available in state courts is immaterial).

(n34)Footnote 6. *Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 772 (1st Cir. 1994)* (issues that would be governed by state law in coercive action are equally governed by state law when declaratory relief is sought).

(n35)Footnote 1. *Exxon Corp. v. FTC, 588 F.2d 895, 900 (3d Cir. 1978)* ; *see § 25A.02.*

(n36)Footnote 2. *See Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1153-1154 (3d Cir. 1995)* .

(n37)Footnote 3. *See 28 U.S.C. § 2201(a)*; *Fed. R. Civ. P. 57.*

(n38)Footnote 4. *Walker v. Flitton, 364 F. Supp. 2d 503, 526 (M.D. Pa. 2005)* .

(n39)Footnote 5. *Fed. R. Civ. P. 57*, Advisory Committee Note.

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART I. FUNCTION OF ACTIONS FOR DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure §§ 25A.04through 25A.19

[Reserved]

§§ 25A.04[Reserved]

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.20

§ 25A.20 Summary of Requirements for Declaratory Reliefn*

A party filing a pleading requesting declaratory relief n1 must establish two primary requirements for a court of the United States to enter a declaratory judgment: n2 first, the federal court must have subject matter jurisdiction, n3 and second, the court must be presented with an actual, that is, a justiciable controversy. n4 Once these two thresholds are satisfied, the court has discretion to render or deny declaratory relief to further the purposes of the relief. n5 As used in the Declaratory Judgment Act, the term "court of the United States" n6 includes all three level of courts: the Supreme Court of the United States, the courts of appeals, and the district courts. n7

The existence of another adequate remedy does not preclude declaratory relief in otherwise proper cases. n8 Although a declaration may not be rendered if a special statutory proceeding is provided for the adjudication of a special type of case, general ordinary or extraordinary legal remedies, whether regulated by statute, are not deemed to be special statutory proceedings. n9 However, the existence of another remedy at law may be considered as a factor in determining whether the court should exercise its discretion to grant declaratory relief. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsFactors

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.09 (Matthew Bender 3d ed.)

(n2)Footnote 1. *See §§ 25A.40, 25A.41.*

(n3)Footnote 2. *See Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1153-1154 (3d Cir. 1995) .*

(n4)Footnote 3. *See § 25A.21.*

(n5)Footnote 4. *See § 25A.22.*

(n6)Footnote 5. *Wilton v. Seven Falls Co., 515 U.S. 277, 289-290, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* ; *see § 25A.23*.

(n7)Footnote 6. *28 U.S.C. § 2201(a)*.

(n8)Footnote 7. *Heller Foundation v. Lee, 847 F.2d 83, 87 (3d Cir. 1988)* ; *see* 12 *Moore's Federal Practice, § 57.20* (Matthew Bender 3d ed.).

(n9)Footnote 8. *Fed. R. Civ. P. 57*; *Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1112 (9th Cir. 1987)* (existence of alternative remedies does not bar appropriate declaratory action); *Continental Cas. Co. v. Coastal Sav. Bank, 977 F.2d 734, 737 (2d Cir. 1992)* (citing **Moore's Federal Practice**).

(n10)Footnote 9. *Fed. R. Civ. P. 57*, Advisory Committee Note.

(n11)Footnote 10. *Aluminum Housewares Co. v. Chip Clip Corp., 609 F. Supp. 358, 360 (E.D. Mo. 1984)* (in patent infringement action, existence of alternative remedy one factor in determining whether to entertain declaratory relief suit).

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.21

§ 25A.21 Subject Matter Jurisdictionn*

[1] Federal Subject Matter Jurisdiction Required for Declaratory Relief

In itself, the Declaratory Judgment Act does not confer or expand federal subject matter jurisdiction, nor does it create an independent basis for jurisdiction; n1 consequently, a party requesting declaratory relief must establish an independent basis for federal court jurisdiction. n2 While actions for declaratory judgments may be based on supplemental jurisdiction or special jurisdictional statutes such as admiralty, n3 more typically, federal subject matter jurisdiction is based on the existence of a federal question n4 or the complete diversity of citizenship of adverse parties. n5

[2] Federal Question Jurisdiction

When a person initiates a claim for declaratory relief that arises under federal law, the suit satisfies the subject matter jurisdiction requirement because it falls within "federal question jurisdiction." n1 Whether a case arises under federal law for purposes of the general federal question statute is a complex issue that goes beyond the limited scope of this chapter. n2 For a detailed analysis of the general federal question statute, see Ch. 5, *Original Jurisdiction over the Subject Matter*. For purposes of an action for declaratory judgment, essentially the same requirements that must be met for an action seeking affirmative relief apply as well to an action seeking declaratory relief: federal law must either create the cause of action or provide the basis for an important issue of law that appears on the face of the plaintiff's well-pleaded complaint. n3

When a declaratory judgment action is brought by a prospective defendant against a prospective plaintiff in anticipation of an affirmative action by that prospective plaintiff, the Supreme Court has held that in order to decide whether the case meets the requirements of the well-pleaded complaint rule one must ask whether the issue of federal law would have appeared on the face of a hypothetical complaint seeking affirmative relief filed by the defendant in the declaratory judgment action. n4 Furthermore, a case asserting a state-created cause of action may also arise under federal law if the resolution of the dispute depends on the validity, construction, or effect of federal law, provided that the federal question is a real and substantial issue and the resolution of that issue is an essential element of the plaintiff's case. n5

[3] Diversity Jurisdiction

[a] Requirement of Complete Diversity

As an alternative to federal question jurisdiction, n1 a court has subject matter jurisdiction over a declaratory relief case if the case meets a minimum amount in controversy, n2 and if the plaintiffs and the defendants are "completely diverse." n3 which means that no plaintiff is a citizen of the same state as any defendant. n4 The defendant asserting federal removal jurisdiction carries the burden of proving all jurisdictional facts, including complete diversity of citizenship. n5

Complete diversity of citizenship must ordinarily exist at the time the action is commenced, which, under Rule 3, n6 is the time the complaint is filed. n7 However, when a case is removed from state court to federal court, complete diversity of citizenship must exist both at the time the action was originally commenced as well as at the time of removal. n8 There is an exception to this rule when a state court plaintiff voluntarily moves to a different state after commencing the action: if such a move creates diverse citizenship, a defendant may then remove the action to the federal court. n9

[b] Requirement of Minimum Amount in Controversy

[i] Minimum Amount Required

In addition to complete diversity of citizenship, n10 diversity jurisdiction requires that the actual matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, determined as of the time that the action is commenced. n11 The amount in controversy is generally determined exclusive of interest and costs. n12 The term "interest and costs" as used in the statute refers to those fees incurred or to be incurred in connection with the federal diversity action itself. Therefore, interest and costs may be included in the jurisdictional amount calculation if a party is contractually obligated to pay them as part of the dispute that underlies the action. n13 In the same way, the amount in controversy is generally determined exclusive of attorney's fees, but if the underlying contract requires one party to pay attorney's fees in the event of a lawsuit, then the estimated amount of attorney's fees are included in calculating the amount in controversy. n14 For example, in insurance cases when the policy expressly provides that the insurer will pay attorney's fees of any covered action against the insured, all attorney's fees that the insurer is obligated to pay are aggregated with the policy limits to determine the amount in controversy. n15

[ii] Determination of Amount in Declaratory Relief Cases

The amount in controversy is controlled by the controversy as stated in the pleading, n16 unless it appears to a legal certainty that the claim is for less than the jurisdictional minimum. n17 In cases removed to federal court, the jurisdictional amount must also be satisfied when the notice of removal is filed. n18

As noted above, the amount in controversy is ordinarily determined by the amount specified in the request for damages, but when the plaintiff is seeking declaratory relief, there is no request for damages. However, it is well established that the amount in controversy is measured by the value of the object of the litigation. n19 To measure the "object" of the litigation, the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented. It should be noted that identifying the object to be valued in determining the amount in controversy is complicated when more than one "object" is involved, depending on the parties' differing points of view. n20 Furthermore, the value of the litigation may vary depending on which party's perspective is analyzed. n21

[iii] Prohibition Against Aggregation of Claims

Aggregation of the amounts in dispute is not permitted to establish the requisite jurisdictional amount regarding the several liability of multiple parties. Thus, when there are multiple, severally liable plaintiffs seeking declaratory judgment regarding their liability to the defendants, the plaintiffs may not aggregate demands to satisfy jurisdictional-amount requirement. n22 However, a suit requesting a declaratory judgment of the validity of a contract calling for payments aggregating more than requisite jurisdictional amount will be held to be within the jurisdiction of

the federal court, even though individual payments do not exceed the amount. n23

[iv] State Law Controls Amount of Substantive Claim

In a declaratory action brought in federal court based on diversity of citizenship, state law rather than federal law governs the amount of the substantive claims in the underlying action. n24 In other words, issues governed by state law in an action for damages are also governed by state law in a declaratory relief suit. n25 Therefore, the court must consult state law to determine the nature and extent of the damages to be awarded, because in a diversity case the substantive questions of what constitutes items of damages are purely matters of state law. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.21 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1335 (Fed. Cir. 2008)* .

(n3)Footnote 2. *Nationwide Ins. v. Zavalis, 52 F.3d 689, 691-692 (7th Cir. 1995)* ; *Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 534 (1st Cir. 1995)* ; *NAP, Inc. v. Shuttletex, Inc., 112 F. Supp.2d 369, 376 (S.D.N.Y. 2000)* ; *see 28 U.S.C. § 2201(a)*.

(n4)Footnote 3. *See Matsuda v. Wada, 128 F. Supp.2d 659, 663-664 (D. Haw. 2000)* .

(n5)Footnote 4. *See 28 U.S.C. § 1331*; *see also* [2], *below*.

(n6)Footnote 5. *See 28 U.S.C. § 1332*; *see also* [3], *below*.

(n7)Footnote 1. *UFCW, Local 1564 v. Albertson's, Inc., 207 F.3d 1193, 1197-1202 (10th Cir. 2000)* ; *see 28 U.S.C. § 1331*.

(n8)Footnote 2. *See UFCW, Local 1564 v. Albertson's, Inc., 207 F.3d 1193, 1197-1202 (10th Cir. 2000)* (federal court lacked jurisdiction to adjudicate declaratory relief claim that collective bargaining agreement violated Fair Labor Standards Act).

(n9)Footnote 3. *Stuart Weitzman, LLC v. Microcomputer Res., Inc., 542 F.3d 859, 862 (11th Cir. 2008)* .

(n10)Footnote 4. *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672-673, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)* .

(n11)Footnote 5. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-13, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

(n12)Footnote 1. *See* [2], *above*.

(n13)Footnote 2. *See* [b], *below*.

(n14)Footnote 3. *Littlefield v. Acadia Ins. Co., 392 F.3d 1, 4 n.2 (1st Cir. 2004)* .

(n15)Footnote 4. *Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445 (2d Cir. 1995) , cert. denied, 517 U.S. 1120 (1996)* (all plaintiffs must be citizens of different states of all defendants, as determined by reference to parties named in proceeding and any indispensable parties).

(n16)Footnote 5. *Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302, 304 (9th Cir. 1987) , rev'd on other grounds by Partington v. Gedan, 923 F.2d 686 (9th Cir. 1991) .*

(n17)Footnote 6. *See Fed. R. Civ. P. 3.*

(n18)Footnote 7. *Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir. 1993) , cert. denied, 513 U.S. 1052 (1994)* (diversity jurisdiction determined as of time when action is commenced).

(n19)Footnote 8. *Freeport-McMoran, Inc. v. K N Energy, Inc., 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991) .*

(n20)Footnote 9. *DeBry v. Transamerica Corp., 601 F.2d 480, 486-488 (10th Cir. 1979)* (citing **Moore's Federal Practice** and stating that defendant may remove case if plaintiff's post-commencement move establishes diversity jurisdiction).

(n21)Footnote 10. *See* [a], *above*.

(n22)Footnote 11. *28 U.S.C. § 1332(a)*; *see Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995)* (diversity jurisdiction determined when action commenced); *Matsuda v. Wada, 128 F. Supp.2d 659, 663-664 (D. Haw. 2000) .*

(n23)Footnote 12. *28 U.S.C. § 1332(a).*

(n24)Footnote 13. *Farmers Ins. Co. v. McClain, 603 F.2d 821, 823 (10th Cir. 1979)* (citing **Moore's Federal Practice**).

(n25)Footnote 14. *Nationwide Mut. Ins. Co. v. Rowles, 818 F. Supp. 852, 854-855 (E.D. Pa. 1993)* (court aggregates all costs required by insurance contract, including costs, attorney's fees, and costs of arbitration).

(n26)Footnote 15. *Farmers Ins. Co. v. McClain, 603 F.2d 821, 823 (10th Cir. 1979) .*

(n27)Footnote 16. *Watson v. Blankinship, 20 F.3d 383, 387 (10th Cir. 1994)* (actual jury finding of less than jurisdictional amount does not destroy jurisdiction or necessarily prove bad faith).

(n28)Footnote 17. *Sellers v. O'Connell, 701 F.2d 575, 579 (6th Cir. 1983)* (court may look beyond complaint when it appears to legal certainty that jurisdictional requisite not met).

(n29)Footnote 18. *Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994) .*

(n30)Footnote 19. *Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 347, 97 S. Ct. 2434 , 53 L. Ed. 2d 383 (1977) .*

(n31)Footnote 20. *Puckett Mach. Co. v. United Rentals, Inc., 342 F. Supp. 2d 610, 613 (S.D. Miss. 2004) .*

(n32)Footnote 21. *McCarty v. Amoco Pipeline Co., 595 F.2d 389, 391-395 (7th Cir. 1979) .*

(n33)Footnote 22. *Niagara Fire Ins. Co. v. Dyess Furniture Co., 292 F.2d 232, 233 (5th Cir. 1961)* (aggregation of amounts in dispute between insurer and defendants is not permitted to establish requisite jurisdictional amount when insurer's liability is several).

(n34)Footnote 23. *Davis v American Foundry Equip. Co., 94 F.2d 441, 442-443 (7th Cir. 1938)* (this rule furthers

intent of Declaratory Judgment Act to avoid delay and accrual of damages against one uncertain of his or rights and to promote early adjudication of controversies).

(n35)Footnote 24. *Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247-248, 73 S. Ct. 236, 97 L. Ed.291 (1952)* .

(n36)Footnote 25. *Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1364-1367 (9th Cir. 1991)* (exercising diversity jurisdiction, court decided issues relating to extent of insurance coverage in conformity with state law).

(n37)Footnote 26. *Rosen v. Chrysler Corp., 205 F.3d 918, 921-922 (6th Cir. 2000)* (if party under applicable state law may recover on particular claim for recission, constructive trust, and treble damages, court must include all of those theories in tabulating jurisdictional minimum amount).

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.22

§ 25A.22 Justiciabilityn*

[1] Requirement of Justiciability

A court should not enter a declaratory judgment unless it has been presented with a justiciable dispute, which is a dispute that involves an actual controversy. *Justiciability* is a concept that embraces several principles including standing and ripeness, and describes the power of a court to hear a particular claim, and the advisability of the court to hear the claim at a particular time. Justiciability is a general term that arises from the Constitution's Article III "cases and controversies" limitation and also from prudential considerations for refusing to exercise jurisdiction. Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. n0.1 Justiciability requires that before a federal court may address itself to a question, there must exist a real, substantial controversy between parties having adverse legal interests, a controversy that is definite and concrete, and not hypothetical or abstract. The doctrine prevents parties from simply submitting questions of general interest or curiosity to the federal court. n1

Justiciability is particularly applied to declaratory relief actions through the Declaratory Judgment Act, which requires that a court may not grant such relief except in a "case of actual controversy." n2 "Cases of actual controversy" in the Declaratory Judgment Act are identical with the type of "cases and controversies" that are justiciable under Article III of the Constitution. n2.1 For a discussion of the principles and doctrines applicable to determining the existence of an actual controversy and the justiciability of a dispute, see [2] through [6], *below*. The determination of the existence of an actual controversy in the context of specific types of declaratory relief suits is discussed in *§ 25A.22[7]*.

With particular respect to declaratory relief, the justiciability doctrine means that even though the Declaratory Judgment Act is to be liberally construed, n3 the Act does not enlarge jurisdiction. n4 Therefore, the Act does not create any exceptions to the fundamental concepts of justiciability and the prohibition of advisory opinions, which are imposed on the federal courts by the Constitution. The rule that courts will not give advisory opinions or answer hypothetical questions is derived from the provisions of Article III of the Constitution, which restrict the federal judicial power to cases and controversies. n5 For example, in one case the Supreme Court held that government employees who wanted to pursue political activities prohibited by the Hatch Act, but who had not alleged that they had actually violated the Act, did not present a justiciable controversy in an action seeking a declaration that the statute was unconstitutional. The

Court stated that a decision on the merits would be only an advisory opinion, because a hypothetical threat is not enough; based on the complaint, the court could only speculate as to the kinds of political activity the appellants desired to pursue. n6

[2] Requirement of Actual Controversy

A court's grant of declaratory relief is not proper except to decide an actual controversy. n1 The difference between an abstract question and an actual controversy is one of degree and is not discernible by any precise test. The United States Supreme Court has directed that the inquiry requires examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. n2

In making the determination of whether a declaratory judgment action satisfies the actual controversy requirement, United States Supreme Court decisions require that the dispute be definite and concrete, touching the legal relations of parties having adverse legal interests, that the controversy be real and substantial, and that it admit of specific relief through a decree of a conclusive character, as distinguished from an opinion merely advising what the law would be on a hypothetical state of facts. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to justify the entry of a declaratory judgment. n3 Additionally, valuable legal rights must be directly affected to a specific and substantial degree. n4 In other words, declaratory relief is appropriate when and only when one or both parties have pursued a course of conduct that will result in imminent and inevitable litigation unless the issue is resolved by a declaratory judgment. n5

In making the determination of whether there is an actual controversy, the court considers whether the plaintiff faces a realistic danger of sustaining a direct injury, for example, as a result of a statute's operation or enforcement, or whether the alleged injury is too "imaginary" or "speculative" to support jurisdiction. n6 While courts will generally avoid deciding disputes contingent in part on future possibilities, an exception may be had where an issue, largely legal in nature, may be resolved without further factual development, or where judicial resolution will largely settle the parties' dispute. Thus, the threat of litigation may establish an actual controversy sufficient to support a declaratory judgment if the threat is specific and concrete. n6.1

The fact that the filing of a lawsuit is contingent on certain factors does not necessarily defeat jurisdiction over a declaratory relief action. However, in determining whether a justiciable controversy exists, the district court must consider the likelihood that those contingencies will occur. In effect, the court inquires whether an injury that has not yet occurred (that is, the potential lawsuit) is sufficiently likely to happen to justify judicial intervention. n7 As with questions of subject matter jurisdiction, the existence or non-existence of an actual case or controversy is determined when the declaratory relief complaint is filed. n8 All jurisdictional prerequisites must be satisfied when the declaratory relief action is filed and must continue for the duration of the suit. n9

A party's mere demand for declaratory relief does not by itself establish a case or controversy as necessary to confer subject matter jurisdiction. n10 Furthermore, when a party is requesting a mere declaration of law without implications for practical enforcement on the parties, the court should dismiss the case. n11

[3] Ripeness

[a] Party Requesting Declaratory Relief Must Establish Ripeness

The party seeking the declaratory judgment carries the burden of demonstrating that the case is ripe for adjudication. n1 Ripeness is a justiciability doctrine that is concerned with when an action may properly be brought. Thus, ripeness is peculiarly a question of timing. Ripeness is not a legal concept with a fixed content or susceptible of scientific verification. The United States Supreme Court has observed that the doctrine is drawn both from Article III

constitutional limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. n2 If an injury has not yet occurred, and the claimant's declaratory relief action is based on conjecture, speculation, or a remote contingency, the issue is not ripe for adjudication. n3 Thus, the ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention. n4

[b] Two-Pronged Inquiry

The Supreme Court has directed that the ripeness inquiry requires examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. n5 The "fitness for judicial decision inquiry" goes to a court's ability to visit an issue. Generally, the fitness inquiry safeguards against judicial review of hypothetical or speculative disagreements. In applications regarding appeals from administrative regulations, for example, the fitness prong questions finality and exhaustion. n6

The key issue implicated by the fitness prong is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all n7 or whether the issue presented is purely legal, rather than factual. n8 In other words, while courts shy away from settling disputes contingent in part on future possibilities, certain cases may warrant review based on their particular disposition; n9 exceptions are allowed when an issue is largely legal in nature, may be resolved without further factual development, or where judicial resolution will largely settle the parties' dispute. n10

The second prong of the ripeness test involves harm. Thus, in addition to being fit for judicial resolution under the first prong, an issue is ripe only if delayed review will result in significant harm. "Harm" includes both the traditional concept of actual damages--pecuniary or otherwise--and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution. n11 For example, in one case the Supreme Court stressed the financial impact that delayed adjudication would have on the petitioning utilities and the rate-paying public by forcing them to gamble millions of dollars on an uncertain state of the law. n12

A party need not wait for actual harm to occur. n13 However, both the immediacy and the degree of the threatened harm impact the ripeness calculus--they must be significant. n14

[4] Standing

The Declaratory Judgment Act provides that the court may declare the rights and other legal relations of any "interested party seeking such a declaration." n1 This means that the court may not grant declaratory relief with respect to nonparties. n2 The requirement that a court may not grant declaratory relief, except to interested persons who are seeking the relief, is a particular facet of the general standing requirement that a plaintiff must assert an adequate personal interest, which the law recognizes, against a defendant having a substantial adverse interest. For example, in one case the Supreme Court ruled that a physician lacked standing to allege that a state anti-contraception statute deprived certain of his patients of life without due process in violation of the *Fourteenth Amendment* because that interest was the patients and not his. The plaintiff did not raise any issue concerning the deprivation of his liberty or property rights. n3

The plaintiff has the burden of alleging and establishing facts that demonstrate standing. To accomplish this, the plaintiff must prove three elements: (1) an injury in fact that is an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complaint of; and (3) the likelihood that the injury will be redressed by a favorable decision. n4

[5] Mootness

The Declaratory Judgment Act is procedural only; therefore, the Act may not be used to obtain a decision on a moot

question. n1 Once an issue becomes moot, it is no longer actual or justiciable under the Article III "case or controversy" requirement. n2 Mootness has been described as the doctrine of standing set in a time frame: it refers to the extinction of the requisite "personal" interest that must exist at the commencement of litigation, and must exist through the entire period the litigation continues. It is the duty of counsel to bring to the federal court's attention without delay any facts that may raise a question of mootness. n3

A case becomes moot when a court is no longer able to grant appropriate relief because the dispute has been resolved through other means or because the passage of time has made the claim stale, n4 and it is not probable that the precise circumstances or conditions of the case will recur. n5 In other words, mootness arises in one of two circumstances: when the issues presented are no longer "live" or when the parties lose any legally cognizable interest in the outcome. n6 Thus, a controversy becomes moot when, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain the litigation. n7 However, the mootness of some but not all issues in the case does not render the entire case moot. n8

[6] Political Question

Under the justiciability doctrine of "political questions," federal courts may not make judicial determinations of a claim, including a declaratory judgment, when the claim involves only political matters. n1 Thus, if a party's challenge to the constitutionality of a law, statute, ordinance, or regulation raises only a "political question," the court should ordinarily decline to grant declaratory relief. n2 However, there is no bright-line test of what constitutes a political question, and different standards apply in several different contexts. Basically, a political question, as opposed to an actual controversy, implicates the separation of powers and involves one or more of the following factors: n3

1. A demonstrable constitutional commitment of the issue to a coordinate political department.

2. A lack of judicially discoverable and manageable standards for resolving the issue.

3. The impossibility of deciding the issue without an initial policy determination that requires nonjudicial discretion.

4. The impossibility of a court's undertaking independent resolution of the issue without expressing a lack of the respect due other branches of government; or

5. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

When a case does involve a political question, the court should dismiss the claim. n4 For suits involving political questions, the court should dismiss rather than issue an indefinite stay, because the political question doctrine is not analogous to abstention, but rather is a constitutional limitation on the federal judiciary because of the constitutional doctrine of separation of powers. n5 For a further discussion of these factors, see Ch. 1, *Federal Courts*.

[7] Issues of Justiciability in Particular Types of Declaratory Relief Actions

[a] Intellectual Property Cases

[i] Trademark

In a declaratory judgment action involving trademarks, the test for the existence of an actual case or controversy has two prongs, both of which must be satisfied to establish declaratory judgment jurisdiction: (1) has the declaratory judgment defendant's conduct created a real and reasonable apprehension of liability on the part of the plaintiff, and (2) has the declaratory judgment plaintiff engaged in a course of conduct that has brought it into adversarial conflict with the defendant. n1

As to the first prong, the unambiguous communication to the plaintiff of the defendant's intent to bring an infringement suit satisfies this requirement. n2

The second prong does not necessarily require that the plaintiff actually use the mark to establish an adversarial relationship that meets the actual case or controversy standard. n3 Rather, an actual case or controversy exists where a party has engaged in a course of conduct evidencing a definite intent and apparent ability to commence use of the marks on the product. n4 Imminent intent and ability to use require more than a vague or general desire to use the disputed mark. n5 The plaintiff must be engaged in meaningful preparation, n6 such that the plaintiff is actively preparing to produce the article in question. n7 Whether a declaratory judgment plaintiff has demonstrated this meaningful and active preparation is decided on a case-by-case basis. n8

[ii] Patent

A declaratory action commonly provides a very useful procedure for patent litigants, in that a declaratory relief action may be brought by potential infringers against asserted patentees seeking a declaration that the asserted patent is invalid or that no infringement of the patent has occurred, or both. In an action seeking a declaration that a patent is invalid, an actual controversy exists if both the following are true: n9 (1) an explicit threat or action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) the plaintiff must actually have either produced the device or have prepared to produce the device. Even if a court has made a finding of noninfringment, the finding does not preclude a court from considering an appeal from a declaratory judgment of patent invalidity, because a declaratory judgment of invalidity presents a claim that is independent of the patentee's charge of infringement. n10

A party may also bring a declaratory judgment action regarding patent infringement. A potential infringer may seek a declaration of noninfringement or the patentee may seek a declaration of infringement against a party who will allegedly infringe in the future.. n11

The test for evaluating whether a justiciable controversy exists in the context of a declaratory judgment action regarding infringement requires the following: (1) the defendant's conduct must have created on the part of plaintiff a reasonable apprehension that the defendant will initiate suit if the plaintiff continues the allegedly infringing activity; (2) the plaintiff must actually have either produced the device or have prepared to produce it. The test, however stated, is objective and is applied to the facts existing when the complaint is filed. The first prong looks to the defendant's conduct while the second to the plaintiff's. n12

Relevant to the issue of reasonable apprehension may be the fact that the parties are engaged in litigation at the time the perceived threat is made or the fact that the patent holder has stated an intent to enforce its patent rights. However, some cases have held such facts insufficient to find a reasonable apprehension of suit. Nonetheless, the court must consider the context in which statements allegedly raising an apprehension of suit were made. n13

[iii] Copyright

The test to determine the existence of a case or controversy in a declaratory relief suit involving the validity or infringement of a copyright is generally the same as that applicable to patent cases; n14 thus, a justiciable case or controversy exists if both the following are true: n15 (1) the declaratory judgment defendant has indicated its refusal to cease conduct in the face of acts by the copyright holder sufficient to create a reasonable apprehension that a suit would be instituted against the defendant. (2) the declaratory judgment defendant has engaged in an activity directed toward the making, selling, or using an allegedly infringing product, or is engaged in meaningful preparation for that activity. Similarly, the real and reasonable apprehension of potential liability requirement also applies in the copyright context. n16 The apprehension must have been caused by the declaratory relief defendant's actions n17 and must exist when the suit is filed and continue throughout the duration of the suit. n18 However, the declaratory relief plaintiff need not show

that an actual charge of infringement has been made by the defendant. n19

[b] Constitutionality of Law or Policy

[i] Challenge Prior to Enforcement

When a party requests a declaration that a statute, regulation, ordinance, or governmental policy is unconstitutional, but the law has not yet been enforced by the government, the plaintiff must show actual or threatened harm caused by the imminent enforcement of the challenged law. This requires the plaintiff to allege that the government has actually threatened to enforce or prosecute under the challenged statute, that enforcement or prosecution is likely, or that there is a real threat of enforcement or prosecution. n20

Although a person need not be the object of an administrative or judicial proceeding before the person may initiate an action for a declaratory judgment, n21 the existence of an actual controversy is not established by the mere passage of a legally questionable ordinance, n22 nor by allegations of fear of enforcement or prosecution that is remote, hypothetical, or speculative. n23 However, when the legal issue presented is fit for judicial resolution, and when a regulation requires immediate and significant change in the plaintiff's conduct of his or her affairs with serious penalties attached to noncompliance, access to the courts under the Declaratory Judgment Act must be permitted, except in cases of a statutory bar or some other unusual circumstances. Furthermore, when a party requests a declaratory judgment that a challenged statute is unconstitutional because it has a chilling effect on *First Amendment* rights, it is generally easier to state a justiciable claim than if *First Amendment* rights are not involved. n24

[ii] Challenge After Enforcement Has Occurred

Once a statute has been enforced against a person, the person may request a declaratory judgment to challenge the constitutional validity of the statute by alleging that there are continuing or current adverse affects from that past enforcement or that there is an immediate threat of repeated injury from subsequent enforcement of the challenged statute. n25 When the constitutionality of a state statute depends on its interpretation, a federal court should normally await state interpretation of the statute before proceeding with any federal constitutional questions that may remain. For example, in one case, the United States Supreme Court held that an action in the federal district court should be stayed until an authoritative interpretation was given the statute in question by the state courts. The Court stated that if after the state court determination, a federal question remains, it may then be determined by the federal courts. Such a procedure, designed to promote harmonious relationships between state and national governments, is proper in declaratory actions. n26

[c] Insurance Cases

The Declaratory Judgment Act has historically provided a useful procedural device for adjudicating disputes concerning insurance coverage and liability. Thus, there has been routine invocation of declaratory judgment jurisdiction in diversity insurance cases at a level comparable to declaratory judgments in federal question patent cases. This activity has been fostered by Rule 57's express provision that in the appropriate circumstances the existence of another adequate remedy, such as state court resolution of insurance issues, does not preclude a judgment for declaratory relief. n27 Nevertheless, a court may not enter a declaratory judgment in an insurance case unless the justiciability test is met. n28

In an action seeking a declaratory judgment regarding whether coverage exists or an insurer is liable under an insurance policy, an actual controversy exists when a significant dispute exists between parties having adverse legal interests, and the dispute has a high degree of immediacy and reality. n29 In the insurance context, the existence of a legal dispute is established when the parties disagree as to the terms, rights, or obligations of the insurance policy. n30 An insured is not precluded from seeking a declaration of insurance coverage before a suit is filed. However, if an insured files a suit before asserting any liability against the insured, the court may find there is not an actual controversy. n31

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityCase or Controversy RequirementsActual DisputesCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.22 (Matthew Bender 3d ed.)

(n2)Footnote 0.1. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604, 614, 620 (2007)* .

(n3)Footnote 1. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co, 234 F.3d 1032, 1037-1038 (8th Cir. 2000)* .

(n4)Footnote 2. *28 U.S.C. § 2201*; *see Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137-1138 (9th Cir. 2000)* ; *see also* [2], *below*.

(n5)Footnote 2.1. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604, 614 (2007)* .

(n6)Footnote 3. *See § 25A.03[5]*.

(n7)Footnote 4. *See § 25A.21*.

(n8)Footnote 5. *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138-1139 (9th Cir. 2000)* .

(n9)Footnote 6. *United Pub. Workers v. Mitchell, 330 U.S. 75, 85-86, 67 S. Ct. 556, 91 L. Ed. 754 (1947)* .

(n10)Footnote 1. *28 U.S.C. § 2201(a)*.

(n11)Footnote 2. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co, 234 F.3d 1032, 1037-1038 (8th Cir. 2000)* ; *Work v. United States Trade, Inc., 747 F. Supp. 1184, 1189 (E.D. Va. 1990)* (whether controversy is sufficiently immediate and real as to constitute actual controversy is determined on case-by-case basis).

(n12)Footnote 3. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604, 614-615 (2007)* (actual controversy requirement was met when one person demanded payment of claim as of right, and other person made payment, but coercive nature of demand for payment preserved right to recover sums paid or to challenge legality of claim).

(n13)Footnote 4. *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch., Inc., 24 F.3d 427, 431-432 (2d Cir. 1994)* (declaratory relief improper when no resolution of dispute and declaration would not affect (broaden or narrow) rights in relation to other party).

(n14)Footnote 5. *GTE Directories Pub. Corp. v. Trimen Am., Inc., 67 F.3d 1563, 1567 (11th Cir. 1995)* .

(n15)Footnote 6. *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000)* .

(n16)Footnote 6.1. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604, 616-618 (2007)* (licensors threatened to institute patent infringement action).

(n17)Footnote 7. *Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 897 (5th Cir. 2000)* .

(n18)Footnote 8. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* .

(n19)Footnote 9. *Lewis v. Continental Bank Corp., 494 U.S. 472, 479-481, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)* (justiciability must exist at all stages of action, throughout both trial and appellate proceedings).

(n20)Footnote 10. *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch., Inc., 24 F.3d 427, 431-432 (2d Cir. 1994)* (declaratory relief improper when it would not resolve dispute and when declaration would not broaden or narrow rights of particular party in relation to other party).

(n21)Footnote 11. *Browning Debenture Holders' Comm'n v. DASA Corp., 524 F.2d 811, 817 (2d Cir. 1975)* .

(n22)Footnote 1. *Grace Holdings, L.P. v. Sunshine Mining & Ref. Co., 901 F. Supp. 853, 858 (D. Del. 1995)* (declaratory judgment plaintiff carries burden of demonstrating that case is ripe).

(n23)Footnote 2. *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000)* ; *City of Houston v. H.U.D., 24 F.3d 1421, 1430-1432 (D.C. Cir. 1994)* .

(n24)Footnote 3. *Illinois v. City of Chicago, 137 F.3d 474, 477-478 (7th Cir. 1998)* (whether airport authority may exercise its purported authority to adopt regulations overriding state law is merely hypothetical issue unless and until airport authority actually adopts such regulations).

(n25)Footnote 4. *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994)* .

(n26)Footnote 5. *Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

(n27)Footnote 6. *Lane v. United States Dep't of Agric., 187 F.3d 793, 795 (8th Cir. 1999)* .

(n28)Footnote 7. *Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536-538 (1st Cir. 1995)* .

(n29)Footnote 8. *W.R. Grace & Co. v. United States EPA, 959 F.2d 360, 364 (1st Cir. 1992)* (case is generally ripe if issues are purely legal ones; conversely, case is not ripe when further factual development is required).

(n30)Footnote 9. *Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 120 S. Ct. 1084, 1093, 146 L. Ed. 2d 1 (2000)* .

(n31)Footnote 10. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000)* .

(n32)Footnote 11. *Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733-734, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998)* .

(n33)Footnote 12. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201-202, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)* .

(n34)Footnote 13. *South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005, 1008-1009 (8th Cir. 1998)* .

(n35)Footnote 14. *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 110 S. Ct. 3177, 3190-3191, 111 L. Ed. 2d 695 (1990)* ; *Nebraska Pub. Power Dist. v. MidAmerican Energy Co, 234 F.3d 1032, 1038 (8th Cir. 2000)* .

(n36)Footnote 1. *28 U.S.C. § 2201(a).*

(n37)Footnote 2. *Mckenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997)* (court may not declare prospective, class-wide relief, unless class has been formally certified as class action).

(n38)Footnote 3. *Tileston v. Ullman, 318 U.S. 44, 46, 63 S. Ct. 493, 87 L. Ed. 603 (1943)* .

(n39)Footnote 4. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ; *Hawaii Motor Sports Ctr. v. Babbitt, 125 F. Supp. 2d 1041, 1049 (D. Haw. 2000)* .

(n40)Footnote 1. *Russell v. INS, 2001 U.S. Dist. LEXIS 52, at *7 (N.D. Ill. Jan3, 2001)* .

(n41)Footnote 2. *Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1462-1467 (3d Cir. 1994)* , *cert. denied sub nom. Presbytery of the Orthodox Presbyterian Church v. Witman, 520 U.S. 1155 (1997)* (when intervening events remove even possibility of harm, court may not decide now speculative controversy).

(n42)Footnote 3. *Arizonans for Official English v. Arizona, 520 U.S. 43, 68-71, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n43)Footnote 4. *Burlington N. R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1243-1244 (9th Cir. 1991)* (case becomes moot when court cannot grant effective relief).

(n44)Footnote 5. *Headwaters, Inc. v. Bureau of Land Management, 893 F.2d 1012, 1015-1016 (9th Cir. 1989)* .

(n45)Footnote 6. *Russell v. INS, 2001 U.S. Dist. LEXIS 52, at *7 (N.D. Ill. Jan 3, 2001)* .

(n46)Footnote 7. *Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153 (5th Cir. 1993)* .

(n47)Footnote 8. *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 748 (11th Cir. 1991)* (mootness of one issue does not moot case when actual controversy exists as to number of other issues).

(N48)Footnote 1. *See De La Rosa v. United States, 113 F. Supp. 2d 228, 237-239 (D.P.R. 2000)* (court determined that plaintiff's complaint was justiciable and not subject to the political question doctrine, and entered declaratory judgment finding that plaintiffs had right to vote in presidential elections).

(n49)Footnote 2. *See Larsen v. Senate of Commonwealth, 152 F.3d 240, 246-248 (3d Cir. 1998)* , *cert. denied sub nom. larsen v. Afflerbach,* 525U.S. 1145 (1999) (political question doctrine did not bar former state justice's federal civil rights claim against state senators asserting constitutional violations arising from impeachment and removal of justice and seeking declaratory relief).

(n50)Footnote 3. *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)* .

(n51)Footnote 4. *767 Third Ave. Assocs. v. Consulate Gen. of Yugo., 218 F.3d 152, 163-164 (2d Cir. 2000)* (citing **Moore's Federal Practice**).

(n52)Footnote 5. *767 Third Ave. Assocs. v. Consulate Gen. of Yugo., 218 F.3d 152, 163-164 (2d Cir. 2000)* (citing **Moore's Federal Practice**).

(n53)Footnote 1. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* ; *Windsurfing Int'l, Inc. v. AMF, Inc., 828 F.2d 755, 757-758 (Fed. Cir. 1987)* .

(n54)Footnote 2. *Northeastern Fla. Chapter, Ass'n Gen'l Contractors v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)* (when threat for further trademark infringement action is withdrawn, either voluntarily or based on court decision, case in controversy persists; because threatening practices could simply be resumed at later date, cessation is viewed as temporary, and suffices to establish justiciability).

(n55)Footnote 3. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* .

(n56)Footnote 4. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* (citing **Moore's**, borrowing imminent intention and ability test derived from patent law); *see Golden Gulf Corp. v. Jordache Enters., 896 F. Supp. 337, 340 (S.D.N.Y. 1995)*

(n57)Footnote 5. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* (citing **Moore's**, borrowing imminent intention and ability test derived from patent law); *see Wembley, Inc. v. Superba Cravats, Inc., 315 F.2d 87, 90 (2d Cir. 1963)* (imminent intention and ability test in patent cases).

(n58)Footnote 6. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996)* (meaningful preparation required).

(n59)Footnote 7. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 597 (2d Cir. 1996) .*

(n60)Footnote 8. *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241, 57 S. Ct. 461, 81 L. Ed. 617 (1937)* (meaningful and active preparation decided on case-by-case basis).

(n61)Footnote 9. *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988)* ; *Dataline, Inc. v. MCI Worldcom Network Servs., 2001 U.S. Dist. LEXIS 950, at *7-8 (S.D.N.Y. Feb. 6, 2001)* (if either of these two requirements is not met, dismissal for lack of subject matter jurisdiction is required); *see BP Chems. Ltd. v. Union Carbide Corp., 4 F.3d 975, 978 (Fed. Cir. 1993)* (two-prong test for measuring case or controversy determines whether need for adjudication is real and immediate).

(n62)Footnote 10. *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 96-97, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993) .*

(n63)Footnote 11. *Dataline, Inc. v. MCI Worldcom Network Servs., Inc., 2001 U.S. Dist. LEXIS 950, at *10 (S.D.N.Y. 20001)*

(n64)Footnote 12. *Goodyear Tire & Rubber Co. v. Releasomers, Inc., 824 F.2d 953, 955 (Fed. Cir. 1987) .*

(n65)Footnote 13. *Dataline, Inc. v. MCI Worldcom Network Services, Inc., 2001 U.S. Dist. LEXIS 950 (S.D.N.Y. 20001) .*

(n66)Footnote 14. *See* [ii], *above*.

(n67)Footnote 15. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555-1556 (9th Cir. 1989) .*

(n68)Footnote 16. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555-1556 (9th Cir. 1989) .*

(n69)Footnote 17. *International Harvester Co. v. Deere & Co., 623 F.2d 1207, 1210-1211 (7th Cir. 1980) .*

(n70)Footnote 18. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1556 n.22 (9th Cir. 1989) .*

(n71)Footnote 19. *International Harvester Co. v. Deere & Co., 623 F.2d 1207, 1210-1211 (7th Cir. 1980) .*

(n72)Footnote 20. *Minnesota Citizens Concerned for Life v. Federal Election Comm'n, 113 F.3d 129, 132 (8th Cir. 1997)* (pre-enforcement declaration could be granted when statute imposes costly, self-executing compliance burdens, or when statute chills protected *First Amendment* activity); *J.N.S., Inc. v. Indiana, 712 F.2d 303, 304-306 (7th Cir. 1983)* (suit seeking to declare state anti-racketeering statute unconstitutional failed because plaintiff was not threatened with prosecution; and abstract challenge to constitutionality is not actual controversy).

(n73)Footnote 21. *Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) .*

(n74)Footnote 22. *Del Percio v. Thornsley, 877 F.2d 785, 786-787 (9th Cir. 1989)* .

(n75)Footnote 23. *City of Los Angeles v. Lyons, 461 U.S. 95, 101-103, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* .

(n76)Footnote 24. *Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1299 (3d Cir. 1996)* , *cert. denied, 517 U.S. 1246 (1996)* .

(n77)Footnote 25. *Holstein v. City of Chicago, 803 F. Supp. 205, 208 (N.D. Ill. 1992)* , *aff'd, 29 F.3d 1145 (7th Cir. 1994)* (no remaining case or controversy after city dismissed charges and attempted to refund towing fees to plaintiff); *Nelsen v. King County, 895 F.2d 1248, 1250 (9th Cir. 1990)* (past harm is insufficient; plaintiff must show significantly real possibility of future harm for declaratory relief).

(n78)Footnote 26. *Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 171-173, 62 S. Ct. 986, 86 L. Ed. 1355 (1942)* .

(n79)Footnote 27. *Cf. Wilton v. Seven Falls Co., 515 U.S. 277, 282-283, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* .

(n80)Footnote 28. *Hartford Fire Ins. Co. v. Rhode Island Pub. Transit Auth., 233 F.3d 127, 129-130 (1st Cir. 2000)* .

(n81)Footnote 29. *American States Ins. Co. v. Bailey, 133 F.3d 363, 368 (5th Cir. 1998)* (requisite actual controversy may exist when insurer seeks declaratory judgment that it has neither duty to defend nor duty to indemnify insured).

(n82)Footnote 30. *Kunkel v. Continental Cas. Co., 866 F.2d 1269, 1273-1275 (10th Cir. 1989)* .

(n83)Footnote 31. *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co., 68 F.3d 409, 414-415 (11th Cir. 1995)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.23

§ 25A.23 Exhaustion of Administrative Remediesn*

[1] Exhaustion Required When Intended by Congress

A court may generally order declaratory relief only if the party requesting declaratory relief has exhausted all available administrative remedies. n1 Furthermore, when an administrative agency has the authority to determine a matter, the propriety of that determination is not subject to judicial review until the administrative process has been completed. n2 When Congress has explicitly required that particular administrative procedures must be used in resolving a dispute, the exhaustion requirement is absolute. n3 However, when Congress has not clearly required exhaustion, a court has discretion to decide whether exhaustion will be required. The court may excuse a failure to exhaust administrative remedies if the (1) the claim is collateral to a demand for benefits, (2) exhaustion would be futile, or (3) requiring exhaustion would result in irreparable harm. n4 There are two primary purposes for the exhaustion of remedies requirement. First, exhaustion protects administrative agency authority by giving an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is brought into federal court and by discouraging disregard of the agency's procedures. Second, exhaustion promotes efficiency, because claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. n5

[2] Exhaustion Not Required When Administrative Remedy Is Alternative

Rule 57 specifically provides that declaratory relief does not require a lack of availability of other adequate relief. n1 Therefore, when Congress or a state legislature provides a secondary or alternative remedy, but has not mandated administrative review, a plaintiff has the option to pursue whatever remedy, including a declaratory relief action, that the plaintiff considers appropriate. n2 On the other hand, if Congress has explicitly required by statute the exhaustion of administrative remedies, the propriety of an administrative decision is not subject to judicial review until the administrative process has been completed. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJusticiabilityExhaustion of RemediesContractual RemediesCivil ProcedureJusticiabilityExhaustion of RemediesExceptionsCivil

ProcedureJusticiabilityExhaustion of RemediesFailure to ExhaustCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.23 (Matthew Bender 3d ed.)

(n2)Footnote 1. *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Management Co., 2006 U.S. App. LEXIS 13781, *13 (2d Cir. 2005)* .

(n3)Footnote 2. *Holasek v. United States Dep't of Justice, 123 F. Supp.2d 1126, 1129 (N.D. Ill. 2000)* (as jurisdiction matter, district court may not review administrative decisions of Immigration and Naturalization Service unless appellant has exhausted all administrative remedies available).

(n4)Footnote 3. *Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368, 2006 U.S. LEXIS 4891, at *13-*15 (2006)* .

(n5)Footnote 4. *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Management Co., 2006 U.S. App. LEXIS 13781, *14 (2d Cir. 2005)* .

(n6)Footnote 5. *Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368, 2006 U.S. LEXIS 4891, at *13-*15 (2006)* .

(n7)Footnote 1. *See Fed. R. Civ. P. 57.*

(n8)Footnote 2. *Coteau Props. Co. v. Department of Interior, 53 F.3d 1466, 1471-1472 (8th Cir. 1995)* (owner of coal field not required to pursue administrative remedies before seeking judicial review when governing statute did not require administrative review).

(n9)Footnote 3. *Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368, 2006 U.S. LEXIS 4891, at *13-*15 (2006)* ; *see Abbott Labs. v. Gardner, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.24

§ 25A.24 Declaratory Relief Not Available in Certain Casesn*

[1] Tax Cases

[a] Federal Taxation

The Declaratory Judgment Act specifically provides that declaratory relief is not available in federal taxation proceedings. In particular, declaratory relief is precluded from actions relating to federal taxes other than declaratory judgment actions relating to the status and classification of charitable organizations. n1 Declaratory judgment actions relating to the status and classification of charitable organizations may only be heard by the Court of Federal Claims. n2 The purpose of the exclusion of federal tax cases from the Declaratory Judgment Act is to protect the government's ability to assess and collect taxes free from pre-enforcement judicial interference. Therefore, controversies regarding the propriety or validity of a tax assessment or a collection dispute must be tested in a suit for a tax refund, rather than through judicial intervention under the Declaratory Judgment Act. n3

There are two significant exceptions to the exclusion: a person may obtain a judicial declaration regarding the propriety or validity of a tax assessment or collection either when the government cannot prevail on the merits under any circumstances or when an aggrieved party has no other means of obtaining judicial review, and the taxpayer will suffer irreparable injury without court intervention. n4

[b] State Taxation

The Declaratory Judgment Act does not expressly exclude declaratory judgments regarding state taxes. n5 However, such suits may not be heard by United States courts under the Tax Anti-Injunction Act, provided that state law provides for a plain, speedy, and efficient remedy in the courts of that state. n6 Furthermore. the Supreme Court has held that the Tax Anti-Injunction Act, which precludes enjoining, suspending, or restraining state tax collection, also prohibits declaratory judgment actions in connection with state law tax issues. n7 The Court stated that because Congress intended the Tax Injunction Act to prevent federal court interference with the assessment and collection of state taxes, the Act prohibits declaratory as well as injunctive relief. Consequently federal courts are without jurisdiction to declare state tax provisions unconstitutional or to issue injunctions against state authorities if the contestant has a plain, speedy, and efficient remedy in the state courts. n8 On the other hand, when the state remedies are not plain, speedy, and

efficient, the court may exercise its jurisdiction and grant appropriate declaratory relief. However, even when the Tax Anti-Injunction Act does not bar federal interference, the policies underlying the Act, such as principles of federal equity, should nonetheless be examined and may require withholding declaratory relief. n9

The Tax Anti-Injunction Act does not prevent a federal district court from adjudicating a suit that is brought by the United States to contest the legality of a state tax. n10 Nor does it prohibit a declaratory suit that is brought by a state or local taxing authority to collect tax, because a suit to collect tax is not one brought to restrain state action; therefore, it is not within the Act's description of suits that are barred from adjudication by federal courts. n11

[2] Other Cases

In addition to most tax cases, n1 declaratory relief is also not available in the following cases:

1. Bankruptcy cases. The Declaratory Judgment Act prohibits federal courts from granting declaratory relief with respect to bankruptcy proceedings other than proceedings to determine the tax liability of a bankrupt debtor. n2

2. Drug patent cases. The Act provides restrictions on the use of declaratory judgment action brought with respect to drug patents. n3

3. Certain cases regarding free trade countries. The Declaratory Judgment Act prohibits federal courts from holding proceedings for declaratory relief with respect to any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country, such as, Mexico or Canada. n4

4. State criminal cases. When a district court is precluded from issuing an injunction against a pending state court criminal proceeding, the court is also precluded from issuing declaratory relief stating that the state law on which the prosecution is based is unconstitutional, or is being applied in an unconstitutional manner. n5 A district court may not enjoin any pending state criminal proceeding if the party seeking the injunction has an adequate legal remedy and will not suffer irreparable injury. n6 Such a rule applies to declaratory relief as well as injunctive relief because a declaratory judgment would result in the same negative interference with and disruption of state proceedings as an injunction. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.25 (Matthew Bender 3d ed.)

(n2)Footnote 1. *28 U.S.C. § 2201(a)*; *see 26 U.S.C. § 7428*; *see also Commercial Nat'l Bank v. Demos, 18 F.3d 485, 490 (7th Cir. 1994)* (no declaration of rights available regarding federal tax issues).

(n3)Footnote 2. *28 U.S.C. § 1507*; *see 26 U.S.C. § 7428*.

(n4)Footnote 3. *California by Deukmejian v. Regan, 641 F.2d 721, 722-723 (9th Cir. 1981)* .

(n5)Footnote 4. *Bob Jones Univ. v. Simon, 416 U.S. 725, 737, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974)* ; *California by Deukmejian v. Regan, 641 F.2d 721, 723 (9th Cir. 1981)* .

(n6)Footnote 5. *See 28 U.S.C. § 2201(a)*.

(n7)Footnote 6. *See 28 U.S.C. § 1341*.

(n8)Footnote 7. *California v. Grace Brethren Church, 457 U.S. 393, 408, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982)* .

(n9)Footnote 8. *California v. Grace Brethren Church, 457 U.S. 393, 408, 411-414, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982)* .

(n10)Footnote 9. *Alcan Aluminum Ltd. v. Department of Revenue, 724 F.2d 1294, 1297-1298 (7th Cir. 1984)* .

(n11)Footnote 10. *Federal Reserve Bank v. Commissioner of Corps. & Taxation, 499 F.2d 60, 62-64 (1st Cir. 1974)* (Federal Reserve Bank could, in its own name, maintain declaratory judgment suit as to legality of state sales tax on materials used to construct bank building).

(n12)Footnote 11. *Jefferson County v. Acker, 527 U.S. 423, 433-435, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999)* .

(n13)Footnote 1. *See* [1], *above*.

(n14)Footnote 2. *28 U.S.C. § 2201(a)*; *see 11 U.S.C. §§ 505, 1146*.

(n15)Footnote 3. *28 U.S.C. § 2201(b)*; *see* 11 U.S.C. §§ 355, 360b.

(n16)Footnote 4. *28 U.S.C. § 2201(a)*; *see 19 U.S.C. §§ 2112, 3451*.

(n17)Footnote 5. *Bettencourt v. Board of Registration in Med., 904 F.2d 772, 777 (1st Cir. 1990)* .

(n18)Footnote 6. *Younger v. Harris, 401 U.S. 37, 41-44, 46, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* .

(n19)Footnote 7. *Hoover v. Wagner, 47 F.3d 845, 848-851 (7th Cir. 1995)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.25

§ 25A.25 Court's Discretion to Exercise Declaratory Relief Jurisdictionn*

[1] Entry of Declaratory Judgment Is Discretionary

Even if a district court has made a determination that it has subject matter jurisdiction, that a party has presented a justiciable actual controversy, and that declaratory relief is otherwise available, n1 the court must then determine whether to exercise its discretion to render a declaratory judgment. Because the Declaratory Judgment Act provides that a court *may* declare the rights and other legal relations of any interested party, n2 the court is not *required* to do so, and this statutory language confers on the federal district courts unique and substantial discretion in deciding whether to grant a declaratory judgment. n3 However, this discretion should be exercised with great circumspection when matters of public concern are involved n4 n5 or when a request for declaratory relief threatens to involve a federal court prematurely in constitutional issues fraught with uncertainty. n6 In this regard, the Supreme Court has categorized the Declaratory Judgment Act as an enabling act that grants discretion to the district courts to entertain declaratory relief actions, rather than an absolute right to the litigant. n7

This discretion is not unfettered, however, and a court may not decline to exercise its declaratory relief jurisdiction based on a whim or personal reservation. n8 If a party raises a timely objection, the court must articulate a valid reason for declining to exercise its discretion to enable appellate review. n9 If the record does not state the district court's reasoning after an appropriate objection has been registered, the case must be remanded to the district court to record its reasoning in a manner sufficient to permit the appellate court to properly apply the abuse of discretion standard of review. n10

All of the circuits have developed lists of the factors a district court should consider in determining whether to exercise jurisdiction over a declaratory relief action, based on the practical effect of granting declaratory relief. The five most common factors are: (1) whether the judgment would settle the controversy; (2) whether the judgment would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race for res judicata; (4) whether the use of a declaratory action would increase the friction between federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective. n11

For a complete discussion of the factors that a court should consider in the determination of whether to grant discretionary relief, see [2], *below*.

[2] Factors Considered in Exercise of Discretion

[a] Availability of Adequate Alternative Remedy

The availability of another adequate remedy does not in itself preclude declaratory relief. n1 However, the existence of another equally effective remedy at law may be considered as one factor in determining whether the court should exercise its declaratory relief jurisdiction. n1.1 Thus, the court should consider the availability of an alternative remedy as one of many potential factors in deciding whether declaratory relief affords a more effective means of resolving the dispute than other means. n2

In this regard, the court may dismiss a declaratory action if there is a pending state action in which all of the matters in controversy may be fully litigated. When a federal court is presented with an actual or potential state court action, the federal court should examine whether the entire controversy may be heard in that alternative forum. n3 For example, it was held that the district court properly dismissed a federal declaratory relief suit when the defendants in the declaratory relief action filed a subsequent state court action against the declaratory relief plaintiff-insurer and a construction company because the state court was the only forum in which the entire controversy could be resolved. In that case, the tort claim against the construction company was not removable and separate actions would be duplicative. n4

[b] Avoiding Forum Shopping and Procedural Fencing

The court should use its discretion to prevent a litigant from utilizing the Declaratory Judgment Act as a tool for forum shopping or for other procedural fencing. For example, the court should not allow a declaratory relief plaintiff to rush to file in federal court solely to evade the forum choice of the plaintiff in an underlying coercive claim or claim for damages (the declaratory judgment defendant). n4.1 When a case has limited connection to the declaratory relief forum, the court should not exercise its discretion to grant a declaratory judgment if the suit was merely filed as a preemptive measure. n5 If a court finds that a declaratory judgment action was brought in anticipation of a coercive suit for the mere purpose of gaining a territorial advantage, the court may consider it as a factor in declining declaratory jurisdiction. n6 If it is apparent from the pleadings that the plaintiff did not file the action in order to resolve uncertainty arising from threat of litigation, but rather it was engaged in forum shopping to gain a tactical territorial advantage and counteract defendant's future effort to choose a forum, the court may use this as a factor in favor of declining jurisdiction. n7

[c] Useful Purpose

A declaratory judgment is favored by the courts when the judgment will serve a useful purpose in clarifying the legal relations in issue and affording relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. On the other hand, a declaratory judgment is not favored if it will try particular issues without settling the entire controversy or interfere with an action which has already been instituted. n8 Furthermore, if the declarative relief sought will not accomplish any useful purpose, the court may exercise its discretion and decline to grant relief. n9 However, it should be noted that the existence of another equally effective remedy is not alone a ground for denying declaratory relief. n10

[d] Efficient Judicial Administration

The Supreme Court has stated that because of the unique nature of declaratory relief actions the general principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration. Consequently, federal courts need not find extraordinary circumstances to abstain from rendering declaratory judgments. n11 One of the primary aspects of efficient use of judicial resources is the avoidance of duplicative or piecemeal litigation. n12 Thus, it is uneconomical as well as inefficient for a federal court to proceed in a

declaratory judgment suit when another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. The court should avoid any such gratuitous interference with the orderly and comprehensive disposition of state court litigation. n13 A federal court should also decline to render a declaratory judgment based on an uncertain interpretation of the law, for example, if a diversity declaratory relief action would require the federal court to interpret state law and that law is unclear. n14

[e] Effect of Other Pending Action

The pendency of another federal or state action involving the same parties and issues is an important factor to be considered by the trial court in the exercise of its discretion in determining whether to grant or deny declaratory relief. The discretion to decline to hear a declaratory judgment action permits the court to stay, dismiss, or remand the action in favor of pending state court proceedings involving the same parties and issues. n15 However, the mere pendency of another action involving the same set of facts does not in and of itself preclude the exercise of declaratory jurisdiction. n16 In general, when an action is brought in one federal court and a later action is brought in another federal court or a state court, and both actions embrace the same issues, the first court has jurisdiction to proceed and enjoin the second prosecution, n17 in the absence of a balance of conveniences weighing in favor of the second suit or the existence of other special circumstances. n18

If a declaratory relief action is filed in federal court after a coercive action has been filed in state court, the federal court has discretion to refuse to exercise its declaratory judgment jurisdiction in favor of the pending state action. This principle is commonly referred to as the "first filed" or "first to file" rule. Under the first-filed rule, in cases of federal concurrent jurisdiction and absent exceptional circumstances, the court which first has possession of the subject matter must decide it. The rule allows a district court to transfer, stay or dismiss an action when a similar complaint has already been filed in another federal court.

In deciding whether to apply the rule, courts look to three threshold factors: the chronology of the two actions, the similarity of the parties, and the similarity of the issues. n19 The federal court should generally exercise its discretion by refusing to entertain a declaratory relief suit when a state court action is pending between the same parties that involves the same issues, n20 because the principle goal of the first-filed rule is to avoid duplicative litigation. n21 The court should depart from the first-filed rule only after careful consideration of the particular circumstances of a given case taken as a whole. n22 The court should consider whether special circumstances or a balance of the conveniences justifies proceeding with the declaratory relief action (the second filed action). n23 The party seeking to proceed with the declaratory relief action (the second filed action) has the burden of showing special circumstances or a balance of the conveniences that justifies proceeding with that second action. n24

[f] Promoting Settlement of Controversy

Declaratory relief is appropriate when a declaratory judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and the court should consider that factor in the exercise of its discretion. On the other hand, if declarative relief sought would not settle the controversy giving rise to the proceeding, the court may exercise its discretion and decline to grant relief. n25 Federal courts have a strong interest in promoting the amicable settlement of disputes. To penalize a litigant who has actively pursued settlement prior to filing by allowing the opposition to characterize the time utilized attempting a settlement as unreasonable delay would undermine the policy of promoting good faith settlement efforts. n26

[g] Avoiding of Court Conflicts

One of the purposes of the discretionary nature of the Declaratory Judgment Act is the promotion of harmonious federal-state relations in the administration of justice. n27 Thus, another factor the court may consider in the exercise of its discretion is whether allowing the federal declaratory relief action to proceed when a state proceeding has or will

soon be filed may injure federal-state relationships. In exercising discretion, district courts evaluate whether principles of federalism, comity, judicial efficiency, and avoidance of federal-state conflicts support federal jurisdiction. n28 In this regard, the *Eleventh Amendment*, as well as the public policies concerning federal-state relations, prevents a federal court from granting "notice relief" or a declaratory judgment against a state, in the absence of an ongoing violation of federal law. n29 Even if the exercise of federal jurisdiction does not violate the literal terms of the Constitution or of a federal statute, public policy concerns dictate that any actions which decrease the harmony existing between state and federal governments should be avoided. n30 In other words, federal courts should avoid gratuitous interference with the orderly and comprehensive disposition of state court litigation. n31

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsDiscretion

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.40 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *See §§ 25A.20-25A.24*.

(n3)Footnote 2. *28 U.S.C. § 2201(a)*.

(n4)Footnote 3. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604, 620 (2007)* (district courts have been given considerable discretion to decide whether to grant declaratory relief because facts bearing on usefulness of declaratory judgment remedy, and fitness of case for resolution, are peculiarly within their grasp); *see Wilton v. Seven Falls Co., 515 U.S. 277, 282-283, 286-287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* (because of unique nature of Declaratory Judgment Act, district courts have greater discretion in declaratory judgment actions; courts may decline to adjudicate otherwise justiciable declaratory relief cases).

(n5)Footnote 4. [Reserved]

(n6)Footnote 5. *Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1225-1226 (3d Cir. 1989)* .

(n7)Footnote 6. *Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995)* .

(n8)Footnote 7. *Wilton v. Seven Falls Co., 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* .

(n9)Footnote 8. *Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998)* .

(n10)Footnote 9. *Rowan Cos. v. Griffin, 876 F.2d 26, 28-30 (5th Cir. 1989)* .

(n11)Footnote 10. *Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225-1227 (9th Cir. 1998)* (after proper objection to court's refusal to exercise declaratory jurisdiction, district court must provide adequate record for review of decision).

(n12)Footnote 11. *See, e.g., N.Y. Times Co. v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006)* ; *Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd., 385 F.3d 1291, 1299 (10th Cir. 2004)* .

(n13)Footnote 1. *Fed. R. Civ. P. 57*.

(n14)Footnote 1.1. *Sigmon v. Appalachian Coal Props., LLC, 2007 U.S. Dist. LEXIS 5529, at *7 (E.D. Tenn. 2007)* .

(n15)Footnote 2. *St. Paul Fire & Marine Ins. Co. v. Runyon, 53 F.3d 1167, 1169 (10th Cir. 1995)* .

(n16)Footnote 3. *Psarianos v. Standard Marine, Inc., 12 F.3d 461, 463 (5th Cir. 1994)* , *cert. denied sub nom. Psarianos v. United Kingdom Mut. Steamship Assurance Ass'n (Berm), 511 U.S. 1142 (1994)* .

(n17)Footnote 4. *State Farm Fire & Cas. Co. v. Kirby, 919 F. Supp. 939, 943-946 (N.D. W. Va. 1996)* .

(n18)Footnote 4.1. *Ill. Cent. R.R. Co. v. Cain, 434 F. Supp. 2d 415, 421-422 (S.D. Miss. 2006)* ("forum shopping" factor weighed in favor of dismissal when plaintiff was motivated to file declaratory relief suit merely by desire to secure federal forum).

(n19)Footnote 5. *Federal Ins. Co. v. May Dep't Stores Co., 808 F. Supp. 347, 349-351 (S.D.N.Y. 1992)* (when declaratory relief suit was filed in response to notice of a planned lawsuit by plaintiff's opposition, federal action properly dismissed as forum shopping even before filing of state suit).

(n20)Footnote 6. *Federal Ins. Co. v. May Dep't Stores Co., 808 F. Supp. 347, 350 (S.D.N.Y. 1992)* .

(n21)Footnote 7. Clontech Labs., Inc. v. Life Techs., Inc., 2000 U.S. Dist. LEXIS 19320, at *10-12 (D. Md. Dec. 19, 2000) .

(n22)Footnote 8. *Hartford Cas. Ins. Co. v. BB & T Fin. Corp., 131 F. Supp.2d 752, 754 (W.D.N.C. 2001)* .

(n23)Footnote 9. *Bank of Am. NT & SA v. Riley, 940 F. Supp. 348, 351 n.5 (D.D.C. 1996) , aff'd without op., 132 F.3d 1480 (D.C. Cir. 1997)* (discretionary nature of declaratory relief makes it appropriate to consider whether relief would serve useful purpose).

(n24)Footnote 10. *Fed. R. Civ. P. 57*, Advisory Committee Note.

(n25)Footnote 11. *Wilton v. Seven Falls Co., 515 U.S. 277, 288-289, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* ; *see also Centennial Life Ins. Co. v. Poston, 88 F.3d 255, 257 (4th Cir. 1996)* (considerations of practical and wise judicial administration).

(n26)Footnote 12. *Nationwide Ins. v. Zavalis, 52 F.3d 689, 691-693 (7th Cir. 1995)* .

(n27)Footnote 13. *State Auto Ins. Cos., v. Summy, 234 F.3d 131, 134-135 (3d Cir. 2000)* (appellate court held that discretionary declaratory jurisdiction under Declaratory Judgment Act was improperly assumed because judicial efficiency was not promoted by consideration of same evidence by state and federal courts, especially because interpretation of exclusion clauses in insurance policies was unsettled under state law; furthermore, no federal issues were raised and no federal interests were promoted); *see Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., 655 F.2d 938, 943 (9th Cir. 1981)* (declaratory judgment in patent case could avoid multiple suits and considerable delay and uncertainty that could result from multiple proceedings deciding different aspects of broad patent controversy); *Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1224-1225 (9th Cir. 1998)* (noting that district court may decline to hear declaratory relief action when it would result in duplicative litigation).

(n28)Footnote 14. *Mitcheson v. Harris, 955 F.2d 235, 237-239 (4th Cir. 1992)* ; *see United States Liab. Ins. Co. v. Wise, 887 F. Supp. 348, 352 (D. Mass. 1995)* (court sua sponte declined to render declaratory judgment on insurance coverage partly because all issues were governed by unsettled and complex state law).

(n29)Footnote 15. *Wilton v. Seven Falls Co., 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* .

(n30)Footnote 16. *Allstate Ins. v. Shelton, 105 F.3d 514, 515 (9th Cir. 1997)* .

(n31)Footnote 17. *Sandefer Oil & Gas, Inc. v. Duhon, 871 F.2d 526, 529 (5th Cir. 1989)* .

(n32)Footnote 18. *Diamond State Ins. Co. v. Fame Operating Co., 917 F. Supp. 736, 738 (D. Nev. 1996)* (court

properly declined to exercise declaratory relief jurisdiction when insureds' personal injury suits in state court were parallel to insurer's declaratory relief suit, issues overlapped, federal record lacked sufficient facts on which to base judgment, and insurer could have sought declaratory relief in state court).

(n33)Footnote 19. *Butera, Beausang, Cohen & Brennan, P.C. v. Ryan, 2000 U.S. Dist. LEXIS 17878, at *6 (E.D. Pa. Dec. 11, 2000)* .

(n34)Footnote 20. *Centennial Life Ins. Co. v. Poston, 88 F.3d 255, 258 (4th Cir. 1996)* .

(n35)Footnote 21. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* .

(n36)Footnote 22. *Federal Ins. Co. v. May Dep't Stores Co., 808 F. Supp. 347, 350 (S.D.N.Y. 1992)* .

(n37)Footnote 23. *Reliance Ins. Co. v. Bend'N Stretch, Inc., 935 F. Supp. 476, 477 (S.D.N.Y. 1996)* .

(n38)Footnote 24. *First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 79 (2d Cir. 1989)* .

(n39)Footnote 25. *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994)* , *cert. denied, 513 U.S. 919 (1994)* (court must consider extent to which requested declaration would be of practical guidance in settling underlying controversy).

(n40)Footnote 26. *Capitol Records, Inc. v. Optical Recording Corp., 810 F. Supp. 1350, 1354-1355 (S.D.N.Y. 1992)* .

(n41)Footnote 27. *NAP, Inc v. Shuttletex, Inc., 112 F. Supp.2d 369, 372 (S.D.N.Y. 2000)* .

(n42)Footnote 28. *United States Liab. Ins. Co. v. Wise, 887 F. Supp. 348, 352 (D. Mass. 1995)* (court declined jurisdiction to avoid unnecessary and otherwise inevitable federal-state entanglement caused by overlapping issues of law and fact).

(n43)Footnote 29. *Powder River Basin Res. Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995)* .

(n44)Footnote 30. *Mitcheson v. Harris, 955 F.2d 235, 238 (4th Cir. 1992)* .

(n45)Footnote 31. *Brillhart v. Excess Ins. Co., 316 U.S. 491, 495, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942)* .

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PART II. AVAILABILITY OF DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure §§ 25A.26through 25A.39

[Reserved]

§§ 25A.26[Reserved]

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.40

§ 25A.40 Initiation of Request for Declaratory Reliefn*

An action for a declaratory judgment is treated as a civil action subject to the provisions of the Federal Rules of Civil Procedure n1 Thus, a request for declaratory relief may be commenced by filing a complaint pursuant to Rule 3. n2 However, when an action for damages or injunctive relief has already been initiated, a appropriate claim for declaratory relief may be made by a proper pleading, such as, a counterclaim, by joinder of parties, or by amendment to an original pleading. n3 When raised by counterclaim or cross-claim, an action for declaratory relief must satisfy Rule 13, in addition to the jurisdictional requirements applicable to declaratory judgments. n4 When a declaratory action is initiated by complaint, a summons in proper form must be served under the process requirements specified in Rule 4. n5

When a party makes a request for damages or injunctive relief, and the court decides not to grant either form of relief, the court may sua sponte make a declaration of rights if that relief serves a useful purpose, even if no party has formally requested declaratory relief. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.60 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 57.*

(n3)Footnote 2. *Evanston Ins. Co. v. Merin, 598 F. Supp. 1290, 1300-1301 (D.N.J. 1984)* (in declaratory judgment action, federal claim must appear on face of well-pleaded complaint); *Barmat, Inc. v. United States, 159 F.R.D. 578, 582 (N.D. Ga. 1994)* (party must request declaratory judgment by filing complaint or petition); *see 28 U.S.C. § 2201(a)*; *Fed. R. Civ. P. 3.*

(n4)Footnote 3. *See Fed. R. Civ. P. 13*; *see also Fed. R. Civ. P. 15.*

(n5)Footnote 4. *Super Sack Mfg. Corp. v. Chase Packaging Corp., 57 F.3d 1054, 1058-1060 (Fed. Cir. 1995)* , *cert. denied, 516 U.S. 1093 (1996)* (declaratory judgment counterclaim).

(n6)Footnote 5. *See Putnam v. Ickes, 78 F.2d 223, 224 (D.C. Cir. 1935)* , *cert. denied, 296 U.S. 612 (1935)* (declaratory action dismissed with respect to nonresident defendants because service improper).

(n7)Footnote 6. *Fed. R. Civ. P. 57*, Advisory Committee Note; *see Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995)* (declaratory relief may be granted by court on own motion).

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.41

§ 25A.41 Request for Declaratory Relief Subject to Ordinary Rules of Pleadingn*

The general rules of pleading are applicable to an action for declaratory relief. Therefore, if there are any special heightened pleading requirements for the underlying dispute, the requesting party must comply with those requirements. For example, in one case a plaintiff insurer filed a declaratory judgment action against five defendants seeking a declaration that marine cargo insurance policies were null and void and should have been rescinded. The court denied the defendant insured's motion to dismiss because the plaintiff sufficiently pleaded a claim for violation of the defendant insured's duty of utmost good faith under maritime law, including a claim of alleged fraudulent omission which requires a heightened pleading standard under Rule 9(b). n1

A declaratory judgment action is simply a residual, all-purpose writ or action; it is neither legal nor equitable but operates under either or both theories depending on the facts. n2 The pleadings must show that an actual case or controversy is presented, but in a declaratory action there is no need to show an accomplished injury, n3 nor is it necessary to allege irreparable harm such as would entitle the party to injunctive relief. n4 Similarly, there is no need to show the lack of another adequate remedy. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.60 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Thomas v. NASL Corp., 2000 U.S. Dist. LEXIS 16761, at *17-19 (S.D.N.Y. Nov. 15, 2000)* (under Rule 9, plaintiff must (1) detail statements that plaintiff contends were fraudulent, (2) identify speaker, (3) state where and when statements were made, and (4) explain why statements were fraudulent).

(n3)Footnote 2. *Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* (declaratory relief may be legal or equitable depending on basic nature of underlying issues and remedy sought.).

(n4)Footnote 3. *Kunkel v. Continental Cas. Co., 866 F.2d 1269, 1273-1274 (10th Cir. 1989)* (declaratory judgment designed to enable parties uncertain of their legal rights to seek statement by court regarding such rights before injury or loss occurs).

(n5)Footnote 4. *Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1125-1126 (1st Cir. 1981)* (declaratory relief does not require showing of elements necessary for grant of preliminary injunction, such as irreparable harm, balance of injuries, and public interest).

(n6)Footnote 5. *See 28 U.S.C. § 2201(a)* (declaratory relief available whether further relief is or could be sought); *Fed. R. Civ. P. 57* (existence of another adequate remedy does not preclude a judgment for declaratory relief).

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.42

§ 25A.42 Contents of Complaint or Pleadingn*

A complaint or other pleading for declaratory relief must precisely state the declaratory judgment sought n1 and must allege both the facts that establish that the claim is otherwise within the subject matter jurisdiction of the federal courts (either federal question jurisdiction or diversity jurisdiction) n2 and the facts that establish the existence of an actual controversy, including facts showing standing and ripeness. n3 As in other civil actions, the scope of declaratory relief that may be rendered is limited to the issues raised by the pleadings and the evidence. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.60 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 57*, Advisory Committee Note.

(n3)Footnote 2. *FW/PBS, Inc., v. City of Dallas, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)* .

(n4)Footnote 3. *Burlington N. R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1243 (9th Cir. 1991)* .

(n5)Footnote 4. *Caterpillar Tractor Co. v. International Harvester Co., 106 F.2d 769, 771-772 (9th Cir. 1939)* ; *see Fed. R. Civ. P. 54(c).*

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.43

§ 25A.43 Venue

There is no particular or special venue statute governing declaratory actions. n1 Therefore, venue of an action for declaratory relief is determined by the same principles that are applicable to other civil actions, and if an action is for declaratory relief only, the general venue statute controls, rather than the statute controlling the particular underlying substantive claim. Thus, a declaratory judgment action alleging that a patent is invalid and not infringed is governed by the general venue statute, rather than by the particular venue statute for patent infringement. n2 When a timely objection to improper venue is made, and the court finds that venue is improper, the court may dismiss n3 or transfer venue under the transfer statute, n4 A declaratory judgment action may also be transferred for convenience under that statute. n5

As in other cases, the party seeking a transfer of a declaratory relief action under the transfer statute has the burden of demonstrating that the transferee court is clearly more convenient. In determining the convenience of the parties and witnesses, the court considers: (1) the plaintiff's choice of forum; (2) the situs of material events; (3) the relative ease of access to sources of proof; (4) the convenience of the witnesses; and (5) the convenience of the parties in litigating in the respective forums. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Emerson Elec. Co. v. Black & Decker Mfg. Co., 606 F.2d 234, 238 (8th Cir. 1979)* .

(n2)Footnote 2. *VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1583 (Fed. Cir. 1990)* , *cert. denied, 499 U.S. 922 (1990)* ; *see also Millennium Prods., Inc. v. Gravity Boarding Co., 127 F. Supp.2d 974, 980 (N.D. Ill. 2000)* .

(n3)Footnote 3. *See Millennium Prods., Inc. v. Gravity Boarding Co., 127 F. Supp.2d 974, 980-981 (N.D. Ill. 2000)* .

(n4)Footnote 4. *See 28 U.S.C. § 1406(a).*

(n5)Footnote 5. *Abbott Labs. v. Gardner, 387 U.S. 136, 155, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* ; *see 28 U.S.C. § 1404(a).*

(n6)Footnote 6. *Millennium Prods., Inc. v. Gravity Boarding Co., 127 F. Supp.2d 974, 980 (N.D. Ill. 2000)* .

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.44

§ 25A.44 Joindern*

[1] Parties

The federal rules generally are applicable to declaratory actions, and the Declaratory Judgment Act contains no provision regarding parties. n1 Consequently, the general principles governing joinder of persons needed for a just adjudication, as specified in Rule 19, are applicable in declaratory judgment actions. The compulsory joinder rule is an exception to the common practice of permitting the plaintiff to determine who should be a party to a lawsuit. Because a court may not enter an equitable judgment in the absence of an indispensable party, joinder is required in a declaratory action just as in any other civil action. n2 However, given the flexibility of the declaratory judgment procedure, there may be times when the court will be able to proceed without prejudicing the rights of absent persons, when it would be difficult to do so under the more strict procedure usually applicable. On the other hand, because a declaratory relief action is to serve a useful purpose and put an end to the controversy, all persons interested in the subject matter of the litigation should be made parties. Which competing principle should control is resolved by the proper exercise of discretion of the court. n3

[2] Claims

Even though the Declaratory Judgment Act makes no specific provision for the joinder of claims, courts have held that liberal rules of joinder set forth in Rule 18 are applicable to declaratory actions in the same way that they are in other civil actions. For example, a claim for injunctive relief is typically joined with one for declaratory relief. n1 If there is no independent basis of federal jurisdiction over the joined claims, the district court may adjudicate the claim under the principles of supplemental jurisdiction. n2

A party seeking declaratory relief by way of counterclaim must determine, based on the underlying transaction and the specific declaration sought, whether the newly interposed request is of a compulsory or permissive nature and whether the requested declaration may be granted or enforced in the absence of third parties over whom the court lacks jurisdiction. A party asserting a request for declaratory relief in a counterclaim or cross-claim must also comply with the general rules of pleading. n3 In addition to compulsory claims, and because of the liberal joinder of claims rule, a pleader in a declaratory relief action may join as many permissive counterclaims as are appropriate. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.06[3], [4] (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 57.*

(n3)Footnote 2. *State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co., 518 F.2d 292, 294 (10th Cir. 1975)* .

(n4)Footnote 3. *Abbott Labs. v. Gardner, 387 U.S. 136, 153, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* .

(n5)Footnote 1. *Petrocom License Corp. v. Federal Communications Comm'n, 2001 U.S. Dist. LEXIS 600, at *7 (E.D. La. Jan. 18, 2001)* .

(n6)Footnote 2. *See 28 U.S.C. § 1367.*

(n7)Footnote 3. *See Thunder Basin Coal Co. v. TUCO, Inc., 156 F.R.D. 665, 672-673 (D. Wyo. 1994)* , *aff'd on other grounds, 104 F.3d 1205 (10th Cir. 1997)* ; *see also Fed. R. Civ. P. 8.*

(n8)Footnote 4. *Fed. R. Civ. P. 18*; *see, e.g., Carbon Fuel Co. v. USX Corp., 867 F. Supp. 414, 418 (S.D. W. Va. 1994)* (in declaratory judgment action on contract to assume payment of employee health benefits, court allowed defendant to raise permissive counterclaims against third-party defendants for declaratory judgment on separate agreements by third-parties to assume payment of employee health benefits).

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.45

§ 25A.45 Expedited Proceduren*

Rule 57 permits federal courts to expedite the hearing and advance declaratory relief cases on the calendar. n1 This provision of the rule enables a court to speed adjudication in a proper case and, thus, prevent the accrual of damages or otherwise further the remedial purposes of the Declaratory Judgment Act by an early adjudication. However, the conscientious efforts of the district court to expedite the disposition of declaratory action litigation may not circumvent the determinations of the requirements under the Act, such as, determinations regarding jurisdiction and consideration of the discretionary factors regarding declaratory relief. Thus, expedited decisions in declaratory judgment actions must yield to considerations of practicality and wise judicial administration. Whether declaratory relief should be granted "will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.63 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 57.*

(n3)Footnote 2. *State Auto Ins. Cos. v. Summy, 234 F.3d 131, 136 (3d Cir. 2000)* (court could not overlook strong factors militating against exercise of jurisdiction over this declaratory judgment action, and no federal interests were promoted by deciding case in federal court); *Anderson v. Pictorial Prods., Inc., 232 F. Supp. 181, 182 (S.D.N.Y. 1964)* (plaintiff's significant delay in sending former employer claim indicated that action was not so urgent as to justify advancing declaratory relief suit before other litigation).

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.46

§ 25A.46 Jury Trialn*

As is the case in other civil actions, the *Seventh Amendment* preserves the right of the parties to a jury trial in that the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. n1 An issue is triable by jury under the *Seventh Amendment* if it is legal in nature as opposed to equitable. Declaratory relief may be legal or equitable depending on the basic nature of the underlying issues and the remedy sought. In determining whether a claim for declaratory judgment involves a demand in law or equity, the court must examine how the claim would have arisen had it not been raised in a declaratory judgment action. For example, an action to recover attorney's fees pursuant to a contract presents traditional legal issues which may be submitted to a jury. n2

Because Rule 57 specifically provides that a jury trial may be demanded under the circumstances and in the manner provided by Rules 38 and 39, n3 a party claiming a right to a jury trial must make a timely written demand; otherwise, the right is waived. Other aspects of jury trial practice in declaratory judgment actions are also governed by the provisions of the federal rules that are generally applicable to civil actions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice,* § 57.64 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Fed. R. Civ. P. 57*; *see Fed. R. Civ. P. 38*, *39*.

(n3)Footnote 2. *TXI Operations, L.P. v. Klein, 2000 U.S. Dist. LEXIS 15958, at *3 (E.D. La. Oct. 20, 2000)* (when plaintiff sought declaratory judgment that it was not liable for attorney's fees allegedly due under class action settlement agreement entered in prior litigation, plaintiff was entitled to jury, because settlement agreement constitutes contract, and nature of suit involved determination of contractual legal rights).

(n4)Footnote 3. *Fed. R. Civ. P. 57.*

(n5)Footnote 4. *United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984)* .

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.47

§ 25A.47 Burden of Proofn*

[1] Jurisdictional Facts

The party requesting declaratory relief carries the burden of proving all the requirements for declaratory relief, n1 including demonstrating that the cause of action complies with the jurisdictional requirements of Article III of the Constitution and the Declaratory Judgment Act. n2 In the same way, any defendant asserting federal removal jurisdiction has the burden of proving all jurisdictional facts in declaratory relief removal cases. n3 Once the party has met this burden, courts will deem that jurisdiction continues, absent further information. Although a court does not ordinarily look beyond the face of the complaint to determine jurisdiction, if the declaratory relief defendant or the court raises questions about the factual predicates to jurisdiction, the party invoking jurisdiction may be required to support the jurisdictional allegations with competent proof. n4 For example, if a declaratory relief defendant or the court makes a factual challenge to the court's jurisdiction, the court may consider affidavits and other evidence to determine whether the court is authorized to hear the case. n5

[2] Elements of Substantive Claim

When jurisdiction is based on federal question jurisdiction, the burden of proof as to the substantive right involved in the declaratory relief suit is governed by federal law. n1 When federal subject matter jurisdiction is based on diversity jurisdiction, courts must look to the applicable state law to determine which party bears the burden of proving the facts. n2

While legal principles generally require that the party commencing an action has the burden of proving the averments of the complaint, a flexible approach has been adopted by the courts because in many declaratory judgment actions the traditional positions of the plaintiff and defendant are transposed. In such cases, the burden depends on factors, such as, the nature of the relief sought, and which party asserted the affirmative of a particular issue. n3 For example, in a patent case an issued patent is presumed to be valid, and the party challenging the validity of the patent bears the burden of proving invalidity by clear and convincing evidence, regardless of whether the plaintiff or defendant is the challenging party. n4 However, when the positions of the plaintiff and defendant are not changed by the circumstances of the declaratory relief suit, the burden of proof is the same as in any other case: the plaintiff bears the burden of proof on the plaintiff's prima facie case. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.62 (Matthew Bender 3d ed.)

(n2)Footnote 1. *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 95-98, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993)* (party seeking declaratory judgment has burden of demonstrating that case is justiciable).

(n3)Footnote 2. *See § 25A.20* et seq.

(n4)Footnote 3. *Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon Lijn, Inc., 709 F. Supp. 77, 78 (S.D.N.Y. 1989)* ; *see Shell Oil Co. v. Amoco Corp., 970 F.2d 885, 888 (Fed. Cir. 1992)* (declaratory judgment plaintiff must establish actual controversy on totality of the circumstances surrounding claim).

(n5)Footnote 4. *NLFC, Inc. v. Devcom Mid-Am., Inc., 45 F.3d 231, 237 (7th Cir. 1995)* , *cert. denied, 515 U.S. 1104 (1995)* .

(n6)Footnote 5. *International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700, 711 (3d Cir. 1982)* .

(n7)Footnote 1. *Board of Regents of Univ. of Neb. v. Dawes, 522 F.2d 380, 383-384 (8th Cir. 1975)* , *cert. denied, 424 U.S. 914 (1976)* (declaratory relief defendant class had burden of establishing unlawful discrimination as issue was central issue of suit).

(n8)Footnote 2. *American Nat'l Fire Ins. Co. v. Rose Acre Farms Inc., 911 F. Supp. 366, 369 (S.D. Ind. 1995)* , *aff'd on other grounds, 107 F.3d 451 (7th Cir. 1997)* (applicable state law determines burden of proof in diversity cases; state law requires that party seeking declaratory judgment carries burden of proving its propriety).

(n9)Footnote 3. *Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1174-1176 (3d Cir. 1976)* , *cert. denied, 429 U.S. 1053 (1977)* .

(n10)Footnote 4. *Rosco, Inc. v. Mirror Lite Co. 139 F. Supp. 2d 287 (E.D.N.Y. 2001)* (in patent, copyright, and trademark cases, courts have generally recognized that any role reversal occasioned by declaratory relief should not shift burden of proof from manner in which it would be assigned in coercive infringement suit).

(n11)Footnote 5. *Sims v. Amos, 365 F. Supp. 215, 220 n.1 (M.D. Ala. 1973)* , *aff'd without opinion, Wallace v. Sims, 415 U.S. 902 (1974)* .

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3-25A Moore's Manual--Federal Practice and Procedure § 25A.48

§ 25A.48 Procedural Considerations in Typical Casesn*

[1] Insurance Actions

Insurance companies often institute declaratory relief actions to settle issues between the insurance carriers and their insureds or third parties involving the validity or effect of a liability insurance policy, n1 whether an insurance policy covers existing or anticipated personal injury or other tort litigation, n2 or whether the insurer owes its insured a duty to defend or indemnify when the issue of coverage is unsettled. n3 Insurance carriers may also seek declaratory relief as to the rights, obligations, and respective liability between insurance carriers. n4 However, if the declaratory relief suit is filed before the underlying liability of the insured is established, a court may determine that the declaratory relief action is not ripe and that it is hypothetical. n5

The beneficiary of an insurance policy may file a declaratory judgment action to determine whether any payment or obligation to pay is owed under the policy. n6 In a similar way, a third party injured by an insured may file a declaratory judgment action to determine whether any payment or obligation to pay is owed under an insurance policy. However, when a third party allegedly injured by the insured initiates a declaratory judgment action to determine entitlement to the policy proceeds, a claim against the insurance company may be premature until a judgment has been obtained against the insured. Even though an actual controversy may exist between an injured third party and a tortfeasor's liability insurance carrier, the filing of a declaratory relief suit against the insurer before the liability of the insured is determined raises questions that may not only be speculative, but that may be prejudicial when joined to or tried with the underlying liability suit. n7

It should be noted that despite the existence of federal jurisdiction and a justiciable controversy, courts are still entitled to exercise their jurisdiction and deny declaratory relief. In the field of insurance, the most common factor causing courts to refuse to entertain declaratory judgment suits is whether parallel state court proceedings are pending that would adequately resolve the dispute. n8

[2] Intellectual Property Actions

[a] Trademark Actions

A declaratory relief action is particularly useful in a trademark controversy because such an action can promptly resolve the conflict when the alleged owner of a trademark right threatens to sue for infringement. n1 The actual controversy requirement does not require engaging in allegedly infringing conduct; rather it is sufficient for the plaintiff to show the imminent intent and ability to use the disputed mark. n2 An action for a declaration of the validity, invalidity, or non-infringement of a federally registered trademark may be filed in federal court without regard to the citizenship of the parties and without the necessity of establishing any jurisdictional amount, even though trademarks are also protected by state law. n3 A threat to sue specifically based on federal law, in contrast to a threat to sue under state law, is also not ordinarily required to establish federal jurisdiction. n4 However, when federal and state law regarding a potential claim of trademark infringement overlap, a party who anticipates seeking relief by way of a federal declaratory judgment action should identify the federal grounds on which the request for relief is based, as well as describe the imminence of the claim of infringement. n5

[b] Patent Actions

Patent actions are commonly filed in the form of a request for declaratory relief because the court may declare whether a party has a vested, legally recognizable interest in particular intellectual property and, if so, whether or not an infringement of that interest has occurred. n6 Usually, the action for declaratory relief is filed by either the patent holder or an alleged infringer. A claim by a patent holder that another person is infringing a patent is clearly appropriate for declaratory relief, because the only alternative would be for competitors to pay royalties. n7 Also, competitors facing or threatened with an infringement claim may seek a declaratory judgment that the patent is invalid; the only alternative would be for competitors to incur liability for patent infringement or terminate the enterprise. n8

Under the "actual controversy" requirement applicable to declaratory relief actions, a court is prohibited from rendering any decision regarding infringement or potential infringement with respect to products that are not specifically before the court. n9 An action for a declaration of the invalidity or infringement of a patent is determined by reference to the federal patent law. n10 Therefore, a person may prosecute such an action regardless of the citizenship of the parties and without the necessity of establishing any jurisdictional amount. n11

Special venue statutes may apply to declaratory relief actions involving patents. In this regard, a patent holder may file a declaratory suit alleging infringement where the defendant resides or where the defendant committed acts of infringement and has a regular place of business. However, a suit seeking a declaration of noninfringement and/or patent invalidity is subject to the general venue statute, n12 which allows suit in a judicial district (1) where any defendant resides if all defendants reside in the same state; (2) where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is located; or (3) where any defendant may be found, if no other district exists in which the action may otherwise be brought. n13

[c] Copyright Actions

A person in a copyright dispute will often use the Declaratory Judgment Act to obtain a court declaration regarding whether a party possesses a legally recognized interest in the intellectual property and, if so, whether there has been an infringement of the interest. The Declaratory Judgment Act provides an effective method of resolving such an issue because a party accused of infringement, or that may imminently be subject to a suit for infringement, may seek a declaration that the asserted copyright is invalid or that there has been no infringement.

An action for a declaration of the validity, invalidity, or non-infringement of a copyright arises under federal copyright law. n14 Therefore, a declaratory relief copyright action may be maintained regardless of the citizenship of the parties and without the necessity of establishing any jurisdictional amount. However, as in all declaratory judgment actions, the party seeking the declaration of invalidity or non-infringement must demonstrate the existence of a justiciable controversy. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewEvidenceProcedural ConsiderationsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.80 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Home Ins. Co. v. Townsend, 22 F.3d 91, 92 (5th Cir. 1994)* (action commenced by insurer seeking recission of professional liability policy on ground that insured attorney had made material misrepresentations in application).

(n3)Footnote 2. *State Farm Fire & Cas. Co. v. Kirby, 919 F. Supp. 939, 942-946 (N.D. W. Va. 1996)* .

(n4)Footnote 3. *American States Ins. Co. v. Bailey, 133 F.3d 363, 368-369 (5th Cir. 1998)* .

(n5)Footnote 4. *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 747-749 (11th Cir. 1991)* (declaratory judgment action by excess insurer to determine whether primary insurer was liable to indemnify it for coverage provided to insured).

(n6)Footnote 5. *Century Indem. Co. v. McGillacuty's, Inc., 820 F.2d 269, 270 (8th Cir. 1987)* .

(n7)Footnote 6. *Kelly v. Metropolitan Life Ins. Co., 352 F. Supp. 270, 274 (S.D.N.Y. 1972)* .

(n8)Footnote 7. *Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 680-682 (7th Cir. 1992)* , *aff'd on other grounds, 7 F.3d 93 (7th Cir. 1993)* .

(n9)Footnote 8. *See Hartford Cas. Ins. Co. v. BB & T Fin. Corp., 131 F. Supp.2d 752, 754 (W.D.N.C. 2001)* (discussing at length factors to be considered by court).

(n10)Footnote 1. *Rosco, Inc. v. Mirror Lite Co. 139 F. Supp.2d 287 (E.D.N.Y. 2001)* (in patent, copyright, and trademark cases, courts have generally recognized that any role reversal occasioned by declaratory relief should not shift burden of proof from manner in which it would be assigned in coercive infringement suit).

(n11)Footnote 2. *Starter Corp. v. Converse, Inc., 84 F.3d 592, 596 (2d Cir. 1996)* .

(n12)Footnote 3. *See PHC, Inc. v. Pioneer Healthcare, Inc., 75 F.3d 75, 78-79 (1st Cir. 1996)* .

(n13)Footnote 4. *See PHC, Inc. v. Pioneer Healthcare, Inc., 75 F.3d 75, 78-79 (1st Cir. 1996)* .

(n14)Footnote 5. *Trippe Mfg. Co. v. American Power Conversion Corp., 46 F.3d 624, 627-628 (7th Cir. 1995)* .

(n15)Footnote 6. *See, e.g., Dataline, Inc. v. MCI Worldcom Network Servs., Inc., 2001 U.S. Dist. LEXIS 950, at *79 (S.D.N.Y. Feb. 6, 2001)* .

(n16)Footnote 7. *Hanes Corp. v. Millard, 531 F.2d 585, 592 (D.C. Cir. 1976)* .

(n17)Footnote 8. *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 95-97, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993)* .

(n18)Footnote 9. *Laitram Corp. v. Cambridge Wire Cloth Co., 919 F.2d 1579, 1580-1582 (Fed. Cir. 1990)* , *cert. denied, 506 U.S. 831 (1992)* .

(n19)Footnote 10. *Modern Computer Corp. v. Ma, 862 F. Supp. 938, 943 (E.D.N.Y. 1994)* (citing **Moore's Federal Practice**).

(n20)Footnote 11. *28 U.S.C. § 1338(a).*

(n21)Footnote 12. *United States Aluminum Corp. v. Kawneer Co., 694 F.2d 193, 195 (9th Cir. 1982)* .

(n22)Footnote 13. *28 U.S.C. § 1391.*

(n23)Footnote 14. *State of Texas v. West Publ'g Co., 882 F.2d 171, 175-177 (5th Cir. 1989)* , *cert. denied, 493 U.S. 1058 (1990)* .

(n24)Footnote 15. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555-1556 (9th Cir. 1989)* .

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PART VI Trial and Judgment
CHAPTER 25A DECLARATORY JUDGMENT
PART III. PROCEDURES TO OBTAIN DECLARATORY RELIEF

3-25A Moore's Manual--Federal Practice and Procedure § 25A.49

§ 25A.49 Appellate Review of Declaratory Relief Decisionsn*

[1] Scope of Appealable Declaratory Relief Orders

A declaratory judgment issued by a federal court has the force and effect of a final judgment or decree. n1 A declaratory judgment binds the parties and is res judicata in subsequent proceedings. Therefore, a declaratory judgment is subject to appellate review. n2 A dismissal of a declaratory judgment action is also a final judgment that is subject to immediate appeal. n3 Furthermore, the requirements applicable to the appellate review of declaratory judgments are essentially the same as are applicable to other types of civil cases. n3.1 However, a remand of a declaratory judgment action to state court is appealable only if it is deemed an "exceptional" remand, which means that it is a remand based on grounds other than lack of subject-matter jurisdiction or defect in removal procedure. n4

[2] Standard for Review of Declaratory Relief Orders

[a] Court's Discretion to Hear Declaratory Relief Action

When a district court with proper subject matter jurisdiction makes a determination whether to exercise its discretion to hear a declaratory judgment action, a party may seek review of the propriety of that determination. n1 A party may appeal either the court's decision to exercise its jurisdiction and hear a declaratory judgment claim n1.1 or to decline to exercise its discretion. n2

The court's decision to exercise or decline its declaratory relief jurisdiction is reviewed only for abuse of discretion. n2.1 Thus, for example, when a party appealed a decision to decline to exercise jurisdiction over a party's federal declaratory judgment claim regarding construction of an ordinance, the appellate court reviewed that decision for abuse of discretion. n3 When a court's refusal to entertain a suit for declaratory relief is reviewed for abuse of discretion, such abuse may encompass either an outright mistake of law or a serious misjudgment in the weighing of pertinent considerations. n4

[b] Substantive Determinations

In addition to its decision whether to exercise its discretion to hear a declaratory judgment claim, a party in a

declaratory judgment suit may appeal the judgment itself and request review of the substantive issues decided by the judgment. The scope of appellate review of the substance of the judgment depends on whether a particular determination is a matter of fact or law; however, the principles are the same as with other decisions of the district courts in civil cases. Thus, legal questions are reviewed de novo, n5 and findings of fact are reviewed with the more deferential standard known as clear error, under which the trial court will be reversed only if its factual findings were clearly erroneous. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsAppellate Review

FOOTNOTES:
(n1)Footnote *. For further discussion, see 12 *Moore's Federal Practice*, § 57.100 et seq. (Matthew Bender 3d ed.)

(n2)Footnote 1. *Nautilus Ins. Co. v. 8160 South Mem. Drive, LLC, 436 F.3d 1197, 1199 (10th Cir. 2006)* ; *see 28 U.S.C. § 2201.*

(n3)Footnote 2. *See Alameda Films S A De C V v. Authors Rights Restoration Corp., 331 F.3d 472, 476 (5th Cir. 2003)* ; *see also Fed. R. Civ. P. 54(b).*

(n4)Footnote 3. *Sierakowski v. Ryan, 223 F.3d 440, 441-442 (7th Cir. 2000)* .

(n5)Footnote 3.1. *Nautilus Ins. Co. v. 8160 South Mem. Drive, LLC, 436 F.3d 1197, 1199 n.1 (10th Cir. 2006)* (citing **Moore's Federal Practice**); *see 28 U.S.C. § 2201.*

(n6)Footnote 4. *Huth v. Hartford Ins. Co. of the Midwest, 298 F.3d 800, 802 (9th Cir. 2002)* .

(n7)Footnote 1. *See Nautilus Ins. Co. v. 8160 South Mem. Drive, LLC, 436 F.3d 1197, 1199 (10th Cir. 2006)* .

(n8)Footnote 1.1. *American States Ins. Co. v. Bailey, 133 F.3d 363, 368 (5th Cir. 1998)* .

(n9)Footnote 2. *Wilton v. Seven Falls Co., 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)* (district court properly abstained from hearing case brought under Declaratory Judgment Act as matter of discretion).

(n10)Footnote 2.1. *See Nautilus Ins. Co. v. 8160 South Mem. Drive, LLC, 436 F.3d 1197, 1199 (10th Cir. 2006)* .

(n11)Footnote 3. *Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 389-390 (5th Cir. 2001)* .

(n12)Footnote 4. *Hartford Fire Ins. Co. v. Rhode Island Pub. Transit Auth., 233 F.3d 127, 130 (1st Cir. 2000)* .

(n13)Footnote 5. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1040 (8th Cir. 2000)* (initial question of whether contract is ambiguous is question of law to be determined by trial court, and appellate court must review that determination de novo).

(n14)Footnote 6. *See Nautilus Ins. Co. v. 8160 South Mem. Drive, LLC, 436 F.3d 1197, 1199 n.1 (10th Cir. 2006)* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES

3-26 Moore's Manual--Federal Practice and Procedure 26.syn

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PART VI Trial and Judgment
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PART I. RELIEF FROM JUDGMENT
A. RELIEF FROM CLERICAL ERRORS IN JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.01

§ 26.01 Timetable for Post-Judgment Proceduresn*

Motion to alter or amend judgment	Within 28 days after entry of judgment. Rule 59(e). See Ch. 24, *New Trials and Harmless Error*.
Motion to correct clerical mistakes in judgments, orders, and other parts of record	At any time. Rule 60(a).
Motion for relief from judgment, order, or proceeding for reasons of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) fraud, misrepresentation, or misconduct of an adverse party	Within a reasonable time, but in no event more than a year after the entry of the judgment or order or the date of the proceeding. Rule 60(c)(1).
Motion for relief from judgment, order, or proceeding for reasons of: (4) void judgment, (5) satisfaction, release, or discharge of judgment, or of reversal, vacation, or inequity of prior judgment on which current judgment is based; or (6) any other reason justifying relief	Within a reasonable time. Rule 60(c)(1).
Execution issued by court or initiation of proceedings for enforcement of judgment	Not prior to expiration of 14 days after entry of judgment, with certain exceptions. Rule 62(a).
Appeal taken by appellant giving supersedeas bond	Bond may be given at or after time of filing notice of appeal or of procuring order allowing appeal; stay is effective when supersedeas bond is approved by court. Rule 62(d).
Registration of judgment	When judgment has become final by appeal or expiration of time for appeal, or when ordered by court that entered the judgment. 28 U.S.C.

§ 1963.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. The times given in this table are subject to the provisions of Rule 6(d), which provides for the addition of three days after service of any papers when papers have been served by any means other than by hand delivery. *See* Rule 5(b)(2)(C)-(F). For time limits to move under Rule 50(b) for a judgment as a matter of law, *see* Ch. 22, *Trial by Jury*; for time limits to move for an amendment of findings of fact, or making additional findings and the amendment of a judgment under Rule 52(b), *see* Ch. 23, *Trial to Court; Inability of Judge to Proceed*; for time limits to move for a new trial under Rule 59(b), or to grant a new trial on the court's initiative under Rule 59(d), *see* Ch. 24 *New Trials; Amendment of Judgments; Harmless Error*.

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PART VI Trial and Judgment
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A. RELIEF FROM CLERICAL ERRORS IN JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.02

§ 26.02 Authority of Court to Correct Clerical Errors and Omissionsn*

Federal courts have the express power by rule, n1 and also inherently, n2 to correct clerical mistakes and errors arising from oversights or omissions in judgments, orders or other parts of the record. The court may make such corrections at any time on its own initiative or on the motion of any party and after such notice that the court orders. Rule 60(a) also recognizes the power of the district court to correct clerical mistakes during the pendency of an appeal. n3

After the filing of a notice of appeal, a district court may continue to correct clerical mistakes as if no appeal were pending. However, once an appeal is "docketed," the district court may correct clerical errors under Rule 60(a) only with the permission of the appellate court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* §§ 60.02[1], 60.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 60(a)*; *see Utility Solid Waste Activities Group v. Environmental Protection Agency, 236 F.3d 749, 753 (D.C. Cir. 2001)* .

(n3)Footnote 2. *See Singh v. Mukasey, 533 F.3d 1103, 1110 (9th Cir. 2008)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 60(a).*

(n5)Footnote 4. *Fed. R. Civ. P. 60(a)*; *see, e.g., Kokomo Tube Co. v. Dayton Equip. Servs. Co., 123 F.3d 616, 623 (7th Cir. 1997)* (district court requested leave to correct judgment to reflect correct name of party); *see also § 26.06.*

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PART VI Trial and Judgment
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A. RELIEF FROM CLERICAL ERRORS IN JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.03

§ 26.03 Purpose of Rule Allowing Relief From Clerical Errorn*

Rule 60(a) is designed to provide a specific procedure to ensure that the court's orders, judgments, and records of proceedings are an accurate statement of the actions and intent of the court. n1 The rule provides a quick procedure for rectifying mistakes when the correction does not require additional proof. n2 In a typical example, the court may correct errors in transcribing the amount of prejudgment interest awarded in a judgment. n3 The court has much broader leeway to make a Rule 60(a) clerical error correction than a substantive change to a judgment or an order under Rule 60(b). n4 However, the use of Rule 60(a) is limited strictly to correcting "clerical" mistakes, including inadvertent errors: n5 the court may correct only mistakes that cause a judgment, order, or other part of the record to reflect something other than what was actually decided or that actually occurred in the litigation. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* §§ 60.02, 60.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n3)Footnote 2. United States, IRS v. (*In re Craddock), 149 F.3d 1249, 1254 (10th Cir. 1998)* .

(n4)Footnote 3. *United States v. Griffin, 782 F.2d 1393, 1395-1396 (7th Cir. 1986)* (consent decree that otherwise directed interest "according to law" was corrected to reflect actual agreement to utilize legal rate of interest of 8% rather than incorrectly specified rate of 18%).

(n5)Footnote 4. *See, e.g., National Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc., 115 F. Supp. 2d 1250, 1255-1256 (D. Colo. 2000)* .

(n6)Footnote 5. *Robert Lewis Rosen Assocs. v. Webb, 473 F.3d 498, 505 n.11 (2d Cir. 2007)* .

(n7)Footnote 6. *See Manning v. Astrue, 510 F.3d 1246, 1248 (10th Cir. 2007)* (mistake is not "clerical" when court actually intended to make decision that it did); *see Rutherford v. Harris County, 197 F.3d 173, 190 (5th Cir. 1999)* (under circumstances, omission of back pay and prejudgment interest from original judgment was not "clerical error"); *see also § 26.03*.

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PART VI Trial and Judgment
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A. RELIEF FROM CLERICAL ERRORS IN JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.04

§ 26.04 Clerical Mistakes That Are Subject to Correctionn*

[1] Rule Applies Only to Clerical Errors

One of the most commonly litigated aspects of the clerical error correction rule is the determination of whether the rule is applicable; that is, whether the error is clerical or arises from oversight, or is substantive. n1 The distinction is important because it is much easier, in terms of the lack of time limitations and other requirements, to qualify under Rule 60(a) than Rule 60(b). n2 However, Rule 60(a) is applicable only when there is a discrepancy between what the court intended to include in a judgment, order, or record, and what was actually set out in written form. n3 Thus, Rule 60(a) may not be used to reopen a judgment for the purpose of correcting substantive errors or for the purpose of making rulings that should have been but were not actually made. n4

However, there is no bright line distinction between the two types of errors, and a court must determine which type of error has occurred based on the circumstances of the case. n5 For example, even though a jury's misunderstanding of the court's instructions on joint and several liability may seem like a substantive legal error, in one case it was held that under the circumstances the error was so obvious that it was not unlike a clerical error under Rule 60(a), and correctable as such. n6 For a discussion of the common scenarios regarding clerical errors, see [2], *below*.

[2] Clerical Errors and Omissions Distinguished From Substantive Errors

[a] Nature of Clerical Errors and Omissions

[i] Clerical Errors

In addition to errors arising from oversight or omission, n1 the court may correct under Rule 60(a) any clerical mistakes in a judgment, order, or other part of the record. n2 A "clerical error" is one that the court has made because the judgment, order, or record contains a written statement that clearly reflects something different from what was actually decided by the court or what actually occurred in the litigation. Such an error is usually obvious because there is an inconsistency between the error and some other portion of the judgment or record. n3 Transcription errors and mathematical computational errors mistakes are typical "clerical" mistakes that qualify for correction under Rule 60(a).

Thus, if the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction. n4 An example of a transcription error occurred when a court intended in its original judgment to merely recite the stipulation of the parties concerning attorney's fees but, in doing so, incorrectly stated the amount agreed to for fees. n5 An example of a computational error occurred when the court in an employment discrimination judgment undercounted the plaintiff's period of unemployment by two weeks and three days, and this mathematical error resulted in a considerably smaller damage award than the court intended. n6

Another type of clerical error is a transpositional error, which is similar to a computational mistake and is subject to correction as a clerical mistake under Rule 60(a). For example, in a case in which all of the documentary evidence and testimony specified clearly that the amount of damages was $296,686.89, but a special interrogatory submitted by the court to the jury questioned about damages in the sum of $269,689.89, it was held that there was simple, unintended transposition of the second and third digits. Therefore, the court was within the scope of Rule 60(a) when it corrected the verdict in its judgment to reflect the correct amount of damages. n7

The last type of pure clerical error is ambiguity. For example, a court may utilize Rule 60(a) to correct an ambiguity in its original order if the correction more clearly reflects the intent of the court and ensures that the court's purpose is completely implemented. n8

[ii] Omissions and Oversights

In addition to clerical errors, n9 the court may also correct "omissions and oversights" under Rule 60(a). n10 Such an omission or oversight may occur when the court has failed to include an item in the written judgment or record that it had obviously intended to include. For example, when a judgment included an award of interest, but left the calculation of interest for later, the court could later correct the award pursuant to Rule 60(a) by specifying the amount of interest awarded. n11 In another example, Rule 60(a) provided relief when the court failed to include liquidated damages in a judgment, despite its clear intent to do so as expressed in its findings of fact. n12

However, omissions are usually more difficult than pure clerical errors to distinguish from substantive errors, because an omission may be substantive, especially when the matter has not been litigated or the court has not made required findings on the issue. For example, the omission of the words "without prejudice" in an order did not constitute a mere clerical error under Rule 60(a), because even minor errors are properly dealt with under Rule 60(b)(1) as opposed to Rule 60(a), when the omission is based on legal analysis or reasoning in contrast to an error in transcription or calculation. In this regard, it must be noted that if an omission is legally incorrect, but nonetheless accurately reflects what the court intended, the omission is not subject to correction under Rule 60(a). n13

[b] Nature of Substantive Errors Not Subject to Rule

A court may not make a correction under Rule 60(a) if the error is based on legal analysis or reasoning, rather than a clerical error, which is a copying or computational mistake. Thus, if cerebration or research into the law or facts is required, Rule 60(a) is not available to salvage the error. Furthermore, Rule 60(a) is not a perpetual right to apply different legal rules or different factual analysis to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal excursions that are correctable through Rule 60(a). n14 In other words, the court must distinguish between changes that implement the result intended by the court at the time the order was entered and changes that alter the original meaning to correct a legal or factual error. Rule 60(a) allows for the former but not the latter. n15

Therefore, in deciding whether a trial court may correct a judgment under Rule 60(a), the focus is on what that court originally intended. The basic distinction between clerical mistakes and substantive mistakes is that the former consist of errors in execution, while the latter consist of instances where the court changes its mind, either because of a legal or factual mistake in making its original determination, or because on second thought the court has decided to exercise its

discretion in a manner different from the way it was exercised in the original determination. n16 Because there is no time limit on Rule 60(a) relief, Rule 60(a) relief must be strictly confined to those errors that simply misrepresent the court's original intention. To allow a party to correct alleged errors of law at any time by the mechanism of Rule 60(a) would significantly weaken the policy of finality of judgments, as embodied in the Federal Rules. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Kofoed v. IBEW, Local 48, 237 F.3d 1001, 1007 n.1 (9th Cir. 2001)* (Rymer, J., dissenting) (dissent's discussion of misgivings about use of Rule 60(a) in case because of lack of clerical error).

(n3)Footnote 2. *National Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc., 115 F. Supp. 2d 1250, 1256 (D. Colo. 2000)* .

(n4)Footnote 3. *Manning v. Astrue, 510 F.3d 1246, 1248 (10th Cir. 2007)* .

(n5)Footnote 4. *Truskoski v. ESPN, Inc., 60 F.3d 74, 77-78 (2d Cir. 1995)* (court could not "correct" judgment to include determinations regarding pension issue when that issue was never litigated).

(n6)Footnote 5. *Rutherford v. Harris County, 197 F.3d 173, 190 (5th Cir. 1999)* (under circumstances, error was substantive when it omitted award of back pay and prejudgment interest, considering that court had made no findings of fact or conclusions of law concerning those elements of recovery).

(n7)Footnote 6. *United States v. Sullivan, 1 F.3d 1191, 1197 (11th Cir. 1993)* (court's correction of several verdict into joint and several verdict was within scope of Rule 60(a)).

(n8)Footnote 1. *See* [ii], *below*.

(n9)Footnote 2. *Fed. R. Civ. P. 60(a)*.

(n10)Footnote 3. *See Singh v. Mukasey, 533 F.3d 1103, 1110 (9th Cir. 2008)* (clerical error may occur when judgment is clearly inconsistent with another portion of record).

(n11)Footnote 4. *United States v. Griffin, 782 F.2d 1393, 1396-1397 (7th Cir. 1986)* .

(n12)Footnote 5. *Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112, 114 (5th Cir. 1982)* .

(n13)Footnote 6. *Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 225-226 (10th Cir. 1982)* .

(n14)Footnote 7. *Esquire Radio & Elec., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 795-796 (2d Cir. 1986)* .

(n15)Footnote 8. *In re Marc Rich & Co., A.G., 739 F.2d 834, 836-837 (2d Cir. 1984)* (district court could correct contempt order to reflect court's intent that contemnor serve maximum period allowed by statute when original order was confusing on that matter).

(n16)Footnote 9. *See* [i], *above*.

(n17)Footnote 10. *Fed. R. Civ. P. 60(a)*.

(n18)Footnote 11. *Pogor v. Makita U.S.A., Inc., 135 F.3d 384, 386-388 (6th Cir. 1998)* .

(n19)Footnote 12. *Chavez v. Balesh, 704 F.2d 774, 776 (5th Cir. 1983)* .

(n20)Footnote 13. *Buggs v. Elgin, Joliet & Eastern Ry. Co., 852 F.2d 318, 322 (7th Cir. 1988)* .

(n21)Footnote 14. *United States v. Kellogg (In re West Tex. Mktg. Corp.), 12 F.3d 497, 504-505 (5th Cir. 1994)* (court noted that there was no bright line test that distinguished substantive errors from clerical mistakes).

(n22)Footnote 15. *Kokomo Tube Co. v. Dayton Equip. Servs. Co., 123 F.3d 616, 623 (7th Cir. 1997)* .

(n23)Footnote 16. *Blanton v. Anzalone, 813 F.2d 1574, 1577 & n.2 (9th Cir. 1987)* ; *see Brandon v. Chicago Bd. of Educ., 143 F.3d 293, 294-295 & n.2 (7th Cir. 1998)* , *cert. denied, 525 U.S. 948 (1998)* (Rule 60(a) not applicable when challenged order, which dismissed case for want of prosecution, accurately reflected court's intention at time it was entered; error was not in transcription but in court's decision).

(n24)Footnote 17. *Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)* (citing **Moore's Federal Practice**); *see United States v. Craddock (In re Craddock), 149 F.3d 1249, 1254 n.4 (10th Cir. 1998)* (Rule 60(a) is not available to correct something that was deliberately done but is later discovered to be wrong).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.05

§ 26.05 Types of Written Documents That Are Subject to Correctionn*

The court may use Rule 60(a) to correct clerical mistakes or omissions in judgments, orders, or other parts of the record. n1 The language of the rule itself makes clear that the court has power to correct errors in "judgments" or "orders" as used in their ordinary sense, n2 but the rule does not define what constitutes the "record" for purposes of the application of the rule. n3 It is generally accepted that the term "record" is not restricted to the technical common-law or equity "record," but should be given a more comprehensive meaning because of the rule of liberal construction of the federal rules to do substantial justice requires that clerical errors and omissions be corrected, whether or not they occur in papers and documents not included within some technical definition of the word "record." Therefore, as used in Rule 60(a), the "record" refers not only to process, pleadings, verdicts, orders, and judgments, but also to evidentiary documents, testimony taken, instructions to the jury, findings of fact and conclusions of law, and anything of which there is a record in the action. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.10[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n3)Footnote 2. *National Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc., 115 F. Supp. 2d 1250, 1255-1256 (D. Colo. 2000)* (court may use Rule 60(a) to correct final judgments or interlocutory orders).

(n4)Footnote 3. *See Fed. R. Civ. P. 60(a).*

(n5)Footnote 4. *Cf. United States v. Griffin, 782 F.2d 1393, 1396-1397 (7th Cir. 1986)* (consent decree was

properly corrected under Rule 60(a)).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.06

§ 26.06 Errors Initiated by Either Court or Parties Are Subject to Correctionn*

One may obtain relief under Rule 60(a) from a "clerical" mistake or omission, n1 but that does not mean that the mistake must be committed by the clerk or by the court. It has been held that Rule 60(a) provides relief from mistakes committed by the court, a court clerk, the jury, or a party. n2 For example, one court held that it was proper to use Rule 60(a) to correct a damages award that was incorrect because it was based on an erroneous mathematical computation, irrespective of whether the error was made by the jury or by the court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.10[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n3)Footnote 2. *United States v. Kellogg (In re West Texas Mktg. Corp.), 12 F.3d 497, 503-504 (5th Cir. 1994)* .

(n4)Footnote 3. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665, 669 (5th Cir. 1986)* , *cert. denied, 479 U.S. 930 (1986)* ; *see Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 796 (2d Cir. 1986)* (jury award for plaintiff was properly amended as clerical error under Rule 60(a) when jury had clearly transposed two digits in making award).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.07

§ 26.07 Time Limitations on Correction of Clerical Errors and Omissionsn*

[1] No Appeal Pending

A district court may rectify clerical mistakes and mistakes arising from oversight or omission at any time that there is no currently-pending appeal. n1 For example, in one case it was held that Rule 60(a) allowed a district court to correct its omission of liquidated damages from a judgment 86 days after entry of judgment, and it was also held that the defendant was not even entitled to notice and hearing before the court made the correction, because the court's findings of fact had clearly stated the court's intention to award liquidated damages. n2 It should be noted that neither the filing of a motion to correct a clerical error, nor the district court's entry of an modified judgment to correct a clerical error under Rule 60(a) restart the running of the time for appeal, which must be measured from the entry of the original judgment. n3

Even after an appellate court has decided the appeal of a case, a district court may correct clerical errors at any time that a current appeal is not pending. Although Rule 60(a) is silent on this issue, most courts have held that appellate review of a judgment does not preclude later district court action pursuant to Rule 60(a), provided that the correction otherwise qualifies as a clerical error or omission under Rule 60(a) and the appellate court has not ruled expressly or implicitly on the issue that is the subject of the correction. n4 For example, in a bankruptcy case it was held that the affirmance by the appellate court of a bankruptcy court judgment did not prohibit the bankruptcy court from correcting its over one-year-old judgment to declare that a state court judgment debt was nondischargeable, because the correction fixed a clear clerical mistake, the appellate court had not ruled on the issue, and the correction coincided with the original intent of the bankruptcy court. n5

[2] Appeal Pending

Before an appeal is docketed, a district court may continue to correct clerical mistakes as if no appeal were pending. n1 This rule applies because the pendency of an appeal and the pendency of Rule 60(a) corrections of clerical mistakes generally operate completely independently of each other and because the correction of truly clerical errors does nothing more than make the judgment reflect what the court actually decided. n2 It should also be noted that the filing of a motion to correct a clerical error or the district court's entry of an modified judgment to correct a clerical error

under Rule 60(a) does not invalidate a previously filed notice of appeal, and the appellant is not required to file a new notice of appeal. The correction does not affect the finality of the original judgment nor does it toll the time limit within which one may file notice of an appeal. n3

Once an appeal is docketed, and for the remainder of the time the appeal is pending, the district court may correct clerical errors under Rule 60(a) only with the permission of the appellate court. n4 An appeal is "docketed" when it is entered onto the docket of the court of appeals and after the district court clerk transmits the notice of appeal and the district court docket entries. n5 If permission has been granted by the court of appeals, the district court has the power to correct clerical mistakes. n6 On the other hand, if leave to correct has not been obtained after docketing, the failure nullifies any corrective orders made under Rule 60(a) without the required permission. n7

If the appellate court cannot determine the type of error, the appellate court may remand the case to the trial court to permit the lower court to resolve the issue of whether the asserted error could be corrected as clerical error under Rule 60(a), n8 or whether the error was a result of a mistaken determination of the facts or law, in which case the error is not subject to correction under Rule 60(a). n9 One court has held that, rather than remanding a case to the district court for the correction of a truly clerical error in the judgment or order appealed from, the circuit court may simply treat the judgment or order as if it had been corrected. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n3)Footnote 2. *Chavez v. Balesh, 704 F.2d 774, 776-777 (5th Cir. 1983)* (no abuse of discretion in correcting judgment to award liquidated damages when court's original intent to make award abundantly clear from record).

(n4)Footnote 3. *Rezzonico v. H & R Block, Inc., 182 F.3d 144, 150-151 (2d Cir. 1999) , cert. denied, 528 U.S. 1189 (2000) .*

(n5)Footnote 4. *In re Marc Rich & Co. A.G., 739 F.2d 834, 837-838 (2d Cir. 1984)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. *Klingman v. Levinson, 877 F.2d 1357, 1363 (7th Cir. 1989) .*

(n7)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n8)Footnote 2. *See Aloe Coal Co. Clark Equip. Co., 816 F.2d 110, 112-113 (3d Cir. 1987) , cert. denied, 484 U.S. 853 (1987) .*

(n9)Footnote 3. *Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1139 n.1 (3d Cir. 1993) .*

(n10)Footnote 4. *Fed. R. Civ. P. 60(a).*

(n11)Footnote 5. *See Fed. R. App. P. 12(a).*

(n12)Footnote 6. *Fed. R. Civ. P. 60(a).*

(n13)Footnote 7. *Toscano v. Chandris, S.A., 934 F.2d 383, 386 (1st Cir. 1991) .*

(n14)Footnote 8. *See Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc., 532 F.3d 1063, 1085 (10th Cir. 2008)* .

(n15)Footnote 9. *United States v. Craddock (In re Craddock), 149 F.3d 1249, 1254 (10th Cir. 1998)* .

(n16)Footnote 10. *Bauman v. U.S. Healthcare, Inc. (In re U.S. Healthcare, Inc.), 193 F.3d 151, 158 n.2 (3d Cir. 1999)* , *cert. denied, 530 U.S. 1242 (2000)* (formality of correction by district court is not always necessary).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.08

§ 26.08 Procedures for Correction of Clerical Errors and Omissionsn*

[1] Correction of Error by Court on Its Own Initiative

In addition to motions by the parties, n1 the court on its own initiative may at any time correct clerical mistakes or omissions in judgments, orders, or other parts of the record. n2 For example, a court on its own initiative properly corrected its judgment when it inadvertently omitted liquidated damages, because the court's findings made it clear that it had intended to award liquidated damages to the plaintiff. When the mistake is apparent from the face of the record, the court need not provide notice to the parties that the error will be corrected. The court may simply issue its order correcting the clerical mistake or omission. n3

On the other hand, some courts have indicated that when the mistake is not apparent on the face of the record and evidence must be heard to determine whether there is in fact a clerical mistake, the parties should be given notice and an opportunity to be heard. n4

Before Rule 60 was adopted, notice to the parties was required before a court could correct a mistake not apparent on the face of the record. There are arguable policy reasons why the distinction should continue to apply under current Rule 60(a) because if a mistake must be supported by proof from outside the record, the parties should be entitled to examine and cross-examine that proof. However, in most cases, any mistake will be apparent on the face of the record, and if it needs proof from outside the record, it will not be the kind of "clerical" mistake correctable under Rule 60(a) in any event. n5

[2] Correction of Error After Motion of Party

The district court may correct clerical mistakes in response to a party's motion and after such notice as the court requires. n1 The court should make a correction whenever it observes that a clerical error has been made, but circumstances occur in which an adversely affected party will need to initiate the correction. For example, in one case the defendant moved for a correction to delete prejudgment interest that had been erroneously awarded to the plaintiff in connection with enforcement of a stock redemption agreement. n2 As noted above, there is authority for the proposition that the court must give the parties notice and an opportunity to be heard when the mistake is not apparent on the face of

the record, and when the court must hear evidence in order to determine whether there is a clerical mistake. n3

The form of a motion to correct should comply with Rule 7(b). n4 If the court orders notice of the motion to be given, the motion may be served pursuant to Rule 5 n5 and, unless the court prescribes a different period, should be served not 14 days before the hearing date. n6 If service is made by mail, three days are added to the 14-day period. n7

[3] Method of Correction

Rule 60(a) does not specify the manner in which the court must correct clerical mistakes. n1 However, the court and the parties should use a correction method that makes the judgment, order, or record as clear as possible. Again, there are no particular requirements in the federal rules as to how that must be done. One appellate court has noted that although an informal method of correction is not recommended, informal corrections are within the district court's power. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.13 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* [2], *below*.

(n3)Footnote 2. *Fed. R. Civ. P. 60(a)*.

(n4)Footnote 3. *Chavez v. Balesh, 704 F.2d 774, 776-777 (5th Cir. 1983)* .

(n5)Footnote 4. *See Kelly v. Herrell, 392 B.R. 750, 756-757 (W.D. Wis. 2007)* ; United States v. 706. *98 Acres of Land, 158 F. Supp. 272, 275 (W.D. Ark. 1958)* .

(n6)Footnote 5. *See § 26.03*.

(n7)Footnote 1. *Fed. R. Civ. P. 60(a)*.

(n8)Footnote 2. *Blanton v. Anzalone, 813 F.2d 1574, 1577 (9th Cir. 1987)* (error to include interest in judgment when court made repeated statements on record that court did not intend to award prejudgment interest to plaintiff).

(n9)Footnote 3. United States v. 706. *98 Acres of Land, 158 F. Supp. 272, 275 (W.D. Ark. 1958)* ; *see* [1], *above*.

(n10)Footnote 4. *See Fed. R. Civ. P. 7(b)*.

(n11)Footnote 5. *See Fed. R. Civ. P. 5*.

(n12)Footnote 6. *Fed. R. Civ. P. 6(c)(1)*.

(n13)Footnote 7. *See Fed. R. Civ. P. 6(d)*; *see also* Ch. 9, *Pleadings and Motions in General*.

(n14)Footnote 1. *Fed. R. Civ. P. 60(a)*.

(n15)Footnote 2. *Jernigan v. Southern Pac. Co., 222 F.2d 245, 247-248 (9th Cir. 1955)* (court forwarded letter from party to judge concerning mistakes, and judge merely wrote to clerk directing clerk to make necessary corrections).

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3-26 Moore's Manual--Federal Practice and Procedure §§ 26.09through 26.19

[Reserved]

§§ 26.09[Reserved]

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B. RELIEF FROM SUBSTANTIVE ERRORS IN JUDGMENT
1. Scope of Available Relief From Judgment

3-26 Moore's Manual--Federal Practice and Procedure § 26.20

§ 26.20 Specific Procedure to Obtain Relief From Substantive Errors in Judgmentn*

The federal rules provide a specific procedure for a party or a party's representative to obtain relief from substantive errors in a judgment, n1 which is separate and in addition to the procedure for relief from clerical errors or omissions in a judgment. n2 The primary purpose of Rule 60(b) is to permit the trial court to reconsider and correct obvious substantive errors of law in a judgment without forcing the parties to appeal. n3 The rule enables a court to grant a party relief from a judgment in circumstances in which the need for fairness outweighs the value of finality in litigation. n4 Rule 60(b) may not be granted as a substitute for a proper and timely appeal. n5

The scope of relief that may be obtained under Rule 60(b) is limited to the following specific circumstances:

1. Mistake, inadvertence, surprise, or excusable neglect. n6

2. Newly discovered evidence that the moving party could not have discovered in time to move for a new trial. n7

3. Fraud, misrepresentation, or other misconduct of an adverse party. n8

4. Void judgment. n9

5. Satisfaction, release, or discharge of judgment; reversal or vacation of judgment; or inequity in judgment that precludes its prospective application. n10

6. Any other reason that justifies relief from judgment. n11

Rule 60(b) expressly permits parties or their representatives to obtain this relief from judgment by means of a duly-noticed motion. However, the rule also permits the parties or their representatives to obtain relief by some of the procedural means that existed prior to the enactment of the rule, such as, by means of a new and independent action, n12 or by means of existing statutory procedures, such as, when jurisdiction is exercised in rem without actual notice to

persons with an interest in the property. On the other hand, Rule 60(b) explicitly eliminates other pre-rule remedies such as writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review. n13 The relief available under Rule 60(b) may be contractually waived, for example, in an agreement to submit a claim to alternative dispute resolution. n14

Even though Rule 60(b) lists the six substantive grounds above for relief from a judgment or order, and there is a considerable system of law on each of these grounds, the rule does not specify the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. In other words, the moving party must show compliance with all of the procedural requirements of Rule 60(b), and then establish one or more of the rule's six substantive grounds for relief from judgment. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* §§ 60.02[2], 60.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 2. *See Fed. R. Civ. P. 60(a).*

(n4)Footnote 3. United States v. 329. *73 Acres of Land, 695 F.2d 922, 925 (5th Cir. 1983) .*

(n5)Footnote 4. *See Lonsdorf v. Seefeldt, 47 F.3d 893, 897 (7th Cir. 1995) .*

(n6)Footnote 5. *United States v. Mosbrucker, 340 F.3d 664, 665 (8th Cir. 2003) .*

(n7)Footnote 6. *Fed. R. Civ. P. 60(b)(1)*; *see § 26.41.*

(n8)Footnote 7. *Fed. R. Civ. P. 60(b)(2)*; *see § 26.42.*

(n9)Footnote 8. *Fed. R. Civ. P. 60(b)(3)*; *see § 26.43.*

(n10)Footnote 9. *Fed. R. Civ. P. 60(b)(4)*; *see § 26.44.*

(n11)Footnote 10. *Fed. R. Civ. P. 60(b)(5)*; *see § 26.45.*

(n12)Footnote 11. *Fed. R. Civ. P. 60(b)(6)*; *see § 26.46.*

(n13)Footnote 12. *See § 26.80.*

(n14)Footnote 13. *Fed. R. Civ. P. 60(b).*

(n15)Footnote 14. *Bledsoe v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.), 112 F.3d 160, 162 (4th Cir. 1997) .*

(n16)Footnote 15. *Medlock v. Rumsfeld, 336 F. Supp. 2d 452, 468 (D. Md. 2003)* ; *see United States v. Beggerly, 524 U.S. 38, 43-45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.21

§ 26.21 Coordination of Motion to Obtain Relief From Substantive Error With Other Similar Motionsn*

[1] Similar Forms of Relief

Rule 60(b) was designed to create a procedural mechanism to relieve parties from certain substantive errors in judgments. Other federal rules provide similar forms of relief, and attorneys should consider these other rules whenever a Rule 60(b) motion appears appropriate. However, the practitioner should remember that even though a similar motion may be deemed a Rule 60(b) motion in certain circumstances, all forms of similar relief are not interchangeable. Consequently, Rule 60(b) may not be used to belatedly perform functions that are controlled by other rules. For example, a party may not use a Rule 60(b) motion to be relieved from judgment when the party is essentially trying to make a late Rule 12(b)(6) motion for failure to state a claim. The defense of failure to state a claim may be raised in a Rule 12 motion, in any pleading permitted or ordered under Rule 7(a), in a motion for judgment on the pleadings, or at trial, but it is waived if not made before the completion of a trial on the merits. n1 Furthermore, because the scope of relief that may be obtained under Rule 60(b) is strictly limited to the circumstances specified in the rule, Rule 60(b) may not be used as a substitute for an appeal when a party has not made timely appeal under the proper procedure. n2

[2] Time Limits

Ordinarily, a district court pursuant to Rule 6(b) may enlarge the time limit for taking and considering procedural motions. However, by the specific terms of Rule 6(b), n1 a court may not consider an enlargement regarding any motion under Rule 60(b). n2 Thus, a court may only consider a Rule 60(b) motion if it is made within a "reasonable" time, and if the motion is based on Rule 60(b)(1)-(3) grounds, only if it was made not more than one year from the date that of the judgment, order, or proceeding. n3

Rule 58 specifies the procedure for entry of judgment. n4 This is significant for purposes of Rule 60(b) because the one-year period within which a party may move for relief from a judgment under Rule 60(b)(1)-(3) runs from the date of the entry of judgment. n5

[3] Motion for New Trial

Both the Rule 59(a) motion for new trial and Rule 60(b) may afford a party relief on the ground of newly discovered evidence. If the evidence is discovered in time for the party to file a motion within a strictly-limited 28-day period from the entry of judgment, the affected party may seek a new trial under Rule 59(a), or the court may grant a motion for new trial sua sponte. n1 If the evidence comes to light after the expiration of the 28-day period, but within one year of entry of judgment, the party may seek relief under Rule 60(b)(2). n2 However, Rule 60(b) relief may not be granted sua sponte. n3 Another major difference between a new trial motion and a Rule 60(b) motion is that a motion for a new trial suspends the finality of the judgment and the time for the filing of an appeal from the judgment. n4 On the other hand, filing of a timely Rule 60(b) motion does not affect the finality of a judgment or suspend its operation, nor does it toll the running of the time for filing an appeal. n5

[4] Motion for Amendment of Findings

Rule 52(b) allows a party in a nonjury trial, or in any trial in which matters are submitted to the court rather than to the jury, to move the court to amend its findings or to make additional findings. Such a motion must be filed no later than 28 days after entry of the judgment in question. n1 However, an untimely Rule 52(b) motion to amend may be treated as Rule 60(b) motion if the grounds for seeking amended or additional findings are also a basis for Rule 60(b) relief. n2 It should be noted that filing a Rule 60(b) motion does not affect the finality of the underlying judgment, n3 while a timely-filed Rule 52(b) motion does suspend both the judgment's finality and the time for filing a notice of appeal. n4

[5] Motion for Amendment of Judgment

A motion to alter or amend a judgment under Rule 59(e) must be made no later than 28 days after judgment. n1 However, a court may treat an untimely Rule 59(e) motion to alter or amend a judgment as if it were a Rule 60(b) motion if the grounds asserted in support of the Rule 59(e) motion would also support Rule 60(b) relief. n2 As noted by one circuit court, there is a bright-line rule for distinguishing 59(e) motions from 60(b) motions: the time of a motion's filing controls whether a motion challenging a judgment is a 60(b) or a 59(e) motion. Of course, the substantive standards of the two rules still differ: the bright line rule merely addresses which rule's standards apply. n3

It is the substance and not the label that controls. Thus, it has been held that a "motion for reconsideration" of a nonfinal order that was a "final disposition" of a qualified-immunity defense was properly classified as a motion for relief under Rule 60(b), because Rule 60(b) includes motions filed in response to nonfinal orders as well as judgments, while Rule 59(e) encompasses only motions to alter or amend judgments. n4

[6] Order of Entry of Final Judgment

Rule 60(b) expressly provides that it is only applicable to final judgments, orders, or proceedings. n1 In litigation involving multiple claims or multiple parties, an order completely disposing of a single claim or a single party is not final unless the court makes an express order pursuant to Rule 54(b) that there is no just reason for delay to enter final judgment, and expressly directs entry of judgment. n2 Therefore, if a party is filing a Rule 60(b) motion in litigation that involves multiple claims or multiple parties, the party should refer to Rule 54(b) to determine whether the judgment or order from which relief is sought is "final." n3

[7] Setting Aside of Default Judgment

A district court has the express power under Rule 55(c) to set aside the default of a party. Rule 55(c) also states that, if a judgment has been entered as a result of a default, the court may set that judgment aside in accordance with Rule 60(b). n1 It should be noted that the test is more strict for setting aside under Rule 60(b) than for setting aside under Rule 55(c). For example, excusable neglect is required by Rule 60(b)(1) to set aside a default judgment; n1.1 but setting aside an entry of default under Rule 55(c) requires only good cause, n1.2 which is a less demanding standard. n2 A full discussion of defaults, default judgments, and the standards for setting aside defaults and default judgments may be

found in Ch. 25, *Judgment*.

[8] Stay of Judgment

A district court has discretion pursuant to Rule 62(b) to stay the execution of a judgment or to stay any proceedings to enforce a judgment during the time that the court is considering a Rule 60 motion for relief from a judgment or order. n1 The court also has discretion to stay a judgment while considering a new trial motion, a motion for judgment as a matter of law, or a motion to amend a judgment. n2 However, in its discretion the court may deny any such motion for stay when the moving party fails to establish the grounds for a particular rule. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.02[2] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 870-871 (4th Cir. 1999)* .

(n3)Footnote 2. *See Stoller v. Pure Fishing, Inc., 528 F.3d 478, 480 (7th Cir. 2008)* .

(n4)Footnote 1. *Fed. R. Civ. P. 6(b)(2).*

(n5)Footnote 2. *See Brosted v. Unum Life Ins. Co. of Am., 421 F.3d 459, 464 n.3 (4th Cir. 2005)* .

(n6)Footnote 3. *Fed. R. Civ. P. 60(c)(1)*; *see § 26.61[3].*

(n7)Footnote 4. *Fed. R. Civ. P. 58.*

(n8)Footnote 5. *Fed. R. Civ. P. 60(c)(1).*

(n9)Footnote 1. *Fed. R. Civ. P. 59(b), (d).*

(n10)Footnote 2. *Fed. R. Civ. P. 60(b)(2).*

(n11)Footnote 3. *See Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 378 (W.D. Pa. 2005)* .

(n12)Footnote 4. *Fed. R. App. P. 4(a)(4)(A)(v).*

(n13)Footnote 5. *Fed. R. Civ. P. 60(c)(2)*; *see Howard v. United States, 533 F.3d 472, 474-475 (6th Cir. 2008)* .

(n14)Footnote 1. *Fed. R. Civ. P. 52(b).*

(n15)Footnote 2. *United States v. Clark, 984 F.2d 31, 34 (2d Cir. 1993)* ; *Nisson v. Lundy, 975 F.2d 802, 806 (11th Cir. 1992)* (citing **Moore's Federal Practice**).

(n16)Footnote 3. *Fed. R. Civ. P. 60(c)(2).*

(n17)Footnote 4. *Fed. R. App. P. 4(a)(4)(A)(ii).*

(n18)Footnote 1. *Fed. R. Civ. P. 59(e).*

(n19)Footnote 2. *Wendy's Int'l v. Nu-Cape Constr., 169 F.R.D. 680, 684 (M.D. Fla. 1996)* (if served within 10 days (now 28 days) motion challenging judgment on merits is considered Rule 59(e) motion; otherwise, motion is considered Rule 60(b) motion).

(n20)Footnote 3. *Helm v. Resolution Trust Corp., 43 F.3d 1163, 1166-1167 (7th Cir. 1995)* .

(n21)Footnote 4. *Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)* .

(n22)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n23)Footnote 2. *Fed. R. Civ. P. 54(b)*; *see* Ch. 25, *Judgment.*

(n24)Footnote 3. *Elmore v. Henderson, 227 F.3d 1009, 1012-1013 (7th Cir. 2000)* .

(n25)Footnote 1. *Fed. R. Civ. P. 55(c).*

(n26)Footnote 1.1. *Fed. R. Civ. P. 60(b)(1).*

(n27)Footnote 1.2. *Fed. R. Civ. P. 55(c).*

(n28)Footnote 2. *Conetta v. National Hair Care Ctrs., Inc., 236 F.3d 67, 70 (1st Cir. 2001)* ; *Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994)* (because of preference for finality of judgments, application of test under Rule 60(b) circumstances, when default judgment has been entered, is more limited and stringent even though grounds are identical under either Rule 55(c) or Rule 60(b)).

(n29)Footnote 1. *Fed. R. Civ. P. 62(b)(4)*; *see Steele v. Hernandez, 2008 U.S. Dist. LEXIS 83189, at *3-*4 (E.D. Cal. Sept. 9, 2008)* (court's discretion is based on whether grounds for Rule 60 relief has been shown).

(n30)Footnote 2. *Fed. R. Civ. P. 62(b)(1)-(3).*

(n31)Footnote 3. *See, e.g., Polin v. Kellwood Co., 132 F. Supp. 2d 126, 128 (S.D.N.Y. 2000)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.22

§ 26.22 Methods to Obtain Relief From Judgmentn*

[1] Four Methods to Obtain Relief From Judgment

The motion for relief from judgment under Rule 60(b) n1 is but one of four alternatives for obtaining relief from a judgment. n2 In this regard, Rule 60 specifically provides that the rule does not limit a court's power to grant relief using any of the other three alternatives:1. Hear an independent action to relieve a party from a judgment, order, or proceeding. n3 2. Grant statutory relief to a defendant who was not personally notified of an action on a lien or encumbrance. n4 3. Set aside a judgment for fraud on the court. n5 Rule 60 explicitly eliminates historic methods of relief from a judgment, including bills of review, bills in the nature of bills of review, writs of coram nobis, writs of coram vobis, and audita querela. n6 Relief under these abolished remedies must now be requested by a Rule 60(b) motion or by an independent action. n6.1 The nomenclature used to seek relief from a judgment is not important, and thus, a proceeding for relief under Rule 60(b) may in appropriate circumstances be treated as an independent action. n7 Similarly, an independent action may be treated as a proceeding under Rule 60(b). n8

[2] Motion Under Federal Rule for Relief From Judgment

Under Rule 60(b), a court has discretion to relieve a party of a final judgment, order, or proceeding, for any of the grounds listed in the rule. n1 Thus, the rule allows the court on motion of a party to grant relief on such terms as are just. n2 The purpose of Rule 60(b) is to substitute either a simple motion procedure or an independent action for all of the various grounds and procedures that were available before the rules were adopted. n3

Rule 60(b) may overlap with other federal rules to a certain extent. n4 For example, both Rule 59 and Rule 60(b) permit relief if there is newly-discovered evidence. n5 Consequently, there may be some question as to which rule is the more appropriate in any particular situation, and one motion may be appropriate within the 10-day period and another motion appropriate after the 10-day period expires. n6

A Rule 60(b) motion generally is not a prerequisite for appeal. Thus, if an appellant seeks reversal of the trial court's conclusion on a legal issue, the failure to make a Rule 60(b) motion does not waive the appeal. n7

[3] Independent Action for Relief From Judgment

Rule 60 explicitly provides that the availability of the Rule 60(b) motion does not limit the power of a court to entertain an independent action to relieve a party from a final judgment, order, or proceeding. n1 The primary advantage of an independent action to set aside a judgment is that the independent action does not require a separate source of subject matter jurisdiction. n2 Additionally, an independent action may be the only means of relief, for example, when the time to move for relief on the basis of mistake or fraud precludes relief under Rule 60(b)(1) or (3). n3 Even though the extraordinary equitable relief afforded in an independent action pursuant to Rule 60(d) is more difficult to obtain than relief that might be available through a timely Rule 60(b) motion, it remains the same type of relief, relief from an otherwise final judgment. n4 Additionally, because Rule 60(b) applies only to federal district court judgments rendered in civil actions, the independent action must be used if relief is sought in federal court from a state judgment, unless the state action is properly removed. n5

The merger of law and equity and the availability of Rule 60(b) as a comprehensive motion procedure for obtaining relief from judgments have greatly reduced the need for the independent action in equity as an instrument for obtaining relief from judgments. Thus, the Supreme Court has noted that independent actions are reserved for those cases of injustices which are deemed sufficiently severe to demand a departure from the strict adherence to the doctrine of res judicata and, further, that independent actions are available only to prevent a grave miscarriage of justice. n6 Consequently, in an independent action for relief, a party must demonstrate several essential elements based on traditional equitable principles. n7 For a further discussion of the standards and procedures governing an independent action, *see § 26.80*.

[4] Preservation of Statutory Remedy for Relief From Judgment In Rem

Rule 60(b) explicitly preserves the statutory procedures available for relief from certain judgments entered by a district court in in rem cases involving a lien or encumbrance within the district. n1 Thus, Rule 60 does not affect the power of a court to grant relief to a defendant not actually personally notified of a judgment in such cases. n2 Note that relief from a judgment entered in the statutory proceeding is governed by its own terms, and is entirely distinct from Rule 60 procedure. n3 The statute requires personal service on absent defendants, when possible, but permits service by publication if personal service is not possible. If personal service is not made on a defendant and judgment is rendered in the case, that judgment may be set aside automatically. The only requirement for the defendant who was not personally served to set the judgment aside is to enter his or her appearance within one year after final judgment. The court may then permit the defendant to plead and defend the action on payment of the amount of costs that the court deems just. n4

[5] Relief From Judgment Procured by Fraud on Court

The availability of relief under Rule 60(b) does not limit the authority of a court to set aside a judgment for fraud perpetrated on the court. n1 This provision recognizes the inherent power of a court to grant relief when fraud has been perpetrated on it. "Fraud on the court" is misconduct that undermines the integrity of the judicial process or prevents the court from performing its functions in an impartial manner. Therefore, the "fraud on the court" standard is distinct from the more general fraud standard of Rule 60(b)(3). A party moving to set aside a judgment under the court's inherent power must prove the fraud on the court by clear and convincing evidence. Furthermore, the moving party must also establish that the fraud on the court actually prejudices the party. n2 A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself which actually deceives the court, n3 such as bribery of a judge or jury or the fabrication of evidence by counsel. n4 Either the district or appellate court that is the object of the fraud may exercise its inherent power to remedy the fraud. n5 For a further discussion of the standards and procedures governing relief based on a party's fraud on the court, see *§ 26.81*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See* [2], *below*.

(n3)Footnote 2. *Gonzalez v. Sec'y for the Dep't of Corr., 366 F.3d 1253, 1290-1291 (11th Cir. 2004)* .

(n4)Footnote 3. *Fed. R. Civ. P. 60(d)(1)*; *see* [3], *below*.

(n5)Footnote 4. *Fed. R. Civ. P. 60(d)(2)*; *see 28 U.S.C. § 1655*; *see also* [4], *below*.

(n6)Footnote 5. *Fed. R. Civ. P. 60(d)(3)*; *see* [5], *below*.

(n7)Footnote 6. *Fed. R. Civ. P. 60(e)*; *see Trenkler v. United States, 536 F.3d 85, 93 (1st Cir. 2008)* .

(n8)Footnote 6.1. *Fed. R. Civ. P. 60(b), (d)*; *see United States v. Beggerly, 524 U.S. 38, 44-45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* ; *see also Fed. R. Civ. P. 60(b)*, Committee Notes to 2007 Amendments.

(n9)Footnote 7. *Weldon v. United States, 70 F.3d 1, 5 (2d Cir. 1995)* .

(n10)Footnote 8. *Nevada VTN v. General Ins. Co., 834 F.2d 770, 775 (9th Cir. 1987)* (citing **Moore's Federal Practice**).

(n11)Footnote 1. *Fed. R. Civ. P. 60(b)*; *see § 26.40*.

(n12)Footnote 2. *Fed. R. Civ. P. 60(b)*.

(n13)Footnote 3. *Fed. R. Civ. P. 60(b)*, Advisory Committee Note to 1946 Amendments; *see United States v. Beggerly, 524 U.S. 38, 44-45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

(n14)Footnote 4. *See § 26.21*.

(n15)Footnote 5. *Fed. R. Civ. P. 59, 60(b)(2)*.

(n16)Footnote 6. *See § 26.21*.

(n17)Footnote 7. *Denius v. Dunlap, 209 F.3d 944, 959 (7th Cir. 2000)* (although appellant could have sought Rule 60 relief, failure to do so did not waive claim that district court made erroneous conclusion of law).

(n18)Footnote 1. *Fed. R. Civ. P. 60(d)(1)*.

(n19)Footnote 2. *United States v. Beggerly, 524 U.S. 38, 45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

(n20)Footnote 3. *Jones v. Anderson-Tully Co., 722 F.2d 211, 212 (5th Cir. 1984)* .

(n21)Footnote 4. *Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 878 (8th Cir. 2010)* .

(n22)Footnote 5. *See Northshore Dev., Inc. v. Lee, 835 F.2d 580, 582 (5th Cir. 1988)* .

(n23)Footnote 6. *United States v. Beggerly, 524 U.S. 38, 46-47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

(n24)Footnote 7. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 661 (2d Cir. 1997)* ; *see also Manti's Transp., Inc. v. Citicapital Commer. Corp., 2008 U.S. Dist. LEXIS 29074, at *17 (E.D.N.Y. Apr. 9, 2008)* .

(n25)Footnote 1. *Fed. R. Civ. P. 60(d)(2)*; *see 28 U.S.C. § 1655*.

(n26)Footnote 2. *See 28 U.S.C. § 1655*.

(n27)Footnote 3. *See Herring v. United States, 424 F.3d 384, 389 (3d Cir. 2005)* .

(n28)Footnote 4. *28 U.S.C. § 1655*.

(n29)Footnote 1. *Fed. R. Civ. P. 60(d)(3)*.

(n30)Footnote 2. *Wickens v. Shell Oil Co., 620 F.3d 747, 759 (7th Cir. 2010)* .

(n31)Footnote 3. *Herring v. United States, 424 F.3d 384, 386-387 (3d Cir. 2005)* .

(n32)Footnote 4. *Greiner v. City of Champlin, 152 F.3d 787, 789 (8th Cir. 1998)* .

(n33)Footnote 5. *See Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580-581, 66 S. Ct. 1176 (1946)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.23

§ 26.23 Discretion of Court Controls Grant of Relief From Judgmentn*

Under Rule 60(b), the court may relieve a party from a substantive error in a final judgment, order, or proceeding. n1 In this regard, the word "may" has been consistently interpreted to mean that a party has no right to relief, n2 except when a motion under Rule 60(b)(4) is from a judgment that is totally void. n3 Consequently, a determination as to whether relief should be granted is committed to the sound discretion of the court. n4 Furthermore, the court's discretion extends to all aspects of the decision, including whether the motion was brought within a "reasonable time" as required by Rule 60(b). Thus, whether the moving party acted promptly or was dilatory in bringing the motion is one factor that the court in its discretion may consider. n5

There are limits on the court's discretion, however. The court may not exercise discretion arbitrarily or capriciously, but must be guided by accepted legal principles, n6 which include the principles that:

1. Rule 60(b) may not substitute for a timely appeal. n7 Courts may not grant relief when the moving party has not been diligent in protecting its own rights by filing an appeal from an adverse judgment. n8

2. A party is entitled to relief under Rule 60(b) only if the moving party acts within a "reasonable" time. n9

3. Finality of judgments is of great importance. n10

4. The law prefers giving parties a determination on the merits of claims, so a court may be more inclined to grant a motion in a case in which the moving party has defaulted than in cases already determined on the merits. n11

5. The court may deny relief if setting aside the judgment would cause prejudice to a party. n12

6. The law prefers not to set aside judgments that are consensual. Thus, when a party has made a free, calculated and deliberate choice to submit to an agreed upon decree, rather than seek a more favorable litigation judgment, their burden under Rule 60(b) may be considered more formidable than had they litigated and lost. n13

7. The relief provided by Rule 60(b) is equitable in nature n14 and, in exercising its discretion under Rule 60(b), a court should consider whether the moving party has acted equitably. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 2. *Williams v. Thaler, 602 F.3d 291, 312 (5th Cir. 2010)* (decision to grant or deny relief under Rule 60(b) is within sound discretion of district court and will be reversed only for abuse of that discretion).

(n4)Footnote 3. *FEC v. Salvi, 205 F.3d 1015, 1019 (7th Cir. 2000)* ; *see Fed. R. Civ. P. 60(b)(4)*; *see also § 26.44.*

(n5)Footnote 4. *McLawhorn v. John W. Daniel & Co., 924 F.2d 535, 538 (4th Cir. 1991)* .

(n6)Footnote 5. *Federal Land Bank v. Cupples Bros., 889 F.2d 764, 767 (8th Cir. 1989)* (citing **Moore's Federal Practice**).

(n7)Footnote 6. *Amoco Oil Co. v. United States EPA, 231 F.3d 694, 697 (10th Cir. 2000)* .

(n8)Footnote 7. *Godwin v. Federal Sav. & Loan Ins. Corp., 806 F.2d 1290, 1294 (5th Cir. 1987)* (issue of whether court had jurisdiction was one that should have been undertaken on direct appeal, rather than through Rule 60(b) motion).

(n9)Footnote 8. *Sanders v. Clemco Indus., 862 F.2d 161, 168-170 (8th Cir. 1988)* .

(n10)Footnote 9. *First RepublicBank Fort Worth v. Norglass, Inc., 958 F.2d 117, 121 (5th Cir. 1992)* .

(n11)Footnote 10. *Paddington Partners v. Bouchard, 34 F.3d 1132, 1144 (2d Cir. 1994)* .

(n12)Footnote 11. *Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982)* .

(n13)Footnote 12. *Amernational Industries, Inc. v. Action-Tungsram, Inc., 925 F.2d 970, 976-977 (6th Cir. 1991) , cert. denied, 501 U.S. 1233 (1991)* .

(n14)Footnote 13. *Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831-832 (7th Cir. 1985)* ; *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 755 F.2d 38, 45 (3d Cir. 1985) , cert. denied, 474 U.S. 819 (1985)* .

(n15)Footnote 14. *Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 878 (8th Cir. 2010)* .

(n16)Footnote 15. *Di Vito v. Fidelity & Deposit Co., 361 F.2d 936, 939 (7th Cir. 1966)* .

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PART VI Trial and Judgment
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PART I. RELIEF FROM JUDGMENT
B. RELIEF FROM SUBSTANTIVE ERRORS IN JUDGMENT
1. Scope of Available Relief From Judgment

3-26 Moore's Manual--Federal Practice and Procedure § 26.24

§ 26.24 Relief Available Only From Final Judgmentn*

Rule 60(b) provides expressly that the court may grant relief from a final judgment, order, or proceeding, n1 and all courts have held that this means that a "final" judgment is needed to support a Rule 60(b) motion. n2 The standard test for whether a judgment is "final" for Rule 60(b) purposes is usually stated to be whether the judgment is sufficiently "final" to be appealed. n3 However, there are some situations under which "appealability" and "finality" for Rule 60(b) purposes are not exactly identical. For example, consent judgments and judgments resulting from a Rule 68 "offer of judgment" may finally resolve all issues in a litigation but may not be appealable judgments. Nevertheless, despite their lack of appealability, a consent judgment is sufficiently final to support a Rule 60(b) motion, n4 as is a judgment resulting from a Rule 68 offer of judgment. n5 Even though interlocutory orders and partial judgments are not subject to the restrictive provisions of Rule 60(b), they remain within the plenary power of the district court to modify its prior rulings and to grant such relief as justice requires. n6

For a complete discussion of finality of a judgment sufficient to support an appeal, see Ch. 28, *Appeal to Court of Appeals*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.23 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 2. *See, e.g., McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 366 (5th Cir. 1993)* .

(n4)Footnote 3. *United States v. Martin, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000)* (citing **Moore's Federal**

Practice).

(n5)Footnote 4. *United States v. Baus, 834 F.2d 1114, 1119* (1st Cir. 1987.

(n6)Footnote 5. *Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991)* .

(n7)Footnote 6. *Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1472-1473 (4th Cir. 1991)* (district court erred in applying standards of Rule 60(b) to plaintiffs' motion for reconsideration of dismissal under Rule 12; restrictive standards of Rule 60(b) are applicable only to final judgments).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.25

§ 26.25 Moving Party Must Show Some Merit on Claim or Defensen*

Before the moving party is entitled to relief from a substantive error in a judgment, the party must show that he or she has a meritorious claim or defense, and thus convince the court that vacating the judgment will not be an empty exercise. n1 The only exception to this requirement is that the party need not show a meritorious defense to set aside a completely void judgment. n2

The required showing of a meritorious claim or defense does not mean that the moving party must show that he or she is likely to prevail. n3 Thus, the moving party must make allegations that, if established at trial, would constitute a valid claim or defense. n4 In other words, allegations stating a claim or defense in this context are meritorious if they contain "even a hint of a suggestion" n5 which, if proven at trial, would constitute a valid claim or a complete defense. n6 On the other hand, it is not sufficient for the moving party to provide mere conclusionary statements that a claim or a defense is meritorious; the moving party must state sufficient facts to give a court an opportunity to measure whether the claim or defense has any potential and is one that is recognized by law. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.24 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Boyd v. Bulala, 905 F.2d 764, 769 (4th Cir. 1990)* (threshold condition for granting relief is that moving party demonstrate that granting relief will not have been futile gesture, by showing that she has meritorious defense or claim).

(n3)Footnote 2. *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind, 841 F.2d 646, 649 (5th Cir. 1988)* .

(n4)Footnote 3. *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992)* (while moving party need not establish that it possesses ironclad claim or defense that would guarantee success at trial, it must establish potentially meritorious claim or defense that if proved would provide success).

(n5)Footnote 4. *Weisel v. Pischel, 197 F.R.D. 231, 239 (E.D.N.Y. 2000)* (defense is meritorious if it is sufficient at law to give fact-finder some determination to make).

(n6)Footnote 5. *Blau v. Bill Heard Chevrolet Corp. - Orlando, 422 B.R. 293, 303 (N.D. Ala. 2009)* (citing **Moore's Federal Practice**); *Okehi v. Security Bank, 199 F.R.D. 388, 394 (M.D. Ga. 2001)* .

(n7)Footnote 6. *United States v. Kayser-Roth Corp., 272 F.3d 89, 95 (1st Cir. 2001)* ; *Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 374 (D.C. Cir. 1979)* .

(n8)Footnote 7. *United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 195-196 (3d Cir. 1984)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.26

§ 26.26 Court May Not Grant Additional Reliefn*

Under Rule 60(b), a court has the power only to set aside a prior order or judgment; the court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment. For example, the enforcement of settlement agreements is a form of additional relief that usually requires new litigation, not merely relief from the judgment in the settled case, and most circuits hold that Rule 60(b) is not a settlement enforcement mechanism. n1

The principle that Rule 60(b) may provide relief from the existing obligations created by a judgment or decree, but that it may not create any new obligations, n2 remains true even with continuing injunctions over which, under Rule 60(b)(5), courts have a continuous power of modification to meet changing circumstances and conditions. Even when a court has power under Rule 60(b)(5) to modify an equitable decree to meet changes in circumstances, Rule 60(b) does not authorize a court to modify or reopen a decree so as to provide additional relief. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.25 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Neuberg v. Michael Reese Hosp. Found., 123 F.3d 951, 955-956 (7th Cir. 1997)* (dispute over interpretation of settlement agreement is legal matter distinct from underlying litigation and does not authorize granting Rule 60(b) motion to reopen judgment dismissing underlying litigation).

(n3)Footnote 2. *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 666 F. Supp. 2d 1341, 1344 (S.D. Fla. 2009)* .

(n4)Footnote 3. *Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1152-1153 (6th Cir. 1992)* , *cert. denied,*

509 U.S. 905 (1993) .

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3-26 Moore's Manual--Federal Practice and Procedure §§ 26.27through 26.39

[Reserved]

§§ 26.27[Reserved]

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3-26 Moore's Manual--Federal Practice and Procedure § 26.40

§ 26.40 Six Grounds for Court to Grant Motion for Reliefn*

Once a party has established the threshold requirements of timeliness, the existence of exceptional circumstances justifying extraordinary relief, and the absence of unfair prejudice to the opposing party, the party is entitled to relief from a judgment, order, or proceeding under Rule 60(b) whenever such relief is appropriate to accomplish justice, n0.1 and one of the following six grounds for relief exists:

1. Mistake, inadvertence, surprise, or excusable neglect. n1

2. Newly discovered evidence that the moving party could not have discovered in time to move for a new trial, even if the party had exercised due diligence. n2

3. Fraud, misrepresentation, or other misconduct of an adverse party, regardless of whether, under earlier procedures, the fraud would have been classified as intrinsic or extrinsic. n3 This classification is separate from the special type of fraud known as "fraud on the court"; the court has inherent power to set aside a judgment procured through fraud on the court, as discussed in *§ 26.22[5]* and *§ 26.81*.

4. Void judgment. n4

5. (a) Satisfaction, release, or discharge of the judgment; (b) reversal or vacation of the judgment; or (c) an inequity in the judgment that precludes its prospective application. n5 The Supreme Court has emphasized that the use of the disjunctive "or" in Rule 60(b)(5) makes it clear that each of the provision's three grounds for relief is independently sufficient to obtain relief from the judgment. The three categories are not interrelated. Therefore, for example, relief is warranted if the judgment is no longer equitable under the third category, even if the moving party has not in any way satisfied the judgment under the first category. n6

6. Any other reason that justifies relief from the judgment. n7

The court may not grant relief from a judgment or order under Rule 60(b) for any grounds other than those set out in the six numbered clauses specified in the rule. n8 However, in addition to the procedure by motion under Rule 60(b) the rule also preserves the power of a court: n9 to entertain an independent action to relieve a party from a judgment, order, or proceeding, n10 to grant relief from judgment available by statute, n11 or to set aside a judgment for fraud on the court. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.40 (Matthew Bender 3d ed.).

(n2)Footnote 0.1. *United States v. Kayser-Roth Corp., 272 F.3d 89, 95 (1st Cir. 2001)* ; *see § 26.23-26.25*.

(n3)Footnote 1. *Fed. R. Civ. P. 60(b)(1)*; *see § 26.41*.

(n4)Footnote 2. *Fed. R. Civ. P. 60(b)(2)*; *see § 26.42*.

(n5)Footnote 3. *Fed. R. Civ. P. 60(b)(3)*; *see § 26.43*.

(n6)Footnote 4. *Fed. R. Civ. P. 60(b)(4)*; *see § 26.44*.

(n7)Footnote 5. *Fed. R. Civ. P. 60(b)(5)*; *see § 26.45*.

(n8)Footnote 6. *Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406, 424 (2009)* .

(n9)Footnote 7. *Fed. R. Civ. P. 60(b)(6)*; *see § 26.46*.

(n10)Footnote 8. *Broadway v. Norris, 193 F.3d 987, 989-990 (8th Cir. 1999)* (moving party under Rule 60(b) must establish one of rule's enumerated grounds for relief from judgment or order).

(n11)Footnote 9. *Fed. R. Civ. P. 60(b)*; *see § 26.22*.

(n12)Footnote 10. *See § 26.80*.

(n13)Footnote 11. *See § 26.22[4]*.

(n14)Footnote 12. *See § 26.81*.

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3-26 Moore's Manual--Federal Practice and Procedure § 26.41

§ 26.41 Mistake, Inadvertence, Surprise, or Excusable Neglectn*

[1] Nature of Mistake, Inadvertence, Surprise, and Excusable Neglect

[a] Grounds Considered in Light of Purpose of Relief

Under Rule 60(b)(1), the court may grant relief from a judgment or order for mistake, inadvertence, surprise, or excusable neglect; however, the rule does not define the terms. n1 Case law also does not precisely define the terms. Rather, whether or not an error is sufficient to justify relief under Rule 60(b)(1) is analyzed by considering the fact pattern in the case and the purpose of the rule, which is to permit the trial court to reconsider and correct obvious, substantive errors of law without forcing the parties to engage the machinery of appeal. n2 Some guidelines from case law have developed, as discussed in [b] through [d], *below*. In any event, deliberate or willful conduct on the part of the person seeking relief from the judgment precludes as a general rule a finding of "mistake" or "inadvertence" or "surprise" or "excusable neglect." n3

[b] Mistake

As a general proposition, the "mistake" provision in Rule 60(b)(1) provides for reconsideration of judgments only when (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) the court has made a substantive mistake of law or fact in the final judgment or order. An example of a "legal error" that could be sufficient to just Rule 60(b)(1) relief would occur if a court issues directly conflicting determinations in two separate lawsuits with substantial overlap in parties and substantial similarity in subject matter. n4 The circuits each have their own view of whether relief may be granted under Rule 60(b)(1) for legal errors, as summarized generally by the following three viewpoints:

1. The First Circuit does not permit the use of Rule 60(b)(1) motions to obtain relief from judgments on the ground that the judgment is based on a legal error made by the court. In the First Circuit, claims of legal error may be reviewed only by Rule 59 motions or by an appeal. n5

2. In the Sixth Circuit, a claim of legal error in the underlying judgment falls within the definition of mistake under Rule 60(b)(1). However, the circuit has a strict qualification that a Rule 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal. n6

3. The Ninth Circuit has held that a legal error is sufficient to justify relief under Rule 60(b)(1). n7 Furthermore, the Ninth Circuit also has concluded that, although the denial of a Rule 60(b)(1) motion is reviewed on an abuse of discretion standard, if the mistake in question is one of law and if the district court erred on the law and refused to grant relief, the district court did abuse its discretion. n8

For a complete discussion of each circuit's approach, see 12 *Moore's Federal Practice, § 60.41[4][b]* (Matthew Bender 3d ed.).

[c] Inadvertence

A court may grant Rule 60(b)(1) relief from judgment for inadvertence if a party or attorney has failed to complete some required action despite exercising due diligence. Conversely, a court will deny relief on a determination that the facts and circumstances demonstrate a lack of diligence in pursuing or defending litigation. n9 For example, inadequate trial preparation is not excusable neglect, even when perpetrated by a party representing himself or herself in propria persona. n10 In another example, the failure to attend or participate in a trial or a court proceeding, or a hearing, such as, a pretrial conference, is not excusable if it is part of a pattern of conduct. n11 In the context of Rule 60(b)(1) motions, ignorance of the law also does not constitute inadvertence sufficient for relief. Furthermore, ignorance of, or inattention to, procedural law is not grounds for relief. n12

[d] Excusable Neglect

Excusable neglect is probably the most common ground for relief in this category. The relevant factors that the court must consider to determine whether a party's neglect is excusable include (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith. n13 If the district court has not actually considered all of these relevant factors in determining whether a party or attorney has committed excusable neglect, the circuit court ordinarily will reverse the district court's decision. n14 Using these criteria, courts have held that the failure to follow the clear requirements of a court rule does not constitute excusable neglect. n15 Additionally, mere ignorance of rules nor mistakes construing rules do not usually constitute excusable neglect. n16 However, a failure to comply with a procedural rule might be excusable if the rule is not entirely clear, such as, when it is ambiguous or susceptible of multiple interpretations, or if the applicable rule conflicts with another rule. n17

The courts have developed a special excusable neglect test for cases involving relief from default judgments. To determine "excusable neglect" as used in Rule 60(b)(1) for purposes of a motion to vacate a default judgment, a court considers (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted. n18 Under the "willfulness" standard, the court will look for bad faith, or at least something more than mere negligence, before rejecting a claim of excusable neglect based on an attorney's or a party's error. n19 To satisfy the criterion of a "meritorious defense," the defaulting party need only show that the defense would be proper at law so as to give the factfinder some determination to make. Finally, under the prejudice criterion, the district court must determine whether the non-defaulting party would suffer significant adverse effect from having to prosecute its claim against the defaulting party after a lengthy delay. n20 Conversely, a district court may deny a motion to vacate a default judgment if: (1) the plaintiff would be prejudiced if the judgment is set aside, (2) the defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default. This tripartite test is disjunctive, meaning that the district court is free to deny the motion if any of the three factors is true. n21

[2] Culpability of Party Not Necessary

Historically, Rule 60(b) applied only to relief from unfavorable judgments suffered because of the mistakes, inadvertence, surprise, or excusable neglect of the moving party. However, it has been held that the 1946 amendment to the rule was specifically intended to make it clear that the moving party could have relief from a judgment on account of the mistake, inadvertence, surprise, or excusable neglect of any party, any party's attorney, the clerk, or the court. n1 Thus, mistake or neglect of others beside the moving party may be just as material and call just as much for supervisory jurisdiction as when the judgment is taken against the moving party through the party's own mistake, inadvertence, or excusable neglect. n2 The only limitation that the courts have imposed is that the rule does not permit relief from a "mistake" of the jury. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.41 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)(1).*

(n3)Footnote 2. United States v. 329. *73 Acres of Land, 695 F.2d 922, 925 (5th Cir. 1983)* .

(n4)Footnote 3. *Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 132 (4th Cir. 1992)* ; *Williams v. New Orleans Public Serv., Inc., 728 F.2d 730, 734 (5th Cir. 1984)* .

(n5)Footnote 4. *United Airlines, Inc. v. Brien, 588 F.3d 158, 175 (2d Cir. 2009)* .

(n6)Footnote 5. *Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995)* (even if district court decides point of law incorrectly, that legal error is not grounds for relief under Rule 60(b)).

(n7)Footnote 6. Pierce v. United Mine Workers Welfare & Retirement Funds for 1950 & 1974, *770 F.2d 449, 451 (6th Cir. 1985)* , *cert. denied, 474 U.S. 1104 (1986)* .

(n8)Footnote 7. *Yniques v. Cabral, 985 F.2d 1031, 1034 (9th Cir. 1993)* (district court's erroneous reading of law is a "mistake" sufficient to require reconsideration of order).

(n9)Footnote 8. *Faile v. Upjohn Co., 988 F.2d 985, 986-987 (9th Cir. 1993)* .

(n10)Footnote 9. *FHC Equities, L.L.C. v. MBL Life Assurance Corp., 188 F.3d 678, 685 (6th Cir. 1999)* (neither carelessness or ignorance of the law provide relief under Rule 60(b)(1)).

(n11)Footnote 10. *Salter v. Hooker Chem., Durez Plastic & Chem. Div., 119 F.R.D. 7, 8-9 (W.D.N.Y. 1988)* .

(n12)Footnote 11. *American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 815 (5th Cir. 1993)* (defendants' failure to ask expert witness right questions during deposition, and thus depriving themselves of potentially relevant evidence on summary judgment motion, was not grounds for relief).

(n13)Footnote 12. *Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463-464 (8th Cir. 2000)* (garden variety

attorney inattention in miscalculation when counting number of days for deadline to file appeal is not excusable neglect or inadvertence sufficient to support relief).

(n14)Footnote 13. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* .

(n15)Footnote 14. *Bateman v. United States Postal Serv., 231 F.3d 1220, 1224-1225 (9th Cir. 2000)* .

(n16)Footnote 15. *Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 402-405 (8th Cir. 2000)* .

(n17)Footnote 16. *United States v. Torres, 372 F.3d 1159, 1163 (10th Cir. 2009)* .

(n18)Footnote 17. *See Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 886 (9th Cir. 2004)* ; *Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250 (2d Cir. 1997)* .

(n19)Footnote 18. *Weisel v. Pischel, 197 F.R.D. 231, 238 (E.D.N.Y. 2000)* .

(n20)Footnote 19. *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc., 570 F.3d 845, 847 (7th Cir. 2009)* (repeated failures to comply with the court's orders without explanation).

(n21)Footnote 20. *American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 60-62 (2d Cir. 1996)* .

(n22)Footnote 21. *Weisel v. Pischel, 197 F.R.D. 231, 239 (E.D.N.Y. 2000)* .

(n23)Footnote 1. *Cappillino v. Hyde Park Cent. Sch. Dist., 135 F.3d 264, 265-266 (2d Cir. 1998)* (granting relief from judgment because of mistake of court; district court had entered judgment on settlement even though appellant had rejected settlement by letter to court within time set by court for rejection of settlement).

(n24)Footnote 2. *Fed. R. Civ. P. 60(b)*, Committee Note to 1946 Amendments.

(n25)Footnote 3. *Branson v. Prins Ins., Inc. 79 F.R.D. 662, 664 (D.S.D. 1978)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.42

§ 26.42 Newly Discovered Evidencen*

[1] Required Elements

The court may relieve a party or a party's legal representative from a final judgment, order, or proceeding on the ground of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). n1 A motion for a new trial under Rule 60(b)(2) is an extraordinary motion and the requirements of the rule must be strictly met. n2 In order for the court to grant such a motion, the moving party must meet the following test, which is phrased in varying ways among the circuits: n3

1. The newly-discovered evidence must have existed at the time of trial or must concern facts that were in existence at the time of trial. n4

2. The newly-discovered evidence must have been discovered following the trial. n5

3. The moving party must have shown due diligence to discover the evidence. n6

4. The newly-discovered evidence must be admissible and credible. n7

5. The newly-discovered evidence must be material to the issues tried. n8

6. The newly-discovered evidence must not be merely cumulative or impeachment evidence. n9

7. The newly-discovered evidence must be such that a new trial would probably change the result. n10

All of the requirements must be satisfied, and the fact that one or more elements is very strong does not require the granting of relief. For example, the fact that newly discovered evidence would be considered "conclusive" to determine the outcome of the case (requirement 7) does not require relief from the judgment when the moving party cannot show

due diligence to discover the evidence (requirement 3). n11

Both Rule 60(b)(2) and Rule 59(a) permit a remedy when new evidence is discovered following a trial. Therefore, the moving party needs to prove very similar elements whether the moving party seeks to have a new trial or to have the judgment set aside. n12 Therefore, courts have concluded that Rule 60(b)(2) cases may be cited in support of Rule 59 motions, and vice versa. n13 However, there is a significant difference between the two: if the evidence is discovered and a motion filed within 28 days after entry of judgment, a court may grant a new trial; n14 if the evidence is discovered too late to file a motion within that 28-day period, but a motion is brought within a reasonable time and no later than one year from the entry of judgment, the court may set the judgment aside on the ground that there is newly discovered evidence. n15 However, a party may not simply let the 28-day period for bringing a new trial motion expire and later bring a motion under Rule 60(b)(2). Rule 60(b)(2) expressly permits relief from judgment only if the evidence could not have been discovered in time to move for a new trial under Rule 59(b). n16

[2] Evidence Must Be of Facts That Were in Existence at Time of Trial

The only evidence that qualifies as "newly-discovered" evidence within the meaning of the rule justifying setting the judgment aside is evidence of facts that were in existence at the time of the original trial or that relate directly to the facts that were tried. n1 This rule has been promulgated because Rule 60(b) relief sets aside only a prior order or judgment; the court may not use Rule 60 to grant affirmative relief for matters that occurred after the trial. n2 The crucial question under this test is not when the evidence was created but whether the evidence was of facts that were in existence at the time of trial. Thus, evidence meets the newly discovered evidence test even if it did not come into existence until after the trial, provided that the evidence is of facts that were in existence at the time of trial. n3

[3] Evidence Must Have Been Discovered Following Trial

For purposes of relief from judgment, newly discovered evidence refers only to evidence that was not "discovered" by the moving party in time to move for a new trial. n1 The moving party may not rely on the fact that he or she decided not to offer known evidence at the trial but must demonstrate how and when he or she "discovered" the evidence. In other words, in order for evidence to be newly discovered, the party must have been unaware of the existence of the evidence before or during the trial. n2 The key to deciding whether evidence is "newly discovered" or only "newly available" is to ascertain when the moving party found out about the information at issue. n3 A typical example of a lack of discovery involves the case in which the party who loses at trial claims that he or she wants to present a "new" witness. The losing party will not meet the "discovery" requirement when the party knew of the existence of the witness, and the substance of the witness' testimony, but thought that the witness was not needed until later losing the case. n4

A party does not "discover" evidence that is already in its possession or that is readily available. n5 For example, evidence that is in the possession of some employee of a large employer at the time of trial is not "discovered" at a later time, even though the attorneys for the employer do not know of this evidence until it is too late. n6 Similarly, if evidence is available in public records at the time of trial, it is not considered to be "newly discovered." n7

[4] Failure to Discover Evidence Must Not Be Based on Lack of Diligence

The moving party may obtain relief from a judgment on the basis of newly discovered evidence under Rule 60(b)(2) only if the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(b). n1 Consequently, to prevail on a motion, the moving party must show that the failure to produce the evidence at trial or in time for a new trial motion was not caused by the moving party's lack of diligence. n2 Diligence looks not to what the party actually discovered but what he or she could have discovered. n3 To comply with this requirement, the moving party may not simply claim that he or she has exercised diligence in obtaining evidence. The moving party must present facts that show why he or she was unable to present the evidence that provides the basis for the motion either in time for

use at trial or in time for filing a motion for new trial. n4

[5] Evidence Must Be Admissible and Credible

The newly-discovered evidence that is the basis for relief from a judgment must be both admissible and credible, because there would be no reason to set aside a judgment on the basis of evidence that could not be admitted at a new trial or, if admitted, would not be worthy of belief. For example, speculation about the existence of what some witness would testify to or what some document would show is clearly incompetent evidence that would not be sufficient. n1 Rule 60(b)(2) credibility motions must be decided by the court and not a jury because to hold otherwise would mean that the district court would have to order a new trial no matter how incredible the evidence. n2

[6] Evidence Must Be Material and Not Merely Cumulative or for Impeachment

Newly discovered evidence is not sufficient grounds to set aside the judgment unless it is relevant to an issue tried in the case. n1 It must also be "material," which means that it is pertinent to deciding the case. For example, new evidence of the existence of an agreement between attorneys in a class action concerning reimbursement for fees and expenses was not material because the court decides appropriate fees in class actions, regardless of any agreement between the attorneys. n2

Additionally, the new evidence proffered may not be merely cumulative of other evidence already introduced. n3 The newly-discovered evidence must not be cumulative, not only of the evidence actually presented, but also of whatever evidence that could have been presented had the party exercised due diligence. n4 Finally, newly-discovered evidence will not support a motion for relief from judgment if it merely tends to impeach the credibility of a witness rather than provide substantive evidence concerning a material issue of fact in the case. Evidence offered to impeach evidence already admitted may not be considered newly discovered evidence. n5

[7] Evidence Must Be Likely to Change Result of Case

Newly discovered evidence is grounds for relief under Rule 60(b)(2) only if the evidence is sufficiently substantial that it would be likely to produce a different result on retrial. n1 The moving party has the burden to persuasively explain why the new evidence would change the outcome. n2 For example, a motion failed in one case when the moving party could not explain how the newly discovered evidence regarding enforceability of subrogation agreements could affect the outcome when the court had already ruled on other grounds that the agreements were unenforceable as a matter of law. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.42 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)(2).*

(n3)Footnote 2. *Willard v. Fairfield S. Co., 472 F.3d 817, 824 (11th Cir. 2006) .*

(n4)Footnote 3. *United States v. McGaughey, 977 F.2d 1067, 1075 (7th Cir. 1992) , cert. denied, 507 U.S. 1019 (1993)* ; *see Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000) .*

(n5)Footnote 4. *See* [2], *below.*

(n6)Footnote 5. *See* [3], *below*.

(n7)Footnote 6. *See* [4], *below*.

(n8)Footnote 7. *See* [5], *below*.

(n9)Footnote 8. *See* [6], *below*.

(n10)Footnote 9. *See* [7], *below*.

(n11)Footnote 10. *See* [8], *below*.

(n12)Footnote 11. *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co., 69 F.3d 1312, 1314-1315 (7th Cir. 1995) , cert. denied, 517 U.S. 1134 (1996) .*

(n13)Footnote 12. *Compare Mitchell v. Shalala, 48 F.3d 1039, 1041 (8th Cir. 1995)* ; *with Duffy v. Clippinger, 857 F.2d 877, 879 (1st Cir. 1988) .*

(n14)Footnote 13. *Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990) .*

(n15)Footnote 14. *Fed. R. Civ. P. 59(b).*

(n16)Footnote 15. *Fed. R. Civ. P. 60(b)(2).*

(n17)Footnote 16. *Fed. R. Civ. P. 60(b)(2).*

(n18)Footnote 1. *Mumford v. Bowen, 814 F.2d 328, 330 (7th Cir. 1986) .*

(n19)Footnote 2. *Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1152-1153 (6th Cir. 1992)* ; *see § 26.26.*

(n20)Footnote 3. *National Anti-Hunger Coalition v. Executive Comm. of President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983)* (post-trial reports may be highly relevant to facts considered at trial).

(n21)Footnote 1. *Fed. R. Civ. P. 60(b)(2).*

(n22)Footnote 2. *Parrilla-Lopez v. United States, 841 F.2d 16, 19 (1st Cir. 1988) .*

(n23)Footnote 3. *United States v. Turns, 198 F.3d 584, 587 (6th Cir. 2000) .*

(n24)Footnote 4. *Washington v. Patlis, 916 F.2d 1036, 1038 (5th Cir. 1990) .*

(n25)Footnote 5. *Atkinson v. Prudential Prop. Co., 43 F.3d 367, 371 n.3 (8th Cir. 1994) .*

(n26)Footnote 6. *Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)* (in age discrimination case, employees of defendant knew that plaintiff was already receiving pension benefits, even if trial counsel did not).

(n27)Footnote 7. *Scutieri v. Paige, 808 F.2d 785, 794 (11th Cir. 1987) .*

(n28)Footnote 1. *Fed. R. Civ. P. 60(b)(2).*

(n29)Footnote 2. *Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1433-1434 (7th Cir. 1996)* (plaintiff's asserted new evidence in asbestos case came from product identification witness who had been used by plaintiff's counsel for years in similar cases; therefore, due diligence would have led to discovery of evidence in time for summary

judgment motion).

(n30)Footnote 3. *Aliff v. Joy Mfg. Co., 914 F.2d 39, 44 (4th Cir. 1990)* .

(n31)Footnote 4. *United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir. 1983)* , *cert. denied, 462 U.S. 1144 (1983)* .

(n32)Footnote 1. *New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1201 (5th Cir. 1993)* (new evidence was neither competent nor likely to have produced a different result).

(n33)Footnote 2. *Daniels v. Pipefitters' Ass'n Local Union No. 597, 983 F.2d 800, 803 (7th Cir. 1993)* .

(n34)Footnote 1. *See Fed. R. Evid. 402*.

(n35)Footnote 2. *Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992)* .

(n36)Footnote 3. *Trans Mississippi Corp. v. United States, 494 F.2d 770, 773 (5th Cir. 1974)* .

(n37)Footnote 4. *Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 728 (10th Cir. 1993)* (if party through negligence or tactical decision fails to present evidence that was available, party may not take advantage of Rule 60(b)(2) by finding substantially similar evidence from a newly discovered source).

(n38)Footnote 5. *Baxter Int'l, Inc. v. Morris, 11 F.3d 90, 93 (8th Cir. 1993)* (evidence that defendant had used proprietary information to start business insufficient when it would have only been used to impeach defendant's character and would not contradict trial testimony).

(n39)Footnote 1. *Liquidation Comm'n of Banco Intercontinental, S.A. v. Alvarez Renta, 530 F.3d 1339, 1358 (11th Cir. 2008)* (new evidence would not be sufficient under Rule 60(b)(2) when it is of questionable relevance and authenticity or is largely cumulative of evidence already admitted).

(n40)Footnote 2. *E. Savings Bank, FSB v. LaFata (In re LaFata), 483 F.3d 13, 24 (1st Cir. 2007)* .

(n41)Footnote 3. *Resolution Trust Corp. v. Kemp, 951 F.2d 657, 664 (5th Cir. 1992)* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
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3-26 Moore's Manual--Federal Practice and Procedure § 26.43

§ 26.43 Fraud, Misrepresentation, or Misconduct of Adverse Partyn*

[1] Intentional Conduct Not Necessary for Relief

The court has discretion to relieve a party from a final judgment, order, or proceeding because of intrinsic or extrinsic fraud, misrepresentation, or misconduct by an opposing party. n1 Fraud is the knowing misrepresentation of a material fact, or concealment of a material fact if there is a duty to disclose, for the purpose of inducing another to act to his or her detriment. Thus, fraud may include many types of intentional conduct. n2 However, because Rule 60(b)(3) also includes misrepresentations and misconduct, these grounds for relief do not require intentional or deliberate acts or omissions. n3 Courts determining Rule 60(b)(3) motions always require proof that the alleged fraud or other misconduct prevented the moving party from fully and fairly presenting his or her case at trial. n4

Rule 60(b)(3) expressly states that a party may be relieved from a judgment on the basis of fraud, regardless of whether the fraud could be classified as "intrinsic" or "extrinsic." n5 Therefore, the types of fraud meriting relief from a final judgment include both conduct outside of the courtroom prior to trial, and the presentation of perjured testimony at trial. Perjury at trial is a classic example of "intrinsic" fraud, and prior to enactment of Rule 60(b)(3), there could be no relief from judgment on that grounds. n6 Because the purpose of Rule 60(b)(3) is aimed at providing relief for judgments that were unfairly obtained, and not necessarily those that are factually inaccurate, n7 the moving party does not have to prove that there would be a different outcome in the case and that he or she would prevail in a retrial in order to secure relief from judgment on the basis of fraud of an adverse party. n8 However, the moving party may not complain of fraudulent conduct that could negatively affect only the adverse party. n9

[2] Moving Party Has Burden to Establish Fraud, Misrepresentation, or Misconduct

Rule 60(b) provides relief from judgment where the opposing party engages in fraud, misrepresentation, or other misconduct. n1 The purpose of the rule is to protect the fairness of litigation in federal courts, and to obtain relief under the provision, the moving party has the burden to clearly show that he or she has a meritorious claim and that the opposing party's fraud, misrepresentation, or misconduct prevented the case from being fully and fairly presented at trial. n2

Thus, the fraud, misrepresentation, or misconduct that is grounds for a Rule 60(b)(3) relief refers to an act or omission that subverts the litigation process itself. n3 Therefore, it is improper to base the motion on fraud or misrepresentation that has been alleged in the complaint on the merits of the claim for relief in the underlying case. n4 The court may allow a movant to establish this course of litigation type fraud by first presenting a "colorable" claim of fraud, before permitting the movant preliminary discovery to uncover and present the necessary clear and convincing evidence of fraud. n5

[3] Fraud, Misrepresentation, or Misconduct Must Be Attributable to Adversary

The court will not grant a Rule 60(b)(3) motion if the moving party's own action or omission has contributed to the fraud or misconduct, because the rule expressly states that it applies only to fraud or misrepresentation "of an adverse party." n1 For purposes of this provision, the fraud of an adverse party's attorney is deemed attributable to the adverse party. n2

The fraud or misconduct of a witness is attributable to the adverse party when it has been procured by the adverse party, as in the case of witness tampering. n3 Similarly, the fraudulent testimony of an expert witness could be attributable to an adverse party that has had a long term, ongoing relationship with the expert. n4 On the other hand, fraud or misconduct of an ordinary fact witness is ordinarily not attributable to a party unless the party has knowledge or should have knowledge of the fraudulent circumstances. n5 However, some courts allow Rule 60(b)(3) relief on the basis of false testimony of a witness presented by an adverse party if: the testimony is material; without the testimony, a jury might have reached a different conclusion; the moving party was taken by surprise when the false testimony was given; and the moving was unable to meet the testimony or did not know of its falsity until after trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentFraud

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.43 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)(3).*

(n3)Footnote 2. *Info Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 456 (6th Cir. 2008)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 402 F.3d 1198, 1206 (Fed. Cir. 2005) .*

(n5)Footnote 4. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d 985, 993-994 (10th Cir. 1999)* (no abuse of discretion in denying relief for plaintiff's pretrial failure to disclose its theory of damages; plaintiff's misconduct did not interfere substantially with defendant's trial preparation because defendant had access to numbers on which plaintiff's damages claim was based, and district court afforded defendant opportunity to cross-examine plaintiff concerning damages).

(n6)Footnote 5. *Fed. R. Civ. P. 60(b)(3).*

(n7)Footnote 6. *See Range v. United States, 256 B.R. 868, 874 (S.D. Tex. 2000)* (in independent action, party must still establish extrinsic as opposed to intrinsic fraud, and majority rule is that perjury by trial witnesses is intrinsic fraud).

(n8)Footnote 7. *Schultz v. Butcher, 24 F.3d 626, 631 (4th Cir. 1994) .*

(n9)Footnote 8. *Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978)* .

(n10)Footnote 9. *Alexander v. Robertson, 882 F.2d 421, 425 (9th Cir. 1989)* (when only nonmoving party could have been negatively harmed by fraud during trial, court of appeals concluded that it would be inappropriate to set aside judgment rendered in favor of nonmoving party).

(n11)Footnote 1. *Fed. R. Civ. P. 60(b)(3)*.

(n12)Footnote 2. *Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19, 28 (1st Cir. 2006)* .

(n13)Footnote 3. *Roger Edwards, LLC v. Fiddes & Son, 427 F.3d 129, 134 (1st Cir. 2005)* .

(n14)Footnote 4. *Antoine v. Rucker, 2008 U.S. Dist. LEXIS 53685, at *11-*12 (D.N.J. July 15, 2008)* ; *Optimal Health Care Services v. Travelers Ins. Co., 801 F. Supp. 1558, 1561 (E.D. Tex. 1992)* .

(n15)Footnote 5. *Pearson v. First NH Mortg. Corp., 200 F.3d 30, 34-35 (1st Cir. 1999)* .

(n16)Footnote 1. *Fed. R. Civ. P. 60(b)(3)*; *see Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1102 (9th Cir. 2006)* .

(n17)Footnote 2. *Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 833 (7th Cir. 1985)* .

(n18)Footnote 3. *Ty Inc. v. Softbelly's, Inc., 353 F.3d 528, 536-537 (7th Cir. 2003)* .

(n19)Footnote 4. *Harre v. A.H. Robins Co., 750 F.2d 1501, 1505 (11th Cir. 1985)* , *modified on other grounds*, *866 F.2d 1303, 1304 (11th Cir. 1989)* .

(n20)Footnote 5. *Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 833 (7th Cir. 1985)* .

(n21)Footnote 6. *See Abrahamsen v. Trans State Exp., Inc., 92 F.3d 425, 428 (6th Cir. 1996)* ; *Devon Distrib. Corp v. Arthur E. Miner & A.J. Garrett & Assocs., 525 F. Supp. 2d 1089, 1093 (S.D. Iowa 2007)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.44

§ 26.44 Void Judgmentn*

[1] Void Judgment Subject to Motion for Relief

Rule 60(b)(4) provides one method for a party to obtain relief from a void judgment. n1 A judgment is void for purposes of this provision only if the court that rendered judgment lacked jurisdiction or if the court's action amounts to a plain usurpation of power constituting a violation of due process. n2 A void judgment is distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one that is a complete nullity and without legal effect from its inception. n3 In other words, a judgment is void only if the judgment is totally beyond a court's power to render; the principle of void judgments is narrowly construed. n4 Only when the jurisdictional error is "egregious" will courts treat the judgment as void, and to be egregious, the error occurs when the court wrongfully extends its jurisdiction beyond the scope of its authority. n5

An error in the exercise of jurisdiction by a court's wrongly deciding a case is simply not the same thing as a total lack of jurisdiction, and only the latter demands judicial intervention under Rule 60(b)(4). A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity. n6 For example, a lower court that fails to follow the mandate of an appellate court may commit error that is reversible on appeal, but its judgment is not void if the lower court has jurisdiction of the subject matter, the parties, and does not deny any party due process. n7

[2] Types of Void Judgments

[a] Lack of Subject Matter Jurisdiction

A judgment is void if it was rendered by a court that was entirely without jurisdiction over the subject matter. In the context of Rule 60(b)(4), a lack of subject matter jurisdiction is void when there is no arguable basis for the court's jurisdiction n1 over the type of case, and not whether a court has made an erroneous decision of subject matter jurisdiction in the circumstances in a particular case. n2 For example, certain types of interlocutory appeals may deprive a district court of the power to render any meaningful judgment until the appeal has been concluded. The district court

simply has no power to act under these types of circumstances, and the district court's order of dismissal is void and may be set aside on a Rule 60(b)(4) motion. n3 On the other hand, when a court does have jurisdiction over a general category of case, the fact that a court erroneously assumes jurisdiction in one individual case is generally not sufficient to make the resulting judgment void for lack of subject matter jurisdiction. This is because a court has jurisdiction to determine its own jurisdiction. n4 The concept of a void judgment is extremely limited. Only when the jurisdictional error is "egregious" will courts treat the judgment as void, as when a court plainly usurps jurisdiction or there is no arguable basis for jurisdiction. n5

[b] Lack of Personal Jurisdiction Over Defendant

Rule 60(b)(4) allows a litigant, even one that has not initially appeared in an action, to collaterally attack a judgment on the ground that it is void due to lack of personal jurisdiction. This rule is based on the principle that an in personam judgment entered without personal jurisdiction over a defendant is void as to that defendant. Whether a judgment is void on this ground generally entails a two-step inquiry. First, the court must determine whether the exercise of jurisdiction is appropriate under the forum state's long arm statute. Second, the court must examine whether exercising jurisdiction over the defendant would violate the *Due Process Clause of the Fourteenth Amendment*, which requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction not offend principles of fair play and substantial justice. n6 Although the court had the theoretical power to exercise personal jurisdiction over a defendant, a judgment may also be void because the defendant was not adequately served with process. n7

In a class action, a lack of proper notice to individual members of the class renders the judgment void with respect to those persons, n8 and a Rule 60(b)(4) motion is the proper remedy for relief from a class judgment that is void on such grounds. n9

[c] Violation of Due Process by Court That Entered Judgment

A judgment is void and subject to relief under Rule 60(b)(4) if the court rendered the judgment in circumstances in which the court's action amounted to a plain usurpation of power that constituted a violation of due process. n10 For example, one court of appeals reversed the denial of a Rule 60(b) motion for relief from a void judgment when it found that the judgment compelling arbitration was issued in direct contravention of the statute that entitled the moving party to an evidentiary trial. n11 In another case, a consent judgment based on a settlement of a minor's claim was void because the minor's guardian had not obtained advance approval of the settlement from a state court, and the applicable state law provided that such an unapproved settlement was a nullity. n12

[3] Exceptions From Ordinary Requirements of Rule

Rule 60(b)(4) motions are unique in several respects. First, Rule 60(b) motions are generally considered to be subject to the court's discretion. n1 However, if a judgment is void, it has been held that the court is required to grant relief under Rule 60(b)(4). n2 Therefore, once the court determines that a judgment is actually void and not simply erroneous, the court really has no discretion whether to grant relief. n3 Second, in all Rule 60(b) motions for relief from a judgment on any ground except the judgment is void, the moving party must as a precondition to relief show that he or she has a meritorious claim or defense. n4 This precondition does not apply when the ground asserted for relief is that the judgment is void. n5 Finally, despite the general rule that a motion for relief from a judgment brought under Rule 60(b) must be brought within a "reasonable" time, n6 there is no real time limit of any kind on a motion for relief from a void judgment. Thus, a motion under Rule 60(b)(4) challenging a judgment as void is not subject to the "reasonable" time requirement of Rule 60(b) and may be made at any time. n7

[4] Other Methods to Set Aside Void Judgment

Rule 60(b)(4) is not the only method that may be used to set aside a void judgment. A party may use any of the following methods to have a court set aside a void judgment: a motion to amend the judgment under Rule 59(e); n1 a

direct appeal; n2 an independent action in equity; n3 and a collateral attack, which is an attack on the judgment in a subsequent action in a court different from the court that entered the judgment initially. For example, a person may refuse to respond to a lawsuit brought against the person in a federal district court if, in fact, that court lacked personal or subject matter jurisdiction, and the person could then challenge any post judgment enforcement proceedings in the district court, or challenge the in any other court by collateral attack.

However, the Supreme Court has held that a collateral attack is generally not available if the issue of jurisdiction was contested and decided in the court that entered the judgment initially, even if the decision was erroneous; in such circumstances, the judgment of the first court on the issue is res judicata and is entitled to full faith and credit. n4 The Restatement (Second) of Judgments sets out three exceptions to this general prohibition against a jurisdictional collateral attack: (1) the subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; (2) allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) the judgment was rendered by a court lacking capability to make an adequately informed determination of its own jurisdiction, and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's jurisdiction. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentVoid Judgments

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.44 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)(4).*

(n3)Footnote 2. *Wendt v. Leonard, 431 F.3d 410, 412-413 (4th Cir. N.C. 2005)* ; *Hunter v. Underwood, 362 F.3d 468, 475-476 (8th Cir. 2004)* .

(n4)Footnote 3. *Baella Silva v. Hulsey, 454 F.3d 5, 9 (1st Cir. 2006)* .

(n5)Footnote 4. *United States v. One Rural Lot No. 10,356, 238 F.3d 76, 78 (1st Cir. 2001)* .

(n6)Footnote 5. *United States v. Tittjung, 235 F.3d 330, 335 (7th Cir. 2000)* .

(n7)Footnote 6. *United States v. One Rural Lot No. 10,356, 238 F.3d 76, 78 (1st Cir. 2001)* .

(n8)Footnote 7. *Chambers v. Armontrout, 16 F.3d 257, 260 (8th Cir. 1994)* .

(n9)Footnote 1. *Baella Silva v. Hulsey, 454 F.3d 5, 9 (1st Cir. 2006)* .

(n10)Footnote 2. *Hunter v. Underwood, 362 F.3d 468, 475-476 (8th Cir. 2004)* (district court had arguable basis for subject matter jurisdiction because it is vested with power to hear cases involving implementation of federal regulations and to review administrative agency action).

(n11)Footnote 3. *Williams v. Brooks, 996 F.2d 728, 729-731 (5th Cir. 1993)* .

(n12)Footnote 4. *Williams v. North Carolina, 325 U.S. 226, 230, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945)* .

(n13)Footnote 5. *Wendt v. Leonard, 431 F.3d 410, 412-413 (4th Cir. 2005)* (citing **Moore's Federal Practice**).

(n14)Footnote 6. *Sloss Indus. Corp. v. Eurisol, 488 F.3d 922, 925 (11th Cir. 2007)* .

(n15)Footnote 7. *Printed Media Servs. v. Solna Web, Inc., 11 F.3d 838, 843 (8th Cir. 1993)* .

(n16)Footnote 8. *Simer v. Rios, 661 F.2d 655, 663-664 (7th Cir. 1981)* (entry of settlement decree without notice to putative class members violated due process rights of class members and judgment had to be vacated as void).

(n17)Footnote 9. *Silber v. Mabon, 957 F.2d 697, 700 & n.3 (9th Cir. 1992)* .

(n18)Footnote 10. *United States v. One Rural Lot No. 10,356, 238 F.3d 76, 78 (1st Cir. 2001)* .

(n19)Footnote 11. *Great Am. Trading Corp. v. I.C.P. Cocoa, Inc., 629 F.2d 1282, 1287-1288 (7th Cir. 1980)* .

(n20)Footnote 12. *Carter v. Fenner, 136 F.3d 1000, 1006-1009 (5th Cir. 1998)* (due process violation occurs when parties' failure to follow relevant law or procedure vitiates validity of judgment).

(n21)Footnote 1. *See § 26.23*

(n22)Footnote 2. *Hukill v. Okla. Native Am. Domestic Violence Coalition, 542 F.3d 794, 797 (10th Cir. 2008)* (relief is mandatory Rule 60(b)(4) is properly invoked on grounds of void judgment).

(n23)Footnote 3. *Gillespie v. Capitol Reprographics, LLC, 573 F. Supp. 2d 80, 82 (D.D.C. 2008)* .

(n24)Footnote 4. *See § 26.23*

(n25)Footnote 5. *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind, 841 F.2d 646, 649 (5th Cir. 1988)* .

(n26)Footnote 6. *Fed. R. Civ. P. 60(b).*

(n27)Footnote 7. *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc., 160 F.3d 849, 852 (1st Cir. 1998)* ; *Carter v. Fenner, 136 F.3d 1000, 1006 (5th Cir. 1998)* .

(n28)Footnote 1. *See Demos v. Brown (In re Graves), 279 B.R. 266, 276 (9th Cir. 2002)* ; *see also § 24.80*, et seq.

(n29)Footnote 2. *See Hunter v. Underwood, 362 F.3d 468, 477 (8th Cir. 2004)* .

(n30)Footnote 3. *See Fed. R. Civ. P. 60(d)(1)*; *United States v. Beggerly, 524 U.S. 38, 47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* ; *see also § 26.80* et seq.

(n31)Footnote 4. *Travelers Indem. Co. v. Bailey, ___ U.S. ___, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 110-111 (2009)* .

(n32)Footnote 5. Restatement (Second) of Judgments § 12 (quoted in *Travelers Indem. Co. v. Bailey, ___ U.S. ___, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 111 (2009))* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
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3-26 Moore's Manual--Federal Practice and Procedure § 26.45

§ 26.45 Obsolescence of Judgmentn*

[1] Satisfaction, Release, or Discharge of Judgment

A court may set aside a final judgment or order pursuant to Rule 60(b)(5) when the judgment has been satisfied, released, or discharged. n1 A motion for relief from a judgment under this provision of Rule 60(b)(5) should be granted if the court makes a determination that the judgment from which relief is sought has in fact been satisfied, released, or discharged. If not, the court should deny the motion. For example, in one case relief was denied because, even though the sums set forth in the judgment were paid, there was a dispute about whether it was proper for the defendant to withhold income taxes from the payments made on the judgment. n2 In another case, relief was denied when there was a dispute about the correct amount of taxes to be withheld from payments made on the judgment. n3

[2] Prior Judgment Reversed or Vacated

A court may set aside a final judgment or order when a prior judgment on which the judgment in question is based has been reversed or otherwise vacated. n1 Generally, the judgment in question is "based" on a prior judgment within the meaning of this rule when the prior judgment is so related to the second judgment that the prior judgment has claim or issue preclusion effect on the second. n2 In the absence of such a direct connection, a change in applicable law does not provide sufficient basis for relief. Consequently, in order to come within this second category Rule 60(b)(5), the prior judgment must be directly related to the purportedly reversing decision. The prior judgment would be directly related if it gives rise to the cause of action or is part of the same proceeding. n3 For example, Rule 60(b)(5) authorizes a district court to grant relief from an attorney's fee award if the underlying merits judgment that was the basis for the fee award is vacated on appeal. n4 On the other hand, because the rule is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion, it does not apply merely because a case relied on as precedent in the first judgment has since been reversed. n5

[3] Inequitable Prospective Application of Judgment

[a] Description of Relief Available

Under Rule 60(b)(5), a party may obtain relief from a judgment on the ground that it is no longer equitable that the judgment have prospective application. n1 It is important to note that Rule 60(b)(5) is applicable only to those judgments that have some "prospective" application, and that not all judgments do, even though virtually every court order has at least some consequences in the future. Continuing consequences, however, do not necessarily mean that a judgment has "prospective application" for the purposes of Rule 60(b)(5). To apply prospectively, the judgment must be "executory" or involve "the supervision of changing conduct or conditions." n2

The most common example of the inequitable application of a prospective judgment is a continuing permanent or temporary injunction. n3 A party seeking to dissolve a judgment establishing a continuing injunction has the burden of establishing that a significant change in circumstances has occurred since the judgment was entered. A court may recognize subsequent changes in either statutory or decisional law that render the injunction inappropriate, and a court errs when it refuses to modify an injunction after the occurrence of such changes. n4 If a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction. n5

Another common example of a judgment with prospective application is a consent decree, which is essentially a settlement agreement of the parties that is incorporated into a judgment of a court of competent jurisdiction, and which commands or prohibits conduct. A consent decree is prospective in application because the court is ordering future conduct of the party to comply with the terms of the consent decree. Consequently, a party requesting that a court modify or vacate a consent decree may do so by making a motion under Rule 60(b)(5). n6

On the other hand, a simple money judgment may not be set aside or reopened under Rule 60(b)(5) because it has no prospective application. Even if a judgment debtor has not yet paid a judgment, it remains final and therefore, is not "prospective" because it is not executory and involves no judicial supervision of changing conduct or conditions. n7

A declaratory judgment may or may not have prospective application depending on the circumstances. For example, a declaratory judgment that creates a lien on property affects events in the future and has prospective application. n8 However, a simple judgment declaring the respective rights in the parties to a piece of personal property is immediately final; the dispute over ownership rights is in the past and the declaration resolves the controversy immediately. This type of declaration has no prospective application because no actions are anticipated in the future. n9 In the same way, a civil forfeiture of assets declaration calls for an immediate transfer of the assets in question, and there are no future acts that must be completed pursuant to the declaration. Therefore, the declaration has no prospective application. n10

[b] Standard for Grant of Relief from Judgment

The United States Supreme Court has provided guidelines in the form of a standard under Rule 60(b)(5) for a court to reopen, modify, or set aside a judgment with prospective application on the ground that it "is no longer equitable that the judgment should have prospective application." The Court has stated that because of the equitable nature of the relief, the party seeking modification of a judgment has the burden of establishing a significant change in either factual circumstances or in law. n11 A court should consider several factors in determining whether there is a "significant change" in circumstances that makes continued enforcement of the decree inequitable: n12

1. Whether the relief sought is a complete dissolution of the judgment or only a modification of the judgment. n13

2. Whether the judgment is a private injunction or a public injunction, including a "institutional reform" injunction, because the finality of judgments and sanctity of agreements are much more important for private injunctions. In other words, when a Rule 60(b)(5) motion is made to dissolve a public injunction the court should apply a much more flexible and lenient approach than for private injunctions. n14

3. The degree to which changes in circumstances were anticipated. Generally, dissolution or modification should not be granted when a party is relying on events that actually were anticipated at the time of the judgment. n15

4. Other relevant nonexclusive factors that a court should consider in ruling on a Rule 60(b)(5) motion regarding an injunction include the length of time since the injunction was entered, whether there has been good faith compliance, and the likelihood of recurrence absent the injunction; none of these factors alone is determinative. n16

[c] Standard for Grant of Relief from Consent Decree

A consent decree, while contractual in nature because it is based on an agreement of the parties, is incorporated in a judgment and therefore enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees. Accordingly, parties who want the court to modify or vacate a consent decree may do so by resorting to Rule 60(b). n17 The court applies a two-part test to determine whether modification of a consent decree is justified. Under the first part, a party seeking to modify a consent decree bears the burden of establishing that a significant change in circumstances justifies revision of the decree. A party may meet the initial burden of establishing a significant change in circumstances by showing a significant change either in factual conditions or in law. n18 If the moving party meets this initial burden, the court should move on to the second part of the test, which is a consideration of whether the proposed modification is suitably tailored to the changed circumstance. Thus, a consent decree must be modified if it later turns out that one or more of the obligations placed on the parties has become impermissible under federal law. Modification of a consent decree may also be warranted if the statutory or decisional law has changed to make legal what the decree was designed to prevent. While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentPrior Judgment Reversed

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* §§ 60.45-60.47 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

(n3)Footnote 2. *Redfield v. Insurance Co. of N. Am., 940 F.2d 542, 549 (9th Cir. 1991)* .

(n4)Footnote 3. *Tungseth v. Mutual of Omaha Ins. Co., 43 F.3d 406, 409 (8th Cir. 1994)* (relief denied because defendant failed to prove to district court that amounts withheld for taxes were correct).

(n5)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

(n6)Footnote 2. *Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990)* ; *Tomlin v. McDaniel, 865 F.2d 209, 210-211 (9th Cir. 1989)* (citing **Moore's Federal Practice**).

(n7)Footnote 3. *Comfort v. Lynn Sch. Comm., 560 F.3d 22, 27-28 (1st Cir. 2009)* .

(n8)Footnote 4. *California Med. Ass'n v. Shalala, 207 F.3d 575, 577-578 (9th Cir. 2000)* .

(n9)Footnote 5. *Comfort v. Lynn Sch. Comm., 560 F.3d 22, 27 (1st Cir. 2009)* (mere emergence of controlling precedent in another case that showed incorrectness of prior judgment does not justify Rule 60(b)(5) relief).

(n10)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

(n11)Footnote 2. *Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138-1139 (D.C. Cir. 1988)* .

(n12)Footnote 3. *See Doe v. Briley, 562 F.3d 777, 781 (6th Cir. 2009)* (less common examples are consent decrees and declaratory judgments).

(n13)Footnote 4. *Agostini v. Felton, 521 U.S. 203, 215, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (granting Rule 60(b)(5) relief from prospective application of permanent injunction barring public school teachers from providing remedial instruction in parochial schools).

(n14)Footnote 5. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 466 F.3d 391, 395 (6th Cir. 2006)* .

(n15)Footnote 6. *United States v. Krilich, 303 F.3d 784, 790 (7th Cir. 2002)* ; *see also* [c], *below*.

(n16)Footnote 7. *Stokors S.A. v. Morrison, 147 F.3d 759, 762 (8th Cir. 1998)* .

(n17)Footnote 8. *DeWeerth v. Baldinger, 38 F.3d 1266, 1276 (2d Cir. 1994)* (citing **Moore's Federal Practice**).

(n18)Footnote 9. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 131 F.3d 625, 630-631 (7th Cir. 1997)* (declaratory judgment fixing parties' rights and duties under contract does not have prospective application where it is based on established and immutable facts).

(n19)Footnote 10. *Schwartz v. United States, 976 F.2d 213, 218 (4th Cir. 1992)* .

(n20)Footnote 11. *Horne v. Flores, ___ U.S. ___, 129 S. Ct. 2579, 174 L. Ed. 2d 406, 422 (2009)* .

(n21)Footnote 12. *See also* Ch. 10A, *Injunctions* for a discussion of equitable factors considered in grant of injunctive relief.

(n22)Footnote 13. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 466 F.3d 391, 395 (6th Cir. 2006)* .

(n23)Footnote 14. *Horne v. Flores, ___ U.S. ___, 129 S. Ct. 2579, 174 L. Ed. 2d 406, 422-423 (2009)* (principle is based on federalism concerns that institutional reform injunctions could bind state and local officials for excessively long periods); *Agostini v. Felton, 521 U.S. 203, 215, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (court uses more lenient approach of public injunction to evaluate changes in law).

(n24)Footnote 15. *Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 385, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)* .

(n25)Footnote 16. *SEC v. Coldicutt, 258 F.3d 939, 943 (9th Cir. 2001)* .

(n26)Footnote 17. *United States v. Krilich, 303 F.3d 784, 790 (7th Cir. 2002)* .

(n27)Footnote 18. *Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-384, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)* ; *see* [b], *above*.

(n28)Footnote 19. *United States v. Krilich, 303 F.3d 784, 789-790 (7th Cir. 2002)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.46

§ 26.46 Other Reasons Justifying Reliefn*

[1] Availability of Relief Under Catch-All Provision

The final ground for relief from judgment is a "catch-all" provision under Rule 60(b)(6), n1 which provides that a court may grant relief from a final judgment, order, or proceeding when there is any other reason justifying relief from the operation of the judgment. n2 This provision gives the court equitable power to do justice in a particular case. n3 However, the court's discretion is not unlimited. The rule may not be used except in extraordinary circumstances, n4 and the court may not speculate on grounds for granting relief. n5 The court granting relief must always have an articulated, valid reason for the grant of relief under Rule 60(b)(6). n6

There are other limitations to this catch all provision. First, the provision applies only when the grounds specified for relief relate to matters other than those set out in the more specific clauses of Rule 60(b). To hold otherwise would eliminate the need for the specific provisions and the limitations that are imposed on those specific provisions. n7 Thus, the one year time limit imposed on motions under Rule 60(b)(1)-(3) would have no meaning if the same type of conduct could justify a later motion under Rule 60(b)(6). n8 Because each of the bases for relief under Rule 60(b)(1)-(6) has its own requirements, each application for relief must be categorized into one of the bases. If an application is categorized in Rule 60(b)(1)-(5), but fails to meet the standards of that basis, it may not then be asserted under Rule 60(b)(6). n9 For example, only excusable neglect is a ground for relief under Rule 60(b)(1); therefore, deliberate and willful conduct that is inexcusable under Rule 60(b)(1) may not form the basis for relief under Rule 60(b)(6) any more than it does under Rule 60(b)(1). n10

Another major limitation is that Rule 60(b)(6) may not be used to obtain relief from a late appeal. n11 This limitation prevents a party from using Rule 60(b) to circumvent the 180-day absolute time limit of Appellate Rule 4(a)(6). n12 Once the 180-day period under Appellate Rule 4(a)(6) has expired, a party may not obtain relief under Rule 60(b), because the party is essentially asking the district court to vacate and reenter its order merely to restart the time for appeal. n13

[2] Extraordinary Circumstances Required for Relief

[a] Requirement of Extraordinary Circumstances

Because Rule 60(b)(6) operates as an equitable catch-all provision, it may only be used in "extraordinary circumstances." For purposes of Rule 60(b)(6), there is a fault/no fault distinction that is the primary factor in determining whether extraordinary circumstances exist. n1 To demonstrate extraordinary circumstances, it must appear that the moving party is completely without fault for the situation providing the reason for relief. On the other hand, if a party is entirely or partly to blame, Rule 60(b)(6) relief is not available to that party. n2

In most of the cases finding extraordinary circumstances, the moving party is completely without fault, meaning that the moving party was unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought. n3 Conversely, if the moving party is at fault to any degree, or has engaged in any misconduct or other culpable conduct, the court generally finds a lack of extraordinary circumstances and will deny relief from judgment. In the most common example, courts consistently find that extraordinary circumstances do not exist when an applicant is at fault for a delay in moving for relief. n3.1

[b] Examples of Extraordinary Circumstances

Examples of cases in which the court has found extraordinary circumstances sufficient to justify Rule 60(b)(6) relief from judgment include the following:

1. When the moving party had no knowledge of the proceedings or judgment. For example, a judgment against one of several co-defendants who allegedly signed a loan agreement was set aside when the moving co-defendant established that he never knew of the underlying loan agreement because his name was signed by another person and only a single answer had been filed on behalf of all defendants by an attorney with no authority to represent the moving co-defendant. n4

2. Moving party's agent's wrongful consent to judgment. A court may grant relief under Rule 60(b)(6) when the moving party's agent or attorney has consented to the judgment without authority to bind the moving party principal to the judgment. n5

3. Failure of settlement agreement. A court may grant relief from a judgment entered pursuant to a settlement agreement when, subsequent to the judgment, the nonmoving party fails to perform according to the terms of the settlement agreement. n6 However, the court will deny relief if adequate relief is available through a separate lawsuit for breach of the settlement agreement. n7

4. Improper confession of judgment. If a judgment has been entered by confession of judgment, the court may set aside the judgment under Rule 60(b)(6) when it is improper. n8 The device of the confession of judgment is designed to prevent a debtor from having an opportunity to litigate prior to judgment, so courts have allowed post-judgment remedies to debtors who have claims as to the propriety of the judgments entered against them. Thus, judgments by confession may be attacked when the consideration for the transaction has failed, n9 and when the entry of a judgment by confession has denied due process to a debtor. n10

5. Reinstatement of lawsuit on basis of diversity. Extraordinary circumstances exist that justify relief from a judgment of dismissal for lack of subject-matter jurisdiction if the plaintiff has an inadvertent change in citizenship that prevents reinstatement of a diversity claim and the failure to grant relief from judgment would effectively prevent any adjudication of the plaintiff's claims. n10.1

6. Gross negligence of the party's attorney in the case. If the client can demonstrated gross negligence on the part of his or her counsel, a default judgment against the client may be set aside pursuant to Rule

60(b)(6). However, in order to constitute "extraordinary circumstances," an attorney's failures must be so egregious and profound that they amount to the substantial abandonment of the client's case, such as through physical, or constructive, disappearance. n10.2

[c] Lack of Extraordinary Circumstances

Courts have found that extraordinary circumstances did not exist in the following cases, and, therefore, the moving party was not entitled to relief from the judgment under Rule 60(b)(6):

1. Lack of knowledge of the relevant law or legal theory does not constitute extraordinary circumstances. n11

2. Failure to move for relief in a prompt manner precludes finding of extraordinary circumstances. n12 Similarly if a party fails to take advantage of a clear opportunity to litigate an issue prior to the judgment in question, the party is precluded from use of that issue to obtain Rule 60(b) relief. n13

3. Violation of a court order or rule. A party is not entitled to Rule 60(b)(6) relief from the resulting judgment if the party had repeatedly violated its discovery obligations and court orders after the party has been given opportunities to correct its errors. n14

4. Changes in decisional law generally do not amount to extraordinary circumstances. n15 Courts generally have held that changes in decisional law do not, by themselves, justify relief from judgments. n16 However, a change in decisional law may be considered in granting Rule 60(b)(6) relief in connection with other facts and circumstances that warrant action by the court. n17 Furthermore, at least one court has stated that unexpected changes in statutory law might be the basis for relief. n18

5. The opposition's misrepresentation or failure to disclose required information in a pleading or other filing with the court does not constitute "extraordinary circumstances" necessary to avoid a judgment under Rule 60(b)(6). n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.48 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fafel v. DiPaola, 399 F.3d 403 408 (1st Cir. 2005)* .

(n3)Footnote 2. *Fed. R. Civ. P. 60(b)(6).*

(n4)Footnote 3. *Nisson v. Lundy, 975 F.2d 802, 806 (11th Cir. 1992)* (per curiam), *aff'd without opinion, 51 F.3d 1051 (11th Cir. 1995)* .

(n5)Footnote 4. *Gonzalez v. Crosby, 545 U.S. 524, 534-535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)* .

(n6)Footnote 5. *Provident Sav. Bank v. Popovich, 71 F.3d 696, 699-700 (7th Cir. 1995)* .

(n7)Footnote 6. *African Methodist Episcopal Church, Inc. v. Ward, 185 F.3d 1201, 1202-1203 (11th Cir. 1999)* .

(n8)Footnote 7. *Gonzalez v. Crosby, 545 U.S. 524, 528-529, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)* .

(n9)Footnote 8. *See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* (Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive grounds on which party may seek relief).

(n10)Footnote 9. *Gonzalez v. Crosby, 545 U.S. 524, 529, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)* ; *Cadle Co. v. Neubauer, 562 F.3d 369, 371 (5th Cir. 2009)* .

(n11)Footnote 10. *Epling v. United States, 172 F.R.D. 220, 222-223 (W.D. Ky. 1997)* .

(n12)Footnote 11. *Gleash v. Yuswak, 308 F.3d 758, 761-762 (7th Cir. 2002)* .

(n13)Footnote 12. *Fed. R. App. P. 4(a)(6).*

(n14)Footnote 13. *Vencor Hosps., Inc. v. Standard Life & Accident Ins. Co., 279 F.3d 1306, 1309-1311 (11th Cir. 2002)* .

(n15)Footnote 1. *Lightfoot v. District of Columbia, 555 F. Supp. 2d 61, 71 (D.D.C. 2008)* (quoting **Moore's Federal Practice**).

(n16)Footnote 2. *Blanchard v. Cortes Molina, 453 F.3d 40, 44 (1st Cir. 2006)* .

(n17)Footnote 3. *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 393-394, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* ; *Lender v. Unum Life Ins. Co. of Am., Inc., 519 F. Supp. 2d 1217, 1225 (M.D. Fla. 2007)* (citing **Moore's Federal Practice**).

(n18)Footnote 3.1. *Amado v. Microsoft Corp., 517 F.3d 1353, 1363 (Fed. Cir. 2008)* ; *Grace v. Bank Leumi Trust Co., 443 F.3d 180, 190 n.8 (2d Cir. 2006)* (citing **Moore's Federal Practice**).

(n19)Footnote 4. *National Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 266 (4th Cir. 1993)* .

(n20)Footnote 5. *Washington v. Penwell, 700 F.2d 570, 573-574 (9th Cir. 1983)* (state officers lacked authority to bind state to money judgment in federal court).

(n21)Footnote 6. *Trade Arbed, Inc. v. African Express MV, 941 F. Supp. 68, 70 (E.D. La. 1996)* .

(n22)Footnote 7. *Harman v. Pauley, 678 F.2d 479, 481-482 (4th Cir. 1982)* .

(n23)Footnote 8. *Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 288 & n.3 (3d Cir. 1994)* , *cert. denied, 513 U.S. 1121 (1995)* .

(n24)Footnote 9. *See Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 292 (3d Cir. 1994)* , *cert. denied, 513 U.S. 1121 (1995)* .

(n25)Footnote 10. *See Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 293-294 (3d Cir. 1994)* , *cert. denied, 513 U.S. 1121 (1995)* .

(n26)Footnote 10.1. *LeBlanc v. Cleveland, 248 F.3d 95, 100-101 (2d Cir. 2001)* .

(n27)Footnote 10.2. *Community Dental Servs. v. Tani, 282 F.3d 1164, 1170-1171 (9th Cir. 2002)* ; *Thorpe v. Luisi, 2005 U.S. Dist. LEXIS 15996, *9-*10 (S.D.N.Y. 2005)* .

(n28)Footnote 11. *PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897 (2d Cir. 1983)* , *cert. denied, 464 U.S. 936 (1983)* .

(n29)Footnote 12. *Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 461-462 (2d Cir. 1994)* .

(n30)Footnote 13. *Doe v. Zimmerman (In re Zimmerman), 869 F.2d 1126, 1128 (8th Cir. 1989)* .

(n31)Footnote 14. *Griffin v. Swim-Tech Corp., 722 F.2d 677, 680-681 (11th Cir. 1984)* .

(n32)Footnote 15. *See Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1076-1077 (7th Cir. 1997)* .

(n33)Footnote 16. *Reform Party v. Allegheny County Dep't of Elections, 174 F.3d 305, 311 (3d Cir. 1999)* ; *Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993)* .

(n34)Footnote 17. *See, e.g., Ritter v. Smith, 811 F.2d 1398, 1400-1403 (11th Cir. 1987)* , *cert. denied, 483 U.S. 1010 (1987)* (something more than mere change in the law is necessary to provide the grounds for Rule 60(b)(6) relief).

(n35)Footnote 18. *United States v. Wyle (In re Pacific Far East Lines, Inc.), 889 F.2d 242, 250 (9th Cir. 1989)* .

(n36)Footnote 19. *Patterson v. Mobil Oil Corp., 206 F.R.D. 591, 592 (E.D. Tex. 2002)* .

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3-26 Moore's Manual--Federal Practice and Procedure §§ 26.47through 26.59

[Reserved]

§§ 26.47[Reserved]

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3-26 Moore's Manual--Federal Practice and Procedure § 26.60

§ 26.60 Standing to File Motion for Relief From Judgmentn*

As a general rule, only a party to a judgment or proceeding, or a party's legal representative, may make a Rule 60(b) motion. n1 In this regard, a "party's legal representative" means a nonparty whose interests are directly affected by the final judgment who is a person in privity with a party. This standing limitation to persons in privity with an original party may strictly limit who may or may not bring a Rule 60(b) motion. For example, a person who merely has a contract to indemnify one of the original parties does not have standing to move for a Rule 60(b) relief. n2 A party's legal counsel in a case also lacks standing to bring a Rule 60(b) motion in his or her own right because an attorney is not a party's representative for standing purposes. n3 Similarly, when a person does have standing to bring a Rule 60(b) motion as a party's legal representative, only the party's arguments and claim for relief may be asserted, unless the representative is also a party in his or her own right, because the representative has no standing to assert his or her own claims and arguments. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b)*; *see United States v. 5145 N. Golden State Blvd., 135 F.3d 1312, 1317-1318 (9th Cir. 1998)* ; *but see Grace v. Bank Leumi Trust Co., 443 F.3d 180, 188 (2d Cir. 2006)* (third party may move under Rule 60(b) in limited circumstances when its rights are strongly affected, as when parties agree to settlement for purpose of affecting third party's rights).

(n3)Footnote 2. *Kem Mfg. Corp. v. Wilder, 817 F.2d 1517, 1519-1520 (11th Cir. 1987)* .

(n4)Footnote 3. *Andrews & Kurth L.L.P. v. Wright Killen & Co. (In re El Paso Ref., L.P.), 37 F.3d 230, 234 (5th Cir. 1994)* .

(n5)Footnote 4. *United States v. 8136 S. Dobson St., 125 F.3d 1076, 1082-1083 (7th Cir. 1997)* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
PART I. RELIEF FROM JUDGMENT
B. RELIEF FROM SUBSTANTIVE ERRORS IN JUDGMENT
3. Procedures For Motion for Relief From Judgment

3-26 Moore's Manual--Federal Practice and Procedure § 26.61

§ 26.61 Initiation of Motion for Relief From Judgmentn*

[1] Motion by Party Required to Initiate Relief

The general rule is that Rule 60(b) relief may be initiated only by a motion filed by a party. n1 This means that a court generally will not grant relief under Rule 60(b) sua sponte. n2 However, this is not a strict rule and has several exceptions. Thus, depending on the circuit, the court may initiate Rule 60(b) proceedings provided that the court gives the parties the notice and hearing they would have had available if a party had filed the motion. n3 Some circuits have held that a district court may modify the amount of a default judgment under Rule 60(b) sua sponte. n4 There is also an exception to the motion requirement when a party asserts fraud on the court. Rule 60 explicitly preserves a court's inherent power to set aside a judgment for fraud on the court, n5 and this inherent power may be exercised by the court on its own initiative. n6 However, fraud on the court, as discussed in *§ 26.81*, is a very limited concept.

[2] District Court With Jurisdiction to Hear Motion

[a] Court That Rendered Judgment

Rule 60(b) does not specify the court in which a motion for relief from judgment may be filed. n1 However, it is clear from the language of the rule and from case interpretations that the motion must be brought whenever possible in the court and in the action in which the judgment was rendered. n2 The rationale behind the rule is that the court that rendered the judgment has inherent jurisdiction over a motion to set it aside and is also the court in the best position to judge the equities which determine whether it should be set aside. Furthermore, a court needs no independent source of federal subject matter jurisdiction to support a Rule 60(b) motion proceeding regarding a final judgment or order entered in that court. n2.1 A Rule 60(b) motion is considered a continuation of the original proceeding. If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events. n3

The general rule discussed above that a Rule 60(b) motion must be made in the court in which the judgment was rendered does not apply to judgments rendered in state courts when the proceedings are subsequently removed to

federal court. Once an action is removed to federal court, the district court to which the action is removed may consider a Rule 60(b) motion, even if the motion is to set aside a judgment initially rendered in state court. n4

[b] Court of Registration of Judgment

A Rule 60(b) motion for relief from judgment must generally be presented to the court that rendered the judgment, and most courts hold that a court where a judgment is registered for purposes of enforcement n5 may not hear such a motion. n6 The reason for this rule is that the court of rendition is more familiar with the circumstances and facts. Thus, judicial comity requires that the court of registration defer to rendition court. n7 However, a minority of courts have held that a court of registration of the judgment also has the power to hear the motion. n8

This is especially true in two types of cases. The first is the case in which a registering court has been allowed to grant relief under facts and circumstances that permit the registering court to treat the Rule 60(b) motion as if it were an independent action in equity. n9 The problem with this independent action theory is that many grounds for relief under Rule 60(b) will not support an independent action. n10 The grounds for an independent action in equity are analyzed in § 26.80.

The second type of case in which a court of registration may entertain a Rule 60(b) motion involves motions claiming that the judgment of the rendering court is void because of lack of personal jurisdiction. As one court of appeals noted, the court of rendition will be more familiar with the facts than the court of registration and perhaps more familiar with the applicable law in the usual Rule 60(b) case. When the Rule 60(b) motion is for relief from a default judgment, however, the assumptions about the rendering court's familiarity no longer apply. n11 Other courts have stated that a court of registration may simply refuse to enforce a void judgment. n12

[3] Time Limitations on Filing Motion

[a] Motion Must Be Made Within Reasonable Time

A party must make a motion under Rule 60(b) within a reasonable time, n1 except that this reasonable time limitation does not apply to judgments that are totally void. n1.1 As was noted in § 26.44 (discussing relief from void judgments under Rule 60(b)), there is no time limit on judicial relief from a void judgment because such a judgment is in fact already a nullity and subject to direct and collateral attack at any time. n1.2 In other words, anytime is a "reasonable" time to set aside a void judgment. n2

In all other cases besides void judgments, what is or is not "reasonable" depends on the facts and circumstances of each case. Thus, the court must analyze the facts to determine whether the opposing party was prejudiced by the delay and whether the moving party had a good reason for failing to take the action sooner. n3 For example, the court found that a party seeking relief from a judgment of foreclosure had taken an unreasonable delay when it offered no explanation for failing to bring its motion for relief for 12 months after the enactment of the statute that was relied on as a basis for setting the judgment aside. n4

[b] One-Year Limitation Applicable to First Three Categories of Motion

[i] One-Year Limitation Is Absolute

In addition to the reasonable time requirement, n5 an absolute one-year limitation applies when the motion is made on the grounds of: n6 mistake, inadvertence, surprise, or excusable neglect, n7 newly discovered evidence, n8 or fraud, misrepresentation, or other misconduct of an adverse party. n9 A court has no power to grant a motion that is filed beyond this one-year period. n10 The one-year maximum time limit is in addition to, and not instead of, the requirement that the motion be made within a "reasonable" time. Thus, even a motion that is made within the one-year period may be denied if the court determines that it is not made within a reasonable period of time. n11

[ii] Running of One-Year Period

The one-year time limit applicable to motions based on subsections (1), (2), and (3) of Rule 60(b) n12 begins to run when the judgment, order, or proceeding is entered or taken. n13 Rule 58 controls the formalities required for the entry of a judgment or order. n14 Therefore, the one-year time limit does not begin to run until all of the Rule 58 formalities have been satisfied. For example, because the formalities of Rule 58 require the filing and entry of a separate, signed document containing the court's judgment, the one-year period does not begin to run until the filing and entry. n15

If an appeal is pending, it has been held that the appeal does not toll the running of the one-year period for making a Rule 60(b)(1), (2), or (3) motion. n16 However, one appellate court has indicated that if the appellate court makes a substantive change in the order, the one-year period is restarted with respect to the substantially modified judgment. n17

[c] Filing of Motion Does Not Change Time for Appeal

Unlike other post trial motions, a Rule 60 motion does not suspend or toll the operation of a judgment. n18 Furthermore, a Rule 60 motion does not generally affect the time for filing an appeal from the underlying judgment. However if a Rule 60 motion is filed within 28 days after entry of the judgment, n19 it tolls the beginning the triggering of the time period to file an appeal for all parties until the entry of the order disposing of the last of any similar post-trial motions. n20 This distinction between Rule 60(b) and other post-trial motions seeking relief from the judgment is important because if a party is late in appealing from the judgment, the party has lost the right to appeal the judgment itself and is limited to an appeal from the denial of the Rule 60(b) motion alone. n21 An appeal that is limited only to the propriety of the denial of Rule 60(b) relief is very limited and will usually not involve the merits of the underlying judgment. n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.60 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 2. *Eaton v. Jamrog, 984 F.2d 760, 762 (6th Cir. 1993)* (grant of relief was in error, inter alia, because Rule 60(b) explicitly requires motion from affected party and district court acted on its own initiative).

(n4)Footnote 3. *See Chavez v. Balesh, 704 F.2d 774, 777 (5th Cir. 1983)* ; *International Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977)* , *cert. denied, 434 U.S. 1014 (1978)* .

(n5)Footnote 4. *See, e.g., Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 351-352 (9th Cir. 1999)* (before district court acts sua sponte to modify judgment, due process requires that court provide judgment creditor with notice and opportunity to be heard).

(n6)Footnote 5. *Fed. R. Civ. P. 60(d)(3).*

(n7)Footnote 6. *Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R. 448, 462 (B.A.P. 9th Cir. 2004)* .

(n8)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n9)Footnote 2. *Budget Blinds, Inc. v. White, 536 F.3d 244, 251-252 (3d Cir. 2008)* .

(n10)Footnote 2.1. *United States v. Beggerly, 524 U.S. 38, 45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

(n11)Footnote 3. *Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 799 (7th Cir. 1980)* .

(n12)Footnote 4. *Butner v. Neustadter, 324 F.2d 783, 785-786 (9th Cir. 1963)* (motion to set aside state court default may be made in district court under Rule 60(b)); *see First RepublicBank Fort Worth v. Norglass, Inc., 958 F.2d 117, 119-120 (5th Cir. 1992)* (court indicated that Rule 60(b) motion may be proper procedure to transform state court judgment into federal court judgment appealable to United States Circuit Courts of Appeals).

(n13)Footnote 5. *28 U.S.C. § 1963*; *see § 26.120* et seq.

(n14)Footnote 6. *See, e.g., Board of Trustees v. Elite Erectors, Inc., 212 F.3d 1031, 1034 (7th Cir. 2000)* .

(n15)Footnote 7. *See Budget Blinds, Inc. v. White, 536 F.3d 244, 251-252 (3d Cir. 2008)* .

(n16)Footnote 8. *See, e.g., Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389, 395 (5th Cir. 2001)* .

(n17)Footnote 9. *Dillard v. Baldwin County Comm'rs, 225 F.3d 1271, 1282 n.5 (11th Cir. 2000)* .

(n18)Footnote 10. *Indian Head Nat'l Bank v. Brunelle, 689 F.2d 245, 250 & n.9 (1st Cir. 1982)* .

(n19)Footnote 11. *Covington Indus., Inc. v. Resintex A.G., 629 F.2d 730, 733 (2d Cir. 1980)* .

(n20)Footnote 12. *Board of Trustees v. Elite Erectors, Inc., 212 F.3d 1031, 1034 (7th Cir. 2000)* (court of registration is free to disregard registered judgment, without formally annulling it under Rule 60(b)(4), if rendering court lacked jurisdiction).

(n21)Footnote 1. *Fed. R. Civ. P. 60(d)(3)*.

(n22)Footnote 1.1. " *R" Best Produce, Inc. v. DiSapio, 540 F.3d 115, 123-124 (2d Cir. 2008)* (citing **Moore's Federal Practice**).

(n23)Footnote 1.2. *Cent. Vt. PSC v. Herbert, 341 F.3d 186, 189 (2d Cir. 2003)* ; *United States v. Buck, 281 F.3d 1336, 1344 (10th Cir. 2002)* .

(n24)Footnote 2. *United States v. One Toshiba Color TV, 213 F.3d 147, 157-158 (3d Cir. 2000)* (even laches may not be used to deny Rule 60(b)(4) motion that attacks judgment as void).

(n25)Footnote 3. *United States v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985)* (delay was reasonable when party had two opportunities to appeal judgments party objected to but presented adequate reasons for failing in each instance to do so).

(n26)Footnote 4. *Federal Land Bank v. Cupples Bros., 889 F.2d 764, 765-767 (8th Cir. 1989)* .

(n27)Footnote 5. *See* [b], *above*.

(n28)Footnote 6. *Fed. R. Civ. P. 60(b)*.

(n29)Footnote 7. *Fed. R. Civ. P. 60(b)(1)*.

(n30)Footnote 8. *Fed. R. Civ. P. 60(b)(2)*.

(n31)Footnote 9. *Fed. R. Civ. P. 60(b)(3).*

(n32)Footnote 10. *Brandon v. Chicago Bd. of Educ., 143 F.3d 293, 294-296 (7th Cir. 1998)* , *cert. denied, 525 U.S. 948 (1998)* (because Rule 60(b)(1) motion to vacate dismissal based on mistake was filed one year and three days after dismissal, district court had no jurisdiction to grant relief).

(n33)Footnote 11. *White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990)* .

(n34)Footnote 12. *See* [i], *above.*

(n35)Footnote 13. *Fed. R. Civ. P. 60(c)(1).*

(n36)Footnote 14. *See Fed. R. Civ. P. 58(b), (c).*

(n37)Footnote 15. *Williams v. Norris, 461 F.3d 999, 1001 (8th Cir. 2006)* .

(n38)Footnote 16. *Federal Land Bank v. Cupples Bros., 889 F.2d 764, 766 (8th Cir. 1989)* .

(n39)Footnote 17. *Transit Cas. Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir. 1971)* , *cert. denied, 404 U.S. 883 (1971)* .

(n40)Footnote 18. *Fed. R. Civ. P. 60(c)(2)*; *see, e.g., United States v. Grable, 25 F.3d 298, 301 (6th Cir. 1994)* .

(n41)Footnote 19. *See "R" Best Produce, Inc. v. DiSapio, 540 F.3d 115, 122 (2d Cir. 2008)* (construing former time periods).

(n42)Footnote 20. *See Fed. R. App. P. 4(a)(4)(A)(vi), (B)*; *Catz v. Chalker, 566 F.3d 839, 841-842 (9th Cir. 2009)* (construing former time periods).

(n43)Footnote 21. *Marane, Inc. v. McDonald's Corp., 755 F.2d 106, 111-112 (7th Cir. 1985)* (appellate court treated late motion for "reconsideration" as Rule 60(b) motion, affirmed denial of Rule 60 motion and dismissed appeal of underlying judgment as untimely).

(n44)Footnote 22. *See American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.62

§ 26.62 Form of Motion for Relief From Judgmentn*

There is no required format or structure for a Rule 60(b) motion. Furthermore, the label or description that a party gives its motion does not control whether the party should be granted or denied relief from judgment, provided that its substance requests relief from an identified judgment. n1 Furthermore, the various time limits specified in Rule 60 and other rules related to judgment may not be circumvented by a particular label given to a motion. The substance of a motion controls. n2 Therefore, if the substance of a motion is based on a claim of mistake or excusable neglect under Rule 60(b)(1), the motion is subject to the one-year time limit for relief on those grounds, n3 even if a party attempts to state the motion as one under the "catch-all" provision of Rule 60(b)(6), which is not subject to the one-year limitation, n4 as discussed in *§ 26.46[1]*.

On the other hand, if a motion has the same substance under two different rules, the court should treat the motion as one for relief under the most appropriate ground. n5 For example, a motion labeled as a Rule 52(b) motion to amend findings may be considered as a Rule 60(b) motion, if the circumstances meet the requirements. n6 A court may even construe a motion labeled as a Rule 60(b) motion as an independent action in equity, if it meets all of the requirements. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.64 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002)* .

(n3)Footnote 2. *McKinney v. United States, 2008 U.S. Dist. LEXIS 48342, at *3-*4 (S.D. Ill. June 24, 2008)* .

(n4)Footnote 3. *See Fed. R. Civ. P. 60(c)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 60(c)(1)*; *see Cotto v. United States, 993 F.2d 274, 277 (1st Cir. 1993)* .

(n6)Footnote 5. *Santiago Sepulveda v. Esso Std. Oil Co. (P.R.), Inc., 638 F. Supp. 2d 193, 197 (D. P.R. 2007)* .

(n7)Footnote 6. *See United States v. Martin, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000)* , *cert. denied*, *532 U.S. 1002 (2001)* (motion to alter judgment filed outside time period prescribed by Rule 59(e) could be treated as Rule 60(b) motion if motion met Rule 60(b) standards and time limits).

(n8)Footnote 7. *Weldon v. United States, 70 F.3d 1, 5 (2d Cir. 1995)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.63

§ 26.63 Indicative Ruling on Motion for Relief from Judgment Barred by Pending Appeal

[1] Circumstances for Use of Indicative Ruling

[a] Pending Appeal May Bar Grant of Motion for Relief by District Court

When a party files a timely notice of appeal of a judgment on a claim or claims, the general rule is that the notice of appeal divests the district court of jurisdiction over the claims, n1 including divesting a district court of the power to grant a Rule 60 motion for relief from a judgment. n2 Most significantly, when a valid appeal is pending, n3 a court may not grant a Rule 60(b) motion for relief from judgment on the grounds of mistake, newly discovered evidence, fraud and similar grounds, unless the Rule 60(b) motion is filed within 28 days of the judgment. n4 However, case law has developed which gives the district court the option to either deny such a motion or to indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the moving party may then petition the court of appeals to remand the matter to give the district court jurisdiction to grant the motion. n5 The procedure for such a motion and "indicative ruling" in the district court has been formalized in the federal rules. n6

[b] Federal Rules Codify Procedure for Indicative Ruling

After an appeal has been docketed, and during the time it is pending, the district court generally cannot grant a Rule 60(b) motion without a remand from the court of appeals. n7 However, it can entertain the motion and deny it, defer considering the motion, state that it creates a substantial issue, or state that it would grant the motion if the court of appeals remands for that purpose. n8 Attorneys and courts have referred to the court's suggestion that it would grant the motion as an "indicative ruling." n9

Civil Rule 62.1 and Appellate Rule 12.1, n10 codify, clarify, and formalize this "indicative ruling" practice that has been developed in case law when a postjudgment motion, usually the Rule 60(b) motion for relief from judgment in the district court, is made at a time when a pending appeal prevents the district from granting the motion. The civil rule and the appellate rule are coordinated to implement the procedure between the two courts. n11 Rule 62.1 does not specify the circumstances in which a pending appeal limits or defeats the district court's authority to act in the face of a pending

appeal, because the rules that govern the relationship between the district courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 62.1 applies only when the determination has been made that the district court is divested of jurisdiction. n12 If the district court correctly concludes that it has authority to grant relief without appellate permission, it can act without resorting to the indicative ruling procedure. n13

[c] Coordination of Procedure Between District Court and Court of Appeals

The civil rule and the appellate rule regarding indicative rulings are coordinated to facilitate implementation of the procedure between the two courts. In summary, the district court first indicates whether it would grant the motion or that it creates a substantial issue to be determined, n14 and the moving party notifies the court of appeals. n15 Then, the court of appeals has discretion to determine whether the appeal or the motion should be decided first, and remands if it finds that the district court should determine the motion. n16 The coordinated procedure under the two rules therefore avoids unnecessary determinations by the court of appeals on matters that would be more suitable for resolution by the district court, or that would be mooted by the district court's determination of the postjudgment motion. n17

[2] Procedure for Indicative Ruling in District Court

[a] Options for District Court on Motion for Relief Pending Appeal

If a timely motion is made for relief which the district court lacks authority to grant because of a docketed, pending appeal, the district court may take one of the following options:

- Defer considering the motion. n1 If the district court defers, it may decide the motion after the appeal has been concluded, without leave from the appellate court, with respect to issues that are not decided in the appeal. n2

- Deny the motion. n3 The district court requires neither a remand nor permission of the court of appeals to deny the motion, and if the court does so, no further indicative ruling procedure under Rule 62.1 is necessary. n4

- State that it would grant the motion if the court of appeals remands for the purpose of considering the motion. n5 If it states it would grant the motion, the moving party must notify the court of appeals, n6 and the district court awaits potential remand. n7

- State that the motion raises a substantial issue. n8 The district court may decide to make such a statement if a motion presents complex issues that require extensive litigation and if the motion may be mooted by an appellate decision of the issues. The district court also may state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. If the district court does state that the motion raises a substantial issue, the moving party must notify the court of appeals for further action. n9 After remand, the district court is not bound to grant the motion; further proceedings on remand may show that the motion should not be granted. n10

[b] Notification of Court of Appeals Based on Indicative Ruling Decision of District Court on Motion for Relief Pending Appeal

If the district court states either that it would grant the motion or that the motion raises a substantial issue, the moving party must promptly notify the circuit clerk where the appeal is pending. n11 In such cases, the moving party may request that the court of appeals remand so that the district court can make its final ruling on the motion. n12 Local rules may specify the format for the litigants' notifications and the district court's statement. n13

[c] Determination of Motion if Court of Appeals Remands Issue to District Court

If the district court states that it would grant the motion or that the motion raises a substantial issue, n14 the court of appeals may remand for further proceedings. If it does remand, the court of appeals retains jurisdiction unless it expressly dismisses the appeal. n15 The decision whether to remand is in the court of appeals' discretion. n16

If the court of appeals remands for the purpose of deciding the motion, the district court may then determine the motion. n17 If the court of appeals has remanded but retained jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand. n18 This notification is a joint obligation of all parties, and it is fulfilled when the required notice is given by any litigant involved in the motion in the district court. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction

FOOTNOTES:
(n1)Footnote 1. *Dexia Credit Local v. Rogan, 604 F. Supp. 2d 1180, 1184 (N.D. Ill. 2009)* .

(n2)Footnote 2. *Shepherd v. International Paper Co., 372 F.3d 326, 329-333 (5th Cir. 2004)* .

(n3)Footnote 3. *Marks v. Clarke, 102 F.3d 1012, 1018 fn. 8 (9th Cir. 1996)* (frivolous or forfeited appeal does not automatically divest the district court of jurisdiction).

(n4)Footnote 4. *Fed. R. Civ. P. 62.1*, Committee Note to Original Rule; *see Fed. R. App. P. 4(a)(4)(A)(vi)* (after 28 days, motion of relief no longer suspends notice of appeal).

(n5)Footnote 5. *Mahone v. Ray, 326 F.3d 1176, 1180 (11th Cir. 2003)* .

(n6)Footnote 6. *See* [b], *below*.

(n7)Footnote 7. *See* [a], *above*.

(n8)Footnote 8. *See Fed. R. Civ. P. 62.1*, Committee Note to Original Rule.

(n9)Footnote 9. *See* Cal. ex rel. Lockyer v. United States Dep't of Agriculture, 2008 U.S. Dist. LEXIS 100053, at *4 (N.D. Cal. 2008) ; *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc., 223 F. Supp. 2d 763, 766 (W.D.N.C. 2002)* .

(n10)Footnote 10. *See Fed. R. App. P. 12.1*; *see also § 28.17*.

(n11)Footnote 11. *See Fed. R. Civ. P. 62.1*, Committee Note to Original Rule; *see also* [c] *below*.

(n12)Footnote 12. *Fed. R. Civ. P. 62.1(a)*.

(n13)Footnote 13. *See Fed. R. Civ. P. 62.1*, Committee Note to Original Rule.

(n14)Footnote 14. *See Fed. R. Civ. P. 62.1(a)(3)*.

(n15)Footnote 15. *See Fed. R. Civ. P. 62.1(b)*.

(n16)Footnote 16. *See Fed. R. App. P. 12.1(b).*

(n17)Footnote 17. *See Fed. R. Civ. P. 62.1*, Committee Note to Original Rule; *see also* [2] *below* (complete district court procedure).

(n18)Footnote 1. *Fed. R. Civ. P. 62.1(a)(1).*

(n19)Footnote 2. *Standard Oil Co. v. United States, 429 U.S. 17, 19, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976)* .

(n20)Footnote 3. *Fed. R. Civ. P. 62.1(a)(2).*

(n21)Footnote 4. *See Fed. R. Civ. P. 62.1(a)(2), (b)*; *Fed. R. App. P. 12.1(a)* (moving party need not notify court of appeals if district court denies motion outright).

(n22)Footnote 5. *Fed. R. Civ. P. 62.1(a)(3).*

(n23)Footnote 6. *Fed. R. Civ. P. 62.1(a)(3)*; *see Ameritech Corp. v. IBEW, Local 21, 543 F.3d 414, 419 (7th Cir. 2008)* ; *see also* [b], *below.*

(n24)Footnote 7. *See Fed. R. Civ. P. 62.1(c)*; *Fed. R. App. P. 12.1(b).*

(n25)Footnote 8. *Fed. R. Civ. P. 62.1(a)(3).*

(n26)Footnote 9. *See Fed. R. Civ. P. 62.1(b).*

(n27)Footnote 10. *Fed. R. Civ. P. 62.1(a)(3)*, Committee Note to Original Rule.

(n28)Footnote 11. *Fed. R. Civ. P. 62.1(b)*; *see Fed. R. App. P. 12.1(a).*

(n29)Footnote 12. *See Fed. R. App. P. 12.1(b)*; *Ameritech Corp. v. IBEW, Local 21, 543 F.3d 414, 419 (7th Cir. 2008)* ; *see also* [c], *below.*

(n30)Footnote 13. *See Fed. R. App. P. 47(a)(1).*

(n31)Footnote 14. *Fed. R. Civ. P. 62.1(a)(3)*; *see* [a], *above.*

(n32)Footnote 15. *Fed. R. App. P. 12.1(b).*

(n33)Footnote 16. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule; *see Ameritech Corp. v. IBEW, Local 21, 543 F.3d 414, 419 (7th Cir. 2008)* .

(n34)Footnote 17. *Fed. R. Civ. P. 62.1(c)*; *see Fed. R. App. P. 12.1(b).*

(n35)Footnote 18. *Fed. R. App. P. 12.1(b).*

(n36)Footnote 19. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule.

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PART VI Trial and Judgment
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PART I. RELIEF FROM JUDGMENT
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3-26 Moore's Manual--Federal Practice and Procedure § 26.64

§ 26.64 Prohibition Against Successive Motions for Relief From Judgmentn*

Rule 60(b) rulings are generally final and appealable. n1 Consequently, if a party wants to challenge an adverse ruling by a Rule 60(b) motion, the party must appeal that ruling or waive any objections. Furthermore, the party may not simply file a second Rule 60(b) motion on the same grounds in lieu of such an appeal. If a court determines that the second Rule 60(b) motion is based on the same grounds as the first, the court may deny the second motion on that ground and the second denial is not appealable. n2 There is only one possible exception to this principle. If a court determines that the ruling on the first motion was not sufficiently final to be appealable, the court may permit a second, identical motion to be made at a later time and may permit an appeal from the ruling on the second motion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.69 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 26.65[1].*

(n3)Footnote 2. *Latham v. Wells Fargo Bank, N.A., 987 F.2d 1199, 1203-1204 (5th Cir. 1993)* .

(n4)Footnote 3. *See Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. P'ship, 44 F.3d 1033, 1038 (1st Cir. 1995)* (if first ruling is not actually appealable, denial of second Rule 60(b) motion might be appealable).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.65

§ 26.65 Appeal of Grant or Denial of Motion for Relief From Judgmentn*

[1] Appealability of Order of Grant or Denial of Motion

If the court denies a motion properly made under Rule 60(b), the denial is final and therefore immediately appealable. n1 The appellate court reviews the district court's denial of a Rule 60(b) motion by determining the propriety of the denial of relief and whether the district court abused its discretion in denying relief. n1.1 These issues are fully and finally decided the moment that the Rule 60(b) motion is denied. n2

The appealability of an order granting a Rule 60(b) motion is slightly more complicated. When an order granting a Rule 60(b) motion merely vacates the judgment and leaves the case pending for further determination, as is usually the case, the order is similar to an order granting a new trial and therefore is interlocutory and nonappealable. The propriety of the grant of relief is appealable from the judgment that eventually results from the litigation. n3 On the other hand, the grant of a Rule 60(b) motion is appealable when the court not only relieves a party of judgment but enters a corrected judgment so that there is nothing further to be decided by the district court. n4

Even in circumstances where an order on a Rule 60(b) motion is appealable, the appeal is limited in scope to the propriety of the denial or grant of relief. The appeal may not reach the merits of the underlying judgment from which relief was sought. n5 Appellate review of Rule 60(b) orders is limited in this manner because, otherwise, Rule 60(b) would become a substitute for a timely appeal. n5.1 An inquiry into the merits of the underlying judgment or order may only be challenged by direct appeal from that judgment or order. n6

[2] Standard of Review

The denial of a Rule 60(b) motion is reviewed under the abuse of discretion standard. n1 The court of appeals will reverse for abuse of discretion only when it has a definite and firm conviction that the trial court committed a clear error of judgment. n2 Other courts have stated that a district court will have abused its discretion only in situations in which no reasonable person could agree with the district court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.68 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Feldberg v. Quechee Lakes Corp., 463 F.3d 195, 198 (2d Cir. 2006)* .

(n3)Footnote 1.1. *Smalls v. United States, 471 F.3d 186, 189, 374 U.S. App. D.C. 63 (D.C. Cir. 2006)* ; *see* [2], *below*.

(n4)Footnote 2. *Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 234 (1st Cir. 1992)* .

(n5)Footnote 3. *National Passenger R.R. Corp. v. Maylie, 910 F.2d 1181, 1182-1183 (3d Cir. 1990)* (citing **Moore's Federal Practice**).

(n6)Footnote 4. *Chavez v. Balesh, 704 F.2d 774, 778 (5th Cir. 1983)* .

(n7)Footnote 5. *Townsend v. SSA, 486 F.3d 127, 134 (6th Cir. 2007)* .

(n8)Footnote 5.1. *Stoller v. Pure Fishing, Inc., 528 F.3d 478, 480 (7th Cir. 2008)* .

(n9)Footnote 6. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999)* (appeal of Rule 60(b) ruling may not be used to challenge mistake of law that could have been raised on direct appeal from underlying judgment).

(n10)Footnote 1. *United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 757 (6th Cir. 1999)* , *cert. denied, 530 U.S. 1274 (2000)* .

(n11)Footnote 2. *Cacevic v. City of Hazel Park, 226 F.3d 483, 490 (6th Cir. 2000)* .

(n12)Footnote 3. *Mares v. Busby, 34 F.3d 533, 535 (7th Cir. 1994)* .

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3-26 Moore's Manual--Federal Practice and Procedure §§ 26.66through 26.79

[Reserved]

§§ 26.66[Reserved]

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3-26 Moore's Manual--Federal Practice and Procedure § 26.80

§ 26.80 Independent Action for Relief From Judgmentn*

[1] Preservation of Independent Action to Obtain Relief From Judgment

Rule 60 specifically preserves the device of the independent action for the court to set aside a judgment. Thus, the rule states that a Rule 60(b) motion does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. n1 However, no new right of action is created by this provision of Rule 60. Rather, the rule merely preserves the existence of a procedural remedy by an independent action to set aside a judgment on those principles that were applicable in such an action before the enactment of Rule 60(b). n1.1 In other words, Rule 60(b) merely preserves whatever power federal courts had prior to the enactment of Rule 60 to relieve a party of a judgment by means of an independent action according to traditional principles of equity. n2 Thus, for example, an independent action for relief from a judgment may be brought by a person whose interests are affected by the judgment, even if that person was not a party to the original action. n3

[2] Jurisdiction Required for Independent Action

The court that rendered a judgment has inherent jurisdiction over a motion to set it aside. n1 Therefore, a court needs no independent federal jurisdictional basis to hear an action to set aside its own judgment. n2 The rationale for this rule is that when an independent action for relief from the judgment is brought in the same court that rendered the judgment, the rendering court has a form of supplemental jurisdiction to hear the action. This "ancillary jurisdiction" is broad enough so that even when the original basis for federal jurisdiction no longer exists, such as when diversity has been destroyed or the issue to be litigated is no longer a federal question, the district court that rendered the judgment maintains jurisdiction to hear an action to set that judgment aside. n3

On the other hand, the current court needs its own jurisdictional basis to hear an independent action to set aside a judgment rendered by another court. n4 Provided that it has such jurisdictional grounds, it is within the equitable powers of a federal court to grant relief from a civil judgment issued by another federal court. n5 However, there are some limitations on the power of a non-rendering court to consider an independent action for relief from a judgment rendered by another court. Thus, it has been held that a district court has no jurisdiction to grant relief from a mandatory

injunction issued by another court, n6 especially when relief is available in the rendering court. n7

[3] Prerequisites to Relief by Independent Action

[a] Summary of Requirements

In an independent action for relief, a party must demonstrate several essential elements: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the party from obtaining the benefit of the defense; n1 (4) the absence of fault or negligence on the part of the party; and (5) the absence of any adequate remedy at law. n2 The most important of these are discussed in [b] through [d], *below*.

[b] Injustice in Judgment

Independent actions for relief from a judgment are reserved for those cases of injustices which are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata. In other words, an independent action should be available only to prevent a grave miscarriage of justice. n3 To obtain relief in an independent action in equity, it is thus necessary to show more than facts that would justify relief under an ordinary Rule 60(b) motion. This requirement means that the party seeking relief must show that the judgment is "manifestly unconscionable." n4 Therefore, relief from a judgment in an independent action in equity is available only in unusual and exceptional circumstances, when the prior judgment ought not, in equity and good conscience be enforced. n5

[c] Meritorious Claim by Petitioner

Just as with Rule 60(b) motions, a party seeking relief from a judgment in an independent action in equity must show a meritorious claim or defense. n6 This requirement is regularly stated in formulations of the elements or prerequisites to relief in an independent action in equity. n7

[d] Petitioner Free From Fault

Rule 60(b) preserves an independent action on those principles that had been applied in such an action before promulgation of the rule. n8 Therefore, the courts have strictly applied the traditional rule that equity will set aside a judgment only when the party seeking relief sets forth grounds for relief that establish that the party does not have any fault or negligence in himself or herself, or in the party's agents, or when the party seeking relief shows freedom from fault or neglect on the part of the party or his or her agents. In particular, a lack of diligence by the party seeking relief bars equitable relief. n9 Thus, even though the one-year limitation period on Rule 60(b)(1), (2), and (3) motions does not apply to independent actions, n10 the equitable doctrine of laches does apply in the context of an independent action in equity for relief from a judgment. The doctrine of laches serves as a bar when the party seeking relief has not exercised due diligence in presenting his or her claim or defense, and the opposing party has been prejudiced by the delay. n11

[4] Grounds for Independent Action

[a] Fraud

Fraud is the most common basis for an independent action for relief from a judgment even though fraud is also a basis for a Rule 60(b)(3) motion. n1 Independent actions based on fraud are usually brought in situations that do not meet the requirements for a motion under Rule 60(b): n2 because the one-year time limit on fraud-based Rule 60(b) motions has expired, because the fraud is not chargeable to an adverse party, or because the moving party seeks relief from a court other than the rendering court. It must be remembered that this type of ordinary fraud is distinguished from fraud on the court, which is misconduct that undermines the integrity of the judicial process or prevents the court from performing

its functions in an impartial manner, n3 which is grounds for an entirely separate procedure for relief from a judgment, as is discussed in *§ 26.81*.

In an independent action for fraud, a party must establish extrinsic, as opposed to intrinsic, fraud. n4 Thus, even though a Rule 60(b)(3) motion provides relief for both intrinsic and extrinsic fraud, n5 the court may grant relief in an independent action only for fraud that is extrinsic, which is fraud that actually prevented an issue from being joined or a party from making a valid claim or defense. For example, if an attorney conspires with an opponent to defeat the attorney's client, it is extrinsic fraud. n6 On the other hand, the majority rule is that perjury by trial witnesses is an intrinsic fraud, because even though such fraud may have a negative effect, there has been no obstruction with the party's opportunity to litigate. n7 However, some circuits expressly reject the distinction between intrinsic and extrinsic fraud. These circuits hold that either extrinsic or intrinsic fraud is sufficient to obtain relief from a judgment in an independent action in equity based on a claim of fraud. n8

[b] Newly Discovered Evidence

Newly discovered evidence may serve as a basis for relief in an independent action. Even though in an independent action the petitioner need not comply with the one-year time limit on a Rule 60(b)(2) motion, the petitioner must comply with the all of the other prerequisites to relief for newly discovered evidence under Rule 60(b)(2), n9 as discussed in *§ 26.42*. This means that the same substantive standards that govern a motion for relief under Rule 60(b) apply to an independent action in equity, and that a party bringing an independent action based on newly discovered evidence has the burden to demonstrate that these criteria have been met. Thus, for example, a party may not maintain an independent action on the basis of newly discovered evidence if the party does not show that it exercised diligence in failing to discover the evidence at an earlier time. n10 Furthermore, evidence of facts will not support relief if such evidence was not in existence at the time of trial. n11

[c] Mistake

Another common basis for an independent action for relief from a judgment is "mistake," n12 which is also available by motion under Rule 60(b)(1). However, relief by means of a Rule 60(b)(1) motion is limited to a period of one year from the entry of the judgment. When relief is sought from a judgment for mistake after the one-year period has elapsed, a party may either utilize an independent action, or try to qualify the nature of the mistake as "clerical" under Rule 60(a), n13 which also has no time limit. n14

[d] Duress

If duress prevents a party from having a true adversary trial, and the judgment was procured by duress, the judgment may be set aside in an independent action. n15 However, it may be difficult to find conduct that meets the accepted definition of duress. Insistence on one's legal rights, even if it places another person in a very negative situation, is not duress. n16 Thus, one may not be liable for duress for exercising one's legal rights under a contract. To establish duress one must show conduct such as actual coercion or intimidation. A plaintiff must claim more than mere persuasion, obstinance, or threats, but rather must claim that a defendant withheld something of value to get something wrongfully demanded. n17

[e] Satisfaction of Debt

One case has held that if evidence conclusively shows a complete or partial satisfaction of a debt, the debtor may set aside a judgment for any debt not truly owed, and the party seeking to set aside the judgment may bring an independent action for such relief. n18 However, it should be noted that an independent action may be treated as a Rule 60(b) motion, at least when such a remedy is available, as when the time requirement is met. The title placed on the moving papers filed by the parties is not controlling, so there is no reason why an independent action could not simply be construed as a Rule 60(b) motion. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentIndependent Actions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice*, § 60.80 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(d)(1)*.

(n3)Footnote 1.1. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F. Supp. 2d 283, 293 (S.D.N.Y. 2006)* (citing **Moore's Federal Practice**).

(n4)Footnote 2. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 661 (2d Cir. 1997)* .

(n5)Footnote 3. *Morrel v. Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 222-223 (4th Cir. 1999)* (citing **Moore's Federal Practice**).

(n6)Footnote 1. *Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 799 (7th Cir. 1980)* .

(n7)Footnote 2. *See Dillard v. Baldwin County Comm'rs, 225 F.3d 1271, 1282 n.5 (11th Cir. 2000)* ; *see also United States v. Beggerly, 524 U.S. 38, 46, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* (independent action for relief from judgment brought in same court as original lawsuit against United States does not require independent basis for jurisdiction).

(n8)Footnote 3. *Valerio v. Boise Cascade Corp., 645 F.2d 699, 700 (9th Cir. 1981)* , *cert. denied, 454 U.S. 1126 (1981)* (court that approved class-action settlement had jurisdiction over suit to set aside settlement and reopen class even though basis for relief was state-law claims charging class attorneys with fraud and malpractice).

(n9)Footnote 4. *Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990)* (independent action for relief from the judgment must be supported by its own jurisdictional grounds).

(n10)Footnote 5. *Fed. R. Civ. P. 60(b)*, Committee Note to 1946 Amendments.

(n11)Footnote 6. *Carter v. United States, 733 F.2d 735, 736 (10th Cir. 1984)* , *cert. denied, 469 U.S. 1161 (1985)* .

(n12)Footnote 7. *Lapin v. Shulton, Inc., 333 F.2d 169, 172 (9th Cir. 1964)* , *cert. denied, 379 U.S. 904 (1964)* .

(n13)Footnote 1. *See* [4], *below*.

(n14)Footnote 2. *Range v. United States, 256 B.R. 868, 874 (S.D. Tex. 2000)* .

(n15)Footnote 3. *See United States v. Beggerly, 524 U.S. 38, 46-47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* (because judgment would work no grave miscarriage of justice and perhaps no miscarriage of justice at all, court of appeals erred in concluding that there was sufficient basis to justify reopening judgment).

(n16)Footnote 4. *Pickford v. Talbott, 225 U.S. 651, 657, 32 S. Ct. 687, 56 L. Ed. 1240 (1911)* .

(n17)Footnote 5. *Barrett v. Secretary of Health & Human Services, 840 F.2d 1259, 1263 (6th Cir. 1987)* .

(n18)Footnote 6. *Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir. 1970)* , *cert. denied, 399 U.S.*

927 (1970) (one element of independent action in equity is good defense to alleged cause of action on which judgment is founded).

(n19)Footnote 7. *Adena Corp. v. D'Andrea, 1997 U.S. Dist. LEXIS 21563, at *5 (E.D. Pa. Dec. 22, 1997)* (in determining whether justice favors vacating default judgment under Rule 60(b), courts consider existence of meritorious defense, prejudice to the plaintiff if judgment is vacated, and culpability of defendant in entry of judgment).

(n20)Footnote 8. *Fed. R. Civ. P. 60*, Committee Note to 1946 Amendments.

(n21)Footnote 9. *Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 39 (1st Cir. 1987)* .

(n22)Footnote 10. *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 705-706 (5th Cir. 1954)* ; *see Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1020 (3d Cir. 1987)* (citing advisory committee notes for proposition that purpose of independent action was to provide relief after one-year limit in rule expires).

(n23)Footnote 11. *Lockwood v. Bowles, 46 F.R.D. 625, 629-630 (D.D.C. 1969)* .

(n24)Footnote 1. *Fed. R. Civ. P. 60(b)(3).*

(n25)Footnote 2. *See Range v. United States, 256 B.R. 868, 873 (S.D. Tex. 2000)* .

(n26)Footnote 3. *See Oxxford Clothes XX v. Expeditors Int'l, 127 F.3d 574, 578 (7th Cir. 1997)* ("fraud on the court" is conduct that might be thought to corrupt judicial process itself, as where party bribes judge).

(n27)Footnote 4. *See Range v. United States, 256 B.R. 868, 874 (S.D. Tex. 2000)* .

(n28)Footnote 5. *Fed. R. Civ. P. 60(b)(3).*

(n29)Footnote 6. *Bizzell v. Hemingway, 548 F.2d 505, 507 (4th Cir. 1977)* .

(n30)Footnote 7. *See Range v. United States, 256 B.R. 868, 874-875 (S.D. Tex. 2000)* (fraud alleged by moving party was not such that it was not in issue in the former action, and alleged fraud could have been put in issue by the party's reasonable diligence); *Great Coastal Express, Inc. v. International Bhd. of Teamsters, 675 F.2d 1349, 1357-1358 (4th Cir. 1982)* , *cert. denied, 459 U.S. 1128 (1983)* (notwithstanding considerable criticism against intrinsic/extrinsic distinction, it is clear that perjury and false testimony are intrinsic, and not grounds for relief in independent action).

(n31)Footnote 8. *Bandai America Inc. v. Bally Midway Manufacturing Co., 775 F.2d 70, 73 (3d Cir. 1985)* , *cert. denied, 475 U.S. 1047 (1986)* .

(n32)Footnote 9. *See Fed. R. Civ. P. 60(b)(2).*

(n33)Footnote 10. *Johnson Waste Materials v. Marshall, 611 F.2d 593, 597-598 (5th Cir. 1980)* .

(n34)Footnote 11. *Southmark Props. v. Charles House Corp., 742 F.2d 862, 873 (5th Cir. 1984)* .

(n35)Footnote 12. *Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 39 n.6 (1st Cir. 1987)* .

(n36)Footnote 13. *Fed. R. Civ. P. 60(a).*

(n37)Footnote 14. *Jones v. Anderson-Tully Co., 722 F.2d 211, 212 (5th Cir. 1984)* .

(n38)Footnote 15. *Hadden v. Rumsey Prods., Inc., 196 F.2d 92, 96 (2d Cir. 1952)* .

(n39)Footnote 16. *Southmark Props. v. Charles House Corp., 742 F.2d 862, 873, 875-876 (5th Cir. 1984)* .

(n40)Footnote 17. *Cf. Crescent City M Dealership, L.L.C. v. Mazda Motor of Am., Inc. 2000 U.S. Dist. LEXIS 17484, at *6-*7 (E.D. La. Nov. 20, 2000)* .

(n41)Footnote 18. *Johnson Waste Materials v. Marshall, 611 F.2d 593, 599-602 (5th Cir. 1980)* (debtor produced canceled checks and employee records showed that only half of judgment amount had been withheld from employees, and to pay employees entire judgment would be to award them windfall).

(n42)Footnote 19. *Nevada VTN v. General Ins. Co. of Am., 834 F.2d 770, 775 (9th Cir. 1987)* (citing **Moore's Federal Practice**).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.81

§ 26.81 Relief From Judgment Based on Fraud on Courtn*

[1] Court Retains Inherent Power to Rectify Fraud on Court

Rule 60 expressly provides that the rule does not affect a court's inherent power to set aside a judgment that is procured through fraud on the court. n1 This provision gives a federal court the power to investigate any appearance of fraud on the court by bringing before the court all witnesses and those who may be affected by the outcome of its investigation. n1.1 To adjudicate the rights of the parties in such an investigation, the usual safeguards of adversary proceedings must be observed, and a judgment may not be set aside on grounds of fraud on the court without affording all parties who might be affected the right to appear and be heard. n2

Fraud on the court affects the judicial process rather than just the parties. Thus, "fraud on the court" is misconduct that undermines the integrity of the judicial process or prevents the court from performing its functions in an impartial manner. In other words, fraud on the court is conduct that if unchecked would corrupt the judicial process itself. n3 Fraud on the court is limited to fraud that attempts to defile the court itself or that is perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases. Examples of conduct that meets this definition include:

1. Bribery of a judge. n4

2. Fabrication of evidence. n5

3. Hiring an attorney to improperly influence a judge. n6

4. Jury tampering. n7

5. Improperly attempting to influence a witness. n7.1

Fraud on the court may not be established simply by showing some misconduct by one of the parties to the suit. n8 Thus, fraud on the court does not exist where a judgment has simply been obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Such fraud is "ordinary fraud," and may be rectified by an independent action in equity to set aside the judgment, as discussed in *§ 26.80*. n9

[2] Proceedings to Set Aside Fraud on Court

There are no formal requirements for initiating a claim of fraud on the court, which may be asserted by a party or by the court on its own initiative. n1 However, the United States Supreme Court has made it clear that a judgment may not be set aside on grounds of fraud on the court unless all parties who could be affected by the action are given the right to appear and be heard. n2 This means that the court must provide not only notice and an opportunity to be heard, but also that fact-finding may be based on testimony that is subject to examination and cross-examination. n2.1

Because fraud on the court affects the integrity of the judicial process itself, a judgment may be set aside for fraud on the court at any time, and there is no time limit imposed on any party or on the court. n3 Furthermore, considerable authority indicates that laches is not a defense to an action to set aside a judgment procured by fraud on the court. n4 The rationale is that a judgment procured by fraud on the court should not be allowed to stand solely because someone was not diligent in bringing the fraud to the court's notice. However, in practice, courts will likely consider the delays involved in determining whether the fraud in question is of the magnitude to constitute fraud on the court. The greater the delay, the more deference the court is likely to give to the concept of the finality of judgments. n5

To have a judgment set aside for fraud on the court, the fraud must be established by clear and convincing evidence. n6 This is the same standard of proof applicable to a motion under Rule 60(b)(3) for relief based on fraud committed by a party. However, because fraud on the court is concerned with the integrity of the adjudication process itself, it is not relevant whether a party seeking relief has clean hands or not. n7 This does not mean that clean hands are irrelevant once fraud on the court is established. Thus, if a party procured a judgment through fraud on the court, the court may not only set that judgment aside, it may dismiss the party's claim with prejudice, regardless of the merits of the claim, because the party has engaged in fraud. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentFraud

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 12 *Moore's Federal Practice,* § 60.21[4] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 60(d)(3).*

(n3)Footnote 1.1. *See Eastern Fin. Corp. v. JSC Alchevsk Iron & Steel Works, 2008 U.S. Dist. LEXIS 48640, at *24-*26 (S.D.N.Y. June 24, 2008)* .

(n4)Footnote 2. *Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946)* ; *see* [2], *below*.

(n5)Footnote 3. *Oxxford Clothes XX v. Expeditors Int'l, 127 F.3d 574, 578 (7th Cir. 1997)* .

(n6)Footnote 4. *See Oxxford Clothes XX v. Expeditors Int'l, 127 F.3d 574, 578 (7th Cir. 1997)* .

(n7)Footnote 5. *Anderson v. Calderon, 232 F.3d 1053, 1095 (9th Cir. 2000)* .

(n8)Footnote 6. *Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514, 540-541 (3d Cir. 1948)* , *cert. denied, 335 U.S. 912 (1974)* .

(n9)Footnote 7. *Meindl v. Genesys Pac. Techs, Inc. (In re Genesys Data Techs.), 204 F.3d 124, 130 (4th Cir. 2000)* .

(n10)Footnote 7.1. *Ty Inc. v. Softbelly's, Inc., 517 F.3d 494, 498 (7th Cir. 2008)* .

(n11)Footnote 8. *Range v. United States, 256 B.R. 868, 874 (S.D. Tex. 2000)* ; *see, e.g., Gleason v. Jandrucko, 860 F.2d 556, 560 (2d Cir. 1988)* (neither perjury nor nondisclosure by itself amounts to anything more than fraud involving a single party).

(n12)Footnote 9. *See Range v. United States, 256 B.R. 868, 874 (S.D. Tex. 2000)* (although fraud alleged was not in issue in the former action, it could have been put in issue by party's reasonable diligence).

(n13)Footnote 1. *See Herring v. FDIC, 82 F.3d 282, 285 (9th Cir. 1996)* .

(n14)Footnote 2. *Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946)* .

(n15)Footnote 2.1. *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 250 n.5, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* ; *see Roger Edwards, LLC v. Fiddes & Son, Ltd., 226 F.R.D. 18, 20 (D. Me. 2005)* (court may hold evidentiary hearing).

(n16)Footnote 3. *Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983)* (Rule 60(b) does not impose time limit on motions asserting fraud on court); *Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 640 n.10 (N.D. Cal. 1978)* , *aff'd, 645 F.2d 699 (9th Cir. 1981)* (per curiam) (there is no statute of limitation for fraud on court).

(n17)Footnote 4. *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* .

(n18)Footnote 5. *See Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983)* .

(n19)Footnote 6. *Ty Inc. v. Softbelly's, Inc., 517 F.3d 494, 498 (7th Cir. 2008)* (clear and convincing evidence of attempting to improperly influence a witness would constitute fraud on court); *Booker v. Dugger 825 F.2d 281, 283-284 & n.4 (11th Cir. 1987)* , *cert. denied, 485 U.S. 1015 (1988)* .

(n20)Footnote 7. *See Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960)* (dictum).

(n21)Footnote 8. *Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983)* ; *Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119-1120 (1st Cir. 1989)* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
PART I. RELIEF FROM JUDGMENT
B. RELIEF FROM SUBSTANTIVE ERRORS IN JUDGMENT
4. Alternatives to Motion for Relief From Judgment

3-26 Moore's Manual--Federal Practice and Procedure §§ 26.82through 26.99

[Reserved]

§§ 26.82[Reserved]

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
PART II. EXECUTION OF JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.100

§ 26.100 Function of Execution of Judgmentn*

Execution of judgment is the process used to enforce a judgment of the court. n1 A "writ of execution" is an order issued by a court, n1.1 in the form of a final process designed to enforce a money judgment, directing an officer of the court to seize the property of a judgment debtor and transfer the proceeds to the judgment creditor. n2 Execution of judgment applies only to money judgments. n3 Subject matter jurisdiction for execution of judgment must be based on an appropriate jurisdictional statute. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 69.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Paul Revere Ins. Group v. United States, 500 F.3d 957, 960-962 (9th Cir. 2007)* .

(n3)Footnote 1.1. *Koehler v. Bank of Berm., Ltd., 544 F.3d 78, 87 (2d Cir. 2008)* .

(n4)Footnote 2. *Specialty Healthcare Mgmt., Inc. v. St. Mary Parish Hosp., 220 F.3d 650, 653 (5th Cir. 2000)* ; *Giove v. Stanko, 49 F.3d 1338, 1341-1342 (8th Cir. 1995)* .

(n5)Footnote 3. *Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1344 (9th Cir. 1997)* (Rule 69(a) essentially limits district court's mechanism for enforcement of money judgment to writ of execution).

(n6)Footnote 4. *See National Westminster Bank U.S.A. v. Cheng, 751 F. Supp. 1158, 1161 (S.D.N.Y. 1990)* (Rule 69(a) does not provide nor expand subject matter jurisdiction of district court).

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
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3-26 Moore's Manual--Federal Practice and Procedure § 26.101

§ 26.101 n* Law Governing Execution of Judgment

[1] Procedure in Federal Court

The procedure for execution of judgment in federal court is governed by Rule 69(a)(1), which provides that process to enforce a judgment for the payment of money must be by a writ of execution, unless the court directs otherwise. n1 The language of this provision permits enforcement of money judgments other than by writ of execution. However, such other methods are confined only to cases in which established principles provide for equitable relief when a writ of execution would be an inadequate remedy. n2 For example, a court may enforce a judgment through the imposition of a contempt sanction, but only in cases of exceptional circumstances. n3 Additionally, when a judgment involves intangible assets such as intellectual property rights in a patent, trademark, or copyright, which are not subject to a writ of execution, the court may employ other legal or equitable procedures for enforcement. n4

[2] State Law Controls Except When Explicit Federal Law Governs

Except to the extent that any statute of the United States governs, the procedure on execution, and in proceedings supplementary to and in aid of a judgment, must be in accordance with the practice and procedure of the state in which the district court is held. n1 This provision has the effect that in proceedings in federal court to enforce a judgment, the state execution practices and procedures ordinarily must be followed. n2 Therefore, state law regarding execution has been applied in federal court with regard to the following matters:

1. A specification of which assets of a judgment debtor are subject to levy of execution and sale. n3

2. A specification of which assets of a judgment debtor are exempt from execution. n4

3. The identity of the parties liable on a judgment. n5

4. Whether a judgment creditor may obtain discovery in aid of execution. n6

5. Imposition of court costs. n7

State law applies only to the extent that no federal statute is applicable. Note that a federal rule is considered a governing statute for this purpose. For example, Rule 62(d) is a "governing statute" of the United States within the meaning of Rule 69(a), because Rule 62(d) expressly governs supersedeas bond approval and the effect of such approval, and would prevail over an analogous state bond procedure. n8

[3] Reconciliation of State and Federal Procedures

When applying state execution procedures because no federal law controls, as required by Rule 69(a), n1 the federal court should apply that state law in a common sense manner, n2 because a strict and literal conformity to state procedures may not make enforcement of the federal judgment impossible or impractical; n2.1 flexibility may be required because enforcement of the judgment is the ultimate purpose of the rule. n2.2 For example, the leading Supreme Court case recognized the need for some flexibility in adapting the state procedure to the practice of the federal courts and held that federal officials, including the clerk of the district court and the United States Marshal should be substituted when appropriate for the comparable state officers designated in the state statute. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 69.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 69(a)(1)*; *see* [2], *below*.

(n3)Footnote 2. *Ardex Labs., Inc. v. Cooperider, 319 F. Supp. 2d 507, 509 (E.D. Pa. 2004)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Marshak v. Green, 746 F.2d 927, 930 (2d Cir. 1984)* ; *Baxter State Bank v. Bernhardt, 186 F.R.D. 621, 623 (D. Kan. 1999)* (quoting **Moore's Federal Practice**).

(n5)Footnote 4. *Marshak v. Green, 746 F.2d 927, 930 (2d Cir. 1984)* .

(n6)Footnote 1. *Fed. R. Civ. P. 69(a)(1)*.

(n7)Footnote 2. *Koehler v. Bank of Berm., Ltd., 544 F.3d 78, 87 (2d Cir. 2008)* .

(n8)Footnote 3. *Marshak v. Green, 746 F.2d 927, 931 (2d Cir. 1984)* (trade name not asset subject to levy).

(n9)Footnote 4. *Davis v. Davis (In re Davis), 170 F.3d 475 (5th Cir. 1999)* , *cert. denied, 528 U.S. 822 (1999)* (court of appeals affirmed decision denying execution because debtor was entitled to exempt his homestead from claims of creditors, and the federal bankruptcy exemption statute was not an "execution statute," and therefore did not preempt relevant state law).

(n10)Footnote 5. *Supporters to Oppose Pollution v. Heritage Group, 973 F.2d 1320, 1327 (7th Cir. 1992)* (state law allowed collection only against named judgment debtors).

(n11)Footnote 6. *Dulce v. Dulce, 233 F.3d 143, 146-147 (2d Cir. 2000)* .

(n12)Footnote 7. *In re Merrill Lynch Relocation Mgmt., Inc. 812 F.2d 1116, 1120 (9th Cir. 1987)* .

(n13)Footnote 8. *Ribbens Int'l, S.A. de C.V. v. Transport Int'l Pool, Inc., 40 F. Supp. 2d 1141, 1143-1144 (C.D. Cal. 1999)* .

(n14)Footnote 1. *Fed. R. Civ. P. 69(a)(1).*

(n15)Footnote 2. *See Peacock v. Thomas, 516 U.S. 349, 116 S. Ct. 862, 869 n.7, 133 L. Ed. 2d 817 (1996)* .

(n16)Footnote 2.1. *United States v. Gianelli, 543 F.3d 1178, 1183 (9th Cir. 2008)* (state law should not be applied in manner that thwarts Federal Debt Collection Procedures Act).

(n17)Footnote 2.2. *Duchek v. Jacobi, 646 F.2d 415, 418-419 (9th Cir. 1981)* (state law must not be followed in hyper-technical manner that makes sense only in state court).

(n18)Footnote 3. *Yazoo & Miss.Valley R.R. v. City of Clarksdale, 257 U.S. 10, 24, 42 S. Ct. 27, 66 L. Ed. 104 (1921)* .

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PART VI Trial and Judgment
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PART II. EXECUTION OF JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.102

§ 26.102 Discovery Available in Connection With Execution of Judgmentn*

[1] Persons Subject to Discovery Requests

In aid of enforcement or execution of a judgment, the judgment creditor or a record successor in interest may obtain discovery from any person, including the judgment debtor, in either the usual manner provided in the Federal Rules of Civil Procedure or in the manner provided by the practice of the state in which the district court is held. To obtain discovery, a person must be either a judgment creditor or a successor in interest, provided that successor interest appears on the record. n1 This provision makes discovery available in supplementary proceedings for a writ of execution without the necessity of bringing a separate action. However, discovery may not be requested before the judgment is entered. n2 Because the purpose of the provision is to allow the judgment creditor to identify assets from which the judgment may be satisfied; however, after judgment, the judgment creditor is permitted to conduct a broad inquiry to uncover any hidden or concealed assets of the judgment debtor. n3

Although Rule 69(a) states that discovery may be sought "from any person," the right is not unlimited, and courts typically impose a stricter standard before allowing discovery when the discovery is sought from third persons besides the judgment debtor. n4 In such situations, the court must balance the judgment creditor's need for the information against the privacy interests of the third person. n5 If the judgment creditor fails to demonstrate a sufficient relationship between the judgment debtor and the third person, and some justification for the particular discovery, discovery will be denied. n6 One possible means of obtaining information about a third party's assets is to compel the judgment debtor to disclose information the debtor has knowledge of regarding the assets of the third party. n7

[2] Option to Apply State or Federal Discovery Procedures

Even though proceedings to enforce a judgment generally are governed by state law unless superseded by a particular federal execution law, n1 the determination whether to use federal or state discovery law is based on an election by the judgment creditor. n2 In other words, a judgment creditor may choose whether to use federal or the discovery procedures of the state where the federal court is located. n3 Once the judgment creditor makes a clear election to use either the federal or the state discovery methods, only that discovery law is applicable, and the other discovery law is irrelevant. n3.1 This choice of law consequence makes it imperative on the attorney for the judgment creditor to compare federal and state discovery methods to determine their relative convenience and advantages. n4

[3] Scope of Available Discovery

The scope of discovery under Rule 69(a) is defined by the purpose of the rule, which is to allow the judgment creditor to identify assets from which the judgment may be satisfied. Consequently, the judgment creditor is generally permitted to conduct a broad inquiry to uncover any hidden or concealed assets of the judgment debtor. n1 When a judgment creditor has chosen to use federal discovery rules, all of the general federal rules apply, n2 including the rules regarding discoverable material. Thus, the judgment creditor may discover any matter relevant to the judgment, even if it would not be admissible at trial, provided that the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n2.1 However, the discovery must be relevant to the execution of the judgment and may not be used in order to harass the judgment debtor or any third parties. n3 Furthermore, a party who is the object of discovery may claim any valid privilege. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 69.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 69(a)(2)*; *see State Dep't of Soc. Servs. v. Leavitt, 523 F.3d 1025, 1033 (9th Cir. 2008)* .

(n3)Footnote 2. *Sanderson v. Winner, 507 F.2d 477, 480 (10th Cir. 1974)* .

(n4)Footnote 3. *T-M Vacuum Prods. v. TAISC, Inc., 2008 U.S. Dist. LEXIS 96214, at *4 (S.D. Tex. Nov. 25, 2008)* .

(n5)Footnote 4. *Blaw Knox Corp. v. AMR Indus., Inc., 130 F.R.D. 400, 403-404 (E.D. Wis. 1990)* (judgment creditor must make threshold showing of necessity and relevance when attempting to obtain discovery of non-judgment debtor).

(n6)Footnote 5. *Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 561-562 (S.D.N.Y. 1977)* (discovery of information regarding assets of third parties is not generally contemplated but may be justified by specific circumstances).

(n7)Footnote 6. *Strick Corp. v. Thai Teak Prods. Co., 493 F. Supp. 1210, 1218 (E.D. Pa. 1980)* (citing **Moore's Federal Practice**; discovery denied because judgment creditor failed to present facts to support alter ego relationship and thus, did not demonstrate sufficient relationship between third party and judgment debtor).

(n8)Footnote 7. *National Union Fire Ins. Co. v. Van Waeyenberghe, 148 F.R.D. 256, 256-257 (N.D. Ind. 1993)* (judgment debtor compelled to disclose information about spouse's employment, assets, and finances, even though spouse was neither defendant nor judgment debtor).

(n9)Footnote 1. *Fed. R. Civ. P. 69(a)(1)*; *see § 26.101.*

(n10)Footnote 2. *Fed. R. Civ. P. 69(a)(2)*; *T-M Vacuum Prods. v. TAISC, Inc., 2008 U.S. Dist. LEXIS 96214, at *4 (S.D. Tex. Nov. 25, 2008)* .

(n11)Footnote 3. *See In re Clerici, 481 F.3d 1324, 1336 n.17 (11th Cir. 2007)* .

(n12)Footnote 3.1. *British Int'l Ins. Co. v. Seguros La Republica, S.A., 200 F.R.D. 586, 594 (W.D. Tex. 2000)* (quoting **Moore's Federal Practice**).

(n13)Footnote 4. *See, e.g., Dulce v. Dulce, 233 F.3d 143, 146-147 (2d Cir. 2000)* (applying New York Civil Practice Law and Rules § 5223 and 5224).

(n14)Footnote 1. *United States v. Conces, 507 F.3d 1028, 1040 (6th Cir. 2007)* .

(n15)Footnote 2. *Fed. R. Civ. P. 69(a)(2).*

(n16)Footnote 2.1. *See Fed. R. Civ. P. 26(b)(1)*; *see also Rubin v. Islamic Republic of Iran, 2008 U.S. Dist. LEXIS 4651, at *18 (N.D. Ill. Jan. 18, 2008)* .

(n17)Footnote 3. *Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 561 (S.D.N.Y. 1977)* .

(n18)Footnote 4. *Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981)* (judgment debtor could invoke *Fifth Amendment* privilege against self-incrimination in discovery proceeding under *Fed. R. Civ. P. 69(a)*).

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PART VI Trial and Judgment
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3-26 Moore's Manual--Federal Practice and Procedure § 26.103

§ 26.103 Prohibition on Execution Against Public Officersn*

There are two references in Rule 69(b) that limit the district court's authority to issue a writ of execution under the rule: one relating to tax collectors and other revenue officers and the other relating to officers of Congress. n1 Thus, in any proceeding for a writ of execution against a collector or other revenue officer under a final judgment based on the performance of official duties or the collection of money, the writ may not be issued if the court certifies either that probable cause existed or that the officer acted under the direction of the Secretary of the Treasury or other proper governmental officer. When the court does issue the required certificate, the amount of the judgment must be paid out of the proper appropriation by the United States Treasury. n2 In the same way, in any proceeding brought against an officer of Congress for acts performed in the discharge of official duties, a writ of execution may not be issued against that officer individually. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsGovernmentsFederal GovernmentClaims By & AgainstGovernmentsFederal GovernmentEmployees & Officials

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 13 *Moore's Federal Practice,* § 69.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 69(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 69(b)*; *see 28 U.S.C. § 2006.*

(n4)Footnote 3. *Fed. R. Civ. P. 69(b)*; *see 28 U.S.C. § 118.*

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3-26 Moore's Manual--Federal Practice and Procedure §§ 26.104through 26.119

[Reserved]

§§ 26.104[Reserved]

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PART VI Trial and Judgment
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PART III. REGISTRATION OF JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.120

§ 26.120 Purpose and Function of Registration of Judgmentn*

By statute, a federal judgment that has been entered in one district may be registered in another federal district. n1 The purpose of the registration statute is to allow a judgment creditor to collect a money judgment in another jurisdiction where the judgment debtor has assets, without the necessity of relitigating the merits. n2 In addition to where the judgment was originally entered, a judgment may be registered in one or more other districts. n3 The registration statute also authorizes a satisfaction of judgment to be registered in the same manner in any jurisdiction in which the judgment is registered. n4 Section 1963 is applicable only to judgments for money or property; neither judgments granting injunctive relief nor judgments in divorce actions are subject to registration. n5

Most courts hold that a court where a judgment is registered for purposes of enforcement n6 may not hear a Rule 60(b) motion to set aside a judgment, n7 on the reasoning that the court that entered the judgment should hear the motion, in that it is more familiar with the circumstances and facts, and judicial comity requires that the court of registration defer to the rendition court. n8 However, some courts allow the court of registration to hear a Rule 60(b) motion under equitable principles. n9 For a discussion of this issue, see *§ 26.61[2][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice,* § 130.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1963*.

(n3)Footnote 2. *See Findley v. Blinken (In re Joint E. & S. Dists. Asbestos Litig.), 22 F.3d 755, 763 (7th Cir. 1994)* (registration of judgments makes it possible for judgment creditors to pursue property of debtor in any district where judgment is registered); *Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc., 2000 U.S. Dist. LEXIS 11974 (E.D. Pa. Aug. 3, 2000)* .

(n4)Footnote 3. *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 128 F. Supp. 715, 716 (N.D. Cal. 1955)* (judgment entered in Alaska registered in both California and Hawaii).

(n5)Footnote 4. *See 28 U.S.C. § 1963.*

(n6)Footnote 5. *See § 26.121[2].*

(n7)Footnote 6. *28 U.S.C. § 1963.*

(n8)Footnote 7. *Indian Head Nat'l Bank v. Brunelle, 689 F.2d 245, 249 (1st Cir. 1982)* .

(n9)Footnote 8. *United States v. Fluor Corp., 436 F.2d 383, 384 (2d Cir. 1971)* .

(n10)Footnote 9. *Morris v. Peterson, 759 F.2d 809, 811 (10th Cir. 1985)* .

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3-26 Moore's Manual--Federal Practice and Procedure § 26.121

§ 26.121 Judgments Subject to Registrationn*

[1] Only Money Judgments of Certain Courts Are Subject to Registration

The federal registration statute applies only to money judgments entered in any district court or in the Court of International Trade. n1 Although it has been argued that the statute applies to other federal courts, at least one federal circuit court of appeal has rejected this argument. Therefore, for example, a decision of a court of appeal upholding an action by an administrative agency may not be registered. n2 Furthermore, the registration statute applies only to judgments that include relief on claims for recovery of money or property, and only such judgments may be registered under the statute. n3

[2] Pure Injunctive and Divorce Judgments Are Not Subject to Registration

[a] Injunctions

Injunctions are not among the types of judgments that may be registered under the registration statute. n1 Actually, there appears to be no need to register an injunction because a federal court injunction is binding throughout the United States, and a violation anywhere may be corrected in the court that issued the injunction. n2 In any event, a judgment that provides for recovery of money or property may be registered even though the judgment provides for relief not otherwise entitled to be registered, such as an injunction. However, the injunction may not be enforced in the registering district; it is only enforceable in the rendering jurisdiction. n3

[b] Divorce Judgments

Judgments in divorce actions are specifically excluded from registration under the registration statute. n4 This principle is based on the fact that federal courts decline to exercise diversity jurisdiction in divorce proceedings, n5 and that the registration statute does not authorize registration of judgments in actions when the registration would serve no useful purpose. n6 However, a divorce proceeding judgment that is purely for the recovery of money may be registered. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice,* §§ 130.31, 130.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1963.*

(n3)Footnote 2. *Fox Painting Co. v. NLRB, 16 F.3d 115, 117 (6th Cir. 1994)* (statute providing for registration of district court judgments does not permit registration of judgments of federal courts other than those listed courts).

(n4)Footnote 3. *Stiller v. Hardman, 324 F.2d 626, 627 (2d Cir. 1963)* .

(n5)Footnote 1. *Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963)* (injunction alone not recognizable but money judgment that contains injunction may be registered).

(n6)Footnote 2. *Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452, 52 S. Ct. 238, 76 L. Ed. 389 (1932)* .

(n7)Footnote 3. *Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963)* (district court in New York properly denied enforcement of injunction issued as part of registered Ohio district court judgment in patent infringement action).

(n8)Footnote 4. *28 U.S.C. § 1963.*

(n9)Footnote 5. *Lutsky v. Lutsky, 310 F. Supp. 517, 520-521 (S.D. Fla.) , aff'd 433 F.2d 346 (5th Cir. 1970)*) (citing **Moore's Federal Practice**).

(n10)Footnote 6. *See Stiller v. Hardman, 324 F.2d 626, 627 (2d Cir. 1963)* .

(n11)Footnote 7. *Gullet v. Gullet, 188 F.2d 719, 720 (5th Cir. 1951)* (judgment for fixed sum owed from maintenance order issued as part of divorce decree may be registered as money judgment).

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3-26 Moore's Manual--Federal Practice and Procedure § 26.122

§ 26.122 Procedure to Register Judgmentn*

[1] Filing of Judgment

The prevailing party may register a final judgment granting relief for recovery of money or property in any district or districts. To register the judgment, the party should present a certified copy of the judgment to the court clerk in the district for filing. n1 Under the statute, a judgment is final for purposes of registration after an appeal has been concluded, or after the time within which an appeal must be perfected has concluded. n2 Registration may be permitted prior to such time for good cause. n3

Registration is proper in any district irrespective of whether the court in which the judgment is registered has personal jurisdiction over the defendant. n4 Registration is also proper irrespective of whether the cause of action underlying the judgment would be unavailable in the registering district because it would violate public policy of the state. n5

[2] Immediate Registration Allowed for Good Cause

On a showing of good cause, a court that enters a judgment may permit registration of the judgment in another district prior to expiration of the time to appeal, n1 as is otherwise required to register the judgment. n2"Good cause" typically means a showing that the defendant has assets in a particular district and does not have sufficient assets within the district in which the judgment was rendered to satisfy the judgment. n3 For example, in one case judgment creditors established good cause for registration of their judgments against a debtor in a California district court by showing that the debtor had sold his residence in the rendering district for an amount that would satisfy the judgments against the debtor, and that the debtor had moved to California and was employed there. n4

[3] Statute of Limitation

A party may not register a judgment in another district if the limitation period on the enforcement of the judgment has expired in the rendering jurisdiction. In other words, registration may not be used to revive a stale judgment. n1 However, assuming a judgment is still valid in the rendering jurisdiction, once it is registered in the registering jurisdiction, it is entitled to the same effect and may be enforced in the same manner as any judgment in the registering district. As a result, the general rule is that an applicable statute of limitation for enforcing a registered judgment is that

of the registering jurisdiction. n2

Thus, when a judgment is rendered in a federal district court located in one state and is registered in district court in another state, the applicable statute of limitation for purposes of enforcement of the registered judgment in the registration district is that of registration state. n3 This is so even if the statute of limitation in the state of the rendering district has expired after the registration was completed. n3.1 Conversely, the expiration of the limitation period in the district of registration would preclude the application of the limitation period of the rendering jurisdiction. n4

[4] Registration Is Ministerial Act

Registration to facilitate the enforcement of a judgment rendered in another jurisdiction is purely a ministerial act. n1 Consequently, the registering court may not look into the substance or the merits of the judgment to re-examine its validity. n2 Furthermore, the registering court must facilitate and complete enforcement of a judgment properly registered even if the cause of action on which the judgment is based is against the public policy of the state where it is registered, and even if the action which led to the judgment could not be brought originally in the registering district. n3 Thus, while the act of registration is merely ministerial, the effect of the registered judgment is more than ministerial because the registration statute provides that a judgment registered in another district court must be enforced under the procedures of the registering court and not the rendering court. n4 Additionally, registration is more than merely a procedural device for collection of a foreign judgment. Under the registration statute, the registering court has the same inherent powers to enforce the judgment as the rendering court, including utilization of supplementary proceedings such as attachment and garnishment. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice,* § 130.32 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Bennett v. Dunn, 504 F. Supp. 981, 984 (D. Nev. 1980)* ; *Arenas v. Sternecker, 109 F. Supp. 1, 2 (D. Kan. 1953)* .

(n3)Footnote 2. *28 U.S.C. § 1963*; *see In re Professional Air Traffic Controllers Org. (PATCO), 699 F.2d 539, 545 (D.C. Cir. 1983)* (registration before judgment is final is ineffective).

(n4)Footnote 3. *See* [2], *below*.

(n5)Footnote 4. *Dichter v. Disco Corp., 606 F. Supp. 721, 725 (S.D. Ohio 1984)* (personal jurisdiction over defendant in registering district is not required at time judgment is registered).

(n6)Footnote 5. *Harrah's Club v. Van Blitter, 902 F.2d 774, 777 (9th Cir. 1990)* (Nevada judgment for gambling debts was properly registered and enforceable in California even though cause of action for gambling debts would be unavailable as against public policy in California).

(n7)Footnote 1. *Pacific Reinsurance Mgmt. Corp. v. Fabe, 929 F.2d 1215, 1218 (7th Cir. 1991)* .

(n8)Footnote 2. *28 U.S.C. § 1963*; *see* [1], *above*.

(n9)Footnote 3. *Schreiber v. Kellogg, 839 F. Supp. 1157, 1162 (E.D. Pa. 1993)* (good cause requirement was satisfied when judgment debtor had substantial property in registering district and insufficient assets in rendering

district to satisfy judgment); *Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc., 2000 U.S. Dist. LEXIS 11974 (E.D. Pa. Aug. 3, 2000)* (notwithstanding alleged inconvenience and cost to defendant, distinct possibility of plaintiff being faced with unsatisfied judgment is sufficient good cause to order registration of judgment in foreign district prior to disposition of post-verdict motions).

(n10)Footnote 4. *Owen v. Soundview Fin. Group, Inc., 71 F. Supp. 2d 278 (S.D.N.Y. 1999)* .

(n11)Footnote 1. *Juneau v. Couvillion, 148 F.R.D. 558, 560-561 (W.D. La. 1993)* .

(n12)Footnote 2. *Marx v. Go Pub. Co., 721 F.2d 1272, 1273 (9th Cir. 1983)* (District of Columbia judgment registered in California was governed by California statute of limitation on enforcement of actions); *Home Port Rentals, Inc. v. International Yachting Group, Inc., 95 F. Supp. 2d 623 (W.D. La. 2000)* (limitation law of state in which judgment is registered, not of state that issued judgment, governs enforcement of judgment in registration state).

(n13)Footnote 3. *Home Port Rentals, Inc. v. International Yachting Group, Inc., 252 F.3d 399, 404-406 (5th Cir. 2001)* (because registration creates "new judgment," statute of limitation of registration state starts to run on date of registration).

(n14)Footnote 3.1. *Stanford v. Utley, 341 F.2d 265, 268 (8th Cir. 1965)* .

(n15)Footnote 4. *Matanuska Valley Lines, Inc. v. Molitor, 365 F.2d 358, 359 (9th Cir. 1966)* , *cert. denied, 386 U.S. 914 (1967)* .

(n16)Footnote 1. *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 128 F. Supp. 697, 699-700 (D. Hawaii 1955)* .

(n17)Footnote 2. *Tommills Brokerage Co. v. Thon, 52 F.R.D. 200, 202 (D.P.R. 1971)* .

(n18)Footnote 3. *Harrah's Club v. Van Blitter, 902 F.2d 774, 777 (9th Cir. 1990)* .

(n19)Footnote 4. *Ohio Hoist Mfg. Co. v. LiRocchi, 490 F.2d 105, 107 (6th Cir. 1974)* (judgment rendered in California district and registered in Ohio district court gave Ohio court jurisdiction to enforce judgment in same manner as Ohio judgment).

(n20)Footnote 5. *Condaire, Inc. v. Allied Piping, Inc., 286 F.3d 353, 357 (6th Cir. 2002)* ; *see* § 25.124[1] (effect of registration).

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
PART III. REGISTRATION OF JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.123

§ 26.123 Initiation of Independent Suit Instead of Registrationn*

The federal registration of judgment statute is not the exclusive means of enforcement of a judgment in a foreign district and does not preclude a successful party from initiating a second lawsuit instead of registering the judgment in the foreign district. Furthermore, a separate action to execute or otherwise enforce a judgment may be maintained while an appeal is pending in the rendering court. n1 However, if the judgment the party is seeking to enforce was from an action in which federal question jurisdiction was the basis of federal court jurisdiction, an action solely to enforce the judgment would lack federal question jurisdiction and could not be maintained in federal court unless there was an independent basis of subject matter jurisdiction. n2 The registration statute eliminates such jurisdictional problems for enforcement in federal court and also provides a more efficient method of enforcement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice,* § 130.33 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Urban Indus., Inc. v. Thevis, 670 F.2d 981, 985 (11th Cir. 1982)* .

(n3)Footnote 2. *Anita's N.M. Style Mexican Food, Inc. v. Anita's Mexican Foods Corp., 201 F.3d 314, 317 (4th Cir. 2000)* (citing **Moore's Federal Practice**; district court with diversity jurisdiction may entertain action to enforce judgment entered by another district court, even if first court's jurisdiction was based on existence of federal question).

(n4)Footnote 3. *Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963)* .

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PART VI Trial and Judgment
CHAPTER 26 POST-JUDGMENT PROCEDURES
PART III. REGISTRATION OF JUDGMENT

3-26 Moore's Manual--Federal Practice and Procedure § 26.124

§ 26.124 Effect of Registration of Judgmentn*

[1] Registration Makes Judgment Local Judgment

[a] Enforcement of Registered Judgment

When a party registers a judgment in a district, the judgment becomes a judgment of the court where registered and has the same effect as though it had been rendered by the registering court. n1 Therefore, the court that registers a judgment has the power to hear motions with respect to enforcement of the judgment. Registration of a judgment is the equivalent of a new judgment and is more than a procedural device for collection on a foreign judgment. Thus, the judgment has the same effect as a judgment of the registering district court, and the registering court has a broad range of supplementary proceedings involving third parties to assist the court in the protection and enforcement of the judgment, including attachment, garnishment, mandamus, and the avoidance of fraudulent conveyances. n1.1

[b] Relief From Registered Judgment

While the registering court has full enforcement powers regarding the registered judgment, n2 the general rule is that a motion for relief from judgment must be heard by the court that rendered the initial judgment. n3 The registering court has discretion in granting or denying post-judgment relief under *Federal Rule of Civil Procedure 60(b)* and may decline to review the motion without prejudice to presentation to the rendering court, similar to a forum non conveniens determination. n4 The registering court may defer to the court that rendered the judgment, consistent with the interests of comity among the federal courts, and efficient judicial administration to refer the motion to the court with greater familiarity of the issues raised by the post-judgment motion. n5

[2] Prohibition Against Collateral Attack on Underlying Judgment

The general rule is that the registering court may not look into the substance of the judgment to re-examine its validity. n1 Consequently, the registering court must allow enforcement of a judgment properly registered even if the cause of action on which the judgment is based is against the public policy of the registering state and the action which led to the judgment could not be brought originally in the registering district. n2 However, there is an exception for void judgments, which are otherwise final judgments which remain subject to collateral attack on any attempts to have them

recognized or enforced. These judgments are deemed invalid or void because they are based on lack of personal jurisdiction or fraud. n3 Consequently, any federal court requested to enforce a judgment of another district may inquire into that court's jurisdiction over the defendant. n4 On the other hand, a merely voidable judgment is one that may only be attacked directly, such as by appeal. A voidable judgment includes one in which the court may lack subject matter jurisdiction. These principles, although well established in the full faith and credit context, n5 have not been directly considered with respect to the registration statute. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice,* §§ 130.31[4], 130.35 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Stanford v. Utley, 341 F.2d 265, 268 (8th Cir. 1965)* .

(n3)Footnote 1.1. *Condaire, Inc. v. Allied Piping, Inc., 286 F.3d 353, 357 (6th Cir. 2002)* .

(n4)Footnote 2. *See* [a], *above*.

(n5)Footnote 3. *Fuhrman v. Livaditis, 611 F.2d 203, 204-205 (7th Cir. 1979)* .

(n6)Footnote 4. *James Blackstone Memorial Asso. v. Gulf, Mobile & Ohio R.R., 28 F.R.D. 385, 388 (D. Conn. 1961)* .

(n7)Footnote 5. *Fuhrman v. Livaditis, 611 F.2d 203, 205 (7th Cir. 1979)* .

(n8)Footnote 1. *Tommills Brokerage Co. v. Thon, 52 F.R.D. 200, 202 (D.P.R. 1971)* .

(n9)Footnote 2. *Harrah's Club v. Van Blitter, 902 F.2d 774, 777 (9th Cir. 1990)* .

(n10)Footnote 3. *Hadden v. Rumsey Prods., 196 F.2d 92, 96 (2d Cir. 1952)* ; *see § 26.44[2]*.

(n11)Footnote 4. *Hanes Supply Co. v. Valley Evaporating Co., 261 F.2d 29, 34-35 (5th Cir. 1958)* .

(n12)Footnote 5. *Sanders v. City of Brady (In re Brady Mun. Gas Corp.), 936 F.2d 212, 219 (5th Cir. 1991)* .

(n13)Footnote 6. *Pacific Reinsurance Mgmt. Corp. v. Fabe, 929 F.2d 1215, 1217 (7th Cir. 1991)* .

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3 Moore's Manual--Federal Practice and Procedure .syn

§ Synopsis to Appendix : APPENDIX TO CHAPTER 26 APPENDIX OF FORMS OFFICIAL FORMS FEDERAL RULES OF CIVIL PROCEDURE

Form 1. Caption.

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.

Form 3. Summons.

Form 4. Summons on a Third-Party Complaint.

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

Form 6. Waiver of the Service of Summons.

Form 7. Statement of Jurisdiction.

Form 8. Statement of Reasons for Omitting a Party.

Form 9. Statement Noting a Party's Death.

Form 10. Complaint to Recover a Sum Certain.

Form 11. Complaint for Negligence.

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

Form 14. Complaint for Damages Under the Merchant Marine Act.

Form 15. Complaint for the Conversion of Property.

Form 16. Third-Party Complaint.

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

Form 18. Complaint for Patent Infringement.

Form 19. Complaint for Copyright Infringement and Unfair Competition.

Form 20. Complaint for Interpleader and Declaratory Relief.

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

Form 30. Answer Presenting Defenses Under Rule 12(b).

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

Form 41. Motion to Bring in a Third-Party Defendant.

Form 42. Motion to Intervene as a Defendant Under Rule 24.

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

Form 51. Request for Admissions Under Rule 36.

Form 52. Report of the Parties' Planning Meeting.

Form 60. Notice of Condemnation.

Form 61. Complaint for Condemnation.

Form 70. Judgment on a Jury Verdict.

Form 71. Judgment by the Court without a Jury.

Form 80. Notice of a Magistrate Judge's Availability.

Form 81. Consent to an Assignment to a Magistrate Judge.

Form 82. Order of Assignment to a Magistrate Judge.

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3 Moore's Manual--Federal Practice and Procedure Form 1

Form 1. Caption.

Form 1. Caption.
(Use on every summons, complaint, answer, motion, or other document.)
United States District Court
for the
_____ District of _____

A B, Plaintiff v. C D, Defendant v. E F, Third-Party Defendant *(Use if needed.)*	)))	Civil Action File No. _____

(Name of Document)

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3 Moore's Manual--Federal Practice and Procedure Form 2

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.
(Use at the conclusion of pleadings and other papers that require a signature.)
Date: _____

_____

(Signature of the attorney or unrepresented party)

_____

(Printed name)

_____

(Address)

_____

(E-mail address)

_____

(Telephone number)

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3 Moore's Manual--Federal Practice and Procedure Form 3

Form 3. Summons.

Form 3. Summons.
(Caption--See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under *Rule 12 of the Federal Rules of Civil Procedure*. The answer or motion must be served on the plaintiff's attorney, _____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: _____

_____

Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

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3 Moore's Manual--Federal Practice and Procedure Form 4

Form 4. Summons on a Third-Party Complaint.

Form 4. Summons on a Third-Party Complaint.
(Caption--See Form 1.)

To *name the third-party defendant*:

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under *Rule 12 of the Federal Rules of Civil Procedure*. The answer or motion must be served on the defendant's attorney, _____, whose address is, _____, and also on the plaintiff's attorney, _____, whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may--but are not required to--respond to it.

Date: _____

_____

Clerk of Court

(Court Seal)

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3 Moore's Manual--Federal Practice and Procedure Form 5

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.
(Caption--See Form 1.)

To *(name the defendant--or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service)*:

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making

service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 6

Form 6. Waiver of the Service of Summons.

Form 6. Waiver of the Service of Summons.
(Caption--See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign--See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

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3 Moore's Manual--Federal Practice and Procedure Form 7

Form 7. Statement of Jurisdiction.

Form 7. Statement of Jurisdiction.

a. *(For diversity-of-citizenship jurisdiction.)* The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by *28 U.S.C. § 1332*.

b. *(For federal-question jurisdiction.)* This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty, *specify*] [a federal statute, __ U.S.C. § __].

c. *(For a claim in the admiralty or maritime jurisdiction.)* This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following*: This is an admiralty or maritime claim within the meaning of Rule 9(h).)

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3 Moore's Manual--Federal Practice and Procedure Form 8

Form 8. Statement of Reasons for Omitting a Party.

Form 8. Statement of Reasons for Omitting a Party.

(If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

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3 Moore's Manual--Federal Practice and Procedure Form 9

Form 9. Statement Noting a Party's Death.

Form 9. Statement Noting a Party's Death.
(Caption--See Form 1.)

In accordance with Rule 25(a), *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 10

Form 10. Complaint to Recover a Sum Certain.

Form 10. Complaint to Recover a Sum Certain.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

(*Use one or more of the following as appropriate and include a demand for judgment*.)

(a) On a Promissory Note

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $_____ with interest at the rate of _____ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $_____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $_____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $_____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

(f) For Money Had and Received

2. The defendant owes the plaintiff $_____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $_____, plus interest and costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 11

Form 11. Complaint for Negligence.

Form 11. Complaint for Negligence.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 12

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against one or both defendants for $_____, plus costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 13

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, and costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 14

Form 14. Complaint for Damages Under the Merchant Marine Act.

Form 14. Complaint for Damages Under the Merchant Marine Act.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $_____ a month and found, which is equal to a shore worker's wage of $_____ a month.

4. On *date*, the vessel was at sea on the return voyage. (Describe the weather and the condition of the vessel.)

5. *(Describe as in Form 11 the defendant's negligent conduct.)*

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 15

Form 15. Complaint for the Conversion of Property.

Form 15. Complaint for the Conversion of Property.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 16

Form 16. Third-Party Complaint.

Form 16. Third-Party Complaint.
(Caption--See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. (State grounds entitling *defendant's name* to recover from *third-party defendant's name* for (all or an identified share) of any judgment for *plaintiff's name* against *defendant's name*.)

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 17

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

Form 17. Complaint for Specific Performance of a Contract to Convey Land.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A] [*summarize the contract*].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) the defendant be required to specifically perform the agreement and pay damages of $_____, plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of $_____, plus interest and costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 18

Form 18. Complaint for Patent Infringement.

Form 18. Complaint for Patent Infringement.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 19

Form 19. Complaint for Copyright Infringement and Unfair Competition.

Form 19. Complaint for Copyright Infringement and Unfair Competition.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled _____ _____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____ _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 20

Form 20. Complaint for Interpleader and Declaratory Relief.

Form 20. Complaint for Interpleader and Declaratory Relief.
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court

determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) the plaintiff recover its costs.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 21

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).
(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $_____ with interest at the rate of _____ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $_____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and any judgment granted be made a lien on the property.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 30

Form 30. Answer Presenting Defenses Under Rule 12(b).

Form 30. Answer Presenting Defenses Under Rule 12(b).
(Caption--See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name*, who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense--Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced.

Counterclaim

7. *(Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.)*

Crossclaim

8. *(Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.)*

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 31

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.
(Caption--See Form 1.)

Response to the Allegations in the Complaint

(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from *name* a deposit of $_____.

2. The plaintiff demands payment of the deposit because of a purported assignment from *name*, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) *name* be made a party to this action;

(b) the plaintiff and *name* be required to interplead their respective claims;

(c) the court decide whether the plaintiff or *name* or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover costs and attorney's fees.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 40

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.
(Caption--See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by *28 U.S.C. § 1332*;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 41

Form 41. Motion to Bring in a Third-Party Defendant.

Form 41. Motion to Bring in a Third-Party Defendant.
(Caption--See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 42

Form 42. Motion to Intervene as a Defendant Under Rule 24.

Form 42. Motion to Intervene as a Defendant Under Rule 24.
(Caption--See Form 1.)

1. *name* moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b)*.)

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign--See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

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3 Moore's Manual--Federal Practice and Procedure Form 50

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.
(Caption--See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within _____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy--and to test or sample--the following tangible things:

(Describe each thing, either individually or by category.)

(State the time, place, and manner of the inspection and any related acts.)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(Describe the property and each object or operation.)

(State the time and manner of the inspection and any related acts.)

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 51

Form 51. Request for Admissions Under Rule 36.

Form 51. Request for Admissions Under Rule 36.
(Caption--See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(List each document.)

2. The truth of each of the following statements:

(List each statement.)

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 52

Form 52. Report of the Parties' Planning Meeting.

Form 52. Report of the Parties' Planning Meeting.
(Caption--See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)

(b) Disclosure or discovery of electronically stored information should be handled as follows: (briefly describe the parties' proposals, including the form or forms for production.)

(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (briefly describe the provisions of the proposed order.)

(d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

(e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)

(f) (Maximum number of requests for admission, along with the dates responses are due.)

(g) (Maximum number of depositions for each party.)

(h) (Limits on the length of depositions, in hours.)

(i) (Dates for exchanging reports of expert witnesses.)

(j) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)

(b) (Requested dates for pretrial conferences.)

(c) (Final dates for the plaintiff to amend pleadings or to join parties.)

(d) (Final dates for the defendant to amend pleadings or to join parties.)

(e) (Final dates to file dispositive motions.)

(f) (State the prospects for settlement.)

(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)

(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)

(i) (Final dates to file objections under Rule 26(a)(3).)

(j) (Suggested trial date and estimate of trial length.)

(k) (Other matters.)

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 60

Form 60. Notice of Condemnation.

Form 60. Notice of Condemnation.
(Caption--See Form 1.)

To *name the defendant*.

1. A complaint in condemnation has been filed in the United States District Court for the _____ District of _____, to take property to use for *purpose*. The interest to be taken is *describe*. The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(Describe the property.)

3. The authority for taking this property is *cite*.

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 21 days [after being served with this notice] [from *insert the date of the last publication of notice*]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or

not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 61

Form 61. Complaint for Condemnation.

Form 61. Complaint for Condemnation.
(Caption--See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction--See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is *(describe in enough detail for identification--or attach the description and state "is described in Exhibit A, attached").*

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. *(For each person include the interest claimed.)*

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign--See Form 2.)

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3 Moore's Manual--Federal Practice and Procedure Form 70

Form 70. Judgment on a Jury Verdict.

Form 70. Judgment on a Jury Verdict.
(Caption--See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff *name* recover from the defendant *name* the amount of $_____ with interest at the rate of _____%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name*.]

Date: _____

_____

Clerk of Court

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3 Moore's Manual--Federal Practice and Procedure Form 71

Form 71. Judgment by the Court without a Jury.

Form 71. Judgment by the Court without a Jury.
(Caption--See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff *name* recover from the defendant *name* the amount of $_____, with prejudgment interest at the rate of _____%, postjudgment interest at the rate of _____%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name*.]

Date: _____

_____

Clerk of Court

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3 Moore's Manual--Federal Practice and Procedure Form 80

Form 80. Notice of a Magistrate Judge's Availability.

Form 80. Notice of a Magistrate Judge's Availability.

1. A magistrate judge is available under title *28 U.S.C. § 636(c)* to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called Consent to an Assignment to a United States Magistrate Judge is available from the court clerk's office.

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3 Moore's Manual--Federal Practice and Procedure Form 81

Form 81. Consent to an Assignment to a Magistrate Judge.

Form 81. Consent to an Assignment to a Magistrate Judge.
(Caption--See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk--not to a judge or magistrate judge.)

Date: _____

_____

Signature of the Party

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3 Moore's Manual--Federal Practice and Procedure Form 82

Form 82. Order of Assignment to a Magistrate Judge.

Form 82. Order of Assignment to a Magistrate Judge.
(Caption--See Form 1.)

With the parties' consent, it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with *28 U.S.C. § 636(c)*.

Date: _____

_____

United States District Judge

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure 27.syn

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.01

§ 27.01 Review of Decisions Made By Lower Courts in Federal System

When a lower federal court makes a decision, the appellate courts in the federal court system, including the circuit courts of appeal and the United States Supreme Court may review the decision by only two methods: appeal to the higher court under the authority of a statute, or by application for extraordinary writ. The most common method of review is appeal. For appeals, there are two general types of decisions that are appealable: final decisions n1 and certain appealable nonfinal decisions known as interlocutory orders. n2 The "All Writs Act" enables federal courts to issue any writs that are necessary or appropriate in the aid of the jurisdiction given to the courts by the Constitution or by statute. n3 Under the All Writs Act, a court may issue an extraordinary writ in order to review nonfinal orders and other actions that do not constitute an appealable order. n4

In addition to review of lower courts, several statutes provide for the judicial review of decisions and actions of federal administrative agencies and government officials. These statutes and rules are discussed in the chapters applicable to the particular appellate court: Ch. 28, *Appeal to Court of Appeals,* and Ch. 29, *Appeals to the Supreme Court*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsAll Writs ActCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 27.02*.

(n2)Footnote 2. *See §§ 27.03*, *27.04*.

(n3)Footnote 3. *See 28 U.S.C. § 1651*.

(n4)Footnote 4. *See § 27.07*.

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.02

§ 27.02 Final Judgment Rulen*

[1] Only Final Judgments Generally Appealable

The courts of appeals generally have jurisdiction of appeals only from decisions of the district courts of the United States that are final. n1 This rule is known as the "final judgment rule," and it ordinarily bars consideration of non-dispositive rulings during ongoing judicial proceeding in the trial court, so that appellate proceedings do not interfere with the the trial proceedings. n2 However, the final judgment statutes do not precisely define the term final judgment, n3 nor do they specify when there has been a final decision. Consequently, interpretation of the term has been developed by case precedent. n4 Appeals to the Supreme court are also covered by the final judgment rule. n5

There are exceptions to the final judgment rule, and these exceptions allow appeals from certain decisions even though the decisions have not disposed of the entire action. n6 These decisions are known as interlocutory orders, and interlocutory appeals from these orders are allowed only in particular limited circumstances specified in the Judicial Code, n7 or in situations when the interlocutory order is covered by one of several common-law doctrines that define orders as final, even though the orders do not end the action in total or in part. n7.1

[2] Purpose of Final Judgment Rule

The primary purpose of the final judgment rule is to benefit both the judicial process and the litigants by preventing piecemeal appeals that interrupt and increase the cost of trial litigation. n8 The final judgment rule prevents many issues that might otherwise be raised in an interlocutory appeal from even reaching the appellate court, because a favorable final decision removes the incentive to appeal an order that might otherwise have been appealed at an earlier time. n9 The final judgment rule also benefits litigants because it reduces the ability of litigants to harass opponents in bad faith by making them respond to a succession of costly and time consuming appeals. n10 Finally, the final judgment rule acknowledges the discretion that the trial judge has under the federal rules and emphasizes the deference that appellate courts owe to the trial judge as the individual initially called on to decide the many questions of law and fact that occur in the course of a trial, n11 especially procedural matters. n12

[3] Finality of Decision

[a] "Final Judgment" Defined

For purposes of appealability, a "final judgment" is generally defined as a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. n13 However, there is no definitive formula that determines in all cases whether a decision is final. n14 The label the court gives its decision does not necessarily control whether it is final for purposes of appealability. n15 The Supreme Court has also stated that a final judgment within the meaning of the final judgment rule does not necessarily mean the last order possible to be made in a case; because of the difficulty of making a decision in some cases the requirement of finality is to be given a practical, rather than a technical construction. n16 Thus, absolute finality is not a requirement, and even though a collateral question remains to be decided, an order that ends the litigation on the merits is appealable as long as the collateral question would not alter the order or moot or revise decisions embodied in the order. n17

[b] Court's Retention of Power to Revise Decision Destroys Finality

One of the absolute requirements of finality is the loss of power by the court to revise the order or decision. Thus, even if an order or decision is otherwise final, its finality is destroyed if the court retains power to revise the order or decision. n18 Nevertheless, courts recognize that if the requirements of finality are otherwise met for a particular decision, the finality of the decision is not destroyed by the power of the court to grant a further decision related to the parties provided that the potential decision does not encompass the earlier decision that constitutes final judgment. n19 In the most common example, if a court retains jurisdiction over the parties until they have complied with the terms of an injunction it has included in a judgment, the judgment is a nevertheless a final, appealable judgment. An order or judgment granting injunctive relief is final for purposes of appeal provided that it resolves all substantive issues on the merits and effectively ends the litigation. n20 Similarly, the finality of a judgment is not affected by the reservation of the determination of costs, including attorney's fees, unless the attorney's fees are an integral part of the action's merits. n21

[c] Technical Requirements for Judgment Do Not Control Appealability

The Federal Rules of Civil Procedure specify three technical requirements that must be accomplished at the time the court enters a judgment. However, because the final judgment rule is to be given a practical, rather than a technical construction, these technical requirements generally do not control finality with respect to the issue of appealabilty. n22 Rather than making an order a final judgment, the technical requirements set the time from which an appeal must be taken. An appeal cannot be untimely unless the requirements have been satisfied and the statutory period has elapsed; however, an appeal may be commenced without meeting the requirements. n23

The three technical requirements are:

1. The court must set out the judgment in a separate document. n24 However, the court or clerk's failure to set forth a judgment or order on a separate document when required by Rule 58(a) does not affect the validity of an appeal from that judgment or order. n25 Therefore, although the appealability of a district court's judgment is not determined by whether it is set forth in a separate document, the time when judgment is set forth in a separate document and entered by the clerk *does* determine when the deadline for appeal begins to run. n26

2. A judgment is not effective until the clerk has entered the judgment on its docket pursuant to Rule 79. n27 While some courts have held that the absence of a notation of entry of judgment on the docket sheet technically deprives the circuit court of appellate jurisdiction, n28 a notice of appeal filed after the court announces a decision or order but before entry of judgment is nevertheless treated as filed on the date and after the entry. n29 On the other hand, a docket entry of a judgment does not in and of itself confer jurisdiction on a circuit court. If no final judgment has in fact been rendered, the fact that there is a docket notation suggesting otherwise is jurisdictionally irrelevant. n30

3. Generally a judgment is not final unless it describes the relief to which the prevailing party is entitled. However, a

final judgment for money need only specify the means for determining the amount. n31 Thus, a judgment is still appealable, even if it fails to specify a particular amount of damages, if the amount can be determined by a mechanical and uncontroverted method. n32

[4] Judgment Disposing of Less Than All Claims or Less Than All Parties

Courts have liberally interpreted the final judgment statute n33 in conjunction with Rule 54 to permit a party to appeal an order that ends the litigation on the merits, even though issues regarding some claims or parties may remain, provided the district court states that there is no reason to delay finality for the orders decided. Thus, in an action involving multiple claims or multiple parties, a district court may enter a final judgment as to fewer than all of the claims or determine the rights of fewer than all of the parties. However, such an order is appealable only if it has been certified by the district court under Civil Rule 54(b). n34 To qualify for certification under Civil Rule 54(b), a judgment must dispose of at least a one substantive claim, n35 and that the substantive claim must be separable from the remaining claims. n35.1

The courts have not defined the term "separable," and no exact test exists to determine whether a claim is a distinct claim for relief. However, courts generally concentrate on two factors: whether there is a factual overlap between the claims disposed of and the remaining claims and whether the claims disposed of and the remaining claims seek separate relief. n36

To certify an order as a Rule 54(b) final judgment, a district court must state that the action is final as to specified claims or parties and that there is no just reason for delay. n36.1 In making a determination of whether a claim qualifies under Rule 54(b), the district court must consider judicial administrative interests, as well as the equities between the parties. The judicial administrative interests include whether the claims under review are separable from the remaining claims, and whether the circuit court would have to decide the same issue more than once if certification is granted. The absence of one of these factors does not, however, necessarily preclude certification. The reason for considering these interests is to maintain the federal policy against piecemeal appeals. n37

A court may certify an order that disposes of a claim against one party even if identical claims exist against the remaining parties. n38 However, a partial or interlocutory adjudication of a claim is insufficient, regardless of whether the district court makes the requisite express determination that there is no just cause for delay. n39

[5] Exceptions to Final Judgment Rule

[a] Collateral Order Doctrine

The collateral order doctrine provides that the courts may deem certain types of district court orders appealable because they completely dispose of important issues collateral to the merits, even though the orders are not technically "final orders" under section 1291. n40 Under the doctrine, an order is appealable if it is a final disposition of a claimed right that is not an ingredient of the cause of action and does not require consideration with the cause of action. n41 To be within the collateral order doctrine, the type of order must meet all three of the following requirements: n42

1. The order must conclusively determine a disputed question;

2. The order must resolve an important issue separate from the merits of the action; and

3. The order must be effectively unreviewable on an appeal from a final judgment.

The first requirement, that the order conclusively determine a disputed question, means that the district court has clearly made its last statement about the subject. n43 The second requirement, that the order resolve an important issue separate

from the merits of the action, means that the order must present a serious and unsettled question of law n44 and must involve an important right that would be probably be irreparably lost if review had to await final judgment. n45

The Supreme Court has emphasized that the collateral order doctrine only applies to orders that cover an entire class of claims; when considering the doctrine, the court should *not* engage in an individualized jurisdictional inquiry regarding the factual nature of one order on a particular claim. For example, the court could consider the doctrine with respect to all orders that involve waiver of privilege. n46

The collateral order doctrine is a narrow doctrine, and the courts must never allowed it to swallow the general rule that a party is entitled only to a single appeal that should be deferred until final judgment has been entered. n47 Thus, the following orders have been held appealable as collateral orders under the doctrine:

- An order approving class action settlement; n48
- An order absolutely denying intervention; n49
- An order preventing a father from appearing pro se on behalf of his minor son; n50
- An order quashing writs of attachment or garnishment; n51
- An order imposing sanctions on an attorney not a party to the action.

In contrast, the following types of orders have been held not immediately appealable:

- An order declining to enforce a contractual forum selection clause; n52
- An order denying a motion to dismiss based on immunity when the immunity derives from a private settlement agreement; n53
- Disclosure orders adverse to the attorney-client privilege. n54

[b] Doctrine of Practical Finality

The doctrine of practical finality is another exception to the final judgment rule. The doctrine of practical finality permits appellate review of an order that is not technically final but that resolves all issues that are not purely ministerial. For example, a finding of liability that does not also specify damages is generally not a final decision. However, if damages are based on a precise mathematical formula, the inputs to the formula are all undisputed facts, and the only issues remaining before the district court are purely ministerial, the appellate court may take jurisdiction over the appeal. n55

The practical finality doctrine is also applicable in cases involving property contests. n56 Under the doctrine, a judgment requiring immediate delivery or sale of property, while further proceedings in the action continue, is final for purposes of appellate review. n57 The doctrine is limited to cases in which the appellant would be irreparably harmed if appellate review were delayed until conclusion of the action. n58 The doctrine has also been applied in cases involving payment of interim attorney's fees when the prospect of collection is uncertain. n59 n60-61

[c] Pragmatic Finality Doctrine

The pragmatic finality doctrine is a judicially created doctrine n62 which provides another very narrow exception to the final judgment statute. n63 The court applies the doctrine if the danger of injustice by delaying appellate review

outweighs the inconvenience and costs of piecemeal review. This exception is reserved only for unique and special circumstances. To take advantage of the doctrine, a party must establish four factors: (1) the order is a marginally final order, (2) the order disposes of an unsettled issue of significance, (3) review would implement the same policy Congress sought to promote in Section 1292(b), and (4) the finality issue would not be presented to the appellate court until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue. n64

[6] Application of Final Judgment Rule in Particular Situations

[a] Pretrial Orders

[i] Discovery Orders

A party generally may not appeal a discovery order. n65 Although a discovery order may come within the "collateral order doctrine" exception, n66 it will not usually satisfy one of its prerequisites: that the order be effectively unreviewable on appeal from a final judgment. This is because a party may gain the right of appeal from a discovery order by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to that party. n67

A discovery order may be appealable in certain situations. For example, a discovery order is appealable if part of a final decision disposing of the merits. n68 In some cases, discovery orders are appealable in ancillary proceedings brought in other districts. n69 For example, an order quashing a subpoena in an ancillary proceeding generally is final and appealable because the party seeking to enforce the subpoena has no other effective means of review. n70 Courts have also generally permitted immediate appeals from orders which restrict access to judicial proceedings, such as protective orders and orders sealing documents. These cases may arise when a party seeks access to the protected material, n71 or when an individual wishes to disseminate material to the government or the media. n72

[ii] Orders Regarding Security

The exception to the final judgment rule under the collateral order doctrine n73 arose from an order requiring prejudgment security. The exception may also apply to an order denying security. n74 Thus, an order denying security may be appealed immediately under the collateral order doctrine, whether or not the trial judge mistakenly believed that he or she lacked the power to grant the requested relief, particularly when the appeal presents an important question of law whose resolution will guide courts in other cases. n75 Additionally, some courts have held that the an order granting, denying, or vacating an attachment comes within the collateral order doctrine and is appealable. n76

[iii] Orders Regarding Class Actions

If the district court enters an order that an action is not maintainable as a class action under Civil Rule 23, n76.1 the decision is generally not a "final decision," is not appealable as a matter of right, and may only be reviewed either on appeal from a final judgment in the action or if it comes within an appropriate exception to the final judgment rule. The Supreme Court reached this decision in a class action involving allegations of violations of federal securities laws, in which the district court certified the class and then, after further proceedings, decertified it. n77 The Court held that an order deciding a request for class certification does not come within the "collateral order" exception of the final-judgment rule. n78 An order denying class certification or decertifying an existing class does not meet the criteria of the collateral-order exception because the order is subject to revision in the district court under Civil Rule 23(c)(1); the class determination is generally intertwined with the merits of the action; and an order denying class certification can be effectively reviewed after final judgment at the behest of the class representative or intervening class members. n79

Notwithstanding this general rule of non-appealability, the collateral order doctrine n80 has occasionally been

successfully invoked to obtain immediate review of other nonfinal orders in class actions. For example, in one case the Supreme Court granted immediate review of an order imposing on the defendant 90 percent of the costs of giving notice in a class action suit. n81 A court of appeals has also invoked the doctrine to hear an appeal by objecting class members from the district court's approval of a subclass settlement. n82

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after such an order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals makes a stay order. n83

[iv] Orders Granting or Denying Intervention n*

If a court makes an order that grants a motion to intervene, the order is not appealable. An order granting intervention is interlocutory and not within one of the statutory exceptions. n84

On the other hand an order denying intervention may be appealed in some situations, generally depending on the nature of the intervention as either of right or permissive. In a case that predates the enactment of the Federal Rules of Civil Procedure generally, and Rule 24 specifically (governing intervention), the Supreme Court stated that when an application for intervention was addressed to the discretion of the district court, the order denying intervention was not of the final character which furnishes the basis for appeal. n85 In a later case, the Court held that its jurisdiction to consider an appeal from an order denying intervention depended on the nature of the applicant's right to intervene. If the right is absolute, the order is appealable; but if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable; n85.1 in other words, appellate jurisdiction depends on the nature of the right to intervene in each particular instance. n86

In light of these Supreme Court rulings, and the subsequent enactment of the federal Rules, the majority of circuits hold that the denial of a motion to intervene as of right under Civil Rule 24(a) is an appealable final decision within meaning of Judicial Code Section 1291. n87 Some courts have also held that appealability does not depend on whether intervention is of right under Rule 24(a), or is permissive under Rule 24(b). n88

[b] Postjudgment Motions and Orders

[i] Effect of Postjudgment Motions

If a party makes any of certain postjudgment motions, the motion divests the circuit court of jurisdiction until it is disposed of, in effect, rendering the final judgment temporarily nonfinal for appellate purposes. These motions are:

1. A motion for judgment as a matter of law or a motion for a new trial under Rule 50(b). n89

2. A motion to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment. n90

3. A motion to alter or amend the judgment under Rule 59(e). n91

4. A timely motion for attorney's fees under Rule 54(d)(2), provided that prior to the time any notice of appeal has been filed, the district court decides that under Rule 58, that motion for attorney's fees will be treated as a motion under Rule 59, which has the effect of tolling the time limit for appeal. n92

5. A motion for a new trial. n93

6. A motion for relief under Rule 60 if the motion is filed no later than 28 days after the entry of

judgment. n94

The running of the time for appeal is terminated by a timely motion made under the rules listed above. In such instances, the full time for appeal commences to run from the entry of the order denying a new trial or granting or denying any other such motion. n95

For example, with respect to item 1, if a Rule 50(b) motion for judgment is granted, the result is a final judgment: an original one if a judgment has not already been entered and a superseding one if a judgment was previously entered. If a judgment was entered and a motion for judgment under Rule 50(b) is denied, the finality of the judgment is restored. If no judgment on the verdict was entered, the denial of the Rule 50(b) motion presumably will be followed by the entry of a final judgment on the verdict, unless the trial court grants a motion for new trial under Civil Rule 59.

Motions under Rule 60, listed as item 6 above, should be distinguished from the other listed motions under Rules 50(b), 52(b), and 59. However, a motion under Rule 60(b) deals with obtaining substantial relief from a judgment, and for certain grounds must be made no more than one year after entry of the judgment or order. n96 Furthermore, unless a motion for relief under Rule 60(b) is filed no later than 28 days after the entry of judgment, the motion does not affect the finality of a judgment, nor suspend its operation. n96.1

[ii] Appealability of Postjudgment Orders

If a postjudgment order is ministerial in that it is designed merely to effectuate the final judgment, the order is not appealable. n97 On the other hand, all postjudgment orders that are more than ministerial may be appealed. n98 With respect to finality, courts generally apply less rigorous standards to find a postjudgment order final and appealable than for a prejudgment order because the policy against and the probability of avoidable piecemeal review are less likely to be decisive after judgment than before. n99

Orders issued that decide Rule 60 motions for relief from a judgment or order must be distinguished from other post judgment orders, in that the Rule 60 orders relate directly to the final judgment and not to other issues. A motion under Rule 60 filed within 28 days after judgment renders a final judgment nonfinal for appellate purposes until the motion is decided. n100 However, if the motion is made more than 28 days after the judgment has been entered, the underlying judgment and the later decision on the Rule 60 motion require separate appeals. n101

An order granting or denying a motion under Rule 60(b) is appealable, n102 unless other issues remain in the case. n103 Similarly, if the district court grants a motion under Rule 60 and orders a new trial or other further proceedings, the order is generally not appealable. n104 However, there is an exception to this general rule, and an appeal has been allowed when the district court was without jurisdiction to enter the order. For example, if the district court grants relief from a judgment under Rule 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect on a motion filed more than one year after judgment has been entered, despite the language in the rule specifically limiting to one year the time within which the relief may be sought, an immediate appeal is permissible. n105

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 19 *Moore's Federal Practice,* § 202.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1291*; *see also 28 U.S.C. § 1295* (appeals to federal circuit court of appeals.

(n3)Footnote 2. *See Cunningham v. Hamilton County, 527 U.S. 198, 203-204, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* .

(n4)Footnote 3. *See 28 U.S.C. §§ 1291*, *1295*.

(n5)Footnote 4. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* (Supreme Court has recognized problem of determining whether a judgment, decree, or decision is "final" for appeal purposes); *see* [3], *below*.

(n6)Footnote 5. *See Jefferson v. City of Tarrant, 522 U.S. 75, 80-82, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997)* .

(n7)Footnote 6. *Cunningham v. Hamilton County, 527 U.S. 198, 203-204, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* .

(n8)Footnote 7. *28 U.S.C. § 1292*; *see §§ 27.03*, *27.04*.

(n9)Footnote 7.1. *See* [5], *below*.

(n10)Footnote 8. *Swint v. Chambers County Comm'n, 514 U.S. 35, 45, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)* .

(n11)Footnote 9. *Cheng v. Commissioner, 878 F.2d 306, 310 (9th Cir. 1989)* .

(n12)Footnote 10. *Johnson v. Jones, 515 U.S. 304, 309, 115 S. Ct. 2151, 2154, 132 L. Ed. 2d 238 (1995)* .

(n13)Footnote 11. *Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)* .

(n14)Footnote 12. *Johnson v. Jones, 515 U.S. 304, 309, 115 S. Ct. 2151, 2154, 132 L. Ed. 2d 238 (1995)* (interlocutory appeals may make it more difficult for trial judges to do their basic job of supervising trial proceedings and may threaten those proceedings with delay, added costs, and diminished coherence).

(n15)Footnote 13. *Pause Tech. LLC v. TiVo Inc., 401 F.3d 1290, 1292-1293 (Fed. Cir. 2005)* .

(n16)Footnote 14. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n17)Footnote 15. *Samco Global Arms, Inc. v. Arita, 395 F.3d 1212, 1213 (11th Cir. 2005)* (citing **Moore's Federal Practice**, when court labels its dismissal as without prejudice, label is not controlling for purposes of finality).

(n18)Footnote 16. *Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964)* .

(n19)Footnote 17. *Budinich v. Becton Dickinson and Co., 486 U.S. 196, 199, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* .

(n20)Footnote 18. *Behrens v. Pelletier, 516 U.S. 299, 305, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996)* .

(n21)Footnote 19. *See In re UAL Corp., 411 F.3d 818, 822 (7th Cir. 2005)* ; *University Life Ins. Co. v. Unimarc, Ltd., 699 F.2d 846, 849 (7th Cir. 1983)* , *superseded by statute as stated in Holt v. Shalala, 35 F.3d 376* (9th Cir. 1994).

(n22)Footnote 20. *Tyler v. City of Manhattan, 118 F.3d 1400, 1402 n.1 (10th Cir. 1997)* .

(n23)Footnote 21. *White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 451 n.13, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

(n24)Footnote 22. *Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S. Ct. 308, 311, 13 L. Ed. 2d 199, 203 (1964)* .

(n25)Footnote 23. *Bankers Trust Co. v. Mallis, 435 U.S. 381, 386, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* (noting also that three technical requirements described above may also be waived).

(n26)Footnote 24. *Fed. R. Civ. P. 58(a).*

(n27)Footnote 25. *Fed. R. App. P. 4(a)(7)(B)*; *see Fed. R. Civ. P. 58(a)(1)*; *see also Bankers Trust Co. v. Mallis, 435 U.S. 381, 383-385, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* .

(n28)Footnote 26. *See Fed. R. Civ. P. 58(c)(2)(A)*; *Fed. R. App. P. 4(a)(7)(A)(ii)*; *see also Kunz v. DeFelice, 538 F.3d 667, 673, 680 (7th Cir. 2008)* (starting of clock on deadline for time to appeal).

(n29)Footnote 27. *Fed. R. Civ. P. 58(c)*; *see Fed. R. Civ. P. 79(a)*; *Fed. R. App. P. 4(a)(7)(A)*; *see also Taumoepeau v. Mfrs. & Traders Trust Co. (In re Taumoepeau), 523 F.3d 1213, 1216 (10th Cir. 2008)* .

(n30)Footnote 28. *Sauter v. Ross Restaurants, Inc., 674 F.2d 194, 196 (3d Cir. 1982)* (court dismissed matter for lack of jurisdiction where docket sheet did not reflect entry of judgment pursuant to Rule 58).

(n31)Footnote 29. *Fed. R. App. P. 4(a)(2).*

(n32)Footnote 30. *C.I.T. Financial Service v. Yeomans, 710 F.2d 416, 417 (7th Cir. 1983)* (entry on docket sheet is merely ministerial act performed by court clerk pursuant to Civil Rule 79(a) and is not judicial act of adjudication.).

(n33)Footnote 31. *United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232-233, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958)* .

(n34)Footnote 32. *Semtner ex rel Semtner v. Group Health Serv., Inc., 129 F.3d 1390, 1392 (10th Cir. 1997)* (failure to specify amount of damages was clerical error that could be corrected under Civil Procedure Rule 60(b) without affecting finality of judgment, and therefore circuit court had jurisdiction to hear appeal).

(n35)Footnote 33. *See 28 U.S.C. § 1291.*

(n36)Footnote 34. *See Fed. R. Civ. P. 54(b)*; *see McBeth v. Himes, 598 F.3d 708, 721 (10th Cir. 2010)* .

(n37)Footnote 35. *See Penn-Am. Ins. Co. v. Mapp, 521 F.3d 290, 294 (4th Cir. 2008)* .

(n38)Footnote 35.1. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 518 F.3d 459, 464 (7th Cir. 2008)* (even if two claims arise from same event or occurrence, they are separable for Rule 54(b) purposes if they rely on entirely different legal entitlements yielding separate recoveries, rather than different legal theories aimed at same recovery).

(n39)Footnote 36. *Jordan v. Pugh, 425 F.3d 820, 827 (10th Cir. 2005)* (citing **Moore's Federal Practice**); *Sussex Drug Products v. Kanasco, Ltd., 920 F.2d 1150, 1154 (3d Cir. 1990)* (alternative theories on same facts not separable).

(n40)Footnote 36.1. *Fed. R. Civ. P. 54(b).*

(n41)Footnote 37. *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)* .

(n42)Footnote 38. *National Metalcrafters v. McNeil, 784 F.2d 817, 821 (7th Cir. 1986)* .

(n43)Footnote 39. *Brandt v. Bassett, 69 F.3d 1539, 1547 (11th Cir. 1995)* (judgment must possess requisite finality to be certified under Rule 54(b) by disposing of at least one substantive claim).

(n44)Footnote 40. *Berrey v. Asarco Inc., 439 F.3d 636, 647 (10th Cir. 2006)* .

(n45)Footnote 41. *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* (doctrine applicable to relatively rare class of decisions that finally determine claims of right separable from and collateral to, rights asserted in action and that are too important to be denied review).

(n46)Footnote 42. *Mohawk Indus. v. Carpenter, ___ U.S. ___, ___, 130 S. Ct. 599, 175 L. Ed. 2d 458, 465-466 (2009)* ; *Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)* .

(n47)Footnote 43. *See United States Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 55 (1st Cir. 2009)* (order must provide complete resolution of issue, and not constitute order that is unfinished or inconclusive); *Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1306 (9th Cir. 1981)* (criteria of finality is satisfied when district court has said last word on subject and indicates that order was not tentative).

(n48)Footnote 44. *Baldridge v. SBC Communs., Inc., 404 F.3d 930, 931 (5th Cir. 2005)* .

(n49)Footnote 45. *Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* (order imposing sanctions on attorney for attorney's discovery abuses solely pursuant to Rule 37 was not covered by doctrine because order did not resolve important questions separate from merits).

(n50)Footnote 46. *Mohawk Indus. v. Carpenter, ___ U.S. ___, 130 S. Ct. 599, 175 L. Ed. 2d 458, 467 (2009)* .

(n51)Footnote 47. *Mohawk Indus. v. Carpenter, ___ U.S. ___, 130 S. Ct. 599, 175 L. Ed. 2d 458, 466 (2009)* .

(n52)Footnote 48. *In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1117-1118 (7th Cir. 1979)* , *cert. denied, 444 U.S. 870 (1979)* .

(n53)Footnote 49. *Arney v. Finney, 967 F.2d 418, 421 (10th Cir. 1992)* .

(n54)Footnote 50. *Devine v. Indian River County Sch. Bd., 121 F.3d 576, 579 (11th Cir. 1997)* .

(n55)Footnote 51. *American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970)* .

(n56)Footnote 52. *Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498, 109 S. Ct. 1976, 104 L. Ed. 2d 548 (1989)* .

(n57)Footnote 53. *Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 884, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)* . The courts of appeals for two circuits have also held that orders denying federal sovereign immunity are not immediately appealable, because the federal government's entitlement to federal sovereign immunity can be effectively and more efficiently reviewed on appeal of any final judgment in the action. *Alaska v. United States, 64 F.3d 1352, 1355-1357 (9th Cir. 1995)* ; *Pullman Constr. Indus. v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994)* .

(n58)Footnote 54. *Mohawk Indus. v. Carpenter, ___ U.S. ___, 130 S. Ct. 599, 175 L. Ed. 2d 458, 471 (2009)* .

(n59)Footnote 55. *Vitale v. Latrobe Area Hosp., 420 F.3d 278, 281 (3d Cir. 2005)* .

(n60)Footnote 56. *Devine v. Indian River County Sch. Bd., 121 F.3d 576, 579 n.8 (11th Cir. 1997)* .

(n61)Footnote 57. *Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945)* .

(n62)Footnote 58. *Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68, 68 S. Ct. 972, 92 L. Ed. 1212 (1948)* .

(n63)Footnote 59. *People Who Care v. Rockford Bd. of Educ. Dist. No. 205, 921 F.2d 132, 135 (7th Cir. 1991)* (interim fee award compels mid-litigation payment).

(n64)Footnote 60-61. [Reserved]

(n65)Footnote 62. *Belli v. Temkin (In re Belli), 268 B.R. 851, 857 (9th Cir. 2001)* .

(n66)Footnote 63. *See 28 U.S.C. § 1291.*

(n67)Footnote 64. *Way v. County of Ventura, 348 F.3d 808, 811 (9th Cir. 2003)* ; *see 28 U.S.C. § 1292(b).*

(n68)Footnote 65. *Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992)* (district court's order enforcing discovery request is not generally "final order" subject to appellate review).

(n69)Footnote 66. *See* [5][a], *above.*

(n70)Footnote 67. *In re Sealed Case, 141 F.3d 337, 339-340 (D.C. Cir. 1998)* ; *Bennett v. City of Boston, 54 F.3d 18, 20 (1st Cir. 1995)* .

(n71)Footnote 68. *Corporacion Insular de Seguros v. Garcia, 876 F.2d 254, 256-257 (1st Cir. 1989)* (discovery orders are not generally subject to immediate review unless they constitute final orders, collateral orders, or are appealable as injunctions).

(n72)Footnote 69. *Solarex Corp. v. Arco Solar, Inc., 870 F.2d 642, 643 (Fed. Cir. 1989)* .

(n73)Footnote 70. *Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 554 (2d Cir. 1967)* .

(n74)Footnote 71. *In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1330 (D.C. Cir. 1985)* .

(n75)Footnote 72. *In re Rafferty, 864 F.2d 151, 154 (D.C. Cir. 1988)* .

(n76)Footnote 73. *See* [5][a], *above.*

(n77)Footnote 74. *United States ex rel. St. Paul A.M.E., 541 F.2d 463, 464 (4th Cir. 1976)* .

(n78)Footnote 75. *Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 398 (2d Cir. 1995)* .

(n79)Footnote 76. *Britton v. Howard Savings Bank, 727 F.2d 315, 320-322 (3d Cir. 1984)* (denial of writ of attachment was appealable as a collateral order, since destruction of the security before final judgment would make a subsequent appeal meaningless).

(n80)Footnote 76.1. *See Fed. R. Civ. P. 23(c)(1)(A)*; *Harper v. Sheriff, 581 F.3d 511, 514 (7th Cir. 2009)* .

(n81)Footnote 77. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n82)Footnote 78. *See* [5][a], *above.*

(n83)Footnote 79. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-469, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n84)Footnote 80. *See* [5][a], *above*.

(n85)Footnote 81. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-172, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n86)Footnote 82. *In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1117-1118 (7th Cir. 1979)* , *cert. denied, 444 U.S. 870, 100 S. Ct. 146, 62 L. Ed. 2d 95 (1979)* .

(n87)Footnote 83. *Fed. R. Civ. P. 23(f)*; *see Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 200-201 (2d Cir. 2008)* .

(n88)Footnote *. For a more complete discussion, see 6 *Moore's Federal Practice,* Ch. 24, *Intervention* (Matthew Bender 3d ed.).

(n89)Footnote 84. *Brown v. New Orleans Clerks and Checkers Union Local No. 1497, 590 F.2d 161, 164 (5th Cir. 1979)* ; *Ionian Shipping Co. v. British Law Ins. Co., Ltd., 426 F.2d 186, 188 (2d Cir. 1970)* .

(n90)Footnote 85. *City of New York v. Consolidated Gas Co., 253 U.S. 219, 221, 40 S. Ct. 511, 64 L. Ed. 870 (1920)* .

(n91)Footnote 85.1. *See Davis v. Butts, 290 F.3d 1297, 1299-1300 (11th Cir. 2002)* .

(n92)Footnote 86. *Brotherhood of R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524-525, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)* .

(n93)Footnote 87. *League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997)* ; *see Fed. R. Civ. P. 24(a)*; *see also 28 U.S.C. § 1291*.

(n94)Footnote 88. *See, e.g., New York News, Inc. v. Kheel, 972 F.2d 482 (2d Cir. 1992)* ; *Shea v. Angulo, 19 F.3d 343, 345 (7th Cir. 1994)* ; *Estate of Dixon, 666 F.2d 386, 388 (9th Cir. 1982)* ; *but see Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1476 (11th Cir. 1993)* (order denying permissive intervantion is neither final nor appealable because such order does not substantially affect rights of movant).

(n95)Footnote 89. *Fed. R. App. P. 4(a)(4)(A)(i)*; *see Fed. R. Civ. P. 50(b)*.

(n96)Footnote 90. *Fed. R. App. P. 4(a)(4)(A)(ii)*; *see Fed. R. Civ. P. 52(b)*.

(n97)Footnote 91. *Fed. R. App. P. 4(a)(4)(A)(iv)*; *see Fed. R. Civ. P. 59(e)*; *see also Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007)* (grounds for granting motion to alter or amend).

(n98)Footnote 92. *Fed. R. App. P. 4(a)(4)(A)(iii)*; *Fed. R. Civ. P. 58(e)*; *see Fed. R. Civ. P. 54(d)(2)*, *59(b)*; *see also Robinson v. City of Harvey, 489 F.3d 864, 868 (7th Cir. 2007)* .

(n99)Footnote 93. *Fed. R. App. P. 4(a)(4)(A)(v)*; *see Fed. R. Civ. P. 59(a)*; *see also Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d 1116, 1122 (9th Cir. 2007)* .

(n100)Footnote 94. *Fed. R. App. P. 4(a)(4)(A)(vi)*; *see Fed. R. Civ. P. 60(a)*, *(b)*.

(n101)Footnote 95. *Fed. R. App. P. 4(a)(4)(A)*.

(n102)Footnote 96. *See Fed. R. Civ. P. 60(c)(1)*.

(n103)Footnote 96.1. *See Fed. R. App. P. 4(a)(4)(A)(vi)*.

(n104)Footnote 97. *Blossom v. Milwaukee & Chicago R.R. Co., 68 U.S. 655, 657, 17 L. Ed. 673 (1864)* (appellant may not appeal process of executing final decree).

(n105)Footnote 98. *See Friends for Am. Free Enters. Ass'n v. Wal-Mart Stores, Inc., 284 F.3d 575 (5th Cir. 2002)* (for example, district court's postjudgment order denying Rule 11 sanctions is not ministerial and is therefore properly appealable final order).

(n106)Footnote 99. *Plymouth Mutual Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co., 378 F.2d 389, 391 (3d Cir. 1967)* .

(n107)Footnote 100. *See Fed. R. App. P. 4(a)(4)(A)(vi).*

(n108)Footnote 101. *See Fed. R. Civ. P. 60(c)(2)*; *Fed. R. App. P. 4(a)(4)(A)(vi).*

(n109)Footnote 102. *SEC v. Van Waeyenberghe, 284 F.3d 812, 814 (7th Cir. 2002)* .

(n110)Footnote 103. *Stubblefield v. Windsor Capital Group, 74 F.3d 990, 993-994 (10th Cir. 1996)* .

(n111)Footnote 104. *Jones & Guerrero Co. v. Sealift Pacific, Inc., 650 F.2d 1072, 1073 (9th Cir. 1981)* .

(n112)Footnote 105. *Fuller v. Quire, 916 F.2d 358, 360 (6th Cir. 1990)* .

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.03

§ 27.03 Interlocutory Orders Appealable as of Rightn*

[1] Statutory Framework

Section 1292(a) of the Judicial Code gives the courts of appeals jurisdiction over interlocutory appeals from the following orders (even though the orders are not final):

> 1. Interlocutory orders of the district courts of the United States or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, n1 except when a direct review may be had in the Supreme Court. n2 The rule also applies to orders of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands. n3 These interlocutory orders are discussed in [2], *below*.
>
> 2. Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property. n4 These interlocutory orders are discussed in [4], *below*.
>
> 3. Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed. n5 These interlocutory orders are discussed in [5], *below*.

Under *28 U.S.C. Section 1292(c)*, the Court of Appeals for the Federal Circuit has jurisdiction over analogous interlocutory appeals in any case over which that court would have jurisdiction under Section 1295, and also over appeals from judgments in actions for patent infringement which would otherwise be final and appealable except for an accounting. n6

[2] Appealable Interlocutory Orders Involving Injunctions

[a] Order Granting Injunction

A party has a right to an immediate, interlocutory appeal from an order that expressly grants injunctive relief. n7 Furthermore, a party has an immediate right of appeal of an order which has the "practical effect" of granting an

injunction if the order also threatens serious or irreparable consequences. n8 An order has the practical effect of an injunction for purposes of appeal if the order is directed to one or more of the parties, is coercive and equitable in nature, is enforceable by contempt, and grants at least some of the relief that is sought in the litigation. n9 Note, however, that when an order merely has the effect of an injunction, it is appealable only if it threatens serious or irreparable harm to the enjoined party. n10 On the other hand, if the district court's order expressly grants an injunction, the order is appealable without regard to whether the appellant is able to demonstrate serious or irreparable consequences. n11

As stated above, to have the practical effect of an injunction, an order must meet all three of the following requirements:

1. The order must be directed to one or more of the parties. n12 Thus, an order directing a nonparty to perform an act is not appealable. n13

2. The order must be coercive and equitable in nature, and enforceable by contempt. n14 Therefore, a ruling on a motion for summary judgment that does not award any coercive relief is not appealable. n15 However, an order that immediately prescribes or prohibits certain actions is appealable, even if the order is subject to later modification. n16 On the other hand, an injunction that is not enforceable by its terms is not appealable. n17

3. The order must grant substantive relief. Thus, an order to produce a witness for a deposition is not appealable, because no substantive rights are involved. n18

[b] Order Changing or Extending Injunction

Generally if a new order affects the application of an injunction already in existence, the new order is immediately appealable under Judicial Code Section 1292(a)(1). n18.1 Thus, the following orders are appealable: n19

1. An order modifying an injunction. A district court's order modifying an existing injunction is immediately appealable. n20 Additionally, an order refusing to modify an injunction is immediately appealable, provided that there has been a showing of changed circumstances between the time of entry of the injunction and the filing of the motion. n21 On the other hand, an order that merely interprets an existing injunction is not immediately appealable. n22 For example, an interpretation that the appointment of a master is required to monitor compliance with a previously issued injunction does not necessarily constitute an immediately appealable modification. n23 In distinguishing between a modification and an interpretation, the focus of the inquiry is whether the provisions of the district court's subsequent order are implicit in the terms of the original injunction. n24 Another order that is not considered an immediately appealable modification is an order that does not modify an injunction but merely changes the legal basis or rationale of an injunction. This may occur, for example, when the subsequent order only narrows the grounds on which the injunction is based. n25

2. An order extending an injunction. An interlocutory appeal may be taken from a district court's order that continues an injunction previously entered. An order continues an injunction within the meaning of this provision only if it actually extends the duration of the time imposed by the original injunction. n26 The denial of a motion to dissolve an injunction is similarly appealable if the effect is to extend an injunction. n27 Furthermore, a postponement of a ruling on a request to dissolve an injunction may be deemed an appealable order extending the injunction if the district court states that the injunction will continue in effect regardless of the outcome of the issue. n28 On the other hand, a postponement is not an appealable order when it is made to allow discovery necessary for the court to rule. n29

3. An order that dissolves an existing injunction. An interlocutory appeal may be taken from an order of

dissolution of an injunction. n30 The question of whether an order constitutes the dissolution of an injunction is determined by its substantive effect rather than its form. n31 An order directing that an injunction be dissolved if certain conditions are not satisfied is appealable because it expressly provides for termination of the injunction. n32

[c] Order Denying Injunction

An interlocutory district court order that expressly denies a motion for a preliminary or permanent injunction is an appealable interlocutory order. n33 Furthermore, an interlocutory order that has the practical effect of denying an injunction is also appealable. n33.1 Determining whether the relief denied would be injunctive in nature involves the same criteria as those used to determine whether an order has the effect of granting an injunction. n34 Also, in the same way as for an order granting an injunction, an order having the practical effect of denying an injunction is not appealable unless serious or irreparable consequences may result n34.1 and unless the order could not be reviewed effectively on appeal from the final judgment. n35 On the other hand, the express denial of a motion for an injunction is appealable, even without a showing of irreparable harm to the appellant. n36

[3] Orders Related to Injunctions That are Not Appealable

[a] Temporary Restraining Order Is Not Appealable

An order which grants or denies a temporary restraining order is not appealable. n37 The rationale for this rule is that a motion for a temporary restraining order is often heard ex parte; the order is of short duration; a hearing on a motion for a preliminary injunction usually follows within a brief period of time; and the TRO is likely to become moot before the appeal can be heard. n38 However, because appealability is always a matter of substance rather than form, a temporary restraining order that effectively grants an injunction is appealable under Section 1292(a)(1). n39 If a temporary restraining order remains in effect beyond the time limits set forth in Rule 65(b), n40 the duration is a significant factor in determining whether to treat the order as an appealable injunction. n41 However, it is not the only relevant consideration. A restraining order that has serious or irreparable consequences may be appealable even if relatively short in duration. n42

[b] Orders of Case Management Not Appealable

The court has inherent power to control the progress of a civil action, and may make many types of administrative orders requiring a party or parties to perform certain acts or not take certain acts that are not related to the merits of a claim. Even though some of these "case management orders" are enforceable by contempt, n43 they are generally not appealable: n43.1

1. Orders regarding discovery. Even though a discovery order may compel a party to perform certain actions, and usually is enforceable by contempt, n44 such an order is not appealable because it is not injunctive in nature in that it does not grant or withhold substantive relief. n45 For the same reasons, a protective discovery order is not appealable. n46

2. Order granting or denying a stay. Generally, a stay of proceedings in an action does not involve a determination of a substantive issue and, therefore, is not appealable as an injunction. n47 However, there is a situation in which a stay is appealable. Under the abstention doctrine, the stay of a federal suit (pending resolution of state-court case) is appealable if it effectively acts like a dismissal, because it puts the plaintiff out of federal court by forcing the plaintiff to rely on the state-court judgment. n48 The denial of a stay is generally viewed as an order regarding the internal progress of litigation and, therefore, is not appealable as the denial of an injunction. n49

3. An order determining the sequence in which issues are to be tried is not appealable as an injunction because it does not grant or deny any substantive relief. This is true even if the district court's decision to try an equitable defense in

advance of a jury trial of the plaintiff's legal claims has the effect of an injunction barring prosecution of the legal claim pending resolution of the defense. n50

4. Orders regarding transfer. Thus, an order transferring an action to another district is not appealable. n51 The denial of a motion for transfer is also not an appealable injunction. n52

5. Orders regarding removal. Thus, a refusal to remand a removed action is not appealable as an injunction. n53 An order of remand, even if it could be characterized as an injunction because it deprives the plaintiff of a federal forum, is also not appealable, under the provisions of Judicial Code Section 1447(d). n54

6. An injunction enjoining prosecution of a civil action in another court. There is a split of authority whether an injunction precluding a party from prosecuting a co-pending civil action in another court is immediately appealable. Some circuits hold that such an injunction is appealable as any other injunction. Other circuits hold that the injunction is not appealable because it is a case management order, equivalent to a venue determination. n54.1

[4] Interlocutory Orders Involving Receiver

The circuit courts have jurisdiction to hear an appeal from several types of orders related to the use of a receiver. n55 This statutory exception is entirely separate from the exception regarding injunctions, n56 and applies to the appointment of equity receivers or their equivalent, rather than someone appointed to act as a bankruptcy trustee. n57 Under this provision, the circuit court has jurisdiction to hear an appeal from the following types of orders: n57.1

1. Appointing a receiver. An appeal may be taken from an interlocutory order appointing a receiver even if the district court has not yet named a particular individual. The right to appeal is based on the order appointing a receiver, not from the appointment of any one individual. n58 While an order appointing a receiver is appealable, as is an order modifying the powers of a receiver who has already been appointed, n59 an order refusing to appoint a receiver is not appealable. In addition, a motion to vacate the appointment of a receiver is also not appealable, because an order vacating the appointment of a receiver has the same effect as an order refusing to appoint one. n60

2. Refusing to wind up a receivership. n61 As with the provision granting authority to hear an appeal from an order appointing a receiver, the reverse is not true: an order winding up a receivership is not appealable. n62

3. Refusing to take steps to accomplish the purposes of the receivership, such as directing the sale or other disposition of property. As with the provision granting authority to hear an appeal from an order appointing a receiver, the opposite is not true: an order taking steps to accomplish the purposes of a receivership is not appealable. Thus, the many types of administrative orders that a district may make in the course of overseeing a receivership are not appealable. n63

As with other appeals of interlocutory orders, a party is not obligated to seek immediate review of a district court order under Judicial Code Section 1292(a)(2). If no appeal is taken, a challenge to the order is not foreclosed but is subject to review on appeal from the final judgment. n64 If an appeal of an interlocutory order is taken, however, the circuit court will disturb the district court's decision only if the court abused its discretion. n65

[5] Interlocutory Orders Regarding Admiralty

[a] Interlocutory Admiralty Order Appealable

The courts of appeal have jurisdiction to hear appeals from interlocutory decrees which determine the rights and liabilities of the parties to any admiralty cases in which an appeal from a final decree is allowed. n66 The reference to "admiralty cases" in Judicial Code Section 1292(a)(3) means admiralty and maritime claims as defined by *Federal Rule of Civil Procedure 9(h)*. n67 Consequently, interlocutory appeals are allowed in cases that include a claim: n68 (1)

which is cognizable in admiralty or maritime jurisdiction; or (2) that has been specifically designated by the pleader as an admiralty or maritime claim, even if the claim is within the court's subject matter jurisdiction on some ground other than admiralty or maritime, such as diversity of citizenship. n68.1

[b] Admiralty Order Must Determine Rights and Liabilities

The common practice in admiralty cases is to try the issue of liability first, and if liability is found, to then determine damages. The statutory provision for interlocutory appeals permits an appeal from a decree fixing liability before a determination of damages is made. n69 Therefore, as a prerequisite for bringing an interlocutory appeal the district court order must determine the rights and liabilities of the parties to the action. n70 Any interlocutory order determining the merits of a claim or defense in the action may be appealed. For example, an interlocutory order approving a settlement is immediately appealable because the settlement agreement imposes liability on a party, n71 and an order directing or confirming the judicial sale of a vessel is immediately appealable because it terminates the defendant's rights of title and possession. n72 Furthermore, while an appealable order must conclusively determine the merits of a claim or defense, the order need not dispose of all of the claims involved in the action or proceeding. A determination on the merits of a separate claim is appealable even if the order leaves other claims between the same parties pending. n73

[c] Order of Admiralty Case Management Not Appealable

An order that merely disposes of theories of liability without determining the issue of liability is not appealable under Judicial Code Section 1292(a)(3). n74 Therefore, any procedural order that does not finally determine the substantive rights and liabilities of the parties to an action is not appealable under Section 1292(a)(3) even though it may have important dispositive consequences in the proceedings. n75 Thus, for example, no immediate appeal under Section 1292(a)(3) lies from:

1. An order refusing to dismiss an insurance carrier from a suit arising out of a collision, when the order does not determine the carrier's liability. n76

2. An order regarding the amount of security that must be filed in the case. n77

3. An order transferring an action to another district. n78

4. A pretrial order construing the Carriage of Goods by Sea Act as limiting damages. n79

As is the case with interlocutory appeals generally, Section 1292(a)(3) does not require that a party appeal from an interlocutory district-court order. A party may decline to seek an interlocutory appeal under Section 1292(a)(3) and later challenge the district court's order on appeal from the final judgment. n80

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 19 *Moore's Federal Practice,* § 203.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1292(a)(1).*

(n3)Footnote 2. *See* Ch. 29, *Appeal to Supreme Court.*

(n4)Footnote 3. *28 U.S.C. § 1292(a)(1).*

(n5)Footnote 4. *28 U.S.C. § 1292(a)(2).*

(n6)Footnote 5. *28 U.S.C. § 1292(a)(3).*

(n7)Footnote 6. *28 U.S.C. § 1292(c).* In addition, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court. *28 U.S.C. § 1292(d)(4)(A).*

(n8)Footnote 7. *28 U.S.C. § 1292(a).*

(n9)Footnote 8. *McLaughlin v. Miss. Power Co., 376 F.3d 344, 352 (5th Cir. 2004).*

(n10)Footnote 9. *HBE Leasing Co. v. Frank, 48 F.3d 623, 632 (2d Cir. 1995) .*

(n11)Footnote 10. *Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)* (order has injunctive effect only if threat of serious harm is shown); *Korea Shipping Corp. v. New York Shipping Ass'n, 811 F.2d 124, 126 (2d Cir. 1987)* (even if order had injunctive effect, it was not appealable because no threat of irreparable consequences was shown to exist).

(n12)Footnote 11. *MAI Basic Four, Inc. v. Basis, Inc., 962 F.2d 978, 981 (10th Cir. 1992) .*

(n13)Footnote 12. *HBE Leasing Co. v. Frank, 48 F.3d 623, 632 (2d Cir. 1995) .*

(n14)Footnote 13. *Santana Prods., Inc. v. Compression Polymers, Inc., 8 F.3d 152, 154 (3d Cir. 1993) , cert. denied, 510 U.S. 1196 (1994) .*

(n15)Footnote 14. *Etuk v. Slattery, 936 F.2d 1433, 1440 (2d Cir. 1991) .*

(n16)Footnote 15. *United States v. Pan American Management Co., 789 F.2d 632, 636 (8th Cir. 1986) .*

(n17)Footnote 16. *Dunn v. New York State Dep't of Labor, 47 F.3d 485, 488 (2d Cir. 1995)* (order requiring defendant to submit more extensive reports concerning its compliance with previous injunction was itself appealable as injunction because it imposed significant additional burden).

(n18)Footnote 17. *Zucker v. Maxicare Health Plans Inc., 14 F.3d 477, 483 (9th Cir. 1994) .*

(n19)Footnote 18. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 32 F.3d 1175, 1178 (7th Cir. 1994) .*

(n20)Footnote 18.1. *See McLaughlin v. Miss. Power Co., 376 F.3d 344, 352-353 (5th Cir. 2004).*

(n21)Footnote 19. *See 28 U.S.C. § 1292(a)(1).*

(n22)Footnote 20. *Lorain NAACP v. Lorain Board of Educ., 979 F.2d 1141, 1147-1148 (6th Cir.) , cert. denied, 509 U.S. 905 (1993)* (modification of desegregation consent decree to increase financial obligation of state education department for magnet schools program was injunctive).

(n23)Footnote 21. *Favia v. Indiana Univ. of Pa., 7 F.3d 332, 338-339 (3d Cir. 1993) .*

(n24)Footnote 22. *In re Ingram Towing Co., 59 F.3d 513, 516 (5th Cir. 1995) .*

(n25)Footnote 23. *Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir. 1987)* .

(n26)Footnote 24. *Wilder v. Bernstein, 49 F.3d 69, 72 (2d Cir. 1995)* .

(n27)Footnote 25. *Sierra Club v. Marsh, 907 F.2d 210, 213 (1st Cir. 1990)* (original order enjoined construction until defendants had complied with several environmental statutes; subsequent order narrowed injunction to require only compliance with environmental impact statement, if statement required).

(n28)Footnote 26. *Sierra Club v. Marsh, 907 F.2d 210, 213 (1st Cir. 1990)* .

(n29)Footnote 27. *Hudson v. Barr, 3 F.3d 970, 973 (6th Cir. 1993)* (denial of motion to dissolve temporary restraining order that in effect was injunction).

(n30)Footnote 28. *United States v. Board of Sch. Comm'rs, 128 F.3d 507, 509-510 (7th Cir. 1997)* .

(n31)Footnote 29. *United States v. Michigan, 134 F.3d 745, 748-749 (6th Cir. 1998)* .

(n32)Footnote 30. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc., 312 F.3d 1349, 1358 (11th Cir. 2004)* (even if there has been no "final judgment" in district court case, order that dissolved injunction order is immediately appealable under Section 1292(a)(1)); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 905 (9th Cir. 1995)* .

(n33)Footnote 31. *National Union Fire Ins. Co. v. Sahlen, 999 F.2d 1532, 1535 (11th Cir. 1993)* .

(n34)Footnote 32. *Continuum Co. v. Incepts, Inc., 883 F.2d 333, 334-335 (5th Cir. 1989)* (order that injunction would be dissolved if plaintiff did not increase amount of injunction bond).

(n35)Footnote 33. *Shee Atika v. Sealaska Corp., 39 F.3d 247, 248-249 (9th Cir. 1994)* .

(n36)Footnote 33.1. *McLaughlin v. Miss. Power Co., 376 F.3d 344, 352 (5th Cir. 2004)* .

(n37)Footnote 34. *Sherri A.D. v. Kirby, 975 F.2d 193, 203-204 (5th Cir. 1992)* ; *see* [a], *above*.

(n38)Footnote 34.1. *McLaughlin v. Miss. Power Co., 376 F.3d 344, 352 (5th Cir. 2004)* (order that explicitly denies injunctive relief is immediately appealable as of right, even without a finding of a threat of immediate or irreparable injury; however, order that has practical effect of denying injunction is immediately appealable only if it also threatens serious or irreparable consequences).

(n39)Footnote 35. *United States v. City of Hialeah, 140 F.3d 968, 973-974 (11th Cir. 1998)* ; *see* [a], *above*.

(n40)Footnote 36. *Cable Holdings, Inc. v. Cooke, 764 F.2d 1466, 1471-1472 (11th Cir. 1985)* .

(n41)Footnote 37. *In re Lorillard Tobacco Co., 370 F.3d 982, 985-986 (9th Cir. 2004)* ; *Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Assocs., 964 F.2d 599, 600 (7th Cir. 1992)* .

(n42)Footnote 38. *Board of Governors v. DLG Financial Corp., 29 F.3d 993, 1000 (5th Cir 1994)* , *cert. denied, 513 U.S. 1140 (1995)* .

(n43)Footnote 39. *Nordin v. Nutri/System, Inc., 897 F.2d 339, 342 (8th Cir. 1990)* (TRO of indefinite duration was in effect injunction).

(n44)Footnote 40. *Fed. R. Civ. P. 65(b)(2)* (providing for duration of 14 days, plus discretionary 14 day extension for good cause).

(n45)Footnote 41. *See, e.g., United States v. Crawford (In re Crim. Contempt Proceedings Against Crawford), 329 F.3d 131, 136-138 (2d Cir. 2003)* (if district court extends temporary restraining order beyond period specified by *Fed. R. Civ. P. 65(b)(2)*, temporary restraining order becomes preliminary injunction, including for purposes of appealability).

(n46)Footnote 42. *Romer v. Green Point Savings Bank, 27 F.3d 12, 15 (2d Cir. 1994)* .

(n47)Footnote 43. *Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir. 1999)* .

(n48)Footnote 43.1. *Torres v. Puerto Rico, 485 F.3d 5, 9 (1st Cir. 2007)* .

(n49)Footnote 44. *See Fed. R. Civ. P. 37(b)(2)(D).*

(n50)Footnote 45. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 32 F.3d 1175, 1177 (7th Cir. 1994)* .

(n51)Footnote 46. *Nosik v. Singe, 40 F.3d 592, 596 (2d Cir. 1994)* .

(n52)Footnote 47. *In re TWA, 18 F.3d 208, 213-214 (3d Cir. 1994)* .

(n53)Footnote 48. *Michelson v. Citicorp Nat'l Servs., Inc., 138 F.3d 508, 512-517 (3d Cir. 1998)* ; *see Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 11-13, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1982)* .

(n54)Footnote 49. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 277-278, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n55)Footnote 50. *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 287, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n56)Footnote 51. *Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir. 1999)* .

(n57)Footnote 52. *Hershey Foods Corp. v. Hershey Creamery Co., 945 F.2d 1272, 1278 (3d Cir. 1991)* .

(n58)Footnote 53. *Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 880 (1st Cir. 1983)* .

(n59)Footnote 54. *28 U.S.C. § 1447(d).*

(n60)Footnote 54.1. *Lab. Corp. of Am. Holdings v. Chiron Corp., 384 F.3d 1326, 1329 (Fed. Cir. 2004)* (citing **Moore's Federal Practice**); *see* [2][a], *above*.

(n61)Footnote 55. *28 U.S.C. § 1292(a)(2).*

(n62)Footnote 56. *Dunn v. Savage (In re Saffady), 524 F.3d 799, 804 (6th Cir. 2008)* (citing **Moore's Federal Practice**; even though order regarding receiver may implement stay affecting receivership assets, that order is not appealable injunction under 1292(a)(1); rather, provisions of 1292(a)(2) apply).

(n63)Footnote 57. *See In re Klein, 940 F.2d 1075, 1077 n.2 (7th Cir. 1991)* .

(n64)Footnote 57.1. *28 U.S.C. § 1292(a)(2); Ibeto Petrochemical Indus. v. M/T Beffen, 475 F.3d 56, 61-62 (2d Cir. 2007)* (one of narrowly-drawn exceptions to finality requirement that allows appeal to be taken from interlocutory order).

(n65)Footnote 58. *Sriram v. Preferred Income Fund III, L.P., 22 F.3d 498, 501 (2d Cir. 1994)* .

(n66)Footnote 59. *IIT v. Vencap, Ltd., 519 F.2d 1001, 1020 (2d Cir. 1975)* .

(n67)Footnote 60. *Hartigan v. Peters, 861 F.2d 164, 165-166 (7th Cir. 1988)* .

(n68)Footnote 61. *SEC v. Lincoln Thrift Ass'n., 577 F.2d 600, 602 (9th Cir. 1978)* (order refusing to wind up receivership appealed).

(n69)Footnote 62. *Dunn v. Savage (In re Saffady), 524 F.3d 799, 804 (6th Cir. 2008)* (citing **Moore's Federal Practice**; order vacating receivership not immediately appealable); *SEC v. American Principals Holdings, Inc., 817 F.2d 1349, 1351 (9th Cir. 1987)* (order dissolving receivership not immediately appealable).

(n70)Footnote 63. *IIT v. Vencap, Ltd., 519 F.2d 1001, 1020 (2d Cir. 1975)* .

(n71)Footnote 64. *Retired Chicago Police Ass'n, 7 F.3d 584, 608 & n.29 (7th Cir. 1993)* .

(n72)Footnote 65. *SEC v. American Bd. of Trade, 830 F.2d 431, 436 (2d Cir. 1987)* , *cert. denied sub nom. Economou v. SEC, 485 U.S. 938 (1988)* .

(n73)Footnote 66. *28 U.S.C. § 1292(a)(3).*

(n74)Footnote 67. *Doyle v. Huntress, Inc., 419 F.3d 3, 7 (1st Cir. 2005)* .

(n75)Footnote 68. *Fed. R. Civ. P. 9(h)(3).*

(n76)Footnote 68.1. *Fed. R. Civ. P. 9(h)(1)*; *see Marmac, LLC v. Reed (In re Marmac, LLC), 232 F.R.D. 409, 413 (M.D. Fla. 2005)* (election by pleader to designate claim as admiralty).

(n77)Footnote 69. *Noble Drilling, Inc. v. Davis, 64 F.3d 191, 194 (5th Cir. 1995)* .

(n78)Footnote 70. *Kingstate Oil v. M/V Green Star, 815 F.2d 918, 921 (3d Cir. 1987)* .

(n79)Footnote 71. *Noble Drilling, Inc. v. Davis, 64 F.3d 191, 195 (5th Cir. 1995)* .

(n80)Footnote 72. *Isbrandtsen Marine Servs. v. M/V Inagua Tania, 68 F.3d 1315, 1316 (11th Cir. 1993)* .

(n81)Footnote 73. *Martha's Vineyard Scuba Club Headquarters, Inc. v. Unidentified Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1063-1064 (1st Cir. 1987)* .

(n82)Footnote 74. *Bergeron v. Koninklijke Luchtvaart Maatschappij, N. V., 299 F.2d 78, 79 (2d Cir. 1962)* .

(n83)Footnote 75. *Francis v. Forest Oil Corp., 798 F.2d 147, 150 (5th Cir. 1986)* .

(n84)Footnote 76. *Hollywood Marine v. M/V Artie Jones, 755 F.2d 414, 415-416 (5th Cir. 1985)* .

(n85)Footnote 77. *Bancroft Navigation Co. v. Chadade S.S. Co., 349 F.2d 527, 529-530 (2d Cir. 1965)* .

(n86)Footnote 78. *Arrowhead Co. v. The Aimee Lykes, 193 F.2d 83, 84 (2d Cir. 1951)* .

(n87)Footnote 79. *Bucher-Guyer Ag v. The M/V Incotrans Spirit, 868 F.2d 734, 735 (5th Cir. 1989)* .

(n88)Footnote 80. *Farbwerke Hoeschst A. G. v. M/V "Don Nicky", 589 F.2d 795, 797 (5th Cir. 1979)* .

Moore's Manual--Federal Practice and Procedure

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.04

§ 27.04 Interlocutory Orders Appealable by Permissionn*

[1] Availability of Discretionary Interlocutory Appeal

If an interlocutory order is not otherwise appealable as of right under Judicial Code Section 1292(a), n1 a party may nevertheless immediately appeal the order provided that n2 (1) the district judge who entered the order issues a written statement n3 that the order involves a controlling question of law n4 as to which there is substantial ground for a difference of opinion, n5 and that an immediate appeal from the order may materially advance the ultimate termination of the litigation n6 and (2) the circuit court permits the appeal to be taken. n7

The statutory provision for discretionary appeal of an interlocutory order applies only to a civil case in which the order is not otherwise appealable as of right under Section 1292(a). This would include, for example, an interlocutory order in an admiralty case that is not appealable under Section 1292(a)(3). n8

[2] Statutory Criteria for Discretionary Appeal

[a] Certification by District Court

A litigant must obtain a certification from the district court before the litigant may file a petition in the appellate court for permission to appeal an interlocutory order. The district judge must certify: n9 (1) that the order involves a controlling question of law, (2) that there is substantial ground for a difference of opinion regarding the question of law, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. All three of the requirements must be fulfilled for permissive interlocutory appeal to be granted. n10

[b] Controlling Question of Law

A discretionary interlocutory appeal must pertain to a "controlling question of law." If resolution of the question being challenged on appeal will terminate the action in the district court, it is clearly controlling. However, the phrase does not mean that resolution of the question has to resolve the action entirely. Controlling questions of law include the question of whether a claim exists as a matter of law, n11 the question of whether a particular defense is available to defeat the claim, n12 and a question concerning subject matter jurisdiction n13 proper venue, n14 or standing to maintain the action n15 and whether an action should be certified as a class action. n16

[c] Appeal Involves Substantial Difference of Opinion

Even if an action presents a controlling question of law whose resolution will dispose of the litigation in the district court or materially advance its termination, the question must be one "as to which there is substantial ground for difference of opinion." n17 If the law is clear and there is no question that the district court's order is correct as a matter of law, there is no purpose in appealing the ruling. n18 For example, if there can be no plausible difference of opinion about whether a party is entitled to a jury trial, no discretionary appeal may be taken on the grounds that a party was denied the right to a jury trial. n19

[d] Appeal Required to Advance Disposition of Litigation

A question of law need not completely dispose of litigation in order to be "controlling." However, because all three elements must be present for a discretionary interlocutory appeal, courts require a "controlling" question that has the potential to substantially advance the disposition of the litigation. In other words, a court will require that the appeal present a controlling question of law on an issue whose determination may materially advance the ultimate termination of the case. n20 However, the appeal must present a clear-cut question of law against a background of established facts. An interlocutory review is not appropriate when the facts must be more fully developed so that the appellate court can make a precise decision on a precise record, and not an abstract answer to an abstract question. n21 Thus, whether an order would materially advance the disposition of the litigation depends on whether it would resolve an issue that is necessary to reach an ultimate result on the elements of a claim. n22 Based on all of the requirments of 1292(b), an interlocutory appeal is not authorized merely because an appeal might or possibly could advance the proceedings in the district court. n22.1 Therefore, matters such as pretrial rulings on the admissibility of evidence and matters entrusted to the district court's discretion are not ordinarily certifiable, even though they technically advance the proceedings. n23

[3] Request for Certification to District Court

A party may file a discretionary interlocutory appeal of a district court order only if the district judge provides a written opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. n24 The district court has discretion whether to grant or deny the certification for appeal n25 and may certify on its own initiative. n26 However, the court is not required on its own to take action when an appeal is certifiable, so an adversely affected party should make the request for certification when necessary. n27

The required certification for a discretionary interlocutory appeal should be in writing and it should be included in the order. n28 Although there is no required form of certification, the district court should state the grounds for certification. n29

[4] Petition to Circuit Court for Permission to Appeal

[a] Time Limit for Filing Petition

Provided that the district court has certified its order as appropriate for an immediate discretionary interlocutory appeal, n30 the petitioner must then file a petition in the circuit court for permission to appeal. n31 The district court's certification does not itself make the order appealable; the certification only permits a party to request permission from the circuit court to appeal the district court's order. n31.1 The circuit court has discretion to grant or deny permission to appeal. n32 A petition to the circuit court for permission to appeal must be filed with the circuit clerk within 10 days after entry of the challenged order that contains the district court's certification. n33 This 10-day time limit is jurisdictional, and the circuit court may not waive a party's failure to comply. A notice of appeal does not qualify as a petition for permission to appeal which must be filed within the 10-day period. n33.1 The petitioner must also file proof of service on all other parties to the action. n34 Merely filing a notice of appeal in the district court is not sufficient. n35

[b] Contents of Petition

Even after obtaining certification, the petitioner has the burden of persuading the appellate court that exceptional circumstances justified departure from the basic policy of postponing appellate review until after entry of the final judgment n36 and must present the circuit court with a statement of the facts necessary to understand the controlling question of law, a statement of the question itself, a statement showing why a substantial basis exists for a difference of opinion on the question, and why an immediate appeal will materially advance the termination of the litigation. n37 The petition must also include, or attach as an exhibit, a copy of the order from which the appeal is sought and of any findings of fact, conclusions of law, and opinions relating to the order. n37.1 An adverse party may file an answer in opposition to the petition within seven days of its service. The entire proceeding in the circuit court is submitted on the papers without oral argument unless otherwise ordered. n38 For a complete discussion of the requirements of the petition, see Ch. 28, *Appeal to Court of Appeals*.

[5] Review by Circuit Court

When a party takes an interlocutory appeal, the circuit court must review the order specified in the appeal certification. However, the scope of review by the circuit court is broader than the specific issues the district court has designated for appellate review. The appellate court may address any issue fairly included within the certified order because it is the order that is appealable and not the controlling question identified by the district court. n39 In other words, the circuit court must consider all the legal issues necessary to dispose of the certified order, including other orders and questions that underlie and that are inextricably involved with the certified order. n40 Thus, the circuit court may even review a matter that the district court expressly declined to certify for appeal, if it is material to the order that has been certified by the district court. n41 However, the circuit court may not reach beyond the certified order to address other orders made in the case. n42 If the party opposing the appeal wants to assert issues that increase the opposition's own rights or lessen the rights of the appealing party as stated in the order appealed from, the opposing party must cross appeal or the assertions are not preserved for appeal. n43

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionCertified QuestionsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 19 *Moore's Federal Practice,* § 203.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 27.03*; 28 U.S.C. § 1292(a).

(n3)Footnote 2. *28 U.S.C. § 1292(b)*; *see Belt v. Emcare, Inc., 444 F.3d 403, 406-407 (5th Cir. 2006)* .

(n4)Footnote 3. *See* [2][a], *below*.

(n5)Footnote 4. *See* [2][b], *below*.

(n6)Footnote 5. *See* [2][c], *below*.

(n7)Footnote 6. *See* [2][d], *below*.

(n8)Footnote 7. *See* [4], *below*.

(n9)Footnote 8. *Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1483 (5th Cir. 1992)* (appeal pursuant

to *28 U.S.C. § 1292(b)* will lie for question of whether cause of action is one in admiralty under exclusive federal jurisdiction).

(n10)Footnote 9. *28 U.S.C. § 1292(b).*

(n11)Footnote 10. *Krangel v. General Dynamics Corp., 968 F.2d 914, 915-916 (9th Cir. 1992)* ; *see Caterpillar, Inc. v. Lewis, 519 U.S. 61, 74 n. 10, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)* .

(n12)Footnote 11. *Caterpillar, Inc. v. Great American Ins. Co., 62 F.3d 955, 959 (7th Cir. 1995)* (denial of summary judgment reviewed); *Chan v. City of New York, 1 F.3d 96, 101 (2d Cir. 1993)* (motion to dismiss reviewed in civil rights case).

(n13)Footnote 12. *South v. Saab Cars U.S.A., Inc., 28 F.3d 9, 11 (2d Cir. 1994)* (statute of limitation defense reviewed).

(n14)Footnote 13. *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 768 (9th Cir. 1992)* .

(n15)Footnote 14. *Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d Cir. 1995)* .

(n16)Footnote 15. *Harris v. Evans, 20 F.3d 1118, 1120 (11th Cir. 1994)* .

(n17)Footnote 16. *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 (11th Cir. 1987)* , *cert. denied sub nom. Robinson Humphrey/American Express, Inc. v. Sanders, 485 U.S. 959 (1988)* (denial of class certification reviewed).

(n18)Footnote 17. *28 U.S.C. § 1292(b).*

(n19)Footnote 18. *Burrell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 789 (11th Cir. 1992)* , *cert. denied, 507 U.S. 1018 (1993)* .

(n20)Footnote 19. *Howard v. Parisian, Inc., 807 F.2d 1560, 1567 (11th Cir. 1987)* .

(n21)Footnote 20. *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)* , *aff'd without opinion, 459 U.S.1190 (1983)* .

(n22)Footnote 21. *Paschall v. Kansas City Star Co., 605 F.2d 403, 407 (8th Cir. 1979)* .

(n23)Footnote 22. *In re Prempro Prods. Liab. Litig., 230 F.R.D. 555, 570-571 (E.D. Ark. 2005)* .

(n24)Footnote 22.1. *Chappell & Co. v. Frankel, 367 F.2d 197, 200 & n.4 (2d Cir. 1966)* .

(n25)Footnote 23. *Coursen v. A.H. Robins Co., 764 F.2d 1329, 1342 (9th Cir. 1985)* .

(n26)Footnote 24. *28 U.S.C. § 1292(b).*

(n27)Footnote 25. *United States v. Moats, 961 F.2d 1198, 1201 (5th Cir. 1992)*

(n28)Footnote 26. *Sissoko v. Rocha, 440 F.3d 1145, 1153 (9th Cir. 2006)* .

(n29)Footnote 27. *Executive Software N. Am., Inc. v. United States, 24 F.3d 1545, 1550 (9th Cir. 1994)* .

(n30)Footnote 28. *28 U.S.C. § 1292(b)*; *Fed. R. App. P. 5*; *In re Hamilton, 122 F.3d 13, 14 (7th Cir. 1997)* .

(n31)Footnote 29. *In re Hamilton, 122 F.3d 13, 14 (7th Cir. 1997)* (helpful to appellate court if district court

explains why it believes case satisfies statutory criteria).

(n32)Footnote 30. *See* [3], *above*.

(n33)Footnote 31. *28 U.S.C. § 1292(b)*; *Fed. R. App. P. 5(a)*.

(n34)Footnote 31.1. *Rodriguez v. P.R. Fed. Affairs Admin., 435 F.3d 378, 381 (D.C. Cir. 2005)* .

(n35)Footnote 32. *Fed. R. App. P. 5(b)*; *see Plata v. Davis, 329 F.3d 1101, 1107 (9th Cir. 2003)* ; *Manshack v. Southwestern Elec. Power Co., 915 F.2d 172, 173 (5th Cir. 1990)* .

(n36)Footnote 33. *28 U.S.C. § 1292(b)*; *Fed. R. App. P. 5(a)*.

(n37)Footnote 33.1. *Fed. R. App. P. 5(b)*; *see Plata v. Davis, 329 F.3d 1101, 1107 (9th Cir. 2003)* .

(n38)Footnote 34. *Fed. R. App. P. 5(a)*.

(n39)Footnote 35. *Inmates of the Allegheny County Jail v. Wecht, 873 F.2d 55, 57 (3d Cir. 1989)* .

(n40)Footnote 36. *In re Prudential Lines, Inc., 59 F.3d 327, 332 (2d Cir. 1995)* .

(n41)Footnote 37. *Fed. R. App. P. 5(b)*; *see In re Hamilton, 122 F.3d 13, 14 (7th Cir. 1997)* .

(n42)Footnote 37.1. *Fed. R. App. P. 5(b)*; *see Plata v. Davis, 329 F.3d 1101, 1107 (9th Cir. 2003)* .

(n43)Footnote 38. *Fed. R. App. P. 5(b)*.

(n44)Footnote 39. *Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004)* (citing **Moore's Federal Practice**).

(n45)Footnote 40. *Kroger Co. v. Malease Foods Corp., 437 F.3d 506, 510 (6th Cir. 2006)* (citing **Moore's Federal Practice**); *Steering Comm. v. United States, 6 F.3d 572, 575-576 (9th Cir. 1993)* .

(n46)Footnote 41. *Schlumberger Techs., Inc. v. Wiley, 113 F.3d 1553, 1557 n.6 (11th Cir. 1997)* .

(n47)Footnote 42. *Steering Comm. v. United States, 6 F.3d 572, 576 (9th Cir. 1993)* .

(n48)Footnote 43. *Sikes v. Teleline, Inc., 281 F.3d 1350, 1367 (11th Cir. 2002)* .

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.05

§ 27.05 General Considerations When Taking Interlocutory Appeals

[1] Appellate and Trial Court Jurisdiction Related to Interlocutory Appeals

The filing of a timely and sufficient notice of appeal transfers jurisdiction over matters involved in the appeal from the district court to the court of appeals, and the district court may not take any action with regard to the matter properly appealed except to aid the appeal. n1 However, while an interlocutory appeal is in process, the district court retains its jurisdiction to proceed with the case on matters not involved in the appeal. n2

[2] No Obligation to Take Interlocutory Appeal

Section 1292 gives a litigant either the right or the option to request an immediate appeal from the orders described in the statute. n3 The litigant need not exercise the right to an interlocutory appeal, however, and in general the party is under no obligation to take an interlocutory appeal. n4 If no interlocutory appeal is taken from the district court's order on an injunction, for example, the decision may be reviewed on appeal from the final judgment, n5 or on appeal from a later order regarding the injunction. n6

[3] No Supplemental Appellate Jurisdiction

The United States Supreme Court has rejected a proposed principle referred to as "pendant appellate jurisdiction," by confirming the traditional rule that courts of appeals generally may not exercise jurisdiction over nonappealable interlocutory orders merely because they already have jurisdiction over other, appealable interlocutory orders in the case. The Court emphasized that there might be rare situations in which an appellate court with jurisdiction over one order might also validly consider the propriety of other, related orders, at least when the orders are inextricably intertwined with each other. However, the Court made it clear that courts of appeals should not consider other interlocutory orders that are not independently appealable as a matter of course or when such orders are unrelated. n7 In *Swint,* the Court noted that allowing pendent appellate jurisdiction over otherwise unappealable interlocutory orders largely undermines Section 1292(b). n8 The Court also noted that although Congress had amended the Rules Enabling Act to permit the Supreme Court to promulgate rules defining interlocutory appealability under Sections 1291 and 1292, that power could be employed only through the rule-making process, not by judicial decision. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCertified QuestionsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote 1. *Henry v. Farmer City State Bank, 808 F.2d 1228, 1240-1241 (7th Cir. 1986)* (citing **Moore's,** while appeal was pending, district court lacked jurisdiction to enjoin state action based on same facts as dismissed action).

(n2)Footnote 2. *Shevlin v. Schewe, 809 F.2d 447, 450-451 (7th Cir. 1987)* (citing **Moore's,** district court properly dismissed action because district court retained jurisdiction to proceed with merits of action without interfering with interlocutory appeal, even though intervenor had filed interlocutory appeal from grant of preliminary injunction).

(n3)Footnote 3. *28 U.S.C. § 1292.*

(n4)Footnote 4. *Sierra Club v. Robertson, 28 F.3d 753, 756 n.3 (8th Cir. 1994) .*

(n5)Footnote 5. *Balla v. Idaho St. Bd. of Corrections, 869 F.2d 461, 468 (9th Cir. 1989)* (appealable interlocutory order that is not appealed merges with final judgment).

(n6)Footnote 6. *Favia v. Indiana Univ. of Pa., 7 F.3d 332, 337 (3d Cir. 1993) .*

(n7)Footnote 7. *Swint v. Chambers County Commission, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) .*

(n8)Footnote 8. *28 U.S.C. § 1292(b).*

(n9)Footnote 9. *Swint v. Chambers County Commission, 514 U.S. 35, 45-50, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) .*

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.06

§ 27.06 Stay of Proceedings to Enforce Judgment Pending Appeal

[1] Automatic Period of Stay

The federal rules generally impose an automatic 14-day stay of execution or enforcement of a judgment. n1 The purpose of this stay is to give the losing party time to prepare for appeal or other method of review of the judgment. n2 However, there are two exceptions to the automatic stay. Unless the court orders otherwise, an interlocutory or final judgment is not stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal for the following: (1) an interlocutory or final judgment in an action for an injunction or a receivership; n3 or (2) a judgment or order that directs an accounting in an action for patent infringement. n3.1 The automatic stay applies only to orders of the district court in ordinary proceedings and not to special orders. For example, Rule 62 does not apply to an order of the district court upholding an order of a state regulatory commission. n4 The filing of an appeal alone, without a request for a stay, will not protect the appealing party from execution or enforcement during the pendency of the appeal. n5

A 14-day automatic stay begins to run from the date of entry of the judgment. n6 After 14 days has elapsed from the date of entry, the prevailing party may proceed to enforce or execute the judgment, unless the losing party takes some form of additional action to stay enforcement or execution, n7 such as by making one or more post judgment motions, n8 or by taking an appeal from the judgment. n8.1

[2] Right to Stay of Injunction

An interlocutory or final judgment in an action for an injunction or a receivership is not subject to the automatic 14-day stay provision, n9 and there is no stay in the event of an appeal. n10 Therefore, a district court judgment involving an injunction is generally immediately enforceable by the winning party against the losing party. n10.1 However, the court may in its discretion suspend, modify, restore, or grant an injunction during the pendency of an appeal from an interlocutory or final judgment granting or denying an injunction, and also has the discretion to require the posting of a bond or some other form of security to protect the rights of the adverse party. n11 This provision codifies the court's inherent power to preserve the status quo when the circumstances warrant the preservation. Maintaining the status quo means that a controversy will still exist once the appeal is heard. The district court may not divest the court of appeals of its jurisdiction over the matter by eliminating the controversy prior to the hearing of the appeal. n12 Furthermore, the district court may not adjudicate any of the parties' substantive rights, unless absolutely necessary to preserve the

integrity of the appeal. n13 Furthermore, while the district court may suspend, modify, restore, or grant an injunction pending appeal, it does not have the power to dissolve an injunction. n14

In exercising its discretion to stay an injunction, the district court considers essentially the same criteria used in assessing the propriety of a preliminary injunction: the likelihood of success on the merits, the irreparable harm that will be suffered by the applicant if the injunction is not granted, the harm that will be suffered by other interested parties if the injunction is granted, and whether the public interest will be served by the injunction. n15 An appellate court should not overturn the decision of the district court pursuant to Civil Rule 62(c) unless there has been an abuse of discretion. n16

[3] Stay Pending Appeal

[a] Right to Stay

If a party takes an appeal of a judgment for claims other than an injunction or an accounting in a patent infringement case, and files a supersedeas bond with the court, the party is entitled to a stay of enforcement as a matter of right. n17 However, if there is no right to appeal, the district court has no duty to grant a stay on the filing of a supersedeas bond. For example, an interlocutory order may be appealable not of right but at the discretion of the court. n18 In such a case, the filing of a supersedeas bond will not automatically entitle the appellant to a stay. When the right to appeal is at the discretion of the court, the appellant's proper course of action is to request a stay in the district court, and then in the circuit court if the district court refuses the stay. n19

[b] Relaxation of Bond Requirement

Although the posting of a bond provides the litigant with a stay as of right, n20 it is not required in every case. The party seeking the stay may request that the court (1) waive the bond requirement, n21 (2) set the bond for less than the amount of judgment, n22 or (3) permit an alternate form of security. n23 When the United States, or one of its agencies, is the appellant, no security is required. n24

[c] Motion for Stay

A stay pending appeal must first be sought from the district court. However, a motion for stay may be made in the court of appeals on a showing that an application to the district court for the relief sought is not practicable or that the district court has denied an application or has failed to afford the relief the applicant requested. n25 Furthermore, until the court of appeals issues its mandate, the district court retains the power to grant a stay under Civil Rule 62(d) or to otherwise enforce its judgment. n26 On the other hand, even though the district court retains jurisdiction for stay purposes, Rule 62 does not in any way limit the power of the court of appeals. Thus, the appellate court has the power: n27 (1) to stay proceedings, or to suspend, modify, restore, or grant an injunction while an appeal is pending; n27.1 or (2) to issue an order to preserve the status quo or the effectiveness of a judgment the court of appeals will enter. n27.2

[4] Stay Involving Multiple Claims or Multiple Parties

If a district court has a case involving multiple parties or claims, the court may enter a judgment against fewer than all of the parties or on fewer than all the claims. n28 Furthermore, in such a cases the court may stay enforcement of any judgment and may prescribe any conditions necessary to secure the benefit of the judgment to the party in whose favor it was entered, until the entering of a subsequent judgment or judgments. n29

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney JudgmentsCivil ProcedureJudgmentsEntry

of JudgmentsStays Pending AppealsNonmoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 62(a).*

(n2)Footnote 2. *Jazz Photo Corp. v. United States, 353 F. Supp. 2d 1327, 1357 (Ct. Int'l Trade 2004)* (construing former time periods); *see United States v. One 1962 Ford Galaxie Sedan, 41 F.R.D. 156, 157 (S.D.N.Y. 1966)* (citing **Moore's Federal Practice**; automatic stay period affords litigant opportunity to invoke stay protection of Rule 62; construing former time periods).

(n3)Footnote 3. *Fed. R. Civ. P. 62(a)(1)*; *see* [2], *below.*

(n4)Footnote 3.1. *Fed. R. Civ. P. 62(a)(2).*

(n5)Footnote 4. *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc., 157 F.3d 500, 502 (7th Cir. 1998)* (Rule 62 could not be used to stay order of district court upholding Illinois Commerce Commission order).

(n6)Footnote 5. *MacMann v. Titus, 819 F.2d 8, 9-10 (1st Cir. 1987)* .

(n7)Footnote 6. *Fed. R. Civ. P. 62(a).*

(n8)Footnote 7. *See Garrick v. Weaver, 888 F.2d 687, 695 (10th Cir. 1989)* (construing former time period).

(n9)Footnote 8. *See Fed. R. Civ. P. 62(b)*; *see also* Ch. 26, *Post-Judgment Procedures.*

(n10)Footnote 8.1. *Fed. R. Civ. P. 62(d)*; *see* [3], *below.*

(n11)Footnote 9. *Fed. R. Civ. P. 62(a)(1).*

(n12)Footnote 10. *Fed. R. Civ. P. 62(d).*

(n13)Footnote 10.1. *Duncan v. Farm Credit Bank, 940 F.2d 1099, 1103 (7th Cir. 1991)* ; *see Fed. R. Civ. P. 62(a)(1).*

(n14)Footnote 11. *See Fed. R. Civ. P. 62(c).*

(n15)Footnote 12. *Coastal Corp. v. Texas E. Corp., 869 F.2d 817, 820-821 (5th Cir. 1989)* .

(n16)Footnote 13. *Ortho Pharmaceutical Corp. v. Amgen, Inc., 887 F.2d 460, 464 (3d Cir. 1989)* .

(n17)Footnote 14. *Coastal Corp. v. Texas E. Corp., 869 F.2d 817, 820 (5th Cir. 1989)* .

(n18)Footnote 15. *Drummond v. Fulton County Dep't of Family & Children's Servs., 532 F.2d 1001, 1002 (5th Cir. 1976)* .

(n19)Footnote 16. *Robbins v. Pepsi-Cola Metropolitan Bottling Co., 800 F.2d 641, 643 (7th Cir. 1986)* .

(n20)Footnote 17. *Fed. R. Civ. P. 62(d)*; *see Strong v. Laubach, 443 F.3d 1297, 1299 (10th Cir. 2006)* (filing of bond is to obtain stay, and does not affect right of appeal).

(n21)Footnote 18. *See §§ 27.03, 27.04.*

(n22)Footnote 19. *Law v. NCAA, 134 F.3d 1025, 1030-1031 (10th Cir. 1998)* ; *see Fed. R. App. P. 8.*

(n23)Footnote 20. *See* [a], *above.*

(n24)Footnote 21. *Dillon v. Chicago, 866 F.2d 902, 904-905 (7th Cir. 1989)* (enumerates five criteria required to waive posting of bond).

(n25)Footnote 22. *Miami Int'l. Realty Co. v. Paynter, 807 F.2d 871, 873-874 (10th Cir. 1986)* (court did not err in granting stay without full supersedeas bond; escrow of lesser amount than full judgment plus injunction against transfer of assets was sufficient security).

(n26)Footnote 23. *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 796 (7th Cir. 1986)* .

(n27)Footnote 24. *Fed. R. Civ. P. 62(e)*; *28 U.S.C. § 2408.*

(n28)Footnote 25. *Fed. R. App. P. 8(a)*; *Rakovich v. Wade, 834 F.2d 673, 675 (7th Cir. 1987)* (where district court erroneously denied stay on ground that it lacked jurisdiction, such denial was not on merits and district court was afforded another chance to rule on motion).

(n29)Footnote 26. *Rakovich v. Wade, 834 F.2d 673, 674 (7th Cir. 1987)* (notice of appeal does not deprive district court of jurisdiction over motion for stay of its judgment).

(n30)Footnote 27. *See Global NAPs, Inc. v. Verizon New Eng., Inc., 489 F.3d 13, 20-21 (1st Cir. 2007)* (Rule 62 power of district and appellate courts to preserve status quo and effectiveness of judgment).

(n31)Footnote 27.1. *Fed. R. Civ. P. 62(g)(1).*

(n32)Footnote 27.2. *Fed. R. Civ. P. 62(g)(2).*

(n33)Footnote 28. *Fed. R. Civ. P. 54(b).*

(n34)Footnote 29. *Fed. R. Civ. P. 62(h)*; *Schieffelin & Co. v. Valley Liquors, Inc., 823 F.2d 1064, 1066 (7th Cir. 1987)* (district court did not abuse discretion in entering immediate judgment when defendant failed to move for a stay of judgment under Rule 62(h)).

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.07

§ 27.07 Extraordinary Writsn*

[1] Writs Afford Relief from Final Judgment Rule

The final judgment rule n1 provides that a judgment must be final before a litigant may appeal it. n2 The purposes of the rule are to preclude piecemeal appeals and to show deference to district-court rulings. If always applied strictly, however, the final judgment rule may result in injustice to the parties n3 or may interfere with proper administration of the federal judicial system. n4 Therefore, Congress has provided the All Writs Act, n5 which the courts may use for flexibility to address the exceptional circumstances in which it is necessary to review an order that is neither a final judgment nor an interlocutory order that is appealable either by right or by permission. Thus, to meet the demands of justice in individual cases, discretionary review is preferable to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right. n6

Under the All Writs Act, n6.1 the Supreme Court and the courts of appeals may issue an appropriate writ, such as mandamus, prohibition, common-law certiorari or injunction in aid of the respective court's appellate jurisdiction. Appellate jurisdiction need not have attached prior to the issuance of an extraordinary writ because the purpose of the writ is to aid the court's exercised, existing, or prospective appellate jurisdiction. n7 However, a statute that specifically addresses the particular appellate issue at hand governs the procedure that must be followed, and the court may not issue an extraordinary writ under the All Writs Act to resolve the dispute. n8 For example, if an interlocutory district court order is immediately appealable under Judicial Code Section 1292(a)(1), n9 the extraordinary writ of mandamus is not available to review the interlocutory order, and the party's only method of obtaining review is to file an interlocutory appeal under the statute. n10

[2] Types of Writs Available

The federal courts may issue all writs necessary or appropriate in aid of their jurisdiction. n11 The statutory term "all writs" includes the common-law writs of certiorari, injunction, prohibition, mandamus, and all other writs that are necessary and appropriate in aid of the court's jurisdiction. The most frequently used and perhaps most potent writ is the writ of mandamus. n12 Mandamus in a general sense means an order directing a public official to perform a duty prescribed by law. n13 In the context of the federal judiciary, mandamus is ordinarily used to prevent district judges from exceeding their authority. It is, however, a limited and extraordinary remedy that should not be used to undermine the final judgment rule or to replace the ordinary appeals process. n13.1 If a party petitions for review by writ, the label

that the party gives to the petition is not controlling. n14 A party need not petition for one writ to the exclusion of any other; in effect a single petition may request different writs alternatively or concurrently. n15

[3] Writs May be Used at All Levels of Federal Judiciary

The All Writs Act expressly provides that the Supreme Court is a court that may issue all writs necessary or appropriate in aid of its jurisdiction: both its original jurisdiction and its appellate jurisdiction. n16 The Supreme Court has the power to issue an appropriate writ to any court over which it has jurisdiction, n17 although issuance of the writ is discretionary. n18

The All Writs Act also applies to all courts established by act of Congress. n19 The Act therefore applies to the circuit courts of appeals because the circuit courts are established by Congress. It applies in aid of the circuit courts' appellate jurisdiction. n19.1 As in the case of the Supreme Court, a circuit court has the power to issue an appropriate writ to any court over which it has jurisdiction, n20 although issuance of the writ is discretionary. n21 Appellate Rule 21governs petitions for a writ of mandamus or prohibition to a court, and to petitions for other extraordinary writs. It describes the content requirements for a petition, and the procedures for filing, serving, and docketing a petition, as well as the procedures for responding to a petition. n22 Like the circuit courts, the federal district courts are established by an act of Congress. Thus the All Writs Act also applies to the district courts. n23 At the district court level, the writ of mandamus procedure has been abolished and replaced by procedures under the Federal Rules of Civil Procedure. Appropriate relief equivalent to the writ of mandamus is still available in the district court but must be granted through motion or other action under the rules. n24

[4] General Requirements for Extraordinary Writs

A court may not grant an extraordinary writ if a direct appeal is available n25 or if there are other adequate means to obtain relief. n26 The writ will not be granted merely because review is sought of an order that is not appealable. n27 There is no precise time within which a writ must be sought. However, the grant of an extraordinary writ is governed by equitable considerations, and laches may bar a petition if the petitioner has slept on his or her rights, especially if the delay has been prejudicial to the other party or to the rights of other persons. n27.1 Any delay in seeking a writ should be explained in the petition, because delay is enough to warrant denial. n28

[5] Use of Writ of Mandamus

The courts resort to the extraordinary writ of mandamus reluctantly n29 and reserve mandamus for the most exceptional cases in which the lower court has taken an action it has no power to take or has so abused its discretion that the action is a usurpation of power that justifies granting the writ. n30 Three conditions must be satisfied before it may issue: (1) the party seeking the writ must have no other adequate means to attain the relief requested; (2) the moving party must satisfy the burden of showing that the right to issuance is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. n31

If the petitioner meets the requirements to obtain the writ of mandamus, the writ has proven to be effective in instances when a court exceeds the limits of its authority. n32 For example, mandamus may be used to require a judge to withdraw from a case, n33 to allow amendments to the pleadings, n34 to vacate an order limiting the government's use of peremptory challenges, n35 or to vacate a protective order deemed a prior restraint violative of the *First Amendment*. n36 The adequacy of a postponed review and related factors should be weighed against the general policy of finality so that the grant or denial of a writ will truly rest on a wisely exercised discretion. n36.1

Mandamus has also been granted in exceptional circumstances to decide novel and important questions of law. The Second Circuit, for example, vacated a discovery ruling stating that the publication of a book by one of the defendant's

attorneys acted as a waiver of privilege, not only of discussions referred to in the book, but to all discussions between defendant and his attorney concerning subjects raised in the book. n37

[6] Extraordinary Writ Used to Review Non-appealable Interlocutory Orders

The district courts have broad discretion and authority to procedurally manage the cases they hear. Therefore, pretrial discovery orders are not usually appealable. However, a litigant may have review of such orders by extraordinary writ under extraordinary circumstances, which the reviewing court of appeals must specifically enumerate in its written opinion. n38 For example, one circuit court has developed a three-part test that the court uses before it will issue a writ of mandamus to review a claim of privilege during discovery: (1) the claim must raise an issue of importance and of first impression; (2) the privilege would be lost in the particular case if review were to await a final judgment; and (3) the immediate resolution must avoid the development of discovery practices or doctrines that undermine the privilege. n39

After a motion to dismiss is denied by a district court, there is no procedural device left to prevent a trial. Mandamus ordinarily is not appropriate in this instance, because review may be obtained by direct appeal to the circuit court. n40 However, if a direct appeal would not provide an adequate remedy, mandamus may be appropriate. n41

Other procedural orders that may be reviewed by writ in extraordinary circumstances include the following:

1. Orders transferring actions. An order transferring an action is interlocutory and not appealable. However, under exceptional circumstances, a transfer order may be reviewed by mandamus. n42 If a district court enters an order transferring an action without a hearing, for example, the circuit court will generally grant mandamus. If transfer is from one circuit to another, mandamus will be appropriate because mandamus issues in aid of appellate jurisdiction, and transfer from one circuit to another deprives the circuit court of its proper jurisdiction. n43

2. Orders of consolidation or severance. An order granting or denying consolidation, ordering separate trials, or refusing to consolidate or sever, is interlocutory and not generally appealable except by certification of the district court. n44 However, in a case in which extraordinary circumstances are present, the order may be reviewed on petition for mandamus. n45

3. Orders denying temporary restraining orders. The denial of a temporary restraining order generally is not appealable. However, in extraordinary circumstances, review may be appropriate on a petition for a writ of mandamus. For example, one circuit court reviewed a denial of a temporary restraining order because the petitioner claimed irreparable harm would result from disposition of the goods involved. n46

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsAll Writs ActCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 19 *Moore's Federal Practice,* § 204.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 27.02.*

(n3)Footnote 2. *Will v. United States, 389 U.S. 90, 96, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)* .

(n4)Footnote 3. *In re Balsimo, 68 F.3d 185, 187 (7th Cir. 1995)* (extraordinary writ granted when judicial act

could not be remedied by appeal from final judgment).

(n5)Footnote 4. *Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 713 (7th Cir. 1986)* .

(n6)Footnote 5. *See 28 U.S.C. § 1651.*

(n7)Footnote 6. *Financial Servs. Inc. v. Ferrandina, 474 F.2d 743, 746 n.7 (2d Cir. 1973)* (citing **Moore's** for proposition that in compelling circumstances mandamus may be appropriate vehicle to make appeal of order).

(n8)Footnote 6.1. *See Wis. Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306, 125 S. Ct. 2, 159 L. Ed. 2d 805 (2004)* .

(n9)Footnote 7. *See Cheney v. United States Dist. Court, 542 U.S. 367, 378-379, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)* (deadlines for notice of appeal inapplicable to mandamus petition under the All Writs Act).

(n10)Footnote 8. *Cheney v. United States Dist. Court, 542 U.S. 367, 380-381, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)* (extraordinary writ may not be used as a substitute for the regular appellate process).

(n11)Footnote 9. *See 28 U.S.C. § 1292(a)(1).*

(n12)Footnote 10. *Calderon v. United States Dist. Ct., 137 F.3d 1420, 1421-1422 (9th Cir. 1998)* (if petition for writ of mandamus is filed within time for filing notice of appeal, circuit court may treat mandamus petition as notice of appeal; however, if party could have pursued ordinary appeal, but instead filed mandamus petition after expiration of time for appeal, circuit court lacks jurisdiction to review order).

(n13)Footnote 11. *28 U.S.C. § 1651(a).*

(n14)Footnote 12. *See Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)* .

(n15)Footnote 13. *Corrugated Container Antitrust Litig. v. Mead, 614 F.2d 958, 962 (5th Cir. 1980)* ; *Split Family Support Group v. Moran, 232 F. Supp. 2d 1133, 1135 (D. Mont. 2002)* .

(n16)Footnote 13.1. *See Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)* .

(n17)Footnote 14. *United States v. Santtini, 963 F.2d 585, 594 (3d Cir. 1992)* ("the appropriate inquiry under the All Writs Act is whether extraordinary remedy is available, not which").

(n18)Footnote 15. *Ex parte Peru, 318 U.S. 578, 585-586, 63 S. Ct. 793, 87 L. Ed. 1014 (1943)* .

(n19)Footnote 16. *28 U.S.C. § 1651(a).*

(n20)Footnote 17. *Chandler v. Judicial Council of Tenth Cir., 398 U.S. 74, 112, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970)* .

(n21)Footnote 18. Sup. Ct. R. 20.1; *see* Ch. 29, *Appeal to Supreme Court.*

(n22)Footnote 19. *28 U.S.C. § 1651(a).*

(n23)Footnote 19.1. *See Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2585-2586, 159 L. Ed. 2d 459 (2004)* .

(n24)Footnote 20. *Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 353, 96 S. Ct. 584, 46 L. Ed. 2d 542*

(1976) .

(n25)Footnote 21. *See* Ch. 28, *Appeal to Court of Appeals*.

(n26)Footnote 22. *Fed. R. App. P. 21*; *see* Ch. 28, *Appeal to Court of Appeals*.

(n27)Footnote 23. *28 U.S.C. § 1651(a)*.

(n28)Footnote 24. *Split Family Support Group v. Moran, 232 F. Supp. 2d 1133, 1135 (D. Mont. 2002)* .

(n29)Footnote 25. *Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)* ; *see* [1], *above*.

(n30)Footnote 26. *See* [2], *above*.

(n31)Footnote 27. *Will v. United States, 389 U.S. 90, 104, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)* .

(n32)Footnote 27.1. *Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2586, 159 L. Ed. 2d 459 (2004)* .

(n33)Footnote 28. *NBS Imaging Sys., Inc. v. United States Dist. Court for E. Dist. of Cal., 841 F.2d 297, 298 (9th Cir. 1988)* .

(n34)Footnote 29. *Kmart Corp. v. Aronds, 123 F.3d 297, 300 (5th Cir. 1997)* (mandamus ordinarily is not available concerning matter that is within discretion of district court).

(n35)Footnote 30. *Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989)* .

(n36)Footnote 31. *Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)* .

(n37)Footnote 32. *In re Scott, 709 F.2d 717, 721 (D.C. Cir. 1983)* .

(n38)Footnote 33. *United States v. Ritter, 540 F.2d 459 (10th Cir. 1976)* .

(n39)Footnote 34. *Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 652-653 (2d Cir. 1987)* (when district court failed to afford timely conference at which defendant could amend answer to include counterclaim, court of appeals directed district court to allow amendment, indicating that it would otherwise issue writ of mandamus).

(n40)Footnote 35. *United States v. Newman, 549 F.2d 240, 250-251 (2d Cir. 1977)* .

(n41)Footnote 36. *Rodgers v. United States, 536 F.2d 1001, 1006 (3d Cir. 1976)* .

(n42)Footnote 36.1. *Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)* .

(n43)Footnote 37. *Von Bulow v. Von Bulow, 828 F.2d 94, 97 (2d Cir. 1987)* (issuance of writ of mandamus would act as guide to courts in future cases of similar nature; moreover, writ was essential to defendant because there was no other adequate remedy at law, in that discovery orders are not generally immediately appealable).

(n44)Footnote 38. *Will v. United States, 389 U.S. 90, 106-107, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)* .

(n45)Footnote 39. *In re Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993)* (request for writ to overrule

order compelling production of memorandum was one of rare circumstances permitting use of mandamus).

(n46)Footnote 40. *Helstoski v. Meanor, 442 U.S. 500, 506, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979)* .

(n47)Footnote 41. *Credit Suisse v. United States Dist. Court., 130 F.3d 1342, 1345-1346 (9th Cir. 1997)* (mandamus was appropriate in case involving Swiss banks, because waiting for direct appeal would have forced banks to choose between being in contempt of district court and violating confidentiality requirements of Swiss banking law.

(n48)Footnote 42. *In re Food Lion, Inc., 73 F.3d 528, 532 n.10 (4th Cir. 1996)* (mandamus ordering transfer may issue to achieve orderly and efficient administration of justice).

(n49)Footnote 43. *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns Inc., 689 F.2d 982, 988 (11th Cir. 1982)* .

(n50)Footnote 44. *28 U.S.C. § 1292(b)*; *see § 27.04*.

(n51)Footnote 45. *See, e.g., Garber v. Randell, 477 F.2d 711, 715 n.2 (2d Cir. 1973)* .

(n52)Footnote 46. In re Vuitton et *Fils, S.A., 606 F.2d 1, 3-4 (2d Cir. 1979)* .

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.08

§ 27.08 Amendment of Pleadings

Judicial Code Section 1653 permits a party to amend defective allegations of jurisdiction with court approval. Amendments may at any time be made in the trial or appellate courts, including the Supreme Court. n1 Section 1653's liberal amendment rule permits a party who has not alleged that diversity exists to amend the pleadings even as late as on appeal. If the amended allegations are not contested and nothing bars jurisdiction, jurisdiction is deemed proper, despite the plaintiff's usual burden of alleging and proving jurisdiction. n2

Despite the presumption against federal jurisdiction, when an action has resulted in a final judgment in the district court despite an unnoticed jurisdictional defect, the interests of justice, fairness, and judicial economy require an additional opportunity to cure the pleading defects, if possible. However, one court has refused to allow the plaintiff to amend its complaint to add omitted jurisdictional facts under Section 1653 at the appellate stage, because the record contained evidence that opposing parties were not diverse. The court declined to consider the possible evidentiary dispute, holding that the district court is the proper forum to determine if a curative amendment could be made. n3 This reasoning conforms with the general rule that Section 1653 may be used to cure defective jurisdictional allegations and not defective jurisdictional facts themselves. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. 1653*; *Penteco Corp. v. Union Gas System, 929 F.2d 1519, 1523 (10th Cir. 1991)* .

(n2)Footnote 2. *Dist. of Columbia v. Transamerica Ins. Co., 797 F.2d 1041, 1044 (D.C. Cir. 1986)* .

(n3)Footnote 3. *Penteco Corp. v. Union Gas System, 929 F.2d 1519, 1523 (10th Cir. 1991)* .

(n4)Footnote 4. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

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PART VII Appeal
CHAPTER 27 GENERAL PRINCIPLES OF APPEAL

3-27 Moore's Manual--Federal Practice and Procedure § 27.09

§ 27.09 Fees, Costs, and Damages for Delay

Several provisions of the Judicial Code authorize the courts to impose fees, costs, or damages for delay. n1 Appellate Rules 38 and 39, discussed in Ch. 28, *Appeal to Court of Appeals,* also authorize the courts to impose damages and costs as sanctions. n2 The Supreme Court is authorized to establish fees to be charged by its clerk and to tax those fees against litigants. n3 The current fees are set forth in Supreme Court Rule 38, n4 discussed in Ch. 29, *Appeal to Supreme court*. If a judgment is affirmed by a court of appeals or the Supreme Court, the court may award the prevailing party just damages for the delay, and single or double costs. n5 Additionally, all courts of the United States may tax excess costs against an attorney personally, when the attorney has multiplied proceedings to the extent that it increases costs unreasonably and vexatiously. n6 That sanction, however, is highly unusual and requires a clear showing of bad faith. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsFrivolous Appeals

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920* (general statutory authority).

(n2)Footnote 2. *Fed. R. App. P. 38, 39.*

(n3)Footnote 3. *28 U.S.C. § 1911*; Sup. Ct. R. 38.

(n4)Footnote 4. Sup. Ct. R. 38.

(n5)Footnote 5. *28 U.S.C. § 1912*; *see* Sup. Ct. R. 43.

(n6)Footnote 6. *28 U.S.C. § 1927.*

(n7)Footnote 7. *Estate of Washington v. United States, 53 F.3d 1173, 1176 (10th Cir. 1995)* ; *Barnd v. City of Tacoma, 664 F.2d 1339, 1342-1343 (9th Cir. 1982)* .

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS

3-28 Moore's Manual--Federal Practice and Procedure 28.syn

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART I. APPLICATION OF APPELLATE PROCEDURAL RULES IN FEDERAL COURTS

3-28 Moore's Manual--Federal Practice and Procedure § 28.01

§ 28.01 Appellate Procedure in Lower Federal Courtsn*

[1] Applicability of Federal Rules of Appellate Procedure

The formal rules that govern the procedure for all appeals taken to the United States courts of appeal n1 are designated as the "Federal Rules of Appellate Procedure." n2 These rules are referred to in this publication as the "Appellate Rules," to distinguish them from the Federal Rules of Civil Procedure. A federal court of appeals is a court that has jurisdiction to review a decision made by an inferior court in the federal system. In the federal court system, the circuit courts of appeals have jurisdiction to review decisions from all district courts of the United States. n3 The Appellate Rules were originally promulgated by the Supreme Court in 1968 to govern appellate procedure in the circuit courts, as well as the procedure for transfer of jurisdiction of an appealed case from the district courts to the circuit courts. The Appellate Rules are promulgated under the authority granted by Congress in the United States Code. n4 The Federal Rules of Appellate Procedure do not apply to appeals or any other proceedings in the United States Supreme Court, because procedures in Supreme Court Proceedings are governed by that Court's own rules, known as the Supreme Court Rules. n5

Although the Federal Rules of Appellate Procedure always govern the procedure in the federal circuit courts of appeal, use of the Appellate Rules is not limited to appellate courts. n6 In several circumstances, the Appellate Rules provide for procedures in the district courts, such as extensions of time to appeal when necessary for the district court to determine post-judgment motions. For example, the Appellate Rules provide that the parties must, or may initially, seek relief from the district courts, such as relief regarding judgment, requests for attorney's fees, extensions of time for filing a notice of appeal, applications for a stay or injunction pending appeal, review of an order regarding release after conviction, requests for a transcript of the pleadings, corrections of the record, transfers of custody pending review, and leave to proceed in forma pauperis. n7

In some circumstances, appellate procedure in the district court is provided for in the applicable Appellate Rule. n8 In others, the procedure is not specified. n9 Although the Federal Rules of Civil Procedure strictly apply only in the district courts, when necessary they apply equally to the courts of appeals. n10 Thus, when the Appellate Rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court. n11

[2] When There Is No Controlling Procedural Law

In situations when there is no Appellate Rule, Civil Rule, or statute that specifies the controlling appellate procedural law, a court of appeals has the discretion to regulate practice in any manner consistent with federal law, federal rules, and local rules of the circuit. However, the court may not impose any sanction or other disadvantage for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 301.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 1(a)(1).*

(n3)Footnote 2. *See Fed. R. App. P. 1(c).*

(n4)Footnote 3. *See 28 U.S.C. § 1294.*

(n5)Footnote 4. *See 28 U.S.C. §§ 2072, 2075,* former *18 U.S.C. §§ 3771, 3772*; *see also § 28.02[1].*

(n6)Footnote 5. *See* Sup. Ct. R. 48.2.

(n7)Footnote 6. *See, e.g., Fed. R. App. P. 1(a)(2)* (appellate rules may require or provide for filing motion or other document in district court).

(n8)Footnote 7. *See Fed. R. App. P. 4(a)(4), 4(a)(5), 7, 8, 9(b), 10(b), 10(e), 23(a), 24.*

(n9)Footnote 8. *See, e.g., Fed. R. App. P. 4(a)(5)* (district court may extend time for party to file notice of appeal if party makes timely motion or shows excusable neglect or good cause).

(n10)Footnote 9. *See, e.g., Fed. R. App. P. 10(b)* (appellant's duty to order transcript).

(n11)Footnote 10. *Balgowan v. New Jersey, 115 F.3d 214, 216-217 (3d Cir. 1997)* (provision of *Federal Rule of Civil Procedure 21* that parties may be dropped or added by order of court on motion of any party or of its own initiative at any stage of action and on such terms as are just, has been relied on by appellate courts to both dismiss and add parties for jurisdictional purposes).

(n12)Footnote 11. *Fed. R. App. P. 1(a)(2).*

(n13)Footnote 1. *Fed. R. App. P. 47(b)*; *see § 28.100[2].*

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART I. APPLICATION OF APPELLATE PROCEDURAL RULES IN FEDERAL COURTS

3-28 Moore's Manual--Federal Practice and Procedure § 28.02

§ 28.02 Promulgation of Appellate Rules

[1] Supreme Court Promulgation of Appellate Rules n*

The Supreme Court has the ultimate power to promulgate nationally applicable rules of practice, procedure, and evidence for the federal courts, including the courts of appeal. This rulemaking power is specified by the Rules Enabling Act, n1 which states that the Supreme Court may promulgate rules based on recommendations from the Judicial Conference of the United States. n2 The Judicial Conference is the entity responsible for drafting and recommending rules that promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. The Chief Justice of the United States Supreme Court is the chair of the Judicial Conference of the United States. n3 The federal rules promulgated by the Supreme Court are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure through local court rules that are not inconsistent with the national rules. n4

[2] Court of Appeals Promulgation of Local Appellate Rules n*

Every circuit court of appeals has discretion to make and amend rules governing its own procedure, provided that each such rule: n1 is consistent with, but not duplicative of, Acts of Congress or procedural rules promulgated by the Supreme Court; n2 conforms to any uniform numbering system prescribed by the Judicial Conference of the United States; and has been enacted by a majority of judges after giving appropriate public notice and opportunity for comment. Additionally, any generally applicable direction to a party or an attorney regarding practice before a court must be in the form of a local rule, rather than an internal operating procedure or standing order. Local rules adopted by a court of appeals must be approved by a majority of the circuit judges in regular active service. n3 Once local rules have been promulgated or amended, the clerk of each court must send a copy of the new rule or an internal operating procedure to the Administrative Office of the United States Courts. n4

The circuit courts' local rulemaking power is not unrestricted. A circuit court may not enforce a local rule imposing a requirement of form in any manner that causes a party to lose substantive rights provided that the failure to comply with the requirement was not willful. n5 This prohibition is narrowly drawn and does not cover violations that were willful or violations involving local rules directed to matters of form. Furthermore, the rule is not intended to limit the power of a

circuit court to impose substantive penalties on a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsAuthority to AdjudicateGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 301.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. §§ 2071-2077.*

(n3)Footnote 2. *28 U.S.C. § 2072(a).*

(n4)Footnote 3. *See 28 U.S.C. § 331.*

(n5)Footnote 4. *See 28 U.S.C. § 2071*; *see also* [b], *above.*

(n6)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 301.31 (Matthew Bender 3d ed.).

(n7)Footnote 1. *Fed. R. App. P. 47(a)(1).*

(n8)Footnote 2. *See 28 U.S.C. § 2072.*

(n9)Footnote 3. *Fed. R. App. P. 47(a)(1)*; *Horner Equip. Intl., Inc. v. Seascape Pool Ctr. Inc., 884 F.2d 89, 94 (3d Cir. 1989)* (circuit court guidelines requiring transcripts to be ordered through district court clerk were not effective when not adopted in accordance with requirements of local rulemaking).

(n10)Footnote 4. *Fed. R. App. P. 47(a)(1).*

(n11)Footnote 5. *Fed. R. App. P. 47(a)(2).*

(n12)Footnote 6. *See Fed. R. App. P. 47(a)(2)*, Committee Note to 1995 Amendments; *see also In re Grand Jury Proceedings, 662 F.2d 532, 534 (9th Cir. 1981)* (strict compliance was required with local appellate rule requiring counsel to notify court of appeals immediately of pendency of recalcitrant witness' appeal).

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART I. APPLICATION OF APPELLATE PROCEDURAL RULES IN FEDERAL COURTS

3-28 Moore's Manual--Federal Practice and Procedure § 28.03

§ 28.03 Construction of Appellate Rules

[1] Liberal Construction

All courts must give the Federal Rules of Appellate Procedure liberal construction in light of a Congressional intent to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. n1 The decisions under *Rule 1 of the Federal Rules of Civil Procedure* that explain the liberal construction that must be given to the Civil Rules also apply in construction of the Appellate Rules. n2

One or more Committee Notes accompanies each of the Appellate Rules and their amendments, and the notes usually specify matters such as the history and purpose of the rule. A Committee Note accompanying a rule or an amendment is analogous to the legislative history of a statute and is equally persuasive as a guide to interpretation. n3

[2] Procedural Nature of Appellate Rules

Generally, the Appellate Rules govern only procedure, because the purpose of the Appellate Rules is to expedite completion of the appeal of litigation and to discourage dilatory tactics. n1 They encompass all the steps incident to the taking, processing, and disposition of an appeal or other form of review. They regulate those steps in considerable detail, from the filing of the notice of appeal, petition for review, or other initiating paper, to the issuance of the mandate of the circuit court. n2

A former provision of the Appellate Rules expressly stated that the Appellate Rules could not be construed in a manner to either extend or limit the jurisdiction of the circuit courts. n3 However, that provision was abrogated because two enactments to the United States Code make it possible and even probable that one or more of the Federal Rules of Appellate Procedure could substantively extend or limit the jurisdiction of the courts of appeals. In this regard, Congress has amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is "final" for purposes of appealability of the ruling. n4 Additionally, Congress has also amended a statute to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of new types of interlocutory decisions. n5 The former provision of the Appellate Rules has been abrogated because these amendments both involve indisputably jurisdictional statutes, and as soon as any Appellate Rule is amended to define finality for purposes of appeal, or to authorize new types interlocutory

appeals, such a rule, would "extend or limit the jurisdiction of the courts of appeals," making the former provision obsolete. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 331*; *see also In re Orbitec Corp., 520 F.2d 358, 362 (2d Cir. 1975)* .

(n2)Footnote 2. *See Fishbaugh v. Armour & Co., 185 F.2d 541, 541 (4th Cir. 1950)* .

(n3)Footnote 3. *Maryland Casualty Co. v. Conner, 382 F.2d 13, 16 (10th Cir. 1967)* (Committee Notes are entitled to weight in ascertaining meaning of rules); *see Scott-Harris v. City of Fall River, 134 F.3d 427, 433-34 (1st Cir. 1997)* (decision that adequate notice of entry of judgment specified in Appellate Rule 4(a)(6) must have been in writing partly based on weight of Committee Notes).

(n4)Footnote 1. *See In re Orbitec Corp., 520 F.2d 358, 362 (2d Cir. 1975)* .

(n5)Footnote 2. *See Fed. R. App. P. 3 through 41.*

(n6)Footnote 3. *See* former *Fed. R. App. P. 1(b).*

(n7)Footnote 4. *28 U.S.C. § 2072(c)*; *see 28 U.S.C. § 1291*; In *Re: Flat Glass Antitrust Litig., 288 F.3d 83, 87-91 (3d Cir. 2002)* (extensive analysis of finality rule for purposes of appeal).

(n8)Footnote 5. *See 28 U.S.C. § 1292(e).*

(n9)Footnote 6. *Fed. R. App. P. 1*, Committee Notes to 2002 Amendments.

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART I. APPLICATION OF APPELLATE PROCEDURAL RULES IN FEDERAL COURTS

3-28 Moore's Manual--Federal Practice and Procedure § 28.04

§ 28.04 Suspension of Rules of Appellate Proceduren*

[1] Grounds for Suspension of Rules

To expedite its decision or for other good cause, a court of appeals may suspend any provision of the appellate rules in a particular case and order proceedings as it directs. The court may make an order suspending an appellate rule either on its own or on a party's motion. n1 Thus, Appellate Rule 2 authorizes the court of appeals to suspend the Appellate rules to provide relief to a party when adverse consequences of the rules would otherwise result in manifest injustice. n2 In this regard, the courts may liberally construe the rules to prevent injustice. n3 A court may accept an appeal that is not technically in compliance with the rules of procedure if it deems that a party has met the "functional equivalent" of the rule requirements. n4 For example, a court may exercise appellate jurisdiction to review an order that is not specifically identified in the notice of appeal, provided that the language of the notice of appeal clearly indicates the appellant's intention to appeal that order. n5 However, a court may not dispense with mandatory requirements of the rules, such as jurisdictional requirements for appeals, even for "good cause shown." For example, an appellate court has no jurisdiction to consider an issue not identified by the appellant in the notice of appeal. n6

[2] Suspension of Rules Regarding Time

The primary purpose of Appellate Rule 2 is to allow the court to expedite the determination of cases when time is of the essence to the public interest or to the party. n1 Therefore, a common example of the suspension power under Appellate Rule 2 is when a circuit court expedites proceedings by making shorter time limits in cases where the prescribed time periods are greater than necessary. In such cases, the circuit court may either make a shorter time period or eliminate them entirely, n2 because the Rules of Appellate Procedure were adopted to ensure efficient and expeditious handling of routine matters in the circuit courts. n3

In contrast to expediting a case, Appellate Rule 2 does not control the grant or denial of an extension of time, because requests for extensions of time are specifically controlled by Appellate Rule 26(b). n4 Under Appellate Rule 26(b), an appellate court is authorized to grant an extension of time on motion and for good cause shown, except that the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. n5 Consequently, a court of appeals has no power under Appellate Rule 2 to permit an appeal to be sought or taken after the expiration of the time fixed by statute or rule. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, §§ 302.10, 302.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 2*.

(n3)Footnote 2. *Fed. R. App. P. 2*, Original Committee Note; *see Owens v. Keeling, 461 F.3d 763, 776 (6th Cir. 2006)* .

(n4)Footnote 3. *Houston v. Lack, 487 U.S. 266, 270-271, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)* .

(n5)Footnote 4. *Taylor v. Johnson, 257 F.3d 470, 474-475 (5th Cir. 2001)* ; *see Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* .

(n6)Footnote 5. *Malone v. Vasquez, 138 F.3d 711, 715 (8th Cir. 1998)* , *cert. denied, 525 U.S. 953 (1998)* .

(n7)Footnote 6. *Brandt v. Schal Assoc., Inc., 854 F.2d 948, 954 (7th Cir. 1988)* .

(n8)Footnote 1. *Fed. R. App. P. 2*, Original Committee Note; *see Owens v. Keeling, 461 F.3d 763, 775-776 (6th Cir. 2006)* (purpose of Rule 2 is to ensure that justice is not denied on basis of mere technicality).

(n9)Footnote 2. *Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1222 (5th Cir. 1969)* , *rev'd on other grounds, 396 U.S. 290 (1970)* (Appellate Rule 2 invoked in school desegregation cases to suspend Appellate Rules and order school desegregation to commence as quickly as possible).

(n10)Footnote 3. *See Fed. R. App. P. 2*, Committee Note; *see also Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-317, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* ; *Lucky v. Calderon, 86 F.3d 923, 926 (9th Cir. 1996)* (court's interest in expediting decision justified overlooking procedural error by habeas corpus petitioner's failure to file amended notice of appeal).

(n11)Footnote 4. *Fed. R. App. P. 2*; *see Fed. R. App. P. 26(b)(1)*; *Main Drug, Inc. v. Aetna United States Healthcare, Inc., 475 F.3d 1228, 1231 (11th Cir. 2007)* .

(n12)Footnote 5. *Fed. R. App. P. 26(b)*.

(n13)Footnote 6. *See Griggs v. Consumer Discount Co., 459 U.S. 56, 61, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982)* . The Supreme Court stated that the grant of discretion contained in Appellate Rule 2 is limited by Appellate Rule 26(b), which prohibits the appellate courts from enlarging the time for filing a notice of appeal; *Main Drug, Inc. v. Aetna United States Healthcare, Inc., 475 F.3d 1228, 1231 (11th Cir. 2007)* (Federal Rules of Appellate Procedure explicitly forbid appellate court from suspending time requirements in Rule 5 for permission to appeal, even for good cause).

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.05through 28.09

[Reserved]

§§ 28.05[Reserved]

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART II. RIGHTS AND DUTIES OF APPEAL FROM PARTICULAR TYPES OF ADJUDICATIONS
A. APPEAL FROM DISTRICT COURT JUDGMENT OR ORDER

3-28 Moore's Manual--Federal Practice and Procedure § 28.10

§ 28.10 Appeal As of Right

[1] Manner of Appeal of Right

[a] Standing of Person to Appeal as of Right n*

[i] Requirements of Standing

Only particular persons have standing to make a direct appeal as a matter of right from a district court to a circuit court. Appellate Rule 3 governs the method for an appeal as a matter of right. Generally, a person with standing may take an appeal simply by filing an appropriate notice of appeal and the specified number of copies of the notice with the district clerk. n1 Appellate Rule 3 governs all appeals, civil and criminal, from the district courts to the circuit courts, except permissive appeals under *28 U.S.C. § 1292(b)*, which are governed by Appellate Rule 5, and appeals in proceedings in bankruptcy, which are governed by Appellate Rule 6. n2

To have standing to appeal as of right, a person must meet two prerequisites: (1) the appellant must generally have been a party of record at the time the order or judgment appealed from was entered; n3 and (2) the appellant must have been aggrieved by the order or judgment. n4

[ii] Party of Record

To have standing to appeal as of right, a person must generally have been a party of record at the time the order or judgment appealed from was entered. n5 Note that the appellant need not have necessarily been a party to the suit at of the time the complaint was filed; an appeal may also be taken by a party who entered the original suit by intervention. n6 Similarly, if a party is substituted under Civil Rule 25 while the case is pending in the district court, the party substituted stands in the same position and has the same standing to appeal as the party replaced. n7 In addition, a party who enters the case through third-party practice may appeal an adverse judgment on either the third-party claim or the main claim. n8 A person who is a party to an action in an official capacity only, ceases to be a party on leaving office and, therefore, does not have standing to appeal an adverse judgment. The right to appeal passes to the successor in office. n9

With respect to intervention, a court may allow intervention after a judgment for the purposes of appeal when the court deems intervention necessary to protect the interest of a person whose rights were represented by others before the district court. n10 Postjudgment intervention is permitted in these circumstances because a represented person has no reason to seek intervention before judgment. In fact, if the representation had been adequate, the person has no right to intervene. n11 The failure of the representative to appeal, however, has been found to create the inadequacy of representation necessary to warrant intervention at the postjudgment stage. n12 The denial of a motion to intervene as of right is itself appealable. n13

If the circuit court reverses the order denying intervention and a notice of appeal from judgment in the case has been filed, the circuit court will simply proceed with the merits of the appeal. n14 If the court affirms the denial of intervention, however, the appeal will be dismissed for lack of standing. n15

There are exceptions to this "party of record" rule. In certain limited circumstances, persons who were never parties of record at the time of judgment may be deemed to have standing to appeal. If the following three requirements are met, a nonparty has standing to appeal, even though the nonparty has not intervened: (1) the nonparty actually participated in the lower court proceedings, (2) the equities balance in favor of hearing the appeal, and (3) the nonparty has a personal stake in the outcome. n16 For example, standing has been recognized for a nonparty against whom an injunction was issued, for purposes of appealing the jurisdiction of the court to enter the injunction. n17 Another example of a nonparty with standing to appeal is an attorney who has been sanctioned under Civil Rule 11. n18

[iii] Party Is Aggrieved

The second requirement for standing to appeal is that the appellant must have been aggrieved by the order or judgment. n19 A party is considered "aggrieved" by a decision only if the party has a direct interest that is affected by the decision. n20 Thus, a party who has fully prevailed in litigation may not usually appeal a judgment on the ground that the court has made an adverse finding; however, an appellate court may recognize standing to appeal if the lower court decision could form the basis for collateral estoppel on the issue in later litigation. n21 However, this rarely occurs because a finding may form the basis for collateral estoppel only if it is necessary to the judgment, and a finding adverse to an otherwise fully prevailing party will rarely be necessary to the judgment. n22 Another basis for a prevailing party to be considered "aggrieved" is when the party retains a sufficient stake in the continuing litigation. n23

Conversely, a party may lose its status as an aggrieved party, and therefore the right to appeal, by estoppel or waiver. For example, a party may not ordinarily appeal if the party has agreed to a settlement or consented to the entry of a judgment. n24 A plaintiff who accepts a remittitur to avoid a new trial waives the right to appeal from the judgment for the reduced sum. n25 Even if the defendant appeals from the judgment, a plaintiff who has accepted a remittitur may not cross-appeal, asking the appellate court to restore the full amount of the verdict. n26 The plaintiff may, however, attack the propriety of a new-trial order for the limited purpose of defending the remitted judgment. n27 Waiver does not automatically occur when a judgment creditor pays a judgment pending appeal in lieu of posting a supersedeas bond. Such a judgment creditor is entitled to the return of the money if the judgment is reversed, and the payment does not moot the appeal unless the appellant has specifically relinquished the right to seek repayment in the event the appeal is successful. n28

[b] Matters Appealable as of Right n*

A party in a civil case may take an appeal as of right to the circuit court any *final* decision of the district court, n29 except those decisions that are appealable directly to the Supreme Court. n30 Appeals as of right may also be taken from some interlocutory orders, such as: n31

1. An order granting, continuing, modifying, or refusing to grant an injunction. n32

2. Certain orders in receivership proceedings. n33

3. An interlocutory decree that determines a right and liability of the parties to an admiralty case. n34

4. Judgments in actions for patent infringement that are final except for accounting. n35

When an interlocutory order is not appealable as of right, it may nonetheless be immediately appealed if the party obtains permission of the circuit court. n36 In order to obtain permission, the party must have the district judge certify that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. n37 The procedure for requesting permission to appeal is governed by Appellate Rule 5. n38

[c] Contents of Notice of Appeal n*

[i] Summary of Requirements

The Appellate Rules require that a notice of appeal must specify three things: (1) the party or parties taking the appeal, n39 (2) the judgment, order or part thereof appealed from, n40 and (3) the name of the court to which the appeal is taken. n41 The simplest way to ensure that all the requirements of Appellate Rule 3 are met is to follow the Notice of Appeal form provided in the Appendix of Forms to the Appellate Rules. n42 A notice of appeal need not contain an assignment of errors. n43 Furthermore, although a notice of appeal should be signed according to the mandate of Civil Rule 11(a) n44 a signature is not a jurisdictional requirement to an appeal, because the signature requirement is not among Appellate Rule 3(c)(1)'s specifications. n45

Courts should not strictly interpret the Appellate Rules which specify the required contents of the notice of appeal, especially in cases involving pro se parties and cases when the appellee has not been prejudiced. n46 Therefore, even though substantial compliance with Appellate Rule 3 is jurisdictional and mandatory, the courts will liberally construe those requirements in favor of the appellant. n47 Thus, informality of form or designation of a notice of appeal does not provide grounds for dismissal of the notice of appeal by the court of appeals. n48 For example, the Supreme Court has held that when the Antiterrorism and Effective Death Penalty Act of 1996 applied to a habeas corpus case on appeal, under Appellate Rule 22(b) the Court of Appeals should have treated a notice of appeal as an application for a certificate of appealability. n49 However, the Supreme Court has stated that permitting imperfect but substantial compliance with a technical notice requirement is not the same as waiving the requirement altogether, and that a court may not waive jurisdictional requirements. n50 In this regard, Appellate Rule 3's requirements are jurisdictional in nature, and complete noncompliance with the rule is fatal to an appeal. n51

The appellate courts have developed a "functional equivalent" notice of appeal doctrine to reflect the fact that Appellate Rule 3 is to be liberally interpreted. n52 Under this doctrine, the requirement that the appellant must file a notice of appeal may be satisfied with papers that are technically at variance with the rule, but which serve as a "functional equivalent" of the notice of appeal. n53 The document in question must be filed within the time required by Appellate Rule 4 and must specifically indicate the party's intention to appeal and provide sufficient notice of that intention to the other parties and to the court. If the document meets these requirements it does not matter that the appellant intended it to serve some other function. n54 For example, The following types of documents are among those that have been found to be "functional equivalents" of a notice of appeal, provided that the document gives notice of three elements required by Appellate Rule 3(c)(1):

1. An appellate brief. n55

2. A timely motion under Appellate Rule 4 for extension of time to a file notice of Appeal. n56

3. A docketing statement. n57

4. A letter sent to the court. n58

5. A filing of a motion to appeal. n59

[ii] Parties

A notice of appeal must state the party or parties taking the appeal by naming each one in the caption or body of the notice. n60 However, the court may not dismiss an appeal for failure to name a party whose intent to appeal is otherwise clear from the notice. n61 In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class. n62 A pro se notice of appeal is considered filed on behalf of the signer, and the signer's spouse and minor children if they are parties, unless the notice clearly indicates otherwise. n63

The party designation requirement does not mean that every individual appellant must be designated by name. To prevent the loss of a right to appeal through inadvertent omission of a party's name, and based on the liberal construction of the Appellate Rules, an attorney representing more than one party has the flexibility to indicate which parties are appealing without naming them individually. For example, an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. n64 However, a complete failure to identify the party taking the appeal deprives the appellate court of jurisdiction. n65 The complete failure to designate a party in a notice of appeal is more than excusable informality; it constitutes a failure of that party to appeal. n66

A person or persons taking an appeal need not name in the notice the names of the appellees. n67 Furthermore, the fact that the judgment does not refer to the appellees by name does not prevent an appeal with respect to those appellees. Provided that the notice of appeal specifies the party taking the appeal, the judgment or order from which the appeal is being taken, and the court to which the appeal is taken, that notice is sufficient to bring up all of the appellant's claims with respect to that judgment. n68 If a party does decide to name the appellees, the mere fact that the appellant errs in naming an appellee does not justify dismissal of the appeal. n69 When an appellant uses Appellate Form 1 as recommended, the clear implication is that all opposing parties are made potential appellees. Therefore, use of the form is the preferred course, rather than attempting to name the appellees in a multiparty case and failing to name all the intended parties. Such practice will avoid unnecessary questions. This is because if a notice of appeal specifically names some potential multiple appellees and fails to name others, jurisdiction over the omitted parties may be denied if the non-named parties reasonably relied on the fact that they were not named and prejudice would result from their later inclusion. n70

[iii] Designation of Subject of Appeal

A notice of appeal must contain a designation of the judgment, order, or part of the judgment or order, that is being appealed. n71 This requirement is particularly important in a case in which the appellant wishes to appeal only one part of the judgment or order, because it informs the appellate court of the issues that will be presented in the appeal. n72 However, because mere technicalities will not prevent an appellate court's consideration of the merits, the court will not refuse an appeal under Appellate Rule 3(c) merely because of failure to designate the judgment or a part of the judgment if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee has not been misled by the defect. n73 For example, although a notice did not specifically designate that the appellant was appealing from a summary judgment on the particular grounds of mootness, it was sufficient because the inference could be readily drawn from the text of the notice, and the appellee was not misled by the notice. n74

If a party specifically notices appeal from a particular order, all of the claims disposed of by the order are covered by the notice of appeal. n75 However, a notice of appeal designating a particular judgment or order is effective only for those matters preceding the designated judgment or order. Thus, when a notice of appeal is filed prior to the district court's order disposing of a postjudgment motion, the notice ordinarily does not bring that order up on appeal. n76 On the other hand, if a postjudgment motion covered the same issues decided in an underlying judgment and the district court relied on its underlying judgment in ruling on the postjudgment motion, the issues decided in underlying judgment are properly before the circuit court on appeal from the postjudgment order. n77

As with other required contents of the notice of appeal, the requirement to designate the order or judgment appealed from has been liberally construed by the courts. n78 An appeal will not be dismissed for mere technicalities if the intent to appeal from a specific ruling can be fairly inferred, and the opposing party is not prejudiced. n79 To determine the intention of the appellant, the court may look beyond the notice of appeal to the record as a whole. n80

Despite the liberal construction of the notice requirement, the appellant should avoid the following pitfalls regarding designation of the judgment or order appealed. The designation in the notice of appeal of the final order or judgment does not usually include any orders that are entered after the final judgment. A second notice of appeal is required to raise these later issues. n81 If the judgment appealed from contains several independent or separable determinations, and the notice of appeal designated only specific parts of the judgment rather than the judgment as a whole, the appellate court may not review the parts of the judgment that were not named, unless the appellant has cured the defect by otherwise indicating a clear intent to include those parts in the appeal. The court is less likely to find the necessary clear intent when the parts of the judgment are truly independent. n82 Similarly, if more than one judgment is involved, a notice of appeal that refers to only one judgment does not raise issues that were decided in any other judgment. n83

[iv] Designation of Court of Appeal

A notice of appeal must name the court to which the appeal is taken. n84 Although designation of the court to which the appeal is taken is a mandatory requirement under Appellate Rule 3(c), the defect will not preclude consideration of the appeal, n85 provided that the intention to appeal to a certain court may be inferred from the notice and the defect has not prejudiced the appellee. n86 For example, a notice is not fatally defective on the grounds of court misdesignation when the appellant's intent to appeal to a court is evidenced by the fact that a particular court is the only court to which the appellant could have appealed and the appellee has not shown that the appellee was misled by the failure to make an explicit designation. n87

In most cases in which a misdesignation of court has occurred the court may remedy the mistake. When an appeal is improperly noticed to a court that lacks jurisdiction, that court may nevertheless transfer the appeal to the proper court, as long as the notice would have been timely if filed in the proper court. n88 This situation may arise in a case that properly belongs in the Federal Circuit, because the jurisdiction of the Federal Circuit depends on the subject matter of the appeal, rather than the location of the district court, and the likelihood of making a mistake as to the proper appellate court is greater than in other cases. If the subject matter of an appeal properly belongs in the Federal Circuit, the case may be transferred by the circuit court improperly designated in the notice of appeal. n89

[d] Filing Notice of Appeal n*

[i] Requirement of Filing

An appellant taking an appeal as of right must initiate the appeal by filing a written notice of appeal with the district court clerk. n90 The timely filing of a sufficient notice of appeal is mandatory; when an appeal is not properly filed, the circuit court lacks jurisdiction over the appeal. n91 The notice of appeal must ordinarily be filed within 30 days after the judgment appealed from is entered. n92 However, any mistake in filing is not jurisdictionally fatal to the notice of

appeal. Thus, although the notice of appeal must be filed with the district court clerk, n93 if the appellant mistakenly files a timely notice in the circuit court, the notice will be treated as if it had been properly filed in the district court. If a notice of appeal is mistakenly filed in the circuit court, the circuit clerk will note the date of receipt and forward the notice to the district clerk. The notice will then be treated as if it had been filed in the district court on the date noted. n94

[ii] Process of Filing

There are several steps required to complete the process of initiating an appeal by filing. An appellant must sign the notice of appeal in handwriting n95 and file sufficient copies with the clerk. n96 However, an appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds only for the court of appeals to act as it considers appropriate, including dismissing the appeal. n97 Rather than dismissing, the appellate court also has the option to impose sanctions short of dismissal for the appellant's failure to take the necessary steps for appeal. For example, the court may impose costs on the violating party n98 or directly on counsel. n99 The attorney for the appellant should make sure to sign the notice of appeal in handwriting and to include the attorney's address and phone number, as is required of all documents filed in the district court. n100 However, the lack of a handwritten signature is not jurisdictional, and the defect may be cured by signing the notice after it has been filed; n101 on the other hand, the court of appeals may dismiss such a notice of appeal for lack of a signature. n102

At the time of filing a notice of appeal, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the service requirements of Appellate Rule 3(d). n103 In order to supply sufficient copies, the appellant's counsel must furnish enough copies for the district clerk to serve counsel of record for all parties other than the appellant, to send a copy to the circuit clerk, and, in an appeal by a defendant in a criminal case, to serve the defendant. While a failure to furnish the clerk with a sufficient number of copies at the time of filing does not affect the validity of the appeal, it could subject the appellant to dismissal if the copies are not eventually supplied. Therefore, the prudent course is to supply the clerk with all necessary copies at the time of filing. n104

[iii] Effect of Proper Filing

When a notice of appeal is filed in a timely manner, n105 and adequately contains the necessary information, n106 jurisdiction vests in the court of appeals. n107 Such a filing has the effect of immediately "transferring jurisdiction" from the district court to the court of appeals; however, the district court is divested of jurisdiction only with respect to the judgment brought up for review by the appeal. n108 Here the use of the term "transfer of jurisdiction" does not mean that the district court loses jurisdiction under the jurisdictional statutes or from the rules. It means that, under a judge-made doctrine designed to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time, n109 the district court loses power to take any further action in the proceeding, n110 except: to act in aid of the appeal; n111 to correct clerical errors in the judgment pursuant to Civil Rule 60(a); n112 or to aid in the execution of a judgment that has not been superseded. n113

However there are several exceptions to the rule of transfer of jurisdiction. Thus, jurisdiction is not transferred, and a district court may proceed with the action, if an appeal is filed from a non-appealable order. n114 Also, the district court retains authority to enforce a judgment that has not been stayed. In other words, an appeal taken from a judgment that does not finally determine the entire action does not prevent the district court from proceeding with matters not involved in the appeal. n114.1 For example, the district court is not divested of jurisdiction to award costs as to matters that are not involved in the appeal. n115 Furthermore, an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits. n116 Similarly, an appeal from a partial judgment that is appealable by the certification of the district court under Civil Rule 54(b) does not prevent the district court from adjudicating the remaining claims. n117

[e] Service of Notice of Appeal n*

An appellant is not required to serve the notice of appeal on the other parties to the action. n118 Rather, the appellant is required to furnish the district clerk with sufficient copies of the notice of appeal to enable the clerk to serve it in the manner specified in Appellate Rule 3(d). n119 The particular number of copies required will vary, depending on the number of parties and whether they are represented by separate counsel. n120

The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (excluding the appellant's) or, if a party is proceeding pro se, to the party's last known address. The clerk must also promptly send a copy of the notice of appeal and of all current and future docket entries to the clerk of the court of appeals named in the notice. The district clerk must note on each copy the date when the notice of appeal was filed. n121 The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. n122 If an inmate confined in an institution has filed a notice of appeal in accordance with Appellate Rule 4(c), the district clerk must also note the date when the clerk docketed the notice. n123

The validity of an appeal is not impaired if the district clerk fails to serve a notice of appeal. n124 However, if an appellee has received no notice of an appeal, the appellee's interests may be adversely affected by the appeal. Therefore, when an appellee has received no notice of an appeal, but would be affected by the appeal, the circuit court should not determine the appeal before the appellee is given actual notice of the appeal. n125 On the other hand, an appeal may proceed if the court of appeals determines that the appellee received actual notice from a source other than the clerk. n126 In the same way that failure of service on appellees does not affect the validity of an appeal, the failure of the clerk to transmit the required documents to the circuit court does not defeat the validity of the appeal. n127

After proper service has been initiated, service is sufficient despite the death of a party or the party's counsel. n128 Thus, service of a notice of appeal is valid notwithstanding the death of an appellee after judgment but before service. In this situation, the appellant may proceed as if the death had not occurred and then effect substitution in the circuit court. If a party entitled to appeal dies before appealing, the notice of appeal should be filed by the deceased's personal representative, but if there is none, the appeal may be taken by the deceased's attorney of record. n129

[f] Payment of Fees n*

When filing a notice of appeal, the appellant must pay the district clerk all required fees; the district clerk receives the appellate docket fee on behalf of the court of appeals. n130 In effect, Appellate rule 3(e) requires that an appellant who files a separate or joint notice of appeal from a judgment or order rendered in the district court, must pay to the district clerk all fees established by federal statute n131 as well as the appellate docket fee prescribed by the Judicial Conference of the United States. n132 The fees for filing the notice of appeal and for docketing the appeal are taxable as costs, which an appellant or appellee who prevails on the appeal will ordinarily recover. n133 Although the clerk may refuse to accept papers for filing unless they are accompanied by the required fees, failure to pay fees at that time does not affect the validity of the appeal, although it may be a basis for dismissal if the fees are not eventually paid. n134

[g] Joinder of Appeals n*

If two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. n135 Only a person who has filed a timely notice of appeal may join in an appeal. Joint appellants may file a joint notice of appeal, n136 or may join after filing separate timely notices of appeal. n137 However, a party who has not filed a timely notice of appeal may not become an appellant by joining the appeal of a party who has filed a timely notice. n138

The Appellate Rules do not provide any formal device for effecting joinder. However, because it is in the interest of judicial efficiency to encourage joint appeals, courts will not allow technicalities to prevail over substance in the allowance of joint appeals. It is clear that a simple notice of joinder served and filed in the court which has the record is

sufficient. However, the mere expression of the intent of the parties to proceed jointly may also suffice. n139 For example, the parties might indicate their intent to join by filing a joint designation of the parts of the transcript to be included in the record, n140 or a joint brief in the circuit court.

When filing a joint notice of appeal, the parties must ensure that they name the multiple appellants with specificity. The rule directs that the attorneys name each party in the caption or body of the notice, of if an attorney is representing more than one party, the attorney may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." n141 An attorney who files a notice of appeal representing more than one party must also name each party in the statement that must be filed with the circuit clerk within 14 days after filing the notice of appeal. n142

After two or more parties effectively join in an appeal, either by filing a joint notice of appeal or by joining in appeal after filing separate timely notices of appeal, they may then proceed on appeal as a single appellant. n143 Thus, they may jointly perform any acts that the rules require of a single appellant. As examples, they may serve a single designation of parts of the transcript to be included in the record on appeal, and, if necessary, a single statement of the issues to be presented on the appeal; n144 they may jointly seek an extension of time for transmitting the record and docketing the appeal; n145 and they may join in a single application for intermediate relief pending the appeal. n146 Once in the circuit court, they may file a joint brief and appendix and may offer a single argument. In fact, the court may require that parties who join in an appeal to seek the leave of the circuit court if they wish to argue separately. n147

[h] Consolidation of Appeals n*

If multiple parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals. n148 Consolidated appeals are different from joint appeals because in consolidated appeals the separate appeals do not merge into one, and the parties do not proceed as a single appellant. Furthermore, a court order is required for consolidation even if the parties stipulate to consolidation. n149

The decision of whether to consolidate appeals is in the discretion of the court of appeals. For example, a court may order consolidation if the court concludes that it will serve the interests of justice. n150 The court must have jurisdiction over each matter appealed before the court may consolidate the matters on appeal. In most circumstances, the goal of promoting judicial efficiency and economy is served by placing all related issues before the circuit court at one time, such as if both appeals present common questions of law and fact. n150.1 Consolidation may be appropriate even when severance of the appeals might save the parties time and expense and possibly reduce the workload of the circuit court. For example, in one case the court of appeals denied plaintiff's motion to sever its appeal with respect to a third defendant, because the appeals had common origin, arose out of a single trial, and were taken from a single judgment. n151

There are several circumstances when consolidation of appeals is appropriate. A court may order consolidation if the issues presented for appeal are the same. n152 A court may also order consolidation when a single party has two appeals pending in the same cause of action, or if a party is an appellee in several separate appeals involving the same question. For example, a court may order consolidation when a party files an appeal from an order resolving a postjudgment motion, after the final judgment has been appealed. n153 Similarly, when a district court enters its final decision on the merits while an interlocutory appeal is pending, the two appeals may be consolidated. n154

[2] Time for Appeal of Right n*

[a] Time Periods Start on Entry of Judgment

All of the deadlines for filing an appeal are based on the entry of the judgment or order that is the subject of the appeal. n1 A determination of when a judgment or order is "entered" for these purposes depends on whether the judgment is of

the type that requires a separate document. n2 If Civil Rule 58(a) does not require a separate document, n3 entry occurs when the judgment or order is entered in the civil docket under Civil Rule 79(a). n4 On the other hand, if Civil Rule 58(a) does require a separate document, n5 entry occurs when both: n6 (1) the judgment or order is entered in the civil docket under Civil Rule 79(a); n7 and (2) when the earlier of one of the following events occurs: the judgment or order is set forth on a separate document, n8 or 150 days have run from entry of the judgment or order in the civil docket under Civil Rule 79(a). n9 Thus, entry is effected always by writing, and it is the entry of the judgment itself that commences the time running for the filing of a notice of appeal, not a notification of judgment entry. n10

Compliance with appeal deadlines is determined as of the date the notice of appeal is filed with the district court clerk. n11 If an appellant has mistakenly filed a notice of appeal in the court of appeals rather than in the district court, the clerk of the appellate court must note on the notice the date when it was received and send the notice to the district court clerk. The notice is then considered "filed" in the district court on the date so noted. n12

[b] Ordinary Rule for Civil Cases n*

In a civil case, the notice of appeal required by Appellate Rule n13 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered. n14 The term "civil case" is not defined in Appellate Rule 4, but has been interpreted to mean any case which is not a "criminal case," which is construed narrowly to encompass only a prosecution brought by the government to secure a sentence of conviction for criminal conduct. n15 Conversely, the term "civil case" in *Fed. R. App. P. 4(a)(1)* generally is construed broadly to include any action that is not a criminal prosecution. As a result, proceedings that essentially are civil in nature are deemed to be civil cases, even though they derive from a prior criminal prosecution. n16 For example, a proceeding under the provision of criminal forfeiture statute dealing with third-party interests in forfeited property is a civil case, and the appellate procedure rule establishing time for appeal in civil case applies. n17

Exceptions to the 30-day rule apply when the United States or its officer or agency is a party, n18 when certain motions have been filed, n19 or when the appeal is by an inmate confined in an institution. n20 Additionally, in certain circumstances, the district court may extend the time for a party to file a notice of appeal if the party shows excusable neglect or good cause. n21 Failure to comply with the 30-day deadline for filing a notice of appeal precludes appeal by that party. n22

[c] When Party is United States or United States Officer or Agency

If the United States or an officer or agency of the United States is a party in a civil case, a notice of appeal must be filed with the district clerk within 60 days after entry of the order or judgment appealed from. n23 Once the United States or an officer or agency of the United States becomes a party in the district court, the 60-day appeal period applies under Appellate Rule 4(a)(1)(B), even if the United States or one of its officers or agencies is not participating in the appeal. Thus, any party to an action in which the United States is a party may avail itself of the 60-day appeal period. n24 On the other hand, although the United States may have an interest in many lawsuits, it is a "party" to litigation for purpose of the federal rules only if has formally become a party, either as one by or against whom a lawsuit is brought, or as an intervenor. n25 Furthermore, if the United States has withdrawn as a party during the course of the district court proceedings, the remaining parties may not be able to take advantage of the 60-day period to appeal from an order or judgment. n26

[d] Effect of Certain Motions Filed in District Court n*

If a party in the district court files any of the following six motions in a timely manner under the Federal Rules of Civil Procedure, the time to file an appeal begins to run for all parties from the entry of the order disposing of the last such remaining motion: n27

1. Motion for judgment under Civil Rule 50(b). n28

2. Motion to amend or make additional factual findings under Civil Rule 52(b), whether or not granting the motion would alter the judgment. n29

3. Motion for attorney's fees under Civil Rule 54, provided that the district court has extended the time to appeal pursuant to Civil Rule 58(e). n30

4. Motion to alter or amend the judgment under Civil Rule 59. n31

5. Motion for a new trial under Civil Rule 59. n32

6. Motion for relief from judgment under Civil Rule 60, provided that the motion is filed no later than 28 days after the judgment is entered. n33

If a party files a notice of appeal after the court announces or enters a judgment, but before it disposes of any of the six motions listed above, the notice becomes effective to appeal a judgment or order when the order disposing of the last such remaining motion is entered. n34 If a party intends to challenge an order disposing of any of the six motions listed above, or a judgment altered or amended on such a motion, the party must file a notice of appeal, or an amended notice of appeal, in compliance with Appellate Rule 3(c), within the time prescribed by Appellate Rule 4, measured from the entry of the order disposing of the last such remaining motion. n35 Such a party need not pay an additional appellate docket fee to file an amended notice of appeal. n36 If a party or the court initiates a rehearing on one of the motions listed above, the time for filing an appeal is delayed until the motion for rehearing is resolved, provided that the reason for the ruling goes to the propriety of the initial judgment and is not entered merely as a substitute to grant a proper extension of time to appeal by giving a party a second chance to file a timely notice of appeal. n37

The substance of a post-decision motion, not the label given to the motion by the moving party, determines whether the motion operates to delay the start of the appeal period. For example, if party files a post judgment "motion for reconsideration" within 28 days after the entry of judgment, the filing tolls the beginning of the 30 day period for filing an appeal until after the denial of the motion, because the motion could qualify as either a motion to alter or amend the judgment under Civil Rule 59(e), or a motion for relief under Civil Rule 60. n38 A motion under one of the Civil Rules enumerated above must be timely filed in order to terminate the running of time for filing a notice of appeal. n39 Furthermore, a post-decision motion that is defective or does not set forth any grounds on which it is based does not toll the running of the time for appeal. n40 However, if an otherwise timely post-decisional motion provides the general reasons in support of the motion, it will be effective to terminate the time for appeal. n41

[e] Appeal by Inmate Confined in Institution n*

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is deemed timely if it is deposited in the institution's internal mail system on or before the last day for filing, n42 regardless of when actually received by the district court clerk. n43 If an institution has a system specifically designed for legal mail, the inmate must use that system to receive the benefit of this rule. n44 Otherwise, the inmate must use any prison mail system that is in existence and that documents the time of deposit. If there is no formal prison formal mail system that documents the time, the inmate has the option of documenting the time of deposit by filing either an appropriate declaration or a notarized statement, in addition to filing the inmate's notice of appeal. n45 This mailbox rule may be used by an inmate whether or not the inmate has been or is represented by an attorney. n46

Timely filing may be shown by a declaration in compliance with *28 U.S.C. § 1746* or by a notarized statement that states the date of deposit and that first-class postage has been prepaid. n47 Appellate Rule 4(c)(1) is a codification a Supreme Court decision that held that a pro se prisoner's notice of appeal was "filed" when it was delivered to prison

authorities for forwarding to the district court. n48 If there is no prison mailing system, the inmate must file an affidavit or notarized statement specifying the precise date on which he or she left the notice of appeal with prison authorities. n49 The issue of whether an inmate submitted the notice of appeal to prison authorities before the filing deadline is a factual issue that must be determined by the district court. n50

If an inmate files the first notice of appeal in a civil case as specified above, the 14-day period provided in Appellate Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice. n51

[f] Effect of Filing Notice of Appeal Before Entry of District Court Decision n*

If a party files a notice of appeal after the district court announces a decision or order, but before the entry of the judgment or order, the notice of appeal is treated as filed on the date of and after the entry. n52 In other words, a premature notice of appeal from a verbal announcement of a final judgment may ripen into a valid notice of appeal if the final written judgment has been entered by the time the appeal is heard. n53 The Supreme Court has stated that this rule permits a notice of appeal from a verbal decision to operate as a valid notice of appeal from a final judgment only when a district court announces a decision that would have been appealable if it had been immediately followed by the entry of the written judgment. In such circumstances, an appellant's confusion about when to file a notice of appeal is understandable, and permitting the notice of appeal to become effective when judgment is entered does not take the appellee by surprise. n54 A premature notice of appeal is not valid as to any issues that are not determined as part of the decision announced by the district court prior to entry of final judgment. n55

[g] Time for Filing Multiple Appeals

If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the 30 days of entry of the judgment or order as prescribed by Appellate Rule 4(a), whichever period ends later. n56 Thus, any party to the district court proceeding whether named as an appellee in an initial appeal or not may within 14 days after the filing of the initial notice of appeal, file its own notice of appeal. n57

The purpose of this provision, which allows additional time for an appeal that is taken after an initial appeal, is simply to permit each party to a judgment to decide on the advisability of an appeal with full knowledge of the intentions of all other parties with respect to an appeal. n58 The rule is applicable even if the first appeal was filed by a party that ultimately does not have standing to appeal. n59 The rule is important in that in federal appellate practice only a party who has formally requested review within the prescribed time may seek vacation or alteration of a judgment. This principle applies equally to appeals, whether from the district court to the court of appeals, n60 or directly to the Supreme Court. n61

[h] Extension of Time for Filing Appeal n*

[i] Motion for Extension Based on Excusable Neglect or Good Cause

The district court has discretion to extend the time to file a notice of appeal if a party makes a motion no later than 30 days after the time prescribed by Appellate Rule 4(a) expires. n62 Additionally, the district court may allow an extension even if the party makes a motion for extension more than 30 days after the time prescribed by Appellate Rule 4(a) expires, but only if the moving party shows excusable neglect or good cause. n63 A motion for extension filed before the expiration of the time for taking an appeal prescribed in Appellate Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice of the motion must be given to the other parties in accordance with local rules. n64

The Supreme Court has stated that a determination of "excusable" neglect is an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include the danger of prejudice to the nonmovant, the

length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. The proper focus is on whether the neglect of both the party and counsel was excusable. n65 For example a "simple case of miscalculation" regarding deadlines is not a sufficient reason to extend time. n66 The four factors in the excusable neglect test do not carry equal weight; the most important is the reason given for the late filing. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason for delay factor is always critical to the inquiry. n67 This unequal weight is based on the Supreme Court's position that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect. n68

The second standard allowing an extension of time is for good cause. n69 The "good cause" standard is more lenient than the "excusable neglect" standard. It provides the district court with discretion to grant the extension in those circumstances that are unsuited to traditional excusable neglect analysis. The good cause standard thus applies in situations in which there is no fault, excusable or otherwise. n70 In such situations, the need for an extension of time is usually occasioned by something that is not within the control of the moving party, such as misdelivery of mail. n71

If the district court decides to grant an extension in the time for appeal, the extension may not exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later. n72 The district court lacks authority to grant an extension of longer duration, and if the district court attempts to grant such an extension, the appeal must be dismissed by the circuit court for lack of jurisdiction. n73

[ii] Motion To Reopen Time to File Appeal On Grounds of Lack of Notice

The appellate rules provide a method for a party to make a motion that the court reopen the time to appeal if the party did not receive timely notice of the entry of the court's judgment or order. Under this provision, the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, provided that all three of the following conditions are satisfied: n74

1. The court finds that the moving party did not receive service under Rule 77(d) n75 of the entry of the judgment or order sought to be appealed within 21 days after entry; n76

2. The motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives service under Rule 77(d) n77 of the entry, whichever is earlier; n78 and

3. The court finds that no party would be prejudiced. n79 "Prejudice" means some adverse consequences in addition to the cost of having to oppose the appeal and encounter the possibility of reversal of the judgment, which are consequences that are present in every appeal. n80

Once the three requirements are met the court has discretion to reopen, but is not required to reopen the time to appeal. n81 If the court does grant the motion to reopen, the court does not apply the usual 30-day or 60-day time periods for appeal under Appellate Rule 4(a)(1). Rather, the time to appeal is limited to 14 days after the date on which the order to reopen is entered. n82 The Supreme Court has held that this 14-day limit on the length of the reopening period was imposed by statute, n83 and therefore is mandatory and jurisdictional. Consequently, the district court has no power to extend that 14-day period. n84 This purpose of this provision is to afford a limited opportunity for a party to reopen the time to appeal and is a balancing of the inequity of preventing appeals by parties who do not receive actual notice of a dispositive order against the need to protect the finality of judgments. n85

Appellate Rule 4(a)(6) has been amended to make clear that reopening is possible unless the moving party has received formal notice of the judgment or order under Rule 77(d). Thus, informal notice is insufficient (1) to bar a motion to reopen the time to appeal (if the notice is received within 21 days after entry), or (2) to trigger the 14-day period for filing a motion to reopen (if the notice is received more than 21 days after entry). The amendment also establishes that

verbal communication of notice of entry of judgment alone is insufficient to prevent application of the rule. n86 When a movant denies that the movant has received notice, the district judge must then weigh the evidence and make a considered factual determination concerning receipt. n87

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 3(a).*

(n3)Footnote 2. *See §§ 28.11, 28.12.*

(n4)Footnote 3. *Karcher v. May, 484 U.S. 72, 77-80, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)* (parties entitled to appeal include those who become parties through intervention, substitution, or third-party practice); *see* [ii], *below.*

(n5)Footnote 4. *United States v. Good Samaritan Church, 29 F.3d 487, 488 (9th Cir. 1994)* .

(n6)Footnote 5. *SEC v. Wozniak, 33 F.3d 13, 14 (7th Cir. 1994)* (nonparty whose motion to intervene was denied could not wait until entry of final judgment to seek appellate review of denial of motion).

(n7)Footnote 6. *United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 (3d Cir. 1994)* (right to appeal adverse judgment where right to intervene upheld).

(n8)Footnote 7. *See United States v. LTV Corp., 746 F.2d 51, 53 (D.C. Cir. 1984)* (parties to the record include original parties and those who have become parties by intervention, substitution, or third-party practice).

(n9)Footnote 8. *Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 738 (5th Cir. 1980)* (on issue of third-party liability, when only third-party defendant appealed verdict, court found no error in holding third-party defendant liable to defendant (third-party plaintiff) for damages to plaintiff).

(n10)Footnote 9. *Karcher v. May, 484 U.S. 72, 79-81, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)* (appeal dismissed for lack of jurisdiction where appellants intervened and participated in the action in their official capacities only; after they no longer held offices, right to pursue appeal had passed under *Fed. R. App. P. 43(a)(1)* to their successors, who had withdrawn appeal).

(n11)Footnote 10. *United Airlines, Inc. v. McDonald, 432 U.S. 385, 394-395, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* (permitting intervention by member of putative class, in action brought as class action but later decertified after final judgment, for purpose of appealing decertification order); *Heckethorn v. Sunan Corp., 992 F.2d 240, 241 (9th Cir. 1993)* (plaintiff's former attorney could appeal district court order conditioning plaintiff's voluntary dismissal on former counsel's payment of attorney's fees to defendant).

(n12)Footnote 11. *Fed. R. Civ. P. 24(a).*

(n13)Footnote 12. *Nuesse v. Camp, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967)* (failure to appeal from adverse judgment may introduce element of inadequacy sufficient for interested person to intervene after judgment).

(n14)Footnote 13. *United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1179 (3d Cir. 1994)* .

(n15)Footnote 14. *Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976)* , *aff'd on other grounds*

sub nom. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (intervention timely where sought as soon as apparent that plaintiff would not appeal final order).

(n16)Footnote 15. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 594-595 (7th Cir. 1993)* (stating that unsuccessful movants for interven tion may appeal only order denying intervention).

(n17)Footnote 16. *SEC v. Forex Asset Mgmt., LLC, 242 F.3d 325, 328-330 (5th Cir. 2001)* .

(n18)Footnote 17. *Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1354 (10th Cir. 1972)* (nonparty against whom injunction was issued permitted to appeal jurisdiction).

(n19)Footnote 18. *Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 287 (7th Cir. 2002)* (lawyer need not be made party at trial level before lawyer may be ordered to disgorge fee wrongfully retained, and though not party, lawyer may appeal such order); *Aetna Life Ins. Co. v. Alla Med. Serv., Inc., 855 F.2d 1470 (9th Cir. 1988)* (sanction orders issued solely against nonparty attorneys are immediately appealable).

(n20)Footnote 19. *Gooden v. Neal, 17 F.3d 925, 935 (7th Cir. 1994)* , *cert. denied, 115 S. Ct. 73 (1994)* (cross-appeal deemed neither necessary nor appropriate); *Armotek Indus. v. Employers Ins. of Wausau, 952 F.2d 756, 759 n.3 (3d Cir. 1991)* (nonaggrieved party with no stake in outcome of appeal lacks standing to participate in appeal).

(n21)Footnote 20. *Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152 (7th Cir. 1995)* (victims of automobile accident did not have standing to appeal declaratory judgment holding that insurer did not have duty to defend alleged tortfeasor, because victims' contingent expectancy in cash value of duty to defend was not legal interest adversely affected by judgment).

(n22)Footnote 21. *In re DES Litig., 7 F.3d 20, 23 (2d Cir. 1993)* (appeal by prevailing party is possible where party is aggrieved by collateral estoppel effect of district court's rulings).

(n23)Footnote 22. *In re DES Litig., 7 F.3d 20, 24 (2d Cir. 1993)* (because personal jurisdiction and choice of law rulings did not appear on face of judgment, appellant was not aggrieved by judgment itself).

(n24)Footnote 23. *See, e.g., Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 334, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* .

(n25)Footnote 24. *Justice v. CSX Transp., Inc., 908 F.2d 119, 125 (7th Cir. 1990)* (party may not appeal judgment after settlement).

(n26)Footnote 25. *Donovan v. Penn Shipping Co., 429 U.S. 648, 649-650, 97 S. Ct. 835, 51 L. Ed. 2d 112 (1977)* (plaintiff cannot protest remittitur accepted in attempt to challenge appeal).

(n27)Footnote 26. *Westerman v. Sears, Roebuck & Co., 577 F.2d 873, 883 (5th Cir. 1978)* (plaintiff did not properly reserve right to appeal by accepting remittitur under protest).

(n28)Footnote 27. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 840-843 (7th Cir. 1978)* , *cert. denied, 440 U.S. 930 (1979)* (defendant was not prejudiced by disposition of new-trial motion where jury verdict was "unnecessarily halved" and remitted award of damages affirmed).

(n29)Footnote 28. *Dale M. v. Board of Educ., 237 F.3d 813, 815 (7th Cir. 2001)* .

(n30)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.11 (Matthew Bender 3d ed.).

(n31)Footnote 29. *See Fed. R. App. P. 3(a)(1)*; *see also Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168,*

172 (2d Cir. 2002) (noting that premature notice of appeal from nonfinal order may ripen into a valid notice of appeal of right, provided final judgment has been entered by time appeal is heard and appellee suffers no prejudice).

(n32)Footnote 30. *28 U.S.C. § 1291*. For a discussion of this final judgment rule, *see* Ch. 27, *General Appeal Principles*.

(n33)Footnote 31. For additional discussion of interlocutory orders, see Ch. 27, *General Appeal Principles*.

(n34)Footnote 32. *28 U.S.C. § 1292(a)(1)*.

(n35)Footnote 33. *28 U.S.C. § 1291(a)(2)*.

(n36)Footnote 34. *28 U.S.C. § 1291(a)(3)*.

(n37)Footnote 35. *28 U.S.C. § 1292(c)(2)*.

(n38)Footnote 36. *See 28 U.S.C. § 1292*.

(n39)Footnote 37. *28 U.S.C. § 1292(b), (d)(1),(2)*.

(n40)Footnote 38. *See § 28.11*.

(n41)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.20 (Matthew Bender 3d ed.).

(n42)Footnote 39. *Fed. R. App. P. 3(c)(1)(A)*; *see* [ii], *below*.

(n43)Footnote 40. *Fed. R. App. P. 3(c)(1)(B)*; *see* [iii], *below*.

(n44)Footnote 41. *Fed. R. App. P. 3(c)(1)(C)*; *see* [iv], *below*.

(n45)Footnote 42. *Fed. R. App. P. 3(c)(5)*.

(n46)Footnote 43. *Draper v. Coombs, 792 F.2d 915, 918 n.3 (9th Cir. 1986)* (notice of appeal need not specify precise issues raised on appeal).

(n47)Footnote 44. *Fed. R. Civ. P. 11(a)*.

(n48)Footnote 45. *Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (even though typed name on notice of appeal did not satisfy Civil Rule 11 signature requirement, appellant's failure to sign otherwise complete and timely notice of appeal did not deprive court of appeals of jurisdiction, and case could proceed if appellant promptly supplied required signature once its omission was noted).

(n49)Footnote 46. *Greer v St. Louis Reg'l Med. Ctr., 258 F.3d 843, 846 (8th Cir. 2001)* .

(n50)Footnote 47. *United States v. Michelle's Lounge, 39 F.3d 684, 691-692 (7th Cir. 1994)* (technical variance with letter requirements of notice allowed where party's action is functional equivalent).

(n51)Footnote 48. *Fed. R. App. P. 3(c)(4)*.

(n52)Footnote 49. *Slack v. McDaniel, 529 U.S. 473, 482-483, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000)* .

(n53)Footnote 50. *Torres v. Oakland Scavenger Co., 487 U.S. 312, 315-316, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* (court may not enlarge time within which notice is to be filed).

(n54)Footnote 51. *Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)* .

(n55)Footnote 52. *Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 157 (D.C. Cir. 2002)* .

(n56)Footnote 53. *Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)* .

(n57)Footnote 54. *Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)* (document met requirements, and party's motivation for filing is irrelevant).

(n58)Footnote 55. *Intel Corp. v. Terabyte Int'l., Inc., 6 F.3d 614, 618 (9th Cir. 1993)* (appellant's opening brief designating parties and judgment appealed from and naming court served as notice of appeal required by Appellate Rule 3).

(n59)Footnote 56. *Andrade v. Attorney General, 270 F.3d 743 751-752 (9th Cir. 2001)* .

(n60)Footnote 57. *Grimsley v. MacKay, 93 F.3d 676, 678 (10th Cir. 1996)* (statement in docketing statement served as functional equivalent of notice of appeal, thereby curing defect in naming defendant).

(n61)Footnote 58. *In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 837-838 (3d Cir. 1990)* (any possible impediment in notice of appeal was removed by appellants' counsel's letter, sent to court within period allowed for appeal and with copies sent to all other counsel, identifying in detail parties to appeal).

(n62)Footnote 59. *Hindes v. FDIC, 137 F.3d 148, 155-157 (3d Cir. 1998)* (appellants' motion to certify district court's order for immediate appeal, together with reply to appellees' opposition, notified parties and district court of appellants' specific intention to seek appellate review of two orders of district court and therefore was functional equivalent of notice of appeal).

(n63)Footnote 60. *Fed. R. App. P. 3(c)(1)(A)*

(n64)Footnote 61. *Fed. R. App. P. 3(c)(4).*

(n65)Footnote 62. *Fed. R. App. P. 3(c)(3)*

(n66)Footnote 63. *Fed. R. App. P. 3(c)(2)*

(n67)Footnote 64. *See Fed. R. App. P. 3(c)(1), (4)*, Committee Note to 1993 Amendments; *see also In re Continental Airlines, 125 F.3d 120, 128-129 (3d Cir. 1997)* (term "LPP Claimants" was understood by all parties and court to refer to identifiable group of individual plaintiffs who chose not to participate in settlement of claims).

(n68)Footnote 65. *Billino v. Citibank, N.A., 123 F.3d 723, 725-726 (2d Cir. 1997)* (dismissing appeal of denial of motion to substitute parties, where notice of appeal named deceased plaintiff as sole appellant, even though party in interest was personal representative, whose substitution motion had been denied).

(n69)Footnote 66. *Torres v. Oakland Scavenger Company, 487 U.S. 312, 314, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* .

(n70)Footnote 67. *Thomas v. Gunter, 32 F.3d 1258, 1262 (8th Cir. 1994)* (Appellate Rule 3(c) does not require naming of all appellees).

(n71)Footnote 68. *Weiss v. Cooley, 230 F.3d 1027, 1031 (7th Cir. 2000)* .

(n72)Footnote 69. *Yuen Jung v. Barber, 184 F.2d 491, 497 (9th Cir. 1950)* .

(n73)Footnote 70. *Chathas v. Smith, 848 F.2d 93, 94 (7th Cir. 1988)* (court noted that if appellant named all but

one defendant, and omitted defendant reasonably believed he was not subject of appeal, court could entertain motion to dismiss appeal against him); *Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1528 (11th Cir. 1987)* , *aff'd on other grounds*, *489 U.S. 169 (1989)* (when notice of appeal expressly named some opponents but failed to name one other, party not named would be unfairly prejudiced by inclusion because of lost opportunity to interpose cross-appeal).

(n74)Footnote 71. *Fed. R. App. P. 3(c)(1)(B)*

(n75)Footnote 72. *Bach v. Coughlin, 508 F.2d 303, 307 (7th Cir. 1974)* (because defendant's carefully drafted notice of appeal clearly limited appeal to only part of judgment, court considered only part designated).

(n76)Footnote 73. *Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 156-157 (D.C. Cir. 2002)* (mistake in designating judgment appealed does not result in loss of appeal, provided that intent to appeal from particular judgment can be fairly inferred from notice, and appellee is not misled by the mistake; court may find that party has complied with Appellate Rule if party's action is functional equivalent of what rule requires).

(n77)Footnote 74. *Ortiz v. John O. Butler Co., 94 F.3d 1121, 1125 (7th Cir. 1996)* , *cert. denied, 117 S. Ct. 957 (1997)* .

(n78)Footnote 75. *Haberthur v. City of Raymore, Missouri, 119 F.3d 720, 722-723 (8th Cir. 1997)* .

(n79)Footnote 76. *United States v. McGlory, 202 F.3d 664, 668 (3d Cir. 2000)* .

(n80)Footnote 77. *Town of Norwood v. New England Power Co., 202 F.3d 408, 415 (1st Cir. 2000)* .

(n81)Footnote 78. *Malone v. Vasquez, 138 F.3d 711, 715 (8th Cir. 1998)* (circuit court may waive strict requirements of Appellate Rule 3(c) if language of notice makes clear which orders appellant intends to appeal); *cf. Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (signature requirement not jurisdictional).

(n82)Footnote 79. *Torres v. Oakland Scavenger Co., 487 U.S. 312, 316, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* (mere technicalities should not stand in the way of consideration of the case on its merits); *Smith v. National Steel & Shipbuilding Co., 125 F.3d 751, 753-754 (9th Cir. 1997)* , *cert. denied, 118 S. Ct. 1559 (1998)* (circuit court exercised jurisdiction over appeal from judgment on pleadings, even though notice of appeal incorrectly identified judgment as summary judgment); *Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 771 (4th Cir. 1997)* (although notice of appeal did not specify all orders appealed from, appellant's brief provided appellees with full notice of issues being appealed, and appellees addressed those issues fully in their brief).

(n83)Footnote 80. *SEC v. Van Waeyenberghe, 990 F.2d 845, 847-848 n.3 (5th Cir. 1993)* (appellant's notice of appeal referenced first court order and not later order, but court liberally construed notice of appeal to cover both where appellant's intent was apparent from whole record).

(n84)Footnote 81. *Reed v. AMAX Coal Co., 971 F.2d 1295, 1301 (7th Cir. 1992)* (notice of appeal from final judgment was not sufficient to support review of order denying postjudgment motion to vacate under Civil Rule 60(b)).

(n85)Footnote 82. *Garcia v. City of Chicago, 24 F.3d 966, 969 n.4 (7th Cir. 1994)* , *cert. denied, 514 U.S. 1003 (1995)* (court refused to consider certain of plaintiff's claims that had not been specified in notice of appeal in matter involving several defendants, several claims, and partial settlement).

(n86)Footnote 83. *Huston v. Mitchell, 908 F.2d 275, 277-278 (8th Cir. 1990)* (although generally construed liberally, plaintiff's failure to file motion of appeal in one of two consolidated cases left no jurisdiction when both docket numbers were used to caption other motions).

(n87)Footnote 84. *Fed. R. App. P. 3(c)(1)(C)*

(n88)Footnote 85. *Cf. Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (only absolute requirement is timely filing of notice of appeal with contents that may be determined from intent of filing party).

(n89)Footnote 86. *Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389, 390, 102 S. Ct. 713, 70 L. Ed. 2d 570 (1982)* (circuit court lacked jurisdiction because appellee was prejudiced by failure to properly designate court); *see United States v. Treto-Haro, 287 F.3d 1000, 1002, n.1 (10th Cir. 2002)* (noting that when only one avenue of appeal exists, Appellate Rule 3(c)(1)(C) is satisfied even if notice of appeal does not name appellate court).

(n90)Footnote 87. *Ortiz v. John O. Butler Company, 94 F.3d 1121, 1125 (7th Cir. 1996) , cert. denied, 117 S. Ct. 957 (1997) .*

(n91)Footnote 88. *See 28 U.S.C. § 1631.*

(n92)Footnote 89. *Ramey v. Bowsher, 9 F.3d 133, 136-137 (D.C. Cir. 1993)* (transfer to Federal Circuit warranted in interests of justice in appeal in employment discrimination case).

(n93)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.30 et seq. (Matthew Bender 3d ed.).

(n94)Footnote 90. *Fed. R. App. P. 3(a)(1).*

(n95)Footnote 91. *Smith v. Barry, 502 U.S. 244, 245, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992) .*

(n96)Footnote 92. *Fed. R. App. P. 4(a)(1)(A).*

(n97)Footnote 93. *Fed. R. App. P. 3(a)(1).*

(n98)Footnote 94. *Fed. R. App. P. 4(d).*

(n99)Footnote 95. *Fed. R. Civ. P. 11(a)*; *see Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001) .*

(n100)Footnote 96. *Fed. R. App. P. 3(a)(1).*

(n101)Footnote 97. *Fed. R. App. P. 3(a)(2).*

(n102)Footnote 98. *Oliver v. Michigan State Bd. of Educ., 519 F.2d 619, 622 (6th Cir. 1975)* (court assessed costs against appellant for unnecessary exceeding of page limit by printing appendix).

(n103)Footnote 99. *Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970)* (court assessed costs against appellant's attorney for incurring unnecessary expenses caused by failure to comply with rules).

(n104)Footnote 100. *Fed. R. Civ. P. 11(a)*; *see Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* ; *see also Duran v. Carris, 238 F.3d 1268, 1271-1273 (10th Cir. 2001)* (appellate court strongly disapproved of practice of attorney ghost writing brief and providing substantial assistance to pro se appellant without acknowledging attorney's contribution by signing brief).

(n105)Footnote 101. *Becker v. Montgomery, 532 U.S. 757, 766-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001) .*

(n106)Footnote 102. *See Fed. R. App. P. 3(a)(2).*

(n107)Footnote 103. *Fed. R. App. P. 3(a)(1).*

(n108)Footnote 104. *See Fed. R. App. P. 3(a)(2).*

(n109)Footnote 105. *Fed. R. App. P. 4(a)(1)(A).*

(n110)Footnote 106. *Fed. R. App. P. 3(c)(1).*

(n111)Footnote 107. *Becker v. Montgomery, 532 U.S. 757, 767, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001) .*

(n112)Footnote 108. *International Paper Co. v. Whitson, 595 F.2d 559, 561-562 (10th Cir. 1979) .*

(n113)Footnote 109. *Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 956 (9th Cir. 1983) .*

(n114)Footnote 110. *See May v. Sheahan, 226 F.3d 876, 879-880 (7th Cir. 2000)* ; *Rutherford v. Harris County, 197 F.3d 173, 189-190 (5th Cir. 1999) .*

(n115)Footnote 111. *United States v. Black, 543 F.2d 35 (7th Cir. 1976)* (Appellate Rule 7 and Appellate Rule 8, related to bond on appeal and orders suspending, modifying, restoring, or granting an injunction during pendency of appeal, expressly direct district court to act in assistance of appeal); see *Natural Resources Defense Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166-1168 (9th Cir. 2001)* (district court has jurisdiction to modify injunction while appeal is pending provided that modification preserves status quo and does not significantly alter status of case on appeal).

(n116)Footnote 112. *Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1139 n.1 (3d Cir. 1993) , cert. denied, 511 U.S. 1004 (1994)* (clerical errors made after filing of notice of appeal did not affect finality of judgment and did not require filing of new notice of appeal).

(n117)Footnote 113. *National Serv. Indus., Inc. v. Vafla Corp. 694 F.2d 246, 250 (11th Cir. 1982)* (discovery in aid of execution of judgment is not precluded by filing of appeal).

(n118)Footnote 114. *Rains v. Flinn, 428 F.3d 893, 903-904 (9th Cir. 2005) .*

(n119)Footnote 114.1. *See McCauley v. Halliburton Energy Servs., 413 F.3d 1158, 1161 (10th Cir. 2005)* (citing **Moore's Federal Practice**).

(n120)Footnote 115. *Taylor v. Sterrett, 640 F.2d 663, 668 (5th Cir. 1981) .*

(n121)Footnote 116. *Ex parte National Enameling & Stamping Co., 201 U.S. 156, 26 S. Ct. 404, 50 L. Ed. 707 (1906) .*

(n122)Footnote 117. *Gaudiosi v. Mellon, 269 F.2d 873, 878 (3d Cir. 1959) .*

(n123)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.50 (Matthew Bender 3d ed.).

(n124)Footnote 118. *See Fed. R. App. P. 3(d)(1)*; *Smith v. White, 857 F.2d 1042, 1043 (5th Cir. 1988) .*

(n125)Footnote 119. *See Fed. R. App. P. 3(a)(1).*

(n126)Footnote 120. *See Fed. R. App. P. 3(d)(1).*

(n127)Footnote 121. *Fed. R. App. P. 3(d)(1)*; *see United States ex rel. McAllan v. City of New York, 248 F.3d 48, 53 (2d Cir. 2001) .*

(n128)Footnote 122. *Fed. R. App. P. 3(d)(3).*

(n129)Footnote 123. *Fed. R. App. P. 3(d)(2).*

(n130)Footnote 124. *Fed. R. App. P. 3(d)(3).*

(n131)Footnote 125. *Pike v. Ruby Foo's Den, Inc., 232 F.2d 683, 684 (D.C. Cir. 1956)* (notice of appeal was not mailed to appellee, so court advised appellee of situation and invited action necessary to preserve appellee's interests); *Beecher v. Leavenworth State Bank, 184 F.2d 498, 501 (9th Cir. 1950)* (when clerk failed to serve notice on one appellee, court reserved jurisdiction until appellee could be properly served).

(n132)Footnote 126. *Caspar v. Devine, 257 F.2d 197 (D.C. Cir. 1958)* (although notice of appeal was not served on appellee, appellant's brief and motion to expand time to docket record were mailed to appellee).

(n133)Footnote 127. *Fed. R. App. P. 4(d)(3).*

(n134)Footnote 128. *Fed. R. App. P. 4(d)(3).*

(n135)Footnote 129. *See Fed. R. App. P. 43.*

(n136)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.51 (Matthew Bender 3d ed.).

(n137)Footnote 130. *Fed. R. App. P. 3(e).*

(n138)Footnote 131. *28 U.S.C. § 1914.*

(n139)Footnote 132. *28 U.S.C. § 1913*; *see Fed. R. App. P. 3(e).*

(n140)Footnote 133. *See Hart v. Knox County, 171 F.2d 45, 45 (6th Cir. 1948) .*

(n141)Footnote 134. *See Fed. R. App. P. 3(a)*; *see also Olympic Ins. Co. v. H. D. Harrison, Inc., 413 F.2d 973, 974 (5th Cir. 1969)* (when appellant did not receive customary notice that fee was due, court postponed decision on motion for rehearing and called for brief on merits, noting that appeal could be dismissed if appeal was not meritorious and was taken for purpose of delay).

(n142)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.40, 303.41 (Matthew Bender 3d ed.).

(n143)Footnote 135. *See Fed. R. App. P. 3(b)(1).*

(n144)Footnote 136. *Fed. R. App. P. 3(b)(1)*; *see United States v. Suarez, 880 F.2d 626, 629 (2d Cir. 1989)* (counsel for one defendant filed joint notice for own client and other defendants, and because issues were same as to all defendants, notice of appeal was effective as to all).

(n145)Footnote 137. *Fed. R. App. P. 3(b)(2).*

(n146)Footnote 138. *Cook & Sons Equip., Inc. v. Killen, 277 F.2d 607, 609 (9th Cir. 1960)* (when only timely notice of appeal contained name of corporate defendant, individual defendants could not add names to appeal after time for appeal had run because it constituted failure to appeal); *see Browning v. Navarro, 894 F.2d 99, 100 (5th Cir. 1990)* (failure to name party in notice of appeal was found to be jurisdictional defect, and the party who failed to appeal could not share the benefit of the plaintiff's partial victory); *Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1369 (9th Cir. 1985)* (where only one party filed notice of appeal, another party, although related company, could not join in appeal).

(n147)Footnote 139. *See Rabin v. Cohen, 570 F.2d 864, 866 (9th Cir. 1978)* .

(n148)Footnote 140. *Fed. R. App. P. 10(b).*

(n149)Footnote 141. *Fed. R. App. P. 3(c)(1).*

(n150)Footnote 142. *See Fed. R. App. P. 12(b).*

(n151)Footnote 143. *See Fed. R. App. P. 3(b)(1).*

(n152)Footnote 144. *Fed. R. App. P. 10(b).*

(n153)Footnote 145. *Fed. R. App. P. 11(a), 12(a).*

(n154)Footnote 146. *Fed. R. App. P. 11(g).*

(n155)Footnote 147. *Cf. Fed. R. App. P. 34(b)* (allotting fixed time for argument to each side; parties who join in appeal constitute single side).

(n156)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 303.41 (Matthew Bender 3d ed.).

(n157)Footnote 148. *Fed. R. App. P. 3(b)(2).*

(n158)Footnote 149. *See Fed. R. App. P. 3(b)(2)*, Committee Note to 1998 Amendments.

(n159)Footnote 150. *Weaver v. University of Cincinnati, 970 F.2d 1523, 1528-1529 (6th Cir. 1992)* .

(n160)Footnote 150.1. *Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999, 1005 (6th Cir. 2006)* .

(n161)Footnote 151. *Fuller Brush Co. v. Northern States Power Co., 261 F.2d 340, 342 (8th Cir. 1958)* .

(n162)Footnote 152. *United States v. Ford Motor Co., 574 F.2d 534, 543 (D.C. Cir. 1978)* (court consolidated appeals of similarly situated appellants with respect to issuance of defect notification for vehicle).

(n163)Footnote 153. *Terket v. Lund, 623 F.2d 29, 33-34 (7th Cir. 1980)* (if appeal of order is properly filed before pending appeal is fully briefed and argued, two appeals may be consolidated in circuit court).

(n164)Footnote 154. *Weaver v. University of Cincinnati, 970 F.2d 1523, 1528-1529 (6th Cir. 1992)* (in interest of judicial economy, appeals should have been consolidated when district court entered final decision on merits while interlocutory appeal was pending).

(n165)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.10 et seq. (Matthew Bender 3d ed.).

(n166)Footnote 1. *Fed. R. App. P. 4(a)(1)(A).*

(n167)Footnote 2. *Fed. R. App. P. 4(a)(7)(A).*

(n168)Footnote 3. *See Fed. R. Civ. P. 58(a).*

(n169)Footnote 4. *Fed. R. App. P. 4(a)(7)(A)(i); see Fed. R. Civ. P. 79(a).*

(n170)Footnote 5. *See Fed. R. Civ. P. 58(a).*

(n171)Footnote 6. *See Solis v. Los Angeles, 514 F.3d 946, 951 (9th Cir. 2008)* .

(n172)Footnote 7. *See Fed. R. Civ. P. 79(a)(2)(C).*

(n173)Footnote 8. *See Chambers v. City of Fordyce, 508 F.3d 878, 881 (8th Cir. 2007)* .

(n174)Footnote 9. *Fed. R. App. P. 4(a)(7)(A)(ii)*; *see Fed. R. Civ. P. 79(a)(2)(C).*

(n175)Footnote 10. *Nguyen v. Southwest Leasing and Rental, Inc., 282 F.3d 1061, 1066 (9th Cir. 2002)* .

(n176)Footnote 11. *Fed. R. App. P. 3(a)(1)*; *see* [1][d], *above.*

(n177)Footnote 12. *See Fed. R. App. P. 4(d).*

(n178)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.11 (Matthew Bender 3d ed.).

(n179)Footnote 13. *See Fed. R. App. P. 3(a)(1), (c)*; *see also* [1], *above.*

(n180)Footnote 14. *Fed. R. App. P. 4(a)(1)(A).*

(n181)Footnote 15. *Impounded, 277 F.3d 407, 410-411 (3d Cir. 2002)* .

(n182)Footnote 16. *Impounded, 277 F.3d 407, 410-411 (3d Cir. 2002)* (proceeding that is essentially civil in nature is deemed to be civil case, even though case may have arisen from prior criminal prosecution).

(n183)Footnote 17. *United States v. Lavin, 942 F.2d 177, 181 (3d Cir. 1991)* .

(n184)Footnote 18. *See Fed. R. App. P. 4(a)(1)(B)*; [c], *below.*

(n185)Footnote 19. *See Fed. R. App. P. 4(a)(4)*; [d], *below.*

(n186)Footnote 20. *See Fed. R. App. P. 4(c)*; [e], *below.*

(n187)Footnote 21. *See Fed. R. App. P. 4(a)(5)(A)*; [h], *below.*

(n188)Footnote 22. *Graphic Communications International Union v. Quebecor Printing Providence, Inc, 270 F.3d 1, 3-4 (1st Cir. 2001)* .

(n189)Footnote 23. *Fed. R. App. P. 4(a)(1)(B)*; *see Cohen v. Empire Blue Cross & Blue Shield, 176 F.3d 35, 41-42 (2d Cir. 1999)* (agency defined for purposes of this rule).

(n190)Footnote 24. *Fed. R. App. P. 4(a)(1)(B)* (notice of appeal may be filed by any party within 60 days); *see Cheney v. United States Dist. Court, 542 U.S. 367, 378-379, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)* .

(n191)Footnote 25. United States ex rel. Eisenstein v. City of New York, ___U.S. ___, ___, *129 S. Ct. 2230, 173 L. Ed. 2d 1255, 1261-1263 (2009)* (when United States declined to intervene in a privately initiated False Claims Act action, it was not "party" to litigation for purposes of *Federal Rule of Appellate Procedure 4*, consequently notice of appeal was untimely).

(n192)Footnote 26. *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy, 588 F.2d 1327, 1329 (10th Cir. 1978)* , *cert. denied, 444 U.S. 839 (1979)* .

(n193)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.13 (Matthew Bender 3d ed.).

(n194)Footnote 27. *Fed. R. App. P. 4(a)(4)(A)*; *see Hodge v. Hodge, 269 F.3d 155, 157-158 (2d Cir. 2001)* (timely filing of any of these postjudgment motions resets clock until district court enters order disposing of last such remaining motion, at which point a new 30-day period begins; noting also that untimely motion ineffective to delay running of time for filing notice of appeal).

(n195)Footnote 28. *Fed. R. App. P. 4(a)(4)(A)(i)*; *see Fed. R. Civ. P. 50(b)*.

(n196)Footnote 29. *Fed. R. App. P. 4(a)(4)(A)(ii)*; *see Fed. R. Civ. P. 52(b)*.

(n197)Footnote 30. *Fed. R. App. P. 4(a)(4)(A)(iii)*; *see Fed. R. Civ. P. 54(d)(2)*; *Fed. R. Civ. P. 58(e)*.

(n198)Footnote 31. *Fed. R. App. P. 4(a)(4)(A)(iv)*; *see Fed. R. Civ. P. 59(e)*.

(n199)Footnote 32. *Fed. R. App. P. 4(a)(4)(A)(v)*; *see Fed. R. Civ. P. 59(a)-(c)*.

(n200)Footnote 33. *Fed. R. App. P. 4(a)(4)(A)(vi)*; *see Fed. R. Civ. P. 60*.

(n201)Footnote 34. *Fed. R. App. P. 4(a)(4)(B)(i)*.

(n202)Footnote 35. *Fed. R. App. P. 4(a)(4)(B)(ii)*.

(n203)Footnote 36. *Fed. R. App. P. 4(a)(4)(B)(iii)*.

(n204)Footnote 37. *Sante Fe Snyder Corp. v. Norton, 385 F.3d 884, 887-888 (5th Cir. 2004)* .

(n205)Footnote 38. *See Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 106 (2d Cir. 1998)* (construing former time periods).

(n206)Footnote 39. *Scola v. Beaulieu Wielsbeke, N.V., 131 F.3d 1073, 1074-1075 (1st Cir. 1997)* (untimely Civil Rule 59(e) motion does not toll time for filing appeal, and district court had no power to extend time for filing Civil Rule 59(e) motion; construing former time periods).

(n207)Footnote 40. *Riley v. Northwestern Bell Tel. Co., 1 F.3d 725, 727 (8th Cir. 1993)* (no grounds set forth for motion).

(n208)Footnote 41. *Werth v. Makita Electric Works, Ltd., 950 F.2d 643, 647 (10th Cir. 1991)* (although plaintiff's assignments of error were made in general terms, they clearly stated the particular grounds relied on).

(n209)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.40 et seq. (Matthew Bender 3d ed.).

(n210)Footnote 42. *Fed. R. App. P. 4(c)(1)*.

(n211)Footnote 43. *Ingram v. Jones, 507 F.3d 640, 643 (7th Cir. 2007)* .

(n212)Footnote 44. *Fed. R. App. P. 4(c)(1)*.

(n213)Footnote 45. *United States v. Ceballos-Martinez, 371 F.3d 713, 716-717 (10th Cir. 2004)* (citing **Moore's Federal Practice**); *see also Grady v. United States, 269 F.3d 913, 918 (8th Cir. 2001)* .

(n214)Footnote 46. *United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004)* .

(n215)Footnote 47. *Fed. R. App. P. 4(c)(1).*

(n216)Footnote 48. *Houston v. Lack, 487 U.S. 266, 270, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)* .

(n217)Footnote 49. *Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001)* (appellant has burden to prove that preconditions to the exercise of appellate jurisdiction have been met, including timely filing of notice of appeal).

(n218)Footnote 50. *See, e.g., Oliver v. Commissioner of Mass. Dep't of Corrections, 30 F.3d 270, 272* (1st Cir. 1994).

(n219)Footnote 51. *Fed. R. App. P. 4(c)(2).*

(n220)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.12 (Matthew Bender 3d ed.).

(n221)Footnote 52. *Fed. R. App. P. 4(a)(2).*

(n222)Footnote 53. *DeJohn v. Temple Univ., 537 F.3d 301, 307 (3d Cir. 2008)* .

(n223)Footnote 54. *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 275-276, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991)* ; *see DeJohn v. Temple Univ., 537 F.3d 301, 307 (3d Cir. 2008)* .

(n224)Footnote 55. *In re Jack Raley Constr., Inc., 17 F.3d 291, 294 (9th Cir. 1994)* .

(n225)Footnote 56. *Fed. R. App. P. 4(a)(3)*; *In re Julien Co., 146 F.3d 420, 423 (6th Cir. 1998)* (Appellate Rule 4(a)(3) provides extra 14 days for filing additional appeals when first notice of appeal has been filed by any party, and rule does not specify that first appeal must have been "valid" appeal).

(n226)Footnote 57. *Jackson Jordan, Inc. v. Plasser Am. Corp., 725 F.2d 1373, 1374-1376 (Fed. Cir. 1984)* (plaintiff's appeal was timely, even though not filed within 30 days of entry of judgment, when it was filed within 14 days of defendant's appeal).

(n227)Footnote 58. *Kurdziel v. Pittsburgh Tube Co., 416 F.2d 882, 885, 51 Ohio Op. 2d 85 (6th Cir. 1969)* .

(n228)Footnote 59. *In re Julien Co., 146 F.3d 420, 423 (6th Cir. 1998)* .

(n229)Footnote 60. *Duriso v. K-Mart No. 4195, Div. of S. S. Kresge Co. No. 4195, 559 F.2d 1274, 1278 (5th Cir. 1977)* .

(n230)Footnote 61. *See United States v. American Ry. Express Co., 265 U.S. 425, 435, 44 S. Ct. 560, 564, 68 L. Ed. 1087 (1924)* .

(n231)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 304.14 (Matthew Bender 3d ed.).

(n232)Footnote 62. *Fed. R. App. P. 4(a)(5)(A)(i)*; *Alva v. Teen Help, 469 F.3d 946, 949-950 (10th Cir. 2006)* (motion must be directed to and decided in discretion of district court).

(n233)Footnote 63. *Fed. R. App. P. 4(a)(5)(A)(i)*; *see McCarty v. Astrue, 528 F.3d 541, 544-545 (7th Cir. 2008)* (discretion of district court to determine excusable neglect); *Fed. R. App. P. 4(a)(5)(A)*, Committee Note to 2002 Amendments.

(n234)Footnote 64. *Fed. R. App. P. 4(a)(5)(B).*

(n235)Footnote 65. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 391-392, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* .

(n236)Footnote 66. *Marquez v. Mineta, 424 F.3d 539, 541 (7th Cir. 2005)* .

(n237)Footnote 67. *Gibbons v. United States, 317 F.3d 852, 854 (8th Cir. 2003)* .

(n238)Footnote 68. *Graphic Communications International Union v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5-6 (1st Cir. 2001)* .

(n239)Footnote 69. *Fed. R. App. P. 4(a)(5)(A)(ii)*; *see Asbestos Pers. Injury Plaintiffs v. Travelers Indem. Co. (In re Johns-Manville Corp.), 476 F.3d 118, 124 (2d Cir. 2007)* (further extension allowed for either excusable neglect or good cause).

(n240)Footnote 70. *See Haus v. Bechtel Jacobs Co., 347 F. Supp. 2d 402, 403 (W.D. Ky. 2004)* .

(n241)Footnote 71. *Bishop v. Corsentino, 371 F.3d 1203, 1206-1207 (10th Cir. 2004)* .

(n242)Footnote 72. *Fed. R. App. P. 4(a)(5)(C)*.

(n243)Footnote 73. *See Certain Underwriters at Lloyds of London v. Evans, 896 F.2d 1255, 1256-1258 (10th Cir. 1990)* (construing former time periods).

(n244)Footnote 74. *28 U.S.C. § 2107(c)*; *Fed. R. Civ. P. 4(a)(6)(A)-(C)*.

(n245)Footnote 75. *See Fed. R. Civ. P. 77(d)(1)*.

(n246)Footnote 76. *Fed. R. App. P. 4(a)(6)(A)*; *see Fed. R. Civ. P. 77(d)(2)*.

(n247)Footnote 77. *See Fed. R. Civ. P. 77(d)(1)*.

(n248)Footnote 78. *Fed. R. App. P. 4(a)(6)(B)*; *see Fed. R. Civ. P. 77(d)(2)*.

(n249)Footnote 79. *Fed. R. App. P. 4(a)(6)(C)*.

(n250)Footnote 80. *Cordon v. Greiner, 274 F. Supp. 2d 434, 441 (S.D.N.Y. 2003)* .

(n251)Footnote 81. *American Boat Co. v. Unknown Sunken Barge, 418 F.3d 910, 913 (8th Cir. 2005)* .

(n252)Footnote 82. *Fed. R. App. P. 4(a)(6)*.

(n253)Footnote 83. *See 28 U.S.C. § 2107(c)*.

(n254)Footnote 84. *Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 2363-2364, 168 L. Ed. 2d 96 (2007)* (court erred by reopening time to appeal for 17 days).

(n255)Footnote 85. *Vencor Hosps. v. Std. Life & Accident Ins. Co., 279 F.3d 1306, 1309 (11th Cir. 2002)* .

(n256)Footnote 86. *Fed. R. App. P. 4(a)(6)*, Committee Note to 2005 Amendments; *see Fed. R. Civ. P. 5(b)* (formal service of written document); *Fed. R. Civ. P. 77(d)(1)*.

(n257)Footnote 87. *American Boat Co. v. Unknown Sunken Barge, 418 F.3d 910, 913-914 (8th Cir. 2005)* .

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART II. RIGHTS AND DUTIES OF APPEAL FROM PARTICULAR TYPES OF ADJUDICATIONS
A. APPEAL FROM DISTRICT COURT JUDGMENT OR ORDER

3-28 Moore's Manual--Federal Practice and Procedure § 28.11

§ 28.11 Appeal By Permissionn*

[1] Introduction

The purpose of Appellate Rule 5 is to regulate the procedure for a party to follow in seeking the permission of the circuit court to appeal when the appeal is within the court of appeals' discretion. Appellate Rule 5 governs all discretionary appeals from a district court's or magistrate judge's order, judgment, or decree. n1 Appellate Rule 5 therefore covers appeal by permission from a district court under *28 U.S.C. § 1292(b)*, *(c)*, and *(d)*. n2 Appellate Rule 5 was also promulgated to cover any new statutes or rules authorizing discretionary interlocutory appeals. n3 The rule does not apply to interlocutory appeals under *28 U.S.C. § 1292(a)*, which may be taken as of right; the appeal taken as of right must be taken in the manner and within the time provided by Appellate Rules 3 and 4. n4

[2] Procedure to File Petition for Permission to Appeal

When an appeal is within the court of appeals' discretion, a party may request permission to appeal only by filing a written petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action. n1 The appellant must file an original petition and three copies unless the court requires a different number by local rule or by order in the particular case. n2 The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Appellate Rule 4(a) for filing a notice of appeal as of right. n3 It is mandatory that the appellant file a petition because the petition informs the circuit court of appellant's desire to appeal in a manner that allows the circuit court to respond promptly. n4 Consequently, for a permissive appeal, filing a notice of appeal instead of an Appellate Rule 5 petition will not preserve a party's right to seek appellate review, nor will a notice of appeal preserve appellate jurisdiction if an Appellate Rule 5 petition is not filed or is untimely filed. n5

If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order. n6 Appellate Rule 5(a)(3) does not specify a time limit within which a district court may amend an interlocutory order to include the required permission or statement. n7 However, if a party takes an excessive delay in

seeking an amendment, the district court may deny a motion to amend. n8 Similarly, the circuit court may deny a petition when the interlocutory order on which it is based was amended after an excessive delay. n9

[3] Contents of the Petition

A petition for permission to file an appeal must include all of the following five elements:

1. The facts necessary to understand the question presented on appeal. n1

2. The question itself. n2

3. The relief sought. n3

4. The reasons why the appeal should be allowed and is authorized by a statute or rule. n4

5. An attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, and any order stating the district court's permission to appeal or finding that the necessary conditions are met. n5

In addition to the five required items specified above, counsel may want to include in the petition a statement regarding any exceptional circumstances, n6 because some circuits have stated that appeals of interlocutory orders should be granted only in exceptional circumstances in which an immediate appeal would avoid protracted and expensive litigation. n7

The contents of the petition must not exceed 20 pages except by the court's permission; this length limitation is exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Appellate Rule 5(b)(1)(E). n8 The latter include attached copies of the order, decree, or judgment being appealed, and any order stating the district court's permission to appeal. n9 Additionally, all papers must conform to Appellate Rule 32(a)(1), n10 which specifies requirements such as printing, copying processes, typeface, paper requirements and binding requirements. n11

[4] Response to Petition

A party may file an answer in opposition or a cross-petition within 10 days after the petition is served. n1 Service of the answer is not specifically required by Appellate Rule 5. However, Appellate Rule 25(b) requires service on all parties of all papers required to be filed, and Appellate Rule 25(d) requires proof of service to be filed. n2 If a party wants to make a cross-appeal, the petition must be filed within 10 days of entry of the district court's certified order. Failure to file within this time will bar review by the circuit court for lack of jurisdiction over the cross-appeal. n3

The court or appeals will consider the petition and answer without oral argument, unless the court orders otherwise. n4

[5] Procedure on Circuit Court's Grant of Permission to Appeal

If the circuit court enters an order pursuant to Appellate Rule 5 that grants permission for the petitioner to appeal an order, within 14 days of the entry of appeal the moving party must (1) pay to the district clerk required fees, n1 and (2) file a bond for any costs required under Appellate Rule 7. n2 The district court clerk must notify the circuit court clerk once the petitioner has paid the fees. On receiving this notice, the circuit clerk must enter the appeal on the docket. The district clerk then must forward and file the record in accordance with Appellate Rules 11 and 12(c). n3

A notice of appeal need not be filed for a permissive appeal. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under the Appellate Rules. n4 When a circuit court grants permission for an appeal, the court is allowing appeal from the interlocutory order of the district court. It is the

order that is appealable and not necessarily the controlling question identified by the district court. Therefore, the appeal is not limited to the particular questions or issues specified in the district court's certification, and the circuit court may address any issue necessary to decide the appeal. n5 In addition, the circuit court is not bound by the district court's formulation of the questions of law as presented in its order. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 305.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 5(a)(1)*; *see also Fed. R. App. P. 3(a)(3)* (appeal from judgment by magistrate judge in civil case is taken in the same way as appeal from any other district court judgment).

(n3)Footnote 2. *28 U.S.C. § 1292(b)-(d)*; *see* Ch. 27, *General Appeal Principles*.

(n4)Footnote 3. *Fed. R. App. P. 5(a)*, Committee Note to 1998 Amendments.

(n5)Footnote 4. *See § 28.10*.

(n6)Footnote 1. *Fed. R. App. P. 5(a)(1)*.

(n7)Footnote 2. *Fed. R. App. P. 5(c)*.

(n8)Footnote 3. *Fed. R. App. P. 5(a)(2)*; *see § 28.10[2]*.

(n9)Footnote 4. *Aucoin v. Matador Servs., Inc., 749 F.2d 1180, 1181 (5th Cir. 1985)* .

(n10)Footnote 5. *Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1003 (3d Cir. 1992)* (untimely notice of appeal not effective to vest jurisdiction in appellate court); *Myles v. Laffitte, 881 F.2d 125, 127 (4th Cir. 1989)* (late filing deprives appellate court of jurisdiction to consider appeal).

(n11)Footnote 6. *Fed. R. App. P. 5(a)(3)*.

(n12)Footnote 7. *International Union, United Auto. Workers v. Midland Steel Prods., Co., 771 F. Supp. 860, 861 (N.D. Ohio 1991)* .

(n13)Footnote 8. *Ferraro v. United States Dep't of Health & Human Servs., 780 F. Supp. 978, 979 (E.D.N.Y. 1992)* (motion to amend denied by district court after two and a half month delay without justification).

(n14)Footnote 9. *Weir v. Propst, 915 F.2d 283, 287 (7th Cir. 1990)* (amendment after two month delay was ruled abuse of district court's discretion).

(n15)Footnote 1. *Fed. R. App. P. 5(b)(1)(A)*.

(n16)Footnote 2. *Fed. R. App. P. 5(b)(1)(B)*.

(n17)Footnote 3. *Fed. R. App. P. 5(b)(1)(C)*.

(n18)Footnote 4. *Fed. R. App. P. 5(b)(1)(D)*.

(n19)Footnote 5. *Fed. R. App. P. 5(b)(1)(E).*

(n20)Footnote 6. *See Durant v. Servicemaster Co. Trugreen, Inc., 147 F. Supp. 2d 744, 752 (E.D. Mich. 2001)* .

(n21)Footnote 7. *See United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)* (order granting interlocutory appeal vacated in contract litigation that was not exceptional); *Mateo v. M/S KISO, 805 F. Supp. 792, 799-801 (N.D. Cal. 1992)* (plaintiffs failed to meet their burden of showing that exceptional circumstances existed for interlocutory appeal).

(n22)Footnote 8. *Fed. R. App. P. 5(c).*

(n23)Footnote 9. *See Fed. R. App. P. 5(b)(1)(E).*

(n24)Footnote 10. *Fed. R. App. P. 5(c).*

(n25)Footnote 11. *See Fed. R. App. P. 32(a)(1).*

(n26)Footnote 1. *See Fed. R. App. P. 5(b)(2).*

(n27)Footnote 2. *Fed. R. App. P. 25.*

(n28)Footnote 3. *Tranello v. Frey, 962 F.2d 244, 247-248 (2d Cir. 1992)* (cross appeal dismissed for lack of appellate jurisdiction when not filed in timely manner; construing former time periods).

(n29)Footnote 4. *See Fed. R. App. P. 5(b)(3).*

(n30)Footnote 1. *Fed R. App. P. 5(d)(1)(A).*

(n31)Footnote 2. *Fed R. App. P. 5(d)(1)(B)*; *see Fed R. App. P. 7.*

(n32)Footnote 3. *Fed R. App. P. 5(d)(3)*; *see Fed R. App. P. 11, 12.*

(n33)Footnote 4. *Fed R. App. P. 5(d)(2).*

(n34)Footnote 5. *Dailey v. National Hockey League, 987 F.2d 172, 175 (3d Cir. 1993) , cert. denied, 510 U.S. 816 (1993)* .

(n35)Footnote 6. *Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204-205, 116 S. Ct. 619, 623, 133 L. Ed. 2d 578 (1996)* (citing **Moore's Federal Practice** for proposition that circuit court may exercise jurisdiction over any question fairly included within certified order).

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§ 28.12 Appeal In Bankruptcy Casesn*

[1] Appeal From Decision of District Court Exercising Original Jurisdiction in Bankruptcy Case

An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under *28 U.S.C. § 1334* is taken as any other civil appeal under the Appellate Rules. n1

The district courts have original but not exclusive jurisdiction in bankruptcy matters. n2 District courts have authority to refer bankruptcy cases to the bankruptcy court of each district, n3 and each district has made this reference automatic by local rule. n4 However, a district court exercises original jurisdiction in a bankruptcy case in three situations, and decisions in these situations are subject to appeal: when it enters an order or judgment in a noncore proceeding; n5 when it reviews a bankruptcy judge's proposed findings and conclusions in a noncore proceeding; n6 and when it makes a decision after it has withdrawn a case referred to a bankruptcy judge. n7

[2] Appeal From Decision of District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in Bankruptcy Case

[a] Applicability of General Appellate Rules

Most of the Federal Rules of Appellate Procedure that are applicable to appeals in general also apply to an appeal to a court of appeals under *28 U.S.C. § 158(d)* from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under *28 U.S.C. § 158(a)* or *(b)*. n1 However, there are 3 exceptions:

1. Rules *4(a)(4)*, *4(b)*, *9*, *10*, *11*, *12(b)*, 13-20, 22-23, and *24(b)* do not apply; n2

2. The reference in Appellate Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; n3 and

3. when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel." n4

[b] Additional Applicable Rules

[i] Additional Rules Applicable to Appeals from Courts Exercising Appellate Jurisdiction in Bankruptcy Case

In addition to the general rules made applicable by Appellate Rule 6(b)(1), special rules apply to an appeal to a court of appeals from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction. n5 These additional rules contain regulations regarding motions for rehearing n6 and requirements for the record on appeal. n7

[ii] Motion for Rehearing

If a party files a timely motion for rehearing under *Bankruptcy Rule 8015*, n8 the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree, but before disposition of the motion for rehearing, becomes effective when the order disposing of the motion for rehearing is entered. n9 Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party that intends to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Appellate Rule 4, excluding Rules 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. n10 No additional fee is required to file an amended notice. n11

[iii] Record on Appeal

When a party takes an appeal to a court of appeals from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction, three special rules apply regarding the record on appeal:

1. *Filing of Record On Appeal*. Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with *Bankruptcy Rule 8006*, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. n12 If an appellee believes that other parts of the record are necessary, the appellee must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. n13 The record on appeal consists of the redesignated record as specified in the previous sentence; the proceedings in the district court or bankruptcy appellate panel; and a certified copy of the docket entries prepared by the clerk under Appellate Rule 3(d). n14

2. *Forwarding the Record*. When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt. n15 All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent. n16

3. *Filing the Record*. When the circuit court clerk receives the record, or a certified copy of the docket entries sent in place of the redesignated record, the clerk must file it and immediately notify all parties of the filing date. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsAppealsGeneral OverviewBankruptcy LawPractice & ProceedingsAppealsJurisdictionBankruptcy LawPractice & ProceedingsAppealsProcedures

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 306.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed R. App. P. 6(a)*; *see 28 U.S.C. § 1334* (district court may exercise original jurisdiction in a bankruptcy case).

(n3)Footnote 2. *28 U.S.C. § 1334*.

(n4)Footnote 3. *See 28 U.S.C. § 157(a)*.

(n5)Footnote 4. *See* 1 Collier on Bankruptcy, Ch. 3, *Jurisdiction and Powers of District Courts and Bankruptcy Courts* (Matthew Bender 16th ed.).

(n6)Footnote 5. *28 U.S.C. § 1334*. Noncore matters are specified in *28 U.S.C. § 157*.

(n7)Footnote 6. *28 U.S.C. § 157(c)(1)*.

(n8)Footnote 7. *28 U.S.C. § 157(d)*.

(n9)Footnote 1. *Fed R. App. P. 6(b)(1)*.

(n10)Footnote 2. *Fed R. App. P. 6(b)(1)(A)*.

(n11)Footnote 3. *Fed R. App. P. 6(b)(1)(B)*.

(n12)Footnote 4. *Fed R. App. P. 6(b)(1)(C)*.

(n13)Footnote 5. *Fed R. App. P. 6(b)(2)*.

(n14)Footnote 6. *See* [ii], *below*.

(n15)Footnote 7. *See* [iii], *below*.

(n16)Footnote 8. *See Fed. R. Bankr. P. 8015*.

(n17)Footnote 9. *Fed R. App. P. 6(b)(2)(A)(i)*.

(n18)Footnote 10. *Fed R. App. P. 6(b)(2)(A)(ii)*.

(n19)Footnote 11. *Fed R. App. P. 6(b)(2)(A)(iii)*.

(n20)Footnote 12. *Fed R. App. P. 6(b)(2)(B)(i)*.

(n21)Footnote 13. *Fed R. App. P. 6(b)(2)(B)(ii)*. Thus, the responsibility for any omissions or gaps in the appellate record is on the party whose claim of error depends for its support on any portion of the record of the proceedings below that was omitted from designation of record on appeal. *In re Abijoe Realty Corp., 943 F.2d 121, 123-124 (1st Cir. 1991)* .

(n22)Footnote 14. *Fed R. App. P. 6(b)(2)(B)(iii)*.

(n23)Footnote 15. *Fed R. App. P. 6(b)(2)(C)(i).*

(n24)Footnote 16. *Fed R. App. P. 6(b)(2)(C)(ii).*

(n25)Footnote 17. *Fed R. App. P. 6(b)(2)(D).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.13

§ 28.13 Bond for Costs on Appealn*

[1] District Court May Require Bond in Civil Case

Under the terms of Appellate Rule 7, the district court may require that the appellant in a civil case file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. n1 The purpose of the bond is to give the appellee security for the payment of such costs as may be awarded under the provisions of Appellate Rule 39 in the event that the appellant is unsuccessful in the appeal. n2 This bond for costs under Appellate Rule 7 is prospective, and must be distinguished from the supersedeas bond under Appellate Rule 8, which is a retrospective bond filed to obtain a stay of execution of the judgment, and which must normally be in a sum sufficient to pay the underlying judgment and all costs, interest, and damages for delay. n3 The filing of a supersedeas bond is never mandatory. n4

The district court generally may require the appellant in any civil case to file a bond to ensure the payment of costs on appeal. n5 However, certain persons are exempt by statute from giving security for costs. A person proceeding in forma pauperis does not need to post a bond for costs, n6 provided that a party who will proceed in forma pauperis must make an affidavit that he or she is unable to pay costs or give security. n7 Seamen who institute and prosecute appeals in their own names and for their own benefit for wages or the enforcement of laws enacted for their health or safety are also exempt by statute from furnishing security. n8 Additionally, the United States government and United states entities are exempt from posting a bond for costs n9

[2] Amount of Bond

The district court has considerable discretion in the determination of the amount and nature of the bond for costs on appeal. n1 Thus, the district court may allow an alternative method of security, such as a deed to an interest in land. The circuit court will overrule the nature or amount of the bond set by the district court only if it finds that the district court abused its discretion in requiring too large a bond. n2 The amount of the bond imposed may be in any amount necessary to cover the costs of defending the appeal. n3 Thus, bonds of $5000 are commonly imposed. n4 If the amount of the bond fixed by the district court exceeds the estimated costs to defend the appeal, the circuit court will reduce the bond. n5

An appellee may make a motion to the district court requesting that it require the appellant to file a bond that will cover the anticipated costs of appeal. n6 If the court does not believe that the appellee has justified the amount of the bond requested, the court will require a bond only in the amount it determines appropriate. n7 A district court may not require an extremely large bond merely because it believes the appeal is frivolous. n8 In such cases, Appellate Rule 38, which authorizes the circuit court to award damages for a frivolous appeal, is the appropriate remedy. n9 However, a court may consider the costs of anticipated sanctions in an appeal in its determination of the amount of bond it will impose to cover an appeal that it implicitly deems frivolous. n10

[3] Bond Generally Need Not Cover Attorney's Fees

The court should generally not consider attorney's fees in determining the amount of a bond, because fees are not considered to be costs under Appellate Rule 7. n1 However, a district court may make a bond larger in cases in which the applicable substantive law makes an attorney's fee recoverable as part of the costs of suit. For example, the Copyright Act allows attorney's fees to be levied "as part of the costs." n2 Therefore, in a copyright infringement case, the amount of the appeal bond may be set to cover the appellee's attorney's fees as well as other standard cost items on appeal. n3 Another statute imposing attorney's fees as costs is the civil rights statute. n4

[4] Effect of Failure to File Bond

If the appellant fails to post the required bond, the circuit court may dismiss the appeal. n1 However, such failure does not automatically result in a dismissal, based on the court's discretion. n2 Thus, a circuit court may determine the merits of an appeal despite failure to comply with an order to post bond. n3 In one case, the circuit court reached the merits of the appeal and rejected it as frivolous; it also held that the attorney who filed the appeal without posting the required $3000 bond was personally liable for costs. n4

[5] Filing of Bond Submits Surety to Jurisdiction of Court

The final sentence of Appellate Rule 7 provides that the provisions of Appellate Rule 8(b) apply to a surety on a bond given pursuant to the rule. n1 This sentence in effect adds to Appellate Rule 7 the provisions of Appellate Rule 8(b) dealing with enforcement of a surety's liability on the bond, a procedure identical to that found in Civil Rule 65.1. Thus, the surety on a bond for costs filed with a district court is subject to that court's jurisdiction. n2 Furthermore, by giving bond to secure the payment of the costs on appeal, the surety irrevocably appoints the clerk of the district court as the agent on whom any papers affecting the liability on the bond may be served and agrees that the liability may be determined on motion filed in the district court without the necessity of an independent action. That practice provides a simple, expeditious, and inexpensive manner of determining the liability of the surety. All that the party who elects to proceed against a surety for unpaid costs need do is to file a motion for an order directing the surety to pay the costs, accompanied by such affidavits in support of the motion as are necessary. Service of the motion and accompanying affidavits and such notice of the motion as the court prescribes gives the district court jurisdiction. Motion and notice may be served on the clerk of the district court, who is required to mail copies to the sureties if their addresses are known. Counsel should ensure that the surety receives actual notice, because it has been held that a judgment against the surety may not stand where notice has not been given. n3 Although Rules 7 and 8 refer only to enforcement of the surety's liability on a cost bond, the principal's liability may also be enforced in a summary proceeding on motion and notice. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney Fees

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 307.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed R. App. P. 7.*

(n3)Footnote 2. *Lundy v. Union Carbide Corp., 598 F. Supp. 451, 452 (D. Or. 1984)* (when appellees made no attempt to estimate costs of transcription of portions of record they requested, and did not attempt to justify their request for bond in the amount of $2500, bond in the amount of $500 was appropriate).

(n4)Footnote 3. *Adsani v. Miller, 139 F.3d 67, 70-71 (2d Cir. 1998) , cert. denied, 525 U.S. 875, 119 S. Ct. 176, 142 L. Ed. 2d 144 (1998) .*

(n5)Footnote 4. *The Astoria, 1 F.R.D. 742, 743 (E.D.N.Y. 1941) .*

(n6)Footnote 5. *Fed R. App. P. 7.*

(n7)Footnote 6. *28 U.S.C. § 1915*; *Cruz v. Hauck, 404 U.S. 59, 65-66, 92 S. Ct. 313, 30 L. Ed. 2d 217 (1971) .*

(n8)Footnote 7. *28 U.S.C. § 1915(a).*

(n9)Footnote 8. *28 U.S.C. § 1916.*

(n10)Footnote 9. *28 U.S.C. § 2408.*

(n11)Footnote 1. *Terry Inv. Co. v. United Funding & Investors Inc., 800 F. Supp. 879, 882 (E.D. Cal. 1992)* ; *Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987) .*

(n12)Footnote 2. *Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987)* (district court did not abuse discretion in ordering plaintiff to post $5,000 bond for costs).

(n13)Footnote 3. *In re American President Lines, Inc., 779 F.2d 714, 716 (D.C. Cir. 1985) .*

(n14)Footnote 4. *See, e.g., Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221, 224 (10th Cir. 1980) .*

(n15)Footnote 5. *In re American President Lines, Inc., 779 F.2d 714, 718 (D.C. Cir. 1985) .*

(n16)Footnote 6. *Fed. R. App. P. 8.*

(n17)Footnote 7. *Lundy v. Union Carbide Corp., 598 F. Supp. 451, 452 (D. Or. 1984)* (court awarded $500 bond because appellees made no attempt to estimate transcription costs of record or justify request for $2500 bond).

(n18)Footnote 8. *In re American President Lines, Inc., 779 F.2d 714, 718 (D.C. Cir. 1985)* (excessive bond amount is not acceptable control against frivolous appeal).

(n19)Footnote 9. *In re American President Lines, Inc., 779 F.2d 714, 717 n.23 (D.C. Cir. 1985) .*

(n20)Footnote 10. *Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987)* ($5,000 bond amount upheld based on anticipation of sanctions for appeal that could be frivolous).

(n21)Footnote 1. *Terry Inv. Co. v. United Funding & Investors Inc., 800 F. Supp. 879, 882 (E.D. Cal. 1992)* (bond under Appellate Rule 7 may not include attorney's fees).

(n22)Footnote 2. *15 U.S.C. § 505.*

(n23)Footnote 3. *Adsani v. Miller, 139 F.3d 67, 71-79 (2d Cir. 1998) , cert. denied, 525 U.S. 875 (1998)* (district court did not abuse its discretion in copyright case in imposing appeal bond of $35,000).

(n24)Footnote 4. *See 42 U.S.C. § 1988.*

(n25)Footnote 1. *Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987)* (court upheld order requiring cost bond under Appellate Rule 7 and informing appellant that failure to comply would result in dismissal of appeal).

(n26)Footnote 2. *Carr v. Grace, 516 F.2d 502, 504 (5th Cir. 1975)* (citing **Moore's Federal Practice** for proposition that failure to effect timely filing of the bond does not, without more, result in dismissal).

(n27)Footnote 3. *Perry v. Pogemiller, 16 F.3d 138, 139 n.1 (7th Cir. 1993)* (motion to dismiss case for failure to post cost bond denied as moot since court had already reached merits).

(n28)Footnote 4. *Buffington v. First Serv. Corp., 672 F.2d 687, 690 n.5 (8th Cir. 1982)* (attorney personally liable for double costs for filing repetitious and frivolous appeal).

(n29)Footnote 1. *Fed R. App. P. 7.*

(n30)Footnote 2. *Fed. R. App. P. 7.*

(n31)Footnote 3. *The Astoria, 1 F.R.D. 742, 743 (E.D.N.Y. 1941) .*

(n32)Footnote 4. *John Hancock Mut. Life Ins. Co. v. Hurley, 151 F.2d 751, 754 (1st Cir. 1945) .*

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART II. RIGHTS AND DUTIES OF APPEAL FROM PARTICULAR TYPES OF ADJUDICATIONS
A. APPEAL FROM DISTRICT COURT JUDGMENT OR ORDER

3-28 Moore's Manual--Federal Practice and Procedure § 28.14

§ 28.14 Stay or Injunction Pending Appealn*

[1] Introduction

When a party files an appeal, the filing itself does not act to suspend execution or enforcement of a judgment or injunction; a party must make a motion for a stay and it must be granted before the judgment is suspended. Appellate Rule 8 regulates the procedure in civil matters for an application for a stay of the judgment or order of a district court pending appeal. n1 It also governs approval of a supersedeas bond, n2 or for an order suspending, modifying, restoring, or granting an injunction pending an appeal. n3 The relief sought under Appellate Rule 8 may be conditioned on the giving of a bond by the party requesting the relief. n4 A stay from an agency order is governed by Appellate Rule 18. n5 Appellate Rule 8 must be read in conjunction with Civil Rule 62, n6 which governs the power of a district court to grant stays and injunctions, because under Appellate Rule 8, these applications must first be brought in the district court. n7 In this regard, Appellate Rule 8 provides the procedure to be followed in the circuit court if relief is denied by the district court. A motion for a stay or injunctive relief may be brought in the circuit court only on a showing that an application to the district court is not practicable or has been denied. n8

[2] Initial Motion for Stay Must Be In District Court

A party must ordinarily move first in the district court for any of the following three types of relief: n1

1. A stay of the judgment or order of a district court pending appeal. n2

2. Approval of a supersedeas bond. n3

3. An order suspending, modifying, restoring, or granting an injunction while an appeal is pending. n4

Even though the circuits ordinarily require that a party seek a stay pending appeal first in the district court, the circuit court may dispense with this requirement when an application to the district court would be futile or serve little purpose. n5

An appeal from a judgment does not automatically suspend operation or execution of the judgment until the determination of the appeal. n6 Therefore, unless a judgment awarding money or property is stayed, the judgment may be executed on despite the fact that an appeal is pending. n7 If the judgment grants an injunction, the injunction is effective as ordered unless stayed. n8 If the district court has denied an injunction, the prevailing party may engage in the conduct sought to be restrained unless an injunction pending appeal is obtained. n9 If the judgment denies a declaration of rights, the prevailing party may behave as if the rights do not exist unless a stay is entered. n10

In order to obtain a stay of a district court order pending appeal, the moving party is required to show the district court: its strong position on the merits of the appeal; irreparable injury if a stay is denied; that a stay would not substantially harm other parties to the litigation; and that public interests favor the stay. n11

Ordinarily, a stay of the judgment of the district court pending appeal may be obtained as of right by offering a supersedeas bond with sufficient surety in an amount adequate to protect the interests of the appellee. n12 On the entry of an ordinary judgment awarding money or property its effect is automatically stayed until expiration of 14 days after its entry. n13 The reason for the automatic stay is to give the losing party time to determine what steps, if any, are available to attack the judgment. If an appeal is taken, Civil Rule 62(d) provides that an appellant may obtain a stay by giving a supersedeas bond, and that the stay is effective when the supersedeas bond is approved by the court. The amount and conditions of the bond are subject to the district court's determination. n14 The appellant should then present the supersedeas bond to the court for its approval. n15 As provided in *Fed. R. Civ. P. 62(a)* and *62(c)*, three kinds of judgments are excepted from the general rule that a party may obtain a stay as of right by filing a sufficient supersedeas bond: (1) an interlocutory or final judgment in an action for an injunction; (2) an interlocutory or final judgment in a receivership action; (3) a judgment or order directing an accounting in an action for patent infringement. Such judgments are not subject to the automatic 14-day stay provision of *Fed. R. Civ. P. 62*, and a stay or injunction pending appeal from them is discretionary with the district court. n16 Stays or injunctions pending appeals from such judgments must be sought on motion and notice. n17

[3] Motion for Stay In Appellate Court

If the motion in the district court for stay pending appeal, supersedeas bond, or order suspending, modifying, restoring, or granting an injunction while an appeal is pending is unsuccessful in the district court, a motion for such relief may be made to the court of appeals or to one of its judges. n1 The motion to the court of appeals must meet the following requirements:

1. The motion must show that moving first in the district court would be impracticable, n2 or state that a motion was made in the district court, that the district court denied the motion or failed to afford the relief requested, and state any reasons given by the district court for its action. n3 A showing of impracticability may be made by a showing that the district judge is unavailable, or that, to be effective, relief must be immediate, and that based on the proceedings in the district court, relief from it was improbable. n4

2. The motion must state the reasons for granting the relief requested and the facts relied on. n5

3. The motion must include originals or copies of affidavits or other sworn statements supporting facts subject to dispute. n6

4. The motion must contain relevant parts of the record. n7

5. The moving party must give reasonable notice of the motion to all parties. n8

6. The motion must be filed with the circuit court clerk. n9

The motion will be considered by a panel of the circuit court of appeals, but in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. n10

[4] Security for Stay or Other Relief

The court may condition a stay or an order regarding injunctive relief on a party's filing a bond or other appropriate security in the district court. n1 This type of bond is known as a supersedeas bond, and the bond is retrospective in nature because it covers sums related to the merits of the underlying judgment and the stay of its execution. In contrast, the bond under Appellate Rule 7 n2 is prospective in nature, relating to potential expenses of litigating the appeal. n3 Therefore, under Appellate Rule 8, questions respecting liability under the bond are to be submitted in the first instance to the district court. n4 The district court is the more convenient forum to determine these issues, because the amount of damages sustained by reason of a stay or injunction often depends on evidence, and the district court is in a better position to hear the evidence and make findings of fact. The determination of the district court is reviewable in the circuit court as a final decision. n5

The scope of a surety's liability under a supersedeas bond is determined by the language of the bond and the intent of the parties. n6 If the bond is conditioned to secure satisfaction of the judgment in full with costs, interest, and damages for delay, and the judgment is entirely affirmed, the surety is liable for the payment of those items to the extent of the amount of the bond. n7 If, after an appeal, there remains a question of whether any compensable harm was done, the bond may lapse. If, however, an appellee has proven that damages are due and the court remands merely to determine the amount of the injury, the surety remains liable. n8

If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent who must receive service of any papers affecting the surety's liability on the bond or undertaking. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known. n9 If no notice is given, a judgment against the surety will not be entered. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 308.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 8(a)(1)(A)*; *see* [2], *below*.

(n3)Footnote 2. *Fed. R. App. P. 8(a)(1)(B)*.

(n4)Footnote 3. *Fed. R. App. P. 8(a)(1)(C)*.

(n5)Footnote 4. *Fed. R. App. P. 8(a)(2)(E)*.

(n6)Footnote 5. *Fed. R. App. P. 18*.

(n7)Footnote 6. *Fed. R. Civ. P. 62*.

(n8)Footnote 7. *Fed. R. App. P. 8(a)(1)*.

(n9)Footnote 8. *Fed. R. App. P. 8(a)(2)*; *see* [3], *below*.

(n10)Footnote 1. *A.C.L.U. of Ohio Foundation, Inc. v. Robert Ashbrook, 2002 U.S. Dist. LEXIS 14096* , **3, n.1 (N.D. Ohio 2002) (although notice of appeal filed with circuit court would ordinarily divest district court of jurisdiction, Appellate Rules 8(a)(1)(A) and (C) require party requesting stay to first seek stay in district court under Civil Rule 62(c) before party may apply for stay with circuit court).

(n11)Footnote 2. *Fed. R. App. P. 8(a)(1)(A)*.

(n12)Footnote 3. *Fed. R. App. P. 8(a)(1)(B)*.

(n13)Footnote 4. *Fed. R. App. P. 8(a)(1)(C)*.

(n14)Footnote 5. *Homans v City of Albuquerque, 264 F.3d 1240, 1243 (10th Cir. 2001)* .

(n15)Footnote 6. *NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987)* (district court may take steps to enforce order in absence of stay pending appeal).

(n16)Footnote 7. *C.H. Sanders Co. v. BHAP Housing Dev. Fund Co., 750 F. Supp. 67, 69 (E.D.N.Y.)* , *rev'd in part on other grounds, 903 F.2d 114 (2d Cir. 1990)* .

(n17)Footnote 8. *See In re Montes, 677 F.2d 415, 417 (5th Cir. 1982)* .

(n18)Footnote 9. *Fink v. Continental Foundry & Mach. Co., 240 F.2d 369, 373-374 (7th Cir. 1957)* , *cert. denied, 354 U.S. 938 (1957)* (sale of assets consummated when minority shareholders' application for permanent injunction was denied).

(n19)Footnote 10. *Heikkila v. Barber, 164 F. Supp. 587, 591 (N.D. Cal. 1958)* (in absence of stay, filing of motion to amend decision after final judgment was entered did not operate to prevent plaintiff's deportation).

(n20)Footnote 11. *Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc., 962 F.2d 960, 963 (10th Cir. 1992)* .

(n21)Footnote 12. *Fed. R. Civ. P. 62(d)*.

(n22)Footnote 13. *Fed. R. Civ. P. 62(a)*.

(n23)Footnote 14. *Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986)* (court of appeals refused to overturn district court's requirement of bond, stating that responsibility for the decision is granted initially to district court, and its decision should not be reversed absent abuse of discretion).

(n24)Footnote 15. *Poplar Grove v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1192 (5th Cir. 1979)* .

(n25)Footnote 16. *See Beaver Cloth Cutting Machs., Inc. v. H. Maimin Co., 37 F.R.D. 47 (S.D.N.Y. 1964)* , *rev'd on other grounds, 343 F.2d 442 (2d Cir. 1965)* (construing former time periods).

(n26)Footnote 17. *See Fed. R. App. P. 8(a)(1)(A)*.

(n27)Footnote 1. *Fed. R. App. P. 8(a)(2)*.

(n28)Footnote 2. *Fed. R. App. P. 8(a)(2)(A)(i)*.

(n29)Footnote 3. *Fed. R. App. P. 8(a)(2)(A)(ii)*.

(n30)Footnote 4. *Chemical Weapons Working Group v. Department of the Army, 101 F.3d 1360, 1363 (10th Cir. 1996)* ; *Tape Head Co. v. RCA Corp., 452 F.2d 816, 818 (10th Cir. 1971)* ; *Bulluck v. Washington, 452 F.2d 1385, 1386 n.6 (D.C. Cir. 1971)* .

(n31)Footnote 5. *Fed. R. App. P. 8(a)(2)(B)(i).*

(n32)Footnote 6. *Fed. R. App. P. 8(a)(2)(B)(ii).*

(n33)Footnote 7. *Fed. R. App. P. 8(a)(2)(B)(iii).*

(n34)Footnote 8. *Fed. R. App. P. 8(a)(2)(C).*

(n35)Footnote 9. *Fed. R. App. P. 8(a)(2)(D).*

(n36)Footnote 10. *Fed. R. App. P. 8(a)(2)(D).*

(n37)Footnote 1. *Fed. R. App. P. 8(a)(2)(E).*

(n38)Footnote 2. *See § 28.13.*

(n39)Footnote 3. *Adsani v. Miller, 139 F.3d 67, 70 (2d Cir. 1998)* , *cert. denied*, *525 U.S. 875, 119 S. Ct. 176, 142 L. Ed. 2d 144 (1998)* .

(n40)Footnote 4. *See Fed. R. App. P. 8(b).*

(n41)Footnote 5. *Neeley v. Bankers Trust Co., 848 F.2d 658, 659 (5th Cir. 1988)* (affirming district court's order releasing intervenor from liability as surety on supersedeas bond).

(n42)Footnote 6. *Aviation Credit Corp. v. Conner Air Lines, Inc., 307 F.2d 685, 688 (5th Cir. 1962)* , *cert. denied, 371 U.S. 954 (1963)* .

(n43)Footnote 7. *Rector v. Massachusetts Bonding & Ins. Co., 191 F.2d 329, 331-333 (D.C. Cir. 1951)* (liability on supersedeas bond depends on retrospective evaluation of extent to which judgment has been affected by appeal).

(n44)Footnote 8. *Beatrice Foods Co. v. New England Printing and Lithographing Co., 930 F.2d 1572, 1576 (Fed. Cir. 1991)* (remand regarding damages in patent infringement action).

(n45)Footnote 9. *Fed. R. App. P. 8(b).*

(n46)Footnote 10. *The Astoria, 1 F.R.D. 742, 743 (E.D.N.Y. 1941)* (motion to vacate judgment against surety granted because of failure to give notice).

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART II. RIGHTS AND DUTIES OF APPEAL FROM PARTICULAR TYPES OF ADJUDICATIONS
A. APPEAL FROM DISTRICT COURT JUDGMENT OR ORDER

3-28 Moore's Manual--Federal Practice and Procedure § 28.15

§ 28.15 Record on Appeal

[1] Purpose of Record on Appeal

The "record on appeal" is the official compilation for appellate purposes of the documents, evidence, and transcript of proceedings as they were presented to the district court. n1 While the trial record includes all the material and documentation generated or filed in the district court, the record on appeal includes only that which is needed for review of the issues to be presented on appeal. n2 For example, the record on appeal may consist of the original papers and exhibits filed in the district court, the transcript of proceedings, and a certified copy of the districts court's docket entries. n3 A record on appeal is required not only for appeal of cases in which a final judgment has been rendered but also for interlocutory appeals. n4

The contents of the record as it is presented to the circuit court determine and limit the issues that may be addressed on appeal. Because the function of the circuit court is to review district court decisions, the record on appeal is generally limited to material that was presented to the district court. n5 Failure to include portions of the record that are necessary to review any particular issue raised on appeal may result in the circuit court's refusing to address that issue, n6 or even dismissing the appeal. n7

[2] Composition of Record on Appeal n*

[a] Items Included in Record

All of the following items that have any bearing on the appellate issues n1 are included in the record on appeal:

1. The original papers n2 and exhibits n3 filed in the district court; n4

2. The transcript of proceedings, if any; n5 and

3. A certified copy of the docket entries prepared by the district clerk. n6

[b] Original Papers

"Original papers" include all documents filed with, and presented to, the district court for filing. n7 Thus, the term includes all documents presented and filed with the court, whether by a party or by the district judge. n8 Although filing is defined in Civil Rule 5, cases addressing this issue in an appeal context are usually resolved on a factual, case-by-case basis. n9 The following nonexhaustive list contains examples of documents that are classified as original papers:

1. Pleadings. n10

2. Process and proof of service. n11

3. Pretrial orders. n12

4. Court memoranda. n13

5. Affidavits. n14

While the definition of original papers is broad enough to include documentary evidence, an evidentiary document does not become part of the record merely by being filed; it must also have been offered into evidence. n15 Original papers also do not include documents filed with the district court after the proceedings at issue have been completed or documents related to proceedings other than the one being appealed. n16 However, some documents may become part of the record with circuit court approval, even though they were not presented to the district court, and therefore not original papers. n17

[c] Exhibits

The record on appeal includes exhibits filed in the district court and offered into evidence. n18 This category includes all documentary and physical exhibits filed and offered in evidence whether ultimately admitted in evidence or not. n19 Like testimony of witnesses, the exhibits are necessary to allow the circuit court to review the rulings in the district court. If exhibits relevant to an issue on appeal are not included in the record, the circuit court may refuse to address that issue. n20 An exhibit offered into evidence, but excluded by the court, is a necessary part of the record if the circuit court will be called on to rule regarding its admissibility, n21 and must be placed in the district clerk's custody to facilitate transmission to the circuit court. n22 Exhibits offered but excluded by the district court are part of the record on appeal. n23 While excluded evidence is by definition not considered by the district court in its decision, if its admissibility is in issue, it must be included in the record to allow review of the issue. n24

Attorneys must ensure that all exhibits are properly identified and offered at trial, notwithstanding any exhibit's exclusion as evidence. Appellate Rule 10 seems to assume that all exhibits at a trial are automatically retained on file with the district court clerk. In many district courts, however, at the end of a trial the exhibits are returned to the parties. Counsel should exercise care with the exhibits, because when an appeal is taken, counsel are expected then to file the exhibits with the district clerk. n25 If an exhibit is offered into evidence and viewed by the district court, but inadvertently not filed with the district clerk, it may still be included in the record by filing and transmitting a supplemental record. The rationale for inclusion is that the exhibit, even if not officially made part of the record, was in fact a part of the record because it was reviewed by the district court and could have contributed to the decision. n26

[d] Transcript of Proceedings

[i] Transcript in Existence is Included in Record

If there is a transcript of the district court proceedings, the transcript is included in the record on appeal. n27 The court

reporter is required by statute to create a report of the district court proceedings, unless the parties agree with the approval of the district court not to have all proceedings reported. n28 The court reporter's verbatim report of the entire proceedings is normally not transcribed, that is, converted from stenographic notes or tapes into a typed document, unless a party or the court requests a transcript, as discussed below. Under Appellate Rule 10(b), the parties must designate those parts of the transcript they will need, so that the court reporter can prepare them and file them with the district clerk. When parts of the transcript that are necessary for review of the issues are omitted from the record, one alternative is for the circuit court to order the transcript to be filed. n29

[ii] Duty of Appellant to Order Transcript

The appellant is responsible for providing the necessary transcripts to the court of appeals, and if the appellant does not, the court of appeals may dismiss an either the entire appeal or some of the issues on appeal when the failure to provide the transcripts prevents meaningful appellate review. However, dismissal is not mandatory, and the circuit court may consider issues on appeal if appellate review is possible without the use of transcripts. n30

Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Appellate Rule 4(a)(4)(A), whichever is later, the appellant must either order a transcript n31 or file a certificate stating that no transcript will be ordered. n32 If the appellant elects to order a transcript, the appellant must order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to any local rule of the court of appeals and with the following qualifications:

1. The order must be in writing. n33

2. If the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must state so. n34

3. The appellant must, within the same period, file a copy of the order with the district clerk. n35

[iii] Appellant Urging Unsupported Finding or Conclusion

If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion. n36 Therefore, if a party contends on appeal that a district court's finding was unsupported by the evidence, the party has the burden of including in the record a transcript of evidence pertinent to that finding, and a mere statement of issues does not adequately substitute for a transcript in this regard. n37

[iv] Partial Transcript

The appellant has the option to order a partial transcript. To order a partial transcript, the appellant must, within the 14 days provided in Appellate Rule 10(b)(1), file a statement of the issues that the appellant intends to present on the appeal. The appellant must also serve on the appellee a copy of both the order of transcript, or certificate that it will not be ordered, and the statement of issues. n38 If the entire transcript is not ordered, and the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered. n39 Finally, unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may, within the following 14 days, either order the parts or move in the district court for an order requiring the appellant to do so. n40

[v] Payment for Transcript

When a party orders a transcript, the ordering party must make satisfactory arrangements with the reporter to pay the

cost of the transcript. n41 By statute, the reporter may require any party requesting a transcript to prepay the estimated fee. n42 This requirement and an agreement to pay any balance, is the satisfactory arrangement for payment that is referred to in Appellate Rule 10(b)(4). Additionally, on the request of any party to any proceeding which has been recorded who has agreed to pay the fee, or of a judge of the court, the reporter or other individual designated to produce the record must promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his or her official certificate, and deliver the transcription to the party or judge making the request. n43

Thus, once the requesting party pays the estimated cost and obligates himself or herself to pay the balance, the reporter may not refuse to deliver a certified copy to the clerk for inclusion in the record simply because the appellant has not paid the balance. n44 After completing the transcript, the reporter is required to provide the district court with a certified copy. The fee paid for preparation of a transcript prepared for appeal is taxable as a cost of litigation. n45 However, the cost of the transcript is regarded as a cost incurred in the district court, rather than in the circuit court. n46 This means that the prevailing party must make a separate application for this expenditure in the district court after the mandate has been issued by the circuit court. n47

[vi] Statement of Evidence When Transcript Unavailable

If a transcript of a hearing or trial is not available, for example, when the proceedings were not recorded, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal. n48

The term "unavailable" is not defined in the rule but includes the failure to record portions of a trial, n49 and inadvertent destruction of reporter's notes before transcription. n50 When an appellant prepares a statement of the evidence or proceedings using the "best available means, including the appellant's recollection," the appellant may draw on any reasonable source to prepare a statement. However, a mere oral recounting of proceedings is not sufficient. n51 Use of affidavits by persons with knowledge of the material is an example of an acceptable means of preparing a statement. n52

After a statement is settled and approved by the district court, n53 the statement is filed with the district clerk and becomes part of the record. If the statement is not approved, although it is still technically part of the record, it will not be considered by the circuit court in determining the issues on appeal, n54 unless the failure to approve the statement was the result of judicial error on the part of the district judge. n55 Alternatively, the proponent of the statement may petition the court of appeals for writ of mandamus asking the circuit court to direct the district court to approve a proffered statement, which the court of appeals may grant provided that the proponent shows a special risk of irreparable harm, and a clear demonstration of entitlement to the relief requested, i.e., that the district court's order was erroneous. n56 Once the record is reconstructed and approved by the district court, the circuit court must accept the accuracy of the reconstruction unless the court finds it to be intentionally falsified or obviously unreasonable. n57

[e] Certified Copy of Docket Entries

The last part of the record on appeal is a certified copy of the docket entries prepared by the district clerk. n58 Docket entries include, in chronological order, brief descriptions of all of the following: n59

1. All documents filed with the clerk;

2. Oral and written orders made by the district court;

3. Processes issued and returned;

4. Appearances; and

5. Verdicts and judgments rendered.

The primary purpose of this rule is to establish those entries that were actually docketed by the district clerk and to prevent parties from attempting to argue that entries were included in the docket when such entries were not docketed by the clerk. n60 However, even though purported entries may not be considered when they are not included in certified copies of the docket entries prepared by the district clerk, the court may open the record on appeal to include the extra-record docket entries if a party files a formal motion to supplement the record with such entries, under Appellate Rule 10(e) and the circuit court's inherent equitable power to supplement the record on appeal. n61

[3] Agreed Statement of Record on Appeal n*

In lieu of presenting a record on appeal as defined in Appellate Rule 10(a), n1 the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, the statement (and any additions that the district court may consider necessary to a full presentation of the issues on appeal) must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Appellate Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Appellate Rule 30. n2

The purpose of an agreed statement of record is to provide an inexpensive method of bringing the record before the circuit court in cases where the only questions presented depend on facts or evidence that is not in dispute. n3 An agreed statement may make unnecessary an expensive transcription. n4 Thus, as an alternative to proceeding in the circuit court on the record of the district court described in Appellate Rule 10(a), the parties may prepare an agreed statement under Appellate Rule 10(d), establishing their version of the basis of the questions presented by the appeal, and how they were decided in the district court, setting forth only that information that is essential to a decision on appeal. The agreed statement should include the essential facts of the case and address the crux of the issues on appeal and their resolution in the district court. Once the agreed statement is approved by the district court it becomes the record on appeal. n5

[4] Correction or Modification of the Record n*

Any dispute as to whether the record on appeal truly discloses what occurred in the district court must be submitted to and settled by the district court, and the record on appeal conformed accordingly. n1 Because parties have this procedure available in the district court, a party may not attack the accuracy of the record on appeal by submitting a brief or an oral argument directly to the circuit court of appeals; in other words, Appellate Rule 10(e) provides the exclusive method for settling disputes concerning the accuracy of the district court record. n2

A district court's disposition of the dispute about the record is conclusive, n3 unless a party can establish that the district court misrepresented the contents of the record. n4 The purpose of Appellate Rule 10(e) is to ensure that the record on appeal accurately reflects proceedings in the trial court, and therefore to facilitate the appellate court's ability to review the trial court decision in light of information that was actually before the trial court, and not to enable the losing party to merely add new material to the record in order to collaterally attack the trial court's decision. n5

If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and forwarded in any one of the following three ways:

1. By stipulation of the parties. n6 The parties may thus stipulate to correct or include matters in the record without involving the district or circuit court. n7 However, the parties may not use the stipulation procedure as a means of introducing any matter that was not before the trial court. n8

2. By the district court before or after the record has been forwarded. n9 This power of the district court is an exception to the general rule that the district court ceases to have jurisdiction once a case has been appealed. n10

3. By the court of appeals. n11

All other questions as to the form and content of the record must be presented to the court of appeals. n12 Thus, the circuit court may order the certification and transmittal of a supplemental record in order to rectify an error or omission in the record. n13 The circuit court also may remand the case to the district court for supplementation of the record. n14

Any questions other than about the form and content of the record, other than omissions or misstatements, must be presented directly to the court of appeals. n15 This authority of the circuit court is broader in scope than that granted to the district court, because the circuit court must depend on a second-hand version of the proceedings in the district court. The authority allows the circuit court to view material necessary to decide the appeal. Nevertheless, the general principle of restricting the record on appeal to material presented to the district court limits the circuit court's power to supplement the record with new material except in exceptional circumstances. n16

[5] Forwarding the Record n*

[a] Appellant's Duties

At the time an appellant files a notice of appeal, the appellant has the responsibility to order a transcript for appeal, to perform other duties specified in Appellate Rule 10(b), and to do whatever else is necessary to enable the clerk to assemble and forward the record. n1 Thus, the appellant is responsible for relevant portions of the transcript of the proceedings in the district court and relevant exhibits introduced in the district court. The appellant may complete its duty in this regard by arranging with the court reporter to produce a transcript pursuant to Appellate Rule 10(b) and taking steps necessary to see that all necessary papers, including exhibits that may have been returned to the parties, are provided to the district clerk for inclusion in the record on appeal. n2 The appellant should exercise care in evaluating the issues on appeal and determining what portions of the transcript, exhibits, and documents are necessary to present the appeal because omissions of relevant material from the record on appeal will place the appellant at a disadvantage. n3. For example, the circuit court may decline to reach the merits of an appellant's claim if the appellant fails to include relevant material on the issue. n4 While the circuit court may request from the district clerk docketed material that was not transmitted, the circuit court is not obligated to make such a request. n5

[b] Reporter's Duties

A reporter of proceedings has several duties with regard to the preparation and filing of a transcript. When the reporter receives an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy with those endorsements to the circuit clerk. n6 If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The circuit clerk must note on the docket the action taken and notify the parties. n7 When the transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing. n8 If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and take any other action that the court of appeals directs. n9 The appellant may also request that the district court or circuit court take steps to compel the production of the transcript, including imposing sanctions or monetary penalties on the reporter. n10

[c] District Clerk's Duties

After assembly of the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk with a list of the documents correspondingly numbered and reasonably identified. n11 If there are multiple appeals from a judgment or order, the clerk must forward a single record. n12

Unless directed to do so by a party or the circuit court clerk, the district court clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, the party with responsibility for the exhibits must arrange with the clerks in advance for their transportation and receipt. n13

[d] Record Retained Temporarily in District Court for Use by Parties in Preparing Appeal

If the parties need the record to prepare their papers on appeal, the parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use. In that event, the district clerk must certify to the circuit clerk that the record on appeal is complete. On receipt of the appellee's brief, or earlier if the district court orders or the parties agree, the appellant must request the district clerk to forward the record. n14

[e] Record Copied or Retained by Order of Court

The court of appeals may by order or local rule provide that a certified copy of the docket entries be forwarded instead of the entire record; however, a party may at any time during the appeal request that designated parts of the record be forwarded. n15 The district court may order the record or some part of it retained if the court needs it while the appeal is pending; however, the retention by the district court is subject to request for forwarding by the court of appeals. n16 If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties. n17

[f] Record Retained by Stipulation of the Parties

The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal. n18

[g] Portion of Record Forwarded for Use in Court of Appeals

When certain motions are made by either party to the appeal, the district court may be required to send a portion of the record to the court of appeals before the time that the entire record is sent. The district clerk must send the court of appeals any parts of the record designated by a party before the entire record is required to be forwarded, if any party makes any of the following motions in the court of appeals: motion for dismissal; motion for release; motion for a stay pending appeal; motion for additional security on the bond on appeal or on a supersedeas bond; or motion for any other intermediate order. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 10(a).*

(n2)Footnote 2. *Controlled Demolition, Inc. v. F.A. Wilhelm Constr. Co., 84 F.3d 263, 269 (7th Cir. 1996) .*

(n3)Footnote 3. *Fed. R. App. P. 10(a)*; *see* [2], *below*.

(n4)Footnote 4. *In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023, 1026 n.5 (1st Cir. 1985)* (parties must comply with responsibilities under Appellate Rule 10 by filing and assembling record for interlocutory appeal).

(n5)Footnote 5. *McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 795 (7th Cir. 1997)* (evidence not admitted in district court is not part of record and may not be included in appellate brief); *Dakota Indus. v. Dakota Sportswear Inc., 988 F.2d 61, 63-64 (8th Cir. 1993)* (generally, appellate court may consider only record made before district court).

(n6)Footnote 6. *Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572, 581, n.5 (7th Cir. 2001)* (appellant's failure to file trial transcript from bench trial results in forfeiture of any argument that district court's factual findings were against weight of evidence); *Carter v. Jacobsen, 748 F.2d 487, 488-89 (8th Cir. 1984)* (when trial transcript was not included in record, claim that district court erred in admitting certain evidence could not be reviewed).

(n7)Footnote 7. *LaFollette v. Savage, 63 F.3d 540, 545 (7th Cir. 1995)* (failure of appellant to abide by Appellate Rule 10 may result in dismissal of appeal).

(n8)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 310.10 et seq. (Matthew Bender 3d ed.).

(n9)Footnote 1. *Controlled Demolition, Inc. v. F.A. Wilhelm Constr. Co., 84 F.3d 263, 269 (7th Cir. 1996)* .

(n10)Footnote 2. *See* [b], *below*.

(n11)Footnote 3. *See* [c], *below*.

(n12)Footnote 4. *Fed. R. App. P. 10(a)(1)*.

(n13)Footnote 5. *Fed. R. App. P. 10(a)(2)*; *see* [d], *below*.

(n14)Footnote 6. *Fed. R. App. P. 10(a)(3)*; *see* [e], below.

(n15)Footnote 7. *Fed. R. App. P. 10(a)(1)*.

(n16)Footnote 8. *In re Arthur Andersen & Co., 621 F.2d 37, 39 (1st Cir. 1980)* ("original papers" refers to all papers presented to and filed by district court).

(n17)Footnote 9. *In re Arthur Andersen & Co., 621 F.2d 37, 39 (1st Cir. 1980)* .

(n18)Footnote 10. *United States v. Gilbertson, 111 F.2d 978 (7th Cir. 1940)* (material pleadings required to be included as part of record).

(n19)Footnote 11. *United States v. IBM Corp., 67 F.R.D. 618, 619 (S.D.N.Y. 1975)* (original papers including proof of service must be filed in clerk's office).

(n20)Footnote 12. *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc., 761 F.2d 649, 653 (Fed. Cir. 1985)* , *cert. denied, 474 U.S. 902 (1985)* (record on appeal includes all original papers filed in district court including pretrial orders).

(n21)Footnote 13. *Brown v. United States, 277 F.2d 201, 202 (8th Cir. 1960)* (memorandum of judge considered part of original papers).

(n22)Footnote 14. *United States v. Sclafani, 487 F.2d 245, 253 n.7 (2d Cir. 1973)* , *cert. denied, 414 U.S. 1023 (1974)* (affidavit certified and transmitted to court pursuant to Appellate Rule 10(e) was part of record on appeal).

(n23)Footnote 15. *Fleming v. Gulf Oil Corp., 547 F.2d 908, 911 (10th Cir. 1977)* (appellee was not allowed to create new evidence to supplement record, because only evidence that had been before trial court may be considered on appeal); *see* [c], *below*.

(n24)Footnote 16. *Tonry v. Security Experts, Inc., 20 F.3d 967, 974 (9th Cir. 1994)* (appellant violated Appellate Rule 10 by citing unfiled arbitration award and underlying proceeding challenging factual findings of district court).

(n25)Footnote 17. *United States v. Marren, 890 F.2d 924, 934 (7th Cir. 1989)* (judicial notice taken of indictment and transcript of sentencing proceeding to aid court in reviewing claim); *see* [3],[4], *below*.

(n26)Footnote 18. *Fed. R. App. P. 10(a)(1).*

(n27)Footnote 19. *United States v. Burke, 781 F.2d 1234, 1242 (7th Cir. 1985)* (excluded transcripts of taped conversations marked as exhibits allowed as part of record).

(n28)Footnote 20. *Lakedreams v. Taylor, 932 F.2d 1103, 1109 (5th Cir. 1991))* (circuit court would not rule on whether district court's grant of preliminary injunction was clearly erroneous because relevant exhibits were not presented).

(n29)Footnote 21. *Texas & Pacific Ry. v. Buckles, 232 F.2d 257, 261 (5th Cir. 1956) , cert. denied, 351 U.S. 984 (1956)* (hospital record offered in evidence but not brought forward in record on appeal was not reviewable by court).

(n30)Footnote 22. *United States v. Ross, 321 F.2d 61, 65 n.2 (2d Cir. 1963)* (exhibits pertinent to appeal should be placed with district court clerk to be forwarded with transcript).

(n31)Footnote 23. *United States v. Hubbard, 650 F.2d 293, 299 (D.C. Cir. 1980)* (materials offered but excluded on evidentiary grounds are part of record on appeal); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd., 529 F. Supp. 866, 899 (E.D. Pa. 1981)* (all materials found to be admissible or not, are part of record on appeal).

(n32)Footnote 24. *Texas and Pac. Ry. Co. v. Buckles, 232 F.2d 257, 261 (5th Cir. 1956)* (hospital record at issue but not included in record on appeal was not reviewable by court).

(n33)Footnote 25. *See Fed. R. App. P. 10(a)(1).*

(n34)Footnote 26. *Hastings v. Reynolds Metals Co., 165 F.2d 484, 486 (7th Cir. 1947)* (copy of contract that was presented to district court but inadvertently never filed was included in record on appeal as supplemental record).

(n35)Footnote 27. *See Fed. R. App. P. 10(a)(2).*

(n36)Footnote 28. *28 U.S.C. § 753(b).*

(n37)Footnote 29. *Rodriguez v. Anderson, 973 F.2d 550, 551 (7th Cir. 1992)* (transcript omitted from record was ordered to be submitted by appellant); *Garnes v. Gulf & Western Mfg. Co., 789 F.2d 637, 640 n.3 (8th Cir. 1986)* (if partial transcript is deemed inadequate, complete transcript may be ordered by court for comparison).

(n38)Footnote 30. *See Wrighten v. Glowski, 232 F.3d 119, 120 (2d Cir. 2000) .*

(n39)Footnote 31. *See Fed. R. App. P. 10(b)(1)(A).*

(n40)Footnote 32. *See Fed. R. App. P. 10(b)(1)(B).*

(n41)Footnote 33. *See Fed. R. App. P. 10(b)(1)(A)(i).*

(n42)Footnote 34. *See Fed. R. App. P. 10(b)(1)(A)(ii).*

(n43)Footnote 35. *See Fed. R. App. P. 10(b)(1)(A)(iii).*

(n44)Footnote 36. *See Fed. R. App. P. 10(b)(2)*; *Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572, 581, n.5 (7th Cir. 2001)* (appellant's failure to file trial transcript from bench trial results in forfeiture of any argument that district court's factual findings were against weight of evidence).

(n45)Footnote 37. *Alizadeh v. Safeway Stores, Inc., 910 F.2d 234, 237 (5th Cir. 1990)* .

(n46)Footnote 38. *Fed. R. App. P. 10(b)(3)(A).*

(n47)Footnote 39. *Fed. R. App. P. 10(b)(3)(B).*

(n48)Footnote 40. *Fed. R. App. P. 10(b)(3)(C).*

(n49)Footnote 41. *Fed. R. App. P. 10(b)(4).*

(n50)Footnote 42. *28 U.S.C. § 753(f).*

(n51)Footnote 43. *28 U.S.C. § 753(b).*

(n52)Footnote 44. *Murphy v. L & J Press Corp., 577 F.2d 27, 29-30 (8th Cir. 1978)* .

(n53)Footnote 45. *Fed. R. App. P. 39.*

(n54)Footnote 46. *Fed. R. App. P. 39(e).*

(n55)Footnote 47. *Waterman Steamship Corp., v. Gay Cotton, 419 F.2d 372, 373 (9th Cir. 1969)* .

(n56)Footnote 48. *Fed. R. App. P. 10(c).*

(n57)Footnote 49. *Cameo Convalescent Ctr., Inc. v. Senn, 738 F.2d 836, 842 (7th Cir. 1984)* , *cert. denied*, *469 U.S. 1106 (1985)* (failure to record conference where plaintiffs objected to court's instructions rendered transcripts unavailable).

(n58)Footnote 50. *Murphy v. St. Paul Fire & Marine Ins. Co., 314 F.2d 30, 31 (5th Cir. 1963)* (transcript unavailable when disks in possession of court reporter were destroyed before they were transcribed).

(n59)Footnote 51. *Bilmar Drilling, Inc. v. IFG Leasing Co., 795 F.2d 1194, 1200 (5th Cir. 1986)* (oral recitation of proceedings by appellant's counsel did not satisfy Appellate Rule 10(c)).

(n60)Footnote 52. *Bergerco, U.S.A. v. Shipping Corp. of India, 896 F.2d 1210, 1217 (9th Cir. 1990)* (when transcript was unavailable, affidavits could be used to provide accounts of testimony given at trial).

(n61)Footnote 53. *Fed. R. App. P. 10(c).*

(n62)Footnote 54. *Hawkins v. Missouri P. R. Co., 188 F.2d 348, 349-350 (8th Cir. 1951)* (affidavits not reviewed where trial court refused to incorporate affidavits in record as unreported proceedings).

(n63)Footnote 55. Bergerco, U.S.A. v. Shipping Corp. of In dia *Ltd., 896 F.2d 1210, 1214 (9th Cir. 1990)* (statement reviewable where unavailable transcript resulted in reconstruction based on memories of parties and district court).

(n64)Footnote 56. *In re Cambridge Literary Props. Ltd., 271 F.3d 348, 348 (1st Cir. 2001)* .

(n65)Footnote 57. *United States v. Garcia, 997 F.2d 1273, 1278 (9th Cir. 1993)* .

(n66)Footnote 58. *Fed. R. App. P. 10(a)(3).*

(n67)Footnote 59. *See Fed. R. Civ. P. 79(a).*

(n68)Footnote 60. *Waldorf v. Shuta, 142 F.3d 601, 620 (3d Cir.(1998)* .

(n69)Footnote 61. *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 96-97 (3d Cir. 1990)* ; *see* [4], *below.*

(n70)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 310.31 (Matthew Bender 3d ed.).

(n71)Footnote 1. *See* [2], *above.*

(N72)Footnote 2. *Fed. R. App. P. 10(d).*

(n73)Footnote 3. *Ocasio v. Bryan, 374 F.2d 11, 13-14 (3d Cir. 1967)* (appeal to circuit court on certification from district court on agreed statement).

(n74)Footnote 4. *See, e.g., Daiflon, Inc. v. Bohanon, 612 F.2d 1249, 1251 n.1 (10th Cir. 1979)* , *rev'd on other grounds, Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)* .

(n75)Footnote 5. *United States v. Anderson, 481 F.2d 685 (4th Cir. 1973)* , *aff'd, 417 U.S. 211 (1974)* .

(n76)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 310.40 (Matthew Bender 3d ed.).

(n77)Footnote 1. *Fed. R. App. P. 10(e)(1).* This method of correction of the record on appeal may only be utilized by a distict court to correct its own record on appeal. Therefore, Appellate Rule 10(e) may not be used by a district court acting in an appellate court capacity reviewing an agency decision to require that agency to correct the agency's record of the agency proceedings. *Gooden v. Barnhart, 191 F. Supp. 2d 150, 152 (D.D.C. 2002)* .

(n78)Footnote 2. *Lothschuetz v. Carpenter, 898 F.2d 1200, 1208 (6th Cir. 1990)* (defendants must challenge accuracy of record before district court rather than attack accuracy of transcripts in appellate briefs).

(n79)Footnote 3. *United States v. Franklin, 250 F.3d 653, 663 (8th Cir. 2001)* (appellate courts must accept district court's reconstruction of record under Appellate Rule 10(e) unless it was intentionally falsified or plainly unreasonable).

(n80)Footnote 4. *United States v. Mori, 444 F.2d 240, 246 (5th Cir. 1971)* , *cert. denied, 404 U.S. 913 (1971)* (determination of trial judge in correcting record is conclusive absent showing of intentional misrepresentation of contents of record).

(n81)Footnote 5. *United States v. Elizalde-Adame, 262 F.3d 637, 641 (7th Cir. 2001)* .

(n82)Footnote 6. *Fed. R. App. P. 10(e)(2)(A).*

(n83)Footnote 7. *Ashcroft v. Paper Mate Mfg. Co., 434 F.2d 910, 915-916 (9th Cir. 1970)* (trial court did not abuse its discretion in refusing to hear further arguments on exhibits where parties stipulated entering exhibits into record on appeal).

(n84)Footnote 8. *Panaview Door & Window Co. v. Reynolds, 255 F.2d 920, 922 (9th Cir. 1958)* (matters not

before trial court must be stricken even if included in record on appeal by stipulation of parties).

(n85)Footnote 9. *Fed. R. App. P. 10(e)(2)(B).*

(n86)Footnote 10. *Arundar v. DeKalb County Sch. Dist., 522 F. Supp. 677, 678 (N.D. Ga. 1981)* (when appeal is taken from decision of district court, district court has no jurisdiction except to aid appeal or correct clerical errors); *see Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 216 (6th Cir. 1992)* (district court decides whether disputed item is in record on appeal and may direct that omission be corrected).

(n87)Footnote 11. *Fed. R. App. P. 10(e)(2)(C).*

(n88)Footnote 12. *Fed. R. App. P. 10(e)(3).*

(n89)Footnote 13. *Townsend v. Columbia Operations, 667 F.2d 844, 848-849 (9th Cir. 1982)* (circuit court allowed supplementation of record with documents that were presented to district court but never stamped as "filed").

(n90)Footnote 14. *Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987) , cert. denied, 484 U.S. 890 (1987) .*

(n91)Footnote 15. *Fed. R. App. P. 10(e)(3).*

(n92)Footnote 16. *Allen v. Minnstar, Inc., 8 F.3d 1470, 1474 (10th Cir. 1993)* (circuit court must review decision made in district court on basis of record made before district court that truly discloses what occurred in district court).

(n93)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 311.10 et seq. (Matthew Bender 3d ed.).

(n94)Footnote 1. *Fed. R. App. P. 11(a)*; *see Horsey v. Mack Trucks, Inc., 882 F.2d 844, 849 (3d Cir. 1989)* (appellant bears burden of ensuring all necessary materials are part of record on appeal).

(n95)Footnote 2. *Fed. R. App. P. 11(a)*; *see Fed. R. App. P. 10(b)*; *Willhauck v. Halpin, 953 F.2d 689, 704 n.13 (1st Cir. 1991)* (appellant has duty to order portion of district court transcript relevant to issues on appeal).

(n96)Footnote 3. *Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572, 581, n.5 (7th Cir. 2001)* (appellant's failure to file trial transcript from bench trial resulted in forfeiture of any argument that district court's factual findings were against weight of evidence)

(n97)Footnote 4. *United States v. Gomez, 810 F.2d 947, 959 (10th Cir. 1987) , cert. denied, 482 U.S. 908 (1987) .*

(n98)Footnote 5. *Murray v. Stuckey's, Inc., 939 F.2d 614, 622 n.3 (8th Cir. 1991) , cert. denied, 116 S. Ct. 174 (1995)* (circuit court prefers to consider appeal as prepared, and rarely requests material omitted from record on appeal).

(n99)Footnote 6. *Fed. R. App. P. 11(b)(1)(A).*

(n100)Footnote 7. *Fed. R. App. P. 11(b)(1)(B).*

(n101)Footnote 8. *Fed. R. App. P. 11(b)(1)(C).*

(n102)Footnote 9. *Fed. R. App. P. 11(b)(1)(D).*

(n103)Footnote 10. *Antoine v. Byers & Anderson, 950 F.2d 1471, 1477 (9th Cir. 1991) , rev'd, on other grounds, 508 U.S. 429 (1993)* (party aggrieved by failure of court reporter to produce transcript has remedy of compelled production); *Matter of Bjella, 806 F.2d 211, 216 (10th Cir. 1986)* (court reporter ordered to file transcript, refund fee for transcript, and forego attempt to collect fee because of failures to provide transcript).

(n104)Footnote 11. *Fed. R. App. P. 11(b)(2)*.

(n105)Footnote 12. *Fed. R. App. P. 11(a)*.

(n106)Footnote 13. *Fed. R. App. P. 11(b)(2)*.

(n107)Footnote 14. *Fed. R. App. P. 11(c)*.

(n108)Footnote 15. *Fed. R. App. P. 11(e)(1)*.

(n109)Footnote 16. *Fed. R. App. P. 11(e)(2)*.

(n110)Footnote 17. *Fed. R. App. P. 11(e)(3)*.

(n111)Footnote 18. *Fed. R. App. P. 11(f)*.

(n112)Footnote 19. *Fed. R. App. P. 11(g)*.

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PART VII Appeal
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A. APPEAL FROM DISTRICT COURT JUDGMENT OR ORDER

3-28 Moore's Manual--Federal Practice and Procedure § 28.16

§ 28.16 Docketing Appeal and Filing Record In Court of Appealsn*

[1] Docketing Appeal

At the time the circuit court clerk receives a copy of a notice of appeal and the docket entries from the district clerk pursuant to Appellate Rule 3(d), n1 the circuit court clerk must docket the appeal under the title of the district court action and must identify the appellant, adding the appellant's name if necessary. n2 However, this is not a rigid rule, and the circuit court of appeals has discretion to waive formalities of the Appellate Rules and any local rules of court concerning the docketing of a case, and the filing of the record, and to permit the cause to be docketed despite irregularities. n3

[2] Filing Representation Statement

Within 14 days after filing a notice of appeal, the attorney who filed the notice must file a statement with the circuit clerk naming the parties that the attorney represents on appeal, unless the court of appeals designates a longer time for the attorney to file the statement. n1 This statement of representation allows the circuit court to identify the individual appellants when the notice of appeal uses a description, such as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X," to specify the parties bringing the appeal. n2

[3] Filing Record

When the circuit court clerk receives the complete record, partial record, or district clerk's certificate as provided in Appellate Rule 11, n1 the circuit clerk must file it and immediately notify all parties of the filing date. n2 The notice of the filing of the record is necessary because the date on which the record, partial record, or certificate is filed in the circuit court commences the 40-day deadline for the filing of the appellant's brief. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealCivil

ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 312.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 3(d).*

(n3)Footnote 2. *Fed. R. App. P. 12(a)*; *Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 910 (7th Cir. 1989)* (appeal must be entered on docket as soon as circuit clerk receives copy of notice of appeal and copy of district court docket entries).

(n4)Footnote 3. *United States v. Bowen, 306 F.2d 620, 621 (5th Cir. 1962)* .

(n5)Footnote 1. *Fed. R. App. P. 12(b).*

(n6)Footnote 2. *See Fed. R. App. P. 3(c).*

(n7)Footnote 1. *See Fed. R. App. P. 11(b)(2),(c), (e), (f), (g).*

(n8)Footnote 2. *Fed. R. App. P. 12(c).*

(n9)Footnote 3. See *Fed. R. App. P. 31(a)(1).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.17

§ 28.17 Remand to District Court on Indicative Ruling

[1] Circumstances for Use of Indicative Ruling

[a] Pending Appeal May Preclude Grant of Motion for Relief by District Court

If a party files a timely notice of appeal of a judgment on a claim or claims, the general rule is that the notice of appeal divests the district court of jurisdiction over the claims. n Thus, a court may not grant a Rule 60(b) motion for relief from judgment on the grounds of mistake, newly discovered evidence, fraud and similar grounds, unless the Rule 60(b) motion is filed within 28 days of the judgment. n2 However, case law has developed which gives the district court the option to either deny such a motion or to indicate its belief that the arguments raised are meritorious. If the district court selects to grant the motion, the moving party may then petition the court of appeals to remand the matter to give the district court jurisdiction to grant the motion. n3 The procedure for such an motion and "indicative ruling" in the district court has been formalized in the federal rules. n4

[b] Federal Rules Codify Procedure for Indicative Ruling

After an appeal has been docketed, and during the time it is pending, the district court cannot grant a Rule 60(b) motion without a remand from the court of appeals. n5 However, it can entertain the motion and deny it, defer considering the motion, state that it creates a substantial issue, or state that it would grant the motion if the court of appeals remands for that purpose. n6 Attorneys and courts have referred to the court's suggestion that it would grant the motion as an "indicative ruling." n7

Appellate Rule 12.1 and Civil Rule 62.1, n8 codify, clarify, and formalize this "indicative ruling" practice which has been developed in case law when a postjudgment motion, usually the Rule 60(b) motion for relief from judgment in the district court, is made at a time when a pending appeal prevents the district from granting the motion. The appellate rule and the civil rule are coordinated to implementation the procedure between the two courts. n9 Neither Rule 12.1 nor Rule 62.1 specifies the circumstances in which a pending appeal limits or defeats the district court's authority to act in the face of a pending appeal, because the principles that govern the relationship between the district courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Appellate

Rule 12.1 applies only when the determination has already been made that the district court is divested of jurisdiction to entertain the motion. n10 If the district court correctly concludes that it has authority to grant relief without appellate permission, it can act without resorting to the indicative ruling procedure. n11

[c] Coordination of Procedure Between District Court and Court of Appeals

Appellate Rule 12.1 and Civil Rule 62.1, which control the indicative ruling procedure, are coordinated to facilitate implementation of the procedure between the two courts. In summary, the district court first indicates whether the motion it would grant the motion or that it creates a substantial issue to be determined, n12 and the moving party notifies the court of appeals. n13 Then, the court of appeals has discretion to determine whether the appeal or the motion should be decided first, and remands if the court of appeals finds that the district court should determine the motion. n14 The coordinated procedure under the two rules therefore avoids requiring the court of appeals to make unnecessary determinations on matters that would be more suitable for resolution by the district court, or that would be mooted by the district court's determination of the postjudgment motion. n15

[2] Indicative Ruling Procedure in Appellate Court

[a] Notification of Court of Appeals That District Court Would Grant Motion or that Motion Creates Substantial Issue

If the district court states that it would grant the motion, or that the motion raises a substantial issue, the moving party may request the court of appeals to remand so that the district court can make its final ruling on the motion. n1 Pursuant to Appellate Rule 47(a)(1), n2 each court of appeals may enact a local rule that specifies the format that litigants must use to make a notification, and the format for the district court's statement. Notification is necessary because the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand. n3

[b] Determination by Court of Appeals Whether to Remand

If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings. The court of appeals has considerable discretion whether to remand, n4 and if so, the scope of the remand. n5 If the court of appeals remands, it retains jurisdiction unless it expressly dismisses the entire appeal. n6 Thus, the court of appeals may remand all proceedings and dismiss the appeal. If the court of appeals dismisses the appeal, and the district court then denies the relief requested in the motion, the time for appealing the initial judgment will have run out, and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. Consequently, the court of appeals should exercise caution in delimiting the scope of the remand. n7

The alternative to terminating the entire appeal is to remand for the sole purpose of a ruling on the motion, while retaining jurisdiction to proceed with the appeal after the district court rules on the motion. n8

[c] Procedures After Remand

If the court of appeals remands for the purpose of deciding the motion, the district court may then determine the motion. n9 If the court of appeals has remanded but retained jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand. n10 This notification is a joint obligation of all parties, and it is fulfilled when the required notice is given by any litigant involved in the motion in the district court. n11

When the court of appeals has remanded for the sole purpose of a ruling on the motion, the court of appeals has retained jurisdiction, n12 and proceeds with the appeal after the district court rules on the motion, assuming the appeal is not moot after the ruling and that any party requests to proceed with the appeal. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentCivil ProcedureAppealsRemands

FOOTNOTES:
(n1)Footnote . *Dexia Credit Local v. Rogan, 604 F. Supp. 2d 1180, 1184* .

(n2)Footnote 2. *Fed. R. Civ. P. 62.1*, Committee Note to Original Rule; *see Fed. R. App. P. 4(a)(4)(A)(vi)* (after 28 days, motion of relief no longer suspends notice of appeal).

(n3)Footnote 3. *Mahone v. Ray, 326 F.3d 1176, 1180 (11th Cir. 2003)* ; *see § 26.63*.

(n4)Footnote 4. *See* [b], *below*.

(n5)Footnote 5. *See* [a], *above*.

(n6)Footnote 6. *See Fed. R. App. P. 12.1*, Committee Note to Original Rule.

(n7)Footnote 7. Cal. ex rel. Lockyer v. United States Dep't of Agriculture, 2008 U.S. Dist. LEXIS 100053, at *4 (N.D. Cal. 2008) ; *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc., 223 F. Supp. 2d 763, 766 (W.D.N.C. 2002)* .

(n8)Footnote 8. *See Fed. R. Civ. p. 62.1*; *see § 26.63*.

(n9)Footnote 9. *See Fed. R. App. P. 12.1*, Committee Note to Original Rule; *see also* [c] *below*.

(n10)Footnote 10. *See Fed. R. App. P. 12.1(a)*.

(n11)Footnote 11. *See Fed. R. App. P. 12.1*, Committee Note to Original Rule.

(n12)Footnote 12. *Fed. R. App. P. 12.1(a)*; *see Fed. R. Civ. P. 62.1(a)(3)*.

(n13)Footnote 13. *Fed. R. App. P. 12.1(a)*; *see* Fed. R. App. P. 62.1(b).

(n14)Footnote 14. *See Fed. R. App. P. 12.1(b)*.

(n15)Footnote 15. *See Fed. R. Civ. P. 62.1*, Committee Note to Original Rule; *see also* [2] *below* (complete appellate court procedure).

(n16)Footnote 1. *Fed. R. App. P. 12.1(a)*.

(n17)Footnote 2. *See Fed. R. App. P.47(a)(1)*.

(n18)Footnote 3. *Fed. R. App. P. 12.1(a)*, Committee Note to Original Rule.

(n19)Footnote 4. *Fed. R. App. P. 12.1(b)*; *see Ameritech Corp. v. IBEW, Local 21, 543 F.3d 414, 419 (7th Cir. 2008)* .

(n20)Footnote 5. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule (even when district court states that it would grant motion for relief, court of appeals may in appropriate circumstances choose limited rather than unlimited remand).

(n21)Footnote 6. *Fed. R. App. P. 12.1(b)*.

(n22)Footnote 7. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule.

(n23)Footnote 8. *Fed. R. App. P. 12.1(b)*; *see* [c], *below*; *see also Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule.

(n24)Footnote 9. *Fed. R. App. P. 12.1(b)*; *see Fed. R. Civ. P. 62.1(c)*.

(n25)Footnote 10. *Fed. R. App. P. 12.1(b)*.

(n26)Footnote 11. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule.

(n27)Footnote 12. *Fed. R. App. P. 12.1(b)* (court of appeals retains jurisdiction unless it has expressly dismissed the appeal).

(n28)Footnote 13. *Fed. R. App. P. 12.1(b)*, Committee Note to Original Rule.

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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.18through 28.29

[Reserved]

§§ 28.18[Reserved]

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3-28 Moore's Manual--Federal Practice and Procedure § 28.30

§ 28.30 Applicability of Rules Governing Procedure in Court of Appeals for Review of Tax Court Decisionn*

Appellate Rule 13 explicitly governs the appellate procedure for review of a decision by the tax court. n1 Additionally, all other provisions of the Federal Rules of Appellate Procedure apply to the review of a Tax Court decision by a circuit court of appeals, except for the following rules: n2

1. Appellate Rules 4-9, which govern the time for appeal generally.

2. Appellate Rules 15-20, which govern appeals from orders in administrative proceedings.

3. Appellate Rules 22-23, which govern habeas corpus proceedings.

Thus, Appellate Rule 14 codified the prior uniform practice of the circuit courts, which regulated review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Courts of ReviewGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Notice of AppealTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Standards of ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 314.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. App. P. 13.*

(n3)Footnote 2. *Fed. R. App. P. 14.*

(n4)Footnote 3. *Fed. R. App. P. 14*, Committee Note.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.31

§ 28.31 Procedure for Appealing Decision of Tax Courtn*

[1] Timely Filing of Notice of Appeal Required to Commence Appeal

A party may initiate an appeal of a decision of the United States Tax Court only if the party files a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. When a timely notice of appeal is filed by one party, any other party may also appeal by filing a notice of appeal within 120 days after the entry of the Tax Court's decision. n1

If a party does not file a timely notice of appeal, the court of appeals does not have jurisdiction over the case, and the decision of the Tax Court will be final. n2 Furthermore, after the time for appeal has expired, the Tax Court may not consider a motion to vacate the decision and enter an appealable order. n3 However, after the time for appeal has run, the Tax Court may still vacate a decision for fraud on the court n4 or when the Tax Court did not have jurisdiction to make the decision in question. n5

The court may not extend the time for filing a notice of appeal in tax cases, even when good cause is shown. n6 However, if a party makes a timely motion to vacate or revise the Tax Court's decision according to Tax Court rules, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later. n7 There are limits to the use of this tolling provision. Thus, motions that terminate the running of the period for filing an appeal of a Tax Court decision may not be tacked together to extend further the prescribed time for appeal. n8 Furthermore, a motion to revise a Tax Court decision in one case will not terminate the time for appeal in a consolidated case based on separate facts. n9 Finally, modification of a Tax Court order may not be construed to extend the time to appeal where the order specifically states that it does not affect the finality of the judgment. n10

[2] Method of Filing Notice of Appeal

A party may file a notice of appeal from the tax court either by personal delivery to the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail, the notice is considered filed on the postmark date, subject to *Section 7502 of the Internal Revenue Code*, n11 and the applicable regulations. n12 To complete filing

of the notice of appeal, the appellant of a Tax Court decision must furnish the clerk of the Tax Court with sufficient copies of the notice of appeal to enable the clerk to comply with the requirements of Appellate Rule 3(d), which means that the appellant must provide the clerk with sufficient copies of the notice of appeal to serve the circuit clerk, counsel of record for each of the other parties, and any other party that is not represented by counsel. n13

For purposes of notice of an appeal from a Tax Court decision, each reference in Appellate Rule 3 to the district court or the clerk of the district court is read as a reference to the Tax Court and the clerk of the Tax Court. n14

[3] Service of Notice of Appeal

An appellant need not serve a notice of appeal from a Tax Court decision, because service of such notice must be as prescribed by Appellate Rule 3, which provides that it is the clerk of the Tax Court who must give notice of the filing of the appeal by serving a copy of the notice of appeal, with a notation of the date it was filed, on the circuit clerk, on each party's attorney of record (other than appellant's attorney), and on any party that is not represented by counsel. n15 For purposes of service of notice of an appeal from a Tax Court decision, each reference in Appellate Rule 3 to the district court or the clerk of the district court is read as a reference to the Tax Court and the clerk of the Tax Court. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Courts of ReviewGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Notice of AppealTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Rules of Evidence, Practice & Procedure

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 313.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 13(a)(1)*; *see 26 U.S.C. § 7483*.

(n3)Footnote 2. *Spencer Med. Assocs. v. Commissioner, 155 F.3d 268, 269-270 (4th Cir. 1998)* (if party does not file notice of appeal from tax court's decision in timely manner, appellate court lacks jurisdiction to hear appeal); *Harbold v. Commissioner, 51 F.3d 618, 621 (6th Cir. 1995)* (failure to file timely appeal deprived court of jurisdiction); *Abatti v. Commissioner, 859 F.2d 115, 117-118 (9th Cir. 1988)* (timely filing is jurisdictional).

(n4)Footnote 3. *Webbe v. Commissioner, 902 F.2d 688, 689 (8th Cir. 1990)* (when time for appeal has expired, additional motions may not be considered because Tax Court decision becomes final).

(n5)Footnote 4. *Kenner v. Commissioner, 387 F.2d 689, 691 (7th Cir. 1968)* , *cert. denied*, *393 U.S. 841 (1968)* .

(n6)Footnote 5. *Billingsley v. Commissioner, 868 F.2d 1081, 1084 (9th Cir. 1989)* (decision that never becomes final subject to motion to vacate even after expiration of time for appeal).

(n7)Footnote 6. *Fed. R. App. P. 26(b)(1)*; *see Fed. R. App. P. 14*.

(n8)Footnote 7. *Fed. R. App. P. 13(a)(2)*; *see Buchine v. Commissioner, 20 F.3d 173, 180 (5th Cir. 1994)* (filing of motions terminated running of time for appeal until order denying motions was entered).

(n9)Footnote 8. *Okon v. Commissioner, 26 F.3d 1025, 1026 (10th Cir. 1994)* , *cert. denied*, *115 S. Ct. 583 (1994)* (principle that tolling motions may not be tacked together to further extend prescribed time for appeal is appropriate in tax context).

(n10)Footnote 9. *Page v. Commissioner, 823 F.2d 1263, 1268-1269 (8th Cir. 1987)* , *cert. denied*, *484 U.S. 1043*

(1988) (motion for reconsideration of decision in tax deficiency case with respect to one year did not terminate limitation period for filing appeal of decision concerning another year, even though cases were consolidated for trial).

(n11)Footnote 10. *Haley v. Commissioner, 805 F. Supp. 834, 836-837 (E.D. Cal. 1992)* (equivocal order by court in ruling on motion did not serve to extend time for appeal).

(n12)Footnote 11. *See I.R.C. § 7502.*

(n13)Footnote 12. *Fed. R. App. P. 13(b).*

(n14)Footnote 13. *Fed. R. App. P. 13(a)(1)*; *see Fed. R. App. P. 3(d)*; *see also § 28.10[1][f].*

(n15)Footnote 14. *Fed. R. App. P. 13(d)(1).*

(n16)Footnote 15. *Fed. R. App. P. 13(c)*; *Fed. R. App. P. 3*; *see also § 28.10[1][g].*

(n17)Footnote 16. *Fed. R. App. P. 13(d)(1).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.32

§ 28.32 Content of Notice of Appeal From Tax Courtn*

The content of a notice of appeal from a decision of the Tax Court is controlled by Appellate Rule 3, n1 which basically requires that the notice of appeal specify the party or parties taking the appeal, n2 a designation of the judgment, order, or part of the judgment or order appealed from, n3 and the name of the court to which the appeal is taken. n4 For purposes of the content of the notice of appeal from a Tax Court decision, each reference in Appellate Rule 3 to the district court or the clerk of the district court is read as a reference to the Tax Court and the clerk of the Tax Court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Courts of ReviewGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Notice of Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 313.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 13(c).*

(n3)Footnote 2. *See Fed. R. App. P. 3(c)(1)(A); see also § 28.10[1][e][ii].*

(n4)Footnote 3. *See Fed. R. App. P. 3(c)(1)(B); see also § 28.10[1][e][iii].*

(n5)Footnote 4. *See Fed. R. App. P. 3(c)(1)(C); see also § 28.10[1][e][iv].*

(n6)Footnote 5. *Fed. R. App. P. 13(d)(1).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.33

§ 28.33 Record on Appeal From Tax Courtn*

[1] Composition of Tax Court Record

The composition of the record on appeal from a Tax Court decision is controlled by Appellate Rule 10. n1 Therefore, the appellate record in tax cases includes the original papers n2 and exhibits filed in the Tax Court, n3 any transcript taken of the proceedings, n4 and a certified copy of the docket entries prepared by the clerk of the Tax Court. n5 For purposes of the record on appeal from a Tax Court decision, each reference in Appellate Rule 10 to the district court or the clerk of the district court must be read as a reference to the Tax Court and the clerk of the Tax Court. n6

Pursuant to the rules of the Tax Court, n7 when the parties and the court have settled or agreed on the contents of the record, the Tax Court clerk notifies the appellant of the costs and charges allowable by statute. n8 The clerk will not certify the transcript until these costs are paid. n9

[2] Transmittal of Record from Tax Court to Appellate Court

The procedure for transmitting the record to the circuit court on appeal from a Tax Court decision is governed by Appellate Rule 11, n10 which sets out the responsibilities of the appellant, n11 the court reporter, n12 and the clerk of the Tax Court. n13 For purposes of transmittal of the record on appeal from a Tax Court decision, each reference in Appellate Rule 11 to the district court or the clerk of the district court is read as a reference to the Tax Court and the clerk of the Tax Court. n14

If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record. n15

[3] Filing Tax Court Record in Appellate Court

The filing of the record on appeal from a Tax Court decision is governed by Appellate Rule 12, n16 which gives the circuit clerk the duties of filing the record immediately on its receipt from the Tax Court clerk and of providing all

parties with notice of the filing date. n17 For purposes of the filing of the record on appeal from a Tax Court decision, each reference in Appellate Rule 12 to the district court or the clerk of the district court is read as a reference to the Tax Court and the clerk of the Tax Court. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Courts of ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, §§ 313.12-313.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 13(d)(1).*

(n3)Footnote 2. *See Fed. R. App. P. 10(a)(1)*; *see also § 28.15[2][b].*

(n4)Footnote 3. *See Fed. R. App. P. 10(a)(1)*; *see also § 28.15[2][c].*

(n5)Footnote 4. *See Fed. R. App. P. 10(a)(2)*; *see also § 28.15[2][d].*

(n6)Footnote 5. *See Fed. R. App. P. 10(a)(3)*; *see also § 28.15[2][e].*

(n7)Footnote 6. *Fed. R. App. P. 13(d)(1).*

(n8)Footnote 7. *Tax Ct. R. 52(b).*

(n9)Footnote 8. *See 26 U.S.C. § 7474.*

(n10)Footnote 9. *Tax Ct. R. 52(b).*

(n11)Footnote 10. *Fed. R. App. P. 13(d)(1).*

(n12)Footnote 11. *See Fed. R. App. P. 11(a)*; *see also § 28.15[5][a].*

(n13)Footnote 12. *See Fed. R. App. P. 11(b)(1)*; *see also § 28.15[5][b].*

(n14)Footnote 13. *See Fed. R. App. P. 11(b)(2)*; *see also § 28.15[5][c].*

(n15)Footnote 14. *Fed. R. App. P. 13(d)(1).*

(n16)Footnote 15. *Fed. R. App. P. 13(d)(2).*

(n17)Footnote 16. *Fed. R. App. P. 13(d)(1).*

(n18)Footnote 17. *Fed. R. App. P. 12(c)*; *see also § 28.16[3].*

(n19)Footnote 18. *Fed. R. App. P. 13(d)(1).*

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B. APPEAL FROM DECISION OF TAX COURT

3-28 Moore's Manual--Federal Practice and Procedure § 28.34

§ 28.34 Standard of Review for Tax Court Decisionsn*

The regional circuit court of appeals must review Tax Court decisions in the same manner, and to the same extent, as decisions of the district courts in civil actions tried without a jury. n1 Thus, the circuit court reviews factual questions for clear error, legal questions de novo, and mixed questions of law and fact either for clear error or de novo, depending on whether the question is primarily factual or legal. For example, the appropriate legal standard for determining whether an organization operates for a "charitable" purpose is a legal question, which the circuit court reviews de novo. However, whether an organization in fact operates exclusively for a charitable purpose is a question of fact, which the circuit court reviews for clear error. n2 In other words, if the court of appeals is considering a decision of the tax court that constitutes an ultimate legal conclusion, the review is de novo. n3

The district courts do not have any appellate jurisdiction over tax court decisions. Rather, the regional circuit courts of appeals' appellate jurisdiction is exclusive, with final review in the Supreme Court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Standards of ReviewGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Standards of ReviewAbuse of DiscretionTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Standards of ReviewClearly Erroneous ReviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Standards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, *see* 9 Moore's Federal Practice, § 52.34[7] (Matthew Bender 3d ed.); 20 Moore's Federal Practice, § 313.16 (Matthew Bender 3d ed.)

(n2)Footnote 1. *26 U.S.C. § 7482(a)(1).*

(n3)Footnote 2. *IHC Health Plans, Inc. v. Commissioner, 325 F.3d 1188* , **10-*11 (10th Cir. 2003).

(n4)Footnote 3. *American Elec. Power Co. v. United States, 326 F.3d 737, 741 (6th Cir. 2003)* .

(n5)Footnote 4. *Freytag v. Commissioner, 501 U.S. 868, 889, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* .

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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.35through 28.39

[Reserved]

§§ 28.35[Reserved]

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3-28 Moore's Manual--Federal Practice and Procedure § 28.40

§ 28.40 Rules Governing Procedure for Review or Enforcement of Administrative Ordern*

The procedure for the review or enforcement by a circuit court of an order of an agency, board, commission, or officer is controlled specifically by Appellate Rules 15-20. n1 Additionally, all other provisions of the Federal Rules of Appellate Procedure apply to the review or enforcement of an administrative order by a Circuit court of Appeals, except for the following rules: n2

1. Appellate Rules 3-14, which govern appeals from a judgment or order of the district courts and appeals from decisions of the Tax Court. n2.1

2. Appellate Rules 22-23, which govern habeas corpus proceedings.

Thus, Appellate Rule 20 has codified the prior uniform practice of the circuit courts of appeal, which regulated agency review or enforcement proceedings by the general rules applicable to appeals from judgments of the district courts, n3 except for those circumstances when an appeal from an agency ruling is covered by a particular statute or Appellate Rule. n4

When applying the general Appellate Rules in administrative law cases, the courts use the term "appellant" to include a petitioner or applicant, and the term "appellee" to include a respondent. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, §§ 315.10, 315.11 (Matthew Bender 3d ed.).

(n2)Footnote 1. *LaRouche's Comm. for a New Bretton Woods v. FEC, 439 F.3d 733, 739 (D.C. Cir. 2006)* (failure to substantially comply with procedure specified in Appellate Rules 15-20 will be fatal to challenge agency decision); *see Fed. R. App. P. 15.*

(n3)Footnote 2. *Fed. R. App. P. 20.*

(n4)Footnote 2.1. *See Lucaj v. Gonzales, 425 F.3d 203, 204 n.1 (2d Cir. 2005)* (for review of agency decision, Appellate Rule 4 does not apply; Rule 4 only governs appeals from district court and tax court orders).

(n5)Footnote 3. *Fed. R. App. P. 20*, Committee Note.

(n6)Footnote 4. *See Malvoisin v. INS, 268 F.3d 74, 76 (2d Cir. 2001)* (time for filing petition for review of final order of removal issued by Board of Immigration Appeals controlled by *8 U.S.C. § 1252(b)(1)*, and could not be extended by Circuit Court for any reason); *Reich v. Trinity Indus., 16 F.3d 1149, 1155 (11th Cir. 1994)* (time for filing petition to contest Occupational Safety and Health Commission order not controlled by Appellate Rule 4, but by *29 U.S.C. § 660(a)*).

(n7)Footnote 5. *Fed. R. App. P. 20.*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.41

§ 28.41 Nature of Proceedings for Review or Enforcement of Administrative Order

[1] Types of Agency Orders Subject to Review

There are two general types of proceedings governed by Appellate Rules 15-20. n1 The first type is a petition for review of an agency order, which is filed by an entity or individual in order to challenge an agency's decision or finding. n2 The second type is an application for enforcement of an order, which is filed by a federal government agency to obtain the circuit court's assistance in enforcing that agency's order. n3 Appellate Rule 15 governs only the procedure for these two types of appeals and does not provide the source of circuit court jurisdiction to review or enforce an agency decision. n4 Rather, jurisdiction for review of enforcement of administrative proceedings must be provided by a particular statute which governs the powers of each individual agency. n5 Under the Judicial Review Act, the federal courts of appeals have exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of final orders of several agencies, such as the Federal Communications Commission, Federal Maritime Commission or Maritime Administration, Atomic Energy Commission, and the Interstate Commerce Commission. n6 In the absence of a statutory provision granting jurisdiction to the courts of appeals to review particular administrative proceedings, district courts have jurisdiction to review agency decisions. n7

[2] Standard of Judicial Review of Agency Order

Unless the particular statute establishing an administrative process explicitly establishes a standard for judicial review of the administrative agency, the reviewing court must apply the standard of review from the Administrative Procedure Act. n8 This default standard requires the reviewing court to reverse the agency's decision or action if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. n9 The court must also reverse the agency decision if the agency does not explain its decision sufficiently for a person to reasonably discern the path the agency has taken. n10

However, under the doctrine of "primary jurisdiction," courts normally should accord particular deference to an agency interpretation of longstanding duration, recognizing that well-reasoned views of an expert administrator are based on experience and informed judgment that the courts and litigants may resort to for guidance. n11 The doctrine of "primary

jurisdiction" permits a court to refer a question to the secretary of an agency and to use the secretary's answer in the court's determination.

If the reviewing court concludes that an issue raised in an action before the court is within the primary jurisdiction of a federal agency, the court will defer any decision in the action before it until the agency has addressed the issue. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it will not resolve the dispute until the agency has resolved the issue that is in its primary jurisdiction. n12 The doctrine of primary jurisdiction seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime. n13 Typically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency. n14

[3] Reversal of Agency Order Generally Requires Remand to Agency

When the court of appeals reverses a decision of a federal agency, the court of appeals may not merely supplant the agency's order with its own. n15 Under the "ordinary remand" rule promulgated by the Supreme Court, a court of appeals must generally remand a reversed case to an agency for decision of any matter that the particular statute places primarily in agency hands. n16 However, in special circumstances, such as when the agency has already decided an issue, but has done so in a clearly erroneous manner, the court of appeals may decide the issue de novo, and enter an order without remanding to the agency. n17 The ordinary remand rule is based on the acknowledgment that the agency is in the best position to bring its expertise to bear and make an initial determination on the issue. Through the agency's initial evaluation of the evidence, and informed discussion and analysis, the agency helps a court later to determine whether the agency's decision exceeds the leeway that the law provides. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewReviewabilityFactual Determinations

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 15.*

(n2)Footnote 2. *See, e.g., Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 468-470, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)* (petition by state environmental agency to challenge orders of federal Environmental Protection Agency).

(n3)Footnote 3. *See, e.g., EEOC v. Neches Butane Products Co., 704 F.2d 144, 147 (5th Cir. 1983)* .

(n4)Footnote 4. *Office of Governor v. Department of Health & Human Servs., 997 F.2d 1290, 1292 (9th Cir. 1993)* .

(n5)Footnote 5. *See, e.g., 29 U.S.C. § 160(e), (f)* (providing courts of appeals with jurisdiction to review or enforce orders of National Labor Relations Board); *Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001)* , *cert. denied, Mills v. Barnhart, 534 U.S. 1085 (2002)* .

(n6)Footnote 6. *28 U.S.C. § 2342.*

(n7)Footnote 7. *See 28 U.S.C. § 1331*; *see also La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 318-319 (6th Cir. 2000)* .

(n8)Footnote 8. *Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-497, 124 S. Ct. 983, 157 L. Ed.*

2d 967 (2004) .

(n9)Footnote 9. *5 U.S.C. § 706(2)(A).*

(n10)Footnote 10. *Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-497, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)* .

(n11)Footnote 11. *Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-497, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)* .

(n12)Footnote 12. *Association of Int'l Auto. Mfr., Inc. v. Commissioner, Mass. Dep't of Envtl. Prot., 196 F.3d 302, 304 (1st Cir. 1999)* .

(n13)Footnote 13. *Pharmaceutical Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 123 S. Ct. 1855, 155 L. Ed. 2d 889, 896 (2003)* .

(n14)Footnote 14. *National Communs. Ass'n, Inc. v. AT & T, 46 F.3d 220, 223 (2d Cir. 1995)* .

(n15)Footnote 15. *Gonzales v. Thomas, 547 U.S. 183, 126 S. Ct. 1613, 164 L. Ed. 2d 358, 2006 U.S. LEXIS 3268, *5-*6 (2006)* (judicial judgment may not be made to do service for an administrative judgment).

(n16)Footnote 16. *INS v. Ventura, 537 U.S. 12, 16-17, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002)* .

(n17)Footnote 17. *See Zhao v. Gonzales, 404 F.3d 295, 310-311 (5th Cir. 2005)* .

(n18)Footnote 18. *Gonzales v. Thomas, 547 U.S. 183, 126 S. Ct. 1613, 164 L. Ed. 2d 358, 2006 U.S. LEXIS 3268, *6-*7 (2006)* .

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3-28 Moore's Manual--Federal Practice and Procedure § 28.42

§ 28.42 Petition for Review of Administrative Agency Ordern*

[1] Filing Petition to Commence Review

A person may initiate review of an agency order by filing a petition for review. n1 The person may file the petition for review with respect to an order of an agency, board, commission, or officer. The petition may be denominated as a petition to enjoin, a petition to suspend, a petition to modify, or a notice of appeal, whichever form is indicated by the applicable statute. n2 The person requesting review must file the petition with the clerk of a court of appeals authorized to review the agency order. Two or more persons may join in a petition to the same court to review the same order, provided that their interests make joinder practicable. n3

The petitioner must file the petition with the clerk of the circuit court to review the order within the time specified by the statute that controls the appeal. n4 The statute may provide a specific time limit for filing the petition. n5 When the applicable statute does not specify an applicable time limit, the time for filing a petition seeking review is subject only to the doctrine of laches. n6 A petitioner should not file a petition prematurely, which is before the time an agency order, action, or decision becomes final because the circuit court does not have jurisdiction to accept a premature petition. n7

The time limit for filing a review petition is jurisdictional, which means that the circuit court has no jurisdiction over an untimely petition, nor may the circuit court extend the time for any reason, even under a theory of excusable neglect. n7.1 However, if papers contain all of the information required in a petition for review of agency determination, n7.2 the papers will be considered as a timely petition, even if they are not filed all at the same time, or denominated as a petition for review. For example, one circuit court accepted a "motion for an extension of time to file a petition for review" as an actual, proper petition for review when it contained all the information required in a petition and was filed within the time for filing the petition. n7.3

[2] Contents of Petition

The Federal Rules of Appellate Procedure suggest that Form 3 in the Appendix of Forms be used as a petition for

review. n8

The petition must contain all three of the following items: n8.1

1. The petition must name each party requesting review, either in the caption or the body of the petition. The use of terms such as "et al.," "petitioners," or "respondents" does not effectively name the parties. n9 This requirement is more strict than that of Appellate Rule 3, n9.1 which permits the appellants to be described more generally in the notice of appeal. n10 The reason this designation is more strict is because a petition for review of an agency decision is analogous to a complaint, in that the petition is the first filing in any court. n11

2. The petition must name the agency as a respondent. Even though not named in the petition, the United States is a respondent if required by statute. n12 Note that if an agency such as the Department of Labor has a sub-agency charged with exercising the adjudicatory functions of the primary agency, it is the primary agency that is the respondent "agency" for purposes of Appellate Rule 15(a). However, the primary agency may designate a sub-agency to be its voice before the court of appeals. n13

3. The petition must specify the order or the part of the order to be reviewed. n14 If the correct order is not specified in the petition, the circuit court lacks jurisdiction to review the order. Because this requirement is jurisdictional, it may not be waived. n15 However, as in the case of the review of non-agency decisions, n16 the rule is interpreted liberally. Thus, even if the petition fails to specify the agency order or mistakenly specifies the agency order, the appellate court may review if the order can be determined from the intent of the petition. In other words, a mistaken or inexact specification of the order to be reviewed does not invalidate the petition if the petitioner's intent to seek review of a particular order can be fairly inferred from the petition for review or from other contemporaneous filings, and the respondent is not misled by the mistake. n17

Some circuit courts by local rule impose additional requirements with regard to specification of the order to be reviewed. For example, the Eleventh Circuit requires that a copy of the order sought to be reviewed or enforced be attached to each petition or application. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, §§ 315.20, 315.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. App. P. 15(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 15(a)(4).*

(n4)Footnote 3. *See Fed. R. App. P. 15(a)(1).*

(n5)Footnote 4. *Reich v. Trinity Indus., 16 F.3d 1149, 1155 (11th Cir. 1993)* (time for filing petition to contest Occupational Safety and Health Commission order controlled by statute).

(n6)Footnote 5. *See, e.g., 29 U.S.C. § 660(a)* (60-day period for filing petition to challenge Occupational Safety and Health Commission order).

(n7)Footnote 6. *Griffith Co. v. NLRB, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976) , cert. denied sub nom. Waggoner*

v. Griffith, 434 U.S. 854 (1977) (petition to review NLRB order was timely filed under doctrine of laches).

(n8)Footnote 7. *Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 296-297 (D.C. Cir. 2003)* .

(n9)Footnote 7.1. *Midway Indus. Contractors, Inc. v. Occupational Safety & Health Review Comm'n, 616 F.2d 346, 347 (7th Cir. 1980)* (no procedure by which circuit court may excuse late filing).

(n10)Footnote 7.2. *See* [2], *below*.

(n11)Footnote 7.3. *Paul v. INS, 348 F.3d 43, 46-47 (2d Cir. 2003)* .

(n12)Footnote 8. *See Fed. R. App. P. 15(a)(3)*. Form 3 is set forth in the appendix reprinted at the end of this chapter.

(n13)Footnote 8.1. *Paul v. INS, 348 F.3d 43, 46 (2d Cir. 2004)* .

(n14)Footnote 9. *Fed. R. App. P. 15(a)(2)(A)*.

(n15)Footnote 9.1. *Miljkovic v. Ashcroft, 366 F.3d 580, 582-583 (7th Cir. 2004)* .

(n16)Footnote 10. *See Fed. R. App. P. 3(c)*.

(n17)Footnote 11. *See Fed. R. App. P. 15*, Committee Note to 1993 Amendments.

(n18)Footnote 12. *Fed. R. App. P. 15(a)(2)(B)*; *see Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223, 225 n.1 (7th Cir. 1989)* , *cert. denied, 493 U.S. 813 (1989)* (failure to name United States as party respondent is not fatal defect to appeal).

(n19)Footnote 13. *Ingalls Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248, 117 S. Ct. 796, 808, 136 L. Ed. 2d 736 (1997)* .

(n20)Footnote 14. *Fed. R. App. P. 15(a)(2)(C)*.

(n21)Footnote 15. *City of Benton v. Nuclear Regulatory Comm'n, 136 F.3d 824, 825-826 (D.C. Cir. 1998)* (failure to designate order sought to be reviewed deprives circuit court of jurisdiction to review order, even if opposition party actually understood from another source which order petitioner intended to challenge).

(n22)Footnote 16. *See Fed. R. App. P. 3(c)(1)(B)*.

(n23)Footnote 17. *LaRouche's Comm. for a New Bretton Woods v. FEC, 439 F.3d 733, 739 (D.C. Cir. 2006)* .

(n24)Footnote 18. 11th Cir. Ct. R. 15-2.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.43

§ 28.43 Application for Enforcement of Administrative Agency Ordern*

[1] Filing Application for Enforcement and Answer

To initiate enforcement of a federal agency order by a circuit court, a party must file an application to enforce the order with the clerk of any court of appeals authorized to enforce the order. It should be noted that if a person files a petition to review an agency order that the circuit court may enforce, a party opposing the petition may file a cross-application for enforcement. n1 Although neither Appellate Rule 15 nor any of the statutes governing the agencies specifies a time limit for filing an application for enforcement, the doctrine of laches applies. n2 Within 21 days after an application is filed, the respondent must serve an answer on the petitioner and file it with the clerk. If the respondent fails to answer within this time, judgment will be awarded for the relief sought. n3

[2] Contents of Application for Enforcement

An application for enforcement must contain the following information: n1

1. A concise statement of the proceedings in which the order was entered.

2. The facts on which venue is based. Venue is generally provided for in the statutes governing the particular agency involved. Many statutes governing the powers and procedures of the individual agencies indicate that an application for enforcement of an agency decision may be brought in the United States Court of Appeals for the District of Columbia in addition to whichever circuit court has personal and subject matter jurisdiction over the matter. n2

3. The relief requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 315.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 15(b)(1).*

(n3)Footnote 2. *NLRB v. Searle Auto Glass, Inc., 762 F.2d 769, 772 (9th Cir. 1985)* (in absence of statutory time limit, party asserting that application is untimely must establish that more time has elapsed than was necessary, and that party was prejudiced by delay).

(n4)Footnote 3. *Fed. R. App. P. 15(b)(2).*

(n5)Footnote 1. *Fed. R. App. P. 15(b)(3).*

(n6)Footnote 2. *See, e.g., 29 U.S.C. § 160(e)* and *(f).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.44

§ 28.44 Service of Petition or Applicationn*

The circuit clerk must serve a copy of a petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Appellate Rule 3(d), unless a different manner of service is prescribed by the statute involved. n1

At the time of the filing of the petition or application, the petitioner or applicant must complete each of the following tasks:

1. The petitioner or applicant must serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents (who must be served by the clerk). n2 Provided that the respondent has been served by the clerk, it is not necessarily a fatal defect for the applicant to fail to serve all parties, because the requirement is not jurisdictional in nature. n3

2. The petitioner or applicant must file with the clerk a list of those so served. n4

3. The petitioner or applicant must give the clerk enough copies of the petition or application to serve each respondent. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 315.23 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 15(c).*

(n3)Footnote 2. *Fed. R. App. P. 15(c)(1).*

(n4)Footnote 3. Oil, Chemical & Atomic Workers Local Union No. 6-418, *AFL-CIO v. NLRB, 694 F.2d 1289, 1292 (D.C. Cir 1982)* (failure of union to serve employers with copies of its petitions for review on or before the time of filing those petitions, when employers were parties to unfair labor practice proceedings before Board, was defect that was not jurisdictional in nature and therefore did not render invalid union's filing).

(n5)Footnote 4. *Fed. R. App. P. 15(c)(2)*; *see* Oil, Chemical & Atomic Workers Local Union No. 6-418, *AFL-CIO v. NLRB, 694 F.2d 1289, 1292 (D.C. Cir 1982)* (failure of union to provide clerk with a list of those served was defect that was not jurisdictional in nature, and therefore did not render invalid union's filing).

(n6)Footnote 5. *Fed. R. App. P. 15(c)(3).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.45

§ 28.45 Interventionn*

A person may intervene at the appellate stage in the review of an administrative order, n1 provided that there are extraordinary circumstances or other for substantial reasons. n2 Unless the statute providing for administrative order review specifies another method, a person who requests to intervene in a proceeding under Appellate Rule 15 must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion or other notice of intervention authorized by statute must be filed within 30 days after the petition for review is filed. It must contain a concise statement of the interest of the moving party and the grounds for intervention. n3 A circuit court does not have jurisdiction to consider an issue raised by an intervenor unless the issue is raised in the petition for review. n4 In determining the propriety of an intervention in an administrative appeal, the circuit court should consider the statutory design of the relevant statute and the policies underlying intervention in trial courts. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 315.24 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 15(d).*

(n3)Footnote 2. *See Local Joint Exec. Bd. of Las Vegas v. NLRB, 540 F.3d 1072, 1075 n. 2 (9th Cir. 2008)* (circuit court granted intervention to party's successor in interest).

(n4)Footnote 3. *Fed. R. App. P. 15(d).*

(n5)Footnote 4. *United Gas Pipe Line Co. v. FERC, 824 F.2d 417, 435 (5th Cir. 1987)* (no jurisdiction over issues other than those raised in petition for review); *Platte River Whooping Crane Critical Habitat Maintenance Trust v.*

FERC, 962 F.2d 27, 32 (D.C. Cir. 1992) (absent extraordinary circumstances, court would not address claim asserted by intervenor that had not been brought before court by party).

(n6)Footnote 5. *State of Texas v. United States Dep't of Energy, 754 F.2d 550, 553 (5th Cir. 1985)* .

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3-28 Moore's Manual--Federal Practice and Procedure § 28.46

§ 28.46 Payment of Feesn*

The petitioners must pay the circuit clerk all required fees when filing either a separate or joint petition for review in a court of appeals. n1 This provision parallels Appellate Rule 3(e), which requires the payment of fees when filing a notice of appeal. n2 The omission of such a requirement from Appellate Rule 15 was an apparent oversight until the 1993 Amendments to the rule. n3 Circuit courts also typically have local rules requiring the payment of fees. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 310.25 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 15(e).*

(n3)Footnote 2. *Fed. R. App. P. 15(e)*, Committee Note to 1993 Amendments; *see Fed. R. App. P. 3(e)*, discussed in *§ 28.10[1][h].*

(n4)Footnote 3. *Fed. R. App. P. 15(e)*, Committee Note to 1993 Amendments.

(n5)Footnote 4. *See, e.g.,* 5th Cir. Ct. R. 15.1; Fed. Cir. Ct. R. 15(a)(2).

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3-28 Moore's Manual--Federal Practice and Procedure § 28.47

§ 28.47 Record on Review or Enforcement of Agency Ordern*

[1] Composition of Record

The record on review or enforcement of an agency order consists of all of the following:

1. The order involved. n1

2. Any findings or report on which it is based. n2

3. The pleadings, evidence, and other parts of the proceedings before the agency. n3

There is no distinction between the record compiled in the agency proceeding and the record on review--they are identical. The record in agency cases is thus the same as that in appeals from the district court: the original papers, transcripts and exhibits in the agency proceeding. n4 Furthermore, the record need not include evidence that was not submitted to or considered by the agency in making the order under review. n5 However, to protect the process by which an agency reaches a decision when a formal opinion is issued, agency deliberations during the process prior to decision are not part of the record on review. Therefore, transcripts of meetings, intra-agency memoranda, and documents recording the deliberations are excluded from the record. n6

The composition of the record on review is important because the circuit court's review of an agency's action is limited to evidence in the record. n7 However, a petitioner or applicant may be able to submit additional evidence not originally in the record when the circuit court of appeals considers the review. The Supreme Court has stated that the proper course in such circumstances is to remand the matter to the agency for additional information or findings of facts, if more evidence is needed. n8 The statute providing for agency order review may itself provide a basis for augmenting the record. For example, a provision in the Social Security Act permits the reviewing court to consider additional evidence for the limited purpose of persuading the court to remand the action to the agency for further findings. n9

[2] Omissions From or Misstatements in Record

If there has been an omission from the record or if the record contains a misstatement, the parties may at any time by stipulation supply the omitted material or correct the misstatement, or the court may order the correction. If necessary, the court may order that a supplemental record be prepared and filed. n1 However, a court will deny a motion to supplement the record if the material sought to be added is neither material nor complete. n2

[3] Filing of Record

[a] Agency Responsible for Filing Record

In either administrative order review proceedings or enforcement proceedings, the agency is responsible for filing the record. n1 The agency must file the record with the circuit court clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after the agency files an application for enforcement, unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed. n2

[b] Documents Required to be Filed

Unless the parties stipulate in writing that no record or list be filed, the agency must file one of the following two categories of documents: n3

1. The original or a certified copy of the entire record or the parts designated by the parties. n4 This provision allows the agency to file either the entire record or only the parts designated by the parties, even if the parties do not agree on which parts should be filed, because each party may individually designate the parts that it wants filed. The agency can then forward the parts designated by each party. n5

2. A certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties. n6 The court has the power to correct or supplement the certified list of materials that is submitted in lieu of the record under this provision. n7

If the parties stipulate in writing that no record or certified list be filed, the date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed. n8

In the event that less than the entire record is filed because a party has designated only a part to be filed, or the parties have stipulated that no record be filed, or if only a certified list is filed, the agency must retain the rest of the record. The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordDisclosure & Discovery

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, §§ 316.11, 316.12, 317.11, 317.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 16(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 16(a)(2).*

(n4)Footnote 3. *Fed. R. App. P. 16(a)(3).*

(n5)Footnote 4. *Fed. R. App. P. 16(a)*, Committee Note.

(n6)Footnote 5. *MD Pharm., Inc. v. DEA, 133 F.3d 8, 15 (D.C. Cir. 1998)* .

(n7)Footnote 6. *Kansas State Network, Inc. v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983)* (striking transcript from record on review on grounds that transcripts of agency's deliberations may not be used to impeach agency's opinion).

(n8)Footnote 7. *Panhandle Coop. Ass'n v. EPA, 771 F.2d 1149, 1152 (8th Cir. 1985)* (evidence in record did not support claims that EPA acted in dilatory fashion); *see* [2], *below*.

(n9)Footnote 8. *Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)* (proper course if court cannot reach decision on basis of record before it is to remand for investigation or explanation); *see Abrams v. Federal Deposit Ins. Corp., 938 F.2d 22, 26 (2d Cir. 1991)* , *overruled on other grounds, 78 F.3d 97 (2d Cir. 1996)* (remand to FDIC was warranted for full, written explanation as to why it had failed to follow federal regulatory scheme in making its decision).

(n10)Footnote 9. *42 U.S.C. § 405(g).*

(n11)Footnote 1. *Fed. R. App. P. 16(b)*; *see Consumers Union of United States, Inc. v. Federal Power, 510 F.2d 656, 661-662 (D.C. Cir. 1975)* (Appellate Rule 16(b) provides appellate courts with wide latitude to correct errors and omissions from agency record under review); *see also Bethlehem Steel Corp. v. United States EPA, 638 F.2d 994, 1000 (7th Cir. 1980)* (court ordered supplementation of record to include internal communications of agency to enable effective review of agency's actions).

(n12)Footnote 2. *Alabama Tissue Ctr. v. Sullivan, 975 F.2d 373, 376 (7th Cir. 1992)* (court denied motion to supplement when party moved to supplement record with items that court deemed not material, and other items were deemed not within definition of "record" on review).

(n13)Footnote 1. *Fed. R. App. P. 17*. This requirement differs from the procedure in appeals from judgments of the district courts and decisions of the Tax Court. In such proceedings, the party seeking review must order the record, make arrangements with the reporter to pay the costs of reproducing the transcript of proceedings, and do whatever else is necessary to enable the district clerk to assemble and transmit the record. *See Fed. R. App. P. 10(b)*, *11*; *see also Milwaukee County, Wis. v. Donovan, 771 F.2d 983, 991 n.6 (7th Cir. 1985)* , *cert. denied, 476 U.S. 1140 (1986)* (citing **Moore's Federal Practice** for proposition that Appellate Rule 17 is departure from general principle that party seeking review is responsible for assembling record).

(n14)Footnote 2. *Fed. R. App. P. 17(a).*

(n15)Footnote 3. *Fed. R. App. P. 17(b)(1).*

(n16)Footnote 4. *Fed. R. App. P. 17(b)(1)(A).*

(n17)Footnote 5. *Fed. R. App. P. 17(b)(1)(A)*, Committee Note to 1998 Amendments.

(n18)Footnote 6. *Fed. R. App. P. 17(b)(1)(B).*

(n19)Footnote 7. *MD Pharm., Inc. v. DEA, 133 F.3d 8, 15 (D.C. Cir. 1998)* .

(n20)Footnote 8. *Fed. R. App. P. 17(b)(2)*; *see Fed. R. App. P. 17(b)(2)*, Committee Note to 1998 Amendments

(while no stipulation is necessary for party to designate part of record to be included on appeal, stipulation is necessary for no filing or filing of list).

(n21)Footnote 9. *Fed. R. App. P. 17(b)(3).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.48

§ 28.48 Stay of Order Pending Reviewn*

[1] Motion Must Initially be Made to Agency

If a petitioner requests suspension of the implementation of a decision or order of an agency pending review to the circuit court, the petitioner must ordinarily move first to the agency for a stay of the order. n1 This means that a person should not apply directly to the circuit court for a stay unless application to the agency is not practicable, or unless relief has been sought but been denied by the agency. n2 For example, unlike the ordinary administrative review case, in review proceedings from immigration deportation orders, the petitioner has no obligation to try to persuade the INS to stay the order before filing a motion with the court, because nothing in the immigration statutes or regulations confer authority on the INS to grant a stay of deportation pending the outcome of review in the court of appeals. n3

The same considerations that justify the requirement of an initial application to the district court for a stay pending appeal under Appellate Rule 8 support the requirement of an initial application to the agency pending review. n4 If a statute creating an agency and giving it the power to make orders expressly covers the conditions under which an agency will grant a stay, those conditions control. n5 However, absent any specific statutory regulation, a general statute governs stays of administrative orders pending review and provides that an agency may postpone the effective date of an action taken by it when required by justice. n6

[2] Subsequent Motion to Court of Appeal

[a] Contents of Motion

After a petitioner has first made a motion for a stay to the agency and the motion has been unsuccessful, or if a motion to the agency would be impracticable, n1 the petitioner may make a motion for a stay to the court of appeals or one of its judges. The motion must comply with all of the following requirements:

1. The motion must show either how a motion first made to the agency would be impracticable n2 or that a motion was made to the agency and the agency denied the motion or failed to afford the relief requested. The motion must also state

any reasons given by the agency for its action. n3

2. The motion must state the reasons for granting the relief requested and the facts relied on. n4

3. The motion must include originals or copies of affidavits or other sworn statements supporting facts subject to dispute. n5

4. The motion must include relevant parts of the record. n6

[b] Filing and Consideration of Motion

A petitioner must file the motion for a stay with the circuit clerk n7 and must give reasonable notice of the motion to all parties. n8 The motion ordinarily will be considered by a panel of the court, but in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. n9

The circuit court must consider several factors in its determination of whether to grant a stay: the likelihood that the agency erred in issuing its order; whether irreparable injury would result without the stay; whether the stay would substantially harm other parties interested in the proceedings, and whether the stay would promote, or at least not adversely affect, the public interest. n10

[c] Filing of Bond or Other Security

The court of appeals may condition the grant of a stay on the filing of a bond or other appropriate security. n11 A bond is also required in an appeal of district court proceedings. However, unlike proceedings originating in the district court, there is no automatic entitlement to a stay on the filing of a supersedeas bond in the review of administrative proceedings. Also, because there is no underlying proceeding in the district court in which a motion to enforce the bond may be made, a plenary action is required in order to recover on the bond. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 318.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 18(a)(1)*; *see Superior Trucking Co. v. United States, 614 F.2d 481, 485 (5th Cir. 1980)* (applicant must ordinarily apply to agency first).

(n3)Footnote 2. *Fed. R. App. P. 18(a)*, Committee Note.

(n4)Footnote 3. *Sofinet v. INS, 188 F.3d 703, 706-707(7th Cir. 1999)* .

(n5)Footnote 4. *Fed. R. App. P. 18(a)*, Committee Note (Appellate Rule 18 merely assimilates procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from district courts; same considerations which justify requirement of initial application to district court for stay pending appeal support requirement of initial application to the agency pending review); *see § 28.14[2].*

(n6)Footnote 5. *Superior Trucking Co. v. United States, 614 F.2d 481, 485 (5th Cir. 1980)* .

(n7)Footnote 6. *5 U.S.C. § 705*.

(n8)Footnote 1. *See* [1], *above*.

(n9)Footnote 2. *Fed. R. App. P. 18(a)(2)(A)(i)*; *see Sofinet v. INS, 188 F.3d 703, 706-707(7th Cir. 1999)* (immigration statutory scheme does not contemplate motion for stay to INS). This requirement illustrates the fact that formal agency action on the merits is generally necessary prior to seeking a stay from the appellate court pursuant to Appellate Rule 18. *North Carolina, Environmental Policy Institute v. Environmental Protection Agency, 881 F.2d 1250 (4th Cir. 1989)* (court should not exercise power of review until agency has given some indication of determination of substantive rights of parties).

(n10)Footnote 3. *Fed. R. App. P. 18(a)(2)(A)(ii)*.

(n11)Footnote 4. *Fed. R. App. P. 18(a)(2)(B)(i)*.

(n12)Footnote 5. *Fed. R. App. P. 18(a)(2)(B)(ii)*; *Superior Trucking Co. v. United States, 614 F.2d 481, 485 (5th Cir. 1980)* (if facts are in dispute, motion must be supported by affidavits or other sworn statements regarding those facts).

(n13)Footnote 6. *Fed. R. App. P. 18(a)(2)(B)(iii)*.

(n14)Footnote 7. *Fed. R. App. P. 18(a)(2)(D)*.

(n15)Footnote 8. *Fed. R. App. P. 18(a)(2)(C)*.

(n16)Footnote 9. *Fed. R. App. P. 18(a)(2)(D)*.

(n17)Footnote 10. *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)* ; *see American Cyanamid Co. v. Richardson, 456 F.2d 509, 514 (1st Cir. 1971)* (stay denied because success on merits was not likely); *Associated Sec. Corp. v. SEC, 283 F.2d 773, 774-775 (10th Cir. 1960)* (consideration of factors of public interest, irreparable injury, and harm to others).

(n18)Footnote 11. *Fed. R. App. P. 18(b)*.

(n19)Footnote 12. *Compare Fed. R. App. P. 18(b) with Fed. R. App. P. 7*, discussed in *§ 28.13*.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.49

§ 28.49 Judgment Enforcing an Agency Order in Partn*

If a court of appeals has either enforced completely or denied completely the enforcement of an agency order, the clerk automatically enters the judgment according to Appellate Rule 36, n1 unless the court orders settlement of the judgment. n2 However, when the court files an opinion directing entry of judgment enforcing only a part of the agency's order, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. n3 A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. n4 The court will settle the judgment and direct entry without further hearing or argument. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 319.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 36* (entry of judgment).

(n3)Footnote 2. *Fed. R. App. P. 19*, Committee Note (in such clear cut situation, it serves no useful purpose to delay issuance of the judgment until proposed judgment is submitted by agency).

(n4)Footnote 3. *Fed. R. App. P. 19*; *see, e.g., Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 217 (9th Cir. 1979)* (FTC required to serve and file proposed judgment pursuant to Appellate Rule 19).

(n5)Footnote 4. *Fed. R. App. P. 19*; *see, e.g., NLRB v. Harrah's Club, 408 F.2d 1006, 1007 (9th Cir. 1969)* (respondent objected that judgment was premature and over broad; construing former time periods).

(n6)Footnote 5. *Fed. R. App. P. 19.*

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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.50through 28.59

[Reserved]

§§ 28.50[Reserved]

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3-28 Moore's Manual--Federal Practice and Procedure § 28.60

§ 28.60 Introduction to Extraordinary Writsn*

A writ of mandamus or prohibition is an order from a higher court directing that a lower court take action or an order prohibiting a court from taking a particular action. n1 Appellate Rule 21 governs petitions for a writ of mandamus or prohibition and petitions for other extraordinary writs. It describes the content requirements for a petition and the procedures for filing, serving, and docketing a petition, as well as the procedures for responding to a petition. n2 A petition for a writ of mandamus or prohibition seeks review of the intrinsic merits of a judge's action, and thus is in reality an adversary proceeding between the parties; a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Consequently, in 1996 Appellate Rule 21 was amended to change the tenor of the rule and of mandamus proceedings generally, so that the judge is no longer treated as a respondent. Under the new rule, the caption and subdivision (a) no longer refer to the writs as being "directed to a judge or judges," but rather to the court. n3 A proceeding to determine a writ of prohibition or mandamus is given preference over ordinary civil cases. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsAll Writs ActCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 321.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714-715, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* ; *see also In re Special March 1974 Grand Jury, 541 F.2d 166, 171 (7th Cir. 1976)* (for purposes of Appellate Rule 21, mandamus is extraordinary remedy traditionally employed to confine lower court to lawful exercise of its prescribed jurisdiction, or to compel lower to exercise lower court's authority when it has duty to do so).

(n3)Footnote 2. *See Fed. R. App. P. 21.*

(n4)Footnote 3. *Fed. R. App. P. 21*, Committee Note to 1996 Amendments.

(n5)Footnote 4. *See Fed. R. App. P. 21(b)(6)*.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.61

§ 28.61 Petition for Writ of Mandamus or Prohibitionn*

[1] Procedure for Filing Petition

A party requesting that the circuit court issue a writ of mandamus or prohibition directed to the trial court must file a petition with the circuit clerk and provide proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are considered respondents for all purposes. n1 After he or she receives the prescribed docket fee, the clerk must docket the petition and submit it to the court. n2 There is no express time limit on filing a petition. n3 However, failure to seek prompt relief may result in denial of the relief sought. n4 However, the factual and legal circumstances of the subject matter of the petition for writ may involve acts or occurrences that occurred significantly in the past. n4.1 particularly when the petitioner first attempted to obtain other types of relief. n5 Provided that the requirements for extraordinary writ are met, the circuit court may treat an appeal as a petition for mandamus relief. n6 Thus, the circuit court may deem an attempted appeal from an unappealable order as a petition for a writ of mandamus. n7

The petitioner must file an original and three copies of all papers unless the court requires the filing of a different number by local rule or by order in a particular case. n8

[2] Contents of Petition

A petition for a writ of mandamus or prohibition must meet all of the following requirements:

1. The petition must be titled "In re _____ [*name of petitioner*]." n9

2. The petition must state the relief sought. n10

3. The petition must relate the issues presented. n11

4. The petition must aver the facts necessary to understand the issue presented by the petition. n12

5. The petition must state the reasons why the writ should issue. n13 A writ of mandamus will not be issued when the petitioner could obtain relief through an ordinary appeal. Therefore, the petitioner must show that a novel and significant question of law is present, that other available remedies are inadequate, that an actual legal issue is present such that its resolution will aid in the administration of justice; and that the petitioner's right to the writ is clear. n14

6. The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. n15

All papers of the petition must conform to Appellate Rule 32(a)(1), n16 which specifies requirements such as printing, copying processes, typeface, paper requirements and binding requirements. n17 The contents of the petition must not exceed 30 pages except by the court's permission; this length limitation is exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Appellate Rule 21(a)(2)(C), n18 which include attached copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. n19

[3] Answer to Petition

The court has the discretion to deny the petition outright without requiring an answer. Otherwise, it must order a person referred to as the respondent to answer within a specified fixed time. n20 The clerk must serve the order to respond on all persons directed to respond. n21 If there are two or more respondents, they may answer jointly. n22 The court of appeals may invite or order the trial court judge to address the petition or may invite an amicus curiae to do so. The trial court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals. n23

[4] Proceedings

The circuit court has the option whether to require oral argument or briefing, and the court will direct the clerk to advise the parties of the dates and requirements for argument and briefs, and when appropriate, the clerk should also give that information to the trial court judge or amicus curiae. n24 Any proceeding for argument required by the court must be given preference over ordinary civil cases. n25 The parties should ensure that their briefs address the issue of whether or not the petitioner's right to relief is clear and indisputable, the primary consideration of whether the writ should issue. n26 For a discussion of the other factors that the court will consider in the determination of whether to issue the writ, see [5], *below*.

[5] Decision on Petition for Writ

The Supreme Court has stated that a petitioner seeking a writ of mandamus must satisfy three conditions: n26.1

1. The party seeking of the writ must have no other adequate means to attain the relief he or she desires.

2. The petitioner must satisfy the burden of showing that the right to issuance of the writ is clear and indisputable.

3. Even if the above conditions are met, the issuing court, in the exercise of discretion, must be satisfied that the writ is appropriate under the circumstances.

Prior to the *Cheney* decision, the courts of appeals developed variations on the above test. The primary requirement for a writ of mandamus or prohibition to issue is that the petitioner's right to relief must be clear and indisputable. n27 Otherwise, the various circuit courts of appeals have their own criteria for determining whether a writ of mandamus or prohibition should issue. Several circuits consider all five of the following factors: n28

1. Whether the party seeking the writ has available any alternative means, such as direct appeal, to obtain relief.

2. Whether the petitioner will be damaged or prejudiced in a way not correctable on appeal.

3. Whether the district court's order is clearly erroneous as a matter of law.

4. Whether the district court's order is an error that is routinely repeated or manifests disregard of the federal rules.

5. Whether the district court's order raises new and important problems, or issues of law of first impression.

The other circuits have tests that are a variation on the theme, with similar principles applied to the decision. In the Fifth Circuit, for example, the petitioner must show that (1) he or she lacks adequate alternative means to obtain the relief sought, and (2) that the right to issuance of the writ is clear and indisputable; thus, a writ will issue only if the district court has committed a clear abuse of discretion or has engaged in conduct amounting to a usurpation of power. n29 Similarly, the Second Circuit applies a three-part test to determine whether a writ should issue: (1) whether a novel and important question of law is present; (2) whether other available remedies are adequate; and (3) whether a legal issue is present whose resolution will aid in the administration of justice. n30

When the circuit court makes its decision, the circuit clerk must send a copy of the final disposition to the trial court judge. n31

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, §§ 321.10-321.14 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 21(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 21(a)(3).*

(n4)Footnote 3. *Fed. R. App. P. 21(a)(1).*

(n5)Footnote 4. *In re Rappaport, 558 F.2d 87, 90 (2d Cir. 1977)* (delay in seeking mandamus may itself provide grounds to deny petition).

(n6)Footnote 4.1. *In re IBM Corp., 45 F.3d 641, 643 (2d Cir. 1995)* (petition for writ to mandate that district judge recuse himself from ruling on motion was timely even though case had been dormant for 24 years).

(n7)Footnote 5. *In re IBM Corp., 45 F.3d 641 (2d Cir. 1995)* (petition for writ directing district judge to recuse himself from ruling on motion to terminate consent degree was timely when case had been dormant for 24 years).

(n8)Footnote 6. *Jamison v. Wiley, 14 F.3d 222, 234 (4th Cir. 1994)* .

(n9)Footnote 7. *United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994)* .

(n10)Footnote 8. *Fed. R. App. P. 21(d).*

(n11)Footnote 9. *Fed. R. App. P. 21(a)(2)(A).*

(n12)Footnote 10. *Fed. R. App. P. 21(a)(2)(B)(i).*

(n13)Footnote 11. *Fed. R. App. P. 21(a)(2)(B)(ii).*

(n14)Footnote 12. *Fed. R. App. P. 21(a)(2)(B)(iii).*

(n15)Footnote 13. *Fed. R. App. P. 21(a)(2)(B)(iv).*

(n16)Footnote 14. *In re Parker, 49 F.3d 204, 206 (6th Cir. 1995)* (petitioner could show clear right to issuance of writ by demonstrating clear abuse of discretion by trial court amounting to usurpation of judicial power); *see* [5], *below*.

(n17)Footnote 15. *Fed. R. App. P. 21(a)(2)(C).*

(n18)Footnote 16. *Fed. R. App. P. 21(d).*

(n19)Footnote 17. *See Fed. R. App. P. 32(a)(1).*

(n20)Footnote 18. *Fed. R. App. P. 21(d).*

(n21)Footnote 19. *See Fed. R. App. P. 21(a)(2)(C).*

(n22)Footnote 20. *Fed. R. App. P. 21(b)(1).*

(n23)Footnote 21. *Fed. R. App. P. 21(b)(2).*

(n24)Footnote 22. *Fed. R. App. P. 21(b)(3).*

(n25)Footnote 23. *Fed. R. App. P. 21(b)(4).*

(n26)Footnote 24. *Fed. R. App. P. 21(b)(5).*

(n27)Footnote 25. *Fed. R. App. P. 21(b)(6).*

(n28)Footnote 26. *In re FCC, 217 F.3d 125, 134 (2d Cir. 2000)* .

(n29)Footnote 26.1. *Cheney v. United States Dist. Ct., 542 U.S. 367, 124 S. Ct. 2576, 159 L. Ed. 2d 459, 2004 U.S. LEXIS 4576, 72 U.S.L.W. 4567; (June 24, 2004)* .

(n30)Footnote 27. *In re Special March 1974 Grand Jury, 541 F.2d 166, 171 (7th Cir. 1976).*

(n31)Footnote 28. *See, e.g. Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1345 (9th Cir. 1997)* (although all five guidelines are considered, all need not be satisfied for issuance of writ, because in many cases some guidelines will not be relevant or applicable).

(n32)Footnote 29. *Ozee v. American Council on Gift Annuities, Inc., 110 F.3d 1082, 1093 (5th Cir. 1997)* (mandamus is extraordinary remedy that is not justified merely because hardship may result from delay or unnecessary trial).

(n33)Footnote 30. *In re United States, 903 F.2d 88, 89 (2d Cir. 1990)* .

(n34)Footnote 31. *Fed. R. App. P. 21(b)(7).*

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART II. RIGHTS AND DUTIES OF APPEAL FROM PARTICULAR TYPES OF ADJUDICATIONS
D. EXTRAORDINARY WRITS INCLUDING MANDAMUS AND PROHIBITION

3-28 Moore's Manual--Federal Practice and Procedure § 28.62

§ 28.62 n* Application for Extraordinary Writ Other Than Mandamus or Prohibition

Most of the extraordinary-writ applications in federal court request mandamus or prohibition to a court. A circuit court may, however, issue other extraordinary writs, such as a writ of mandamus to an administrative agency or federal official. An application for an extraordinary writ other than one of mandamus or prohibition to a court must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, to the extent practicable, to the procedures prescribed in Appellate Rule 21(a) and (b), as discussed above in *§ 28.61*. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 321.15 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 21(c).*

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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.63through 28.69

[Reserved]

§§ 28.63[Reserved]

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E. PROCEEDINGS IN FORMA PAUPERIS

3-28 Moore's Manual--Federal Practice and Procedure § 28.70

§ 28.70 Introduction to Proceedings on Appeal in Forma Pauperisn*

[1] Nature of Proceeding

A person's right to proceed in federal court in forma pauperis is governed by *28 U.S.C. § 1915(a)*, which specifies the procedures for determining whether in forma pauperis status should be granted and how fees are to be collected from the person. n1 Significantly, an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. n2 It is generally held that *28 U.S.C. Section 1915(a)*, as well as Section 1915(b), applies to prisoners seeking to proceed in forma pauperis. n3 Appellate Rule 24 provides the procedure for a petitioner to request leave of court to proceed in forma pauperis on appeal. n4 Appellate Rule 24(a) governs applications seeking leave to proceed in forma pauperis on appeal from district court orders. The rule provides content and procedural requirements for requesting leave in the district court and, when leave is denied by the district court, in the circuit court. n5 Appellate Rule 24(b) concerns applications for leave to appeal from decisions of administrative agencies and from the Tax Court. n6

In the event Appellate Rule 24 conflicts with *28 U.S.C. Section 1915(a)*, the statute controls. At one time, there was a conflict because the statute required prisoners who were unable to pay the full amount of the filing fee to pay part of the fee and then to pay the remainder of the fee in installments, but Appellate rule 24(a)(2) provided that an in forma pauperis appellant could proceed without prepaying or giving security. In 2002, Appellate Rule 24(a)(2) was amended to clarify that the rule is not meant to conflict with anything required by statute. n7

[2] Restrictions on Certain Prisoners

A prisoner n8 who has on three or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a federal court that was dismissed on grounds that it was frivolous, malicious, or failed to state a claim on which relief may be granted, may not proceed in forma pauperis in a civil action, unless the prisoner is in imminent danger of serious physical injury. n9 In addition to filing the affidavit required for in forma pauperis status, a prisoner requesting to appeal a judgment in a civil action or proceeding without prepayment of fees or security must submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each

prison at which the prisoner is or was confined. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewCivil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisPrisonersPetitionsCivil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisPrisonersThree Strikes ProvisionCivil ProcedureAppealsAppeals in Forma Pauperis

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 324.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See 28 U.S.C. § 1915(a)(1).*

(n3)Footnote 2. *See 28 U.S.C. § 1915(a)(3).*

(n4)Footnote 3. *Henderson v. Norris, 129 F.3d 481, 483-484 (8th Cir. 1997)* .

(n5)Footnote 4. *See Fed. R. App. P. 24.*

(n6)Footnote 5. *Fed. R. App. P. 24(a).*

(n7)Footnote 6. *See Fed. R. App. P. 24(a).*

(n8)Footnote 7. *See Fed. R. App. P. 24(a)(2),(3)(b)*; *Fed. R. App. P. 24(a)(2),(3)*, Committee Notes to 2002 Amendments.

(n9)Footnote 8. *See 28 U.S.C. § 1915(h)* (in this context, a prisoner means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or terms and conditions of parole, probation, pretrial release, or diversionary program).

(n10)Footnote 9. *28 U.S.C. § 1915(g)*; *see Abdul-Akbar v. McKelvie, 239 F.3d 307, 313-319 (3d Cir. 2001)* ("imminent danger" must be measured at time complaint is filed); *see also Kinnell v. Graves, 265 F.3d 1125, 1128-1129 (10th Cir. 2001)* (this "three strikes" provision is not an unconstitutional denial of equal protection).

(n11)Footnote 10. *28 U.S.C. § 1915(a)(2).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.71

§ 28.71 Prior Approval of Status In District Court Obviates Need for Motion on Appealn*

If a party was granted in forma pauperis status in a district court civil action, or was determined to be financially unable to obtain an adequate defense in a criminal case, that party may proceed on appeal in forma pauperis without further authorization. n1 However, if the district court, before or after the notice of appeal is filed, certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis, the party must move to obtain in forma pauperis status. n2 Furthermore, a district court's dismissal of a case as frivolous under *28 U.S.C. Section 1915* n3 is equivalent to a certification that an appeal was not taken in good faith, and authorization for in forma pauperis status from the circuit court is necessary. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppeals in Forma PauperisCivil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 324.10 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. App. P. 24(c)*; *McGann v. United States, 362 U.S. 309, 309, 80 S. Ct. 725, 4 L. Ed. 2d 734 (1960)* (when district court grants leave to proceed in forma pauperis, motion in circuit court is unnecessary); *Dixon v. Pitchford, 843 F.2d 268, 270 (7th Cir. 1988)* (district court order granting leave to proceed on appeal in forma pauperis on one issue confers in forma pauperis status on all issues).

(n3)Footnote 2. *See Fed. R. App. P. 24(c)* (district court must state in writing its reasons for certification or finding).

(n4)Footnote 3. *See 28 U.S.C. § 1915(d).*

(n5)Footnote 4. *Oatess v. Sobolevitch, 914 F.2d 428, 430 n.4 (3d Cir. 1990) .*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.72

§ 28.72 District Court Motion for In Forma Pauperis Status for Appealn*

[1] Filing Motion

Except when a party has prior approval for in forma pauperis status in the district court, as stated in Appellate Rule 24(a)(3), n1 a party to a district court action who desires to appeal a decision of the district court in forma pauperis must file a motion in the district court. n2 Appellate Rule 24 does not specify a time for filing a motion in the district court for leave to proceed on appeal in forma pauperis. n3 However, the moving party should file promptly, because a motion to file in forma pauperis does not affect the obligation of a party to file a timely notice of appeal. n4

[2] Requirements for Motion

A party making a motion in the district court for in froma pauperis status on appeal must attach an affidavit to the motion that:

1. Shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs; n5

2. Claims an entitlement to redress; n6 and

3. States the issues that the party intends to present on appeal. n7

A prisoner moving for leave to proceed in forma pauperis in a civil action must also submit a certified copy of his or her trust fund account statement (or institutional equivalent) for the six-month period immediately preceding the filing of the complaint or notice of appeal. This certified copy must be obtained from the appropriate official of each prison at which the prisoner is or was confined. n8

[3] Decision on Motion

[a] Factors Considered in Determination of Motion

A district court will grant leave to proceed on appeal in forma pauperis if a party shows the requisite financial eligibility and that the appeal is not frivolous. The party need not show probable success on the merits. The existence of any non-frivolous issue on appeal and financial eligibility requires that the court grant the motion for leave to proceed on appeal in forma pauperis. n9 On the other hand, the court will dismiss the case if at any time the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. n10

[b] Effects of Determination

If the district court grants the motion, the moving party may proceed on appeal without prepaying or giving security for fees and costs. n11 A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part. n12

If the district court denies the motion, it must state its reasons in writing. n13 The district clerk must immediately notify the parties and the court of appeals when the district court denies a motion to proceed on appeal in forma pauperis. n14 The district court also must notify the parties and the court of appeals when the district court certifies that the appeal is not taken in good faith n15 or finds that the party is not otherwise entitled to proceed in forma pauperis. n16 After the district court enters a denial, the party may proceed to appeal the denial in the circuit court. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewCivil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisAffidavits of PovertyCivil ProcedureAppealsAppeals in Forma Pauperis

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 324.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 28.71*

(n3)Footnote 2. *See Fed. R. App. P. 24(a)(1)*; *28 U.S.C. § 1915(a)(1),(2)*; *Stockmeier v. Angelone, 62 F.3d 287, 287 (9th Cir. 1995)* (party was required to file new in forma pauperis motion in district court, because prior district court order granting party permission to file partial filing fee is not tantamount to order granting leave to proceed in forma pauperis).

(n4)Footnote 3. *Fed. R. App. P. 24(a)(1)*.

(n5)Footnote 4. *United States v. Boutwell, 896 F.2d 884, 888-889 (5th Cir. 1990)* (in forma pauperis status does not confer any special rights to appeal).

(n6)Footnote 5. *Fed. R. App. P. 24(a)(1)(A)*.

(n7)Footnote 6. *Fed. R. App. P. 24(a)(1)(B)*.

(n8)Footnote 7. *Fed. R. App. P. 24(a)(1)(C)*.

(n9)Footnote 8. *28 U.S.C. § 1915(a)(2)*. This requirement is not applicable in habeas corpus proceedings because such proceedings are not deemed "civil actions" for this purpose. *Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997)* .

(n10)Footnote 9. *Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986)* (provided that party can show

financial eligibility and arguable legal issue, party need not show probable success on merits).

(n11)Footnote 10. *28 U.S.C. § 1915(e)(2)*; *Mathis v. New York Life Ins. Co., 133 F.3d 546, 547-548 (7th Cir. 1998)* (district court has discretion to dismiss complaint with prejudice as sanction for party's intentionally providing inaccurate financial information).

(n12)Footnote 11. *Fed. R. App. P. 24(a)(2)*.

(n13)Footnote 12. *Fed. R. App. P. 24(c)*.

(n14)Footnote 13. *Fed. R. App. P. 24(a)(2)*.

(n15)Footnote 14. *Fed. R. App. P. 24(a)(4)(A)*.

(n16)Footnote 15. *Fed. R. App. P. 24(a)(4)(B)*.

(n17)Footnote 16. *Fed. R. App. P. 24(a)(4)(C)*.

(n18)Footnote 17. *See Fed. R. App. P. 24(a)(5)*; *see also § 28.73*.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.73

§ 28.73 Motion in Court of Appeals for In Forma Pauperis Statusn*

[1] After Denial of Motion for In Forma Pauperis Status in District Court

If a motion for in forma pauperis status is denied in the district court, a party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice from the district court prescribed in Appellate Rule 24(a)(4). n1 Under this provision, the circuit court has express authority to override the district court's denial of the motion. n2 Thus, when a district court has denied a motion for leave to proceed in forma pauperis on appeal, the proper procedure for the moving party to obtain review of that denial is to refile the motion in circuit court, rather than merely appealing from district court's order. n3

The motion in the circuit court must include: n4

1. A copy of the affidavit filed in the district court; n5 and

2. The district court's statement of reasons for its action. n6

[2] Motion to Proceed in Forma Pauperis on Appeal or Review of Administrative Order or Tax Court Decision

When an appeal or review of a proceeding before an administrative agency, board, commission, or officer, or before the United States Tax Court proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Appellate Rule 24(a)(1). n7 This affidavit must contain the details showing the party's inability to pay or to give security for fees and costs; a claim for entitlement to redress; and a statement of the issues that the party intends to present on appeal n8

[3] Decision on Motion

The circuit court will weigh the same factors in making its determination as used by the district court. n9 If the circuit court grants the motion, the moving party may proceed on appeal without prepaying or giving security for fees and

costs. n10 A party allowed to proceed on appeal in forma pauperis may also request that the appeal be heard on the original record without reproducing any part. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppeals in Forma PauperisCivil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20 Moore's Federal Practice, § 324.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 24(a)(5)*; *see § 28.72*.

(n3)Footnote 2. *Tolefree v. Cudahy, 49 F.3d 1243, 1244 (7th Cir. 1995)* ; *United States v. Sorrells, 145 F.3d 744, 748 n.1 (5th Cir. 1998)* .

(n4)Footnote 3. *United States v. Sorrells, 145 F.3d 744, 748 n.1 (5th Cir. 1998)* .

(n5)Footnote 4. *Fed. R. App. P. 24(a)(5)*; *see § 28.72*.

(n6)Footnote 5. *Fed. R. App. P. 24(a)(5)*; *see Fed. R. App. P. 24(a)(1)(A)-(C)*; *see also § 28.72[2]*. If no affidavit was filed in the district court, the party must include an original the affidavit prescribed by Appellate Rule 24(a)(1).

(n7)Footnote 6. *Fed. R. App. P. 24(a)(5)*; *see Fed. R. App. P. 24(a)(2)*; *see also § 28.72[3][b]*.

(n8)Footnote 7. *Fed. R. App. P. 24(b)*

(n9)Footnote 8. *See Fed. R. App. P. 24(a)(1)(A)-(C)*; *see also § 28.72[2]*.

(n10)Footnote 9. *Denton v. Hernandez, 504 U.S. 25, 31-33, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992)* ; *see § 28.72[3][a]*.

(n11)Footnote 10. *Cf. Fed. R. App. P. 24(a)(2)*.

(n12)Footnote 11. *Fed. R. App. P. 24(c)*.

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3-28 Moore's Manual--Federal Practice and Procedure §§ 28.74through 28.79

[Reserved]

§§ 28.74[Reserved]

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PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.80

§ 28.80 Filing and Servicen*

[1] Filing Papers

[a] General Method of Filing with Clerk

When filing a paper required or permitted to be filed in a court of appeals, an appellant must file the paper with the circuit court clerk. n1 The appellant may accomplish filing by mail addressed to the clerk, but filing is not timely unless the clerk actually receives the papers within the time specified for filing. n2 Therefore, mailing within the applicable time period is insufficient if not actually received by court within that period. n3 In other words, by requiring that the clerk "receive" the filing, Appellate Rule 25(a)(2)(A) generally rejects the "mailbox rule," which states that a paper is timely if sent within the deadline. n4

[b] Filing Brief or Appendix

A separate rule is applicable to the filing of a brief or appendix. Such documents are timely filed if on or before the last day for filing one of the following is accomplished: n5

1. The brief or appendix is mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; n6 or

2. The brief or appendix is dispatched to a third-party commercial carrier for delivery to the clerk within three days. n7

The effect of this separate "mailbox rule" for briefs and appendices is that while such documents are timely if "mailed" within the applicable time period, any other documents are timely only if received by the circuit court clerk within the applicable time period. n8

[c] Filing by Inmate

If a party is an inmate who is confined in an institution, a paper filed by the inmate is timely if deposited in the institution's internal mailing system on or before the last day for filing. n9 If an institution has a system designed for

legal mail, n10 the inmate must use that system to receive the benefit of this rule. n11 Timely filing may be shown by a declaration in compliance with *28 U.S.C. Section 1746* n12 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. n13

[d] Filing by Electronic Means

A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means, provided that the means are consistent with any technical standards that have been established by the Judicial Conference of the United States. n14 If a paper is filed by electronic means in compliance with a local rule, the electronic transmission constitutes filing of a written paper for the purpose of applying the Federal Rules of Appellate Procedure. n15 In other words, an electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification, and need not be separately made in writing unless a local rule requires that the party file both electronic and hard copies. n16 If a local rule does not expressly allow electronic filing, a party may not electronically file unless the party obtains a court order to do so. n17

A local rule may *require*, as opposed to *permit*, filing by electronic means only if reasonable exceptions are allowed. n18 Several courts of appeals require electronic filings, and all courts that have done so must make exceptions when electronic filing would impose a hardship on a party, such as when a party does not have technological capability to make an electronic filing. n19

[e] Filing Motion With Individual Judge

Some motions made in the circuit court may be decided by a single judge, although some motions require a panel decision. If a party's motion requests relief that may be granted by a single circuit judge, the circuit judge may permit the motion to be filed with the judge personally; the judge must note the filing date on the motion and give it to the circuit court clerk. n20

[f] Clerk May Not Refuse Filing of Documents

A circuit court clerk may not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by the Appellate Rules or by any local rule or practice. n21 However, this provision prohibiting a clerk from refusing a document does not mean that a clerk may not review documents to determine whether they comply with the rules. The court may instruct that the clerk must inform parties whenever a filing fails to comply with the rules. n22 If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment, the party fails to correct the filing, the clerk must refer the matter to the court for a ruling. n23

[g] Privacy Protection for Electronic Filings on Appeal

To protect against privacy and security concerns relating to electronic filing of documents, and the public availability of documents when they are filed electronically, the Appellate Rules make provisions for the Court of Appeals to protect such filings, and also to protect similar filings in paper form. n24 Consequently, Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the special privacy protection rule that applied to the case in the lower court will continue to apply to the case on appeal. n25

Therefore, in appeals from the district court in civil cases, privacy protections for filings in the appeal include: (1) redaction of filings to protect social-security numbers, taxpayer-identification numbers, an individual's birth date, the minor's initials, and financial-account numbers; n26 (2) limitations on remote access to electronic files; n27 (3) an authorization for the court of appeals to order that filings be made under seal; n28 and (4) the discretion for the court of appeals to make any other appropriate order regarding redaction and limitations on electronic access. n29

For a further discussion of these protections for filing, see Ch. 9, *Pleadings and Motions in General*.

[2] Service of Papers

[a] Methods of Service

Unless a particular rule requires service by the clerk, a party must serve a copy of all papers on the other parties to the appeal or review at or before the time of filing a paper. If a party is represented by counsel, the server must make the service on the party's counsel. n1 Service may be made in any of the following ways:

1. Personal service, including delivery to a responsible person at the office of the party's attorney. n2

2. Service by mail. n3

3. Service by third-party commercial carrier for delivery within three days. n4

4. Service by electronic means, such as e-mail or fax, if the party being served consents in writing. n5 If authorized by local rule, a party may use the court's transmission equipment to make this electronic service. n6 A court of appeals may not by local rule completely forbid the use of electronic service on a party that has consented to its use. However, courts have considerable discretion to use local rules to regulate electronic service. Parties also have the flexibility to define the terms of their consent; for example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service of only documents that were created with Corel WordPerfect. n7

[b] Completion of Service

Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served. n8 When reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. n9 Thus, when a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner, meaning either by personal service if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard has been included in the rule so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. n10

[c] Proof of Service

A paper presented for filing must contain either of the following:

1. An acknowledgment of service by the person served; n11 or

2. Proof of service consisting of a statement by the person who made service, certifying: n12 (a) the date and manner of service; n13 (b) the names of the persons served; n14 and (c) their mailing addresses or the addresses of the places of delivery; when a paper is served electronically, the proof of service of that paper must include the electronic address appropriate for the type of service, such as e-mail address or facsimile number to which the paper was transmitted. n15

When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), n16 the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk. n17 Proof of service may appear on or be affixed to the papers filed. n18

Intentional violations of the service requirements of Rule 25(d) may subject the violating party or attorney to sanctions

by the circuit court. n19

[3] Number of Copies Required by Local Rule or Court Order

For particular matters, the Appellate Rules require the filing or furnishing of a number of copies; n1 however, a circuit court may require a different number by local rule or by order in a particular case. n2 The purpose of this rule is that the number of copies a court of appeals needs may vary depending on the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Therefore, a party must consult local rules to determine whether the court requires a different number than that specified in the national Appellate Rules. n3 However, if a party fails to file the required number of copies, the failure does not create a jurisdictional defect. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 325.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 25(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 25(a)(2)(A).*

(n4)Footnote 3. *Thompson v. E.I. Dupont de Nemours & Co., 76 F.3d 530, 532 (4th Cir. 1996)* .

(n5)Footnote 4. *Sheviakov v. INS, 237 F.3d 1144, 1147 (9th Cir. 2001)* ; *see* [b], [c], *below* (mailbox rule still applies in particular situations); *Price v. Philpot, 420 F.3d 1158, 1164 (10th Cir. 2005)* (special prison mailbox rule still applies to filings by inmates).

(n6)Footnote 5. *Aircraft Owners and Pilots Association v. Hinson, 102 F.3d 1421, 1423 (7th Cir. 1996)* (sanctions were imposed where party failed to meet deadline for filing response when its brief was not delivered in accordance with requirements).

(n7)Footnote 6. *Fed. R. App. P. 25(a)(2)(B)(i).*

(n8)Footnote 7. *Fed. R. App. P. 25(a)(2)(B)(ii).*

(n9)Footnote 8. *Sheviakov v. INS, 237 F.3d 1144, 1147-1148 (9th Cir. 2001)* .

(n10)Footnote 9. *Fed. R. App. P. 25(a)(2)(C).*

(n11)Footnote 10. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, and so forth. Appellate rule 25 was amended in 1998 to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph. *Fed. R. App. P. 25(a)(2)(C)*, Committee Note to 1998 Amendments.

(n12)Footnote 11. *Knickerbocker v. Artuz, 271 F.3d 35, 37 (2d Cir. 2001)* (this mailbox rule did not apply when prisoner delivers notice of appeal to someone outside prison system for forwarding to court clerk).

(n13)Footnote 12. *See 28 U.S.C. § 1746* (requirements for unsworn declarations).

(n14)Footnote 13. *Fed. R. App. P. 25(a)(2)(C)*.

(N15)Footnote 14. *Fed. R. App. P. 25(a)(2)(D)*; *see Phansalkar v. Andersen, Weinroth & Co., L.P., 356 F.3d 188, 190 (2d Cir. 2004)* (in Second Circuit, submission of electronic format briefs is permitted and encouraged, provided that all parties have consented or a motion to file electronically has been granted); *see, e.g.*, 1st Cir. R. 32; 7th Cir. R. 31(e); 8th Cir. R. 28A(d).

(n16)Footnote 15. *Fed. R. App. P. 25(a)(2)(D)*.

(n17)Footnote 16. *Fed. R. App. P. 25(a)(2)(D)*, Committee Note to 2006 Amendments.

(n18)Footnote 17. *Yukiyo, Ltd. v. Watanabe, 111 F.3d 883, 886 (Fed. Cir. 1997)* (noting that local rule may permit electronic filing via Internet, computer e-mail system, computer disk, and CD-ROM).

(n19)Footnote 18. *Fed. R. App. P. 25(a)(2)(D)*.

(n20)Footnote 19. *Fed. R. App. P. 25(a)(2)(D)*, Committee Note to 2006 Amendments.

(n21)Footnote 20. *Fed. R. App. P. 25(a)(3)*.

(n22)Footnote 21. *Fed. R. App. P. 25(a)(4)*.

(n23)Footnote 22. *See In re McBryde, 120 F.3d 519, 521-522 (5th Cir. 1997)* (court may order clerk to strike nonconforming pleading).

(n24)Footnote 23. *Fed. R. App. P. 25(a)(4)*; *United States v. Sosa, 55 F.3d 278, 278-279 (7th Cir. 1995)* (clerk accepted nonconforming brief, but mailed notice to filing party to file corrected brief within seven days).

(n25)Footnote 24. *See Fed. R. App. P. 25(a)(5)*, Committee Note to 2007 Amendments.

(n26)Footnote 25. *Fed. R. App. P. 25(a)(5)*; *see Fed. R. Bankr. P. 9037*; *Fed. R. Civ. P. 5.2*; *Fed. R. Crim. P. 49.1*.

(n27)Footnote 26. *Fed. R. Civ. P. 5.2(a), (b)*.

(n28)Footnote 27. *Fed. R. Civ. P. 5.2(c)*.

(n29)Footnote 28. *Fed. R. Civ. P. 5.2(d)*.

(n30)Footnote 29. *Fed. R. Civ. P. 5.2(e)*.

(n31)Footnote 1. *Fed. R. App. P. 25(b)*.

(n32)Footnote 2. *Fed. R. App. P. 25(c)(1)(A)*.

(n33)Footnote 3. *Fed. R. App. P. 25(c)(1)(B)*.

(n34)Footnote 4. *Fed. R. App. P. 25(c)(1)(C)*.

(n35)Footnote 5. *Fed. R. App. P. 25(c)(1)(D)*.

(n36)Footnote 6. *Fed. R. App. P. 25(c)(2)*.

(n37)Footnote 7. *Fed. R. App. P. 25(c)(1)(D)*, Committee Notes to 2002 Amendments.

(n38)Footnote 8. *Fed. R. App. P. 25(c)(4)*; *see Zhong Guang Sun v. United States DOJ, 421 F.3d 105, 108 (2d Cir.*

2005) (note that while *service* on parties by mail or by commercial carrier is complete under Rule 25(c)(4) on mailing or delivery to the carrier, *filing* with court under Rule 25(a)(2)(B) is not complete until clerk receives papers within time fixed for filing).

(n39)Footnote 9. *Fed. R. App. P. 25(c)(3).*

(n40)Footnote 10. *Fed. R. App. P. 25(c)*, Committee Note to 1994 Amendment.

(n41)Footnote 11. *Fed. R. App. P. 25(d)(1)(A).*

(n42)Footnote 12. *Fed. R. App. P. 25(d)(1)(B).*

(n43)Footnote 13. *Fed. R. App. P. 25(d)(1)(B)(i).*

(n44)Footnote 14. *Fed. R. App. P. 25(d)(1)(B)(ii).*

(n45)Footnote 15. *Fed. R. App. P. 25(d)(1)(B)(iii).*

(n46)Footnote 16. *See* [1][b], *above*.

(n47)Footnote 17. *Fed. R. App. P. 25(d)(2)*; *Fed. R. App. P. 25(d)*, Committee Note to 1996 Amendment (including such information in certificate of service avoids necessity for separate certificate concerning date and manner of filing).

(n48)Footnote 18. *Fed. R. App. P. 25(d)(3).*

(n49)Footnote 19. *In re Bagdade, 2003 U.S. App. LEXIS 12613, at *13-*15 (7th Cir. Jan. 13, 2003)* , *sanctions allowed*, *334 F.3d 568 (7th Cir. 2003)* .

(n50)Footnote 1. *See, e.g., Fed. R. App. P. 5(c)* (party applying to circuit court for permissive appeal must file an original petition and three copies).

(n51)Footnote 2. *Fed. R. App. P. 25(e).*

(n52)Footnote 3. *Fed. R. App. P. 25(e)*, Committee Note to 1994 Amendment).

(n53)Footnote 4. *Fed. R. App. P. 3(a)(2).*

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.81

§ 28.81 Computation and Extension of Time Periodsn*

[1] Introduction

The Appellate Rules, local rules, orders of court, or a controlling statute may specify time periods for parties to complete specified aspects of the appeal. Unless specified in the particular rule, order, or statute, Appellate Rule 26 specifies the method for computing time periods related to the appeal. n1 Appellate Rule 26 also permits a court to extend a prescribed time for good cause n2 and allows additional time after service of papers on a party required or permitted to act within a prescribed period. n3 Finally, Appellate Rule 26 describes circumstances when a court may not extend a particular prescribed period of time. n4 Appellate Rule 26 applies to all time periods prescribed or allowed by the Appellate Rules, by order of the court, or by an applicable statute. It applies only in procedures governed by the Appellate Rules. n5

Appellate Rule 26 controls the computation of any time period found in a statute that does not specify a method of computing time, in any Federal Rule of Appellate Procedure, in a local rule, or in a court order. n6 However, a local rule may not direct that a deadline be computed in a manner inconsistent with Rule 26. n7 Rule 26 was amended in 2009 to simplify and clarify the provisions that describe how deadlines are computed for appellate procedures. n8

The time computation provisions of Rule 26 apply only when a time period must be computed. They do not apply when a fixed time or date to act is specified. For example, if the court were to state that the date for filing a document is on November 1, 2007, Rule 26(a) does not govern. However if a rule or order specifies that a party must file a document "within 10 days" or "within 72 hours," subdivision (a) specifies the manner for calculating the deadline. n9

[2] Computation of Time Periods

[a] Terminology Used in Calculation of Deadlines

The following is the meaning of terms as used in the calculation of time periods for appellate practice: n1

"Last Day"--Except as otherwise specified by a statute, local rule, or court order, the last day ends:

- for electronic filing in the district court, at midnight in the court's time zone; n2

- for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office; n3

- for filing under Rule 4(c)(1) (inmate filing of notice of appeal), Rule 25(a)(2)(B) (filing of brief or appendix), Rule 25(a)(2)(C) (inmate filing of document), and filing by mail under Rule 13(b), at the latest time for the method chosen for delivery to the post office, third party commercial carrier, or prison mailing system; n4

- for filing by other means, when the clerk's office is scheduled to close. n5

"Next Day"--The next day is determined by continuing to count forward if the period is measured after an event and backward when measured before an event. n6

"Legal Holiday"--legal holidays include all of the following:

- the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; n7

- any day declared a holiday by the President or Congress; n8

- for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. n9 For determination of holidays under the appellate rules, the word "state" encompasses all of the states of the Union, the District of Columbia, and all federal territories, commonwealths, and possessions. n10

[b] Deadline Calculation For Period Stated in Days or Longer Unit

When a time period is stated in days or a longer unit of time, calculate the due date by taking the following steps:

1. Exclude the day of the event that triggers the period. n11

2. Count every day, including intermediate Saturdays, Sundays, and legal holidays. n12

3. Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. n13

[c] Deadline Calculation For Period Stated in Hours

When a time period is stated in hours, calculate the due date by taking the following steps:

1. Begin counting immediately on the occurrence of the event that triggers the period. n14

2. Count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays. n15

3. If the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday. n16

[d] Effect of Inaccessibility of the Clerk's Office

Inaccessibility of the clerk's office generally delays the due date under a time period. n17 Whether an office is "inaccessible" is not defined in Rule 26, but is developed through case law. n18 It generally means that the party does not have access to the clerk's office, and that such access is not in the control of the party. n19 While Appellate Rule 26 previously stated that inclement weather or conditions made an office inaccessible, that specific reference has been deleted because bad weather is only one example of inaccessibility. n20 Other examples include an outage of the electronic filing system, and the possibility of the spread of disease. n21

Unless the court orders otherwise, there are two rules applied to the calculation of time periods when the clerk's office is inaccessible, depending on the unit of time stated in the period, as follows:

- *Period Stated in Days or Longer Unit*. If the clerk's office is inaccessible on the last day for filing under Rule 26(a)(1), n22 then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday. n23

- *Period Stated in Days or Longer Unit*. If the clerk's office is inaccessible during the last hour for filing under Rule 26(a)(2), n24 then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday. n25

[3] Court Ordered Extension of Time Period for Good Cause

Except in two situations, n1 an appellate court may for good cause extend the time prescribed by the Appellate Rules or by the court's order to perform any act, n2 or the court may permit an act to be done after that time expires. n3 For example, the circuit court may extend the time period for a party to file the record on appeal to the appellate court, n4 or to consider a petition for rehearing even though the time for rehearing has passed. n5 A circuit court may specify by local rule factors it considers sufficient to establish "good cause" for enlargement of time. n6

[4] Circumstances in Which Court May Not Grant Extension

Even if good cause is shown, a court may not extend time in two situations: n1

1. To file a notice of appeal n2 (except as authorized in Appellate Rule 4) or a petition for permission to appeal. n3 This prohibition is jurisdictional and strictly applied. n4 Furthermore, this prohibition may not be circumvented by procedural technicalities, such as the district court reentering a certification for appeal of interlocutory order for the sole purpose of extending the time for filing the appellate petition. n5

2. To file a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law. n6

[5] Additional Time Based on Service Date

When a party may or must act within a specified time after service, three days are added after the period would otherwise expire under Rule 26(a), unless the document is delivered on the date of service stated in the proof of service. For purposes of this three-day provision, a paper that is served electronically is never treated as delivered on the date of service stated in the proof of service. n1 Note that this rule adds three additional days for the opposition to act only if the prescribed period runs from date of *service* of a document. If the prescribed period is measured from the date of *filing* or from some other date specified by court, rather than from date of service, then the 3 day addition of time under is inapplicable. n2 It should also be noted that the 3-day addition is calculated only after the due date for the time period

is first calculated according to the other provisions of Rule 26. Thus, after the party has calculated the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add three days. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 326.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. App. P. 26(a)*; *Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 682-683 (D.C. Cir. 2001)*, *cert. denied, 534 U.S. 972 (2001)* (Appellate Rule 26 does not apply when Congress has specified a different method of counting days in statute governing a particular procedure).

(n3)Footnote 2. *Fed. R. App. P. 26(b)*; *see NLRB v. IBEW, Local Union 16, 425 F.3d 1035, 1039 (7th Cir. 2005)* (power of appellate court to excuse late filing).

(n4)Footnote 3. *See Fed. R. App. P. 26(c)*.

(n5)Footnote 4. *Fed. R. App. P. 26(b)(1), (2)*; *see, e.g., Delta Airlines v. Butler, 383 F.3d 1143, 1145 (10th Cir. 2004)* (appellate court has no power to grant extension specifically prohibitted by Rule 26(b)(1)).

(n6)Footnote 5. *See Fed. R. App. P. 1*.

(n7)Footnote 6. *Fed. R. App. P. 26(a)*.

(n8)Footnote 7. *Fed. R. App. P. 26(a)*, Committee Note to 2009 Amendments; *see* [2], *below*.

(n9)Footnote 8. *Fed. R. App. P. 26(a)*, Committee Note to 2009 Amendments.

(n10)Footnote 9. *Fed. R. App. P. 26(a)*, Committee Note to 2009 Amendments; *see* [2], *below*.

(n11)Footnote 1. *See* [b]-[d], below.

(n12)Footnote 2. *Fed. R. App. P. 26(a)(4)(A)*.

(n13)Footnote 3. *Fed. R. App. P. 26(a)(4)(B)*.

(n14)Footnote 4. *Fed. R. App. P. 26(a)(4)(C)*.

(n15)Footnote 5. *Fed. R. App. P. 26(a)(4)(D)*.

(n16)Footnote 6. *Fed. R. App. P. 26(a)(5)*.

(n17)Footnote 7. *Fed. R. App. P. 26(a)(6)(A)*.

(n18)Footnote 8. *Fed. R. App. P. 26(a)(6)(B)*.

(n19)Footnote 9. *Fed. R. App. P. 26(a)(6)(C)*; *see Yepremyan v. Holder, 614 F.3d 1042, 1044 (9th Cir. 2010)* (state law may control to determine holiday status of specific days, such as day after Thanksgiving).

(n20)Footnote 10. *Fed. R. App. P. 1(b)*.

(n21)Footnote 11. *Fed. R. App. P. 26(a)(1)(A).*

(n22)Footnote 12. *Fed. R. App. P. 26(a)(1)(B).*

(n23)Footnote 13. *Fed. R. App. P. 26(a)(1)(C)*; *see Harrington v. State Farm Fire & Cas. Co., 563 F.3d 141, 146 (5th Cir. 2009)* (when prescribed 30 day period ended on Saturday, last day was deemed to fall on following Monday).

(n24)Footnote 14. *Fed. R. App. P. 26(a)(2)(A).*

(n25)Footnote 15. *Fed. R. App. P. 26(a)(2)(B).*

(n26)Footnote 16. *Fed. R. App. P. 26(a)(2)(C).*

(n27)Footnote 17. *Fed. R. App. P. 26(a)(3).*

(n28)Footnote 18. *Fed. R. App. P. 26(a)(3)*, Committee Note to 2009 Amendments; *see, e.g., Yepremyan v. Holder, 614 F.3d 1042, 1044 (9th Cir. 2010)* .

(n29)Footnote 19. *Tummino v. Hamburg, 260 F.R.D. 27, 38 (E.D.N.Y. 2009)* .

(n30)Footnote 20. *Fed. R. App. P. 26(a)(3)*, Committee Note to 2009 Amendments; *see Salvador-Calleros v. Ashcroft, 389 F.3d 959, 964 (9th Cir. 2004)* .

(n31)Footnote 21. *Fed. R. App. P. 26(a)(3)*, Committee Note to 2009 Amendments.

(n32)Footnote 22. *See* [b], *above*.

(n33)Footnote 23. *Fed. R. App. P. 26(a)(3)(A).*

(n34)Footnote 24. *See* [c], *above*.

(n35)Footnote 25. *Fed. R. App. P. 26(a)(3)(B).*

(n36)Footnote 1. *See* [4], *below*.

(n37)Footnote 2. *Gross v. Town of Cicero, 528 F.3d 498, 500 (7th Cir. 2008)* (whether to extend should, at least in part, be based on degree of fault).

(n38)Footnote 3. *Fed. R. App. P. 26(b).*

(n39)Footnote 4. *NLRB v. IBEW, Local Union 16, 425 F.3d 1035, 1038-1039 (7th Cir. 2005)* .

(n40)Footnote 5. *Aircraft Owners and Pilots Ass'n v. Hinson, 102 F.3d 1421, 1428-1429 (7th Cir. 1996)* (court allowed party to file brief on emergency motion to stay after deadline set by court, but imposed fine for party's failure to request extension until after deadline had passed).

(n41)Footnote 6. *See, e.g.,* 7th Cir. Ct. R. 26.

(n42)Footnote 1. *Delta Airlines v. Butler, 383 F.3d 1143, 1145 (10th Cir. 2004)* (court may grant extension of time to file notice of appeal only as specifically authorized by Appellate Rule 4 or, in cases of administrative ruling, as specifically authorized by statute).

(n43)Footnote 2. *See United States v. Detrich, 940 F.2d 37, 38 (2d Cir. 1991)* (circuit court may not enlarge time for filing notice of appeal).

(n44)Footnote 3. *Fed. R. App. P. 26(b)(1)*; *see Aparicio v. Swan Lake, 643 F.2d 1109, 1111-1112 (5th Cir. 1981)* .

(n45)Footnote 4. *Herzberg v. Indiana, 429 F.3d 651, 651 (7th Cir. 2005)* ; *see Stone v. INS, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)* (judicial review provisions are jurisdictional in nature).

(n46)Footnote 5. *Welcome Ctr. v. Brown, 466 U.S. 147, 162, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* (concurring opinion).

(n47)Footnote 6. *Fed. R. App. P. 26(b)(2)*; *see Lucaj v. Gonzales, 425 F.3d 203, 204 n.1 (2d Cir. 2005)* (appellate court may not extend time to file petition for review of order of administrative agency, board, or commission, unless specifically authorized by statute).

(n48)Footnote 1. *Fed. R. App. P. 26(c)*.

(n49)Footnote 2. *Delta Airlines v. Butler, 383 F.3d 1143, 1145 (10th Cir. 2004)* .

(n50)Footnote 3. *Fed. R. App. P. 26(c)*, Committee Note to 2009 Amendments.

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.82

§ 28.82 Corporate Disclosure Statementn*

[1] Required Disclosure Statement

Each nongovernmental corporate party to a proceeding in a court of appeals must file a disclosure statement regarding any relationships it has with other corporations. In the statement the corporation (1) must identify any of its parent corporations, (2) must list any publicly held company that owns 10 percent or more of the party's stock, or (3) must state that the corporation does not have any parent corporations and that no publicly held corporation owns at least 10 percent of the corporation's stock. n1 The purpose of a disclosure statement is to assist a circuit judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. n2 The disclosure statement may also be used by the court to determine the status of the corporation for any other federal litigation purpose, n3 for example, its status as a nongovernmental unit. n4 The filing of the corporate disclosure statement is an absolute minimal requirement to assert or defend against an appeal, and a party's failure to file the statement may result in dismissal or the striking of a brief. n5

[2] Time for Filing

A corporate party must file its disclosure statement with the principal brief or on filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Furthermore, a party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes. Even if the disclosure statement has already been filed, the party's principal brief must include the disclosure statement before the table of contents. n1

[3] Filing of Original and Copies

If a party's disclosure statement is filed before the principal brief, the party must file an original and three copies unless the court requires a different number by local rule or by order in a particular case. n1 Because the statement must be included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. n2 If a party is required to file a supplemental disclosure statement because the party's required statement information has changed, the party must file an original and three copies, unless a local rule or an order entered in a particular case provides otherwise. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 326.1.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 26.1(a)*.

(n3)Footnote 2. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* (*Fed. R. App. P. 26.1* works as assistance to judges in determining their impartiality with respect to case); *Fed. R. App. P. 26.1(a)*, Committee Note to 1998 Amendments.

(n4)Footnote 3. *See, e.g., Price v. Wyeth Holdings Corp., 505 F.3d 624, 628 (7th Cir. 2007)* (disclosure statement used to identify correct parties in interest).

(n5)Footnote 4. *See Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval), 541 F.3d 997, 1001 (10th Cir. 2008)* .

(n6)Footnote 5. *See Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007)* (per curiam).

(n7)Footnote 1. *Fed. R. App. P. 26.1(b)*.

(n8)Footnote 1. *Fed. R. App. P. 26.1(c)*.

(n9)Footnote 2. *Fed. R. App. P. 26.1(c)*, Committee Note to 1994 Amendments.

(n10)Footnote 3. *Fed. R. App. P. 26.1(c)*, Committee Notes to 2002 Amendments.

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.83

§ 28.83 Motionsn*

[1] Motion Consists of Written Application for Relief

An application for an order or other relief must be made by motion, unless the Appellate Rules prescribe some other form. A motion must be in writing unless the court permits otherwise. n1 The most common instance in which the court would allow an oral motion would be during oral argument in the presence of opposing counsel. For example, an oral motion may be a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. However, the court has discretion to allow oral motions at other times but may also prohibit oral motions during oral argument, for example, when the motion is extremely complex. n2

[2] Contents of a Motion

[a] Required Contents

A motion must contain the following:

1. A statement, with particularity, of the grounds for the motion, the relief sought, and the legal argument necessary to support it. n1 When a motion fails to state the specific grounds for a motion and the legal argument supporting the grounds, or the relief requested, the court may order that those grounds or request for relief have been waived. n2

2. An affidavit or other paper, if necessary to support the motion. n3 Supporting "other papers" include documentation such as the underlying trial court decisions. Any supporting affidavit must be served and filed with the motion and must contain only factual information, not legal argument. n4

3. A copy of the trial court's opinion or agency's decision as a separate exhibit, if the motion seeks substantive relief. n5

[b] Documents Prohibited or Not Required

A party may not file a separate brief supporting or responding to a motion. n6 A notice of motion is not required. n7 A proposed order is also not required. n8 Although common in the district court, in the courts of appeals a proposed order

is not expected or desired. n9

[3] Response

[a] Time to File

Any party that wants to file a response to any motion must file that response within 10 days after service of the motion unless the court shortens or extends the time. n1 The contents of a response are the same as an original motion, as stated in Appellate Rule 27(a)(2). n2 If a party fails to make the required filing within the time period, the court will deem the motion unopposed. n3

Because the time period for a response is triggered by service, three days are added to the 10 day deadline (making a total of 13 days), unless service of the motion was actually delivered on the date of service stated in its proof of service. For purposes of this rule, a motion that is served electronically is not treated as delivered on the date of service stated in the proof of service. n4 Also, if the last day or the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. n5

A motion authorized by Appellate Rules 8, 9, 18, or 41 may be granted before the 10 day period runs only if the court gives reasonable notice to the parties that it intends to act sooner. n6

[b] Request for Affirmative Relief

A response may include a motion for affirmative relief. n7 It is permissible to combine the response and the new motion in the same document, and because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document must alert the court to the request for relief. n8 The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses in Appellate Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief. n9

[4] Reply to Response

A counter to a response is referred to as a "reply." Any reply to a response must be filed within seven days after service of the response, unless that time is shortened or extended by the court. n1

Because the time period for a response is triggered by service, three days are added to the seven-day deadline (making a total of 10 days), unless service of the response was actually delivered on the date of service stated in its proof of service. For purposes of this rule, a response that is served electronically is not treated as delivered on the date of service stated in the proof of service. n2 Also, if the last day or the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. n3

A reply must not present matters that do not relate to the response. n4 This means that a reply should not reargue issues or assertions presented by the original motion, or that could have been presented in the original motion. Furthermore, the reply should not argue matters that do not involve the issues or assertions presented by the response. However, if matters relevant to the original motion arise after the motion is filed, the court may consider argument on such matters in the reply if the court deems it appropriate, even though strictly speaking the matters do not directly relate to the response. n5

[5] Disposition of Motion for Procedural Order

The court may act on a motion for a procedural order, including a motion to extend time for good cause under Appellate Rule 26(b), at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk

to act on specified types of procedural motions. A party adversely affected by the court's or the clerk's action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed. n1 Thus, a party wishing to have the court reconsider, vacate, or modify the disposition must file an entirely new motion that specifically addresses the order which granted the earlier motion. Although the rule does not expressly require the court to do so, whenever a motion is disposed of before receipt of any response from the opposing party, it would be helpful if the court in its ruling indicate that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. n2

[6] Power of Single Judge to Entertain Motion

A single circuit judge may act alone on any motion. n1 For example, a single judge has the power to decide an emergency petition for a stay pending appeal. n2 However, a single judge may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. Furthermore, the court may review the action of a single judge. n3

[7] Format

[a] Physical Requirements

A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. n1 A cover is not required on a motion, response, or a reply. However, if a cover is used on any such a paper, the cover must be white. All motions, responses, and replies must contain a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. n2 The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open. n3 For example, a party may use spiral binding or secure stapling at the upper left-hand corner to satisfy the binding requirement, but these are not the exclusive methods of binding. n4

[b] Page Layout

The document must be on 81/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. n5

[c] Typeface and Typestyle Requirements

A motion to an appellate court must comply with the typeface requirements that are applicable to briefs as specified in Appellate Rule 32(a)(5) and with the typestyle requirements as specified in Appellate Rule 32(a)(6). n6 These typeface and typestyle restrictions are discussed in *§ 28.84[7]* and have been applied to motion papers in the same manner as to briefs to prevent abuses such as litigants using very small typeface to fit as many words as possible into the page limitations for motions. n7

[8] Page Limits

A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Appellate Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages. n1 Some circuits have developed local rules regarding page limits and criteria for permission to exceed page limits. n2

Appellate Rule 27(d)(2) does not establish special page limits for those instances in which a party combines a response

to a motion with a new request for affirmative relief; because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, 20 pages will be sufficient in most instances. If it is not sufficient, the party may request additional pages. If 10 pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made. n3

[9] Number of Copies

An original and three copies must be filed unless the court requires a different number by local rule or by order in a particular case. n1 The copies may be created by any process that yields a clear black image on light paper. The paper must be opaque and unglazed, and only one side of the paper may be used. n2

[10] Oral Argument

The court will decide a motion without oral argument unless the court determines that it should hear oral argument and orders that a hearing be held. n1 This provision has been included in the Appellate Rules to make it clear that a party does not have an automatic right to oral argument on a motion. Several circuits already have local rules stating that oral argument of motions will not be held unless the court orders it. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 327.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 27(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 27(a)(1)*, Committee Note to 1998 Amendments.

(n4)Footnote 1. *Fed. R. App. P. 27(a)(2)(A).*

(n5)Footnote 2. *Jones v. Sec'y, 607 F.3d 1346, 1354 (11th Cir. 2010) .*

(n6)Footnote 3. *Fed. R. App. P. 27(a)(2)(B)(i).*

(n7)Footnote 4. *Fed. R. App. P. 27(a)(2)(B)(ii).*

(n8)Footnote 5. *Fed. R. App. P. 27(a)(2)(B)(iii).*

(n9)Footnote 6. *Fed. R. App. P. 27(a)(2)(C)(i).*

(n10)Footnote 7. *Fed. R. App. P. 27(a)(2)(C)(ii).*

(n11)Footnote 8. *Fed. R. App. P. 27(a)(2)(C)(iii).*

(n12)Footnote 9. *Fed. R. App. P. 27(a)(2)*, Committee Note to 1998 Amendments.

(n13)Footnote 1. *Fed. R. App. P. 27(a)(3)(A).*

(n14)Footnote 2. *Fed. R. App. P. 27(a)(3)(A)*; *see Fed. R. App. P. 27(a)(2)*; *see § 28.83[2][a], above.*

(n15)Footnote 3. *See Fed. R. App. P. 27(a)(3)(A)*, Committee Note to 1998 Amendments.

(n16)Footnote 4. *Fed. R. App. P. 26(c)*.

(n17)Footnote 5. *See Fed. R. App. P. 26(a)(1)(C)*, *26(a)(2)(C)*; *see § 28.81[2][b],[c]*.

(n18)Footnote 6. *Fed. R. App. P. 27(a)(3)(A)*.

(n19)Footnote 7. *Fed. R. App. P. 27(a)(3)(B)*.

(n20)Footnote 8. *Fed. R. App. P. 27(a)*, Committee Note to 1998 Amendments.

(n21)Footnote 9. *Fed. R. App. P. 27(a)(3)(B)*.

(n22)Footnote 1. *Fed. R. App. P. 27(a)(3)(A)*.

(n23)Footnote 2. *Fed. R. App. P. 26(c)*; *see § 28.81[5]*.

(n24)Footnote 3. *See Fed. R. App. P. 26(a)(1)(C)*, *26(a)(2)(C)*; *see § 28.81[2][b],[c]*.

(n25)Footnote 4. *Fed. R. App. P. 27(a)(4)*.

(n26)Footnote 5. *Fed. R. App. P. 27(a)(4)*, Committee Note to 1998 Amendments; *see* 20A *Moore's Federal Practice, § 327.13* (Matthew Bender 3d ed.).

(n27)Footnote 1. *Fed. R. App. P. 27(b)*.

(n28)Footnote 2. *Fed. R. App. P. 27(b)*, Committee Note to 1998 Amendments.

(n29)Footnote 1. *Fed. R. App. P. 27(c)*.

(n30)Footnote 2. *McClendon v. City of Albuquerque, 79 F.3d 1014, 1019 (10th Cir. 1996)* .

(n31)Footnote 3. *Fed. R. App. P. 27(c)*; *see McClendon v. City of Albuquerque, 79 F.3d 1014, 1019 (10th Cir. 1996)* (action of single judge to decide emergency petition for stay pending appeal was reviewable by court of appeals).

(n32)Footnote 1. *Fed. R. App. P. 27(d)(1)(A)*.

(n33)Footnote 2. *Fed. R. App. P. 27(d)(1)(B)*.

(n34)Footnote 3. *Fed. R. App. P. 27(d)(1)(C)*.

(n35)Footnote 4. *Fed. R. App. P. 27(d)(1)*, Committee Note to 1998 Amendments.

(n36)Footnote 5. *Fed. R. App. P. 27(d)(1)(D)*.

(n37)Footnote 6. *Fed. R. App. P. 27(d)(1)(E)*.

(n38)Footnote 7. *Fed. R. App. P. 27(d)(1)(E)*, Committee Note to 2005 Amendments.

(n39)Footnote 1. *Fed. R. App. P. 27(d)(2)*.

(n40)Footnote 2. *See, e.g.*, D.C. Ct. App. R. 27(h)(3) (motion to exceed page limits may be granted only for extraordinarily compelling reasons).

(n41)Footnote 3. *Fed. R. App. P. 27(d)(2) Fed. R. App. P. 27(d)(1)*, Committee Note to 1998 Amendments.

(n42)Footnote 1. *Fed. R. App. P. 27(d)(3).*

(n43)Footnote 2. *Fed. R. App. P. 27(d)(1)(A).*

(n44)Footnote 1. *Fed. R. App. P. 27(e)*; *see, e.g., Cubic Defense Sys. v. United States, 45 Fed. Cl. 450, 467 (Ct Cl. 2000)* (although court of appeals may liberally allow oral argument on dispositive motions, the entitlement to and scope of oral argument is within discretion of court, and no party has right to oral argument).

(n45)Footnote 2. *Fed. R. App. P. 27(e)*, Committee Note to 1998 Amendments.

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.84

§ 28.84 Briefsn*

[1] Contents of Appellant's Brief

An appellant's brief must contain all of the following items, under appropriate headings and in the order indicated:

1. A corporate disclosure statement, if required by Appellate Rule 26.1. n1

2. A table of contents, with page references. n2

3. A table of authorities, with cases alphabetically arranged, statutes, and other authorities. Each item must have references to the pages of the brief where it is cited. n3

4. A jurisdictional statement, including each of the following:

a. The basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction. n4

b. The basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction. n5

c. The filing dates establishing the timeliness of the appeal or petition for review. n6

d. An assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis. n7

5. A statement of the issues presented for review. n8 Issues that are not raised in the appellant's brief are deemed abandoned. n9 For example, if the appellant fails to assert in its brief grounds for reversal of the challenged orders, the failure results in a waiver of those issues. n10 Furthermore, if the appellant fails to raise an issue for the first time until the reply brief, the issue is waived. n11

6. A statement of the case, briefly indicating the nature of the case, the course of proceedings, and the disposition below. n12

7. A statement of facts relevant to the issues submitted for review with appropriate references to the record (see Appellate Rule 28(e)). n13

8. A summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings. n14

9. The argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies, n15 and for each issue, a concise statement of the applicable standard of review, which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues. n16 A common failure with respect to the argument, which may result in waiver, is to make conclusory statements that are not supported by authority. n17 The requirement of legal argument applies both to represented and pro se appellants. n18

10. A short conclusion stating the precise relief sought. n19

11. A certificate of compliance with type-volume and page limitations, if required by Appellate Rule 32(a)(7). n20

12. The signature of the party filing the brief or, if the party is represented, by one of the party's attorneys. n21 By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. n22

[2] Contents of Appellee's Brief

An appellee's brief must conform to the requirements of Appellate Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

1. The jurisdictional statement in Appellate Rule 28(a)(4). n1

2. The statement of the issues on appeal in Appellate Rule 28(a)(5). n2

3. The statement of the case in Appellate Rule 28(a)(6). n3

4. The statement of the facts in Appellate Rule 28(a)(7). n4

5. The statement of the standard of review in Appellate Rule 28(a)(9)(B). n5

As is the case with the appellant, an appellee that fails to provide in its brief sufficient argument on a particular issue waives its right to have the appellate court consider that issue. n6

[3] Reply Brief

An appellant has the right to file a brief in reply to the appellee's brief. n1 Unless the court permits, no further briefs may be filed. A reply brief must contain: (1) a table of contents with page references; and (2) a table of authorities with references to the pages of the reply brief of citations, including alphabetically arranged cases, statutes, and other authorities. n2 If an issue is raised for the first time in a reply brief, that issue will not be considered by the court. n3

[4] [Reserved]

[5] Briefs in Case Involving Multiple Appellants or Appellees

If a case involves more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs. n1 This rule is construed liberally. For example, in a case in which the appellate court determined that appellants intended to proceed under Appellate Rule 28(i), the court did not dismiss their appeal for failure to file any brief, especially when the issues raised on appeal were identical to those of other appellants. n2 However, this rule applies only if the appellants' cases are consolidated for appeal, and neither appellant may adopt the other's arguments from another case by reference. n3

[6] References and Citations

[a] References to Parties

In briefs and at oral argument, the drafting or arguing attorney should minimize use of the terms "appellant" and "appellee." To make briefs and arguments clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore." n1

[b] References to Record

When applicable, the parties must refer specifically to those parts of the record that support the facts and arguments relied on. n2 A party that fails to do so may suffer consequences such as waiver of the argument. n3 When a party makes references to the parts of the record contained in the appendix filed with the appellant's brief, the references must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Appellate Rule 30(c). If the original record is used under Appellate Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. n4 For example, a party may refer to "Answer p. 7," "Motion for Judgment p. 2," or "Transcript p. 231." Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected. n5

[c] Reproduction of Statutes, Rules, Regulations and Other Laws

If the court's determination of the issues presented requires the analysis of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum, or may be supplied to the court in pamphlet form. n6 If a party fails to provide the court with requested copies of rules and regulations, or reference to locations in the appendix, the party could be subject to sanctions for non-compliance with Appellate Rule 28(f). n7

[d] Citation of Supplemental Authorities

If a party becomes aware of pertinent and significant authorities after the party's brief has been filed, or after oral argument but before decision, the party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. n8 This filing of a "notice of supplemental authority" under *Federal Rule of Appellate Procedure 28(j)* is particularly important when relevant retroactive legislation has been enacted, or when directly relevant caselaw precedent has been decided. n9 The letter must state the reasons for the supplemental citations indicating the issue in question by referring either to the page of the brief or to the issue argued orally. The body of the letter must not exceed 350 words. Any response letter must be made promptly, and is also limited to 350 words. n10 However, a party may not supplement the record using this rule, which relates only to legal authorities such as statutes, cases, regulations, rulings, while supplementation of the record is designed to present to the appellate court an accurate representation of the proceedings that occurred in the trial court. Therefore, a circuit court will reject a motion to

supplement authorities if the party attempts to provide new evidence or new issues not presented in the proceedings below. n11

[7] Form of Briefs n*

[a] Conformance to Format Requirements

Appellate Rule 32 controls the technical requirements for the format of briefs. It is important to follow these guidelines to ensure that the brief is accepted by the circuit court. If a party does not conform a brief to the requirements of Appellate Rule 32 or pertinent local rules, the court may impose appropriate sanctions, such as dismissal of the appeal, n1 rejection of the brief, or the imposition of a monetary sanction. n2 An attorney wishing to file a brief that does not comply with Appellate Rule 32 should first file a motion requesting permission to do so. n3

Every court of appeals must accept a brief that complies with the form requirements discussed in [b]-[h], *below*. By local rule or order in a particular case, a court of appeals may accept a brief that does not meet all of the form requirements listed in [b]-[h], *below*. n4

[b] Reproduction

A party may reproduce a brief by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. n5 Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. n6 Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy. n7

[c] Cover

Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. n8 The front cover of a brief must contain:

1. The number of the case centered at the top. n9

2. The name of the court. n10

3. The title of the case (*see* Appellate Rule 12(a)). n11

4. The nature of the proceeding (*e.g.*, Appeal *or* Petition for Review) and the name of the court, agency, or board below. n12

5. The title of the brief, identifying the party or parties for whom the brief is filed. n13 and

6. The name, office address, and telephone number of counsel representing the party for whom the brief is filed. n14

[d] Binding

A party may bind the brief in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open. n15 Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. Thus, a spiral binding or secure stapling at the upper left-hand corner satisfy the binding requirement, but they are not the exclusive methods of binding. n16

[e] Page Layout

The brief must be on 81/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. n17

[f] Typeface

A drafter of a brief may use either a proportionally spaced or a monospaced face may be used. A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger. n18 A monospaced face may not contain more than 101/2 characters per inch. n19 This rule recognizes that today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. Therefore, the rule has been drafted to ensure that the standards will enable all parties to have an equal opportunity to present their material and to ensure that the briefs are easily legible. n20

[g] Type Styles

A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. n21 Italicizing case names is preferred but underlining may be used. n22

[h] Length Limitation

[i] Page Limitation

Appellate Rule 32 restricts the length of any brief on appeal. The rule provides that a brief may meet this limitation either by meeting an absolute length limit, or by complying with a type-volume limitation. Thus, a principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with the type-volume limit of Appellate Rule 32(a)(7)(B) and (C). n23 In effect, Appellate Rule 32(a)(7)(A) is a "safe-harbor" provision that any principal brief which does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is also given that safe-harbor. n24

All attorneys for parties must note that an amicus brief may not be used to circumvent the page limitation imposed on the brief of each party. In this regard, any corporate amicus curiae filing a brief must also file a disclosure statement stating its ownership, n25 which will indicate whether that amicus is related to any party. n26 All amicus curiae must also make disclosures indicating whether a party's counsel authored the amicus curiae brief, and the identity of any party, attorney, or other person who contributed money for a brief. n27

The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this has made the 50-page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed. n28

[ii] Type-Volume Limitation

A principal brief is acceptable if it contains no more than 14,000 words or if it uses a monospaced face and contains no more than 1,300 lines of text. n29 A reply brief is acceptable if it contains no more than half of the type volume

specified in Appellate Rule 32(a)(7)(B)(i). n30 Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation. n31

[iii] Certificate of Compliance

A brief submitted under the type-volume limitation of Appellate Rule 32(a)(7)(B) n32 must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. n33 The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief. n34 Form 6 in the Appendix of Forms has been the strongly suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet these certification requirements. n35

[7A] Contents and Format of Briefs in Cross-Appeals n*

[a] Unique Briefing Rule Controls

Appellate Rule 28.1 has been added to provide special provisions that control the format, content, length, and timing of briefs in cases of cross-appeals. n1 A "cross-appeal" is an appeal which is initiated by a party to an already existing appeal (usually referred to as the "direct appeal"), n2 on an appellate issue which differs in some way from the original appellate issue. n3 For some appeals, it may not be obvious which party is the original appellant. Consequently, Rule 28.1 contains a provision to determine and designate the appellant and appellee in cases of cross-appeal. n4

Rule 28.1 makes clear that in any case involving a cross-appeal, briefs are governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference. n5 In other words, only when Appellate Rule 28.1 contains a provision which specifies that a cross-appeal is governed by a rule that applies to appellate briefs generally does that general rule also apply to cross-appeal briefs. For example, an appellant's principal brief in a cross-appeal must comply with Rule 28(a), n6 which is the general rule which specifies the required contents for an appellant's principal brief. n7

[b] Designation of Parties in Cross-Appeals

When a cross-appeal is filed, the party who files a notice of appeal first is designated the "appellant" for purposes of the rules governing the preparation of briefs, appendices to briefs, and oral argument. n8 The party filing a cross-appeal is designated the "appellee." n9 If parties to an appeal have filed their notices on the same day, the party that was plaintiff in the lower court proceeding is the "appellant." n10 The parties' may agree or the court by order may modify these designations. n11 Appellate Rule 28.1, which governs the preparation of briefs in cases involving cross-appeals, refers simply to the "appellant" and the "appellee." n12 However the appellate rules sometimes use the term "cross-appellant" to refer to the party filing a cross-appeal, and to the opposition as the "cross-appellee," n13 as do the courts of appeals in case law under the former Rule 28(h). n14

[c] Types of Briefs in Cross-Appeals

The following is a list of briefs as they are required to be used in a cross-appeal:

- Appellant's Principal Brief. The appellant must file a principal brief in its direct appeal, n15 which is the document that is required to specify the contentions that the appellant has regarding the issues raised in the direct appeal by the appellant. n16

- Appellee's Principal and Response Brief. In this brief, the appellee must specify the contentions that

the appellee has regarding the issues raised by the appellee's cross-appeal, and in the same brief must respond to the appellant's direct appeal contentions. n17

- Appellant's Response and Reply Brief. In this brief, the appellant may respond regarding the contentions made by the appellee in the cross-appeal, and in the same brief reply to the appellee's response to the appellant's direct appeal. n18

- Appellee's Reply Brief. In this brief, the appellee may reply to the appellant's response to the appellee's cross-appeal. n19

Other than the four briefs listed above, no briefs may be filed in a cross-appeal unless the court expressly permits, n20 such as:

- Intervenor's or Amicus Curiae Brief. The court has discretion to allow an intervenor or amicus curiae to file briefs in cross-appeals in appropriate circumstances. n21

- Supplemental Brief. A supplemental brief is a brief which the court of appeals allows the parties to file in order to augment the parties' initial principal, reply, or response brief. The appellate court has discretion to order a supplemental brief when circumstances or legal precedent has changed related to issues already raised. n22 The cross-appeal brief rule expressly recognizes that a party may file a supplemental brief in cases of cross-appeal. n23

[d] Contents of Briefs in Cross-Appeals

The following is a list of the contents required in the various types of briefs in a case involving a cross-appeal:

- Appellant's Principal Brief. The appellant must file a principal brief that complies with all of the usual requirements for an appellant's principal brief generally. n24 The brief must contain a corporate disclosure statement, if applicable; n25 a table of contents, with page references; a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages in the brief at which they are cited; a jurisdictional statement; a statement of the issues presented for review in the appeal; a statement of the case that briefly indicates the type of case, the course of proceedings, and the disposition in the lower court proceeding; a statement of facts relevant to the issues submitted for review, with appropriate references to the record, n26 a summary of the appellant's argument in the appeal, containing a succinct, clear, and accurate statement of the arguments; the argument, including the appellant's contentions and the reasons for them, with citations to the authorities and the record, and for each issue, a concise statement of the applicable standard of review; a short conclusion stating the precise relief sought in the appeal; and any required certificate establishing compliance with the applicable type-volume limitations on the size of the brief: n27

- Appellee's Principal and Response Brief. In this brief, the appellee must file a principal brief in the cross-appeal. In addition, this same brief must respond to all of the issues and contentions set out in the appellant's principal brief in the appeal. n28 Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, it must comply with all of the usual requirements for an appellant's principal brief, as listed above, n29 except that it need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement. n30

- Appellant's Response and Reply Brief. In this brief, the appellant must file a brief that responds to the appellee's contentions that the appellee set out in its principal brief on cross-appeal and may, in the same brief, reply to the appellee's response to the appellants direct appeal. n31 Because it responds to the

appellee's principal brief in the cross-appeal, the appellant's response and reply brief must contain most of the elements required of a response brief in the ordinary case that does not have a cross-appeal, except that a corporate disclosure statement is unnecessary because it has already been provided in the appellant's principal brief. n32 Thus, the appellant's response and reply brief must contain: a table of contents, with page references; a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages in the brief at which they are cited; a jurisdictional statement except that this statement need not be included if the appellant is satisfied with the statement in the appellee's principal brief in the cross-appeal; a statement of the issues presented for review in the cross-appeal, except that this statement need not be included if the appellant is satisfied with the statement in the appellee's principal brief in the cross-appeal; a statement of the case that briefly indicates the type of case, except that this statement need not be included if the appellant is satisfied with the statement in the appellee's principal brief in the cross-appeal; a statement of facts except that this statement need not be included if the appellant is satisfied with the statement in the appellee's principal brief in the cross-appeal; a summary of the appellant's argument in the response and reply, containing a succinct, clear, and accurate statement of the arguments; the argument itself, including the appellant's contentions and the reasons for them, with citations to the authorities and the record, and for each issue, a concise statement of the applicable standard of review; and any required certificate establishing compliance with the applicable type-volume limitations on the size of the brief: n33

- Appellee's Reply Brief. In this brief, the appellee may file a reply to the appellant's response brief to the appellee's principal brief in the cross-appeal. n34 The appellee's reply brief must include the following: n35 A table of contents, with page references; a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages in the brief of the citations; and when required, a certificate establishing compliance with the applicable type-volume limitations on the size of the brief. n36

- Intervenor's or Amicus Curiae Brief. When permitted by the court, this brief must contain all of the contents ordinarily required in briefs of intervenors or amici. n37

- Supplemental Brief. When permitted by the court, this brief must contain argument that augments the argument presented in the appellant's or appellee's initial principal, response, or reply brief. Ordinarily, the supplemental brief may not contain argument or contentions that were not raised by issues resented in the initial brief. n38

[e] Colors and Contents of Covers in Cross-Appeals

Brief covers must be of a particular color and content; the court has discretion to order corrections in a brief cover, if erroneous. n39 The following is a list of the particular color and content requirements for the cover of a brief filed in a case in which a cross-appeal has been filed:

- Appellant's Principal Brief. The cover of an appellant's principal brief must be blue when the appellant is represented by an attorney. The front cover of the brief must contain the number of the case centered at the top; the name of the appellate court; the title of the case; the type of the proceeding and the name of the lower court, agency, or board; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of any attorneys representing the party for whom the brief is filed. n40

- Appellee's Principal and Response Brief. The cover of an appellee's principal and response brief must be red when the appellee is represented by an attorney. The front cover of the brief must contain the number of the case centered at the top; the name of the appellate court; the title of the case; the type of

proceeding and the name of the lower court, agency, or board; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of any attorneys representing the party for whom the brief is filed. n41

- Appellant's Response and Reply Brief. The cover of the appellant's response and reply brief must be yellow when the appellant is represented by an attorney. The front cover of the brief must contain the number of the case centered at the top; the name of the appellate court; the title of the case; the type of proceeding and the name of the lower court, agency, or board; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of any attorneys representing a party on whose behalf a brief is filed. n42

- Appellee's Reply Brief. The cover of the appellee's reply brief must be gray when the appellee is represented by an attorney. The front cover of the brief must contain the number of the case centered at the top; the name of the appellate court; the title of the case; the type of proceeding and the name of the lower court, agency, or board; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of counsel representing the party for whom the brief is filed. n43

- Intervenor's or Amicus Curiae Brief. The cover of an intervenor's or amicus curiae's brief must be green when filed by a party represented by an attorney. The front cover of an intervenor's or amicus curiae's brief must contain the number of the case centered at the top; the name of the court; the title of the case; the type of proceeding and the name of the lower court, agency, or board; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of any attorneys representing the party for whom the brief is filed. n44

- Supplemental Brief. Unless filed by a party not represented by an attorney, the cover of any supplemental brief must be tan. n45 The front cover of a supplemental brief must contain the number of the case centered at the top; the name of the court; the title of the case; the type of proceeding and the name of the court, agency, or board below; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of counsel representing the party for whom the brief is filed. n46

[f] Length of Briefs in Cross-Appeals

The appellate rules set length limitations on the parties' briefs. A brief may comply with the length limitation in either of two ways: n47 (1) the brief is less than the specified number of pages or (2) the brief is less than the specified volume of type, as certified by the attorney or party. The certificate by the attorney or unrepresented appellant must certify that the brief complies with the type-volume limitation, n48 by stating either the number of words in the brief or the number of lines of monospaced type in the brief. n49 The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. n50

The following is a list of the length and volume limitations for each type of brief in cases with a cross-appeal:

- Appellant's Principal Brief.

Page Limitation. The appellant's principal brief must not exceed 30 pages; n51

OR

Type-volume Limitation. If certified by the attorney or an unrepresented party, n52 the brief may contain

no more than 14,000 words or, if the brief uses monospaced typeface, may contain no more than 1,300 lines of text. n53

- Appellee's Principal and Response Brief.

Page Limitation. The appellee's principal and response brief must not exceed 35 pages; n54

OR

Type-volume Limitation. If certified by the attorney or an unrepresented party, n55 the brief may contain no more than 16,500 words or, if the brief uses monospaced typeface, may contain no more than 1,500 lines of text. n56

- Appellant's Response and Reply Brief.

Page Limitation. The appellant's response and reply brief must not exceed 30 pages; n57

OR

Type-volume Limitation. If certified by the attorney or an unrepresented party, n58 the brief may contain no more than 14,000 words or, if the brief uses monospaced typeface, may contain no more than 1,300 lines of text. n59

- Appellee's Reply Brief.

Page Limitation. The appellee's reply brief must not exceed 15 pages; n60

OR

Type-volume Limitation. If certified by the attorney or an unrepresented party, n61 the brief may contain no more than 7,000 words or, if the brief uses monospaced typeface, may contain no more than 650 lines of text. n62

- Amicus Curiae Brief.

All attorneys for parties must note that an amicus brief may not be used to circumvent the page limitations imposed on the briefs of any parties; consequently any amicus must file a disclosure statement stating its ownership, n63 and also disclose the author of the brief and who paid for the brief. n64

Page Limitation. In a case involving a cross-appeal, an amicus brief must not exceed 15 pages, which is half the maximum length authorized by the appellate rules for an appellant's principal brief, unless the court allows otherwise; n65

OR

Type-volume Limitation. If certified by the attorney or an unrepresented party, n66 an amicus brief may contain no more than 7,000 words or, if the brief uses monospaced typeface, may contain no more than 650 lines of text, which is half the type volume limitation authorized by the appellate rules for an appellant's principal brief. n67

- Supplemental Brief. Depending on the need to brief issues due to a change in legal precedent or circumstances, the court will order a specific maximum of page length or type-volume. Ordinarily, this maximum will be less than the length of the initial brief. n68

[g] Deadlines for Service and Filing Briefs in Cross-Appeals

In cases when a cross-appeal has been filed, the time of service of a brief is the same as the time of filing. n69 The following is a list of the deadlines for service and filing of each type of brief in cases with a cross-appeal:

- Appellant's Principal Brief. The appellant's principal brief must be served and filed within 40 days after the record is filed. n70

- Appellee's Principal and Response Brief. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. n71

- Appellant's Response and Reply Brief. The appellant's response and reply brief must be served and filed within 30 days after the appellee's principal and response brief is served. n72 Therefore, the appellant has the same amount of time to respond to the appellee's principal brief as the appellee had to respond to the appellant's principal brief.

- Appellee's Reply Brief. The appellee's reply brief generally must be served and filed within 14 days after the appellant's response and reply brief is served, but at least seven days before argument unless the court permits a later filing for good cause. n73

- Supplemental Brief. Depending on the length of time needed to brief issues due to a change in legal precedent or circumstances, the court will order a specific date that supplemental briefs must be filed. n74

[8] Brief of Amicus Curiae n*

[a] Leave of Court Required Except for Government Entities

The expression "amicus curiae" means "friend of the court," and has traditionally been used to describe one who assists the court by providing information on some matter of law. n1 The traditional function of an amicus curiae is to assist in cases of general public interest by supplementing the efforts of private counsel and by drawing the court's attention to law that might otherwise escape consideration; governmental entities often file as amicus curiae. n2 Because more than one amicus curiae may be permitted or encouraged to present more than one viewpoint, amicus curiae need not be impartial concerning the outcome of the issues in a case. n3

However, it should be noted that an amicus brief may not be used to circumvent the page limitations imposed on the briefs of any parties. n4 Whether to allow a person to file a amicus curiae brief is generally matter of judicial accommodation. n5

The United States or its officer or agency, or a state, territory, commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. n6 In 1998, this provision was amended to provide that it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties

have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief. n7

[b] Motion for Leave to File

A motion for leave to file an amicus curiae brief must be accompanied by the proposed brief and state the movant's interest. n8 and the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. n9 Permission to file a brief as an amicus is within the sound discretion of the circuit court. n10 Traditionally, a court would grant amicus curiae status to a nonparty when the nonparty could aid the court in resolving complex issues of law that may not have necessarily been presented by the parties. Formerly, courts usually did not grant that status to nonparties who advocated a point of view so that a claim for relief could be won by one party or another. n11 If a nonparty has a strong adversarial interest or a partisan view of the facts, the party should intervene in the case, rather than see amicus curiae status. n12

However, at the appellate level, courts have recognized that an amicus need not be completely impartial, and may contribute a limited adversary support for particular issues, provided that the amicus is not advocating for a particular outcome on the merits. n13 For example, the grant of amicus curiae status is appropriate when a party is not represented competently or not represented at all; the amicus has an interest that may be affected by the decision in the present case, but the interest is not sufficient to entitle the amicus to intervene; or the amicus has unique information or a unique perspective that would aid the court beyond the presentation provided by the parties' attorneys. n14

[c] Contents and Form

An amicus brief must comply with Appellate Rule 32. n15 In addition to the requirements of Appellate Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. n16 Rather than the general requirements for briefs of the appellants and appellees specified in Rule 28, the particular requirements for amicus curiae briefs are specified in Rule 29; thus, amicus briefs require all of the following:

1. If the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; n17

2. A table of contents, with page references; n18

3. A table of authorities, including cases alphabetically arranged, statutes, and other authorities, all with references to the pages of the brief where they are cited; n19

4. A concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file; n20

5. Unless the amicus curiae is a governmental entity listed in the first sentence of Rule 29(a), a statement that indicates: n21

A. whether a party's counsel authored the brief in whole or in part; n22

B. whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; n23 and

C. the identity of any person who has contributed money that was intended to fund preparing or submitting the brief other than the amicus curiae, its members, or its counsel. n24

6. An argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review;

7. A certificate of compliance, if required by Rule 32(a)(7); n25

8. A signature of the party filing the brief or, if the party is represented, by one of the party's attorneys. n26 By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every brief. n27

[d] Length

Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by the appellate rules for a party's principal brief. n28 If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief. n29

The attorneys for parties should recognize that an amicus curiae brief may not be used to circumvent the page limitations imposed on the briefs of any parties. n30 Consequently, any corporate party filing a brief must file a disclosure statement stating its ownership, n31 which will indicate whether it is related to any amicus curiae. n32 Furthermore, except for governmental entities, all amicus curiae filing briefs must file a statement that indicates whether a party's counsel authored the amicus curiae brief, whether a party or a party's counsel contributed money intended to submit a brief, and the identity of any other person who contributed money to submit a brief. n33

[e] Time for Filing

An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than seven days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than seven days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer. n34 It is advised that a party making a late filing show good cause for doing so. n35

[f] Court's Permission Required to File Reply Brief or Participate in Oral Argument

Except by the court's permission, an amicus curiae may not file a reply brief, n99 because the role of an amicus does not require the use of a reply brief. n100 Furthermore, an amicus curiae may participate in oral argument only with the court's permission. n101 This provision was amended to delete the former language stating that an amicus would be granted permission to participate in oral argument "only for extraordinary reasons." The deletion was made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. n102

[9] Appendix to Brief n*

[a] Appellant's Responsibility

[i] Contents of the Appendix

The appellant must prepare and file an appendix to the briefs containing all of the following:

1. The relevant docket entries in the proceeding below. n103

2. The relevant portions of the pleadings, charge, findings, or opinion. n104

3. The judgment, order, or decision in question. n105

4. Other parts of the record to which the parties wish to direct the court's attention. n106

If an appellant in a civil case fails to comply with the appellant's responsibilities to provide an appendix with the required contents, the failure may result in dismissal of the appeal. n107

[ii] Excluded Material

The appellant should not include memoranda of law in the district court in the appendix unless they have independent relevance. n108 However, exhibits not entered into evidence should be included as part of the appendix if their admissibility is at issue. n109 Parts of the record may be relied on by the court or the parties even though not included in the appendix. n110

[iii] Time to File Required Number of Copies

Unless filing is deferred under Appellate Rule 30(c), n111 the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number. n112

[b] Responsibilities of All Parties

[i] Determining Contents of Appendix

The court must encourage the parties to agree on the contents of the appendix. However, if they cannot agree, the appellant must within 14 days after the record is filed serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix, and a statement of the issues the appellant intends to present for review. Within 14 days after receiving the designation, the appellee may serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee. n113

[ii] Costs of Appendix

Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix. n114

[c] Deferred Appendix

[i] Deferral Until After Briefs Are Filed

The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Appellate Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief and need not include a statement of the issues presented. n115

[ii] References to the Record

If a deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear. n116 When a deferred appendix is used, a brief must make reference to the original record rather than to the appendix, because the appendix does not exist when the briefs are prepared. Unless a party later files an amended brief with direct references to the pages of the appendix (as provided in Appellate Rule (c)(2)(B), and discussed in the next paragraph, *below*), the material in the appendix must indicate the pages of the original record from which it was drawn so that a reader of the brief can make meaningful use of the appendix. n117

A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Appellate Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief. n118

[d] Format of the Appendix

The appendix must begin with a table of contents identifying the page at which each part begins. Next, the relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters, such as captions, subscriptions, and acknowledgments should be omitted. n119

[e] Reproduction of Exhibits

Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit. n120

[f] Appeal on the Original Record Without an Appendix

The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file. n121

[g] Form of Appendix to Brief n*

An appendix must comply with the form for a brief, as specified in Appellate Rule 32(a)(1), (2), (3), and (4), n122 with the following exceptions:

1. The cover of a separately bound appendix must be white. n123

2. An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. n124

3. When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 81/2 by 11 inches and need not lie reasonably flat when opened. n125

Every court of appeals must accept an appendix to a brief that complies with the form requirements listed above. By local rule or order in a particular case a court of appeals may accept an appendix to a brief that does not meet all of the form requirements listed above. n126

[10] Serving and Filing Brief n*

[a] Time to Serve and File Brief

The appellant must serve and file a brief within 40 days after the record is filed. n127 If the proceeding is for enforcement or review of an order of the National Labor Relations Board or an officer of the board, the party adverse to the National Labor Relations Board is considered the appellant and proceeds first on briefing, unless the court orders otherwise. n128

After the appellant files and serves a brief, the appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least seven days before argument, unless the court, for good cause, allows a later filing. n129 However, a court will not consider a party's conduct as excusable neglect, for example, if the party's brief is 80 days late, and the party shows no good cause shown for delay. n130

A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case. n131

[b] Number of Copies

An appellant must file with the clerk 25 copies of each brief and serve two copies on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file four legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number. n132

[c] Consequence of Failure to File Brief

If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. n133 However, the circuit court is not required to dismiss the appeal. n134 The circuit court may hear the appeal even if a brief has not been filed, n135 it may extend the appellant's time to file, n136 or it may permit the party to show cause why the appeal should not be dismissed. n137 An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission. n138

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefs

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 328.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 28(a)(1)*; *see § 28.82*.

(n3)Footnote 2. *Fed. R. App. P. 28(a)(2)*.

(n4)Footnote 3. *Fed. R. App. P. 28(a)(3).*

(n5)Footnote 4. *Fed. R. App. P. 28(a)(4)(A).*

(n6)Footnote 5. *Fed. R. App. P. 28(a)(4)(B).*

(n7)Footnote 6. *Fed. R. App. P. 28(a)(4)(C).*

(n8)Footnote 7. *Fed. R. App. P. 28(a)(4)(D).*

(n9)Footnote 8. *Fed. R. App. P. 28(a)(5).*

(n10)Footnote 9. *Regional Economic Community Action Program v. City of Middletown, 281 F.3d 333, 343 (2d Cir. 2002)* (plaintiffs did not in brief dispute merits of trial court's summary judgment decision on appeal and thus waived any appeal of that decision).

(n11)Footnote 10. *Harris v. Folk Constr. Co., 138 F.3d 365, 367 n.1 (8th Cir. 1998)* .

(n12)Footnote 11. *McMillan v. United States, 112 F.3d 1040, 1047 (9th Cir. 1997)* .

(n13)Footnote 12. *Fed. R. App. P. 28(a)(6).*

(n14)Footnote 13. *Fed. R. App. P. 28(a)(7).*

(n15)Footnote 14. *Fed. R. App. P. 28(a)(8).*

(n16)Footnote 15. *Fed. R. App. P. 28(a)(9)(A)*; *see Jeseritz v. Potter, 282 F.3d 542, 548 (8th Cir. 2002)* (appellant's argument failed when he failed to cite relevant case law or record evidence in support of his argument).

(n17)Footnote 16. *Fed. R. App. P. 28(a)(9)(B)*; *see Harris v. Folk Constr. Co., 138 F.3d 365, 367 n.1 (8th Cir. 1998)* (if appellant fails to assert in its brief grounds for reversal of challenged orders, it waives those grounds).

(n18)Footnote 17. *Pitsonbarger v. Gramley, 141 F.3d 728, 740 (7th Cir. 1998)* , *cert. denied, 525 U.S. 984 (1998)* (Appellate Rule 28(a) does not permit appellant to incorporate by reference arguments presented to district court); *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998)* (arguments inadequately addressed in opening brief are waived, such as bald assertions that there were genuine issues of material fact, with no references to authority or record); *Pitsonbarger v. Gramley, 141 F.3d 728, 740 (7th Cir. 1998)* (Appellate Rule 28(a) does not permit appellant to incorporate by reference arguments presented to district court); *LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921-922 (7th Cir. 1997)* (failure to cite any authority in appellant's brief to support nonjurisdictional argument constituted waiver of issue, and appellate court had no duty to research and construct legal arguments available to party).

(n19)Footnote 18. *Anderson v. Hardman, 241 F.3d 544, 545-546 (7th Cir. 2001)* (although circuit court may more liberally construe requirements for pro se litigants, court may not fill gaps by formulating argument and performing necessary legal research).

(n20)Footnote 19. *Fed. R. App. P. 28(a)(10).*

(n21)Footnote 20. *Fed. R. App. P. 28(11).*

(n22)Footnote 21. *Fed. R. App. P. 32(d).*

(n23)Footnote 22. *Fed. R. App. P. 32(d)*, Committee Notes to 2002 Amendments.

(n24)Footnote 1. *Fed. R. App. P. 28(b)(1).*

(n25)Footnote 2. *Fed. R. App. P. 28(b)(2).*

(n26)Footnote 3. *Fed. R. App. P. 28(b)(3).*

(n27)Footnote 4. *Fed. R. App. P. 28(b)(4).*

(n28)Footnote 5. *Fed. R. App. P. 28(b)(5).*

(n29)Footnote 6. *Norton v. Sam's Club, 145 F.3d 114, 117-118 (2d Cir. 1998)* .

(n30)Footnote 1. *Fed. R. App. P. 28(c).* Note that an appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. *Fed. R. App. P. 28.1(c)(4)*; *see* [7A], *below*.

(n31)Footnote 2. *Fed. R. App. P. 28(c).*

(n32)Footnote 3. *N.Y. State Teamsters Conf. Pension & Ret. Fund v. Express Servs., 426 F.3d 640, 649 (2d Cir. 2005)* .

(n33)Footnote 1. *Fed. R. App. P. 28(i).*

(n34)Footnote 2. *Marcaida v. Rascoe, 569 F.2d 828, 831 (5th Cir. 1978)* .

(n35)Footnote 3. *United States v. McDougal, 133 F.3d 1110, 1114 (8th Cir. 1998)* .

(n36)Footnote 1. *Fed. R. App. P. 28(d).*

(n37)Footnote 2. *Fed. R. App. P. 28(a)(9)(A).*

(n38)Footnote 3. *McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649, 653 (5th Cir. 1986)* (appellant's argument in brief stricken when not supported by references to evidence in record).

(n39)Footnote 4. *Fed. R. App. P. 28(e).*

(n40)Footnote 5. *Fed. R. App. P. 28(e).*

(n41)Footnote 6. *Fed. R. App. P. 28(f).*

(n42)Footnote 7. *Sands v. Runyon, 28 F.3d 1323, 1332 n.2 (2d Cir. 1994)* .

(n43)Footnote 8. *Fed. R. App. P. 28(j)*; *see United States v. Thomas, 274 F.3d 655, 668 (2d Cir. 2001)* .

(n44)Footnote 9. *See Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1288 n.2 (10th Cir. 2010)* (concurring opinion).

(n45)Footnote 10. *Fed. R. App. P. 28(j)*; *see, e.g., In re McClean Indus. v. United States, 30 F.3d 385, 387 (2d Cir. 1994)* (party supplemented its authorities with decision by circuit court that was decided days after opening brief was submitted).

(n46)Footnote 11. *Trans-Sterling v. Bible, 804 F.2d 525, 528 (9th Cir. 1986)* (Appellate Rule 28(j) permits party to bring new authorities to court's attention, and is not designed to allow party to bring new evidence through the back door).

(n47)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 332.11 (Matthew Bender 3d ed.).

(n48)Footnote 1. *Mitchell v. Union Pac. R.R. Co., 501 F.3d 794, 795-796 (7th Cir. 2007)* (court dismissed appeal after party filed oversized brief despite warnings).

(n49)Footnote 2. *Doyle v. Hasbro, Inc., 103 F.3d 186, 196 (1st Cir. 1996)* (because appellants' brief violated Appellate Rule 32(a) court awarded double costs).

(n50)Footnote 3. *Fleming v. County of Kane, 855 F.2d 496, 498 (7th Cir. 1988)* (parties should file motion rather than attempt to conceal excessive length of text in appendix or footnotes).

(n51)Footnote 4. *Fed. R. App. P. 32(e)*.

(n52)Footnote 5. *Fed. R. App. P. 32(a)(1)(A)*.

(n53)Footnote 6. *Fed. R. App. P. 32(a)(1)(B)*.

(n54)Footnote 7. *Fed. R. App. P. 32(a)(1)(C)*.

(n55)Footnote 8. *Fed. R. App. P. 32(a)(2)*.

(n56)Footnote 9. *Fed. R. App. P. 32(a)(2)(A)*.

(n57)Footnote 10. *Fed. R. App. P. 32(a)(2)(B)*.

(n58)Footnote 11. *Fed. R. App. P. 32(a)(2)(C)*.

(n59)Footnote 12. *Fed. R. App. P. 32(a)(2)(D)*.

(n60)Footnote 13. *Fed. R. App. P. 32(a)(2)(E)*.

(n61)Footnote 14. *Fed. R. App. P. 32(a)(2)(F)*.

(n62)Footnote 15. *Fed. R. App. P. 32(a)(3)*.

(n63)Footnote 16. *Fed. R. App. P. 32(a)(3)*, Committee Note to 1998 Amendments.

(n64)Footnote 17. *Fed. R. App. P. 32(a)(4)*; *see Doyle v. Hasbro, Inc., 103 F.3d 186, 196 (1st Cir. 1996)* (appellants' single-spaced brief violated Appellate Rule 32(a) and flouted page limit imposed by Appellate Rule 28(g); therefore, court awarded double costs).

(n65)Footnote 18. *Fed. R. App. P. 32(a)(5)(A)*.

(n66)Footnote 19. *Fed. R. App. P. 32(a)(5)(B)*.

(n67)Footnote 20. *Fed. R. App. P. 32(a)(5)*.

(n68)Footnote 21. *Fed. R. App. P. 32(a)(6)*.

(n69)Footnote 22. *Fed. R. App. P. 32(a)(6)*, Committee Note to 1998 Amendments.

(n70)Footnote 23. *Fed. R. App. P. 32(a)(7)(A)*; *see* [ii], [iii], *below*.

(n71)Footnote 24. *See Fed. R. App. P. 32(a)(7)*, Committee Note to 1998 Amendments.

(n72)Footnote 25. *Fed. R. App. P. 29(c)(1).*

(n73)Footnote 26. *Fed. R. App. P. 29(c)(1)*, Committee Note to 2010 Amendments.

(n74)Footnote 27. *See Fed. R. App. P. 29(c)(5)*, Committee Note to 2010 Amendments; *see § 28.84[8][c]*, *[d]*, *below*.

(n75)Footnote 28. *Fed. R. App. P. 32(a)(7)(A)*, Committee Note to 1998 Amendments.

(n76)Footnote 29. *Fed. R. App. P. 32(a)(7)(B)(i).*

(n77)Footnote 30. *Fed. R. App. P. 32(a)(7)(B)(ii).*

(n78)Footnote 31. *Fed. R. App. P. 32(a)(7)(B)(iii).*

(n79)Footnote 32. *See* [ii], *above*.

(n80)Footnote 33. *Fed. R. App. P. 32(a)(7)(C).*

(n81)Footnote 34. *Fed. R. App. P. 32(a)(7)(C)(i).*

(n82)Footnote 35. *Fed. R. App. P. 32(a)(7)(C)(ii)*; *see* the appendix of forms, at the end of this chapter.

(n83)Footnote *. For a more complete discussion of cross-appeal briefs, see *Moore's Federal Practice,* Ch. 328.1, *Cross-Appeals* (Matthew Bender 3d ed.)

(n84)Footnote 1. *See Fed. R. App. P. 28.1(a).*

(n85)Footnote 2. *DiSorbo v. Hoy, 343 F.3d 172, 189 (2d Cir. 2003)* .

(n86)Footnote 3. *See, e.g., D'Angelo v. Conagra Foods, 422 F.3d 1220, 1229 n.5* (noting that cross-appeal by party is proper only when party wants to change district court's judgment, and not when district court has entered judgment entirely in favor of party).

(n87)Footnote 4. *See Fed. R. App. P. 28.1(b)*; *see also* [b], *below*.

(n88)Footnote 5. *See Fed. R. App. P. 28.1(a)*, Committee Note.

(n89)Footnote 6. *See Fed. R. App. P. 28.1(c)(1).*

(n90)Footnote 7. *See Fed. R. App. P. 28(a).*

(n91)Footnote 8. *Fed. R. App. P. 28.1(b).*

(n92)Footnote 9. *See, e.g., Fed. R. App. P. 28.1(c)(2).*

(n93)Footnote 10. *Fed. R. App. P. 28.1(b).*

(n94)Footnote 11. *Fed. R. App. P. 28.1(b).*

(n95)Footnote 12. *See Fed. R. App. P. 28.1(c).*

(n96)Footnote 13. *See Fed. R. App. P. 30(b)(1).*

(n97)Footnote 14. *See Capon v. Eshhar, 418 F.3d 1349, 1351 n.1 (Fed. Cir. 2005)* .

(n98)Footnote 15. *Fed. R. App. P. 28.1(c)(1).*

(n99)Footnote 16. *Rothe Dev. Corp. v. DOD, 413 F.3d 1327, 1339 (Fed. Cir. 2005)* .

(n100)Footnote 17. *Fed. R. App. P. 28.1(c)(2).*

(n101)Footnote 18. *Fed. R. App. P. 28.1(c)(3).*

(n102)Footnote 19. *Fed. R. App. P. 28.1(c)(4).*

(n103)Footnote 20. *Fed. R. App. P. 28.1(c)(5).*

(n104)Footnote 21. *See Fed. R. App. P. 28.1(d), 29, 32(a)(2).*

(n105)Footnote 22. *See In re Fowlkes, 326 F.3d 542, 544 (4th Cir. 2003)* .

(n106)Footnote 23. *See Fed. R. App. P. 28.1(d)*; *see Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108, 110 (2d Cir. 2001)* .

(n107)Footnote 24. *Fed. R. App. P. 28.1(c)(1)*; *see Fed. R. App. P. 28(a)*; *see also* [1], *above*.

(n108)Footnote 25. *See Fed. R. App. P. 26.1.*

(n109)Footnote 26. *See Fed. R. App. P. 28(e).*

(n110)Footnote 27. *See Fed. R. App. P. 28.1(e)(3), 32(a)(7)(C)*; *see also* [f], *below*).

(n111)Footnote 28. *Fed. R. App. P. 28.1(c)(2).*

(n112)Footnote 29. *See Fed. R. App. P. 28(a)*; *see also* [2], *above*.

(n113)Footnote 30. *Fed. R. App. P. 28.1(c)(2).*

(n114)Footnote 31. *Fed. R. App. P. 28.1(c)(3).*

(n115)Footnote 32. *See Fed. R. App. P. 28.1(c)*, Committee Note; *see also Fed. R. App. P. 28(a)(1),(b)*; [3], *above*.

(n116)Footnote 33. *See Fed. R. App. P. 28.1(e)(3), 32(a)(7)(C)*; *see also* [f], *below*).

(n117)Footnote 34. *Fed. R. App. P. 28.1(c)(4).*

(n118)Footnote 35. *Fed. R. App. P. 28(a)(2),(3), (11), 28.1(c)(4)*; *see Fed. R. App. P. 28(c)* (almost identical requirements for reply brief in case with no cross-appeal).

(n119)Footnote 36. *See Fed. R. App. P. 28.1(e)(3), 32(a)(7)(C).*

(n120)Footnote 37. *See Fed. R. App. P. 28(a), 29(c), 32*; *see also* [1], *above* (intervenor's brief), [8], *below* (amicus curiae's brief).

(n121)Footnote 38. *See Greene v. Lambert, 288 F.3d 1081, 1097 (9th Cir. 2002)* ; *see also* [c], *above*.

(n122)Footnote 39. *Lester v. DOJ, 232 F.3d 910 (Fed. Cir. 2000)* .

(n123)Footnote 40. *Fed. R. App. P. 28.1(d)*; *see Fed. R. App. P. 32(a)(2).*

(n124)Footnote 41. *Fed. R. App. P. 28.1(d)*; *see Fed. R. App. P. 32(a)(2)*.

(n125)Footnote 42. *Fed. R. App. P. 28.1(d)*, *32(a)(2)*.

(n126)Footnote 43. *Fed. R. App. P. 28.1(d)*, *32(a)(2)*.

(n127)Footnote 44. *Fed. R. App. P. 28.1(d)*, *32(a)(2)*.

(n128)Footnote 45. *Fed. R. App. P. 28.1(d)*.

(n129)Footnote 46. *Fed. R. App. P. 28.1(d)*, *32(a)(2)*.

(n130)Footnote 47. *Fed. R. App. P. 28.1(e)*.

(n131)Footnote 48. *Fed. R. App. P. 28(a)(11)*, *28.1(c)(1)*,*(e)(3)*, *32(a)(7)(C)*.

(n132)Footnote 49. *Fed. R. App. P. 32(a)(7)(C)*; *see* Fed. R. App. P., Form 6.

(n133)Footnote 50. *Fed. R. App. P. 32(a)(7)(C). But see DeSilva v. DiLeonardi, 185 F.3d 815, 816-817 (7th Cir. 1999)* (alerting counsel that operation of word counting function in certain word-processing software programs may result in underestimation of number of words in appellate briefs).

(n134)Footnote 51. *Fed. R. App. P. 28.1(e)(1)*.

(n135)Footnote 52. *See Fed. R. App. P. 28(a)(11)*, *28.1(c)(1)*,*(e)(3)*, *32(a)(7)(C)*.

(n136)Footnote 53. *Fed. R. App. P. 28.1(e)(2)(A)*.

(n137)Footnote 54. *Fed. R. App. P. 28.1(e)(1)*; *see Fed. R. App. P. 28.1(e)*, Committee Note (this brief may be longer than appellant's principal brief because it is combination of principal and response brief).

(n138)Footnote 55. *See Fed. R. App. P. 28(a)(11)*, *28.1(c)(1)*,*(e)(3)*, *32(a)(7)(C)*.

(n139)Footnote 56. *Fed. R. App. P. 28.1(e)(2)(B)*; *see Fed. R. App. P. 28.1(e)*, Committee Note (this brief may contain more words or lines than appellant's principal brief because it is combination of principal and response brief).

(n140)Footnote 57. *Fed. R. App. P. 28.1(e)(1)*.

(n141)Footnote 58. *See Fed. R. App. P. 28(a)(11)*, *28.1(c)(1)*,*(e)(3)*, *32(a)(7)(C)*.

(n142)Footnote 59. *Fed. R. App. P. 28.1(e)(2)(A)*.

(n143)Footnote 60. *Fed. R. App. P. 28.1(e)(1)*.

(n144)Footnote 61. *See Fed. R. App. P. 28(a)(11)*, *28.1(c)(1)*,*(e)(3)*, *32(a)(7)(C)*.

(n145)Footnote 62. *Fed. R. App. P. 28.1(e)(2)(A)*, *(C)*.

(n146)Footnote 63. *Fed. R. App. P. 29(c)(1)*.

(n147)Footnote 64. *See Fed. R. App. P. 29(c)(5)*, Committee Note to 2010 Amendments; *see § 28.84[8][c]*, *[d]*, *below*.

(n148)Footnote 65. *Fed. R. App. P. 29(d)*; *see Fed. R. App. P. 28.1*, Committee Note of 2005.

(n149)Footnote 66. *See Fed. R. App. P. 28(a)(11), 28.1(c)(1),(e)(3), 32(a)(7)(C).*

(n150)Footnote 67. *Fed. R. App. P. 29(d)*; *see Fed. R. App. P. 28.1(e)(2)(A)*; *Fed. R. App. P. 28.1*, Committee Note of 2005.

(n151)Footnote 68. *See, e.g., Toney v. L'Oreal U.S.A., Inc., 400 F.3d 964, 965 (7th Cir. 2005)* (court ordered that supplemental briefs were limited to 15 pages).

(n152)Footnote 69. *Fed. R. App. P. 28.1(f).*

(n153)Footnote 70. *Fed. R. App. P. 28.1(f)(1).*

(n154)Footnote 71. *Fed. R. App. P. 28.1(f)(2).*

(n155)Footnote 72. *Fed. R. App. P. 28.1(f)(3).*

(n156)Footnote 73. *Fed. R. App. P. 28.1(f)(4).*

(n157)Footnote 74. *See, e.g., Toney v. L'Oreal U.S.A., Inc., 400 F.3d 964, 965 (7th Cir. 2005)* .

(n158)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 329.11 (Matthew Bender 3d ed.).

(n159)Footnote 1. *Leigh v. Engle, 535 F. Supp. 418, 419-420 (N.D. Ill. 1982)* .

(n160)Footnote 2. *See, e.g., Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co., 623 F.3d 135, 140 n.3 (3d Cir. 2010)* .

(n161)Footnote 3. *Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995)* ; *see Miller-Wohl Co. v. Commissioner of Labor & Industry, 694 F.2d 203, 204 (9th Cir. 1982)* .

(n162)Footnote 4. *See Fed. R. App. P. 29(c)(1), (5)*, Committee Note to 2010 Amendments; *see § 28.84[8][c], [d], below.*

(n163)Footnote 5. *NOW, Inc. v. Scheidler, 223 F.3d 615, 616-617 (7th Cir. 2000)* (permission denied because proposed amicus brief would merely duplicate arguments made in party's brief).

(n164)Footnote 6. *Fed. R. App. P. 29(a)(1).*

(n165)Footnote 7. *Fed. R. App. P. 29(a)(1)*, Committee Note to 1998 Amendments.

(n166)Footnote 8. *Fed. R. App. P. 29(b)(1).*

(n167)Footnote 9. *Fed. R. App. P. 29(b)(2).*

(n168)Footnote 10. *United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991) , cert. denied, 513 U.S. 925 (1994)* .

(n169)Footnote 11. *See New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979)* ; *Community Ass'n for Restoration of the Env't v. Deruyter Bros. Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999)* .

(n170)Footnote 12. *Ryan v. CFTC, 125 F.3d 1062, 1063-1064 (7th Cir. 1997)* .

(n171)Footnote 13. *Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995)* .

(n172)Footnote 14. *Ryan v. CFTC, 125 F.3d 1062, 1063-1064 (7th Cir. 1997)* .

(n173)Footnote 15. *Fed. R. App. P. 29(c)*; *see Fed. R. App. P. 32*.

(n174)Footnote 16. *Fed. R. App. P. 29(c)*; *see Fed. R. App. P. 26.1*; *see also § 28.82*.

(n175)Footnote 17. *Fed. R. App. P. 29(c)(1)*; *see Fed. R. App. P. 26.1*; *see also § 28.82*.

(n176)Footnote 18. *Fed. R. App. P. 29(c)(2)*.

(n177)Footnote 19. *Fed. R. App. P. 29(c)(3)*.

(n178)Footnote 20. *Fed. R. App. P. 29(c)(4)*.

(n179)Footnote 21. *Fed. R. App. P. 29(c)(5)*; *see Fed. R. App. P. 29(a)*.

(n180)Footnote 22. *Fed. R. App. P. 29(c)(5)(A)*.

(n181)Footnote 23. *Fed. R. App. P. 29(c)(5)(B)*.

(n182)Footnote 24. *Fed. R. App. P. 29(c)(5)(C)*.

(n183)Footnote 25. *Fed. R. App. P. 29(c)(7)*; *see Fed. R. App. P. 32(a)(7)(C)*; *see also § 28.84[7][h][iii]*, *above*.

(n184)Footnote 26. *Fed. R. App. P. 32(d)*.

(n185)Footnote 27. *See Fed. R. App. P. 32(d)*, Committee Note to 2002 Amendments.

(n186)Footnote 28. *See* [7][f], *above*.

(n187)Footnote 29. *Fed. R. App. P. 29(d)*.

(n188)Footnote 30. *See Fed. R. App. P. 29(c)(5)*, Committee Note to 2010 Amendments.

(n189)Footnote 31. *Fed. R. App. P. 29(c)(1)*; *see § 28.84[8][c]*, *above* (item 1).

(n190)Footnote 32. *Fed. R. App. P. 29(c)(1)*, Committee Note to 2010 Amendments.

(n191)Footnote 33. *See Fed. R. App. P. 29(c)(5)*; *see § 28.84[8][c]*, *above* (item 5).

(n192)Footnote 34. *Fed. R. App. P. 29(e)*.

(n193)Footnote 35. *See Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1062 n.1 (9th Cir. 1996)* (court rejected late petition, because no attempt to show good cause for late filing was made).

(n194)Footnote 99. *Fed. R. App. P. 29(f)*.

(n195)Footnote 100. *Fed. R. App. P. 29(f)*, Committee Note to 1998 Amendments.

(n196)Footnote 101. *Fed. R. App. P. 29(g)*.

(n197)Footnote 102. *Fed. R. App. P. 29(g)*, Committee Note to 1998 Amendments.

(n198)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 330.11 et seq. (Matthew Bender 3d ed.).

(n199)Footnote 103. *Fed. R. App. P. 30(a)(1)(A).*

(n200)Footnote 104. *Fed. R. App. P. 30(a)(1)(B).*

(n201)Footnote 105. *Fed. R. App. P. 30(a)(1)(C).*

(n202)Footnote 106. *Fed. R. App. P. 30(a)(1)(D).*

(n203)Footnote 107. *United States v. Rogers, 270 F.3d 1076, 1084-1085 (7th Cir. 2001)* .

(n204)Footnote 108. *Fed. R. App. P. 30(a)(2)*; *United States v. Noall, 587 F.2d 123, 125 n.1 (2d Cir. 1978)* .

(n205)Footnote 109. *United States v. Burke, 781 F.2d 1234, 1245-1246 (7th Cir. 1985)* (motion to strike appendix was denied because if rule limited record to items admitted into evidence, party could not show appellate court material it contends was incorrectly excluded).

(n206)Footnote 110. *Fed. R. App. P. 30(a)(2).*

(n207)Footnote 111. *See* [c], *below*.

(n208)Footnote 112. *Fed. R. App. P. 30(a)(3).*

(n209)Footnote 113. *Fed. R. App. P. 30(b)(1).*

(n210)Footnote 114. *Fed. R. App. P. 30(b)(2)*; *see U.S.A., Inc. v. Ozak Trading, Inc., 952 F.2d 44, 50 n.4 (3d Cir. 1991)* (appellant required to pay costs because relevant parts of record were omitted, appendix was missing 13 pages, and appellant failed to contact appellee about contents of appendix before submission).

(n211)Footnote 115. *Fed. R. App. P. 30(c)(1)*; *see also Cont'l Cas. Co. v. Adamo, 2008 U.S. App. LEXIS 13979, at *2 (11th Cir. 2008)* (court should dispense with deferred appendix if appendix is not necessary to resolve issue on appeal).

(n212)Footnote 116. *Fed. R. App. P. 30(c)(2)(A).*

(n213)Footnote 117. *Fed. R. App. P. 30(c)(2)*, Committee Note to 1998 Amendments.

(n214)Footnote 118. *Fed. R. App. P. 30(c)(2)(B).*

(n215)Footnote 119. *Fed. R. App. P. 30(d).*

(n216)Footnote 120. *Fed. R. App. P. 30(e).*

(n217)Footnote 121. *Fed. R. App. P. 30(f).*

(n218)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 332.11 (Matthew Bender 3d ed.).

(n219)Footnote 122. *See Fed. R. App. P. 32(a)(1)-(4)*; *see also § 28.84[7][a]-[d].*

(n220)Footnote 123. *Fed. R. App. P. 32(b)(1).*

(n221)Footnote 124. *Fed. R. App. P. 32(b)(2).*

(n222)Footnote 125. *Fed. R. App. P. 32(b)(3).*

(n223)Footnote 126. *Fed. R. App. P. 32(e).*

(n224)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 331.11 (Matthew Bender 3d ed.).

(n225)Footnote 127. *Fed. R. App. P. 31(a)(1).*

(n226)Footnote 128. *Fed. R. App. P. 15.1* (this rule is a codification of the existing practice that has already been in effect in most circuits).

(n227)Footnote 129. *Fed. R. App. P. 31(a)(1).*

(n228)Footnote 130. *Meza v. Washington State Dep't of Social and Health Servs., 683 F.2d 314, 316 (9th Cir. 1982)* .

(n229)Footnote 131. *Fed. R. App. P. 31(a)(2).*

(n230)Footnote 132. *Fed. R. App. P. 31(b).*

(n231)Footnote 133. *Fed. R. App. P. 31(c).*

(n232)Footnote 134. *Bartell v. Aurora Pub. Schs., 263 F.3d 1143, 1146 (10th Cir. 2001)* (failure to file appellate brief on time is not jurisdictional defect, and court has discretion to permit late filing for good cause).

(n233)Footnote 135. *Gerritsen v. Shirai, 979 F.2d 1524, 1527 (Fed. Cir. 1992)* .

(n234)Footnote 136. *Fed. R. App. P. 26(b).*

(n235)Footnote 137. *Campos v. New England Oyster House, 711 F.2d 158, 159 (11th Cir. 1983)* .

(n236)Footnote 138. *Fed. R. App. P. 31(c)*; *see Chao v. Russell P. Le Frois Builder, Inc. 291 F.3d 219, 226 (2d Cir. 2002)* (noting that this is sole sanction for appellee failing to file brief).

Moore's Manual--Federal Practice and Procedure

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.85

§ 28.85 Form of Papers Other Than Motion, Brief, or Appendixn*

Not all appellate papers are required to have the same form. The form of a motion is governed by Appellate Rule 27(d). n1 The form of a brief is governed by Appellate Rule 32(a). n2 The form of an appendix to a brief is governed by Appellate Rule 32(b). n3 Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Appellate Rule 32(a), with the following two exceptions:

1. A cover is not necessary if the caption and signature page of the paper together contain the information required by Appellate Rule 32(a)(2); however, if an optional cover is used, it must be white. n4

2. The length limitation of Appellate Rule 32(a)(7) does not apply. n5

Every court of appeals must accept documents that comply with the form requirements stated above. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all of the form requirements of this rule. n6 Every paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys. n7 By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 332.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 32(c)(1).*

(n3)Footnote 2. *See Fed. R. App. P. 32(a).*

(n4)Footnote 3. *See Fed. R. App. P. 32(b).*

(n5)Footnote 4. *Fed. R. App. P. 32(c)(2)(A).*

(n6)Footnote 5. *Fed. R. App. P. 32(c)(2)(B).*

(n7)Footnote 6. *Fed. R. App. P. 32(e).*

(n8)Footnote 7. *Fed. R. App. P. 32(d).*

(n9)Footnote 8. *Fed. R. App. P. 32(d)*, Committee Notes to 2002 Amendments.

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
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3-28 Moore's Manual--Federal Practice and Procedure § 28.85A

§ 28.85A Citation Permitted to Unpublished or Non-precedential Opinions and Other Written Judicial Dispositions

[1] Courts May Not Prohibit Citation to Unpublished or Non-precedential Judicial Dispositions

By appellate rule, a federal court may not limit citation to any federal judicial opinion, order, judgment, or other written judicial disposition on or after January 1, 2007. This rule applies to any opinions or other dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or in a similar manner. n1 A court may continue to designate a judicial disposition as unpublished, non-precedential, or the like. Each circuit is free to determine whether such a written judicial disposition has any precedential value and the extent of the persuasive authority of such a disposition. n2 Several circuits have local rules that specify whether a judicial disposition has precedential value. n3

Rule 32.1(a) is intended to replace the inconsistent standards that circuits have previously applied to citations of unpublished and nonprecedential opinions and judicial dispositions with one uniform rule. n4 Rule 32.1(a) provides that a court may not place any conditions on the citation of such opinions or dispositions; for example, a court may not instruct parties that the citation of unpublished opinions is discouraged. n5

[2] Party Must Provide Copies When Citing to Unavailable Opinions or Judicial Dispositions

If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper that cites to the unavailable disposition. n6 Thus, a citing party must provide copies unless the cited opinion or other disposition is available in a publicly accessible electronic database, such as a database maintained by a commercial legal research service or a database maintained by a court. To meet its obligation, the citing party must file and serve on all other parties a copy of the opinion or other judicial disposition with the brief or other paper in which the opinion is cited. n7

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAppealsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. App. P. 32.1(a).*

(n2)Footnote 2. *See, e.g., Abdul-Muhammad v. Kempker, 450 F.3d 350, 351-352 (8th Cir. 2006)* .

(n3)Footnote 3. *See, e.g.*, Ninth Circuit Local Rule 36-3.

(n4)Footnote 4. *Fed. R. App. P. 32.1(a)*, Committee Note.

(n5)Footnote 5. *Fed. R. App. P. 32.1(a)*, Committee Note.

(n6)Footnote 6. *Fed. R. App. P. 32.1(b).*

(n7)Footnote 7. *Fed. R. App. P. 32.1(a)*, Committee Note.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.86

§ 28.86 Appeal Conferencesn*

The circuit court may direct the attorneys, and also the parties if appropriate, to participate in one or more conferences to address any matter that may aid in disposing of the appellate proceedings, including simplifying the issues and discussing settlement. n1 A judge or other person designated by the court may preside over the conference, n2 which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement. n3 To order implementation of a settlement while the case is on appeal, the appellate court must first examine and then approve the terms of the settlement agreement as written by the parties. n4

Courts have held that use of an Appellate Rule 33 conference convened under a local rule or case management plan does not deprive a party of the party's right to appeal, provided that the conference mechanism is not used to pressure parties to settle or withdraw an appeal. n5 Thus, a court may adopt a case management plan pursuant to Appellate Rule 33 to increase efficiency of appellate resolution or to preserve confidentiality of a process such as mediation. n5.1 On the other hand, a court may dismiss an appeal as a result of information learned during an appeal conference. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, §§ 333.11, 333.12 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 33*; *see Beazer E., Inc. v. Mead Corp., 412 F.3d 429, 434 & n.4 (3d Cir. 2005)* (under Rule 33, appellate court has power to order conference to mediate or settle dispute and to implement any settlement agreement reached as result of conference).

(n3)Footnote 2. *Northwest Env't Advocates v. United States EPA, 340 F.3d 853, 854 (9th Cir. 2003)* (rather than

have appellate court judges directly involved in settlement process, it may be preferable to refer process to permanent master); *In re Young, 253 F.3d 926, 928 (7th Cir. 2001)* (circuit court designated mediator to preside over appeal conference).

(n4)Footnote 3. *Fed. R. App. P. 33.*

(n5)Footnote 4. *Herrnreiter v. Chi. Hous. Auth., 281 F.3d 634, 637-638 (7th Cir. 2002)* (only if parties have reached written agreement calling for dismissal of appeal will circuit court order implementation of agreement under Appellate Rule 33).

(n6)Footnote 5. *Bell v. A-Leet Leasing Corp., 863 F.2d 257, 259 (2d Cir. 1988)* .

(n7)Footnote 5.1. *In re Anonymous, 283 F.3d 627, 634 (4th Cir. 2002)* .

(n8)Footnote 6. *Motorola, Inc. v. Computer Displays Int'l, Inc., 739 F.2d 1149, 1153 n.6 (7th Cir. 1984)* (following conference court dismissed second appeal as duplicating appeal previously filed).

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3-28 Moore's Manual--Federal Practice and Procedure § 28.87

§ 28.87 Oral Argumentn*

[1] Right to Oral Argument

Oral argument must be allowed on the merits of every appeal unless a panel of three judges of the appellate court who have examined the briefs and record unanimously agree that oral argument is unnecessary because of any of the following reasons: n1

- The appeal is frivolous; n2
- The dispositive issue or issues have been authoritatively decided; n3 or
- The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. n4

To assist the court in its determination, any party may file a statement explaining why oral argument on the merits of the appeal should or need not be permitted, or the court may require such a statement by local rule. n5 The parties may also agree to submit a case for decision without oral argument, but the court is not bound by the parties' agreement. If the court does not unanimously concur with the stipulation, the case must be argued orally. n6 When the court determines not to hear oral argument, the court decides the appeal on the briefs and appellate record. n7

[2] Oral Argument Procedure

The circuit clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date. n8 If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise. n9 The court has the ultimate authority by unanimous decision of its three judge panel to determine whether or not to hear oral argument. n10

The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

n11 If there is a cross-appeal, Appellate Rule 28.1(b) n12 determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument. n13 If an attorney intends to use physical exhibits other than documents at the argument, he or she must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. n14

If the proceeding is for enforcement or review of an order of the National Labor Relations Board or an officer of the board, a party adverse to the National Labor Relations Board is considered the appellant, and proceeds first on oral argument, unless the court orders otherwise. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 334.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 34(a)(2).*

(n3)Footnote 2. *Fed. R. App. P. 34(a)(2)(A).*

(n4)Footnote 3. *Fed. R. App. P. 34(a)(2)(B).*

(n5)Footnote 4. *Fed. R. App. P. 34(a)(2)(C)*; *see, e.g., Evancho v. Fisher, 423 F.3d 347, 349 (10th Cir. 2005)* .

(n6)Footnote 5. *Fed. R. App. P. 34(a)(1).*

(n7)Footnote 6. *Fed. R. App. P. 34(f)*; *see Blunk v. Arizona DOT, 177 F.3d 879, 879 (9th Cir. 1999)* .

(n8)Footnote 7. *Hunt v. Lamb, 427 F.3d 725 (10th Cir. 2005)* .

(n9)Footnote 8. *Fed. R. App. P. 34(b).*

(n10)Footnote 9. *Fed. R. App. P. 34(e).*

(n11)Footnote 10. *Fed. R. App. P. 32(a)(2)*; *see* [1], *above*.

(n12)Footnote 11. *Fed. R. App. P. 34(c).*

(n13)Footnote 12. *See Fed. R. App. P. 28.1(b)* ("appellant" is generally party who files notice of appeal first, or if notices are filed on same day, party who is plaintiff in lower court proceeding).

(n14)Footnote 13. *Fed. R. App. P. 34(d).*

(n15)Footnote 14. *Fed. R. App. P. 34(g).*

(n16)Footnote 15. *Fed. R. App. P. 15.1* (this rule is codification of existing practice that has already been in effect in most circuits).

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3-28 Moore's Manual--Federal Practice and Procedure § 28.88

§ 28.88 En Banc Determinationn*

[1] Order for Hearing or Rehearing En Banc

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. n0.1 An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless either an en banc consideration is necessary to secure or maintain uniformity of the court's decisions, n1 or the proceeding involves a question of exceptional importance. n2 The majority of a circuit court may on its own initiative order a hearing or rehearing in banc. Thus, a party need not have filed a motion for circuit court to order hearing or rehearing in banc, n3 although a party may do so. n4 Generally, the en banc court is composed of all of the judges of a circuit in regular active service. n5 However, several circuits provide that a senior circuit judge who sat as a member of the panel deciding the case being reviewed is eligible to participate on the en banc court. n6

[2] Petition for Hearing or Rehearing En Banc

[a] Contents of Petition

A party may petition the court for a hearing or rehearing en banc. The petition must begin with a statement that either:

1. The panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed with citation to the conflicting case or cases and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; n7 or

2. The proceeding involves one or more questions of exceptional importance, each of which must be concisely stated. n8

The drafter of a petition should take care to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards. n9 Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Appellate Rule 32. n10 For purposes of the page limit in Appellate Rule 35(b)(2), if a party files both a petition

for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule. n11

[b] Petition Procedures

A party may petition for either an original hearing en banc or rehearing en banc. n12 To petition to have an appeal heard initially en banc, a party must file the petition by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Appellate Rule 40 for filing a petition for rehearing. n13 The number of copies to be filed must be prescribed by local rule, and may be altered by court order in a particular case. n13.1 No response may be filed to a petition for en banc consideration unless the court orders a response. n14 A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote. n15 It is necessary, however, that each court of appeals develop a procedure for disposing of such petitions, because the petitions will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari. n16

An amendment to Rule 35 that substituted, the term "petition" for the term "suggestion" has made clear that the deadlines are the same for a petition for a rehearing by a court panel and a petition for a rehearing en banc. The terminology change also has made clear that if a timely filing of a petition for rehearing has been made in the lower court by any party, the time to file the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsEn Banc Determinations

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 335.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 0.1. *Fed. R. App. P. 35(a)*; *see Fed. R. App. P. 35(a)*, Committee Note to 2005 Amendments (Rule 35(a) amended to make clear that disqualified judges may not vote to determine whether to hold en banc hearing or rehearing).

(n3)Footnote 1. *Fed. R. App. P. 35(a)(1)*; *see Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 823 (6th Cir. 2005)* (rehearing en banc is an extraordinary procedure which is limited to cases when precedent-setting error of exceptional public importance has occurred or when opinion directly conflicts with prior Supreme Court or circuit precedent).

(n4)Footnote 2. *Fed. R. App. P. 35(a)(2)*; *see Landell v. Sorrell, 406 F.3d 159, 166 (2d Cir. 2005)* (concurring opinion, discussing whether issue presented by appeal is of "exceptional importance").

(n5)Footnote 3. *Sparks v. Duval County Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979)* .

(n6)Footnote 4. *See* [2], *below*.

(n7)Footnote 5. *Moody v. Albemarle Paper Co., 417 U.S. 622, 626, 94 S. Ct. 2513, 41 L. Ed. 2d 358 (1974)* (authority to order hearing or rehearing en banc confined to judges in regular active service).

(n8)Footnote 6. *28 U.S.C. § 46(c)*; 5th Cir. Ct. R. 35.6.

(n9)Footnote 7. *Fed. R. App. P. 35(b)(1)(A)*.

(n10)Footnote 8. *Fed. R. App. P. 35(b)(1)(B)*; *see Grutter v. Bollinger, 288 F.3d 732, 811 (6th Cir. 2005)* .

(n11)Footnote 9. *Fed. R. App. P. 35(b)*, Committee Note to 1998 Amendments; *see Landell v. Sorrell, 406 F.3d 159, 165 (2d Cir. 2005)* (mere disagreement about correctness of panel decision is not sufficient for en banc rehearing).

(n12)Footnote 10. *Fed. R. App. P. 35(b)(2)*.

(n13)Footnote 11. *Fed. R. App. P. 35(b)(3)*.

(n14)Footnote 12. *Fed. R. App. P. 35(b)*; *see also MedImmune, Inc. v. Centocor, Inc., 409 F.3d 1376, 1381-1382 (Fed. Cir. 2005)* (panel of court of appeals may on its own intitiate request that en banc court consider whether to overule prior panel decision).

(n15)Footnote 13. *Fed. R. App. P. 35(c)*.

(n16)Footnote 13.1. *Fed. R. App. P. 35(d)*.

(n17)Footnote 14. *Fed. R. App. P. 35(e)*.

(n18)Footnote 15. *Fed. R. App. P. 35(f)*; *Squaw Valley Dev. Co. v. Goldberg, 395 F.3d 1062, 1064 (9th Cir. 2005)* (after entire court has been informed of petition, no vote is required unless requested by one or more judges).

(n19)Footnote 16. *Fed. R. App. P. 35(f)*, Committee Note to 1998 Amendments.

(n20)Footnote 17. *Fed. R. App. P. 35(b)*, Committee Note to 1998 Amendments 35(c); *see Hibbs v. Winn, 542 U.S. 88, 97-98, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)* (petition by party or court of appeals order that requires parties to brief question whether case should be reheard en banc delays time period for filing writ of certiorari).

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3-28 Moore's Manual--Federal Practice and Procedure § 28.89

§ 28.89 Entry and Notice of Judgmentn*

[1] Entry of Judgment

The judgment of a circuit court is entered when it is noted on the docket. The circuit clerk must prepare, sign, and enter the judgment in either of two circumstances:

1. After receiving the court's opinion; but if settlement of the judgment's form is required, after final settlement. n1 or

2. If a judgment is rendered without an opinion, as the court instructs. n2

Appellate Rule 36 clarifies what constitutes an opinion of the circuit court of appeals to avoid confusion of what constitutes a "judgment," rather than merely an "opinion," for purposes of other rules that are based on the date of entry of a "judgment," such as the date that commences the time for filing a petition for certiorari. n3

[2] Notice of Judgment

On the date judgment is entered, the clerk must serve on all parties a copy of the opinion, or the judgment, if no opinion was written, and a notice of the date when the judgment was entered. n4 Appellate Rule 36(b) was most recently amended to delete the requirement that the clerk "mail" the opinion or judgment to the parties, in recognition of the rule that the clerk may now use either electronic means or mail to "serve" a copy of the opinion or judgment or to "serve" notice of the date when judgment was entered on parties who have consented to electronic service. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsPublication of Opinions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 336.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 36(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 36(a)(2).*

(n4)Footnote 3. *See CIR v. Bedford's Estate, 325 U.S. 283, 291, 65 S. Ct. 1157, 89 L. Ed. 1611 (1945)* .

(n5)Footnote 4. *Fed. R. App. P. 36(b)*; *NLRB v. Amalgamated Clothing Workers, 430 F.2d 966, 971-972 (5th Cir. 1970)* (entry of judgments without opinions allowed especially with respect to summary affirmances).

(n6)Footnote 5. *Fed. R. App. P. 45(a)*, Committee Notes to 2002 Amendments.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.90

§ 28.90 Interest on Judgmentn*

[1] Interest Accrual When Court Affirms Judgment

If the circuit court affirms a money judgment in a civil case, whatever interest is allowed by law is payable from the date when the district court's judgment was entered, unless the law provides otherwise. n1 The term "judgment" in Appellate Rule 37 refers to a final, appealable judgment, and not to an intermediate order. n2 The circuits are in disagreement about the time when a judgment occurs regarding attorney's fees, and thus accrual of interest on attorney's fees. Some circuits hold that postjudgment interest on an attorney's fee award begins to accrue from the time of entry of the judgment that unconditionally entitles the prevailing party to reasonable attorney's fees, even if the amount of those fees has not yet been stated. n3 Other circuits hold that the unconditional judgment does not occur until the date on which the court actually sets the amount of the fee award, and therefore postjudgment interest on an attorney's fee award does not accrue from the date the court initially orders that the plaintiff is entitled to recover attorney fees. n4

[2] Interest Accrual When Court Reverses

If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest. n5 The mandate may direct the district court to exercise its discretion to determine the date from which postjudgment interest is to be calculated. n6 Alternatively, the mandate may direct that interest accrue either from the date judgment is entered on remand, n7 or from the date of the first judgment. n8 In its determination of which date to begin accrual of interest, the circuit court will consider whether the original judgment was basically upheld but nominally reversed, for example, with a liability reapportionment, n9 or whether it entirely lacked an evidentiary or legal basis. n10

[3] Rate of Interest

Appellate Rule 37 by its terms applies only to postjudgment interest. n11 Prejudgment interest is controlled by federal and state statutes as well as by common law. Appellate Rule 37 applies to all judgments for money in civil cases that are affirmed and to those judgments that are modified or reversed by a circuit court with a direction to enter a money judgment in the district court. Thus, the circuit court, not the district court, controls the accrual of interest on a verdict that is reinstated. n12 When postjudgment interest is awarded, Appellate Rule 37 provides that it is to be interest

"allowed by law," n13 a phrase that refers to federal law. n14 The rate of interest on federal judgments is fixed generally by *28 U.S.C. § 1961* at a rate equal to the coupon issue yield equivalent as determined by the Secretary of the Treasury of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 337.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 37(a)*; *Magee v. United States Lines, Inc., 976 F.2d 821, 823 (2d Cir. 1992)* (postjudgment interest runs from judgment date, not verdict date).

(n3)Footnote 2. *Dishman v. Unum Life Ins. Co. of Am., 269 F.3d 974, 989-991 (9th Cir. 2001)* (judgment must be final and appealable before postjudgment interest begins to run).

(n4)Footnote 3. *See, e.g., Associated Gen. Contractors of Ohio, Inc. v. Drabik, 250 F.3d 482, 485-495 (6th Cir. 2001)* .

(n5)Footnote 4. *See, e.g., Eaves v. County of Cape May, 239 F.3d 527, 529-542 (3d Cir. 2001)* .

(n6)Footnote 5. *Fed. R. App. P. 37(b)*.

(n7)Footnote 6. *Swope v. Siegel-Robert, Inc., 270 F.3d 742, 743 (8th Cir. 2001)* .

(n8)Footnote 7. *Riha v. International Tel. & Tel. Corp., 533 F.2d 1053, 1054 (8th Cir. 1976)* .

(n9)Footnote 8. *Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973)* .

(n10)Footnote 9. *Brooks v. United States, 757 F.2d 734, 741 (5th Cir. 1985)* .

(n11)Footnote 10. *Adkins v. Asbestos Corp., 18 F.3d 1349, 1351-1352 (6th Cir. 1994)* .

(n12)Footnote 11. *Fed. R. App. P. 37(a)*.

(n13)Footnote 12. *See Fed. R. App. P. 37*, Committee Note; *Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989)* .

(n14)Footnote 13. *Fed. R. App. P. 37(a)*.

(n15)Footnote 14. *James B. Lansing Sound, Inc. v. National Union Fire Ins. Co., 801 F.2d 1560, 1570 (9th Cir. 1986)* .

(n16)Footnote 15. *28 U.S.C. § 1961(a)*.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.91

§ 28.91 Sanctions for Frivolous Appealn*

[1] Award of Damages and Costs to Appellee

On motion or its own initiative, n1 a court of appeals that determines that an appeal is frivolous may award just damages and single or double costs to the appellee. Sanctions for a frivolous appeal may be imposed only after a separately filed motion or notice from the court, and reasonable opportunity for the appellant to respond. n2 By its terms, Appellate Rule 38 may be used only by appellees; thus, there is no such thing as a frivolous response to an appeal, and the rule may not be used by an appellant to recover damages and either single or double costs from an appellee. n3 In most cases, an assertion that an appeal is frivolous is raised by a motion for sanctions filed by the appellee. However, the court may raise the issue sua sponte. In either case, there must be notice and an opportunity to respond. n4 A statement or request in a brief does not constitute adequate notice. Only a separately filed, timely motion is sufficient. n5 Absent such a motion, notice must be sent to the appellant by the circuit court. n6

The imposition of sanctions under Appellate Rule 38 is a two-step process. n7 First, the court must determine whether the appeal was frivolous; n8 second, the court should determine whether sanctions are justified. n9 The purpose of Appellate Rule 38 is to penalize the appellant who files a frivolous appeal, n10 and to compensate the injured appellee for the delay and expense of defending the appeal. n11

[2] Determination of Frivolousness

A court may impose sanctions under Appellate Rule 38 only if it determines that the appeal is frivolous. There is no precise formula for determining whether an appeal is frivolous. Generally, the circuit court will determine first if the argument advanced on appeal has any merit. n12 If the result of the appeal is obvious, and the arguments advanced are entirely without merit, then the appeal is frivolous. n13 If the appellant's brief and oral argument fail to address the issues presented on appeal, the court will also find the appeal frivolous. n14 On the other hand, if an appeal raises an issue of first impression, n15 or an issue on which there is very little case law directly on point, the appeal is less likely to be deemed frivolous. n16

Appellate Rule 38 governs sanctions imposed by the circuit court for frivolous appeals, while *Federal Rule of Civil Procedure 11* governs the standard for sanctions for frivolous actions filed in the district court. n17 Although Civil Rule

11 does not apply directly to the circuit court, some circuits have relied on it to provide guidance in interpreting the rules. n18

[3] Imposition of Sanctions

Once it has determined that an appeal is frivolous, n19 the circuit court may impose just damages and single or double costs as sanctions. n20 Damages may be either in the form of a lump-sum monetary penalty or attorney's fees. The court should award damages in an amount that reflects the duty of the appellee to mitigate the harm caused by the frivolous appeal. n21 Single or double costs are calculated under the provisions of Appellate Rule 39. n22 If the court awards attorney's fees, the court may remand the action for determination of the fees in the district court or may make an award itself based on a submission by the appellee. n23 An award of sanctions for a frivolous appeal is payable only to the appellee. n24

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsFrivolous Appeals

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 338.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Abbs v. Principi, 237 F.3d 1342, 1350 (Fed. Cir. 2001)* .

(n3)Footnote 2. *Fed. R. App. P. 38.*

(n4)Footnote 3. *Reynolds v. Roberts, 207 F.3d 1288, 1301 (11th Cir. 2000)* ; *Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999)* .

(n5)Footnote 4. *See Hill v. Norfolk & W. Ry. Co, 814 F.2d 1192, 1200 (7th Cir. 1987)* .

(n6)Footnote 5. *Sims v. Great-West Life Assurance Co., 941 F.2d 368, 371 (5th Cir. 1991)* .

(n7)Footnote 6. *See In re Bero, 110 F.3d 462, 466-467 (7th Cir. 1997)* (even though appellee's brief on merits requested sanctions for frivolous appeal, and appellant's brief replied to that request, circuit court was required to send appellant notice of probable sanctions and opportunity to respond because no separate motion for sanctions was made).

(n8)Footnote 7. *Etter v. Pease Constr. Co., 963 F.2d 1005, 1008 (7th Cir. 1992)* .

(n9)Footnote 8. *See* [2], *below.*

(n10)Footnote 9. *Lorentzen v. Anderson Pest Control, 64 F.3d 327, 331 (7th Cir. 1995)* ; *see* [3], *below.*

(n11)Footnote 10. *Burlington N. R. Co. v. Woods, 480 U.S. 1, 7, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987)* (purposes of Appellate Rule 38 are to penalize appellant and compensate appellee); *Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 212 (9th Cir. 1987)* .

(n12)Footnote 11. *Coghlan v. Starkey, 852 F.2d 806, 815 (5th Cir. 1988)* (compensation for damages suffered by parties is justification for sanctions).

(n13)Footnote 12. *Grove Fresh Distribs., Inc. v. John Labatt, Ltd., 299 F.3d 635, 642 (7th Cir. 2002)* (sanctions were appropriate when party was merely repackaging prior appeals; given that appellant's claims had been unsuccessfully litigated numerous times in both circuit and district court, appellant could not have believed in good faith

that he might be successful).

(n14)Footnote 13. *Evanow v. M/V Neptune, 163 F.3d 1108, 1119 (9th Cir. 1998)* .

(n15)Footnote 14. *Kurzweg v. Marple, 841 F.2d 635, 641 (5th Cir. 1988)* .

(n16)Footnote 15. *Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999)* .

(n17)Footnote 16. *International Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1412 (9th Cir. 1997)* .

(n18)Footnote 17. *Fed. R. Civ. P. 11*; *United States v. Carley, 783 F.2d 341, 344 (2d Cir. 1986)* , *cert. denied, 476 U.S. 1142 (1986)* (circuit court relied on Civil Rule 11 to impose sanctions rather than Appellate Rule 38 to award attorney's fees, because conduct at issue included proceedings in district court as well as circuit court).

(n19)Footnote 18. *Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999)* .

(n20)Footnote 19. *See* [2], *above*.

(n21)Footnote 20. *Fed. R. App. P. 38*.

(n22)Footnote 21. *Berwick Grain Co. v. Illinois Dep't of Agric., 217 F.3d 502, 505 (7th Cir. 2000)* .

(n23)Footnote 22. *Fed. R. App. P. 39*; *see § 28.92*.

(n24)Footnote 23. *Gipson v. Rosenberg, 797 F.2d 224, 226 (5th Cir. 1986)* , *cert. denied, 481 U.S. 1007 (1987)* (circuit court granted appellee's motion and awarded double costs and attorney's fees).

(n25)Footnote 24. *Fed. R. App. P. 38*; *Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999)* .

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.92

§ 28.92 Costsn*

[1] Persons Subject to Assessment of Costs

After an appeal is decided, the circuit court generally has the responsibility to determine who will pay costs. n1 The following rules apply with respect to the assessment of costs against the parties, unless the law provides or the court orders otherwise:

1. If an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise. n2

2. If a judgment is affirmed, costs are taxed against the appellant. n3

3. If a judgment is reversed, costs are taxed against the appellee. n4

4. If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders. n5

5. A court may assess costs for or against the United States, its agency, or officer under Appellate Rule 39(a) only if authorized by law. n6 Under the Equal Access to Justice Act n7 costs may be awarded in any civil action brought by or against the United States, unless otherwise provided by statute. If such costs are awarded, then the provisions of Appellate Rule 39(a) apply. n8 It is important to note that, except for item 5 relating to the United States as a party, the assessment of costs is discretionary with the court in all of the above situations. n9

[2] Costs of Document Duplication

Each circuit court of appeals must have a local rule of court that specifies the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Appellate Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying. n1 Litigants are not required to use the least expensive method of reproduction, if quality can be improved; methods that provide sharper and clearer image than typing may be utilized, and reproduction expenses are recoverable when incurred through any in-house method. n2 However, under this provision, only marginal costs of reproduction may be taxed against the party's adversary, not the costs of producing

originals. n3

[3] Bill of Costs

To request the appellate court to tax costs, a party must file with the circuit clerk within 14 days after entry of judgment an itemized and verified bill of costs, along with proof of service of that bill on the other parties. n1 The court has discretion to allow late filing of a bill of costs under Appellate Rule 26(b), n2 and will consider each case on its own merits to determine whether good cause has been shown for the delay. n3

The opponent must file objections to the bill of costs within 14 days after service of the bill of costs, unless the court extends the time. n4 Then the clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must on request of the circuit clerk add the statement of costs, or any amendment of it, to the mandate. n5

[4] Costs on Appeal Taxable in the District Court

The district court, rather than the appellate court may tax the following costs on appeal, for the benefit of the party entitled to costs under Appellate Rule 39: n1

1. The preparation and transmission of the record. n2

2. The reporter's transcript, if needed to determine the appeal. n3

3. The premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. n4 and

4. The fee for filing the notice of appeal. n5

The district court has discretion to award costs for trial under *Federal Rule of Civil Procedure 54(d)*. n6 but it may not award costs on appeal that are not authorized by Appellate Rule 39. n7 However, if the parties agree to less expensive substitutes for costs explicitly authorized by Appellate Rule 39(e), they may be taxed by the district court. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney Fees

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 339.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Whitfield v. Scully, 241 F.3d 264, 274-275 (2d Cir. 2001)* (circuit court allocates appellate costs, except as specified in Appellate Rule 39(e) to be under responsibility of district court).

(n3)Footnote 2. *Fed. R. App. P. 39(a)(1)*.

(n4)Footnote 3. *Fed. R. App. P. 39(a)(2)*.

(n5)Footnote 4. *Fed. R. App. P. 39(a)(3)*.

(n6)Footnote 5. *Fed. R. App. P. 39(a)(4)*; *see Lahoti v. VeriCheck, Inc., 586 F.3d 1190, 1204 (9th Cir. 2009)* (courts commonly order each party to bear its own costs based on Rule 39, local rule, or general order).

(n7)Footnote 6. *Fed. R. App. P. 39(b).*

(n8)Footnote 7. *28 U.S.C. § 2412.*

(n9)Footnote 8. *See Baez v. United States Dep't of Justice, 684 F.2d 999, 1006 (D.C. Cir. 1982)* (government awarded costs after prevailing on appeal).

(n10)Footnote 9. *McDonald v. McCarthy, 966 F.2d 112, 115 (3d Cir. 1992)* (circuit court may require each party to bear its own costs).

(n11)Footnote 1. *Fed. R. App. P. 39(c)*; see *Fed. R. App. P. 30(f).*

(n12)Footnote 2. *Pepsico, Inc. v. Swan, 720 F.2d 746, 747 (2d Cir. 1983) .*

(n13)Footnote 3. *Martin v. United States, 931 F.2d 453, 455-456 (7th Cir. 1991) .*

(n14)Footnote 1. *Fed. R. App. P. 39(d)(1)*; *Haroco, Inc. v. American Nat'l Bank and Trust Co., 38 F.3d 1429, 1440 (7th Cir. 1994)* (party that filed first requests for costs incurred on appeal years after judgment not entitled to costs).

(n15)Footnote 2. *See Fed. R. App. P. 26(b).*

(n16)Footnote 3. *Denofre v. Transportation Ins. Rating Bureau, 560 F.2d 859, 861 (7th Cir. 1977) .*

(n17)Footnote 4. *Fed. R. App. P. 39(d)(2)*; *McGill v. Faulkner, 18 F.3d 456, 458-459 (7th Cir. 1994)* (appellant who failed to file objections to bill of costs waived right to challenge order for payment of costs).

(n18)Footnote 5. *Fed. R. App. P. 39(d)(3).*

(n19)Footnote 1. *See Whitfield v. Scully, 241 F.3d 264, 274-275 (2d Cir. 2001)* (these are only appellate costs that are taxable in district court).

(n20)Footnote 2. *Fed. R. App. P. 39(e)(1).*

(n21)Footnote 3. *Fed. R. App. P. 39(e)(2).*

(n22)Footnote 4. *Fed. R. App. P. 39(e)(3).*

(n23)Footnote 5. *Fed. R. App. P. 39(e)(4).*

(n24)Footnote 6. *Fed. R. Civ. P. 54(d).*

(n25)Footnote 7. *Johnson v. Pacific Lighting Land Co., 878 F.2d 297, 298 (9th Cir. 1989) , cert. denied, 493 U.S. 965 (1989) .*

(n26)Footnote 8. *Lerman v. Flynt Distrib. Co., 789 F.2d 164, 166 (2d Cir. 1986) , cert. denied, 479 U.S. 932 (1989)* ; *see Johnson v. Pacific Lighting Land Co., 878 F.2d 297, 298 (9th Cir. 1989) , cert. denied, 493 U.S. 965 (1989)* (district court could grant costs if there were agreement by parties).

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.93

§ 28.93 Petition for Panel Rehearingn*

[1] Time to File Petition

To petition for a panel rehearing, a party must generally file the petition within 14 days after entry of judgment, unless the time is shortened or extended by circuit court order or local rule. However, the exception is that in a civil case in which the United States or its officer or agency is a party, a party may file a petition for a panel rehearing within 45 days after entry of judgment, unless an order shortens or extends the time. n1

If a party files a late petition for rehearing, the circuit court need not consider it. However, a party may file a motion to enlarge the time to file the petition, and the circuit court has the authority to extend the time by order. n2 Generally, such a motion must be made during the 14-day period and before the mandate issues. The circuit court has discretion to allow or disallow an extension of time, but the motion is usually granted if filed within the 14-day period. Once the mandate issues, however, the court will usually deny the motion. n3 However, in the event a motion for rehearing is not filed or is filed late, the court may elect to treat another pleading filed within the 14-day time period as a motion for rehearing. n4

[2] Contents and Length of Petition

A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. n1 The purpose of a petition for rehearing is to ensure that the panel properly considers all relevant information before rendering its decision. This purpose is a limited one, and the panel need not consider points of fact that occur subsequent to the initial decision. On the other hand, subsequent controlling legal opinions may be considered, because they may reveal that the panel misconstrued the law when rendering the original opinion. n2 However, the circuit court will not address legal theories raised for the first time in a petition for rehearing. n3 Oral argument is not permitted on the petition. n4

A petition for rehearing must comply in form with Appellate Rule 32. n5 Copies must be served and filed as Appellate Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages. n6

[3] Answer

No answer to a petition for panel rehearing is permitted unless the court requests an answer. Because very few rehearings are granted, a rehearing ordinarily will not be granted in the absence of a request by the circuit court for an answer to the petition. n1 However, in some clear-cut situations the petition will be granted without the necessity of an answer, for example, when the Supreme Court decides in an opinion that states that the circuit court adopted the wrong rule. n2

[4] Action by Court Granting Petition

If the court panel grants a petition for panel rehearing, the court may take any of the following actions:

1. Make a final disposition of the case without reargument. n1

2. Restore the case to the calendar for reargument or resubmission. n2 or

3. Issue any other appropriate order. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRehearings

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 340.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 40(a)(1).*

(n3)Footnote 2. *See Fed. R. App. P. 40(a)(1).*

(n4)Footnote 3. *Marino v. Ortiz, 888 F.2d 12, 13 (2d Cir. 1989) , cert. denied, 495 U.S. 931 (1990)* (motion for extension filed after issuance of mandate denied because such motion is granted only in compelling circumstances).

(n5)Footnote 4. *Elliott v. Tilton, 69 F.3d 35, 36 (5th Cir. 1995)* (motion to dismiss party was filed within 14 days of entry of judgment and considered timely as motion for rehearing).

(n6)Footnote 1. *Fed. R. App. P. 40(a)(2).*

(n7)Footnote 2. *Armster v. United States Dist. Court for the Dist. of Alaska, 806 F.2d 1347, 1356-1357 (9th Cir. 1986)* (while subsequent points of law may be considered, subsequent points of fact may not be considered).

(n8)Footnote 3. *Pentax Corp. v. Robison, 135 F.3d 760, 762 (Fed. Cir. 1998) .*

(n9)Footnote 4. *Fed. R. App. P. 40(a)(2).*

(n10)Footnote 5. *See Fed. R. App. P. 32(a), (c); see also § 28.85.*

(n11)Footnote 6. *Fed. R. App. P. 40(b).*

(n12)Footnote 1. *Fed. R. App. P. 40(a)(3).*

(n13)Footnote 2. *United States v. Allegheny-Ludlum Industries, 568 F.2d 1073, 1074 (5th Cir. 1978)* (answer to

petition for rehearing not required because Supreme Court rendered opinion that squarely and unequivocally determined standard to be applied).

(n14)Footnote 1. *Fed. R. App. P. 40(a)(4)(A).*

(n15)Footnote 2. *Fed. R. App. P. 40(a)(4)(B).*

(n16)Footnote 3. *Fed. R. App. P. 40(a)(4)(C).*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.94

§ 28.94 Mandate Issued by Court of Appealsn*

[1] Contents of Mandate

A mandate is the appellate court's directions to the lower court following the determination of the appeal. n1 The court may, but need not, issue a formal mandate. Unless the court directs that a formal mandate issue, the mandate consists only of a certified copy of the judgment, a copy of the court's opinion if one was written, and any direction about costs. n2 For purposes of a mandate, the term *judgment* refers to the final judgment on appeal and not to an intermediate order. n3

[2] Mandate Effective When Issued

A circuit court must issue its mandate within seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time for issuance of the mandate. n1 Thus, the circuit court may direct the mandate to issue immediately on judgment, prior to the time to file a petition for rehearing expires, and then later entertain a petition for rehearing or rehearing en banc. n2

However, the Supreme Court has held that the court of appeals does not have unlimited discretion regarding the length of time it may postpone a mandate nor may the court of appeals "withhold" the mandate indefinitely (by failing to issue a mandate), which, in effect, constitutes an indefinite stay of the mandate. n3

A mandate is effective at the time it is issued, n4 except when the court of appeals orders a stay of the mandate. n5 A court of appeals' judgment becomes final and effective on the issuance of the mandate, and at that time the parties' obligations under the judgment become fixed. n6 Thus, the effectiveness of the mandate is not delayed until the mandate is received by the district court or agency or until the trial court or agency acts on the mandate. n7 Once the mandate is issued, the circuit court's appellate jurisdiction formally ends. The circuit court does have inherent power within a reasonable time to recall the mandate and cancel its effectiveness, and to restore its appellate jurisdiction, but only in very exceptional circumstances. n8

Following the issuance of the appellate mandate, the district court is required to take any action that is consistent with

the mandate, as stated in the judgment entered in the circuit court, and any written opinion of circuit court. n9 Conversely, the district court may not reconsider issues the parties failed to raise on appeal. It must attempt to implement the spirit of the mandate, and the court may not alter rulings impliedly made by the appellate court. n10

[3] Stay of Mandate

[a] Stay on Petition for Rehearing or Motion

Unless the circuit court orders otherwise, the timely filing of the following papers stays the mandate until disposition of the petition or motion: a petition for panel rehearing, a petition for rehearing en banc, or a motion for stay of mandate. n1 Thus, a rehearing en banc is treated exactly like a petition for panel rehearing, so that a request for either rehearing will suspend the finality of the court of appeals' judgment, and delay the running of the period for filing a petition for writ of certiorari. n2 Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition. n3 The procedure for doing so is left to local practice. n4 If the court of appeals denies the motion for a stay, the court must issue the mandate seven days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. By delaying issuance of a mandate, the court of appeals may eliminate the need to recall the mandate if the motion for a stay is granted. n5 However, the court of appeals has discretion to order that the mandate issue immediately if it determines that it would be inappropriate to delay issuance until disposition of the motion for a stay. n6

When the circuit court does order a stay of mandate, it has two effects during the period of the stay: first, the lower court's and the parties' obligations under the mandate do not become effective; and second, other courts may not rely on the decision for precedent. n7

[b] Pending Petition for Certiorari

An appellate party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay. n8 The circuit court should grant a stay pending the filing and disposition of a petition for a writ of certiorari only if an applicant establishes: (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the circuit court should balance the equities and weigh the relative harms to the applicant and to the respondent. n9

Any stay of mandate pending the filing of a petition for a writ of certiorari must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition. n10 The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. n11 The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. n12 However, in extremely unusual circumstances in the interests of justice, it is possible that the court of appeals may stay its mandate, pursuant to Appellate Rule 41(b), even after the Supreme Court has denied a petition for writ of certiorari. n13

The maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, is 90 days, because Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari, whether the case is civil or criminal. However, the court of appeals is not required to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 341.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Youghiogheny & Ohio Coal Co. v. Milliken, 200 F.3d 942, 950-951 (6th Cir. 1999)* , *cert. denied, 531 U.S. 818 (2000)* ; *South Atl. Ltd. P'ship v. Riese, 356 F.3d 576, 582-584 (4th Cir. 2004)* .

(n3)Footnote 2. *Fed. R. App. P. 41(a)*; *see United States v. Rivera, 844 F.2d 916, 920 (2d Cir. 1988)* (explaining nature of mandate and how it is issued and used).

(n4)Footnote 3. *York Int'l Bldg., Inc. v. Chaney, 527 F.2d 1061, 1066 (9th Cir. 1975)* .

(n5)Footnote 1. *Fed. R. App. P. 41(b)*.

(n6)Footnote 2. *N. Cal. Power Agency v. NRC, 393 F.3d 223, 224 (D.C. Cir. 2004)* .

(n7)Footnote 3. *Bell v. Thompson, 545 U.S. 794, 803-804, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005)* .

(n8)Footnote 4. *Fed. R. App. P. 41(c)*.

(n9)Footnote 5. *See* [3], *below*.

(n10)Footnote 6. *Heartland By-Products, Inc. v. United States, 223 F. Supp. 2d 1317, 1333 (Ct. Intl. Tr. 2002)* .

(n11)Footnote 7. *Fed. R. App. P. 41(c)*, Committee Note to 1998 Amendments.

(n12)Footnote 8. *N. Cal. Power Agency v. NRC, 393 F.3d 223, 225-226 (D.C. Cir. 2004)* (one of exceptional circumstances is clerical error); *see Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 22 n.3 (1st Cir. 2010)* (party should request by motion that court recall mandate; citing **Moore's Federal Practice**).

(n13)Footnote 9. *Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1483-1484 (Fed. Cir. 1998)* , *cert. denied, 525 U.S. 877 (1998)* .

(n14)Footnote 10. *South Atl. Ltd. P'ship v. Riese, 356 F.3d 576, 584 (4th Cir. 2004)* .

(n15)Footnote 1. *Fed. R. App. P. 41(d)(1)*; *Brumfield v. Pioneer Credit Co., 291 F. Supp. 2d 462, 467 (E.D. Miss. 2003)* ; *see Robinson v. United States, 416 F.3d 645, 648 (7th Cir. 2005)* (stay is automatic on filing of motion).

(n16)Footnote 2. *See Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1088 (10th Cir. 2005)* (effect of any such motion is as if no mandate has been issued, unless motion is ultimately denied).

(n17)Footnote 3. *See Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1088 n.2 (10th Cir. 2005)* .

(n18)Footnote 4. *Fed. R. App. P. 41(d)(1)*, Committee Note to 1998 Amendments.

(n19)Footnote 5. *See Ellis v. United States Dist. Court, 360 F.3d 1022, 1023 (9th Cir. 2005)* .

(n20)Footnote 6. *Fed. R. App. P. 41(d)(1)*, Committee Note to 1998 Amendments.

(n21)Footnote 7. *Smith v. Union Nat'l Life Ins. Co., 286 F. Supp. 2d 782, 786 (S.D. Miss. 2003)* .

(n22)Footnote 8. *Fed. R. App. P. 41(d)(2)(A)*; *see United States v. Sears, 411 F.3d 1240, 1242 (11th Cir. 2005)* (party must make motion for stay of mandate; stay does not automatically issue on filing of petition for certiorari with Supreme Court).

(n23)Footnote 9. *Hollingsworth v. Perry, ___ U.S. ___, 130 S. Ct. 705, 175 L. Ed. 2d 657, 663 (2010)* .

(n24)Footnote 10. *Fed. R. App. P. 41(d)(2)(B)*.

(n25)Footnote 11. *Fed. R. App. P. 41(d)(2)(C)*.

(n26)Footnote 12. *Fed. R. App. P. 41(d)(2)(D)*.

(n27)Footnote 13. *Bell v. Thompson, 545 U.S. 794, 125 S. Ct. 2825, 2832, 162 L. Ed. 2d 693 (2005)* .

(n28)Footnote 14. *Fed. R. App. P. 41(d)(2)*, Committee Note to 1998 Amendments.

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PART VII Appeal
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3-28 Moore's Manual--Federal Practice and Procedure § 28.95

§ 28.95 Voluntary Dismissaln*

[1] Voluntary Dismissal in District Court

If all of the parties sign a stipulation of dismissal and file it with the court, or if the appellant moves the court and gives notice to all parties, the district court may dismiss an appeal provided that the filing or motion occurs before the appeal has been docketed by the circuit clerk. n1 However, once an appeal has been docketed, the district court may not dismiss it, and the parties must seek dismissal in the circuit court. n2

[2] Voluntary Dismissal in Court of Appeals

The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due; however, no mandate or other process may issue without the court's order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court. n3 When a stipulation of dismissal is made pursuant to Appellate Rule 42(b), it is not effective if it is not filed, even if it has been signed by all of the parties. n4

The ultimate power to approve or disapprove a voluntary dismissal is with the circuit court, and the circuit court is not bound by the terms of the parties' agreement to dismiss the matter if the parties seek a mandate or other process. If the relief sought by the parties involves a substantive disposition, the court must determine if the requested action is proper on the merits. n5 The court of appeals has broad discretion to grant voluntary motions to dismiss; such motions are generally granted but may be denied in the interest of justice or fairness. n6

The circuit court's discretion includes the authority to attach conditions to a voluntary dismissal, such as making the dismissal with prejudice. n7 However, the power to dismiss an appeal subject to conditions fixed by the circuit court does not include a general power to condition dismissal on the appellant's reimbursement of appellee's expenses. n8 Similarly, because awards of attorney's fees are exceptional in the American legal system and will not be presumed from the general language of Appellate Rule 42(b), the Rule does not allow the appellate court to condition a voluntary dismissal of an appeal on the condition of the appellant's payment of appellee's reasonable attorney's fees, absent exceptional circumstances. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsGeneral OverviewCivil ProcedureAppealsDismissals of AppealsVoluntary Dismissals

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 342.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 42(a)*; *see Rivera v. Ciccone, 311 F. Supp. 373, 374 (W.D. Mo. 1969)* .

(n3)Footnote 2. *United States v. Clark, 917 F.2d 177, 179 (5th Cir. 1990)* ; *United States v. Hitchmon, 602 F.2d 689, 692 (5th Cir. 1979)* ; *see* [2], *below*.

(n4)Footnote 3. *Fed. R. App. P. 42(b)*; *see Greenlaw v. United States, 554 U.S. 237, 128 S. Ct. 2559, 171 L. Ed. 2d 399, 413 (2008)* (noting that Appellate Rule 42(b) voluntary dismissal is effective way for parties to settle appeals and cross appeals before positions become hardened during hours invested in preparing the case for appellate court consideration).

(n5)Footnote 4. *Totalplan Corp. of Am. v. Colborne, 14 F.3d 824, 828 (2d Cir. 1994)* .

(n6)Footnote 5. *Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991)* (court not bound by settlement agreement).

(n7)Footnote 6. *American Auto. Mfrs. Ass'n, v. Commissioner, Mass. Dep't of Envtl. Protection, 31 F.3d 18, 22 (1st Cir. 1994)* .

(n8)Footnote 7. *NLRB v. Brooke Indus., Inc., 873 F.2d 165, 166 (7th Cir. 1989)* .

(n9)Footnote 8. *Ormsby Motors, Inc. v. General Motors Corp., 32 F.3d 240, 241-242 (7th Cir. 1994)* (only in exceptional cases will court sanction voluntary dismissals on reimbursement of expenses).

(n10)Footnote 9. *Overseas Cosmos, Inc. v. NR Vessel Corp., 148 F.3d 51, 52 (2d Cir. 1998)* .

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PART VII Appeal
CHAPTER 28 APPEAL TO COURT OF APPEALS
PART III. GENERAL RULES OF APPELLATE PROCEDURE CONTROLLING ALL APPEALS

3-28 Moore's Manual--Federal Practice and Procedure § 28.96

§ 28.96 Substitutionn*

[1] Substitution on Death of Party

[a] After Notice of Appeal Is Filed

In the event a party to an appeal dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Appellate Rule 25. n1 When substituted, the personal representative stands in the place of the deceased party and acquires only the rights and defenses of that party. n2

If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings. n3 For example, the circuit court may direct that the case be continued until a representative is appointed, n4 or may dismiss the appeal if there is no request for substitution. n5

[b] Before Notice of Appeal Is Filed

[i] Substitution of Potential Appellant Before Notice of Appeal Is Filed

If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative, or if there is no personal representative, the decedent's attorney of record, may file a notice of appeal within the time prescribed by the Appellate Rules. n6 After the notice of appeal is filed, the substitution must be made in accordance with Appellate Rule 43(a)(1). n7

[ii] Substitution of Potential Appellee Before Notice of Appeal Is Filed

If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be made in accordance with Appellate Rule 43(a)(2). n8

[2] Substitution for Reason Other Than Death

If a party needs to be substituted for any reason other than death, the same procedure applies as that for substitution on death as prescribed in Appellate Rule 43(a). n9 Thus, if an individual was acting only as an agent for a business entity, the circuit court may substitute the entity for the individual. n10 The court may also make substitution when a party is incapable of continuing the suit. For example, the court may substitute when a party has become incompetent, when a transfer of interest in the company or property involved in the suit has occurred, or when the focus of the litigation has shifted, making another entity the real party in interest. n11

[3] Public Officers

[a] Identification of Party

A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. n12 But the court may require the public officer's name to be added. n13

[b] Automatic Substitution of Officeholder

If a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. n14 Proceedings following the substitution are to be in the name of the substituted party, n15 but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time but failure to enter an order does not affect the substitution. n16 This provision prevents suits involving public officials from becoming moot due to personnel changes. n17 However, substitution of parties is only a procedural device and does not control the question of mootness, based on the type of relief requested. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 343.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 43(a)(1).*

(n3)Footnote 2. *Kowaleski v. Director, Office of Workers' Compensation Programs, USDOL, 879 F.2d 1173, 1177 n.4 (3d Cir. 1989)* .

(n4)Footnote 3. *Fed. R. App. P. 43(a)(1).*

(n5)Footnote 4. *Ward v. Edgeton, 59 F.3d 652, 653-654 (7th Cir. 1995)* (motion to dismiss appeal by deceased person was denied, and court ordered that next of kin be notified and offered chance to be substituted as party).

(n6)Footnote 5. *Crowder v. Housing Auth., 908 F.2d 843, 846 (11th Cir. 1990)* .

(n7)Footnote 6. *Fed. R. App. P. 43(a)(2)*; *see Slade v. United States Postal Serv., 952 F.2d 357, 359-360 (10th Cir. 1991)* (deceased plaintiff's attorney made timely filing of appeal and wife was substituted at later date).

(n8)Footnote 7. *Fed. R. App. P. 43(a)(2)*; *see* [a], *above*.

(n9)Footnote 8. *Fed. R. App. P. 43(a)(3)*; *see* [a], *above*.

(n10)Footnote 9. *Fed. R. App. P. 43(b)*; *see* [1], *above*.

(n11)Footnote 10. *United Transp. Union v. ICC, 891 F.2d 908, 909 n.1 (D.C. Cir. 1989)* , *cert. denied*, *497 U.S. 1024 (1990)* .

(n12)Footnote 11. *Alabama Power Co. v. ICC, 852 F.2d 1361, 1366-1367 (D.C. Cir. 1988)* .

(n13)Footnote 12. *Fed. R. App. P. 43(c)(1)*; *see* *Karcher v. May, 484 U.S. 72, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)* (in suit involving official capacity of public official, real party in interest is entity represented and not individual officeholder).

(n14)Footnote 13. *Fed. R. App. P. 43(c)(1)*.

(n15)Footnote 14. *Fed. R. App. P. 43(c)(2)*.

(n16)Footnote 15. *Chao v. Russell P. Le Frois Builder, Inc. 291 F.3d 219, 221 n.1 (2d Cir. 2002)* .

(n17)Footnote 16. *Fed. R. App. P. 43(c)(2)*.

(n18)Footnote 17. *Karcher v. May, 484 U.S. 72, 83, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)* .

(n19)Footnote 18. *Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982)* .

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PART VII Appeal
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3-28 Moore's Manual--Federal Practice and Procedure § 28.97

§ 28.97 Constitutional Cases Not Involving United States as Partyn*

There are two special appellate notice provisions that apply when a party is litigating the constitutionality of either a federal or state statute and the applicable federal or state government is not already a party to the case. n1 Thus, if a party challenges the constitutionality of a federal statute or other Act of Congress in any proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately at the filing of the record, or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General. n2

In the same way, a party must give notice when the party is challenging the constitutionality of the statute of any state, n3 which includes the District of Columbia and federal territories, commonwealths, and possessions. n4 For such a challenge, the party must give written notice to the circuit clerk immediately on the filing of the record or as soon as the constitutional question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State. n5

The purpose of these provisions is to ensure that the executive branch of the applicable government has notice of the proceeding and an opportunity to intervene and present its views and later appeal the case to the Supreme Court if the federal circuit court of appeals determines that the federal statute is unconstitutional. n6 In any proceeding in a federal court in which the United States or any federal agency, officer, or employee is not a party, and which raises the constitutionality of a federal law affecting the public interest, the court must certify that fact to the United States Attorney General and permit the United States to intervene for argument on the question of constitutionality. n7 Another subsection of that same statute contains virtually identical language imposing on the federal court the duty to notify the attorney general of a state of any constitutional challenge to any statute of that state. n8

If a party fails to provide the required notice for a constitutional challenge to either a federal statute n9 or a state statute, n10 the court may deem the constitutional issue waived. n11 Because the purpose of Appellate Rule 44 is to notify the appropriate federal or state official or agency of a constitutional challenge to one of its laws, there is authority to the effect that if the government has actual notice from another source, the circuit court may proceed despite lack of the formal notice required by the rule. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 344.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 44(a), (b).*

(n3)Footnote 2. *Fed. R. App. P. 44(a).*

(n4)Footnote 3. *Fed. R. App. P. 44(b).*

(n5)Footnote 4. *Fed. R. App. P. 1(b).*

(n6)Footnote 5. *Fed. R. App. P. 44(b).*

(n7)Footnote 6. *Tonya K. v. Board of Educ., 847 F.2d 1243, 1247 (7th Cir. 1988) .*

(n8)Footnote 7. *See 28 U.S.C. § 2403(a).*

(n9)Footnote 8. *See 28 U.S.C. § 2403(a).*

(n10)Footnote 9. *See Fed. R. App. P. 44(a).*

(n11)Footnote 10. *See Fed. R. App. P. 44(a).*

(n12)Footnote 11. *See Noonan v. Staples, Inc., 561 F.3d 4, 6 (1st Cir. 2009)* (waiver of constitutional challenge to state statute); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (because personal jurisdiction is individual [due process] right, it can be waived like other individual rights).

(n13)Footnote 12. *Gosselin v. Commonwealth of Mass. Dep't of Revenue, 276 F.3d 70 (1st Cir. 2002) ; Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997) .*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.98

§ 28.98 Clerk's Dutiesn*

[1] Qualifications of Clerk

The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office as a clerk in the circuit court of appeals. n1

[2] Time Court Is Open

The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. n2

[3] Duties With Respect to Records

The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments. n1

The formal docket entries are the official record that the parties and court can utilize to definitively ascertain the determinations and actions that have been made in the appellate case. n2 By direction of the circuit court, the clerk must also prepare a calendar of cases awaiting argument. When placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law. n3 Finally, the clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court. n4

The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. On disposition of the case, original

papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed. n5

[4] Notice of Order or Judgment

When the circuit court enters an order or judgment, the circuit clerk must immediately serve a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel. n1 Although the clerk may serve the parties with the notice of an order or judgment by mail, the clerk is no longer required to do so. Thus, the clerk may now serve the parties by electronic means, such as email. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsClerks of Court

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 345.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 45(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 45(a)(2).*

(n4)Footnote 1. *Fed. R. App. P. 45(b)(1)*; *see, e.g., In re Capitol Hill Group, 330 B.R. 1, 2 (D.D.C. 2005)* (appellate court does not issue its mandate until it has been recorded on docket by clerk).

(n5)Footnote 2. *See Bell v. Thompson, 545 U.S. 794, 805, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005) .*

(n6)Footnote 3. *Fed. R. App. P. 45(b)(2).*

(n7)Footnote 4. *Fed. R. App. P. 45(b)(3).*

(n8)Footnote 5. *Fed. R. App. P. 45(d)*; *Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980) .*

(n9)Footnote 1. *Fed. R. App. P. 45(c).*

(n10)Footnote 2. *See Fed. R. App. P. 45(c)*; *Molski v. Mandarin Touch Rest., 385 F. Supp. 2d 1042, 1048 (C.D. Cal. 2005) .*

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3-28 Moore's Manual--Federal Practice and Procedure § 28.99

§ 28.99 Attorneys' Federal Appellate Practicen*

[1] Admission to Bar of Court of Appeals

[a] Eligibility

An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands). n1

Under the Appellate Rules, the highest court of a "state" includes the courts of the states of the Union, the District of Columbia, and all federal territories, commonwealths, and possessions. n2 In addition to the requirement of prior bar membership, an attorney must have the sponsorship of a current member of the court of appeals. n3 If a person does not have admission to practice in the specified federal courts, admission to practice before the highest court of the state, or membership in a state bar, the federal circuit court is without authority to grant bar membership to an applicant. n4

However, the converse is not necessarily true. Even though a person's eligibility for admission to the bar of the court of appeals must be based on other bar membership, membership in the circuit court bar is not automatic. Thus, any prospective member must nevertheless apply for circuit court membership on the official application form n5 even though the person has membership in one of the courts listed in Rule 46(a). n6

[b] Application

To be admitted to practice in a circuit court, an attorney must file an application for admission, on a form approved by the court that contains the attorney's personal statement showing eligibility for membership. The applicant must also subscribe to the following oath or affirmation: "I, _____ [*name*], do solemnly _____ [swear *or* affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States." n7

[c] Admission Procedures

On written or oral motion of a current member of the circuit court's bar, n8 the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. On admission, an applicant must pay the clerk the fee prescribed by local rule or court order. n9

[2] Suspension or Disbarment

A member of the court's bar is subject to suspension or disbarment by the court if the member has been either suspended or disbarred from practice in any other court, n1 or found guilty of conduct unbecoming a member of the court's bar. n2 The court must give the member an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred. n3 The court must enter an appropriate order regarding discipline after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made. n4

Before a circuit bar member is disbarred or suspended, the member whose conduct is in question must be given an opportunity to show good cause why the member should not be disciplined. n5 The member may have a hearing if requested; however, a court is not absolutely required to grant a hearing if the hearing will not assist the circuit court in its decision. n6 Disbarment or suspension based on action taken by state bar or another jurisdiction requires that procedural due process was met before the state discipline was imposed. Similarly, the right to notice and the opportunity for a hearing in a current circuit court discipline proceeding are controlled by the standard of procedural due process. n7

Specific guidelines of whether conduct constitutes "conduct unbecoming a member of the court's bar" is provided by case law, court rules, and codes of professional conduct. n8 Examples of conduct justifying suspension of an attorney include: failure to file a jurisdictional statement required by the court's rules until after several orders threatening sanctions, failure to file a brief as required by a scheduling order without requesting an extension until after a show-cause order requiring a response and a brief, and other acts of unprofessional preparation. n9 An example of conduct justifying disbarment occurred when an attorney had exhibited a long history of ignoring court deadlines and judicial orders, including failing to prosecute four cases on appeal. n10 On the other hand, taking an unreasonable position in litigation is not in itself conduct unbecoming a member of the bar, even though it could be sanctionable under various jurisdiction's rules designed to protect courts and parties from frivolous and vexatious litigation and other abuses of judicial process. n11

[3] Other Discipline

If a court of appeals finds that an attorney has engaged in conduct unbecoming a member of the bar, but that suspension or disbarment is too harsh a penalty, the court may impose a lesser penalty. n1 The court may also impose discipline less than disbarment for a failure to comply with any court rule. n2 However, as in the case with disbarment, the court must first provide the attorney with reasonable notice, an opportunity to show cause to the contrary, and a hearing, if requested by the attorney. n3 The existence of a violation, and the severity of the punishment, for conduct unbecoming an attorney, is based on case law, court rules, and codes of professional conduct. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewLegal EthicsPractice Qualifications

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 346.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 46(a)(1).*

(n3)Footnote 2. *Fed. R. App. P. 1(b).*

(n4)Footnote 3. *Fed. R. App. P. 46(a)(3)*; *see, e.g.*, Second Circuit, Local Rule 46.1(a)(1)(c); *see § 28.99[1][c], below.*

(n5)Footnote 4. *In re Martin 120 F.3d 256, 258-259 (Fed. Cir. 1997)* (membership in bar of circuit court of appeals was premised on attorney's status as member of state bar, and because attorney was not actually admitted to any state bar, attorney's admission in circuit court was granted in error and had to be revoked).

(n6)Footnote 5. *See § 28.99[1][b], [c], below.*

(n7)Footnote 6. *See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1119 (9th Cir. 2007)* .

(n8)Footnote 7. *Fed. R. App. P. 46(a)(2).*

(n9)Footnote 8. *Fed. R. App. P. 46(a)(3)*; *see, e.g.*, Second Circuit, Local Rule 46.1(a)(1)(c).

(n10)Footnote 9. *Fed. R. App. P. 46(a)(3).*

(n11)Footnote 1. *Fed. R. App. P. 46(b)(1)(A)*; *see In re Fallin, 255 F.3d 195, 197 (4th Cir. 2001)* .

(n12)Footnote 2. *Fed. R. App. P. 46(b)(1)(B).*

(n13)Footnote 3. *Fed. R. App. P. 46(b)(2).*

(n14)Footnote 4. *Fed. R. App. P. 46(b)(3).*

(n15)Footnote 5. *Fed. R. App. P. 46(b)(2).*

(n16)Footnote 6. *Mays v. Chicago Sun-Times, 865 F.2d 134, 139 (7th Cir. 1989)* (hearing not necessary to impose sanctions because attorney filed brief containing false statements).

(n17)Footnote 7. *In re Barach, 540 F.3d 82, 85 (1st Cir. 2008)* .

(n18)Footnote 8. *In re Snyder, 472 U.S. 634, 645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985)* .

(n19)Footnote 9. *In re John Millard Beck, 902 F.2d 5, 6 (7th Cir. 1990)* .

(n20)Footnote 10. *In re Riggs, 240 F.3d 668, 670-671 (7th Cir. 2001)* .

(n21)Footnote 11. *In re Lightfoot, 217 F.3d 914, 915-918 (7th Cir. 2000)* (poor judgment in applying legal principles to facts is not professional misconduct for purposes of Appellate Rule 46(c)).

(n22)Footnote 1. *Fed. R. App. P. 46(c)*; *see In re Harte, 701 F.2d 62, 62 (7th Cir. 1983)* (for example, court may impose public reprimand or a fine).

(n23)Footnote 2. *Fed. R. App. P. 46(c).*

(n24)Footnote 3. *Fed. R. App. P. 46(c).*

(n25)Footnote 4. *Thomas v. Girardi, 611 F.3d 1027, 1035 (9th Cir. 2010)* .

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3-28 Moore's Manual--Federal Practice and Procedure § 28.100

§ 28.100 Promulgation of Local Rules by Courts of Appealsn*

[1] Enactment of Local Rules

Each circuit court by vote of a majority of its judges in regular active service may make and amend "local rules" governing its practice; the court may enact local rules only after giving appropriate public notice and opportunity for comment. Under the Appellate Rules, if a circuit court is enacting a generally applicable directive to parties or lawyers regarding practice before the court, the directive must be in the form of a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with (but not duplicative of) Acts of Congress and rules adopted under *28 U.S.C. § 2072*, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. n1 Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. n2

A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. n3 In other words, a court will not dismiss an appeal with regard to a failure to comply with a format requirement unless the failure is deliberate. n4

[2] Regulation of Procedure When There Is No Controlling Law

A court of appeals may regulate practice in a particular case in any manner consistent with federal law, the Appellate Rules, and the local rules of the circuit. n1 In other words, in circumstances when there is no specific Appellate Rule, Civil Rule, or statute controlling procedural law, a court of appeals has the discretion to regulate practice in any manner consistent with federal statutes, federal rules, and local rules of the circuit. For example, the fact that no appellate or local rule addresses class-action certification does not mean that an appellate court must refuse to hear a request for class certification in the circuit court. n2

However, a circuit court may not impose any sanction or other disadvantage for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with prior actual notice of the requirement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 347.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 47(a)(1)*; *Horner Equip. Int'l Inc. v. Seascape Pool Ctr. Inc., 884 F.2d 89, 94 (3d Cir. 1989)* (circuit court guidelines which required transcripts to be ordered through district court clerk were not effective when not adopted in accordance with requirements of local rulemaking).

(n3)Footnote 2. *Fed. R. App. P. 47(a)(1)*.

(n4)Footnote 3. *Fed. R. App. P. 47(a)(2)*.

(n5)Footnote 4. *See United States ex rel. Jimenez v. Health Net, Inc., 400 F.3d 853, 855 (10th Cir. 2005)* .

(n6)Footnote 1. *Fed. R. App. P. 47(b)*.

(n7)Footnote 2. *Burns v. United States R.R. Retirement Bd., 701 F.2d 189, 191 (D.C. Cir. 1983)* (court declined to rule on class certification because in case at hand appellate proceeding was not compatible with designation and management of class).

(n8)Footnote 3. *Fed. R. App. P. 47(b)*.

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3-28 Moore's Manual--Federal Practice and Procedure § 28.101

§ 28.101 Mastersn*

[1] Appointment and Powers of Master

A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. n1 Ordinarily, when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. However, when a factual issue arises in the first instance in the court of appeals, it may be useful to refer such determinations to a master for a recommendation. n2 Another example of the use of a master is for ongoing enforcement of an order of the court. n3

Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

1. The power to regulate all aspects of a hearing. n4

2. The power to take all appropriate action for the efficient performance of the master's duties under the order. n5

3. The power to require the production of evidence on all matters embraced in the reference. n6

4. The power to administer oaths and examine witnesses and parties. n7

It has been suggested that a party may directly move a circuit court of appeals to appoint a special master when the court does not do so on its own motion. n8

[2] Compensation

After appointment, the circuit court of appeals must determine and specify the master's compensation if the master is not a judge or court employee and whether the cost is to be charged to any party. n1 For a discussion of the analogous situation in which a district court determines the amount of compensation for a special master, and specifies the party that has the obligation for payment of compensation and the time and procedures for payment of compensation, see Chapter 21, *Masters and Magistrate Judges*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 20A Moore's Federal Practice, § 348.11 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. App. P. 48(a).*

(n3)Footnote 2. *Fed. R. App. P. 48(a)*, Committee Notes to 1994 Amendments; *see Rafaelano v. Wilson, 471 F.3d 1091, 1099 (9th Cir. 2006)* (dissenting opinion).

(n4)Footnote 3. *Polish Nat'l Alliance v. NLRB, 159 F.2d 38, 38 (7th Cir. 1946)* .

(n5)Footnote 4. *Fed. R. App. P. 48(a)(1).*

(n6)Footnote 5. *Fed. R. App. P. 48(a)(2).*

(n7)Footnote 6. *Fed. R. App. P. 48(a)(3)*; *see, e.g., Reich v. Sea Sprite Boat Co., 50 F.3d 413, 414-415 (7th Cir. 1995)* .

(n8)Footnote 7. *Fed. R. App. P. 48(a)(4).*

(n9)Footnote 8. In *Re Byrd, 269 F.3d 585, 595-596 (6th Cir. 2001)* (electronic publication only) (dissenting opinion).

(n10)Footnote 1. *Fed. R. App. P. 48(b). Cf. Rafaelano v. Wilson, 471 F.3d 1091, 1099 (9th Cir. 2006)* (dissenting opinion noting that referral may be to magistrate judge).

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3-28 Moore's Manual--Federal Practice and Procedure .syn

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APPENDIX OF FORMS, FEDERAL RULES OF APPELLATE PROCEDURE

Form 1 Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

Form 2 Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

Form 3 Petition for Review of Order of an Agency, Board, Commission or Officer

Form 4 Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

Form 5 Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

Form 6 Certificate of Compliance With Rule 32(a)

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TITLE I. APPLICABILITY OF RULES

3-28 Moore's Manual--Federal Practice and Procedure Rule 1

Rule 1. Scope of Rules; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) Definition. In these rules, "state" includes the District of Columbia and any United States commonwealth or territory.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Legislative History

[*Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective, Dec. 1, 2002; Apr. 28, 2010; effective Dec. 1, 2010.*]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 2

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may--to expedite its decision or for other good cause--suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 3

Rule 3. Appeal as of Right--How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under *28 U.S.C. § 1292(b)* or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record--excluding the appellant's--or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries--and any later docket entries--to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 3.1

Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case

Legislative History

[Abrogated Dec. 1, 1998]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 4

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's

alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under *Federal Rule of Civil Procedure 77(d)* of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under *Federal Rule of Civil Procedure 77(d)* of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if *Federal Rule of Civil Procedure 58(a)* does not require a separate document, when the judgment or order is entered in the civil docket under *Federal Rule of Civil Procedure 79(a)*; or

(ii) if *Federal Rule of Civil Procedure 58(a)* requires a separate document, when the judgment or order is entered in the civil docket under *Federal Rule of Civil Procedure 79(a)* and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under *Federal Rule of Civil Procedure 79(a)*.

(B) A failure to set forth a judgment or order on a separate document when required by *Federal Rule of Civil Procedure 58(a)* does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under *Federal Rule of Criminal Procedure 35(a)*, nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under *Federal Rule of Criminal Procedure 35(a)* does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with *28 U.S.C. § 1746* or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Legislative History

[*Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1 1979; Nov. 18, 1988; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 27, 1995, effective Dec. 1, 1995; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29,2002, effective Dec. 1, 2002; Apr. 25, 2005, effective Dec. 1, 2005; Mar. 26, 2009, effective Dec. 1, 2009; Apr. 28, 2010; effective Dec. 1, 2010.*]

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TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

3-28 Moore's Manual--Federal Practice and Procedure Rule 5

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 5.1

Rule 5.1. Appeal by Leave under 28 U.S.C. § 636(c)(5)

Legislative History

[Abrogated Dec. 1, 1998]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 6

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.

An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under *28 U.S.C. § 1334* is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under *28 U.S.C. § 158(d)* from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under *28 U.S.C. § 158(a)* or *(b)*. But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for rehearing.

(i) If a timely motion for rehearing under *Bankruptcy Rule 8015* is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree--but before disposition of the motion for rehearing--becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4--excluding Rules 4(a)(4) and 4(b)--measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The record on appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with *Bankruptcy Rule 8006*--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;

- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Forwarding the record.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the record. Upon receiving the record--or a certified copy of the docket entries sent in place of the redesignated record--the circuit clerk must file it and immediately notify all parties of the filing date.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 7

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 8

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) Initial Motion in the District Court. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the Court of Appeals; Conditions on Relief. A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceeding Against a Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) Stay in a Criminal Case. *Rule 38 of the Federal Rules of Criminal Procedure* governs a stay in a criminal case.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1, 1986; Apr. 27, 1995, effective Dec. 1, 1995; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 9

Rule 9. Release in a Criminal Case

(a) Release Before Judgment of Conviction.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) Release After Judgment of Conviction. A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy

of the judgment of conviction.

(c) Criteria for Release. The court must make its decision regarding release in accordance with the applicable provisions of *18 U.S.C. §§ 3142*, *3143*, and *3145(c)*.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1972, effective Oct. 1,1972; Oct. 12, 1984; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 10

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) The Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Partial Transcript. Unless the entire transcript is ordered:

(A) the appellant must--within the 14 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it--together with any additions that the district court may consider necessary to a full presentation of the issues on appeal--must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 0, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 27, 1995, effective Dec. 1, 1995; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 11

Rule 11. Forwarding the Record

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) Duties of Reporter and District Clerk.

(1) Reporter's Duty to Prepare and File a Transcript. The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the

filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) District Clerk's Duty to Forward. When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal. The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) **[Abrogated]**

(e) Retaining the Record by Court Order.

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties. The parties may agree by written

stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order--

the district clerk must send the court of appeals any parts of the record designated by any party.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 12

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

(a) Docketing the Appeal. Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) Filing the Record, Partial Record, or Certificate. Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 1, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 12.1

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Legislative History

[Adopted Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 13

Rule 13. Review of a Decision of the Tax Court

(a) How Obtained; Time for Filing Notice of Appeal.

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(b) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to *§ 7502 of the Internal Revenue Code*, as amended, and the applicable regulations.

(c) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) The Record on Appeal; Forwarding; Filing.

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 1, 1979, effective Aug. 1, 1979; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

3-28 Moore's Manual--Federal Practice and Procedure Rule 14

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision

All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 15

Rule 15. Review or Enforcement of an Agency Order--How Obtained; Intervention

(a) Petition for Review; Joint Petition.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition--using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application or Cross-Application to Enforce an Order; Answer; Default.

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of the Petition or Application. The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) Intervention. Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion--or other notice of intervention authorized by statute--must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) Payment of Fees. When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 22, 1993, effective Dec. 1, 1993; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 15.1

Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Legislative History

[Adopted Mar. 10, 1986, effective July 1, 1986; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 16

Rule 16. The Record on Review or Enforcement

(a) Composition of the Record. The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) Omissions From or Misstatements in the Record. The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 17

Rule 17. Filing the Record

(a) Agency to File; Time for Filing; Notice of Filing. The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) Filing--What Constitutes.

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24,1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 18

Rule 18. Stay Pending Review

(a) Motion for a Stay.

(1) Initial Motion Before the Agency. A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) Motion in the Court of Appeals. A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) Bond. The court may condition relief on the filing of a bond or other appropriate security.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 19

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1,1986; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

3-28 Moore's Manual--Federal Practice and Procedure Rule 20

Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order

All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

Legislative History

[Adopted Dec. 4, 1967, effective July 1,1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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PART VII Appeal
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TITLE V. EXTRAORDINARY WRITS

3-28 Moore's Manual--Federal Practice and Procedure Rule 21

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)

(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) Denial; Order Directing Answer; Briefs; Precedence.

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 29, 1994, effective Dec. 1, 1994; Apr. 23, 1996, effective Dec. 1, 1996; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002.]

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TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

3-28 Moore's Manual--Federal Practice and Procedure Rule 22

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under *28 U.S.C. § 2253*, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a *28 U.S.C. § 2255* proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under *28 U.S.C. § 2253(c)*. If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under *28 U.S.C. § 2254* or *§ 2255* (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1996; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 23

Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) Detention or Release Pending Review of Decision Not to Release. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) Release Pending Review of Decision Ordering Release. While a decision ordering the release of a prisoner is under review, the prisoner must--unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise--be released on personal recognizance, with or without surety.

(d) Modification of the Initial Order on Custody. An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 24

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) Motion in the Court of Appeals. A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative Agency Proceeding. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 25

Rule 25. Filing and Service.

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) In General. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) A Brief or Appendix. A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) Inmate Filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with *28 U.S.C. § 1746* or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) Electronic Filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) Filing a Motion with a Judge. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) Clerk's Refusal of Documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by *Federal Rule of Bankruptcy Procedure 9037*, *Federal Rule of Civil Procedure 5.2*, or *Federal Rule of Criminal Procedure 49.1* is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by *Federal Rule of Civil Procedure 5.2*, except that *Federal Rule of Criminal Procedure 49.1* governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1, 1986; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 23, 1996, effective Dec. 1, 1996; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 26

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)--and filing by mail under Rule 13(b)--at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 1, 1971, effective July 1, 1971; Mar. 10, 1986, effective July 1, 1986; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 23, 1996, effective Dec. 1, 1996; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Apr. 25,2005, effective Dec. 1, 2005; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 26.1

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Legislative History

[Adopted Apr. 25, 1989, effective Dec. 1, 1989; amended Apr. 30, 1991, effective Dec. 1, 1991; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 27

Rule 27. Motions

(a) In General.

(1) Application for Relief. An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) Contents of a Motion.

(A) Grounds and relief sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Accompanying documents.

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) Documents barred or not required.

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) Response.

(A) Time to file. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) Request for affirmative relief. A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) Reply to Response. Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(b) Disposition of a Motion for a Procedural Order. The court may act on a motion for a procedural order--including a motion under Rule 26(b)--at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion

requesting that relief must be filed.

(c) Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) Form of Papers; Page Limits; and Number of Copies.

(1) Format.

(A) Reproduction. A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Cover. A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) Binding. The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) Paper size, line spacing, and margins. The document must be on 81/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) Typeface and type styles. The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) Page Limits. A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) Number of Copies. An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(e) Oral Argument. A motion will be decided without oral argument unless the court orders otherwise.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 1, 1979, effective Aug. 1, 1979; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Apr. 25, 2005, effective Dec. 1, 2005; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 28

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) or each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the reply brief where they are cited.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. or example:

- Answer p. 7;
- Motion for Judgment p. 2;

- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) **[Reserved]**

(h) **[Reserved]**

(i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 25, 1989, effective Dec. 1, 1989; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Apr. 25, 2005, effective Dec. 1, 2005.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 28.1

Rule 28.1. Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) Page Limitation. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) Certificate of Compliance. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served;

and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Legislative History

[Adopted Apr. 25, 2005, effective Dec. 1, 2005; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 29

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) a certificate of compliance, if required by Rule 32(a)(7).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

Legislative History

[*Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 4, 1998, effective Dec. 1, 1998; Apr. 28, 2010, effective Dec. 1, 2010.*]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 30

Rule 30. Appendix to the Briefs

(a) Appellant's Responsibility.

(1) Contents of the Appendix. The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) Excluded Material. Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the

appendix.

(3) Time to File; Number of Copies. Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) Costs of Appendix. Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) References to the Record.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 30, 1970, effective July 1, 1970; Mar. 10, 1986, effective July 1, 1986; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 31

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral

argument unless the court grants permission.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 30, 1970, effective July 1, 1970; Mar. 10, 1986, effective July 1, 1986; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 32

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 81/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 1/2 characters per inch.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 81/2 by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) Other Papers. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Apr. 25, 2005, effective Dec. 1, 2005.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 32.1

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Legislative History

[Adopted Apr. 12, 2006, effective Dec. 1, 2006.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 33

Rule 33. Appeal Conferences

The court may direct the attorneys--and, when appropriate, the parties--to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 34

Rule 34. Oral Argument

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 1, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 25, 2005, effective Dec. 1, 2005.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 35

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 1, 1979, effective Aug. 1, 1979; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 25, 2005, effective Dec. 1, 2005.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 36

Rule 36. Entry of Judgment; Notice

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion--but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion--or the judgment, if no opinion was written--and a notice of the date when the judgment was entered.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 37

Rule 37. Interest on Judgment

(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 38

Rule 38. Frivolous Appeal--Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 39

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing

necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must--within 14 days after entry of judgment--file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must--upon the circuit clerk's request--add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1, 1979; Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 40

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 30, 1979, effective Aug. 1,1979; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 41

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Mar. 26, 2009, effective Dec. 1, 2009.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 42

Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 43

Rule 43. Substitution of Parties

(a) Death of a Party.

(1) After Notice of Appeal Is Filed. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) Before Notice of Appeal Is Filed--Potential Appellant. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative--or, if there is no personal representative, the decedent's attorney of record--may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) Before Notice of Appeal Is Filed--Potential Appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for a Reason Other Than Death. If a party needs to be substituted for any reason other than death, the

procedure prescribed in Rule 43(a) applies.

(c) Public Officer: Identification; Substitution.

(1) Identification of Party. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) Automatic Substitution of Officeholder. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1,1986; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 44

Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 45

Rule 45. Clerk's Duties

(a) General Provisions.

(1) Qualifications. The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) Records.

(1) The Docket. The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) Calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) Other Records. The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Mar. 1, 1971, effective July 1, 1971; Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998; Apr. 29, 2002, effective Dec. 1, 2002; Apr. 25, 2005, effective Dec. 1, 2005.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 46

Rule 46. Attorneys

(a) Admission to the Bar.

(1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Legislative History

[Adopted Dec. 4,1967, effective July 1, 1968; amended Mar. 10, 1986, effective July 1, 1986; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 47

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with--but not duplicative of--Acts of Congress and rules adopted under *28 U.S.C. § 2072* and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 27, 1995, effective Dec. 1, 1995; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Rule 48

Rule 48. Masters

(a) Appointment; Powers. A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(b) Compensation. If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

Legislative History

[Adopted Dec. 4, 1967, effective July 1, 1968; amended Apr. 29, 1994, effective Dec. 1, 1994; Apr. 24, 1998, effective Dec. 1, 1998.]

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3-28 Moore's Manual--Federal Practice and Procedure Scope

APPENDIX OF FORMS, FEDERAL RULES OF APPELLATE PROCEDURE

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3- Moore's Manual--Federal Practice and Procedure Form 1

Form 1 Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the
_____ District of _____

A. B., Plaintiff	)	
v.	)	
	)	File Number _____
C. D., Defendant	)	
	)	
	)	

Notice of Appeal

Notice is hereby given that _____ (here name all parties taking the appeal), _____ (plaintiffs) (defendants) in the above named case,1)_and_footnotes(n1);.vk n* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20_____.

(s) _____

Attorney for _____

Address: _____

FOOTNOTES:
(n1)Footnote *. See Rule 3(c) for permissible ways of identifying appellants.

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3- Moore's Manual--Federal Practice and Procedure Form 2

Form 2 Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A. B., Petitioner v. Commissioner of Internal Revenue, Respondent	)))	Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (here name all parties taking the appeal)2)_and_footnotes(n1);.vk n* hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20_____ (relating to _____).

(s) _____

Counsel for _____

Address: _____

FOOTNOTES:
(n1)Footnote *. See Rule 3(c) for permissible ways of identifying appellants.

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3- Moore's Manual--Federal Practice and Procedure Form 3

Form 3 Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A. B., Petitioner	)	
v.	)	
	)	Petition for Review
XYZ Commission, Respondent	)	
	)	
	)	

_____ (here name all parties bringing the petition)3)_and_footnotes(n1);.vk n* hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 20_____.

(s) _____

Attorney for Petitioners

Address: _____

FOOTNOTES:
(n1)Footnote *. See Rule 15.

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3- Moore's Manual--Federal Practice and Procedure Form 4

Form 4 Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff	)	
v.	)	Case No. _____
C.D., Defendant	)	
	)	
	)	

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "O," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Date of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Date of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? $_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home .....(Value)	**Other real estate** .....(Value)	**Motor vehicle #1** .....(Value)
_____	_____	Make & year:

		_____
_____	_____	Model: _____
_____	_____	Registration #: _____

Motor vehicle #2 .....(Value)	**Other assets** .....(Value)	**Other assets** .....(Value)
Make & Year: _____	_____	_____
Model:_____	_____	_____
Registration #: _____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name [or, if under 18, initials only]	**Relationship**	**Age**
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	**Your spouse**
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____

Are real estate taxes included? ☐ Yes ☐ No

Is property insurance included? ☐ Yes ☐ No

Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify):_____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____

Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. Have you paid--or will you be paying--anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

13. State the city and state of your legal residence.

Your daytime phone number: (_____) _____

Your age:_____ Your years of schooling: _____

Your social-security number: _____

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PART VII Appeal
APPENDIX TO CHAPTER 28: FEDERAL RULES OF APPELLATE PROCEDURE
FEDERAL RULES OF APPELLATE PROCEDURE
APPENDIX OF FORMS, FEDERAL RULES OF APPELLATE PROCEDURE

3- Moore's Manual--Federal Practice and Procedure Form 5

Form 5 Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re	)	
_____,	)	
Debtor	)	File No. _____
_____, Plaintiff	)	
v. _____, Defendant	)	
	)	
	)	

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20_____ [here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

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PART VII Appeal
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APPENDIX OF FORMS, FEDERAL RULES OF APPELLATE PROCEDURE

3- Moore's Manual--Federal Practice and Procedure Form 6

Form 6 Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [state the number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [state name and version of word processing program] in [state font size and name of type style], or

☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

(s) _____

Attorney for _____

Dated: _____

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PART VII Appeal
1 SPECIAL ALERT FOR CHAPTER 29 AND APPENDIX TO CHAPTER 29

3-1 Moore's Manual--Federal Practice and Procedure Scope

Scope

Editor's Note:
On January 12, 2010, the United States Supreme Court ordered the revision of the Supreme Court Rules, effective February 16, 2010. The revised rules govern all proceedings in cases commenced on or after February 16 and, to the extent feasible and just, cases then pending. Set forth below are the amended rules with new matter boldfaced and matter to be omitted lined through. For more information, visit www.supremecourtus.gov. These changes will be fully incorporated into the text of *Moore's Manual: Federal Practice and Procedure* in Release 90.

REVISIONS TO RULES
OF THE
SUPREME COURT OF THE UNITED STATES ADOPTED January 12, 2010 EFFECTIVE February 16, 2010
The Clerk's Comments that accompany the revisions to the Rules are not part of the Rules. They are furnished solely to assist readers in understanding the revisions.

Revised Rule 25. Briefs on the Merits: Number of Copies and Time to File

1.

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. If cross-petitions or cross-appeals have been consolidated for argument, the Clerk, upon request of the parties, may designate one of the parties to file an initial brief and reply brief as provided in paragraphs 1 and 3 of this Rule (as if the party were petitioner or appellant), and may designate the other party to file an initial brief as provided in paragraph 2 of this Rule and, to the extent appropriate, a supplemental brief following the submission of the reply brief. In such a case, the Clerk may establish the time for the submission of the briefs and alter the otherwise applicable word limits. Except as approved by the Court or a Justice, the total number of words permitted for the briefs of the parties cumulatively shall not exceed the maximum that would have been allowed in the absence of an order under this paragraph.

The material within the following brackets is overstruck in the original. [4.] **5.** The time periods stated in paragraphs 1, 2, and 3 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

The material within the following brackets is overstruck in the original. [5.] **6.** A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

The material within the following brackets is overstruck in the original. [6.] **7.** After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

The material within the following brackets is overstruck in the original. [7.] **8.** The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

The material within the following brackets is overstruck in the original. [8.] **9.** An electronic version of every brief on the merits shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed.

[CLERK'S COMMENT: The Revised Rule allows for the adoption of a briefing schedule for consolidated cross-petitions or cross-appeals (whether or not they were filed under Rule 12.5 or Rule 18.4) using a four-brief format like the briefing structure set out in *Rule 28.1 of the Federal Rules of*

Appellate Procedure. The Rule also allows the briefing schedule to be approved by the Clerk without need for a motion to the Court. The total number of words contained in the four briefs filed under this paragraph cannot exceed the total number of words that otherwise would have been allowed under Rule 33.1(g)--*i.e.*, if both sides were to file opening briefs, responses, and replies--unless approved by the Court or a Justice.]

Revised Rule 26. Joint Appendix

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4.

(a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs

have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Two lines must appear at the bottom of the cover of the joint appendix: (1) The first line must indicate the date the petition for the writ of certiorari was filed or the date the appeal was docketed; (2) the second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed.

The material within the following brackets is overstruck in the original. [6.] **7.** Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

The material within the following brackets is overstruck in the original. [7.] **8.** The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

The material within the following brackets is overstruck in the original. [8.] **9.** For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

[CLERK'S COMMENT: The Revised Rule incorporates into the Rule instructions provided separately by the Clerk's Office.]

Revised Rule 33.1

(g) Word limits and cover colors for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
(vii) Reply Brief on the Merits (Rule 24.4)	The material within the following brackets is overstruck in the original. [7,500] **6,000**	yellow

[CLERK'S COMMENT: The Revised Rule restores the volume limit in effect for reply briefs on the merits prior to the 2007 Rule revisions. Experience has shown that the increased volume limit has allowed for the filing of some briefs that repeat previous arguments rather than address only new material presented in intervening briefs.]

Revised Rule 34. Document Preparation: General Requirements

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 9.1) and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address, **e-mail address**, and telephone number. Only one counsel of record may be noted on a single document, **except that counsel of record for each party must be listed on the cover of a joint appendix**. The names of other members of the Bar of this Court or of the bar of the highest court of State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se*, in which case the party's name, address, and telephone number shall appear.

(g) The foregoing shall be displayed in an appropriate typographical manner and, except for identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document exceeding five pages (other than a joint appendix), whether prepared under Rule 33.1 or Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(f) of this Rule, as may be desired.

4. Every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix.

5. All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified therein. In the event the provision has not been classified to the United States Code, citation should be to the Statutes at Large. Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument.

[CLERK'S COMMENT: For ease of reference, the changes require a descriptive index of appendices and citations to the United States Code, whenever available. The e-mail address of counsel of record is now required on the cover of a document. The requirement for listing counsel on the cover of the joint appendix is clarified.]

Revised Rule 37.1. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. **An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.**

[CLERK'S COMMENT: The change incorporates a longstanding practice of the Court into the Rule.]

Revised Rule 37.3(a). Brief for an *Amicus Curiae*

3.

(a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. **Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument.** An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

[CLERK'S COMMENT: The changes clarify that as with amicus curiae briefs at the petition stage, a motion to extend the time for filing an amicus curiae brief at the merits stage will not be entertained, and that the notice requirement applies only to petition-stage amicus curiae briefs.]

Revised Rule 42.1. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, The material within the following brackets is overstruck in the original. [the mandate will contain instructions with respect to the allowance of interest] **the courts below may award interest to the extent permitted by law**. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

[CLERK'S COMMENT: The Revised Rule recognizes that questions of allowance of interest are best left to the lower courts in the first instance.]

Revised Rule 48. Effective Date of Rules

1. These Rules, adopted The material within the following brackets is overstruck in the original. [July 17, 2007] **January 12, 2010**, will be effective The material within the following brackets is overstruck in the original. [October 1, 2007] **February 16, 2010**.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies.

3. The material within the following brackets is overstruck in the original. [In any case in which a petition for a writ of certiorari or appeal has been filed before the effective date of these revised Rules, but in which the respondent or appellee has not filed its response prior to that date, all remaining briefs submitted in that case prior to the Court's decision whether to grant review may comply with the May 2, 2005 version of the Rules of the Supreme Court of the United States rather than with these revised Rules. Similarly,]In any case in which a petitioner or appellant has filed its brief on the merits prior to the effective date of these revised Rules, all remaining briefs in that case may comply with the May 2, 2005 October 1, 2007, version of the Rules of the Supreme Court of the United States rather than with these revised Rules.

[CLERK'S COMMENT: A provision specifically applicable to the 2007 Rules changes has been deleted.]

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure 29.syn

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

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§ 29.01 Supreme Court Jurisdiction

[1] Both Original and Appellate Jurisdiction

Article III of the Constitution gives the United States Supreme Court both original and appellate jurisdiction. n1 "Original jurisdiction" is the authority of a court to act as a trial court and to hear and adjudicate claims for relief by considering testimony and evidence in an original action. n2 By contrast, "appellate jurisdiction" means the authority of a court to review the judgment of another court which has decided a claim for relief as a trial court, or to review the judgment made by a lower appellate court. n3 In exercising its original and appellate jurisdiction in civil cases, the Court is bound by the *Seventh Amendment*, which requires the court to recognize the parties' right to a jury trial in civil common law actions. n4 Additionally, the *Eleventh Amendment* prohibition against certain suits against an individual state, n4.1 and the underlying principles, sovereign immunity and justiciability, limit the scope of the Court's original and appellate jurisdiction. n5 The Supreme Court's original jurisdiction is explicit in the Constitution, n6 while the appellate jurisdiction of the Supreme Court is subject to exceptions and regulations made by Congress. n6.1

[2] Original Jurisdiction n*

[a] Constitutional and Statutory Basis of Original Jurisdiction

As specified in the Constitution, the United States Supreme Court has the power in certain circumstances to act as a trial court and to hear and decide claims for relief and defenses against such claims; in other words, it has original jurisdiction. n7 The Constitution gives the Supreme Court original jurisdiction over two types of cases: the first type is cases that affect ambassadors and other representatives of foreign states. The second type consists of cases in which one of the United States is a party. n8 Neither of these constitutional grants is exclusive; however, by statute, Congress has given the Supreme Court *exclusive* original jurisdiction over controversies between two or more states. n9 Also by statute, Congress has given the Supreme Court original jurisdiction concurrent with the district courts over actions to which ambassadors, other public ministers, consuls, and vice consuls of foreign states are parties, n10 controversies between the United States and a state, n11 and actions by a state against the citizens of another state or against aliens. n12

While Article III expressly states that Congress can regulate the Supreme Court's appellate jurisdiction, Congress cannot restrict the Supreme Court's original jurisdiction. n13 Article III's grant of original jurisdiction to the Supreme Court is

self-executing, which means that the Supreme Court does not need Congress's approval to exercise such jurisdiction. n14 Congress has the option, however, to give concurrent original jurisdiction to other courts. n14.1

The Supreme Court has held that its original jurisdiction is limited to civil actions and not criminal proceedings. n15 The Court has stated that it will not exercise original jurisdiction in such cases because of their local nature and because it is inappropriate for one jurisdiction to enforce another's criminal law. n16 The exclusion of criminal cases from the Supreme Court's original jurisdiction includes any case in which a state is seeking to recover a penalty for an offense against its own laws. In one case, for example, the Court would not decide an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for a fine imposed under Wisconsin law. n17

[b] Supreme Court Has Exclusive Original Jurisdiction Over Actions Between Two or More States

Although Congress may not limit the Supreme Court's jurisdiction over actions between states, the exclusivity of the Supreme Court's original jurisdiction is a matter subject to Congressional control; Congress has the power to give the lower federal courts concurrent jurisdiction over such actions. However, Congress has declined to do so, and the current statute gives the Supreme Court original and exclusive jurisdiction over all controversies between two or more states. n17.1 In addition, the Court has stated that because of the nature of such disputes, litigation between states should be within the Supreme Court's exclusive jurisdiction. n18 The Court has held that a state's express consent is not a prerequisite for its being sued by another state or other states; the states are deemed to have consented to such suits by ratifying the Constitution. n19 The Supreme Court has also noted that the states' ability to file suits against each other in court is an essential element of American federalism because states cannot resort to force for the redress of any grievance. Many of the early cases between states involved disputes over state boundaries. n20 However, the Court has exercised its original jurisdiction in many types of state versus state controversies, including pollution control n21 and interstate tax issues. n22

The Supreme Court is not obligated to hear every state versus state action, because its exercise of original jurisdiction is discretionary, not mandatory. n23 The Court has stated that it believes its original jurisdiction should be invoked sparingly, n24 and in determining whether a state versus state case is an appropriate instance for the exercise of its original jurisdiction, the Court considers two factors: first, the nature and seriousness of the interest of the complaining state, and second, the availability of an alternative forum in which the issue tendered could be resolved. n25 For example, when the state of Wyoming made a *commerce clause* challenge to Oklahoma legislation which required that Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma burn a mixture of coal containing at least 10 percent Oklahoma mined coal, the case was an appropriate one for the exercise of the Supreme Court's original jurisdiction because the case implicated serious and important concerns of federalism, Wyoming had a significant interest at issue, and there was no pending action to which the adjudication could be deferred. n26

Under the exclusive jurisdiction statute, n27 a political subdivision of a state does not constitute a "state" and therefore, the case is not within the exclusive jurisdiction of the United States Supreme Court. n28 This principle also applies to state officials. Thus, a controversy between one state and the governor of another state, challenging the creation of a regional airport authority by one city in each state, did not present a controversy between two states that was within exclusive jurisdiction of the Supreme Court. n29

[c] Supreme Court's Concurrent Original Jurisdiction Shared With Other Federal Courts

By statute, the Supreme Court has original but not exclusive jurisdiction of the following three types of actions:

1. All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties. n30 The Supreme Court's jurisdiction is concurrent because, by statute, the district courts have original jurisdiction exclusive of the courts of the states over civil actions

commenced against (1) consuls or vice consuls of foreign states, (2) members of a diplomatic mission, or (3) family members of persons serving in a diplomatic mission. n31 The Supreme Court has only rarely invoked its original jurisdiction over actions involving ambassadors and other representatives of foreign states, because of the immunity given to most ambassadors and other diplomatic personnel. The Court almost always rejects attempts to invoke this aspect of its original jurisdiction. n32

2. All controversies between the United States and a state. n33 Another statute also gives federal district courts original jurisdiction of all civil actions, suits or proceedings commenced by the United States, n34 and it has been held that this statute applies to all justiciable actions brought by the United States against a state. n35 The Supreme Court's jurisdiction is original whenever a State is a party. n35.1 Furthermore, a state's consent is not a prerequisite for such an action, because the states implicitly consented to such suits by ratifying the Constitution. n36

3. All actions by a state against the citizens of another state or against citizens of a foreign state. n37 However, Congress has passed no statute that gives similar jurisdiction to other federal courts. Therefore, the Supreme Court effectively has exclusive jurisdiction over such actions. n38

[d] Original Jurisdiction Practice

[i] Leave to File Original Jurisdiction Action

The Supreme Court has stated that due to the serious and important character of its original jurisdiction, it interprets Article III of the United States Constitution and the original jurisdiction statute as giving it substantial discretion to make case-by-case judgments as to the practical necessity of providing an original forum in the Supreme Court. n39 Because the Court's exercise of original jurisdiction is discretionary, a pleading that invokes the Supreme Court's original jurisdiction must be preceded by a motion for leave to file an original action in the Supreme Court. n40 This motion is known as a motion for leave to file a bill of complaint, n41 and the Court has explained that it serves the important gatekeeping function of allowing the Court to maintain control over the cases it hears under its original jurisdiction. n42

A party that is filing a motion for leave to file a bill of complaint to invoke original jurisdiction in the Supreme Court may, but is not required to, file a brief in support of the motion for leave to file the action. n43 Persons opposing the motion may also file briefs in opposition to the motion. n44 The party filing a motion for leave to file a bill of complaint must file 40 copies of the motion, and any brief in support of the motion. The motion and brief, if any, must be served either personally or by mail. n45 When the opposition party is one of the United States, the motion and brief must be served on both the governor and the attorney general of that state. n46 If the United States is a party, service must be made on the Solicitor General or attorney general, as appropriate. n47 Proof of service must be included with the motion and brief, if any. n47.1 For a further discussion of filing and service of documents under Supreme Court Rule 29, see *§ 29.10[1].*

When the motion for leave to file and the initial pleading are filed with the clerk, the clerk will place the prospective original jurisdiction action on the Court's docket. n48 The opposition party has up to 60 days in which to file 40 copies of its brief in opposition to the motion, and must include proof of service as required by Supreme Court Rule 29. n49 The Supreme Court Clerk must distribute the motion and accompanying briefs to the members of the Court at the earliest of the following: no less than 10 days after the opposing parties have filed a brief in opposition, when the clerk receives an express waiver from all opposing parties of their right to file a brief in opposition or, if no waiver of the right to file an opposing brief is filed, on the expiration of the time allowed for filing a brief in opposition to the motion. n50 The party requesting leave to file the original action may file a reply brief, but the Court will not defer consideration of the matter pending its filing. n51

After it considers the filings, the Supreme Court may either grant or deny the motion for leave to file the bill of complaint, n52 set the motion for oral argument, n53 direct that additional documents be filed, or order that other proceedings be conducted. n54 If the Court denies a party's motion for leave to file a bill of complaint, the party may seek reconsideration of the denial. n55 A party may also file a renewed motion for leave to file the bill of complaint, n56 or in proper circumstances other proper parties may file a motion for leave. n56.1 If the Court grants leave and the movant files an original action with the Court, the party may voluntarily dismiss the action without obtaining leave from the Court if all the parties file an agreement to that effect with the Supreme Court Clerk; the agreement must specify the terms for payment of costs and the parties must pay the costs as specified to the Court Clerk. n57 For a complete discussion of procedures under Supreme Court Rule 17, see *§ 29.05*.

[ii] Procedure in Original Jurisdiction Action

The rules of procedure and evidence that the Supreme Court uses in an action brought under the Supreme Court's original jurisdiction are set forth in Supreme Court Rule 17. n58 In original jurisdiction actions, the general form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed by the Supreme Court. For other procedural matters, the Supreme Court takes the other Federal Rules of Civil Procedure as guides. Additionally, for evidentiary matters, the Supreme Court uses the Federal Rules of Evidence as guides for trials under the Supreme Court's original jurisdiction. n59 Thus, all pleadings in a Supreme Court original jurisdiction trial must conform to Federal Rules 7 through 11. Because the Supreme Court takes the remainder of the Federal Rules of Civil Procedure and all of the Federal Rules of Evidence as guides, the Court is not technically bound by those rules, but may utilize them in a manner appropriate for the particular original jurisdiction trial. For example, the Court has used Rule 56 to apply the principle that summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. n60 In another example, the Court has stated that the concern for liberal amendment of the pleadings pervasive in the *Federal Rule of Civil Procedure 15* n61 does not suit cases within the Supreme Court's original jurisdiction. The need for a more strict standard regarding amendment of pleadings follows from the Court's traditional reluctance to exercise original jurisdiction in any but serious circumstances even when the Court's jurisdiction is exclusive, as in cases between two or more states. Consequently, the Court has a requirement that requested pleading amendments are to be scrutinized closely to see whether they would take the litigation beyond what the Court reasonably anticipated when it granted leave to file the initial pleadings. n62

There is also another important difference between the process of instituting an action in a federal district court under the Federal Rules of Civil Procedure and one in the Supreme Court pursuant to its original jurisdiction. Because, the Supreme Court's exercise of its original jurisdiction is discretionary, and not mandatory, the Court requires that an initial pleading filed to invoke an original action be preceded by a motion for leave to file, which may be accompanied by a brief in support of the motion. n63

During the trial of an action, the Court itself does not sit as a trial court but appoints a master n64 who conducts the fact-finding process, n65 employing the procedure authorized by the Federal Rules of Civil Procedure. n66 The Supreme Court will appoint a master with authority to establish the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, and to summon witnesses, issue subpoenas, and take evidence that the litigants may introduce. The master is directed to submit any reports he or she may deem appropriate. n67

The parties to the original proceeding may assert legal or factual exceptions to the report submitted by the master. n68 The Court may accept or reject those exceptions, just as the Court may adopt or reject all or part of a master's report. n69 Before it makes its final order, the Court may also remand an action to a master for further proceedings. n70

In its adjudication of an original jurisdiction trial the law that the Supreme Court will apply depends on the nature of the action. If the claim between two or more states is a matter that may not be heard by a state court, the Court may not utilize the law applied by any of the states that are parties to the litigation, because that application may give unfair advantage to that state. However, the nature of these types of disputes also makes it unlikely that the Court will be able

to rely on the provisions of the Constitution or on a federal statute. Consequently, in this situation the Court will typically apply federal common law, also referred to as interstate federal common law. n71 This is a flexible principle, however, and although interstate federal common law applies in such cases, the Court has discretion to consider any state standards that may be appropriate and relevant in deciding a specific claim. n71.1 In cases affecting ambassadors and other representatives of foreign governments, the Court will also apply federal, state, and international law, as it deems appropriate. n72

[3] Appellate Jurisdiction

[a] In General n*

Because it limits its original jurisdiction to relatively few serious disputes, n73 the Supreme Court typically functions as a court of appellate review, n73.1 which means that the Court is exercising its authority to review the judgment of another court which has decided a claim for relief as a trial court, or to review the judgment made by a lower appellate court. n73.2 The Court's appellate jurisdiction is specified in Article III of the U.S. Constitution, which prescribes the general limitations of federal judicial power. Under the first clause of Article III, Section 2, the federal judicial power is defined as extending to all of the following cases: n74

1. Cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made under authority of the Constitution or such laws.

2. Cases affecting ambassadors, other public ministers and consuls.

3. Cases of admiralty and maritime jurisdiction.

4. Cases to which the United States is a party.

5. Cases between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens of a state, and foreign states, citizens, or subjects.

The second clause of Article III, Section 2, allocates this power to the Supreme Court, giving it original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and cases in which a state is a party, n75 and appellate jurisdiction over all of the other cases in the first clause of Section 2 that are listed above. n76 The second clause is not an independent grant of jurisdiction; it merely distributes the power conferred by the first clause. n77

The second clause of Article III, Section 2, also includes two provisions that qualify its grant of appellate jurisdiction. One provision states that the Supreme Court's appellate jurisdiction exists both with respect to law and to fact; the other provision states that appellate jurisdiction exists with any exceptions and under any regulations that may be made by Congress. n78 Unlike the Supreme Court's original jurisdiction, n79 its appellate jurisdiction is not limited to civil actions, but includes the power to hear appeals in both civil and criminal cases. n80

Under the statutory scheme of the United States Code, Congress has specified the Supreme Court's appellate jurisdiction in a series of discrete statutes, all of which are codified in Title 28 of the Code. One of the Supreme Court's primary responsibilities is to exercise the authority given by Congress to review decisions of the federal courts of appeals, n80.1 whether entered in a civil or criminal case. n81 The Court has absolute discretion to review such a decision, and consequently, a litigant must seek a writ of certiorari from the Court to obtain review. n82 The statute also gives the Court jurisdiction over questions of law which a federal court of appeals certifies for Supreme Court review. n83 A certified question may arise in either a civil or criminal case. The certification procedure provides courts of appeals an opportunity to obtain instructions from the Supreme Court for the proper decision of cases pending before them. n84

Like review pursuant to a writ of certiorari, the Court's review of a certified question is discretionary, not mandatory. The Supreme Court has stated that certification must be reserved for exceptional cases when certification may be advisable in the proper administration and expedition of judicial business, for example, when the pendency of another case before the Court raises the same issue. n85

The Supreme Court also has jurisdiction to review an order granting or denying an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any act of Congress to be heard and determined by a district court of three judges. n86 The Supreme Court views its jurisdiction over three-judge decisions narrowly. n87

Another statute gives the Supreme Court the authority to review state court decisions. n88 Under this statute, the Supreme Court has jurisdiction to review certain final judgments or decrees rendered by a state's highest court. Congress substantially revised this statute in 1988, and substituted discretionary review pursuant to a writ of certiorari for provisions that had given the Court mandatory appellate jurisdiction over the highest state court decisions. n89

Lastly, Congress has also given discretionary review to the Supreme Court to review decisions of specialized courts, including review of judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico, n90 and for review of decisions rendered by the U.S. Court of Appeals for the Armed Forces. n91 To obtain review from both of these types of decisions, a litigant must seek a writ of certiorari from the Supreme Court. n92

[b] Review of Decisions of Federal Courts of Appeals n*

[i] Decisions Reviewable

Congress has given the Supreme Court jurisdiction to review decisions entered in a civil or criminal case by any of the eleven numbered circuit courts of appeals, the District of Columbia Circuit Court of Appeals and the Federal Circuit Court of Appeals. n93 Review of the court of appeals decisions is a matter within the Court's discretion; consequently, a litigant seeking Supreme Court review of such a decision must petition the Supreme Court for review, n94 through the device known as a writ of certiorari. n95 The Supreme Court can grant a writ of certiorari before or after the court of appeals renders its judgment in a case that is before the court of appeals.

The Supreme Court has imposed restrictions on the circumstances under which it will issue a petition for a writ of certiorari to review a case pending in a court of appeals before judgment is entered. Such a petition will be granted only if the litigant shows that the case is of such imperative public importance that it justifies deviation from normal appellate practice, and that it requires immediate determination by the Supreme Court. n96

[ii] Writ of Certiorari

The primary method of obtaining appellate review from the Supreme Court is through a writ of certiorari. The statutory writ of certiorari is created by the jurisdictional statutes that authorize the Supreme Court to use the writ to exercise its discretionary appellate review over certain types of cases. The certiorari procedure is the primary means of seeking review of decisions issued by a federal court of appeals. n97 Thus, the Supreme Court uses certiorari jurisdiction for the principal purpose of resolving conflicts among the circuit courts of appeals regarding the meaning of provisions of federal law. n98

Review under a writ of certiorari is discretionary, not obligatory and will be granted only for compelling reasons. n99 Supreme Court Rule 10 specifies the factors that the Court considers in making a decision, including if the court of appeals: (1) has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; (2) has decided an important federal question in a way that conflicts with a decision by a state court of last resort; (3) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, that the decision calls for an exercise of the Supreme Court's supervisory power; n100(4) has

decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or (5) has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. n101

The Supreme Court also has authority to issue a "common-law writ of certiorari," which is used to review cases that do not fall within the provisions of the statutes which specifically define its appellate jurisdiction. n102 The Supreme Court derives this power through the All Writs Act, which provides that the Supreme Court may issue all writs necessary or appropriate in aid of its jurisdiction, provided the writ is in agreement with the usages and principles of the law. n103 The Supreme Court has stated that, under the Act, the Court has power, in the aid of its appellate jurisdiction, to review judgments and orders by resort to the common-law writs of certiorari, mandamus, and prohibition, and that the writs may be granted or denied in the sound discretion of the Supreme Court. n104

For a complete discussion of the procedural considerations applicable to the grant or denial of writs of certiorari, see *§ 29.05*.

[c] Review on Certification of Question by Court of Appeals n*

The Supreme Court has jurisdiction over questions of law that a federal court of appeals has certified for Supreme Court review. n105 The Supreme Court may review a certified question whether it arises in a civil case or a criminal case, provided that the appellate court requests instructions from the Supreme Court on how the appellate court is to proceed. n106 Like its review pursuant to a writ of certiorari, n107 the Court's review of a certified question is discretionary. The Supreme Court has stated that it will accept jurisdiction based on certification only in exceptional cases, for example, when the pendency of another case before the Supreme Court raises the same issue, and therefore certification would be advisable in the proper administration and expedition of judicial business. n108 In considering a certified question, the Supreme Court may either give binding instructions to the circuit court, or have the record below transmitted to the Supreme Court, which would then decide the entire matter in controversy. n109

[d] Review of Order Granting or Denying Injunction by Three-Judge District Court n*

The Supreme Court has very restricted jurisdiction to directly review decisions of district courts. It has jurisdiction to review an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. n110 This type of appeal may be brought by any party to the action. n111 The Supreme Court has construed its jurisdiction over three-judge decisions pursuant to *28 U.S.C.§ 1253* narrowly. n112 The Court has stated that the three-judge-court legislation is not a measure of broad social policy to be construed with great liberality but is rather to be applied in a technical sense. n113

An example of this narrow construction is the Court's interpretation of the Section 1253 provision authorizing direct appeal to the Supreme Court from an order granting or denying an injunction in cases requiring a three-judge district court. The fact that an otherwise qualifying order is issued by a three-judge court does not by itself satisfy the statute. The case must be one that requires a three-judge court. If the court has been improperly convened, its decision is not appealable to the Supreme Court and must be taken to the court of appeals. n114 The Supreme Court has also declined to review the actions of a single judge sitting on a three-judge court n115 and has dismissed an appeal of a temporary restraining order entered by a single judge of a three-judge court on the grounds of lack of jurisdiction. n116

Section 1253 provides for direct, exclusive appeal to the Supreme Court from any order granting or denying any interlocutory or permanent injunction in any action requiring a three-judge court, except as otherwise provided by law. It is clear that Section 1253 governs appeals in actions seeking an injunction under Section 2284, which governs only legislative and congressional reapportionment cases. n117 However, there are several statutes in addition to Section 2284 that independently authorize the formation of three-judge district courts. These include, for example, various provisions relating to voting rights violations n118 and discrimination in employment. n119 These statutes create direct,

nonexclusive Supreme Court appellate jurisdiction independent of Section 1253. Several of the statutes broadly provide that any appeal may be taken to the Supreme Court. n120 Others provide that any appeal from a final judgment of the three-judge district court will lie to the Supreme Court. n121

[e] Review of State High Court Decisions n*

[i] Highest State Court Decision on Federal Question

The Supreme Court has jurisdiction to review certain final judgments or decrees rendered by a state's highest court that may render a decision on a particular question. n122 The term "highest court of the state" includes the District of Columbia Court of Appeals. n123 An intermediate appellate court is the "highest court" for purposes of *28 U.S.C. § 1257* if its decision in question is not reviewable by another state court. A trial court is the "highest court in which a decision can be had" if under state practice its judgment is final and not reviewable in any state appellate court. n124

A trial court may also be considered the "highest state court" for purposes of United States Supreme Court certiorari jurisdiction when state appellate review procedures applicable to the federal issue would delay review to the detriment of a party's important constitutional rights. For example, when a trial court entered an order restraining potential *First Amendment* rights, and the state supreme court under state rules delayed consideration of the issue, the United States Supreme Court concluded that the trial court's order was final and unreviewable by any other state court. Therefore, the final judgment of the trial court was subject to appellate review by the United States Supreme Court. n125

The Supreme Court has stated that the final judgment requirement of Section 1257 should not be mechanically construed. Thus, Supreme Court jurisdiction is not destroyed by the mere fact that the highest state court did not enter the final judgment with the requisite formalities under state law. A judgment is generally "final" for purposes of Supreme Court review if the judgment effectively determines the litigation of the federal issue, leaving nothing to be judicially decided on that issue. n126

The Supreme Court's jurisdiction over appeals from a state's highest court is discretionary. n127 Therefore, to obtain review of the highest court of a state, a litigant must seek a writ of certiorari from the Supreme Court. n128 The Supreme Court has held that it will exercise jurisdiction to review a state court judgment or decision only if at least one of the following criteria specified in the statute exists: n128.1

1. The judgment or decision calls into question the validity of a federal statute or treaty.

2. The judgment or decision finds a state statute repugnant to the Constitution, laws, or treaties of the United States. n128.2

3. The judgment or decision addresses a contention that a title, right, privilege, or immunity is asserted or claimed under the Constitution or the treaties or statutes of the United States, or any commission held or authority exercised under the United States.

Federal court jurisdiction to review the judgments of state courts lies exclusively in the United States Supreme Court. Consequently, if a state court misinterprets or erroneously determines a federal question, the litigant may not obtain review in the United States District Court or the United States Courts of Appeals. Similarly, a litigant may not obtain declaratory relief to have a lower federal court control a state court's decision on federal law. n129

[ii] State Court Decision Must Be Final

The statutory authorization for certiorari review of a decision of a state's highest court provides that the Supreme Court may not review a judgment or decision of a state court unless the judgment or decision is final. n130 The finality

requirement of this statute has several purposes: it avoids piecemeal review of state court decisions; it avoids giving advisory opinions in cases where there may be no real "case or controversy;" and it limits review of state court determinations of federal constitutional issues to minimize federal intrusion into state affairs. n131 The Supreme Court has stated that the finality requirement is a strict prerequisite to the Court's deciding the merits of an appeal of a state court decision. Thus, the Court may dismiss an appeal of a state court decision on grounds of lack of finality even if the issue is not raised by any party. n132

Whether a state court judgment or decision is final is determined by federal law as stated in Supreme Court precedent, irrespective of state law relating to finality. n133 Generally, a state court decision is final for the purpose of Supreme Court appeal if the judgment effectively determines the litigation of the federal issue, leaving nothing to be judicially decided. On the other hand, a judgment or decree is not final if it merely determines interlocutory or intermediate steps or issues in the case. n134

There are exceptions to the strict finality rule. If the state court decision determines the federal litigation, the decision may be considered final even if further state court proceedings have been ordered to be held on remand from the state's highest court. In this regard, the Supreme Court has specified four exceptional categories of cases to be regarded as"final" on the federal issue despite the ordering of further proceedings in the lower state courts by the state's highest court: n135

1. When the federal issue is conclusive or the outcome of any further proceedings in the state courts is preordained n136

2. When the federal issue will survive any possible outcome of the future state court proceedings and will require resolution by the Supreme Court. n137

3. When the federal claim has been finally decided but later review of the federal issue will be impossible whatever the ultimate outcome of the state court proceedings. n138

4. When the federal issue has been finally decided by the state high court, but the party seeking review of the federal issue in the United States Supreme Court might prevail on the merits on nonfederal grounds in the subsequent lower state court proceedings, provided that a refusal by the Supreme Court to immediately review the state court decision might seriously erode federal policy. n139

[iii] Federal Question Must be Substantial

In addition to the requirement of finality, United States Supreme Court will not review a decision unless the federal question is substantial. n140 This rule is not based on statute but is imposed by the Supreme Court itself based on its discretion to grant or dismiss a petition for certiorari; thus, whenever it appears that the federal question is insubstantial, the Supreme Court will dismiss the writ of certiorari as improvidently granted, n141 even if the lack of a substantial federal question is not apparent until after the Court has heard oral argument. n142

With respect to the requirement of substantiality of the federal issue, the United States Supreme Court has determined that it may not review a state court judgment or decision unless resolution of the federal issue would affect the validity of the judgment or decision of the state court. n143 Therefore, the United States Supreme Court has promulgated a self-imposed restriction that the Supreme court will not review a state court decision if the state court decision is based on state law that is "independent" of federal law and is "adequate" to support the state court decision, regardless of how the federal issue would be resolved in the case. In other words, the United States Supreme Court will not review a state court decision if a reversal of the state court's federal law ruling would not change the outcome of the case. n143.1 In such circumstances, a United States Supreme Court opinion on the federal issue would amount to an impermissible advisory opinion, because the federal issue determination would not affect the outcome of the case. n143.2

[f] Review of Decisions of Specialized Courts

[i] Military Courts n*

Congress has given the Supreme Court jurisdiction to review decisions rendered by the U.S. Court of Appeals for the Armed Forces. n144 To obtain such review, a litigant must seek a writ of certiorari from the Supreme Court. n145 Because its review of these decisions is discretionary, rather than mandatory, n146 the Court often refuses to grant a writ of certiorari. n147 The Supreme Court may exercise direct review jurisdiction in any of four types of military cases:

1. Capital cases reviewed by the Court of Appeals for the Armed Forces under *10 U.S.C. Section 867(a)(1)*. n148

2. Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under *10 U.S.C. Section 867(a)(2)*. n149

3. Cases in which the Court of Appeals for the Armed Forces granted a petition for review under *10 U.S.C. Section 867(a)(3)*. n150

4. Cases that do not fall within any of these categories, in which the Court of Appeals for the Armed Forces granted relief. n151

[ii] Puerto Rico Supreme Court n*

Congress has given the Supreme Court jurisdiction to review decisions rendered by the Supreme Court of the Commonwealth of Puerto Rico. n152 Because review is discretionary, and not mandatory, a litigant must apply for review by petition for a writ of certiorari from the Supreme Court of the United States. n153 For the Court to exercise jurisdiction to review such a judgment or decree, the judgment or decree must do any one of the following: n154

1. Call into question the validity of a federal statute or treaty.

2. Indicate that a Puerto Rican statute is repugnant to the Constitution, treaties, or laws of the United States. n155

3. Address a contention that a title, right, privilege, or immunity is specially set up or claimed under the Constitution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureU.S. Supreme Court ReviewGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. U.S. Const., Art. III.

(n2)Footnote 2. *South Carolina v. North Carolina, ___ U.S. ___, 130 S. Ct. 854, 175 L. Ed. 2d 713, 718, 730 (2010)* .

(n3)Footnote 3. *Marbury v. Madison, 5 U.S. 137, 174, 2 L. Ed. 60 (1803)* ; *see Britt v. Garcia, 457 F.3d 264, 266-267 (2nd Cir. 2006)* .

(n4)Footnote 4. *U.S. Const. Amend. VII.*

(n5)Footnote 4.1. *U.S. Const. Amend. XI.*

(n6)Footnote 5. *See Flast v. Cohen, 392 U.S. 83, 94-97, 101, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)* ; *see also* Ch. 1, *Federal Courts.*

(n7)Footnote 6. *See* [2], *below.*

(n8)Footnote 6.1. *U.S. Const., Art. III, § 2, Cl. 2*; *see* [3], *below.*

(n9)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice*, § 402.02 et seq. (Matthew Bender 3d ed.).

(n10)Footnote 7. *See U.S. Const., Art. III, § 2, cl. 2*; *Kansas v. Colorado, ___ U.S. ___, 129 S. Ct. 1294, 173 L. Ed. 2d 245, 249-250 (2009)* (court's original jurisdiction as trial court to hear case by one state against another state).

(n11)Footnote 8. *See U.S. Const., Art. III, § 2, cl. 2.*

(n12)Footnote 9. *28 U.S.C. § 1251(a).*

(n13)Footnote 10. *28 U.S.C. § 1251(b)(1).*

(n14)Footnote 11. *28 U.S.C. § 1251(b)(2).*

(n15)Footnote 12. *28 U.S.C. § 1251(b)(3).*

(n16)Footnote 13. *See U.S. Const., Art. III, § 2, cl. 2*; *see Kansas v. Colorado, ___ U.S. ___, 129 S. Ct. 1294, 173 L. Ed. 2d 245, 250 (2009)* (concurring opinion).

(n17)Footnote 14. *California v. Arizona, 440 U.S. 59, 65, 99 S. Ct. 919, 59 L. Ed. 2d 144 (1979)* (original jurisdiction requires no legislative implementation).

(n18)Footnote 14.1. *See* [b], *below.*

(n19)Footnote 15. *Georgia v. Pennsylvania R.R., 324 U.S. 439, 446, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* (original jurisdiction does not include enforcement of state penal statutes).

(n20)Footnote 16. *Chisholm v. Georgia, 2 U.S. 419, 432, 1 L. Ed. 440 (1793)* (criminal cases are of local nature and to be decided by local laws).

(n21)Footnote 17. *Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299-300, 8 S. Ct. 1370, 32 L. Ed. 239 (1888)* (statute assessing penalties against out-of-state insurance companies that failed to meet certain reporting requirements construed as criminal).

(n22)Footnote 17.1. *28 U.S.C. § 1251(b)(3)*; *see Hood ex rel Mississippi v. City of Memphis, 570 F.3d 625, 631 (5th Cir. 2009) .*

(n23)Footnote 18. *See Kansas v. Colorado, 185 U.S. 125, 139, 22 S. Ct. 552, 46 L. Ed. 838 (1902) .*

(n24)Footnote 19. *Principality of Monaco v. Mississippi, 292 U.S. 313, 328-330, 54 S. Ct. 745, 78 L. Ed. 1282 (1934) .*

(n25)Footnote 20. *Mississippi v. Louisiana, 506 U.S. 73, 74, 113 S. Ct. 549, 553, 121 L. Ed. 2d 466 (1992) .*

(n26)Footnote 21. *See Alabama v. North Carolina, ___ U.S. ___, 130 S. Ct. 2295, 176 L. Ed. 2d 1070, 1081 (2010)* .

(n27)Footnote 22. *Maryland v. Louisiana, 451 U.S. 725, 735-736, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)* .

(n28)Footnote 23. *Texas v. New Mexico, 462 U.S. 554, 570, 103 S. Ct. 2558, 77 L. Ed. 2d 1 (1983)* (substantial discretion to determine practical necessity of exercising original jurisdiction).

(n29)Footnote 24. *Utah v. United States, 394 U.S. 89, 95, 89 S. Ct. 761, 22 L. Ed. 2d 99 (1969)* .

(n30)Footnote 25. *Illinois v. City of Milwaukee, 406 U.S. 91, 93, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* .

(n31)Footnote 26. *Wyoming v. Oklahoma, 502 U.S. 437, 451, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)* .

(n32)Footnote 27. *28 U.S.C. § 1251.*

(n33)Footnote 28. *Illinois v. City of Milwaukee, 406 U.S. 91, 98, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* (political subdivisions deemed citizens of states, rather than states).

(n34)Footnote 29. *Edgar v. City of Chicago, 942 F. Supp. 366, 369-370, (N.D. Ill. 1996)* , *vacated on other grounds, 137 F.3d 474 (1998)* .

(n35)Footnote 30. *28 U.S.C. § 1251(b)(1).*

(n36)Footnote 31. *28 U.S.C. § 1351* (note that § 1351 includes only those persons on some type of diplomatic mission; it does not include mere employees of foreign nations).

(n37)Footnote 32. Cf. *In re Republic of Suriname ex rel. Boerenveen, 484 U.S. 961, 108 S. Ct. 447, 98 L. Ed. 2d 388 (1987)* (court declined to exercise original jurisdiction).

(n38)Footnote 33. *28 U.S.C. § 1251(b)(2)*; *see, e.g., United States v. Maine, 469 U.S. 504, 505-506, 105 S. Ct. 992, 83 L. Ed. 2d 998 (1985)* (action by United States to determine rights to seabed and subsoil off coast of eastern seaboard states)

(n39)Footnote 34. *28 U.S.C. § 1345.*

(n40)Footnote 35. *United States v. Illinois, 454 F.2d 297, 301 (7th Cir. 1971)* , *cert. denied, 406 U.S. 918 (1972)* .

(n41)Footnote 35.1. *U.S. Const., Art. III, § 2, cl. 2.*

(n42)Footnote 36. *See United States v. Texas, 143 U.S. 621, 643-646, 12 S. Ct. 488, 36 L. Ed. 285 (1892)* .

(n43)Footnote 37. *28 U.S.C. § 1251(b)(3).*

(n44)Footnote 38. *Cf. Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 499 n.3, 91 S. Ct. 1005, 28 L. Ed. 2d 256, 57 Ohio Op. 2d 351 (1971)* .

(n45)Footnote 39. *Mississippi v. Louisiana, 506 U.S. 73, 76, 113 S. Ct. 549, 552, 121 L. Ed. 2d 466 (1992)* (original jurisdiction is to be exercised only sparingly); *Wyoming v. Oklahoma, 502 U.S. 437, 450, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)* (Court applied discretion even when its jurisdiction was exclusive).

(n46)Footnote 40. *Wyoming v. Oklahoma, 502 U.S. 437, 440, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)* (leave to file granted over Oklahoma's objections).

(n47)Footnote 41. *Louisiana v. Mississippi, 516 U.S. 22, 23, 116 S. Ct. 290, 292, 133 L. Ed. 2d 265 (1995)* .

(n48)Footnote 42. *Nebraska v. Wyoming, 515 U.S. 1, 8, 115 S. Ct. 1933, 1938, 132 L. Ed. 2d 1 (1995)* .

(n49)Footnote 43. Sup. Ct. R. 17.3.

(n50)Footnote 44. Sup. Ct. R. 17.5; *Alabama v. North Carolina, ___ U.S. ___, 130 S. Ct. 2295, 176 L. Ed. 2d 1070, 1078 (2010)* .

(n51)Footnote 45. Sup. Ct. R. 29.3.

(n52)Footnote 46. Sup. Ct. R. 17.3.

(n53)Footnote 47. *See* Sup. Ct. R. 29.4.

(n54)Footnote 47.1. Sup. Ct. R. 29.5.

(n55)Footnote 48. Sup. Ct. R. 17.4.

(n56)Footnote 49. Sup. Ct. R. 17.5; *see* Sup. Ct. R. 29.5.

(n57)Footnote 50. Sup. Ct. R. 17.5.

(n58)Footnote 51. Sup. Ct. R. 17.5.

(n59)Footnote 52. *Corrinet v. Ghali, 516 U.S. 1039, 116 S. Ct. 694, 133 L. Ed. 2d 653 (1996)* (denial of motion); *New Jersey v. New York, 511 U.S. 1080, 114 S. Ct. 1828, 128 L. Ed. 2d 458 (1994)* (grant of motion).

(n60)Footnote 53. *South Carolina v. Regan, 462 U.S. 1114, 103 S. Ct. 3080, 77 L. Ed. 2d 1344 (1983)* (motion for leave to file bill is set for oral argument).

(n61)Footnote 54. Sup. Ct. R. 17.5.

(n62)Footnote 55. *See, e.g., Rettig v. Ohio, 510 U.S. 1007, 114 S. Ct. 594, 126 L. Ed. 2d 560 (1993)* (motion for reconsideration denied).

(n63)Footnote 56. *Louisiana v. Mississippi, 516 U.S. 22, 24, 116 S. Ct. 290, 292, 133 L. Ed. 2d 265 (1995)* .

(n64)Footnote 56.1. *Alabama v. North Carolina, ___ U.S. ___, 130 S. Ct. 2295, 176 L. Ed. 2d 1070, 1078 (2010)* .

(n65)Footnote 57. Sup. Ct. R. 46.1.

(n66)Footnote 58. Sup. Ct. R. 17.1; *see § 29.05[1].*

(n67)Footnote 59. Sup. Ct. R. 17.2.

(n68)Footnote 60. *Alabama v. North Carolina, ___ U.S. ___, 130 S. Ct. 2295, 176 L. Ed. 2d 1070, 1082 (2010)* .

(n69)Footnote 61. *See Fed. R. Civ. P. 15(a).*

(n70)Footnote 62. *Nebraska v. Wyoming, 515 U.S. 1, 8-9, 115 S. Ct. 1933, 1938, 132 L. Ed. 2d 1 (1995)* .

(n71)Footnote 63. *Louisiana v. Mississippi, 516 U.S. 22, 23, 116 S. Ct. 290, 292, 133 L. Ed. 2d 265 (1995)* ; *see* [i], *above.*

(n72)Footnote 64. *Mississippi v. Arkansas, 415 U.S. 289, 298 n.1, 94 S. Ct. 1046, 39 L. Ed. 2d 333 (1974)* .

(n73)Footnote 65. *United States v. Raddatz, 447 U.S. 667, 683 n.11, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980)* .

(n74)Footnote 66. *See Fed. R. Civ. P. 53(a).*

(n75)Footnote 67. *Delaware v. New York, 488 U.S. 990, 990, 109 S. Ct. 550, 102 L. Ed. 2d 578 (1988)* .

(n76)Footnote 68. *Colorado v. New Mexico, 467 U.S. 310, 313, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1984)* .

(n77)Footnote 69. *California v. Nevada, 447 U.S. 125, 133, 100 S. Ct. 2064, 65 L. Ed. 2d 1 (1980)* .

(n78)Footnote 70. *Texas v. New Mexico, 482 U.S. 124, 132, 107 S. Ct. 2279, 96 L. Ed. 2d 105 (1987)* .

(n79)Footnote 71. *See Virginia v. Maryland, 540 U.S. 56, 124 S. Ct. 598, 157 L. Ed. 2d 461 (2003)* .

(n80)Footnote 71.1. *Illinois v. City of Milwaukee, 406 U.S. 91, 105-107, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* ; *see Colorado v. New Mexico, 459 U.S. 176, 183, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982)* (application of law to establish justice between states).

(n81)Footnote 72. First National City Bank v. Banco Para el *Comercio Exterior de Cuba, 462 U.S. 611, 621-623, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983)* .

(n82)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 403.01 et seq. (Matthew Bender 3d ed.).

(n83)Footnote 73. *See* [2], *above*.

(n84)Footnote 73.1. *See Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998)* (normal function of Supreme Court is to review possible misapplications of law by the courts of appeals).

(n85)Footnote 73.2. *Marbury v. Madison, 5 U.S. 137, 174, 2 L. Ed. 60 (1803)* ; *see Britt v. Garcia, 457 F.3d 264, 266-267 (2nd Cir. 2006)* .

(n86)Footnote 74. *U.S. Const., Art. III, § 2, Cl. 1.*

(n87)Footnote 75. *See* [2], *above*.

(n88)Footnote 76. *See U.S. Const., Art. III, § 2, Cl. 2.*

(n89)Footnote 77. *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 464, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* .

(n90)Footnote 78. *See U.S. Const., Art. III, § 2, Cl. 2.*

(n91)Footnote 79. *See* [2], *above*.

(n92)Footnote 80. *Hiatt v. Brown, 339 U.S. 103, 106 n.1, 70 S. Ct. 495, 94 L. Ed. 691 (1950)* .

(n93)Footnote 80.1. *Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998)* .

(n94)Footnote 81. *28 U.S.C. § 1254(1)*; *see 28 U.S.C. § 2350(a)*; *see also* [b], *below*.

(n95)Footnote 82. *28 U.S.C. § 1254(1)*; *see, e.g., Padilla v. Hanft, 547 U.S. 1062, 1062, 126 S. Ct. 1649, 164 L. Ed. 2d 409 (2006)* .

(n96)Footnote 83. *28 U.S.C. §§ 1254(2), 2350(b)*; *see* [c], *below*.

(n97)Footnote 84. *28 U.S.C. § 1254(2)*; *see* Sup. Ct. R. 19.

(n98)Footnote 85. *Wisniewski v. United States, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957)* .

(n99)Footnote 86. *28 U.S.C. § 1253*; *see* [d], *below*.

(n100)Footnote 87. *In re Slagle, 504 U.S. 952, 112 S. Ct. 2296, 119 L. Ed. 2d 220 (1992)* (White, J., dissenting).

(n101)Footnote 88. *28 U.S.C. § 1257*; *see* [e], *below*.

(n102)Footnote 89. *28 U.S.C. § 1257(a)*.

(n103)Footnote 90. *28 U.S.C. § 1258*.

(n104)Footnote 91. *28 U.S.C. § 1259*.

(n105)Footnote 92. *See 28 U.S.C. §§ 1258, 1259*; *see* [f], *below*.

(n106)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 405.02 et seq. (Matthew Bender 3d ed.).

(n107)Footnote 93. *28 U.S.C. §§ 1254, 2350(a)*.

(n108)Footnote 94. *28 U.S.C. § 1254(1)*.

(n109)Footnote 95. *See* [ii], *below*.

(n110)Footnote 96. Sup. Ct. R. 11; *see also 28 U.S.C. § 2101(e)*. For a complete discussion of procedures under Supreme Court Rule 11, *see § 29.06[2]*.

(n111)Footnote 97. *28 U.S.C. § 1254(1)*.

(n112)Footnote 98. *Braxton v. United States, 500 U.S. 344, 347, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991)* (review regarding meaning of federal sentencing guidelines).

(n113)Footnote 99. Sup. Ct. R. 10.

(n114)Footnote 100. Sup. Ct. R. 10(a).

(n115)Footnote 101. Sup. Ct. R. 10(c).

(n116)Footnote 102. *Davis v. Jacobs, 454 U.S. 911, 913, 917, 102 S. Ct. 417, 70 L. Ed. 2d 226 (1981)* (Rehnquist, J., dissenting).

(n117)Footnote 103. *28 U.S.C. § 1651(a)*.

(n118)Footnote 104. *La Buy v. Howes Leather Co., 352 U.S. 249, 255, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* (common-law writs available at Court's discretion).

(n119)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 405.02 et seq. (Matthew Bender 3d ed.).

(n120)Footnote 105. *28 U.S.C. § 1254(2)*.

(n121)Footnote 106. *28 U.S.C. § 1254(2)*; *see* Sup. Ct. R. 19; *United States v. Barnett, 376 U.S. 681, 689 n.6, 84 S. Ct. 984, 12 L. Ed. 2d 23 (1964)* .

(n122)Footnote 107. *See* [b][ii], *above*.

(n123)Footnote 108. *Wisniewski v. United States, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957)* .

(n124)Footnote 109. *28 U.S.C. § 1254(2)*.

(n125)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice*, § 404.02 et seq. (Matthew Bender 3d ed.).

(n126)Footnote 110. *28 U.S.C. § 1253*.

(n127)Footnote 111. *28 U.S.C. § 1253*.

(n128)Footnote 112. *In re Slagle, 504 U.S. 952, 112 S. Ct. 2296, 119 L. Ed. 2d 220 (1992)* (White, J., dissenting).

(n129)Footnote 113. *Mitchell v. Donovan, 398 U.S. 427, 431, 90 S. Ct. 1763, 26 L. Ed. 2d 378 (1970)* .

(n130)Footnote 114. *Moody v. Flowers, 387 U.S. 97, 104, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967)* (judgment vacated and case remanded for entry of new decree that would allow appeal properly taken to court of appeals).

(n131)Footnote 115. *Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 96 n.14, 95 S. Ct. 289, 42 L. Ed. 2d 249 (1974)* .

(n132)Footnote 116. *Hicks v. Pleasure House, Inc., 404 U.S. 1, 2, 92 S. Ct. 5, 30 L. Ed. 2d 1 (1971)* .

(n133)Footnote 117. *28 U.S.C. § 2284*.

(n134)Footnote 118. *See 42 U.S.C. §§ 1971*, *1973b*, *1973c*, *1973h*.

(n135)Footnote 119. *42 U.S.C. § 2000e-6*.

(n136)Footnote 120. *See 42 U.S.C. §§ 1973b*, *1973c*, *1973h*.

(n137)Footnote 121. *See 42 U.S.C. § 2000e-6*.

(n138)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice*, § 406.02 et seq. (Matthew Bender 3d ed.).

(n139)Footnote 122. *28 U.S.C. § 1257*.

(n140)Footnote 123. *28 U.S.C. § 1257(b)*.

(n141)Footnote 124. *Nash v. Florida Indus. Comm'n, 389 U.S. 235, 237, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967)* .

(n142)Footnote 125. *Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329-1330, 96 S. Ct. 251, 46 L. Ed. 2d 237 (1975)* .

(n143)Footnote 126. *Nike, Inc. v. Kasky, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580, 581-583 (2003)* ; *see* [ii], *below*.

(n144)Footnote 127. *Hammerstein v. Superior Court, 341 U.S. 491, 492, 71 S. Ct. 820, 95 L. Ed. 1135 (1951)* .

(n145)Footnote 128. *28 U.S.C. § 1257(a)*; *see Nike, Inc. v. Kasky, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580, 581-583 (2003)* ; *see also* [b][ii], *above* (discussion of certiorari jurisdiction).

(n146)Footnote 128.1. *Johnson v. California, 541 U.S. 428, 124 S. Ct. 1833, 158 L. Ed. 2d 696, 2004 U.S. LEXIS 3380, *4 (2004)* ; *see 28 U.S.C. § 1257(a).*

(n147)Footnote 128.2. *See Virginia v. Hicks, 539 U.S. 113, 120-121, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)* (United States Supreme Court had appellate jurisdiction to review Virginia Supreme Court decision that state trespass statute was unconstitutionally overbroad because it authorized the prohibition of speech and conduct protected by the *First Amendment*).

(n148)Footnote 129. *Exxon Shipping Co., v. Airport Depot Diner, Inc., 120 F.3d 166, 169-170 (9th Cir. 1997)* (district court abused its discretion in granting declaratory relief to preempt ruling on federal law issues by state court).

(n149)Footnote 130. *28 U.S.C. 1257(a).*

(n150)Footnote 131. *Jefferson v. City of Tarrant, 522 U.S. 75, 80, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997)* .

(n151)Footnote 132. *Johnson v. California, 541 U.S. 428, 124 S. Ct. 1833, 158 L. Ed. 2d 696, 2004 U.S. LEXIS 3380, *4 (2004)* .

(n152)Footnote 133. *Gotthilf v. Sills, 375 U.S. 79, 80, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963)* .

(n153)Footnote 134. *Pierce County v. Guillen, 537 U.S. 129, 140-141, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003)* .

(n154)Footnote 135. *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-483, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)* .

(n155)Footnote 136. *Pierce County v. Guillen, 537 U.S. 129, 140-142, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003)* .

(n156)Footnote 137. *Brady v. Maryland, 373 U.S. 83, 85 n.1, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)* .

(n157)Footnote 138. *Johnson v. California, 541 U.S. 428, 124 S. Ct. 1833, 158 L. Ed. 2d 696, 2004 U.S. LEXIS 3380, *3 (2004)* .

(n158)Footnote 139. *Johnson v. California, 541 U.S. 428, 124 S. Ct. 1833, 158 L. Ed. 2d 696, 2004 U.S. LEXIS 3380, *3 (2004)* .

(n159)Footnote 140. *Zucht v. King, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194 (1922)* .

(n160)Footnote 141. *Duncan v. Tennessee, 405 U.S. 127, 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972)* .

(n161)Footnote 142. *Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75-77, 75 S. Ct. 614, 99 L. Ed. 897 (1955)* .

(n162)Footnote 143. *Coleman v. Thompson, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)* .

(n163)Footnote 143.1. *Fitzgerald v. Racing Ass'n, 539 U.S. 103, 123 S. Ct. 2156, 2158-2159, 156 L. Ed. 2d 97 (2003)* ; *see Michigan v. Long, 463 U.S. 1032, 1041-1042, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)* .

(n164)Footnote 143.2. *Herb v. Pitcairn, 324 U.S. 117, 126, 65 S. Ct. 459, 89 L. Ed. 789 (1945)* .

(n165)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 407.01 et seq. (Matthew Bender 3d ed.).

(n166)Footnote 144. *28 U.S.C. § 1259.*

(n167)Footnote 145. *28 U.S.C. § 1259.*

(n168)Footnote 146. *28 U.S.C. § 1259*; *see* [b][ii], *above.*

(n169)Footnote 147. *Huet-Vaughn v. United States, 516 U.S. 1117, 116 S. Ct. 922, 133 L. Ed. 2d 851 (1996)* (writ of certiorari to United States Court of Appeals for Armed Forces denied).

(n170)Footnote 148. *28 U.S.C. § 1259(1)*; *see 10 U.S.C. § 867(a)(1)*; *see, e.g., Loving v. United States, 517 U.S. 748, 751-752, 116 S. Ct. 1737, 1740, 135 L. Ed. 2d 36 (1996)* .

(n171)Footnote 149. *28 U.S.C. § 1259(2)*; *see 10 U.S.C. § 867(a)(2).*

(n172)Footnote 150. *28 U.S.C. § 1259(3)*; *see 10 U.S.C. § 867(a)(3).*

(n173)Footnote 151. *28 U.S.C. § 1259(4).*

(n174)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 406.04 (Matthew Bender 3d ed.).

(n175)Footnote 152. *28 U.S.C. § 1258.*

(n176)Footnote 153. *28 U.S.C. § 1258*; *see* [b][ii], *above.*

(n177)Footnote 154. *28 U.S.C. § 1258.*

(n178)Footnote 155. *See, e.g., Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 331, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986)* (Supreme Court had jurisdiction to review decision concerning constitutionality of Puerto Rican statute).

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.02

§ 29.02 n* Applicability of Procedural Rules of Supreme Court

The Judicial Code gives the Supreme Court power to prescribe rules for the procedures to conduct of its own business n1 and also the power to prescribe uniform rules for the lower federal courts. n2 Rules promulgated by the Supreme Court are subject to public notice and comment when they have been proposed for the Supreme Court's consideration by the Judicial Conference under the authority of Judicial Code. n3

The Judicial Code also requires the Supreme Court to submit proposed rules to Congress, and gives Congress several months to consider them. If Congress fails to act, the rules become effective at the prescribed time after submission, except for rules that create, abolish, or modify an evidentiary privilege, which require explicit congressional approval before they become effective. n4 The latest amendments to the Supreme Court Rules became effective May 3, 1999. The last complete revision of the Supreme Court Rules were adopted January 16, 1997, and became effective May 1, 1997. n5 The Supreme Court Rules may not abridge, enlarge, or modify any substantive right. However, once Supreme Court Rules become effective, all other procedural laws in conflict with the Supreme Court Rules have no further force or effect. n6

With respect to retroactivity, the court promulgating new or amended rules is authorized to determine the effect of the new or amended rules on pending proceedings. n7 The Supreme Court has generally provided that newly enacted Supreme Court Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Supreme Court, the application of the new procedural rules to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 22 *Moore's Federal Practice,* § 408.01 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2071(a).*

(n3)Footnote 2. *See, e.g., 28 U.S.C. § 2072* (Supreme Court power to prescribe general rules of practice and procedure and rules of evidence for cases in United States district courts and courts of appeals).

(n4)Footnote 3. *28 U.S.C. § 2073(a)*.

(n5)Footnote 4. *28 U.S.C. § 2074*.

(n6)Footnote 5. Sup. Ct. R. 48.1.

(n7)Footnote 6. *28 U.S.C. § 2072(b)*; *see* Sup. Ct. R. 48.2.

(n8)Footnote 7. *28 U.S.C. § 2071(b)*.

(n9)Footnote 8. Sup. Ct. R. 48.2.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.03

§ 29.03 Composition and Function of Supreme Court

[1] Quorum of Supreme Court n*

The Supreme Court of the United States consists of nine total justices, the Chief Justice of the United States and eight associate justices. n1 Any six justices of the Supreme Court constitute a quorum. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending--or if no Justice is present, the Clerk or a Deputy Clerk--may announce that the Court will not meet until there is a quorum. n2 With the exception of authorized direct appeals from a district court, if there is no quorum, the case will ordinarily be heard and determined at the next ensuing term. For direct appeals from a district court, the Chief Justice may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges. n3

[2] Term and Sessions of Supreme Court n*

The Supreme Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. n4 At the end of each Term, all cases pending on the docket are continued to the next Term. n5 Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and after that Monday as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m. n6 When appropriate, the Court will direct the Clerk or the Marshal to announce recesses. n7

[3] Clerk of Supreme Court n*

[a] Receipt of Filings

The clerk is responsible for receipt of all documents filed with the Court. n8 However, the clerk has authority to reject any submitted filing that does not comply with the Supreme Court Rules. n9 No single Supreme Court Rule specifies all of the items that the clerk must reject, which are specified throughout the individual rules. For example the clerk must reject a petition for writ of certiorari jurisdictionally filed late; n10 a brief filed after the submission or argument of a case, unless the party has leave of the Court; n11 and consecutive or late petitions for rehearing; n12

[b] Custody of Records

The Clerk has responsibility to maintain the Court's records, and will not permit any of them to be removed from the Court building except when authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not be withdrawn after the time of filing from the official Court files. After the conclusion of proceedings in the Supreme Court, original records and documents transmitted to the Supreme Court by any other court will be returned to the court from which they were received. n13

[c] Notification and Supervisory Duties

In addition to filing and recordkeeping duties, the individual Supreme Court Rules also give the clerk responsibility to notify parties in certain situations. For example, the clerk must notify the court below and counsel of record of the denial of a petition for writ of certiorari; n14 must notify the parties when the Court orders a certified case briefed or set for argument; n15 and must notify attorneys when they must be present for oral argument. n16 In certain circumstances, other Supreme Court Rules give the clerk authority to grant an extension of time to file a document, n17 or to dismiss a case, as when the parties file a written agreement that the case be dismissed and pay the Clerk any fees that are due. n18 All of these duties of the clerk are discussed in this chapter in the individual sections that pertain to the particular subject matter.

[d] Clerk's Office Hours

Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on the following legal holidays: n19 New Year's Day, Martin Luther King Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving, and Christmas. n20

[4] Library n*

The Supreme Court has a library that is available for use by personnel of the Supreme Court, members of the Bar of the Supreme Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies. n21 The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court. n22 Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewConstitutional LawThe JudiciaryGeneral OverviewGovernmentsCourtsCreation & Organization

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 504.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1.*

(n3)Footnote 2. Sup. Ct. R. 4.2.

(n4)Footnote 3. *28 U.S.C. § 2109.*

(n5)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* §§ 503.02, 504.02 et seq. (Matthew Bender 3d ed.).

(n6)Footnote 4. Sup. Ct. R. 3; *see 28 U.S.C. § 2.*

(n7)Footnote 5. Sup. Ct. R. 3.

(n8)Footnote 6. Sup. Ct. R. 4.1.

(n9)Footnote 7. Sup. Ct. R. 4.3.

(n10)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* §§ 501.02, 501.03 (Matthew Bender 3d ed.).

(n11)Footnote 8. Sup. Ct. R. 1.1.

(n12)Footnote 9. Sup. Ct. R. 1.1; *see* Sup. Ct. R. 29.1.

(n13)Footnote 10. Sup. Ct. R. 13.2.

(n14)Footnote 11. Sup. Ct. R. 25.6.

(n15)Footnote 12. Sup. Ct. R. 44.4.

(n16)Footnote 13. Sup. Ct. R. 1.2.

(n17)Footnote 14. Sup. Ct. R. 16.3.

(n18)Footnote 15. Sup. Ct. R. 19.4.

(n19)Footnote 16. Sup. Ct. R. 27.2.

(n20)Footnote 17. *See* Sup. Ct. R. 30.3.

(n21)Footnote 18. *See* Sup. Ct. R. 46.1.

(n22)Footnote 19. Sup. Ct. R. 1.3.

(n23)Footnote 20. *5 U.S.C. § 6103*.

(n24)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 502.01 (Matthew Bender 3d ed.).

(n25)Footnote 21. Sup. Ct. R. 2.1.

(n26)Footnote 22. Sup. Ct. R. 2.2.

(n27)Footnote 23. Sup. Ct. R. 2.3.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.04

§ 29.04 Practice of Attorneys Before Supreme Court

[1] Admission to Bar of Supreme Court n*

[a] Application for Admission

Not all licensed attorneys may practice before the Supreme Court. To qualify for admission to the Bar of the Supreme Court, an applicant must have been admitted to practice in the highest court of a state, commonwealth, territory or possession, or the District of Columbia for a period of three or more years immediately before the date of application, must not have been the subject of any adverse disciplinary action during that three-year period, and must appear to the Court to be of good moral and professional character. n1 Each applicant must file with the Clerk (1) a certificate from his or her court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by the Supreme Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of the Supreme Court who personally know, but are not related to, the applicant. n2

[b] Admission Fees

Prior to admission, the applicant must pay the fee for admission to the Bar, which is $ 200 payable to the United States Supreme Court. For this fee, the applicant also receives a certificate bearing the seal of the Supreme Court. The fees are applied to the costs of admission and for the benefit of the Court and its Bar, and for related purposes. n3 The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. n4

[c] Acceptance for Admission

If the documents submitted to the Supreme Court demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation n5 and paid the required fee, n6 the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. If an applicant wishes to, the applicant may be admitted in open court on oral motion by a member of the Bar of the Supreme Court, provided that all

other requirements for admission have been satisfied. n7 On admission, each applicant must sign the following oath or affirmation: I, _____, do solemnly _____ [swear or affirm] that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States. n8

[2] Argument For One Particular Occasion n*

The Supreme Court Rules make provision for argument by an attorney not admitted to practice for the requisite three years, provided that the attorney is otherwise eligible for admission to practice in the Supreme Court under Supreme Court Rule 5.1. The Court may allow such an attorney to argue pro hac vice, which means that the attorney may argue only in the particular proceeding specified by the Court. n9 The Court may also allow pro hac vice argument by an attorney qualified to practice in the courts of a foreign state. n10 The Court will allow oral argument pro hac vice only on motion of the counsel of record for the party on whose behalf leave is requested. The motion must state concisely the qualifications of the attorney who is to argue pro hac vice. It must be filed with the Clerk, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed. The motion must be in the form required by Supreme Court Rule 21, and it must be accompanied by proof of service as required by Supreme Court Rule 29. n11

[3] Prohibition Against Employee's Practice Before Court n*

As long as an attorney is employed by the Supreme Court, the attorney may not practice as an attorney or counselor in any court or before any agency of government; furthermore, after any person leaves employment with the Supreme Court, the person may not participate in any professional capacity in any case pending before the Supreme Court or in any case being considered for filing in the Supreme Court until two years have elapsed after separation. Finally, a former employee of the Supreme Court may never participate in any professional capacity in any case that was pending in the Supreme Court during the employee's tenure. n12

[4] Disbarment and Other Disciplinary Action n*

If an attorney member of the Bar of the Supreme Court is disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of the Supreme Court, the Court may enter an order suspending that member from practice before the Supreme Court. n12.1 The Supreme court has never directly construed this "conduct unbecoming" language. However, because membership in the bar of the country's highest Court is a privilege and a responsibility, such unbecoming conduct exists whenever an attorney fails to comport with good moral and professional character. n12.2 After the Supreme Court has entered an order of suspension, the Court will give the member 40 days to show cause why the court should not enter a disbarment order. The Court will enter an appropriate order on the attorney's response, or at the end of the 40 days if no response is filed. n13 The Supreme Court may also take any other appropriate disciplinary action against any attorney for conduct unbecoming a member of the Bar, or for failure to comply with the Supreme Court Rules or any order of the Supreme Court. The Supreme Court will take such action after reasonable notice and an opportunity for the attorney to show cause why disciplinary action should not be taken, and a hearing if material facts are in dispute. n14

[5] Appearance of Attorneys Before Court n*

Before an attorney attempts in a representative capacity to file any document in the Supreme Court, the attorney must first be admitted to practice before the Supreme Court as provided in Supreme Court Rule 5 n15 except that admission to the Bar of the Supreme Court is not required for an attorney appointed under the Criminal Justice Act, n16 or under any other applicable federal statute. n17 In appropriate circumstances, n18 a non-member attorney may appear pro hac vice. n18.1

If filing a document with the court, an attorney need not file a separate notice of appearance because the filing constitutes appearance as counsel of record by the attorney whose name, address, and telephone number is designated

on the cover of the document presented for filing. n18.2 Attorneys who are not members of the bar of the Supreme Court may also be listed on a brief along with the counsel of record; n18.3 if so, the cover must identify clearly the attorney who is counsel of record. n18.4

If an attorney will be representing a party who will not be filing a document, the attorney must enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance must also be entered whenever an attorney is substituted as counsel of record in a particular case. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewLegal EthicsPractice Qualifications

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 505.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 5.1.

(n3)Footnote 2. Sup. Ct. R. 5.2.

(n4)Footnote 3. Sup. Ct. R. 5.5.

(n5)Footnote 4. Sup. Ct. R. 5.6.

(n6)Footnote 5. *See* [a], *above*.

(n7)Footnote 6. *See* [b], *above*.

(n8)Footnote 7. Sup. Ct. R. 5.3.

(n9)Footnote 8. Sup. Ct. R. 5.4.

(n10)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 506.02 et seq. (Matthew Bender 3d ed.).

(n11)Footnote 9. *See CareFirst of Md., Inc. v. First Care, P.C., 422 F. Supp. 2d 592, 597-598 (E.D. Va. 2006)* .

(n12)Footnote 10. Sup. Ct. R. 6.2.

(n13)Footnote 11. Sup. Ct. R. 6.3.

(n14)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 507.02 (Matthew Bender 3d ed.).

(n15)Footnote 12. Sup. Ct. R. 7.

(n16)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 508.02 (Matthew Bender 3d ed.).

(n17)Footnote 12.1. Sup. Ct. R. 8.1.

(n18)Footnote 12.2. *See Gadda v. Ashcroft, 377 F.3d 934, 947 n.7 (9th Cir. 2004)* .

(n19)Footnote 13. Sup. Ct. R. 8.1.

(n20)Footnote 14. Sup. Ct. R. 8.2.

(n21)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice*, §§ 509.02, 509.03 (Matthew Bender 3d ed.).

(n22)Footnote 15. Sup. Ct. R. 9.1; *see* [1], *above*.

(n23)Footnote 16. *See 18 U.S.C. § 3006A(d)(6)*.

(n24)Footnote 17. Sup. Ct. R. 9.1.

(n25)Footnote 18. *See* [2], *above*.

(n26)Footnote 18.1. *See* Sup. Ct. R. 6.1.

(n27)Footnote 18.2. Sup. Ct. R. 9.1.

(n28)Footnote 18.3. Sup. Ct. R. 9.1; see Sup. Ct. R. 34.1(f).

(n29)Footnote 18.4. Sup. Ct. R. 9.1.

(n30)Footnote 19. Sup. Ct. R. 9.2.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.05

§ 29.05 Procedures When Jurisdiction Not Based on Certiorari

[1] Procedure in an Original Action n*

[a] Rules Applicable to Original Action

The Supreme Court has promulgated Supreme Court Rule 17 to apply exclusively only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. n1 In an original action, the litigants must follow the form of pleadings and motions prescribed by the Federal Rules of Civil Procedure. In other respects, the Supreme Court will take the Federal Rules of Civil Procedure and the Federal Rules of Evidence as guides. n2

[b] Initiation of Original Action in Supreme Court

The initial pleading must be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. The litigant bringing the action must file 40 copies of each document with proof of service. Service must be accomplished as required by Supreme Court Rule 29, except that when an adverse party is a state, service must be made on both the governor and the attorney general of that state. n3 When a litigant files with the Clerk the motion for leave to file and the initial pleading, the clerk will place the case on the docket. The Supreme Court Rule 38(a) docket fee must be paid at that time. n4

[c] Response by Adverse Party

An adverse party must file 40 copies of any brief in opposition to the motion for leave to file and the initial pleading no more than 60 days after receiving the motion, with proof of service as required by Supreme Court Rule 29, or may expressly waive the right to file such a brief. The Clerk has the duty to distribute the filed documents to the Court for its consideration on receiving an express waiver of the right to file a brief or, if no waiver or brief is filed, on the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but the Court will not defer its consideration of the case for a reply to be received. n5

[d] Action by Court on Motion for Leave

After it receives the initial motion and any brief in response, the Court may grant or deny the motion for leave to file, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted. n6 If the Court grants the motion for leave to file the complaint, a summons issued out of the Supreme Court must be served on the defendant 60 days before the return day specified in the summons. n7 Service of the summons must comply with Supreme Court Rule 29. n8 If the defendant does not respond by the return day, the plaintiff may proceed ex parte. n9 Process against a state must be served on both the governor and the attorney general of that state. n10

[2] Procedure for Appeal Direct from United States District Court n*

[a] Commencement of Appeal

When authorized by law, a party may commence a direct appeal from a decision of a United States District Court by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. n11 The notice of appeal must specify the parties taking the appeal, designate the judgment or partial judgment appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. n12 However, the notice of appeal need not state the issues involved. n13 A copy of the notice of appeal must be served on all parties to the proceeding as required by Supreme Court Rule 29, and proof of service must be filed in the district court together with the notice of appeal. n14

[b] Parties to Appeal

All parties to the proceeding in the district court are generally deemed parties to the appeal and are entitled to file documents in the Supreme Court. However, parties that have no interest in the outcome of the appeal may notify the Clerk of their election not to participate in the appeal to the Supreme Court and must serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, the litigants must file a notice of appeal for each judgment with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no documents will not qualify for any relief from the Supreme Court. n15

[c] Appellant Required to File Jurisdictional Statement

[i] Time for Filing

To perfect the direct appeal, the appellant must file 40 copies of a jurisdictional statement and must pay the Supreme Court Rule 38 docket fee no more than 60 days after filing the notice of appeal in the district court. However, an appellant proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2, together with a motion for leave to proceed in forma pauperis, a copy of which must precede and be attached to each copy of the jurisdictional statement. n16

[ii] Contents and Notice

The jurisdictional statement must follow to the extent possible the form for a petition for a writ of certiorari prescribed by Supreme Court Rule 14 and must be served as required by Supreme Court Rule 29. The clerk will then place the case on the docket. The appellant has the duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice must be served as required by Supreme Court Rule 29. Furthermore, the appendix must include a copy of the notice of appeal showing the date it was filed in the district court. n17

If the Supreme Court Clerk determines that a jurisdictional statement, submitted timely and in good faith, is in a form

that does not comply with Supreme Court Rule 18, or with Supreme Court Rules 33 or 34, the Clerk will return it with a letter indicating the deficiency. If the litigant submits a corrected jurisdictional statement in accordance with Rule 29.2, n17.1 no more than 60 days after the date of the Clerk's letter, its filing will be deemed timely. n18

[iii] Extension of Time to File Jurisdictional Statement

For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days; however, the application to extend the time to file a jurisdictional statement is not favored. n19 An application to extend the time to file a jurisdictional statement must specify the basis for jurisdiction in the Supreme Court, identify the judgment sought to be reviewed, and include a copy of the opinion, any order respecting rehearing, and the notice of appeal, and set out specific reasons why an extension of time is justified. The time and format for presenting the application is specified in Rules 21, 22, and 30. n20

[d] Cross-Appeal By Appellee

An appellee may file a conditional cross-appeal no more than 30 days after a case has been placed on the docket. The time to file a cross-appeal will not be extended. A conditional cross-appeal is a cross-appeal that would have been untimely if filed as a notice of appeal under the rules governing the time for filing a notice of appeal. An appellee filing a conditional cross-appeal must file, with proof of service as required by Supreme Court Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with Supreme Court Rule 18.3, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again, n21 and must pay the Supreme Court Rule 38 docket fee n22 or submit a motion for leave to proceed in forma pauperis. The cover of the cross-appeal must indicate clearly that it is a conditional cross-appeal. After filing, the cross-appeal will be placed on the docket, and it is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice must be served as required by Supreme Court Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed in forma pauperis must be attached. n23

[e] Dismissal of Appeal Before Docketing

[i] Voluntary Dismissal

After a notice of appeal has been filed in the district court, but before the case is placed on the Supreme Court's docket, the parties may dismiss the appeal by stipulation filed in the district court. Alternatively, the district court may dismiss the appeal on the appellant's motion with notice to all parties. n24

[ii] Involuntary Dismissal

If a notice of appeal has been filed, but the case has not been placed on the Supreme Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move the Supreme Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion must be accompanied by proof of service as required by Supreme Court Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. Once an appellee has filed a motion to dismiss an appeal, the appellant may not then file a jurisdictional statement without special leave of the Supreme Court, and the Court may allow costs against the appellant. n25

[f] Appellee's Motion After Docketing to Dismiss or Affirm

[i] Motion by Appellee

Within 30 days after the case is placed on the Supreme Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion must be filed, except that an appellee proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2, together with a motion for leave to proceed in forma pauperis, a copy of which must precede and be attached to each copy of the motion. The motion must follow, insofar as applicable, the form for a brief in opposition prescribed by Supreme Court Rule 15 and must comply in all respects with Supreme Court Rule 21. n26

[ii] Responsive Brief By Appellant

Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the Court under Supreme Court Rule 18.7 n27 will not be deferred pending its receipt. Forty copies must be filed, except that an appellant proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. The brief must be served as required by Supreme Court Rule 29. n28

[g] Clerk's Duty to Distribute Documents

The Supreme Court Clerk will distribute the jurisdictional statement to the Court for its consideration on receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, on the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 10 days after the motion is filed. n29 If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under Supreme Court Rule 18. n30

[h] Supplemental Briefs

Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief may argue only new matter, and must follow, to the extent applicable, the form for a brief in opposition prescribed by Supreme Court Rule 15. A party must file 40 copies of a supplemental brief, except that a party proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. The supplemental brief must be served as required by Supreme Court Rule 29. n31

[i] Duty of District Court Clerk Regarding Record

The clerk of the district court must retain possession of the record until notified by the Clerk of the Supreme Court to certify and transmit it. It must be certified and transmitted in the same manner as cases being reviewed on certiorari. n32

[j] Action By Supreme Court

The Supreme Court has several choices after considering the jurisdictional statement, motions, and briefs distributed under Supreme Court Rule 18. The Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, the attorneys at the outset of their briefs and at oral argument, must address the question of jurisdiction. If the record has not previously been filed in the Supreme Court, the Clerk of the Supreme Court will request the clerk of the court in possession of the record to certify and transmit it. n33

[3] Procedure for Certified Question n*

[a] Certification By Court of Appeals

If a United States Court of Appeals desires instruction for the proper decision of a case, the court may certify to the Supreme Court a question or proposition of law. n34 The certificate must contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they must be stated separately and with precision. The certificate must be prepared as required by Supreme Court Rule 33.2 and must be signed by the clerk of the court of appeals. n35 When a question is certified by a court of appeals, the Supreme Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. n36

[b] Certification Procedure in Supreme Court

When a question is certified, the Supreme Court Clerk must notify the parties and docket the case, and the attorneys must then enter their appearances. After docketing, the Supreme Court Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed. n37 If the Court orders the case briefed or set for argument, the Supreme Court Clerk will notify the parties, who are then permitted to file briefs. The Clerk of the Supreme Court then will request the clerk of the court in possession of the record to certify and transmit it. If the parties wish to direct the Court's particular attention to any portion of the record, it should be printed in a joint appendix, prepared in conformity with Supreme Court Rule 26, by the appellant or petitioner in the court of appeals. However, if any part of the record has not been printed, that fact will not prevent the parties or the Court from relying on it. n38 Any brief on the merits in a case involving a certified question must comply with Rules 24, 25, and 33.1, except that the brief for the party who is the appellant or petitioner below must be filed within 45 days of the order requiring briefs or setting the case for argument. n39

[4] Procedure on Petition for Extraordinary Writ n*

[a] Supreme Court's Discretion to Issue Writ

Under the All Writs Act, the Supreme Court has discretion to issue an extraordinary writ authorized by the Judicial Code. n40 Such a writ is not issued as a matter of right in any case but is entirely within the discretion of the Court. n41 For example, the Supreme Court may issue an injunction against the enforcement of a statute that is unconstitutional. However, issuance of relief under the All Writs Act must be used sparingly, only in the most critical and exigent circumstances, and only if the legal rights at issue are indisputably clear. n42 Thus, to justify the granting of an extraordinary writ by the Supreme Court, the petitioner must show: that (1) no other adequate means exist to attain the relief sought, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances. n43 With respect to unavailability of other available "adequate relief," the Supreme Court has held that if any statute or rule specifically addresses the particular issue under consideration, it is that statutory authority or rule that governs the procedure which must be followed, and the Court may not supersede that procedure by issuing an extraordinary writ under the All Writs Act. n44

[b] General Requirements for Petition

A petition seeking a writ authorized by the All Writs Statute n45 or a writ of habeas corpus n46 must be prepared as required by Supreme Court Rules 33 and 34. The petition must be captioned "In re _____ [name of petitioner]" and must follow, to the extent applicable, the form of a petition for a writ of certiorari prescribed by Supreme Court Rule 14. The petitioner must include all of the petitioner's supporting contentions. Before the case is docketed, the petitioner generally must file 40 copies with the Clerk and pay the docket fee; however, a petitioner proceeding in forma pauperis under Supreme Court Rule 39 need only file the number of copies required for a petition

under Supreme Court Rule 12.2, and must attach a copy of the motion for leave to proceed in forma pauperis preceding each petition. The petition must be served as required by Supreme Court Rule 29 and is subject to Supreme Court Rule 20.4(b) regarding ex parte habeas corpus procedures. n47

[c] Petition Seeking Writ of Prohibition or Mandamus

A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative, must state the name and office or function of every person against whom relief is sought and must set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, n47.1 including any related opinion, must be appended to the petition together with any other document essential to understanding the petition. n48 A petitioner may obtain a stay pending the filing and disposition of a petition for a writ of mandamus by showing a fair prospect that a majority of the Court will vote to grant mandamus and the likelihood that irreparable harm will result from the denial of a stay. n48.1

The petitioner must serve the petition on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party must file 40 copies of any brief or briefs in opposition to the petition, which must comply fully with Supreme Court Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in the Supreme Court. n49

[d] Petition Seeking Writ of Habeas Corpus

A petition seeking a writ of habeas corpus must comply with the requirements of Judicial Code Sections 2241 and 2242, n50 and, in particular, with the provision in the last paragraph of Section 2242, which requires a statement of the reasons for not making application to the district court of the district in which the applicant is held. n51 A petition for habeas corpus is rarely granted. n52

When the habeas relief sought is from a judgment of a state court, the petition must set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of Judicial Code Section 2254(b). n53 The petitioner must also show that exceptional circumstances warrant the exercise of the Court's discretion, and that adequate relief cannot be obtained in any other form or from any other court. n53.1 However, the state court judgment or opinion that is the subject of the habeas petition need not necessarily state explicitly the federal habeas grounds that formed the satisfaction of the exhaustion requirement. n53.2

Except in capital cases, habeas corpus proceedings are ex parte, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If it is a capital case or if the Court orders a response, the response must comply fully with Supreme Court Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of Judicial Code Section 2241(b), n54 is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought. n55

[e] Petition Documentation

The Supreme Court Clerk must distribute the documents to the Court for its consideration when a brief in opposition under Supreme Court Rule 20.3(b) has been filed, n56 when a response under Supreme Court Rule 20.4(b) has been ordered and filed, n57 when the time to file has expired, or when the right to file has been expressly waived. n58 If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties must prepare a joint appendix in accordance with Supreme Court Rule 26. n59

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 517.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 17.1; *see § 29.01[2]* (discussion of jurisdiction for original action in Supreme Court); *see also 28 U.S.C. § 1251.*

(n3)Footnote 2. Sup. Ct. R. 17.2.

(n4)Footnote 3. Sup. Ct. R. 17.3, 17.7.

(n5)Footnote 4. Sup. Ct. R. 17.4.

(n6)Footnote 5. Sup. Ct. R. 17.5.

(n7)Footnote 6. Sup. Ct. R. 17.5.

(n8)Footnote 7. Sup. Ct. R. 17.6.

(n9)Footnote 8. Sup. Ct. R. 29.3.

(n10)Footnote 9. Sup. Ct. R. 17.6.

(n11)Footnote 10. Sup. Ct. R. 17.7.

(n12)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 518.02 et seq. (Matthew Bender 3d ed.).

(n13)Footnote 11. Sup. Ct. R. 18.1; *Territo v. United States, 358 U.S. 279, 279, 79 S. Ct. 312, 3 L. Ed. 2d 298 (1959)* (time for appeal jurisdictional; appeal dismissed because it was not timely filed).

(n14)Footnote 12. Sup. Ct. R. 18.1.

(n15)Footnote 13. *See* Sup. Ct. R. 18.3 (issues may be stated in jurisdictional statement).

(n16)Footnote 14. Sup. Ct. R. 18.1.

(n17)Footnote 15. Sup. Ct. R. 18.2.

(n18)Footnote 16. Sup. Ct. R. 18.3.

(n19)Footnote 17. Sup. Ct. R. 18.3.

(n20)Footnote 17.1. *See § 29.10[1][a].*

(n21)Footnote 18. Sup. Ct. R. 18.13; *see* [i], *above.*

(n22)Footnote 19. Sup. Ct. R. 18.3; *see Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32, 32-33, 87 S. Ct. 195, 17 L. Ed. 2d 31 (1966)* ("misunderstanding between counsel" did not excuse late filing).

(n23)Footnote 20. Sup. Ct. R. 18.3.

(n24)Footnote 21. Sup. Ct. R. 18.4.

(n25)Footnote 22. *See* Sup. Ct. R. 38(a).

(n26)Footnote 23. Sup. Ct. R. 18.4.

(n27)Footnote 24. Sup. Ct. R. 18.5.

(n28)Footnote 25. Sup. Ct. R. 18.5.

(n29)Footnote 26. Sup. Ct. R. 18.6.

(n30)Footnote 27. *See* [f], *below*.

(n31)Footnote 28. Sup. Ct. R. 18.8.

(n32)Footnote 29. Sup. Ct. R. 18.7.

(n33)Footnote 30. Sup. Ct. R. 18.9.

(n34)Footnote 31. Sup. Ct. R. 18.10.

(n35)Footnote 32. Sup. Ct. R. 18.11; *see* Sup. Ct. R. 12.7.

(n36)Footnote 33. Sup. Ct. R. 18.12.

(n37)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* §§ 519.02, 519.03 (Matthew Bender 3d ed.).

(n38)Footnote 34. Sup. Ct. R. 19.1; *28 U.S.C. § 1254(2)* (this process is know as certification).

(n39)Footnote 35. Sup. Ct. R. 19.1.

(n40)Footnote 36. Sup. Ct. R. 19.2.

(n41)Footnote 37. Sup. Ct. R. 19.3.

(n42)Footnote 38. Sup. Ct. R. 19.4.

(n43)Footnote 39. Sup. Ct. R. 19.5.

(n44)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 520.02 et seq. (Matthew Bender 3d ed.).

(n45)Footnote 40. *See 28 U.S.C. § 1651(a)*.

(n46)Footnote 41. Sup. Ct. R. 20.1.

(n47)Footnote 42. *Wis. Right to Life, Inc. v. FEC, 542 U.S. 1305, 1305-1306, 125 S. Ct. 2, 159 L. Ed. 2d 805 (2004)* ; *Brown v. Gilmore, 533 U.S. 1301, 1303, 122 S. Ct. 1, 150 L. Ed. 2d 782 (2001)* (closely contested claims were not indisputably clear).

(n48)Footnote 43. *Hollingsworth v. Perry, ___ U.S. ___, 130 S. Ct. 705, 175 L. Ed. 2d 657, 663 (2010)* ; *see* Sup. Ct. R. 20.1.

(n49)Footnote 44. *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002)* .

(n50)Footnote 45. *See 28 U.S.C. § 1651(a).*

(n51)Footnote 46. *See 28 U.S.C. §§ 2241, 2254.*

(n52)Footnote 47. Sup. Ct. R. 20.2.

(n53)Footnote 47.1. *See Cheney v. United States Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2586-2587, 159 L. Ed. 2d 459 (2004)* (writ of mandamus is typically issued by higher court against lower court).

(n54)Footnote 48. Sup. Ct. R. 20.3(a).

(n55)Footnote 48.1. *Hollingsworth v. Perry, ___ U.S. ___, 130 S. Ct. 705, 175 L. Ed. 2d 657, 663-664 (2010)* .

(n56)Footnote 49. Sup. Ct. R. 20.3(b).

(n57)Footnote 50. Sup. Ct. R. 20.4(a); *see 28 U.S.C. §§ 2241, 2242.*

(n58)Footnote 51. Sup. Ct. R. 20.4(a); *see 28 U.S.C. § 2242.*

(n59)Footnote 52. Sup. Ct. R. 20.4(b).

(n60)Footnote 53. *28 U.S.C. §§ 2241, 2254.*

(n61)Footnote 53.1. Sup. Ct. R. 20.4(a).

(n62)Footnote 53.2. *Dye v. Hofbauer, 546 U.S. 1, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005)* (discussing exhaustion of state remedy requirement).

(n63)Footnote 54. *See 28 U.S.C. § 2241(b).*

(n64)Footnote 55. Sup. Ct. R. 20.4(b).

(n65)Footnote 56. *See* [c], *above.*

(n66)Footnote 57. *See* [d], *above.*

(n67)Footnote 58. Sup. Ct. R. 20.5.

(n68)Footnote 59. Sup. Ct. R. 20.6.

Moore's Manual--Federal Practice and Procedure

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.06

§ 29.06 Procedures Regarding Writ of Certiorari

[1] Considerations Governing Whether Court Will Grant Writ n*

A litigant does not have a right to review the Supreme Court's decision regarding a writ of certiorari; the Supreme Court has complete judicial discretion on whether to issue the writ. The Court will grant a petition for a writ of certiorari only for compelling reasons. Furthermore, a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The following list, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court will grant a writ of certiorari:

> 1. A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. n1
>
> 2. A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. n2
>
> 3. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. n3

A "state court" subject to Supreme Court review includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, and the local courts of Guam. Also, "state laws" include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam. n3.1

[2] Certiorari Before Judgment in United States Court of Appeals n*

The Supreme Court may consider a petition for a writ of certiorari to review a case pending in a United States court of

appeals, even before judgment is entered in the court of appeals. n4 Certiorari will be granted, however, only on a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in the Supreme Court. n5 An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment. n6 One area in which this type of writ of certiorari is granted is for labor disputes with significant public importance. n7

[3] Method of Petitioning for Writ n*

[a] Filing of Writ

Except when proceeding in forma pauperis, a petitioner for writ of certiorari must file 40 copies of a petition for a writ of certiorari, prepared as required by Supreme Court Rule 33.1 and must pay the Supreme Court Rule 38(a) docket fee. n8 A petitioner proceeding in forma pauperis under Supreme Court Rule 39 must file an original and 10 copies of a petition for a writ of certiorari prepared as required by Supreme Court Rule 33.2, together with an original and 10 copies of the motion for leave to proceed in forma pauperis. A copy of the motion must precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding in forma pauperis and not represented by counsel, need file only an original petition and motion. n9

[b] Requirements of All Writs

Whether the petitioner is in forma pauperis or not, the petition must comply in all respects with Supreme Court Rule 14 and must be submitted with proof of service as required by Supreme Court Rule 29. The Clerk will then place the case on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice must be served as required by Supreme Court Rule 29. n10

[c] Multiple Petitioners

Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined in the petition at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed in forma pauperis must be attached. n11

[d] Respondent's Cross Petition

A respondent may file a conditional cross-petition no more than 30 days after a case has been placed on the docket. The time to file a conditional cross-petition will not be extended. A conditional cross-petition is a cross-petition that would have been untimely if filed under the rules governing the time for filing a certiorari petition. A respondent filing a conditional cross-petition must file, with proof of service as required by Supreme Court Rule 29, 40 copies of the cross-petition prepared as required by Supreme Court Rule 33.1, except that a cross-petitioner proceeding in forma pauperis under Supreme Court Rule 39 must comply with Supreme Court Rule 12.2. The cross-petition must comply in all respects with Supreme Court Rule 12 and Supreme Court Rule 14, except that material already reproduced in the appendix to the opening petition need not be reproduced again.

A cross-petitioning respondent must pay the Supreme Court Rule 38(a) docket fee or submit a motion for leave to proceed in forma pauperis. The cover of the cross-petition must indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Supreme Court Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the

date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice must be served as required by Supreme Court Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed in forma pauperis must be attached. n12

[e] Persons Deemed Parties to Petition

All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in the Supreme Court, unless the petitioner notifies the Clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice must be served as required by Supreme Court Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner must meet the petitioner's time schedule for filing documents, except that a response supporting the petition must be filed within 20 days after the case is placed on the docket, and that time will not be extended. Parties who file no documents will not qualify for any relief from the Supreme Court. n13

[f] Maintenance and Transmission of Record

In any document filed with the Supreme Court, a party may cite or quote from the record, even if it has not been transmitted to the Supreme Court. n14 The Supreme Court Rules provide a means to obtain the record from the lower court. The clerk of the court having possession of the record must keep the record until notified by the Clerk of the Supreme Court to certify and transmit it. When requested by the Clerk of the Supreme Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record must number the documents to be certified and must transmit with the record a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of the Supreme Court requests otherwise. n15

The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by the Supreme Court, that court may provide by order for the transport, safekeeping, and return of such originals. n16

[4] Time for Petition n*

[a] Time from Judgment

A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals is generally timely when it is filed with the Clerk of the Supreme Court within 90 days after entry of the judgment. n16.1 A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. n17 Different times may otherwise be provided by law. For example, when the Court may issue a writ of certiorari to review an interlocutory order, such as under Judicial Code Section 2350, n18 Supreme Court Rule 13 does not apply. Judicial Code Section 2350 provides that certiorari is available to review the grant or denial of an interlocutory injunction entered under Section 2349(b), but the application for the writ must be made within 45 days of the entry of the order. This statutory provision controls the question of the applicable time period. n19

[b] Late Filing Rejected by Clerk

The Clerk is instructed to reject for filing any petition for a writ of certiorari that is jurisdictionally out of time. n20 Thus, for a civil case, the clerk must reject any petition for writ of certiorari intended to bring any judgment or decree

that is taken or applied for later than 90 days after the entry of the judgment or decree. n21 A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days. n22

[c] When Time to File Begins to Run

The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed and not from the issuance date of the mandate or the equivalent of mandate under local practice. n23 However, if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment. n24

[d] Time to File Cross Petition

A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in Supreme Court Rule 13.1, 13.3, and 13.5, or in Supreme Court Rule 12.5. However, a conditional cross-petition, which except for Supreme Court Rule 12.5 would be untimely, will not be granted unless another party's timely petition for a writ of certiorari is granted. n25

[e] Extension of Time for Good Cause

For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. n26 An application to extend the time to file must set out the basis for jurisdiction in the Supreme Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. The time and manner of presenting the application is prescribed in Supreme Court Rules 21, 22, 30, and 33.2. n27

An application to extend the time to file a petition for a writ of certiorari is not favored. n28 In making its determination of whether good cause exists for an extension, the Court will consider all of the circumstances, but takes the rule of disfavor seriously. For example, the Court held that good cause did not exist despite the voluminous record in the lower court, the breadth of errors for which review was sought, and the attorney's absence for a period, because the attorney's familiarity with the record was demonstrated by the 375-page brief filed in the state appellate court, the attorney had six months to review the record while seeking rehearing below, and the attorney's absences did not affect orderly administration of deadlines. n29 Thus, the petitioner seeking an extension of time should establish that, but for the reasons specified in the application why an extension of time is justified, the applicant would have filed a timely application for an extension. n30

[5] Requirements of Petition n*

[a] Contents of Petition

A petition for a writ of certiorari must contain all of the following, in the order listed (if the material required is voluminous, it may be presented in a separate volume or volumes with appropriate covers): n31

1. The questions presented for review. The litigant must express the questions concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" must precede the questions presented. The questions must be set out on the first page following the cover, and no other information may appear on

that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included in the question. n32 The Court will consideronly the questions that are set out in the petition, and those considerations that are fairly included in such questions. n33

2. A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a list of parent companies and nonwholly owned subsidiaries as required by Supreme Court Rule 29.6. n34

3. If the petition exceeds five pages or 1,500 words, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix. n35

4. Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies. n36

5. A concise statement of the basis for jurisdiction in the Supreme Court, showing: n37

> a. The date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under Supreme Court Rule 11); n38
>
> b. The date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari; n39
>
> c. Express reliance on Supreme Court Rule 12.5, when a cross-petition for a writ of certiorari is filed under that rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed; n40
>
> d. The statutory provision believed to confer on the Supreme Court jurisdiction to review, on a writ of certiorari, the judgment or order in question; n41 and
>
> e. If applicable, a statement that the notifications required by Supreme Court Rule 29.4(b) or (c) have been made. n42

6. The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citations. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text must be set out in the appendix referred to in Supreme Court Rule 14.1(i). n43

7. A concise statement of the case setting out the facts material to the consideration of the questions presented and also containing the following: n44

> a. If review of a state-court judgment is sought, the specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary of the record, with specific references to the places in the record where the matter appears (e.g., the court's opinion, rulings on exceptions, portions of court's charge and exceptions to the charge, or assignments of error), so as to show that the federal question was timely and properly raised and that the Supreme Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they must be

included in the appendix. n45

b. If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance. n46

8. A direct and concise argument amplifying the reasons relied on for allowance of the writ, as discussed in Supreme Court Rule 10. n47

9. An appendix containing, in the following order:

a. The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed; n48

b. Any other relevant opinions, orders, findings of fact, and conclusions oflaw entered in the case by courts or administrative agencies, and, if reference to them is necessary to ascertain the grounds of the judgment, any opinions, orders, findings of fact, and conclusions of law entered in companion cases (each document must include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry); n49

c. Any order on rehearing, including the caption, showing the name of the issuing court, the title and number of the case, and the date of entry; n50

d. The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in (a), above; n51

e. Material required by Supreme Court Rules 14.1(f) or 14.1(g)(i); n52 and

f. Any other material the petitioner believes essential to understand the petition. n53

[b] Presentations of Contentions

All contentions in support of a petition for a writ of certiorari must be set out in the body of the petition, as provided in Supreme Court Rule 14.1(h), which requires a direct and concise argument amplifying the reasons relied on for allowance of the writ. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended. n54

[c] Limitations on Petition

A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Supreme Court Rule 33. n55 The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition. n56

[d] Clerk's Request that Nonconforming Petition be Corrected

If the Clerk determines that a petition that has been submitted in a timely manner and in good faith is, however, in a form that does not comply with Supreme Court Rules 14, 33, or 34, the Clerk will return it with a letter indicating the deficiency. If the litigant submits a corrected petition in accordance with Rule 29.2, n57 no more than 60 days after the

date of the Clerk's letter, the petition will be deemed timely. n58

[6] Opposition and Reply Briefs n*

[a] When Opposition Brief Required

A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case but is not mandatory except in a capital case n59 or when ordered by the Court. n60 A failure to file a brief constitutes a waiver of any opposition to the petition for certiorari. n61

[b] Required Arguments and Waiver

A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Supreme Court Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. n62

A significant new question or argument raised by the respondent must be raised in the opposition to the petition, because the Court will ordinarily not entertain such a question raised for the first time in a merits brief. The Court expects notice of an intent to make a far reaching argument in the respondent's opposition to a petition for certiorari, in order to assure adequate preparation time for those likely affected and wishing to participate. n63 The rules do not allow a respondent to file a motion to dismiss a petition for a writ of certiorari. Consequently, any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari must be included in the brief in opposition. n64

Supreme Court Rule 15.2 specifically admonishes attorneys that they have an obligation to the Court to point out in the brief in opposition, and not later, anyperceived misstatement made in the petition. n65 Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition. n66 Consequently, an argument is waived if either the litigant did not seek consideration of the argument in the lower court or the litigant does not address the argument in its brief in opposition to the petition. n67

However, the Court has discretion regarding waiver, and it will be especially inclined to hear an issue, even if the issue is not jurisdictional and even if it was not called to the Court's attention in the brief in opposition, if the issue could be "fairly included" within the question that was actually presented to the Court. n68

[c] Time for Filing and Format of Opposition Briefs

If any party desires or is required to file a brief in opposition, n69 it must be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Supreme Court Rule 30.4. The opposition party must file 40 copies of the brief, except that a respondent proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2, together with a motion for leave to proceed in forma pauperis, a copy of which must precede and be attached to each copy of the brief in opposition. n70 If the respondent wants, or is required, to file a brief in opposition to a petition filed in forma pauperis, the respondent must prepare its brief in opposition as required by Rule 33.2, n71 and must file an original and 10 copies of that brief. n72

Whether prepared under Supreme Court Rules 33.1 or 33.2, the brief in opposition must comply with the requirements of Supreme Court Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed in forma pauperis must be attached. The brief in opposition must be served as required by Supreme Court Rule 29. n73

[d] Clerk's Duty to Distribute Documents

Once the time for filing a brief in opposition has passed, or earlier on receiving an express waiver of the right to file a brief in opposition, the Supreme Court Clerk must distribute the petition to the Court for its consideration. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed. n74 If a cross-petition for a writ of certiorari has been docketed, distribution of the original and cross petitions will be deferred until the cross-petition is due for distribution under Supreme Court Rule 15. n75

[e] Reply Brief

Any petitioner may file a reply brief addressed to new points raised in the brief in opposition. However, distribution and consideration by the Court under Supreme Court Rule 15.5 will not be deferred pending its receipt. The litigant must file 40 copies of the brief, except that a petitioner proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. The reply brief must be served as required by Supreme Court Rule 29. n76

Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matters not available at the time of the party's last filing. A supplemental brief must be restricted to new matter and must follow, insofar as applicable, the form for a brief in opposition prescribed by Supreme Court Rule 15. Forty copies must be filed, except that a party proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. A supplemental brief must be served as required by Supreme Court Rule 29. n77

[7] Disposition of a Petition for a Writ of Certiorari n*

After the Supreme Court considers the documents distributed under Supreme Court Rule 15, the Court will enter an appropriate order which may be a summary disposition on the merits. n78 If the Court decides to grant a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will immediately notify counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in the Supreme Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. The Clerk will not issue a formal writ unlessspecially directed. n79 If the Court decides to deny a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will immediately notify counsel of record and the court whose judgment was sought to be reviewed. An order denying a petition for a writ of certiorari will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice. n80 A suspension of an order of denial constitutes "most extraordinary relief," and a Justice or the Supreme Court will not grant a suspension unless there is a reasonable likelihood of the Court's reversing its previous position and granting certiorari. n81

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewCivil ProcedureU.S. Supreme Court ReviewFederal Court DecisionsCivil ProcedureU.S. Supreme Court ReviewState Court Decisions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 510.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 10(a); *see United States v. Dionisio, 410 U.S. 1, 5, 93 S. Ct. 764, 35 L. Ed. 2d 67*

(1973) .

(n3)Footnote 2. Sup. Ct. R. 10(b); *see Cuyler v. Adams, 449 U.S. 433, 435-436, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981)* (certiorari granted to resolve conflict among circuits and state courts over interpretation of interstate agreement on detainers).

(n4)Footnote 3. Sup. Ct. R. 10(c); *Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 339, 112 S. Ct. 2009, 119 L. Ed. 2d 121, 130 (1992)* (certiorari granted because of importance of federal question and likelihood that it had been decided in way conflicting with applicable decisions of Supreme Court).

(n5)Footnote 3.1. Sup. Ct. R. 47.

(n6)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 511.02 et seq. (Matthew Bender 3d ed.).

(n7)Footnote 4. *28 U.S.C. § 1254(1).*

(n8)Footnote 5. Sup. Ct. R. 11.

(n9)Footnote 6. *28 U.S.C. § 2101(e).*

(n10)Footnote 7. *United States v. United Mine Workers of Am., 330 U.S. 258, 269, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* (Supreme Court granted certiorari to review action of district court only four days after defendants had taken appeal to court of appeals).

(n11)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 512.02 et seq. (Matthew Bender 3d ed.).

(n12)Footnote 8. Sup. Ct. R. 12.1.

(n13)Footnote 9. Sup. Ct. R. 12.2.

(n14)Footnote 10. Sup. Ct. R. 12.3.

(n15)Footnote 11. Sup. Ct. R. 12.4.

(n16)Footnote 12. Sup. Ct. R. 12.5.

(n17)Footnote 13. Sup. Ct. R. 12.6.

(n18)Footnote 14. Sup. Ct. R. 12.7.

(n19)Footnote 15. Sup. Ct. R. 12.7.

(n20)Footnote 16. Sup. Ct. R. 12.7.

(n21)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 513.02 et seq. (Matthew Bender 3d ed.).

(n22)Footnote 16.1. Sup. Ct. R. 13.1; *see Hibbs v. Winn, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172, 183 (2004)* ; *see also* [c], *below.*

(n23)Footnote 17. Sup. Ct. R. 13.1.

(n24)Footnote 18. *28 U.S.C. § 2350.*

(n25)Footnote 19. *28 U.S.C. §§ 2349, 2350.*

(n26)Footnote 20. Sup. Ct. R. 13.2.

(n27)Footnote 21. *See Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 103 (2007)* (stating that 90 day time limit for filing petition is jurisdictional and mandatory in civil cases, but may be relaxed in criminal cases).

(n28)Footnote 22. *28 U.S.C. § 2101(c)*; *see* [e], *below.*

(n29)Footnote 23. Sup. Ct. R. 13.3.

(n30)Footnote 24. Sup. Ct. R. 13.3; *see Hibbs v. Winn, 542 U.S. 88, 97-99, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)* (time period for filing petition for writ is suspended by any order of lower court that suspends finality of its judgment); *Cochran v. Holder, 564 F.3d 318, 324 (4th Cir. 2009)* (motion for rehearing or rehearing en banc in Courts of Appeals delays running of period to file petition for writ of certiorari in Supreme Court).

(n31)Footnote 25. Sup. Ct. R. 13.4.

(n32)Footnote 26. Sup. Ct. R. 13.5; *see 28 U.S.C. § 2101(c).*

(n33)Footnote 27. Sup. Ct. R. 13.5; *see Boumediene v. Bush, 550 U.S. 1301, 127 S. Ct. 1725, 167 L. Ed. 2d 757, 758-759 (2007)* (express provisions of rules control extensions of time in which to file a petition for writ of certiorari, but do not allow request for extension of time in which to file a petition for rehearing of an order denying certiorari).

(n34)Footnote 28. Sup. Ct. R. 13.5.

(n35)Footnote 29. *Penry v. Texas, 515 U.S. 1304, 1304-1306, 116 S. Ct. 2, 3, 132 L. Ed. 2d 887 (1995)* .

(n36)Footnote 30. *See Davis v. Bruce, 215 F.R.D. 612, 620 (D. Kan. 2003)* .

(n37)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice*, § 514.02 et seq. (Matthew Bender 3d ed.).

(n38)Footnote 31. Sup. Ct. R. 14.1.

(n39)Footnote 32. Sup. Ct. R. 14.1(a); *see Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 968 n.4 (2008)* (when question presented could not genuinely be answered without addressingsubsidiary question, court concluded that subsidiary question was fairly included within presented question).

(n40)Footnote 33. Sup. Ct. R. 14.1(a); *see 14 Penn Plaza LLC v. Pyett, ___ U.S. ___, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 420 (2009)* (Court would not consider question that was not encompassed within question presented to court); *City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214-215, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005)* (Court may consider all matters inextricably linked to questions actually presented in petition).

(n41)Footnote 34. Sup. Ct. R. 14.1(b).

(n42)Footnote 35. Sup. Ct. R. 14.1(c).

(n43)Footnote 36. Sup. Ct. R. 14.1(d).

(n44)Footnote 37. Sup. Ct. R. 14.1(e).

(n45)Footnote 38. Sup. Ct. R. 14.1(e)(i).

(n46)Footnote 39. Sup. Ct. R. 14.1(e)(ii).

(n47)Footnote 40. Sup. Ct. R. 14.1(e)(iii).

(n48)Footnote 41. Sup. Ct. R. 14.1(a); *cf. Johnson v. California, 541 U.S. 428, 431, 124 S. Ct. 1833, 158 L. Ed. 2d 696 (2004)* (attorneys should have stated compliance with statutory requirements for jurisdiction).

(n49)Footnote 42. Sup. Ct. R. 14.1(e)(v).

(n50)Footnote 43. Sup. Ct. R. 14.1(f).

(n51)Footnote 44. Sup. Ct. R. 14.1(g).

(n52)Footnote 45. Sup. Ct. R. 14.1(g)(i); *see Johnson v. California, 541 U.S. 428, 431-432, 124 S. Ct. 1833, 158 L. Ed. 2d 696 (2004)* (petition for certiorari must demonstrate to Supreme Court that Court has jurisdiction to review judgment).

(n53)Footnote 46. Sup. Ct. R. 14.1(g)(ii).

(n54)Footnote 47. Sup. Ct. R. 14.1(h).

(n55)Footnote 48. Sup. Ct. R. 14.1(i)(i).

(n56)Footnote 49. Sup. Ct. R. 14.1(i)(ii); *see Johnson v. California, 541 U.S. 428, 431-432, 124 S. Ct. 1833, 158 L. Ed. 2d 696 (2004)* (demonstrating that petitioner should include complete versions of all opinions and decisions that could possibly affect Supreme Court determination).

(n57)Footnote 50. Sup. Ct. R. 14.1(i)(iii).

(N58)Footnote 51. Sup. Ct. R. 14.1(i)(iv).

(n59)Footnote 52. Sup. Ct. R. 14.1(i)(v); *see* Sup. Ct. R. 14.1(g)(i); *see also Johnson v. California, 541 U.S. 428, 431, 124 S. Ct. 1833, 158 L. Ed. 2d 696 (2004)* (attorneys should have included opinions of lower court bearing on jurisdictional grounds of Supreme Court).

(n60)Footnote 53. Sup. Ct. R. 14.1(i)(vi).

(n61)Footnote 54. Sup. Ct. R. 14.2.

(n62)Footnote 55. Sup. Ct. R. 14.3.

(n63)Footnote 56. Sup. Ct. R. 14.4.

(n64)Footnote 57. *See § 29.10[1][a].*

(n65)Footnote 58. Sup. Ct. R. 14.5; *cf. Becker v. Montgomery, 532 U.S. 757, 767, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (Supreme Court indicating errors in form or title of petition or name party could be corrected under Rule 14.5).

(n66)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 515.02 et seq. (Matthew Bender 3d ed.).

(n67)Footnote 59. *See* Sup. Ct. R. 14.1(a).

(n68)Footnote 60. Sup. Ct. R. 15.1.

(n69)Footnote 61. *Deal v. Hamilton County Dep't of Educ., 2006 U.S. Dist. LEXIS 76324, at *50 (E.D. Tenn. 2006)* .

(n70)Footnote 62. Sup. Ct. R. 15.2.

(n71)Footnote 63. *Gross v. FBL Fin. Servs., ___ U.S. ___, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 132 (2009)* .

(n72)Footnote 64. Sup. Ct. R. 15.4.

(n73)Footnote 65. *Carcieri v. Salazar, ___ U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791, 804 (2009)* (Court may accept as fact any matter asserted in petition that is not contested in opposition to petition).

(n74)Footnote 66. Sup. Ct. R. 15.2.

(n75)Footnote 67. *Baldwin v. Reese, 541 U.S. 27, 33-34, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004)* .

(n76)Footnote 68. *See* Sup. Ct. R. 14.1(a); *see also City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214-215, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005)* .

(n77)Footnote 69. *See* [a], *above*.

(n78)Footnote 70. Sup. Ct. R. 15.3.

(n79)Footnote 71. *See* Sup. Ct. R. 33.2 (requiring brief on 8 1/2- by 11-inch paper).

(n80)Footnote 72. Sup. Ct. R. 15.3.

(n81)Footnote 73. Sup. Ct. R. 15.3.

(n82)Footnote 74. Sup. Ct. R. 15.5.

(n83)Footnote 75. Sup. Ct. R. 15.7.

(n84)Footnote 76. Sup. Ct. R. 15.6; *see, e.g., Colburn v. Cockrell, 537 U.S. 1016, 123 S. Ct. 517, 154 L. Ed. 2d 422 (2002)* (court may dispense with filing requirements of Rule 29).

(n85)Footnote 77. Sup. Ct. R. 15.8.

(n86)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice*, § 516.02 et seq. (Matthew Bender 3d ed.).

(n87)Footnote 78. Sup. Ct. R. 16.1.

(n88)Footnote 79. Sup. Ct. R. 16.2.

(n89)Footnote 80. Sup. Ct. R. 16.3; *see In re Smith, 436 F.3d 9, 10-11 (1st Cir. 2006)* (unless suspended, denial will start to run certain time limitations, such as one year period for prisoner to seek habeas corpus relief under *28 U.S.C. § 2255*.

(n90)Footnote 81. *Boumediene v. Bush, 550 U.S. 1301, 127 S. Ct. 1725, 1727, 167 L. Ed. 2d 757, 759 (2007)*

(possible grant of certiorari based on activity in lower courts not sufficient).

Moore's Manual--Federal Practice and Procedure

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.07

§ 29.07 Motions and Applications

[1] Motions to Entire Supreme Court n*

[a] Motion Contents

Whenever any party makes a motion to the Supreme Court, the motion must clearly state its purpose and the facts on which it is based, and may present legal argument in support of the motion. Motions must not be accompanied by separate briefs and no separate brief may be filed. A motion should be concise and must comply with any applicable word or page limits. n1 In contrast to a motion to the entire court under Supreme Court Rule 21, Supreme Court Rule 22 governs an application addressed to a single Justice. n2

[b] Motion Format

The format of a motion depends on the type of action in which the motion is made, or the particular type of motion, as follows:

1. If a motion is to be filed in any action within the Court's original jurisdiction, the motion must comply with Supreme Court Rule 17.3. n3

2. A motion to dismiss as moot, a motion for leave to file a brief as amicus curiae, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Supreme Court Rule 18.5 or a motion for voluntary dismissal under Supreme Court Rule 46) must be prepared as required by Supreme Court Rule 33.1, and 40 copies must be filed, except that a movant proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file a motion prepared as required by Supreme Court Rule 33.2, and must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. The motion must be served as required by Supreme Court Rule 29. n4

3. Any motion to the Court other than those described in items 1 and 2 must be prepared as required by Supreme Court Rule 33.2; the moving party must file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Supreme Court Rule 33.1, and in that

event the party must file 40 copies. n5

[c] Filing Motion

A motion to the Court must be filed with the Clerk and must be accompanied by proof of service as required by Supreme Court Rule 29. A litigant may not present a motion in open Court except when the proceeding to which it refers is being argued, and except for a motion for admission to the Bar. Oral argument on a motion will not be permitted unless the Court directs oral argument. n6

[d] Filing Response to Motion

A party who desires to file a response to a motion, must file the response as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and in any event, within 10 days of receipt of a motion. However, the Court or a Justice or the Clerk under Supreme Court Rule 30.4, may set a different time. A response to a motion prepared as required by Supreme Court Rule 33.1 must be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response. n7

[2] Applications to Individual Justices n*

[a] Procedure for Making Application

Each Supreme Court Justice has authority to individually grant or deny certain types of relief, n8 typically related to injunctive relief or a stay of proceedings. n9 When an individual Justice does have such authority, a party may make an application to the individual Justice by filing the application to the Clerk, who must transmit it promptlyto the appropriate Justice. n10 The original and two copies of any application addressed to an individual Justice must be prepared as required by Supreme Court Rule 33.2 and must be accompanied by proof of service as required by Supreme Court Rule 29. n11 An application must be addressed to the Justice allotted to the circuit from which the case arises, except that an application arising from the United States Court of Appeals for the Armed Forces must be addressed to the Chief Justice. When the Justice allotted to a circuit is unavailable for any reason, an application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice. n12

When an application for a stay or for bail is submitted to an individual Justice, that justice has discretion to refer it to the entire Court for determination. n13 Alternatively, the individual Justice may deny the application without referring it to the court if appropriate in the circumstances, for example, if time is of the essence. n14

When an individual Justice denies or grants an application, the Clerk must promptly advise all parties concerned of the disposition made of the application. n15

[b] Procedure for Renewal in Event of Denial

If an individual Justice denies an application made to the Justice, he or she will note the denial on the application. Thereafter, unless action on the application is restricted by law to the Circuit Justice or is untimely under Supreme Court Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of Supreme Court Rule 22. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed and must be accompanied by 10 copies of the original application and proof of service as required by Supreme Court Rule 29. n16

[3] Application for Stay n*

[a] Availability of Stay

A stay may be granted by a Justice as permitted by law. n1 Thus, when a final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the losing party to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a justice of the Supreme Court or by the court rendering the judgment or decree. n2

The Supreme Court will stay execution of a lower court judgment, such as an appellate mandate, only in extraordinary cases. The court has developed a test whether to grant a stay. As a threshold, the applicant must demonstrate three conditions: (1) a reasonable probability that four Justices of the U.S. Supreme Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a significant prospect that a majority of the Court will conclude that the lower court decision was erroneous and will be reversed; and (3) a likelihood that irreparable harm will result from a denial of a stay. n3 With respect to the third condition, irreparable harm, the amount of money, time, and energy lost in the absence of a stay are not controlling. Irreparable harm exists only when no adequate compensatory or other corrective relief will be available at a later date in the ordinary course of the litigation, as through an appeal. n4

All of these three threshold factors must be present under the circumstances of the particular situation, and no one factor controls. n5 However, a stay will not issue simply because the necessary threshold conditions are satisfied. Rather, the Court must next exercise equitable discretion to determine whether a stay should be denied because a balance of the equities weighs against a stay. n6 This balance of equities is an analysis of the relative harms to the applicant and respondent, as well as the interests of the public at large. n7

[b] Requirements for Application

Any party to a judgment sought to be reviewed in the Supreme Court may present to a Justice an application to stay the enforcement of that judgment. n8 An application for a stay must set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges of the court or courts. An application for a stay must identify the judgment sought to be reviewed and have appended to the stay a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Supreme Court Rules 22 and 33.2. n9

[c] Requirement of Bond

When an appeal of a judgment is pending before the Supreme Court, a Justice of the Supreme Court or the lower court judge may condition its grant of an application for stay of execution of the judgment on the applicant's posting of a bond. n10 This bond to obtain a stay of judgment pending appeal is known as a supersedeas bond. n11

When required by the court granting the stay, the applicant must post a supersedeas bond having an approved surety or sureties in an amount sufficient to satisfy the judgment in full, and also any costs, interest, and damages for delay that may be awarded for prosecution of the appeal. n12 In this regard, the Supreme Court Justice or lower court judge may require a bond covering the expenses of the applicant's failure to file a petition writ of certiorari within the time period allotted, failure to obtain an order granting his or her petition for writ of certiorari, failure to prevail in Supreme Court, and all other damages and costs that the other party incurs on account of the stay. n13 If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral OverviewCivil ProcedureU.S. Supreme Court ReviewFederal Court DecisionsCivil ProcedureU.S. Supreme Court ReviewState Court Decisions

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 521.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 21.1.

(n3)Footnote 2. Sup. Ct. R. 21.1; *see* [2], *below*.

(n4)Footnote 3. Sup. Ct. R. 21.2(a); *see § 29.05[1][b]*.

(n5)Footnote 4. Sup. Ct. R. 21.2(b).

(n6)Footnote 5. Sup. Ct. R. 21.2(c).

(n7)Footnote 6. Sup. Ct. R. 21.3.

(n8)Footnote 7. Sup. Ct. R. 21.4.

(n9)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 522.02 et seq. (Matthew Bender 3d ed.).

(n10)Footnote 8. *See 28 U.S.C. § 42* (each Supreme Court justice may be allotted to hear matters from each circuit); *see, e.g., Democratic Nat'l Comm. v. Republican Nat'l Comm., 543 U.S. 1304, 1304, 125 S. Ct. 306, 160 L. Ed. 2d 216 (2004)* .

(n11)Footnote 9. *See* [3], *below*; *see also 28 U.S.C. § 2101(f)*.

(n12)Footnote 10. Sup. Ct. R. 22.1.

(n13)Footnote 11. Sup. Ct. R. 22.2.

(n14)Footnote 12. Sup. Ct. R. 22.3.

(n15)Footnote 13. Sup. Ct. R. 22.5; *see Brunner v. Ohio Republican Party, 555 U.S. 5, 129 S. Ct. 5, 172 L. Ed. 2d 4, 5 (2008)* .

(n16)Footnote 14. *See Spencer v. Pugh, 543 U.S. 1301, 1302-1303, 125 S. Ct. 305, 160 L. Ed. 2d 213 (2004)* .

(n17)Footnote 15. Sup. Ct. R. 22.6.

(n18)Footnote 16. Sup. Ct. R. 22.4.

(n19)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 523.02 et seq. (Matthew Bender 3d ed.).

(n20)Footnote 1. Sup. Ct. R. 23.1.

(n21)Footnote 2. *28 U.S.C. § 2101(f)*; *see* Sup. Ct. R. 23.2.

(n22)Footnote 3. *Philip Morris USA Inc. v. Scott, ___ U.S. ___, 131 S. Ct. 1, 177 L. Ed. 2d 1040, 1042 (2010)* .

(n23)Footnote 4. *Conkright v. Frommert, ___ U.S. ___, 129 S. Ct. 1861, 173 L. Ed. 2d 865, 867 (2009)* .

(n24)Footnote 5. *Ind. State Police Pension Trust v. Chrysler LLC, ___ U.S. ___, 129 S. Ct. 2275, 173 L. Ed. 2d 1285, 1287 (2009)* (stay is not a matter of right, even if irreparable injury would otherwise result).

(n25)Footnote 6. *Philip Morris USA Inc. v. Scott, ___ U.S. ___, 131 S. Ct. 1, 177 L. Ed. 2d 1040, 1043-1044 (2010)* .

(n26)Footnote 7. *Conkright v. Frommert, ___ U.S. ___, 129 S. Ct. 1861, 173 L. Ed. 2d 865, 867 (2009)* .

(n27)Footnote 8. Sup. Ct. R. 23.2; *see 28 U.S.C. § 2101(f)* (execution and enforcement of judgment or decree may be stayed for reasonable time to enable party aggrieved to obtain writ of certiorari from Supreme Court).

(n28)Footnote 9. Sup. Ct. R. 23.3.

(n29)Footnote 10. Sup. Ct. R. 23.4.

(n30)Footnote 11. *See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 413, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)* .

(n31)Footnote 12. Sup. Ct. R. 23.4.

(n32)Footnote 13. *28 U.S.C. § 2101(f).*

(n33)Footnote 14. Sup. Ct. R. 23.4.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.08

§ 29.08 Brief on Merits

[1] General Requirements of Brief n*

[a] Required Contents of Brief for Petitioner or Appellant

A brief on the merits for a petitioner or an appellant must comply in all respects with Supreme Court Rules 33.1 and 34, and must contain in the following order: n1

1. The questions presented for review under Supreme Court Rule 14.1(a). The questions must be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement; however, the brief may not raise any additional questions or issues, nor may the brief modify the substance of the questions already presented in those documents. n2 The court does have discretion, on the other hand, to consider a plain error even if the error is not among the issues presented, provided that the error is otherwise evident from the record and otherwise within its jurisdiction to decide. n3

2. A list of all parties to the proceeding in the court whose judgment is under review, unless the caption of the case in the Supreme Court contains the names of all parties. Any amended list of parent companies and nonwholly owned subsidiaries as required by Supreme Court Rule 29.6 must be placed here. n4

3. If the brief exceeds five pages, a table of contents and a table of cited authorities. n5

4. Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies. n6

5. A concise statement of the basis for jurisdiction in the Supreme Court, including the statutory provisions and time factors on which jurisdiction rests. n7 The parties must include an accurate jurisdictional statement in the briefs on the merits because the Supreme Court must ensure that it has jurisdiction to review a judgment at all stages of the appellate process. The court will rely on the statements in the brief on the merits, as well as all other materials required to be submitted to the Court,

such as opinions of lower courts, to verify its jurisdiction at all stages of the proceedings. n8

6. The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, must be set out in an appendix to the brief. n9

7. A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12. n10

8. A summary of the argument in suitable paragraph format. The summary must be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient. n11

9. The argument, stating clearly the points of fact and of law presented and citing the authorities and statutes relied on. n12

10. A conclusion specifying with particularity the relief the party seeks. n13

[b] Required Contents of Brief for Respondent or Appellee

A brief on the merits for a respondent or an appellee must conform to the requirements specified for a petitioner or appellant, n14 except that items required by Supreme Court Rule 24.1(a), (b), (d), (e), (f), and (g) need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party. n15

[c] Required Contents of Reply Brief

A reply brief must conform to those portions of Supreme Court Rule 24 applicable to the brief for a respondent or an appellee, n16 but if appropriately divided by topical headings, need not contain a summary of the argument. n17

[d] Limitations

A brief on the merits may not exceed the word limitations specified in Supreme Court Rule 33.1(g). Thus, the reply brief is limited to 6,000 words. n18 An appendix to a brief may include only relevant material; it may not contain arguments or citations that properly belong in the body of the brief. n19

[e] Cross references

A reference to the joint appendix or to the record set out in any brief must indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge must be indicated, e.g., Pl. Exh. 14, Record 199, 2134. n20

[f] Striking of Inappropriate Material

A brief must be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this requirement. n21

[2] Timely Filing of Required Number of Copies n*

[a] Time for Filing by Petitioner or Appellant or Parties in Support

The petitioner or appellant must file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant must meet the petitioner's or appellant's time schedule for filing documents. n1

[b] Time for Filing by Respondent or Appellee

The respondent or appellee must file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed. n2

[c] Time for Filing Reply

The petitioner or appellant must file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief. n3 Additionally, the Supreme Court may allow amicus curiae leave to file briefs, with reply briefs to be filed within the 35-day time period specified in Rule 25.3. n4

[d] Extensions of Time

The time periods for filing a brief may be extended as provided in Supreme Court Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party. n5

[e] Supplemental Brief

A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with the Supreme Court Rules, up to the time the case is called for oral argument or by leave of the Court after that time. n6

[f] Refusal of Filings by Clerk

After a case has been argued or submitted, the Supreme Court Clerk will not file any brief, except that of a party filed by leave of the Court. n7 The Clerk also will not file any brief that is not accompanied by proof of service as required by Supreme Court Rule 29. n8

[g] Electronic Submission of All Briefs on Merits

At the time any party files a brief on the merits, the party must also transmit an electronic version of the brief to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk. This electronic transmission requirement is in addition to, and does not obviate, the requirement that the parties timely file booklet-format briefs. n9

[h] Brief in Cross-Petition or Cross-Appeal

If a cross-petition or cross-appeal has been consolidated for argument, and if requested by the parties, the Clerk may designate the parties to assume the roles of appellant and appellee. n10 Thus, the clerk designates one of the parties to file an initial brief and reply brief as if the party were petitioner or appellant, n11 and designates the other party to file an initial response brief as provided in Rule 25.2 and, to the extent appropriate, a supplemental brief following the

submission of the reply brief. n12 In such a case, the Clerk also establishes the time for the submission of the briefs and alter the otherwise applicable word limits. Except as approved by the Court or a Justice, the total number of words permitted for the briefs of the parties cumulatively shall not exceed the maximum that would have been allowed in the absence of a cross-petition or cross-appeal brief. n13

[3] Filing of Joint Appendix n*

[a] Requirement of Joint Appendix

Unless the Clerk has allowed the parties to use the deferred method described in Supreme Court Rule 26.4, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, must file 40 copies of a joint appendix, prepared as required by Supreme Court Rule 33.1. n1 For good cause, the time limits regarding the filing of an appendix may be shortened or extended by the Court or a Justice, or by the Clerk under Supreme Court Rule 30.4. n2

The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix, and may permit a case to be heard on the original record (with such copies of the record, or relevant parts of the record, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of Supreme Court Rule 26. n3

[b] Contents of Joint Appendix

The joint appendix generally must contain all four of the following:

1. The relevant docket entries in all the courts below;

2. Any relevant pleadings, jury instructions, findings, conclusions, or opinions.

3. The judgment, order, or decision under review.

4. Any other parts of the record that the parties particularly wish to bring to the Court's attention.

However, any of the four above items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant must serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29. n4

[c] Designation in Absence of Agreement

The Supreme Court encourages parties to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, must serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record designated by the opposition insufficient must serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant must include the parts so designated.

If the Court has permitted the respondent or appellee to proceed in forma pauperis, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine and must avoid

unnecessary designations. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix. n5

[d] Costs

When filing the joint appendix, the petitioner or appellant also must immediately file with the Clerk a statement of the cost of printing 50 copies and must serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix must be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then must advance the cost of printing the additional parts, unless the Court or a Justice otherwise establishes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party. n6

[e] Deferred Method of Filing

The Supreme Court Clerk may allow deferral of preparation of the joint appendix until after the briefs have been filed, if the parties request deferral. In that event, the petitioner or appellant must file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of Supreme Court Rule 26.1, 26.2, and 26.3 must be followed, except that the designations referred to in those provisions must be made by each party when that party's brief is served. Deferral of the joint appendix is not favored. n7

If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix must include in brackets on each page of the appendix the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Supreme Court Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, must be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected. n8

[f] Preface of Joint Appendix

The joint appendix must be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries must be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears must be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix must be indicated by asterisks. Immaterial formal matters must be omitted, for example, unnecessary captions, subscriptions, acknowledgments. A question and its answer may be included in a single paragraph. n9

[g] Exhibits

Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph. n10

[h] Indication of Dates on Cover

The parties must place two lines at the bottom of the cover of the joint appendix: (1) The first line must indicate the date

the petition for the writ of certiorari was filed or the date the appeal was docketed; (2) The second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 524.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 24.1.

(n3)Footnote 2. Sup. Ct. R. 24.1(a); *see Board of Trustees v. Garrett, 531 U.S. 356, 360 n.1, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)* (Court not required to decide issues not briefed by parties, even if certiorari was granted on issue); *Chandris, Inc. v. Latsis, 515 U.S. 347, 353* n.*, *115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995)* (because issue was not specified in petition for certiorari, Court would not consider argument concerning issue).

(n4)Footnote 3. Sup. Ct. R. 24.1(a); *see Board of Trustees v. Garrett, 531 U.S. 356, 360 n.1, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)* (even if Court grants certiorari on particular issue not presented by parties, court is not required to decide issue); *Taylor v. Freeland & Kronz, 503 U.S. 638, 646, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992)* (Court should only consider additional issues in unusual circumstances).

(n5)Footnote 4. Sup. Ct. R. 24.1(b).

(n6)Footnote 5. Sup. Ct. R. 24.1(c).

(n7)Footnote 6. Sup. Ct. R. 24.1(d).

(n8)Footnote 7. Sup. Ct. R. 24.1(e).

(n9)Footnote 8. *Johnson v. California, 541 U.S. 428, 431-432, 124 S. Ct. 1833, 158 L. Ed. 2d 696 (2004)* (Supreme Court dismissed case for lack of jurisdiction once court determined, after briefs on merits were filed, that highest state court judgment was not "final").

(n10)Footnote 9. Sup. Ct. R. 24.1(f).

(n11)Footnote 10. Sup. Ct. R. 24.1(g).

(n12)Footnote 11. Sup. Ct. R. 24.1(h).

(n13)Footnote 12. Sup. Ct. R. 24.1(i).

(n14)Footnote 13. Sup. Ct. R. 24.1(j).

(n15)Footnote 14. *See* [a], *above*.

(n16)Footnote 15. Sup. Ct. R. 24.2.

(n17)Footnote 16. *See* [a], *above*.

(n18)Footnote 17. Sup. Ct. R. 24.4.

(n19)Footnote 18. Sup. Ct. R. 33.1(g)(vii).

(n20)Footnote 19. Sup. Ct. R. 24.3.

(n21)Footnote 20. Sup. Ct. R. 24.5.

(n22)Footnote 21. Sup. Ct. R. 24.6.

(n23)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 525.02 et seq. (Matthew Bender 3d ed.).

(n24)Footnote 1. Sup. Ct. R. 25.1.

(n25)Footnote 2. Sup. Ct. R. 25.2.

(n26)Footnote 3. Sup. Ct. R. 25.3.

(n27)Footnote 4. *See Metro-North Commuter R.R. v. Buckley, 519 U.S. 958, 958, 117 S. Ct. 379, 136 L. Ed. 2d 297 (1996)* .

(n28)Footnote 5. Sup. Ct. R. 25.5.

(n29)Footnote 6. Sup. Ct. R. 25.6.

(n30)Footnote 7. Sup. Ct. R. 25.7.

(n31)Footnote 8. Sup. Ct. R. 25.8.

(n32)Footnote 9. Sup. Ct. R. 25.9.

(n33)Footnote 10. *See* Sup. Ct. R. 25.4.

(n34)Footnote 11. *See* Sup. Ct. R. 25.1, 25.3.

(n35)Footnote 12. *See* Sup. Ct. R. 25.2, 25.5.

(n36)Footnote 13. Sup. Ct. R. 25.4.

(n37)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 526.02 et seq. (Matthew Bender 3d ed.).

(n38)Footnote 1. Sup. Ct. R. 26.1.

(n39)Footnote 2. Sup. Ct. R. 26.9.

(n40)Footnote 3. Sup. Ct. R. 26.8.

(n41)Footnote 4. Sup. Ct. R. 26.1.

(n42)Footnote 5. Sup. Ct. R. 26.2.

(n43)Footnote 6. Sup. Ct. R. 26.3.

(n44)Footnote 7. Sup. Ct. R. 26.4(a).

(n45)Footnote 8. Sup. Ct. R. 26.4(b).

(n46)Footnote 9. Sup. Ct. R. 26.5.

(n47)Footnote 10. Sup. Ct. R. 26.7.

(n48)Footnote 11. Sup. Ct. R. 26.6.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.09

§ 29.09 Calendar and Oral Argument

[1] Calendar n*

The Clerk must periodically prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due. n1 The Clerk will advise the attorneys when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public. n2 The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe. n3

[2] Oral Argument n*

[a] Nature of Oral Argument

In their oral argument, the attorneys should emphasize and clarify the written arguments in the briefs on the merits. The attorneys should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored. n4

[b] Order of Oral Argument

The petitioner or appellant must open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who must open and close. n5 Unless the Court directs otherwise, each side is allowed one-half hour for argument. Attorneys are not required to use all their allotted time. To make a request for additional time to argue, the litigant must make a motion under Rule 21 in time to be considered at a scheduled conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. The motion must set out specifically and concisely why the case cannot be presented within the half-hour limitation. The Supreme Court will rarely accord additional time. n6

Generally, the Court will hear only one attorney each side. However, the court may hear more than one attorney, in a procedure know as divided argument, by granting leave of the Court on motion filed by a litigant. The motion must be

filed in time to be considered at a scheduled conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. The motion must meet the requirements of Supreme Court Rule 21 and must set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored. n7

Regardless of the number of counsel participating in oral argument, counsel making the opening argument must present the case fairly and completely and not reserve points of substance for rebuttal. n8 Oral argument will not be allowed on behalf of any party for whom a brief has not been filed. n9

[c] Oral Argument by Attorney for Amicus Curiae

Subject to leave of the Court and the usual requirements of oral argument under Supreme Court Rule 28.4, n10 counsel for an amicus curiae whose brief has been filed as provided in Supreme Court Rule 37 may argue orally on the side of a party with the consent of that party. In the absence of consent, counsel for an amicus curiae may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 527.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 27.1.

(n3)Footnote 2. Sup. Ct. R. 27.2.

(n4)Footnote 3. Sup. Ct. R. 27.3.

(n5)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 528.02 et seq. (Matthew Bender 3d ed.).

(n6)Footnote 4. Sup. Ct. R. 28.1.

(n7)Footnote 5. Sup. Ct. R. 28.2.

(n8)Footnote 6. Sup. Ct. R. 28.3.

(n9)Footnote 7. Sup. Ct. R. 28.4.

(n10)Footnote 8. Sup. Ct. R. 28.5.

(n11)Footnote 9. Sup. Ct. R. 28.6.

(n12)Footnote 10. *See* [b], *above*.

(n13)Footnote 11. Sup. Ct. R. 28.7.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.10

§ 29.10 General Supreme Court Practice and Procedures

[1] Filing, Service, and Notice n*

[a] Filing of Documents

If a litigant is required or permitted to present any document to the Court or to an individual Justice, the document must be filed with the Clerk. n1 A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within three calendar days. n1.1 It is significant to note that a document is considered filed as of the time it is placed in authorized mail; it is not necessarily that it be received by the clerk. n1.2

If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with Judicial Code Section 1746, n2 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who mailed the document to submit a notarized statement or declaration in compliance with Judicial Code Section 1746, n3 setting out the details of the mailing and stating that the mailing took place on a particular date within the permitted time. n3.1

A document also is timely filed if it is forwarded through a private delivery or courier service and is actually received by the Clerk within the time permitted for filing. n4

[b] Service of Documents

[i] In General

When the Supreme Court Rules require a document to be served, the document may be served personally, by mail, or by third-party commercial carrier for delivery within three calendar days on each party to the proceeding at or before the time of filing. n5 Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file

the document with the Court. If a party makes personal service, service must consist of delivery at the office of the counsel of record, either to counsel or to an employee in the office. If service is by mail or third-party commercial carrier, it must consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within three calendar days, addressed to counsel of record at the proper address. When a party is not represented by counsel, service must be made on the party, personally, by mail, or by commercial carrier.

The number of copies required to be served depends on the type of document. If the document has been prepared in booklet style, as required by Supreme Court Rule 33.1, n5.1 three copies must be served on each other party separately represented in the proceeding. If the document has been prepared in standard sized paper format, as required by Rule 33.2, n5.2 service of a single copy on each other separately represented party is sufficient. n5.3

[ii] Service on United States Entity

If the United States or any federal department, office, agency, officer, or employee is a party to be served, service must be made on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, DC 20530. When an agency of the United States that is a party is authorized by law to appear before the Supreme Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee must be served in addition to the Solicitor General. n6

[iii] Service in Case Involving Constitutionality of Act of Congress

In any proceeding in the Supreme Court in which the constitutionality of an act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in the Supreme Court must recite that *28 U.S.C. Section 2403(a)* n7 may apply and must be served on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, DC 20530. n8

[iv] Service in Case Involving Constitutionality of Statute of State

In any proceeding in the Supreme Court in which the constitutionality of any statute of a state is drawn into question, and neither the state nor any agency, officer, or employee of the state is a party, the initial document filed in the Supreme Court must recite that *28 U.S.C. Section 2403(b)* may apply and must be served on the attorney general of that state. n9

[c] Proof Service of Documents

When required by a Supreme Court rule, proof of service must accompany the document when it is presented to the Clerk for filing, but must be separate from and not included in the document. Proof of service must contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following three documents:

1. An acknowledgment of service signed by the attorney of record for the party served and bearing the address and telephone number of the attorney. n10

2. A certificate of service that recites the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of Supreme Court Rule 29, and which is signed by a member of the Bar of the Supreme Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act n11 or under any other applicable federal

statute. n12

3. A notarized affidavit or declaration in compliance with the Judicial Code, n13 reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of Supreme Court Rule 29, whenever service is made by any person not a member of the Bar of the Supreme Court and not an attorney appointed to represent a party under the Criminal Justice Act, n14 or under any other applicable federal statute. n15

[d] Corporate Disclosure Statement

When an attorney files any document, except a joint appendix or amicus curiae brief, on behalf of a nongovernmental corporation, the document must contain a corporate disclosure statement that identifies the parent corporations and lists any publicly held company that owns 10 percent or more of the corporation's stock. n16 The purpose of a disclosure statement is to assist the Justices in ascertaining whether any Justice has an interest that should cause the Justice to recuse himself or herself from the case. n17 If there is no parent or publicly held company owning 10 percent or more of the corporation's stock, a notation to this effect must be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document, except when the earlier statement appeared in a document prepared under Supreme Court Rule 33.2, and only amendments to the statement to make it current need be included in the document being filed. n18

[2] Computation and Extension of Time n*

[a] Computation of Time

In the computation of any period of time prescribed or allowed by the Supreme Court Rules, by order of the Supreme Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period must be included, unless it is a Saturday, Sunday, or federal legal holiday, n19 or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period must extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed. n20

[b] Application for Extension of Time

Whenever a Justice or the Clerk is empowered by law or the Supreme Court Rules to extend the time to file any document, the litigant requesting the extension must file an application within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under the Supreme Court Rules; if filed less than 10 days before the final filing date, the application will not be granted except in the most extraordinary circumstances. n21 In addition to showing extraordinary circumstances, the petitioner should establish that, but for such circumstances, the applicant would have filed the application more than 10 days before the final filing date. n21.1

[c] General Format of Application

For an application to extend the time to file a document or paper other than those that must be submitted to an individual justice, n22 the application may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter must be served on all other parties as required by Supreme Court Rule 29. The application may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed. n23

[d] Certain Applications Must be Submitted to Individual Justice

If a litigant makes an application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing, the application must be made to an individual Justice and presented and served on all other parties as provided by Supreme Court Rule 22. Once denied, such an application may not be renewed. n24

[3] Translations n*

Whenever a court clerk is required to transmit a record to the Supreme Court that contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record must advise the Clerk of the Supreme Court immediately, so that the Supreme Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix. n25

[4] Demonstrative Evidence and Material Provided for Inspection of Court n*

Models, diagrams, and exhibits of material that form a part of the evidence taken in a case and that are brought to the Supreme Court for its inspection must be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted. n26 All models, diagrams, exhibits, and other items placed in the custody of the Clerk must be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to immediately remove the articles. If they are not removed within a reasonable time after the case is decided, the Clerk will destroy them or dispose of them in any other appropriate way. n27

If a party or amicus curiae desires to lodge non-record material with the Clerk, the requesting party must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why it would be proper for the Supreme Court to consider the non-record material. The requesting party may not submit material proposed for lodging until and unless requested by the Clerk. n27.1 As used in the federal courts, the term "lodge," is commonly understood as referring to the temporary acceptance of a document by the clerk pending a determination whether the court will consider it, while the term file means that a document is officially deposited with the court as part of the record. n27.2

This requirement has been added to the Supreme Court Rules because the practice of lodging non-record materials has increased in recent years to the extent that parties and amici curiae have deluged the court with all types of materials, such as, reports, magazine articles, photographs, video and cassette tapes, and DVDs. This new requirement places the burden on the party or amicus curiae wishing to submit the non-record material to show why the Court should consider the material. The requirement also eliminates the need for the court to be the depository of materials that may not be relevant or properly considered. n27.3

[5] Document Formats n*

[a] General Requirement that Documents Conform to Booklet Format

[i] Required Booklet

Except for a document expressly permitted by the Supreme Court Rules to be submitted on 8 1/2- by 11-inch paper, n28 every document filed with the Court must be prepared in a 6 1/8- by 9 1/4-inch booklet format using a standard typesetting process, such as hot metal, photocomposition, or computer typesetting, to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer. n29

[ii] Text of Booklet

The text of every booklet-format document, including any appendix to the document, must be typeset in a Century family (e. g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type 2-point or more leading between lines. The typeface must be similar to that used in current volumes of the United States Reports. Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited. Type size and face must be consistent throughout. Quotations in excess of 50 words must be indented. The typeface of footnotes must be 10-point with 2-point or more leading between lines. The text of the document must appear on both sides of the page. n30

[iii] Paper and Binding

Every booklet-format document must be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight and must have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4 1/8 by 7 1/8 inches. The document must be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix. n31

[iv] Word Count Limitation

Every booklet-format document must comply with the word limits shown on the chart in subparagraph 1(g) of Supreme Court Rule 33. n32 The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. Verbatim quotations required under Supreme Court Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. On the other hand, the word limits do include footnotes. For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored. An application to exceed word limits must comply with Supreme Court Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances. n33

[v] Cover Specifications

Every booklet-format document must have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in Supreme Court Rule 33.1(g). If a separate appendix to any document is filed, the color of its cover must be the same as that of the cover of the document it supports. The Clerk will furnish a color chart on request. Counsel must ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, must have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in Supreme Court Rule 33.1(g) must have a tan cover. n34

[vi] Number of Copies

When a booklet-format document is required, 40 copies of the booklet must be filed. n35

[vii] Color of Cover

Supreme Court Rule 33.1 also specifies the color required for each type of booklet. For example, a petition for certiorari booklet must have a white cover, and a brief in opposition to a petition must have an orange cover. n36 For a list of these limits and colors, see the Appendix of Supreme Court Rules following this Chapter.

[viii] Certification of Compliance With Word Limits

For each booklet format document, the attorney, an unrepresented party, or the preparer of the booklet must also file a signed certificate stating that the booklet complies with the word limitations. The certificate must state the precise number of words in the document. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the booklet, provided that the word-processing system is set to include footnotes in the word count. The certificate must accompany the booklet when it is presented to the Clerk for filing and must be separate from the booklet. n37 If the certificate is signed by a person other than a member of the Supreme Court Bar, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with the Judiciary Code. n38

[b] Filing of Paper Format Document

[i] Text of 8 1/2 by 11-Inch Paper Format

The text of every document, including any appendix to the document, expressly permitted by the Supreme Court Rules to be presented to the Court on 8 1/2 by 11-inch paper must appear double spaced, except for indented quotations, which must be single spaced, on opaque, unglazed, white paper. The document must be stapled or bound at the upper left-hand corner. Any copies that are required, must be produced on the same type of paper and must be legible. The original of any such document, except a motion to dismiss or affirm under Supreme Court Rule 18.6 must be signed by the party proceeding pro se or by counsel of record who must be a member of the Bar of the Supreme Court or an attorney appointed under the Criminal Justice Act or under any other applicable federal statute. The cover requirement of Supreme Court Rule 33.1(g) does not apply to documents prepared under Supreme Court Rule 33.2. n39

[ii] Page Limits

Page limits for documents presented on 8 1/2- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The page limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, any appendix, and verbatim quotations required under Rule 14.1(f). n40

[6] Requirements For Both Document Formats n*

[a] Items Listed on Cover

Each document must list all of the following items on its cover, in the order indicated from the top of the page:

1. The docket number of the case or, if there is none, a space for one. n1

2. The name of the Supreme Court. n2

3. The caption of the case as appropriate in the Supreme Court. n3

4. The nature of the proceeding and the name of the court from which the action is brought (e.g., "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"); or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"). n4

5. The title of the document (e.g., "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix"). n5

6. The name of the attorney who is counsel of record for the party concerned, and on whom service is to

> be made; that attorney must be a member of the Bar of the Supreme Court except as provided in Rule 9.1. Directly under the attorney's name, a notation must identify the attorney as counsel of record and must set out the counsel's office address, e-mail address, and telephone number. The names of other members of the Bar of the Supreme Court or of the bar of the highest court of a state acting as counsel, and, if desired, their addresses, may be added, but counsel of record must be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing pro se, in which case the party's name, address, and telephone number must appear. n6

All of the six items above must be displayed in an appropriate typographical manner and, except for identification of counsel (item 6), may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1. n7

[b] Table of Contents and Table of Authorities

Every document exceeding five pages (other than a joint appendix), whether prepared under Supreme Court Rule 33.1 or 33.2, must contain a table of contents and a table of cited authorities, that is, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials; references must be made to the pages in the document where such authorities are cited. n8

[c] Body of Document

The body of every document must state at its close the name of the attorney of record and any other attorneys that are desired, identified on the cover of the document in conformity with Supreme Court Rule 34.1(g). n9

[d] Table of Contents of Appendices

Whenever a party includes an appendix to a document, the party must precede the appendix by a table of contents that provides a description of each document in the appendix. n10

[e] Citation to Federal Statutory Law

All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified in the Code. If the provision has not been classified to the United States Code, citation should be to the Statutes at Large. Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument. n11

[7] Substitution n*

[a] Substitution of Parties

If a party dies after the filing of a petition for a writ of certiorari, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case abates. n1

[b] Prohibition Against Revival in Lower Court

Whenever review is sought in the Supreme Court and the case cannot be revived in the court whose judgment is being reviewed because the deceased party's authorized representative is not subject to that court's jurisdiction, the Supreme Court will direct how the proceedings will be conducted. n2

[c] Public Officer Who Ceases to Hold Office

When a public officer who is a party to a proceeding in the Supreme Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties must notify the Clerk in writing of any such successions. Proceedings following the substitution must be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded. n3 A public officer who is a party to a proceeding in the Supreme Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added. n4

[8] Habeas Corpus Proceedings n*

[a] Transfer of Prisoner

Pending review in the Supreme Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under Supreme Court Rule 36. n1 On application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party. n2

[b] Enlargement of Prisoner Pending Review of Order Regarding Release

Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, the Supreme Court, or a judge or Justice of either court. n3 Pending review of a decision ordering release, the prisoner must be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, the Supreme Court, or a judge or Justice of either court, orders otherwise. n4

[c] Enlargement of Prisoner Pending Review of Initial Order

An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, must continue in effect pending review in the court of appeals and in the Supreme Court unless, for reasons shown to the court of appeals, the Supreme Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered. n5

[9] Brief for Amicus Curiae n*

[a] Nature of Amicus Curiae Brief

An amicus curiae brief is a brief that brings to the attention of the Court relevant matter that would not have already brought to its attention by the parties. n1 An amicus curiae brief may be of considerable help to the Court. However, an amicus curiae brief that does not serve this purpose burdens the Court and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5. n2

[b] Amicus Curiae Brief Submitted Before Consideration of Issue by Court

An amicus curiae brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file, as discussed below. An amicus curiae brief in support of a petitioner or appellant must be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An amicus curiae brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An amicus curiae brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm.

An amicus curiae must ensure that the counsel of record for all parties receive notice of its intention to file an amicus curiae brief at least 10 days prior to the due date for the amicus curiae brief, unless the amicus curiae brief is filed earlier than 10 days before the due date. Only one signatory to any amicus curiae brief filed jointly by more than one amicus curiae must make the notice of intent to file that brief. The amicus curiae brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover must identify the party supported. n3

When a party to the case has withheld consent, a motion for leave to file an amicus curiae brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Supreme Court Rule 33.1 and as one document with the brief sought to be filed, must be submitted within the time allowed for filing an amicus curiae brief and must indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored. n4

[c] Amicus Curiae Brief Submitted on Oral Argument

An amicus curiae brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file. The brief must be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. The Supreme Court will not entertain motions to extend the time for filing an amicus curiae brief. The 10-day notice requirement of Rule 37.2(a) does not apply to an amicus curiae brief in a case before the Court for oral argument. n5

An electronic version of the amicus brief must be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The amicus curiae brief must specify whether consent was granted, and its cover must identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an amicus curiae, or a brief for an amicus curiae in support of, or in opposition to, a petition for rehearing. n6

When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an amicus curiae brief may be presented to the Court. The motion, prepared as required by Supreme Court Rule 33.1 and as one document with the brief sought to be filed, must be submitted within the time allowed for filing an amicus curiae brief, and must indicate the party or parties who have withheld consent and state the nature of the movant's interest. n7

[d] Amicus Curiae Brief Filed on Behalf of Public Entity

No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before the Supreme Court when submitted by the agency's authorized legal representative; on behalf of a state, commonwealth, territory, or

possession when submitted by its attorney general; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer. n8

[e] Requirements for Amicus Curiae Brief

A brief or motion filed regarding a brief must be accompanied by proof of service as required by Supreme Court Rule 29, and must comply with the applicable provisions of Supreme Court Rules 21, 24, and 33.1 (except that it is sufficient to set out in the brief the interest of the amicus curiae, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection to the motion, stating concisely the reasons for withholding consent; the objection must be prepared as required by Supreme Court Rule 33.2. n9

[f] Identification of Author of Amicus Curiae Brief

Except for briefs presented on behalf of a public entity listed in Supreme Court Rule 37.4, n10 an amicus brief must indicate whether any party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. The brief must also identify every person other than the amicus curiae, its members, or its counsel who made such a monetary contribution. The disclosure must be made in the first footnote on the first page of text. n11

[10] Fees n*

Under Judicial Code Section 1911, n1 the fees charged by the Supreme Court Clerk are:

1. For docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Supreme Court Rule 18.5, $300. n2

2. For filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200. n3

3. For reproducing and certifying any record or paper, $1 per page; and for comparing with the original of any record or paper any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page. n4

4. For a certificate bearing the seal of the Court, $10. n5

5. For a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35. n6

[11] Proceedings in Forma Pauperis n*

[a] Motion to Proceed in Forma Pauperis

A party that seeks to proceed in the Supreme Court in forma pauperis must file a motion for leave to do so, together with the party's notarized affidavit or declaration n1 in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion must state whether leave to proceed in forma pauperis was sought in any other court and, if so, whether leave was granted. n2 The requirement of the filing of a declaration or affidavit is dispensed with only if the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act n3 or some other applicable federal statute, provided that the motion cites the statute under which counsel was appointed. n4

[b] Motion to File Document in Forma Pauperis

If leave to proceed in forma pauperis is sought for the purpose of filing a document, the motion, and an affidavit or declaration, if required, must be filed together with that document and must comply in every respect with Supreme Court Rule 21. As provided in that rule, n5 it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration, if required, must precede and be attached to each copy of the accompanying document. n6

[c] Documents Prepared by Party Proceeding in Forma Pauperis

Except when the Supreme Court Rules expressly provide that a document must be prepared as required by Supreme Court Rule 33.1, every document presented by a party proceeding under Supreme Court Rule 39 must be prepared as required by Supreme Court Rule 33.2 (unless such preparation is impossible). Every document must be legible. While making due allowance for any case presented under Supreme Court Rule 39 by a person appearing pro se, the Clerk will not file any document if it does not comply with the substance of the Supreme Court Rules or is jurisdictionally out of time. n7

[d] No Fee Required

When the documents required by Supreme Court Rules 39.1 and 39.2 are presented to the Clerk, accompanied by proof of service as required by Supreme Court Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee. n8

[e] Response to Party Proceeding in Forma Pauperis

The respondent or appellee in a case filed in forma pauperis must respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Supreme Court Rule 33.2, with proof of service as required by Supreme Court Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed in forma pauperis in a separate document or in the response itself. n9

[f] Document Preparation by Counsel for Indigent Party

Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, must be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D.C., and return, in connection with the argument. n10

[g] Appointment of Counsel

In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, the Supreme Court may appoint counsel to represent a party financially unable to afford an attorney, to the extent authorized by the Criminal Justice Act, n11 or by any other applicable federal statute. n12

[h] Sanctions for Filing Frivolous or Malicious Petition

If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed in forma pauperis. n13 Furthermore, if a petitioner has a history or record of filing numerous frivolous or malicious petitions the court may prospectively deny leave to proceed in forma pauperis, or may set conditions on the filing. n14 Thus, if a petitioner has filed numerous frivolous civil petitions, the Supreme Court will deny the petitioner's current petition to proceed in forma pauperis, and also has the

option to direct the Clerk not to accept any further petitions for any type of writs from the petitioner in noncriminal matters. n15 For example the court may require the petitioner to pay the docketing fee required by Supreme Court Rule 38 and to submit the petition in formal compliance with Supreme Court Rule 33.1, requiring documents in booklet format. n16

[12] Cases Involving Veterans, Seamen, and Military n*

A veteran suing to establish reemployment rights under any provision of law exempting veterans from the payment of fees or court costs, may proceed without prepayment of fees or costs or furnishing security for the fees or costs and may file a motion for leave to proceed on papers prepared as required by Supreme Court Rule 33.2. The motion must ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion must precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran. n1

A seaman suing under Judicial Code Section 1916 n2 may proceed without prepayment of fees or costs or furnishing security for fees or costs and may file a motion for leave to proceed on non-booklet format papers prepared as allowed under by Rule 33.2. The motion must request leave to proceed as a seaman and be accompanied by an affidavit or declaration setting out the movant's seaman status. The seaman must attach a copy of the motion to each copy of the petition for a writ of certiorari or other substantive document filed by the seaman. n3

An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under Judicial Code Section 1259 n4 may proceed without prepayment of fees or costs or furnishing security for fees or costs and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Supreme Court Rule 33.2, except as authorized by the Court on separate motion under Supreme Court Rule 39. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 529.02 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 29.1.

(n3)Footnote 1.1. Sup. Ct. R. 29.2.

(n4)Footnote 1.2. *See Evans v. Principi, 17 Vet. App. 41, 49 n.1 (2003)* .

(n5)Footnote 2. *28 U.S.C. § 1746*.

(n6)Footnote 3. *28 U.S.C. § 1746*.

(n7)Footnote 3.1. Sup. Ct. R. 29.2.

(n8)Footnote 4. Sup. Ct. R. 29.2.

(n9)Footnote 5. Sup. Ct. R. 29.3.

(n10)Footnote 5.1. *See* Sup. Ct. R. 33.1; *see also* [5], *below*.

(n11)Footnote 5.2. *See* Sup. Ct. R. 33.2.

(n12)Footnote 5.3. Sup. Ct. R. 29.3; *see also* [5], *below*.

(n13)Footnote 6. Sup. Ct. R. 29.4(a).

(n14)Footnote 7. *28 U.S.C. § 2403(a)*.

(n15)Footnote 8. Sup. Ct. R. 29.4(b); *see* Sup. Ct. R. 14.1(e)(v).

(n16)Footnote 9. Sup. Ct. R. 29.4(c); *see* Sup. Ct. R. 14.1(e)(v).

(n17)Footnote 10. Sup. Ct. R. 29.5(a).

(n18)Footnote 11. *See 18 U.S.C. § 3006A(d)(6)*.

(n19)Footnote 12. Sup. Ct. R. 29.5(b).

(n20)Footnote 13. *28 U.S.C. § 1746*.

(n21)Footnote 14. *18 U.S.C. § 3006A(d)(6)*.

(n22)Footnote 15. Sup. Ct. R. 29.5(c).

(n23)Footnote 16. Sup. Ct. R. 29.6.

(n24)Footnote 17. *Cf In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* (similar Appellate Procedure Rule applied to circuit justices).

(n25)Footnote 18. Sup. Ct. R. 29.6.

(n26)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* §§ 530.02, 530.03 (Matthew Bender 3d ed.).

(n27)Footnote 19. *5 U.S.C. § 6103(a)* (holidays are New Year's Day, Martin Luther King Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving, and Christmas).

(n28)Footnote 20. Sup. Ct. R. 30.1.

(n29)Footnote 21. Sup. Ct. R. 30.2.

(n30)Footnote 21.1. *See Davis v. Bruce, 215 F.R.D. 612, 620 (D. Kan. 2003)* .

(n31)Footnote 22. Sup. Ct. R. 30.4; *see* [d], *below*.

(n32)Footnote 23. Sup. Ct. R. 30.4.

(n33)Footnote 24. Sup. Ct. R. 30.3.

(n34)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 531.02 (Matthew Bender 3d ed.).

(n35)Footnote 25. Sup. Ct. R. 31.

(n36)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 532.02 (Matthew Bender 3d

ed.).

(n37)Footnote 26. Sup. Ct. R. 32.1.

(n38)Footnote 27. Sup. Ct. R. 32.2.

(n39)Footnote 27.1. *See* Sup. Ct. R. 32.3.

(n40)Footnote 27.2. *See Boudette v. Barnette, 923 F.2d 754, 755, 756 n.4 (9th Cir. 1991)* .

(n41)Footnote 27.3. *See* Sup. Ct. R. 32, Comment of Clerk to 2003 Amendment.

(n42)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 533.02 et seq. (Matthew Bender 3d ed.).

(n43)Footnote 28. *See, e.g.,* Sup. Ct. R. 21, 22, 39.

(n44)Footnote 29. Sup. Ct. R. 33.1(a).

(n45)Footnote 30. Sup. Ct. R. 33.1(b).

(n46)Footnote 31. Sup. Ct. R. 33.1(c).

(n47)Footnote 32. *See* Appendix to this Chapter.

(n48)Footnote 33. Sup. Ct. R. 33.1(d).

(n49)Footnote 34. Sup. Ct. R. 33.1(e).

(n50)Footnote 35. Sup. Ct. R. 33.1(f).

(n51)Footnote 36. Sup. Ct. R. 33.1(g).

(n52)Footnote 37. *See* Sup. Ct. R. 33.1(h).

(n53)Footnote 38. Sup. Ct. R. 33.1(h); *see 28 U.S.C. § 1746*.

(n54)Footnote 39. Sup. Ct. R. 33.2(a).

(n55)Footnote 40. Sup. Ct. R. 33.2(b); *see* Sup. Ct. R. 33.1(d).

(n56)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 534.02 et seq. (Matthew Bender 3d ed.).

(n57)Footnote 1. Sup. Ct. R. 34.1(a).

(n58)Footnote 2. Sup. Ct. R. 34.1(b).

(n59)Footnote 3. Sup. Ct. R. 34.1(c).

(n60)Footnote 4. Sup. Ct. R. 34.1(d).

(n61)Footnote 5. Sup. Ct. R. 34.1(e).

(n62)Footnote 6. Sup. Ct. R. 34.1(f).

(n63)Footnote 7. Sup. Ct. R. 34.1(g).

(n64)Footnote 8. Sup. Ct. R. 34.2.

(n65)Footnote 9. Sup. Ct. R. 34.3.

(n66)Footnote 10. Sup. Ct. R. 34.4.

(n67)Footnote 11. Sup. Ct. R. 34.5.

(n68)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 535.02 et seq. (Matthew Bender 3d ed.).

(n69)Footnote 1. Sup. Ct. R. 35.1.

(n70)Footnote 2. Sup. Ct. R. 35.2.

(n71)Footnote 3. Sup. Ct. R. 35.3.

(n72)Footnote 4. Sup. Ct. R. 35.4.

(n73)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 536.02 et seq. (Matthew Bender 3d ed.).

(n74)Footnote 1. Sup. Ct. R. 36.1.

(n75)Footnote 2. Sup. Ct. R. 36.2.

(n76)Footnote 3. Sup. Ct. R. 36.3(a).

(n77)Footnote 4. Sup. Ct. R. 36.3(b).

(n78)Footnote 5. Sup. Ct. R. 36.4.

(n79)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 537.02 et seq. (Matthew Bender 3d ed.).

(n80)Footnote 1. Sup. Ct. R. 37.1; *see generally Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co., 623 F.3d 135, 139-140 (3d Cir. 2010)* .

(n81)Footnote 2. Sup. Ct. R. 37.1; *see* Sup. Ct. R. 5.1-5.3.

(n82)Footnote 3. Sup. Ct. R. 37.2(a).

(n83)Footnote 4. Sup. Ct. R. 37.2(b).

(n84)Footnote 5. Sup. Ct. R. 37.3(a).

(n85)Footnote 6. Sup. Ct. R. 37.3(a).

(n86)Footnote 7. Sup. Ct. R. 37.3(b).

(n87)Footnote 8. Sup. Ct. R. 37.4.

(n88)Footnote 9. Sup. Ct. R. 37.5.

(n89)Footnote 10. Sup. Ct. R. 37.4; *see* [d], *above*.

(n90)Footnote 11. Sup. Ct. R. 37.6.

(n91)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice*, § 538.02 (Matthew Bender 3d ed.).

(n92)Footnote 1. *28 U.S.C. § 1911*.

(n93)Footnote 2. Sup. Ct. R. 38(a).

(n94)Footnote 3. Sup. Ct. R. 38(b).

(n95)Footnote 4. Sup. Ct. R. 38(c).

(n96)Footnote 5. Sup. Ct. R. 38(d).

(n97)Footnote 6. Sup. Ct. R. 38(e).

(n98)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice*, § 539.02 et seq. (Matthew Bender 3d ed.).

(n99)Footnote 1. *See 28 U.S.C. § 1746*.

(n100)Footnote 2. Sup. Ct. R. 39.1.

(n101)Footnote 3. *18 U.S.C. § 3006A*.

(n102)Footnote 4. Sup. Ct. R. 39.1; *see P. S. v. Franklin County Children Servs., ___ U.S. ___, 130 S. Ct. 1117, 175 L. Ed. 2d 878 (2010)* (granting motion without affidavit).

(n103)Footnote 5. Sup. Ct. R. 21.

(n104)Footnote 6. Sup. Ct. R. 39.2.

(n105)Footnote 7. Sup. Ct. R. 39.3.

(n106)Footnote 8. Sup. Ct. R. 39.4.

(n107)Footnote 9. Sup. Ct. R. 39.5.

(n108)Footnote 10. Sup. Ct. R. 39.6.

(n109)Footnote 11. *18 U.S.C. § 3006A*.

(n110)Footnote 12. Sup. Ct. R. 39.7.

(n111)Footnote 13. Sup. Ct. R. 39.8.

(n112)Footnote 14. *Judd v. United States Dist. Court, 528 U.S. 5, 120 S. Ct. 1, 145 L. Ed. 2d 7 (1999)*

(n113)Footnote 15. *Schwarz v. NSA, 526 U.S. 122, 122-123, 119 S. Ct. 1109, 143 L. Ed. 2d 203 (1999)* .

(n114)Footnote 16. *See, e.g.*, *Lowe v. Pogue, 526 U.S. 273, 273, 119 S. Ct. 1238, 143 L. Ed. 2d 384 (1999)* ; *Rivera v. Florida Dep't of Corrections, 526 U.S. 135, 135, 119 S. Ct. 1166, 143 L. Ed. 2d 235 (1999)* .

(n115)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 540.02 et seq. (Matthew Bender 3d ed.).

(n116)Footnote 1. Sup. Ct. R. 40.1.

(n117)Footnote 2. *28 U.S.C. § 1916*.

(n118)Footnote 3. *See 28 U.S.C. § 1916*; Sup. Ct. R. 40.2(a); *see also Howard v. United States, 74 Fed. Cl. 676, 679 (Fed. Cl. 2006)* (Section 1916 and Rule 40 are only procedural devices, and neither creates substantive rights against United States entitling claimant to monetary relief).

(n119)Footnote 4. *28 U.S.C. § 1259*.

(n120)Footnote 5. Sup. Ct. R. 40.3.

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PART VII Appeal
CHAPTER 29 Appeal to Supreme Court

3-29 Moore's Manual--Federal Practice and Procedure § 29.11

§ 29.11 Court's Disposition of Cases

[1] Supreme Court Opinions n*

The Supreme Court Clerk must release opinions of the Supreme Court immediately on their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk must cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports. n1

[2] Interest and Damages n*

[a] Interest

If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the courts below may award interest to the extent permitted by law. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the state in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law. n1

[b] Damages

When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Supreme Court may award the respondent or appellee just damages, and single or double costs under Supreme Court Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel. n2

[3] Costs n*

[a] Party Required to Pay Costs

If the Court affirms a judgment, the petitioner or appellant must pay costs unless the Court otherwise orders. n1 If the Court reverses or vacates a judgment, the respondent or appellee must pay costs unless the Court otherwise orders. n2 In

a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Supreme Court Rule 19.2, costs are allowed as provided in Supreme Court Rules 43.1 and 43.2. n3

These provisions of Rule 43 specifying a particular allocation for the payment of costs "unless the Court orders otherwise" means that there is presumption that the court allocate costs in the manner specified. The court in its discretion may modify that allocation when warranted by the particular circumstances of the case. n4

[b] Taxable Costs

The Clerk's fees and the cost of printing the joint appendix are the only taxable items in the Supreme Court. The cost of the transcript of the record from the court below is also a taxable item, but will be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable. n5

[c] Costs For or Against United States

To the extent permitted by Judicial Code Section 2412, n6 any costs specified in Supreme Court Rule 43 are allowed for or against the United States or an officer or agent of the United States, unless expressly waived, or unless the Court otherwise orders. n7

[d] Costs Included in Mandate

When costs are allowed in the Supreme Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs. n8 In extraordinary circumstances the Court may adjudge double costs. n9

[4] Rehearing n*

[a] Petition for Rehearing of Judgment or Decision on Merits

A petition for rehearing of any judgment or decision of the Supreme Court on the merits must be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. n1 If the petition for rehearing is for any decision not a judgment or decision on the merits, Rule 44 is not applicable, and the petitioner must proceed under the more rigorous standards of Rule 16.3. n2

To complete a petition for extension of time, the petitioner must file 40 copies of the rehearing petition and must pay the filing fee prescribed by Supreme Court Rule 38(b), except that a petitioner proceeding in forma pauperis under Supreme Court Rule 39, including an inmate of an institution, must file the number of copies required for a petition by such a person under Supreme Court Rule 12.2. The petition must state its grounds briefly and distinctly and must be served as required by Supreme Court Rule 29. The petition must be presented together with the certification of counsel, or of a party unrepresented by counsel, that it is presented in good faith and not for delay; one copy of the certificate must bear the signature of counsel or of a party unrepresented by counsel. A copy of the certificate must follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision. n3

[b] Petition for Rehearing of Denial of Petition for Writ

A petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ must be filed within 25 days after the date of the order of denial and must comply with all the form and filing requirements of Supreme Court Rule 44.1, n4 including the payment of any required filing fee. n5 On of the strict requirements for the application of Rule 44.1 is that the subject of the petition must be either a judgment or decision of the Court on the

merits, and not any preliminary, collateral, or subsequent decision, such as a decision to deny a writ of certiorari, n6 counsel or of a party unrepresented by counsel, that it is restricted to the grounds specified in Supreme Court Rule 44.2 and is presented in good faith and not for delay. One copy of the certificate must bear the signature of counsel, or of a party unrepresented by counsel. The certificate must be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument. n7

If the Clerk determines that a petition for rehearing has been submitted in a timely manner and in good faith but is not in a form required under the provisions of Rule 44 n8 or in the proper booklet format required under Rule 33 or standard sized paper format of Rule 34, n9 the Clerk must return it to the petitioner for correction, with a letter indicating the deficiency. If the petitioner submits the corrected petition for rehearing in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter, the court will deem that the corrected petition has been timely filed. n10

[c] Clerk Screens for Prohibited Petitions

The Clerk may not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response. n11 The Clerk will not file consecutive petitions and petitions that are out of time under Supreme Court Rule 44. n12 Furthermore the Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing. n13

[5] Process and Mandate n*

All process of the Supreme Court issues in the name of the President of the United States. n1 The term "process" in an appellate context means a stay, or a mandate, which is a direction to a lower court to proceed in the manner specified in the reviewing court's judgment. Process also means an act or declaration made to have a legal effect, and includes a summons in an original action, n2 a statement to procure attendance, such as a subpoena, and any order or decree of the judiciary. n3

When the United States Supreme Court reviews a state court judgment, the mandate to the state court issues 25 days after entry of the judgment, unless the Supreme Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. If a party files a timely petition for rehearing, the filing stays the mandate until disposition of the petition unless the Court orders otherwise. If the petition is denied, the mandate issues forth immediately on that denial. n4

When the United States Supreme Court reviews a federal court judgment or decree, a formal mandate does not issue unless specially directed by the Supreme Court. n5 A "formal mandate" is an express direction from the higher court to the lower court to take some action or refrain from taking action. n6 The Supreme Court rarely issues a formal mandate, and does only if there is a particular reason for doing so. n7 Rather than issue a formal mandate, the Clerk of the Supreme Court will send the clerk of the lower court a copy of the opinion or order and a certified copy of the judgment, which together constitute the mandate. The certified copy of the judgment, prepared and signed by the Supreme Court Clerk, will provide for costs if any are awarded. n8 The mandate issues 25 days after entry of the judgment, unless the Supreme Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues at the time of the denial. n9

During the period of the stay of a Supreme Court mandate, the lower court's and parties' obligations under the mandate do not become effective and other courts must refrain from relying on the opinion of Supreme Court judgment for precedential value. n10

[6] Dismissal of Case n*

[a] Dismissal on Agreement of Parties

At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk without further reference to the Court, will enter an order of dismissal. n1

[b] Motion to Dismiss by Petitioner or Appellant

A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Supreme Court Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service of the motion to dismiss, an adverse party may file an objection, limited to the amount of damages and costs in the Supreme Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited. n2 When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination. n3

If no objection is filed or if one is filed going only to the amount of damages and costs in the Supreme Court and the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand for additional damages and costs, the Clerk will enter an order of dismissal without further reference to the Court. If, after objection as to the amount of damages and costs in the Supreme Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination. n4

When the Supreme Court dismisses under Supreme Court Rule 46, no mandate or other process will issue without an express order of the Court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 541.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. Sup. Ct. R. 41.

(n3)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* §§ 542.02, 542.03 (Matthew Bender 3d ed.).

(n4)Footnote 1. Sup. Ct. R. 42.1.

(n5)Footnote 2. Sup. Ct. R. 42.2.

(n6)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 543.02 et seq. (Matthew Bender 3d ed.).

(n7)Footnote 1. Sup. Ct. R. 43.1.

(n8)Footnote 2. Sup. Ct. R. 43.2.

(n9)Footnote 3. Sup. Ct. R. 43.4.

(n10)Footnote 4. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S.*

598, 606 n.8, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) .

(n11)Footnote 5. Sup. Ct. R. 43.3.

(n12)Footnote 6. *28 U.S.C. § 2412*.

(n13)Footnote 7. Sup. Ct. R. 43.5.

(n14)Footnote 8. Sup. Ct. R. 43.6.

(n15)Footnote 9. Sup. Ct. R. 43.7.

(n16)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 544.02 et seq. (Matthew Bender 3d ed.).

(n17)Footnote 1. Sup. Ct. R. 44.1.

(n18)Footnote 2. *Boumediene v. Bush, 550 U.S. 1301, 1301-1302, 127 S. Ct. 1725, 167 L. Ed. 2d 757 (2007)* (Rule 44.2 does not apply to application for extension of time to file petition for rehearing of order denying certiorari).

(n19)Footnote 3. Sup. Ct. R. 44.1.

(n20)Footnote 4. *See* [a], *above*.

(n21)Footnote 5. Sup. Ct. R. 44.2.

(n22)Footnote 6. *Boumediene v. Bush, 550 U.S. 1301, 1301-1302, 127 S. Ct. 1725, 167 L. Ed. 2d 757 (2007)* (Rule 44 does not apply to petition for rehearing of order denying certiorari).

(n23)Footnote 7. Sup. Ct. R. 44.2.

(n24)Footnote 8. *See* [a], [b], *above*.

(n25)Footnote 9. *See* Sup. Ct. R. 33, 34.

(n26)Footnote 10. *See* Sup. Ct. R. 44.6.

(n27)Footnote 11. Sup. Ct. R. 44.3.

(n28)Footnote 12. Sup. Ct. R. 44.4.

(n29)Footnote 13. Sup. Ct. R. 44.5.

(n30)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 545.02 et seq. (Matthew Bender 3d ed.).

(n31)Footnote 1. Sup. Ct. R. 45.1.

(n32)Footnote 2. *See In re Urban, 262 B.R. 865, 869 (D. Kan. 2001)* .

(n33)Footnote 3. *See, e.g., First Va. Bank v. Randolph, 110 F.3d 75, 79 (D.C. Cir. 2004)* .

(n34)Footnote 4. *See* Sup. Ct. R. 45.2; *see Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78, 121 S. Ct. 471, 475, 148 L. Ed. 2d 366 (2000)* .

(n35)Footnote 5. Sup. Ct. R. 45.3.

(n36)Footnote 6. *South Atl. Ltd. P'ship v. Riese, 356 F.3d 576, 582-584 (4th Cir. 2004)* .

(n37)Footnote 7. *Crowley v. L.L. Bean, Inc., 361 F.3d 22, 26 (1st Cir. 2004)* .

(n38)Footnote 8. Sup. Ct. R. 45.3.

(n39)Footnote 9. Sup. Ct. R. 45.3; *see* Sup. Ct. R. 45.2.

(n40)Footnote 10. *See Smith v. Union Nat'l Life Ins. Co., 286 F. Supp. 2d 782, 786 (S.D. Miss. 2003)* .

(n41)Footnote *. For a more complete discussion, see 23 *Moore's Federal Practice,* § 546.02 et seq. (Matthew Bender 3d ed.).

(n42)Footnote 1. Sup. Ct. R. 46.1; *see South Carolina v. North Carolina, ___ U.S. ___, 131 S. Ct. 855, 178 L. Ed. 2d 586 (2010)* (bill of complaint in case of original jurisdiction dismissed pursuant to Rule 46.1).

(n43)Footnote 2. Sup. Ct. R. 46.2(a).

(n44)Footnote 3. Sup. Ct. R. 46.2(b).

(n45)Footnote 4. Sup. Ct. R. 46.2(c).

(n46)Footnote 5. Sup. Ct. R. 46.3.

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PART VII Appeal
APPENDIX TO CHAPTER 29: RULES OF THE SUPREME COURT OF THE UNITED STATES

3-29 Moore's Manual--Federal Practice and Procedure APPENDIX TO CHAPTER 29:.syn

§ 29.syn Synopsis to Appendix 29: RULES OF THE SUPREME COURT OF THE UNITED STATES

§ Rule 1. Clerk.

§ Rule 2. Library.

§ Rule 3. Term.

§ Rule 4. Sessions and Quorum.

§ Rule 5. Admission to the Bar.

§ Rule 6. Argument Pro Hac Vice.

§ Rule 7. Prohibition Against Practice.

§ Rule 8. Disbarment and Disciplinary Action.

§ Rule 9. Appearance of Counsel.

§ Rule 10. Considerations Governing Review on Certiorari.

§ Rule 11. Certiorari to a United States Court of Appeals Before Judgment.

§ Rule 12. Review on Certiorari; How Sought; Parties.

§ Rule 13. Review on Certiorari; Time for Petitioning.

§ Rule 14. Content of a Petition for a Writ of Certiorari.

§ Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs.

§ Rule 16. Disposition of a Petition for a Writ of Certiorari.

§ Rule 17. Procedure in an Original Action.

§ Rule 18. Appeal From a United States District Court.

§ Rule 19. Procedure on a Certified Question.

§ Rule 20. Procedure on a Petition for an Extraordinary Writ.

§ Rule 21. Motions to the Court.

§ Rule 22. Applications to Individual Justices.

§ Rule 23. Stays.

§ Rule 24. Briefs on the Merits: In General.

§ Rule 25. Briefs on the Merits: Number of Copies and Time to File.

§ Rule 26. Joint Appendix.

§ Rule 27. Calendar.

§ Rule 28. Oral Argument.

§ Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing.

§ Rule 30. Computation and Extension of Time.

§ Rule 31. Translations.

§ Rule 32. Models, Diagrams, Exhibits, and Lodgings

§ Rule 33. Document Preparation: Booklet Format; 8.5 by 11-Inch Paper Format.

§ Rule 34. Document Preparation: General Requirements.

§ Rule 35. Death, Substitution, and Revivor; Public Officers.

§ Rule 36. Custody of Prisoners in Habeas Corpus Proceedings.

§ Rule 37. Brief for an Amicus Curiae.

§ Rule 38. Fees.

§ Rule 39. Proceedings In Forma Pauperis.

§ Rule 40. Veterans, Seamen, and Military Cases.

§ Rule 41. Opinions of the Court.

§ Rule 42. Interest and Damages.

§ Rule 43. Costs.

§ Rule 44. Rehearing.

§ Rule 45. Process; Mandates.

§ Rule 46. Dismissing Cases.

§ Rule 47. Reference to "State Court" and "State Law".

§ Rule 48. Effective Date of Rules.

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RULES OF THE SUPREME COURT OF THE UNITED STATES
PART I. THE COURT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 1

§ Rule 1. Clerk.

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in *5 U.S.C. § 6103*.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 501 (Matthew Bender 3d ed.).

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RULES OF THE SUPREME COURT OF THE UNITED STATES
PART I. THE COURT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 2

§ Rule 2. Library.

1. This Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 502 (Matthew Bender 3d ed.).

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RULES OF THE SUPREME COURT OF THE UNITED STATES
PART I. THE COURT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 3

§ Rule 3. Term.

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See *28 U.S.C. § 2*. At the end of each Term, all cases pending on the docket are continued to the next Term.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 503 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 4

§ Rule 4. Sessions and Quorum.

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See *28 U.S.C. § 1*. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending--or if no Justice is present, the Clerk or a Deputy Clerk--may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 504 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 5

§ Rule 5. Admission to the Bar.

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, _____ , do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $ 200, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 505 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 6

§ Rule 6. Argument ***Pro Hac Vice***.

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice*.

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*.

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice*. It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 506 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 7

§ Rule 7. Prohibition Against Practice.

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 507 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 8

§ Rule 8. Disbarment and Disciplinary Action.

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an ordersuspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 508 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 9

§ Rule 9. Appearance of Counsel.

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see *18 U.S.C. § 3006A(d)(6)*, or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 509 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 10

§ Rule 10. Considerations Governing Review on Certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 510 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 11

§ Rule 11. Certiorari to a United States Court of Appeals Before Judgment.

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See *28 U.S.C. § 2101(e)*.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 511 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 12

§ Rule 12. Review on Certiorari; How Sought; Parties.

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion *shall precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i.e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the appendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leaveto proceed *in forma pauperis*. The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a conditional cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. Parties who file no documents will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. It the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 512 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 13

§ Rule 13. Review on Certiorari; Time for Petitioning.

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g., 28 U.S.C. § 2101(c).*

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 513 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 14

§ Rule 14. Content of a Petition for a Writ of Certiorari.

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6.

(c) If the petition exceeds five pages, or 1,500 words, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or

administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance upon Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 received no more than 60 days after the date of the Clerk's letter will be deemed timely.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 514 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 15

§ Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs.

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 515 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 16

§ Rule 16. Disposition of a Petition for a Writ of Certiorari.

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 516 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 17

§ Rule 17. Procedure in an Original Action.

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also *28 U.S.C. § 1251* and *U.S. Const., Amdt. 11*. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed, with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a

brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 18

§ Rule 18. Appeal From a United States District Court.

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule

29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendixshall include a copy of the notice of appeal showing the date it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i.e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 10 days after the motion is filed.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter, its filing will be deemed timely.

Reference

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 19

§ Rule 19. Procedure on a Certified Question.

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See *28 U.S.C. § 1254(2)*.

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Reference

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 20

§ Rule 20. Procedure on a Petition for an Extraordinary Writ.

1. Issuance by the Court of an extraordinary writ authorized by *28 U.S.C. § 1651(a)* is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by *28 U.S.C. § 1651(a)*, *§ 2241*, or *§ 2254(a)* shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3.

(a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the

petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4.

(a) A petition seeking a writ of habeas corpus shall comply with the requirements of *28 U.S.C. §§ 2241* and *2242*, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of *28 U.S.C. § 2254(b)*. To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of *28 U.S.C. § 2241(b)*, is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

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23 MOORE'S FEDERAL PRACTICE, Ch. 520 (Matthew Bender 3d ed.).

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PART V. Motions and Applications

3-29 Moore's Manual--Federal Practice and Procedure § Rule 21

§ Rule 21. Motions to the Court.

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Rule 22 governs an application addressed to a single Justice.

2.

(a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. *The motion shall be served as required by Rule 29.*

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in

that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an *amicus curiae* brief (see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Reference

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 22

§ Rule 22. Applications to Individual Justices.

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. An application arising from the United States Court of Appeals for the Armed Forces shall be addressed to the Chief Justice. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 522 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 23

§ Rule 23. Stays.

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See *28 U.S.C. § 2101(f).*

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.
Reference

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PART VI. BRIEFS ON THE MERITS AND ORAL ARGUMENT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 24

§ Rule 24. Briefs on the Merits: In General.

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended listing of parent companies and nonwholly owned subsidiaries as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the word limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the

reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, *e.g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.
Reference

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PART VI. BRIEFS ON THE MERITS AND ORAL ARGUMENT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 25

§ Rule 25. Briefs on the Merits: Number of Copies and Time to File.

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after receiving the brief for the respondent or appellee, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. If cross-petitions or cross-appeals have been consolidated for argument, the Clerk, upon request of the parties, may designate one of the parties to file an initial brief and reply brief as provided in paragraphs 1 and 3 of this Rule (as if the party were petitioner or appellant), and may designate the other party to file an initial brief as provided in paragraph 2 of this Rule and, to the extent appropriate, a supplemental brief following the submission of the reply brief. In such a case, the Clerk may establish the time for the submission of the briefs and alter the otherwise applicable word limits. Except as approved by the Court or a Justice, the total number of words permitted for the briefs of the parties cumulatively shall not exceed the maximum that would have been allowed in the absence of an order under this paragraph.

5. The time periods stated in paragraphs 1, 2, and 3 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

6. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

7. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

8. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

9. An electronic version of every brief on the merits shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed.

Reference

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 26

§ Rule 26. Joint Appendix.

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4.

(a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entriesshall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e.g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Two lines must appear at the bottom of the cover of the joint appendix: (1) The first line must indicate the date the petition for the writ of certiorari was filed or the date the appeal was docketed; (2) the second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed.

7. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably

indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

8. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

9. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 526 (Matthew Bender 3d ed.).

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PART VI. BRIEFS ON THE MERITS AND ORAL ARGUMENT

3-29 Moore's Manual--Federal Practice and Procedure § Rule 27

§ Rule 27. Calendar.

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 527 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 28

§ Rule 28. Oral Argument.

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 528 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 29

§ Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing.

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk.

2. A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with *28 U.S.C. § 1746* setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who mailed the document to submit a notarized statement or declaration in compliance with *28 U.S.C. § 1746* setting out the details of the mailing and stating that the mailing took place on a particular date within the permitted time. A document also is timely filed if it is forwarded through a private delivery or courier service and is actually received by the Clerk within the time permitted for filing.

3. Any document required by these Rules to be served may be served personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office of counsel of record, either to counsel or to an employee therein. If service is by mail, or third-party commercial carrier, it

shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper post office address. When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier. Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court.

4.

(a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, DC 20530. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that *28 U.S.C. § 2403(a)* may apply and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, DC 20530. In such a proceeding from any court of the United States, as defined by *28 U.S.C. § 451*, the initial document also shall state whether that court, pursuant to *28 U.S.C. § 2403(a)*, certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that *28 U.S.C. § 2403(b)* may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by *28 U.S.C. § 451*, the initial document also shall state whether that court, pursuant to *28 U.S.C. § 2403(b)*, certified to the state Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served, and bearing the address and telephone number of such counsel;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see *18 U.S.C. § 3006A(d)(6)*, or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with *28 U.S.C. § 1746*, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal Justice Act of 1964, see *18 U.S.C. § 3006A(d)(6)*, or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statementidentifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 529 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 30

§ Rule 30. Computation and Extension of Time.

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in *5 U.S.C. § 6103*, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. An application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The application may be acted on by the Clerk in

the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 530 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 31

§ Rule 31. Translations.

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 531 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 32

§ Rule 32. Models, Diagrams, Exhibits, and Lodgings

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, exhibits, and other items placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

3. Any party or amicus curiae desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 532 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 33

§ Rule 33. Document Preparation: Booklet Format; 8.5 by 11-Inch Paper Format.

1. *Booklet Format:*

(a) Except for a document expressly permitted by these Rules to be submitted on 81/2- by 11-inch paper, see, *e.g.*, Rules 21, 22, and 39, every document filed with the Court shall be prepared in a 61/8- by 91/4-inch booklet format using a standard typesetting process (*e.g.*, hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in a Century family (e. g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines. The typeface should be similar to that used in current volumes of the United States Reports. Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited. Type size and face shall be consistent throughout. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 9-point or larger with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 41/8 by 71/8 inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by

the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix.

(d) Every booklet-format document shall comply with the word limits shown on the chart in subparagraph 1(g) of this Rule. The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. The word limits include footnotes. Verbatim quotations required under Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored. An application to exceed word limits shall comply with Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every booklet-format document shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a booklet-format document shall be filed.

(g) Word limits and cover colors for booklet-format documents are as follows:

	Type of Document	Word Limits	Color of Cover
(i)	Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	9,000	white
(ii)	Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4)	9,000	orange
(iii)	Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	3,000	tan
(iv)	Supplemental Brief (Rules 15.8, 17, 18.10, and 25.5)	3,000	tan
(v)	Brief on the Merits for Petitioner or Appellant	15,000	light blue

	(Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)		
(vi)	Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	6,000	yellow
(viii)	Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	15,000	orange
(ix)	Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	yellow
(x)	Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi)	Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii)	Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiii)	Petition for Rehearing (Rule 44)	3,000	tan

(h) A document prepared under Rule 33.1 must be accompanied by a certificate signed by the attorney, the unrepresented party, or the preparer of the document stating that the brief complies with the word limitations. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document. The word-processing system must be set to include footnotes in the word count. The certificate must state the number of words in the document. The certificate shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with *28 U. S. C. § 1746*.

2. 81/2- by 11-Inch Paper Format:

(a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 81/2- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964,

see *18 U.S.C. § 3006A(d)(6)*, or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 81/2- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The page exclusions specified in subparagraph 1(d) of this Rule apply. The exclusions specified in subparagraph 1(d) of this Rule apply.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 533 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 34

§ Rule 34. Document Preparation: General Requirements.

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court from which the action is brought (*e.g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e.g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 9.1) and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address, e-mail address, and telephone number. Only one counsel of record may be noted on a single document, except that counsel of record for each party must be listed on the cover of a joint appendix. The names of other members of the Bar of this Court or of the bar of the highest court of State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing pro se, in which case the party's name, address, and telephone number shall appear.

(g) The foregoing shall be displayed in an appropriate typographical manner and, except for identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document exceeding five pages (other than a joint appendix), whether prepared under Rule 33.1 or Rule 33.2, shall contain a table of contents and a table of cited authorities (*i.e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(g) of this Rule, as may be desired.

4. Every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix.

5. All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified therein. In the event the provision has not been classified to the United States Code, citation should be to the Statutes at Large. Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 534 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 35

§ Rule 35. Death, Substitution, and Revivor; Public Officers.

1. If a party dies after the filing of a petition for a writ of certiorari, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 535 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 36

§ Rule 36. Custody of Prisoners in Habeas Corpus Proceedings.

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3.

(a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 536 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 37

§ Rule 37. Brief for an Amicus Curiae.

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

2.

(a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leaveto file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one amicus curiae must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3.

(a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an amicus curiae brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an amicus curiae brief in a case before the Court for oral argument. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

(b) When a party to the case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary

contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae,* its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 537 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 38

§ Rule 38. Fees.

Under *28 U.S.C. § 1911*, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 538 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 39

§ Rule 39. Proceedings ***In Forma Pauperis***.

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with *28 U.S.C. § 1746*) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whetherleave was granted. If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, *18 U.S.C. § 3006A*, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of

service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D.C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, *18 U.S.C. § 3006A*, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis*.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 539 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 40

§ Rule 40. Veterans, Seamen, and Military Cases.

1. A veteran suing to establish reemployment rights under any provision of law exempting veterans from the payment of fees or court costs, may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under *28 U.S.C. § 1916* may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a seaman and be accompanied by an affidavit or declaration setting out the moving party's seaman status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the seaman.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under *28 U.S.C. § 1259* may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule 33.2, except as authorized by the Court on separate motion under Rule 39.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 540 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 41

§ Rule 41. Opinions of the Court.

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 541 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 42

§ Rule 42. Interest and Damages.

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the courts below may award interest to the extent permitted by law. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 542 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 43

§ Rule 43. Costs.

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by *28 U.S.C. § 2412*, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 543 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 44

§ Rule 44. Rehearing.

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of

extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely.

Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 544 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 45

§ Rule 45. Process; Mandates.

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by *28 U.S.C. § 451*, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 545 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 46

§ Rule 46. Dismissing Cases.

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2.

(a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed--or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor--the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 546 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 47

§ Rule 47. Reference to "State Court" and "State Law".

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, and the local courts of Guam. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 547 (Matthew Bender 3d ed.).

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3-29 Moore's Manual--Federal Practice and Procedure § Rule 48

§ Rule 48. Effective Date of Rules.

1. These Rules, adopted January 12, 2010, will be effective February 16, 2010.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies.

3. In any case in which a petitioner or appellant has filed its brief on the merits prior to the effective date of these revised Rules, all remaining briefs in that case may comply with the October 1, 2007, version of the Rules of the Supreme Court of the United States rather than with these revised Rules.
Reference

23 MOORE'S FEDERAL PRACTICE, Ch. 548 (Matthew Bender 3d ed.).

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
A. COMPARISON OF PRECLUSION PRINCIPLES

3-30 Moore's Manual--Federal Practice and Procedure § 30.01

§ 30.01 Doctrines of Preclusionn*

As used in federal litigation, the doctrine of "preclusion" generally means that a matter that has been disposed of by a court may not be raised again for consideration. There are several distinct preclusion doctrines that are summarized in this section. These doctrines have different effects depending on the type or stage of litigation involved, the matters that are precluded from reconsideration, and the parties that are affected by the particular doctrine. n1 Thus, stare decisis, law of the case, res judicata (claim preclusion), collateral estoppel (issue preclusion), and judicial estoppel are doctrines that prescribe the limits of reconsideration of judicial decisions. n2 While they are related because they are all preclusive and have as a common general purpose the conservation of judicial resources, they are distinct doctrines and each has other, unique policy considerations. n3 The primary distinctions among these doctrines are discussed in *§ 30.02*. The effects of the doctrines are discussed in the remainder of Part I of this chapter. n4

The doctrine of full faith and credit may be considered to be preclusive, because it requires courts to abide by the decisions of courts of other jurisdictions. However, the doctrine is not strictly a doctrine of preclusion in that it is an explicit constitutional requirement. It is considered separately in Part II of this chapter. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the CaseCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 130.01 et seq., 131.01 et seq., 132.01 et seq., 134.01 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Compare Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 476, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* (claim preclusion means that final judgment on merits of particular action prevents parties or privies from

initiating subsequent litigation arising out of same transaction or series of transactions); *with Schiro v. Farley, 510 U.S. 222, 232, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)* (issue preclusion means that when any issue has been determined by valid and final judgment, that issue may not again be litigated between same parties in any future lawsuit).

(n3)Footnote 2. *See Devex Corp. v. General Motors Corp., 857 F.2d 197, 200 (3d Cir. 1988)* .

(n4)Footnote 3. *See Baker v. GMC, 522 U.S. 222, 234, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998)* .

(n5)Footnote 4. *See § 30.10* et seq.

(n6)Footnote 5. *See § 30.110* et seq.

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A. COMPARISON OF PRECLUSION PRINCIPLES

3-30 Moore's Manual--Federal Practice and Procedure § 30.02

§ 30.02 Attributes of Preclusion Doctrinesn*

[1] Stare Decisis

The doctrine of stare decisis provides that a case must be decided in accordance with what has been decided previously in other similar cases. n1 Stare decisis provides that a decision on an issue of law embodied in a final judgment is binding in all future cases on the court that decided it and such other courts as owe obedience to its decisions. n2 For a complete discussion of the doctrine of stare decisis, see *§ 30.10* et seq.

Stare decisis means that identical facts must receive identical treatment by the court. n3 Therefore, as a general rule, the principle of stare decisis is applicable only where facts in two actions are the same. n4 Under the stare decisis rule, language and general expressions in a court's opinion should be limited to particular facts and issues involved. The language of a court's opinion should not be extended beyond that for any purpose of authority in another or different case. Additionally, a decision depending on its underlying facts is not necessarily controlling precedent under the doctrine of stare decisis with respect to subsequent analysis of the same question on different facts and different records.

The doctrine of stare decisis is an important social policy utilized by courts to provide predictability, continuity, and consistency in the law. n5 The stare decisis doctrine ensures that the law will not merely change erratically, but will develop in a principled and intelligible fashion. The doctrine allows society to presume that societal principles are founded in the law rather than in the proclivities of individuals and contributes to the integrity of our constitutional system of government. However, stare decisis is not an inexorable command but is guidance to ensure that any deviations from its dictates must occur for articulable reasons and only when a court is obliged to bring its opinions into agreement with experience and with newly ascertained facts. n6

[2] Law of Case

The law of the case doctrine provides that when a court decides a rule of law, that decision should continue to govern the same issues in all subsequent stages of the same case. The law of the case doctrine applies only to issues that were either explicitly or implicitly decided by the court. n1 The doctrine also expresses the duty of a lower or another court to follow what has been decided by a higher court at an earlier stage of the case. n2 The law of the case doctrine expresses

the general practice of courts to refuse to reopen an issue in the case that already has been decided, but does not limit the power of the court to do so. A court has the power to redetermine prior decisions, although as a general rule courts should not alter a decision except in the absence of extraordinary circumstances, such as when the initial decision was clearly erroneous and would work a manifest injustice. n3 It should be noted that the doctrine applies as much to the decisions of a coordinate court in the same case, as to a court's own decisions. n4 For a complete discussion of the doctrine of law of the case, see *§ 30.30* et seq.

The law of the case doctrine is a rule of practice that promotes the finality and efficiency of the judicial process by protecting against the disturbance of settled issues. n5 It is thus similar to the doctrine of issue preclusion. However, while the doctrine of issue preclusion forbids relitigation by the same parties in any future lawsuit of an issue determined by a valid and final judgment, n6 the law of the case doctrine provides that the law applied in decisions at one stage of litigation, must be applied as the governing principle in later stages of the same litigation. n7

[3] Claim Preclusion

The doctrine of claim preclusion, also referred to as res judicata, n1 means that a final judgment on the merits of an action prohibits the parties or their privies from initiating subsequent litigation arising out of the same transaction or series of transactions. n2 In other words, when a final judgment is entered, the judgment constitutes a bar that prevents the parties from relitigating the claims for damages or other relief encompassed by the judgment. Thus, when a judgment is rendered for the defendant, the plaintiff's claim is considered extinguished and the judgment acts as a bar to relitigation of that claim. Furthermore, the claim preclusion bar extends to all issues relevant to the same claim between the same parties, whether or not these issues were raised at trial. n3 For a complete discussion of the doctrine of claim preclusion, see *§ 30.50* et seq.

Claim preclusion differs from stare decisis n4 in that claim preclusion does not apply either to the claims of strangers to the litigation, n5 or to claims for relief between the same parties other than than the claims encompassed by the judgment. n6 Claim preclusion also differs from stare decisis in that claim preclusion prohibits relitigation of the claims regarding issues of either law or fact, if such issues could have been raised and determined. n7 The basic difference between claim preclusion and issue preclusion n8 is that claim preclusion prevents relitigation of entire claims for relief, whether litigated or not, while issue preclusion prevents relitigation of individual issues that have been contested and resolved. Thus, claim preclusion prevents parties and those in privity with them from raising claims for relief or defenses to claims for relief that could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case. n9 Issue preclusion, on the other hand, precludes litigation of issues that were actually litigated and essential to the outcome of the prior case, even if such issues are subsequently presented to support an entirely different claim for relief. n10

As is the case with other preclusion doctrines, claim preclusion is a fundamental rule of law that serves an important public interest by ensuring a definitive end to litigation. n11 The rationale for the doctrine of claim preclusion is that a valid judgment should have the effect of foreclosing litigation of a matter because of a determination that the matter should have been advanced in that earlier suit, even when that matter has never been actually litigated. n12 Thus, the primary purpose of claim preclusion is to prevent a plaintiff from merely relitigating the same facts by using a different legal theory. n13 Additional purposes of claim preclusion are to further judicial economy and to spare parties from wasteful, duplicative litigation of identical obligations, wrongful conduct, or breaches. n14

[4] Issue Preclusion

The doctrine of issue preclusion, also referred to historically as collateral estoppel, n1 essentially provides that when an issue of fact or law has been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any subsequent legal action. n2 Issue preclusion therefore applies to prevent relitigation of the same issues in a subsequent case even on a different claim for relief, if the claim involves a party or privy to the prior

litigation. n3 The doctrine of issue preclusion prevents a party from relitigating an issue that the party has already litigated and lost and thus often protects a defendant from the burden of litigating an issue that has been fully and fairly tried in a prior action and decided against the same plaintiff. n4 For a complete discussion of the doctrine of issue preclusion, see *§ 30.70* et seq.

Issue preclusion differs from claim preclusion because claim preclusion deems that a validly entered judgment is the entire measure of relief to be accorded between the same parties on the same claim for relief, and therefore precludes relitigation of that claim only, n5 while issue preclusion merely bars the relitigation of those issues that were actually adjudicated and essential to a judgment in a prior litigation between the same parties or privies. n6 Thus, claim preclusion may be used to preclude claims or causes of action other than those previously litigated, n6.1 provided that the issue was previously litigated and essential to the prior judgment. n7

Issue preclusion has the dual purpose of protecting litigants from the burden of relitigating an identical issue and of promoting judicial economy by preventing needless litigation. n8 The doctrine also prevents inconsistent decisions and encourages reliance on adjudication by preventing inconsistent decisions. n9

[5] Judicial Estoppel

The doctrine of judicial estoppel is an equitable doctrine n1 which gives the court discretion to reject a claim made by a party in a legal proceeding when that claim is inconsistent with a claim made by that party earlier in the same proceeding or in a previous legal proceeding. n2 Thus, if a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, the court may reject a later contrary position, even though the party's interests have changed. The rule of judicial estoppel is intended to prevent improper use of the judicial process. n3 As an equitable doctrine, judicial estoppel is most appropriately applied when a party's change in position or argument would adversely affect the proceeding or constitute a fraud on the court. n6 It is also typically used when a party intentionally uses self-contradiction in an attempt to obtain unfair advantage. n7 For a complete discussion of the doctrine of judicial estoppel, see *§ 30.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the CaseCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 131.13, 132.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Helvering v. Hallock, 309 U.S. 106, 119, 60 S. Ct. 444, 451, 84 L. Ed. 604 (1940)* .

(n3)Footnote 2. *Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997)* (citing **Moore's Federal Practice** for proposition that, while stare decisis makes each judgment binding precedent in future cases before same court or another court owing obedience to its decisions, court of appeals in one circuit under federal system owes no obedience to decisions of court of appeals in another circuit).

(n4)Footnote 3. *Brock v. El Paso Natural Gas Co., 826 F.2d 369, 374 (5th Cir. 1987)* .

(n5)Footnote 4. *United States v. Nolan, 136 F.3d 265, 269 (2d Cir. 1998)* .

(n6)Footnote 5. *Premier Elec. Const. Co. v. Nat'l Elect. Contractors Ass'n, Inc., 814 F.2d 358, 367 (7th Cir. 1987)*

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(n7)Footnote 6. *Vasquez v. Hillery, 474 U.S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)* .

(n8)Footnote 1. *Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186-1187 (9th Cir. 2001)* , *cert. denied, 534 U.S. 1040 (2001)* .

(n9)Footnote 2. Appointing Indep. Counsels Ethics in Gov't Act of 1978, *925 F.2d 428, 434 (D.C. Cir. 1991)* .

(n10)Footnote 3. *Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)* .

(n11)Footnote 4. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (policies supporting doctrine of law of case apply with even greater force to decisions transferred from coordinate court than to decisions of substantive law).

(n12)Footnote 5. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (citing **Moore's Federal Practice**).

(n13)Footnote 6. *See Schiro v. Farley, 510 U.S. 222, 232, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)* ; *see* [d], *below*.

(n14)Footnote 7. *Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 (5th Cir. 1995)* .

(n15)Footnote 1. *Perkins v. Board of Trustees of the Univ. of Illinois, 116 F.3d 235, 236 (7th Cir. 1997)* ; *Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 (5th Cir. 1995)* ; *see State of Arizona v. State of California, 530 U.S. 392, 409, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* (defense of claim preclusion is also known as defense of res judicata).

(n16)Footnote 2. *Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 476, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* .

(n17)Footnote 3. *Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc., 575 F.2d 530, 535-536 (5th Cir. 1982)* .

(n18)Footnote 4. *See* [1], *above*.

(n19)Footnote 5. *Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993)* , *cert. denied, 511 U.S. 1082 (1994)* .

(n20)Footnote 6. *Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1982)* .

(n21)Footnote 7. *See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* .

(n22)Footnote 8. *See* [3], *below*.

(n23)Footnote 9. *Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979)* (citing **Moore's Federal Practice**).

(n24)Footnote 10. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (citing **Moore's Federal Practice**).

(n25)Footnote 11. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1979)* .

(n26)Footnote 12. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n27)Footnote 13. *Hiser v. Franklin, 94 F.3d 1287, 1292 (9th Cir. 1996)* , *cert. denied, 520 U.S. 1103 (1997)* .

(n28)Footnote 14. *Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1982)* .

(n29)Footnote 1. *See Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n30)Footnote 2. *San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315, 332 (2005)* (issue preclusion and other preclusive doctrines are encompassed by Judicial Code Section 1738, which provides that judicial proceedings must be given the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of each state).

(n31)Footnote 3. *Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 20 F.3d 289, 294 (7th Cir. 1994)* .

(n32)Footnote 4. *Comair Rotron, Inc. v. Nippon Densan Corp., 49 F.3d 1535, 1537 (Fed. Cir. 1995)* .

(n33)Footnote 5. *McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C. Cir. 1986)* .

(n34)Footnote 6. *See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n35)Footnote 6.1. *B-S Steel of Kan. v. Tex. Indus., 439 F.3d 653, 662 (10th Cir. 2006)* .

(n36)Footnote 7. *See Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir. 1979)* .

(n37)Footnote 8. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n38)Footnote 9. *Montana v. United States, 440 U.S. 147, 153-154, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* .

(n39)Footnote 1. *New Hampshire v. Maine, 532 U.S. 742, 749-750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* (citing **Moore's Federal Practice**).

(n40)Footnote 2. *Mintze v. Am. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 232 (3d Cir. 2006)* (citing **Moore's Federal Practice**).

(n41)Footnote 3. *New Hampshire v. Maine, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* .

(n42)Footnote 6. *In re Baker Hughes, Inc., 215 F.3d 1297, 1302 n.2 (Fed. Cir. 2000)* .

(n43)Footnote 7. *Lampi Corp. v. American Power Prods., 228 F.3d 1365, 1377 (Fed. Cir. 2000)* .

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3-30 Moore's Manual--Federal Practice and Procedure §§ 30.03through 30.09

[Reserved]

§§ 30.03[Reserved]

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
B. STARE DECISIS

3-30 Moore's Manual--Federal Practice and Procedure § 30.10

§ 30.10 Nature of Stare Decisisn*

[1] Definition of Stare Decisis

The doctrine of stare decisis provides that courts must abide by or adhere to cases that have been previously decided n1 and that a legal decision on an issue of law that is contained in a final judgment is binding in all future cases on the court that made the legal decision and all other courts that owe obedience to that court. n2 In other words, the doctrine of stare decisis incorporates two principles: (1) a court is bound by its own prior legal decisions unless there are substantial reasons to abandon a decision; n3 and (2) a legal decision rendered by a court will be followed by all courts inferior to it in the judicial system. n4 In general, a district court's decisions do not bind another district court; a circuit court's decision binds the district courts sitting within its jurisdiction; and a decision by the United States Supreme Court binds all circuit and district courts. n4.1

[2] Stare Decisis Compared With Other Preclusive Doctrines

Claim preclusion and stare decisis both provide that a judgment has certain preclusive effects on later court decisions regarding matters contained in that judgment. However, claim preclusion precludes relitigation of the claims as to either issues of law or fact if such issues could have been raised and determined, and is limited to parties or their privies, while stare decisis is not so limited. On the other hand, claim preclusion is broader in its effect because it precludes relitigation of the claims as to either issues of law or fact, while stare decisis applies only to questions of law. n1

The law of the case and stare decisis both provide that a legal decision made by a court affects judicial decisions made at a later time. However, while stare decisis essentially provides that a final judgment establishes a legal principle that is binding as a precedent in other courts which owe obedience to the court that made the decision, n1.1 the law of the case doctrine provides that the law decided at one stage of the same litigation becomes the governing principle in later stages. n2 It should be noted that unlike res judicata, both law of the case and stare decisis allow reconsideration of erroneous decisions by the court that rendered the decision. n3

The doctrines of issue preclusion and stare decisis both make a decision binding after judgment is entered, and like stare decisis, issue preclusion applies only to issues of fact or law that were necessarily decided by a prior court. n4 However,

the stare decisis doctrine is not limited to the parties to the original lawsuit or those in privity with the parties, while only a party or privy may be bound by the issue preclusive effect of a prior judgment. n5 Another difference is that while stare decisis applies only to issues of law, n5.1 issue preclusion also applies to issues of fact. n6

[3] Purposes of Stare Decisis

The doctrine of stare decisis has several purposes. Stare decisis promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. The doctrine avoids the instability and unfairness that accompany disruption of settled legal expectations. n1 Stare decisis provides the stability and predictability required for the ordering of personal and business affairs over the course of time and provides a basis for public faith in the judiciary as a source of impersonal and reasoned judgments. n2 The doctrine reflects the central judicial idea that similar cases should be treated similarly absent a reason for not doing so, n3 and thus the doctrine is derived from considerations of stability and equal treatment. n4 The Supreme Court has noted that stare decisis is important because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. n5

[4] Limitations of Doctrine

[a] Flexibility of Doctrine

Stare decisis is a principle of policy rather than a black letter rule or a mechanical formula of adherence to the latest decision. n1 Stare decisis does not require adherence to recent and questionable decisions when such adherence conflicts with a prior doctrine that is more embracing in scope, intrinsically sounder, and verified by experience. n2 Similarly, as it relates to successive decisions in the same court, stare decisis is not a bar to change; rather, it is an important conservative influence. It gives a court the discretion to depart from one of its own prior holdings if a compelling reason to do so exists. n3

A party arguing that a court should dispense with the doctrine of stare decisis, however, has a heavy burden. The Supreme Court has stated that a departure from the doctrine is exceptional and requires a "special justification," especially when the precedent in question has become settled through iteration and reiteration over a long period of time. n3.1 Only when presented with a compelling constitutional attack or dire practical ramifications should a court overturn well-established precedent. Courts must be particularly circumspect in reconsidering decisions interpreting statutes. n4 Thus, a court must be reluctant to overturn its prior decisions construing statutes, doing so only to achieve a uniform interpretation of similar statutory language or to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy. n5 On the other hand, when a court decides a case based on constitutional issues, that decision is largely insulated from legislative disapproval; therefore, the Supreme Court has recognized that the principles of stare decisis should be less rigorously applied in constitutional cases. n6

[b] Factors Considered in Overruling Prior Decision

Stare decisis binds other courts owing obedience to a higher court, and generally binds courts to following their own prior decisions. However, stare decisis is not an inexorable command, and allows courts to overrule their own prior decisions, based on a balancing of the benefit of overruling the decision with the interest in stability. In deciding whether to overrule a precedent, courts should examine all factors, including:

1. Whether the precedent is one of statutory construction or constitutional challenge. n7

2. Whether the precedent has been questioned seriously by the Supreme Court or any court to which the lower court owes obedience. n8

3. Whether the precedent has proven to be impracticable. n9

4. Whether overruling the precedent would create a special hardship. n10

5. Whether the precedent has become outmoded or inconsistent with justice or with public policy. n11

6. Whether subsequent case law has made the precedent a legal anomaly or otherwise undermined its basic legal principles; whether circumstances have changed so radically as to undermine the precedent's critical factual assumptions; or whether the precedent has promoted considerable reliance and overruling the precedent would dramatically undermine this reliance. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 134.01, 134.05, 134.06 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482, 2006 U.S. LEXIS 5161, *25-*26 (2006)* (stare decisis is basic legal principle that commands judicial respect for Court's earlier decisions and rules of law that those decisions embody); *United States IRS v. Osborne (In re Osborne), 76 F.3d 306, 309 (9th Cir. 1996)* (because "decisis" means literally and legally "decision," doctrine of stare decisis applies to holding of previous case and not necessarily rationale of court or factual finding).

(n3)Footnote 2. *Aves. in Leather, Inc. v. United States, 423 F.3d 1326, 1331 (Fed. Cir. 2005)* (citing **Moore's Federal Practice**; stare decisis deals only with law, because facts of each case must be determined by evidence adduced at trial).

(n4)Footnote 3. *Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987)* (stare decisis relationship between court and its own previous decision).

(n5)Footnote 4. *Arizonans for Official English v. Arizona, 520 U.S. 43, 68-69, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n6)Footnote 4.1. *McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004)* .

(n7)Footnote 1. *EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986)* .

(n8)Footnote 1.1. *Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457-458 (7th Cir. 2005)* .

(n9)Footnote 2. *Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978)* .

(n10)Footnote 3. *Thompson v. Sawyer, 678 F.2d 257, 270 (D.C. Cir. 1982)* .

(n11)Footnote 4. *Compare Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345 (5th Cir. 1982)* ; *with Matter of Ellis, 674 F.2d 1238, 1250 (9th Cir. 1982)* .

(n12)Footnote 5. *Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993)* , *cert. denied, 511 U.S. 1082 (1994)* .

(n13)Footnote 5.1. *Aves. in Leather, Inc. v. United States, 423 F.3d 1326, 1331 (Fed. Cir. 2005)* .

(n14)Footnote 6. *Meredith v. Beech Aircraft Corp., 18 F.3d 890, 895 (10th Cir. 1994)* .

(n15)Footnote 1. *Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482, 2006 U.S. LEXIS 5161, *26 (2006)* .

(n16)Footnote 2. *Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)* .

(n17)Footnote 3. *Brock v. El Paso Natural Gas Co., 826 F.2d 369, 374 (5th Cir.1987)* ; *Flowers v. United States, 764 F.2d 759, 761 (11th Cir. 1985)* .

(n18)Footnote 4. *Ute Indian Tribe v. Utah, 935 F. Supp. 1473, 1509 (D. Utah 1996)* .

(n19)Footnote 5. *Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)* .

(n20)Footnote 1. *Johnson v. DeSoto County Bd. of Comm'rs., 72 F.3d 1556, 1559 (11th Cir. 1996)* (in contrast to principle of stare decisis, principle of "binding precedent" requires district courts to follow holdings of their court of appeals and Supreme Court even in compelling circumstances).

(n21)Footnote 2. *Helvering v. Hallock, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940)* .

(n22)Footnote 3. *Johnson v. DeSoto County Bd. of Commrs., 72 F.3d 1556, 1559 (11th Cir. 1996)* .

(n23)Footnote 3.1. *Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482, 2006 U.S. LEXIS 5161, *26-*27 (2006)* .

(n24)Footnote 4. *Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1353 (5th Cir. 1987)* ; *see Hubbard v. United States, 514 U.S. 695, 711, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995)* (respect for precedent is strongest in the area of statutory construction, where Congress is free to change Supreme Court's interpretation of its legislation); *Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)* (burden borne by party advocating abandonment of an established precedent is greater when court is asked to overrule point of statutory construction).

(n25)Footnote 5. *Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* .

(n26)Footnote 6. *Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L. Ed. 2d 164 (1984)* ; *Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1065 (7th Cir. 2000)* .

(n27)Footnote 7. *See* [a], *above*.

(n28)Footnote 8. *United States v. Aman, 31 F.3d 550, 554 (7th Cir. 1994)* .

(n29)Footnote 9. *Critical Mass Energy Project v. NRC, 975 F.2d 871, 875 (D.C. Cir. 1992)* .

(n30)Footnote 10. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* .

(n31)Footnote 11. *Patterson v. McLean Credit Union, 491 U.S. 164, 174, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)* .

(n32)Footnote 12. *Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482, 2006 U.S. LEXIS 5161,*

*27 (2006) .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
B. STARE DECISIS

3-30 Moore's Manual--Federal Practice and Procedure § 30.11

§ 30.11 Determining Applicability of Stare Decisisn*

[1] Prerequisites to Application of Stare Decisis

All of the following factors must exist before a particular decision has stare decisis effect:

1. The decision must constitute a holding of the majority of the court. n1 If a particular principle or result is adopted by a clear majority of the court, n2 it has absolute precedential effect in substantially identical legal and factual circumstances. n3 Results articulated by less than a clear majority or by dissenting opinions are not entitled to precedential effect. n4 The absence of a clear majority rationale supporting the result may give a lower court some flexibility to formulate a justifying rule; however, the lower court may not adopt a line of reasoning that will lead to a contrary result. n5

2. The decision must involve an issue of law. A decision of a court constitutes a precedent subject to stare decisis only with respect to an issue of law heard and decided by the court. Thus, issues of law are subject to stare decisis, not the entire decision. n6

3. Similar fact situations must be involved. Although only issues of law are subject to stare decisis effect, it should not be assumed that facts are unimportant to stare decisis analysis. On the contrary, the principle of stare decisis is generally applicable only where facts in the two actions are the same. n7 In addition, a decision depending on its underlying facts is not necessarily controlling precedent as to subsequent analysis of the same question on different facts and different records. n8

4. The decision has actually determined an issue. Reasoning that does not form the basis of the holding merely constitutes dictum and is not binding on courts that are obligated to follow precedent. n9 However, although dictum is not binding precedent, it may be persuasive authority. n10 A circuit court panel's implicit holdings are not binding precedent. n11 Furthermore, potential issues that could have been raised on the record, but that were never argued to the court by a party nor ruled on by the court, are not considered as having been decided and do not constitute precedent. n12

5. An opinion or other dispositive order which has been designated by the issuing court as unpublished or non-precedential is generally not considered as having stare decisis effect, although it may be of persuasive value to other courts. n12.1 Each circuit may by local rule specify the effect of such opinions or orders. n12.2

6. The decision must be from the same court that is seeking to apply the stare decisis doctrine, or from a court to which the court applying stare decisis owes obedience. Thus, stare decisis does not apply to the decision of a court when the current court is not under a duty to obey the decisions of that court. n13

[2] Prohibition Against Limitations on Citation of Judicial Dispositions

When it issues an opinion, judgment, order, or other disposition, a circuit court has the option to designate the judicial disposition as "unpublished," "not for publication," "non-precedential," "not precedent," or some similar designation. Each circuit determines whether such a written judicial disposition has precedential value and the extent of the persuasive authority of such a ruling. n14 Furthermore, local rules may specify whether such a judicial disposition is of precedential value. n15

By appellate rule, a federal court may not prohibit or otherwise restrict citation to opinions and other written judicial dispositions, even if they are designated unpublished or non-precedential. n16 Rule 32.1 preserves only the right to *cite* the unpublished or non-precedential disposition. The rule does not require nor forbid any court from issuing an unpublished or nonprecedential opinion. It leaves for the issuing court to choose when to designate an opinion or other judicial disposition as unpublished or nonprecedential. Furthermore, it does not dictate what effect a court must give to one of own its unpublished or non-precedential judicial dispositions, or those of another court. n17 Rule 32.1(a) is intended to replace the inconsistent standards which circuits have previously applied to *citation* of unpublished and nonprecedential opinions and judicial dispositions with one uniform rule. n18

[3] Copies Required When Citing to Unavailable Opinions or Other Judicial Dispositions

If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper that cites to the unavailable judicial disposition. n19 Therefore, a citing party must provide copies unless the cited opinion or other disposition is available in a publicly accessible electronic database, such as a database maintained by a commercial legal research service or a database maintained by a court. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *In re Chateaugay Corp., 94 F.3d 772, 782 (2d Cir. 1996)* .

(n3)Footnote 2. *City of Erie v. Pap's A.M., 529 U.S. 277, 285, 120 S. Ct. 1382, 146 L. Ed. 2d 265* .

(n4)Footnote 3. *EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986)* .

(n5)Footnote 4. *United States v. Ameline, 409 F.3d 1073, 1083 (9th Cir. 2005)* .

(n6)Footnote 5. *Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994)* .

(n7)Footnote 6. *EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986)* (citing **Moore's Federal Practice**).

(n8)Footnote 7. *United States v. Nolan, 136 F.3d 265, 269 (2d Cir. 1998)* .

(n9)Footnote 8. *Gately v. Commonwealth of Mass., 2 F.3d 1221, 1226 (1st Cir. 1993)* .

(n10)Footnote 9. *United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000)* .

(n11)Footnote 10. *Lancaster v. Am. & Foreign Ins. Co., 272 F.3d 1059, 1062 (6th Cir. 2001)* .

(n12)Footnote 11. *Washington v. Schriver, 255 F.3d 45, 54 & n.3 (2d Cir. 2001)* .

(n13)Footnote 12. *United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S. Ct. 67, 97 L. Ed. 54 (1952)* .

(n14)Footnote 12.1. *Abdul-Muhammad v. Kempker, 450 F.3d 350, 352 (8th Cir. 2005)* .

(n15)Footnote 12.2. *Fed. R. App. P. 32.1(a)*, Committee Note; *see* [2], *below*.

(n16)Footnote 13. *Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997)* (citing **Moore's Federal Practice** for proposition that while stare decisis makes each judgment binding precedent in future cases before same court or another court owing obedience to its decisions, stare decisis does not apply to decision court of appeals in one circuit in federal system for court of appeals in a different circuit); *see In re Visness, 57 F.3d 775, 778 (9th Cir. 1995)* , *cert. denied, 516 U.S. 1099 (1996)* (regarding courts of different levels, stare decisis is based on principle that lower court is required to render decisions that are consistent with the results of prior decisions of a higher court to which the lower court owes allegiance).

(n17)Footnote 14. *See, e.g., Abdul-Muhammad v. Kempker, 450 F.3d 350, 351-352 (8th Cir. 2006)* .

(n18)Footnote 15. *See, e.g.*, Ninth Circuit Local Rule 36-3.

(n19)Footnote 16. *Fed. R. App. P. 32.1(a)*.

(n20)Footnote 17. *Fed. R. App. P. 32.1*, Committee Note.

(n21)Footnote 18. *Fed. R. App. P. 32.1(a)*, Committee Note.

(n22)Footnote 19. *Fed. R. App. P. 32.1(b)*.

(n23)Footnote 20. *Fed. R. App. P. 32.1(a)*, Committee Note.

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B. STARE DECISIS

3-30 Moore's Manual--Federal Practice and Procedure § 30.12

§ 30.12 Effect of Application of Stare Decisisn*

[1] Determination of Effect by Court

As a rule, stare decisis means that the court must abide by the previously decided case. Thus, similar facts in the previous case must receive the same legal treatment in the current case, n1 and the current court should limit the language and general expressions in the prior opinion to the particular facts and issues involved and must construe the prior opinion in light of the issues presented. n2

[2] Consistency With Prior Result

When a court is giving stare decisis effect to an earlier decision of the same court or to another court to which the current court owes allegiance, the current court is required, at a minimum, to render a decision that is consistent with the results of the prior decision. n1 Thus, when precedent has binding effect, the minimum deference required is that the results of the precedent must be applied to the subsequent decision. n2 This principle is "result stare decisis," which mandates that any specific result adopted by a clear majority of the Court should be controlling in substantially identical cases. Adherence to result stare decisis is essential to further the purposes of certainty and uniformity. n3

[3] Consistency With Prior Holding

When the majority of the judges comprising a court have issued a written opinion accompanying a decision, the opinion controls the scope of the effect of the decision. Therefore, when a court is bound by a prior decision, the usual rule is that the court must following the holding of the prior decision. n1 However, it is not always clear what the holding is in a particular case, and holdings may be given broad or narrow interpretations. n2 A characterization of a holding as broad or narrow is important, because reasoning that is found to be mere dicta, and not part of the holding, is not binding on courts that are obligated to follow the decision. n3 However, even though dicta are not absolutely binding authority, they may be considered by the court. n4 Circuit courts must particularly consider the Supreme Court's dicta, because the Supreme Court uses dicta to help control and influence many issues it cannot decide because of its limited docket. n5 Appellate courts that ignore dicta increase disparity among the circuits because other circuit courts will properly be influenced by the Supreme Court's dicta; such procedure frustrates the evenhanded administration of justice.

n6

[4] Consistency With Prior Reasoning

A court that is following the stare decisis effect of another decision may consider the reasoning of the prior decision and is not necessarily limited to following the holding of the previous decision. n1 Some courts have even held that the following court must consider the reasoning of the prior court. n2 Thus, it has been articulated that a circuit court must follow prior precedent, which includes not only the very narrow holdings of prior cases but also the reasoning underlying those holdings, particularly when the reasoning articulates a point of law. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Premier Elec. Const. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358, 367 (7th Cir. 1987)* .

(n3)Footnote 2. *See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* (under principle of stare decisis, inferior or lower courts are bound to follow decisions of superior courts; lower court may not alter results of a prior final judgment, even if that judgment was wrong).

(n4)Footnote 1. *Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994)* .

(n5)Footnote 2. *In re Hammond, 27 F.3d 52, 55 (3d Cir. 1994)* (district court was bound by prior decision of circuit that was on all fours with instant case).

(n6)Footnote 3. *Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994)* .

(n7)Footnote 1. *Ratliff v. DeKalb County, 62 F.3d 338, 341 (11th Cir. 1995)* (binding effect of "holding").

(n8)Footnote 2. *Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1183 n.6 (3d Cir. 1991)* .

(n9)Footnote 3. *Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1472 (9th Cir. 1995)* (statements not necessary to decision are dicta and thus are not binding precedent).

(n10)Footnote 4. *Cerro Metal Prods. v. Marshall, 620 F.2d 964, 978 n.38 (3d Cir. 1980)* (court may consider general expressions in opinion, even though only dictum).

(n11)Footnote 5. *Stone Container Corp. v. United States, 229 F.3d 1345, 1350 (Fed. Cir. 2000)* , *cert. denied, 532 U.S. 971 (2001)* (Supreme Court's explicit and carefully considered dicta must be followed).

(n12)Footnote 6. *McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 612-613 (3d Cir. 2000)* , *cert. denied, 531 U.S. 822 (2000)* .

(n13)Footnote 1. *Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996)* , *rev'd on other grounds, 523 U.S. 75 (1998)* (applying stare decisis to alternative reasoning supporting result in prior decision).

(n14)Footnote 2. *CFTC v. Dunn, 58 F.3d 50, 53-54 (2d Cir. 1995)* , *rev'd on other grounds, 519 U.S. 925 (1997)* .

(n15)Footnote 3. *United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.13

§ 30.13 Stare Decisis in Federal Courtn*

[1] Stare Decisis Effect of Decisions by Same Court

In the federal system, the doctrine of stare decisis has a different effect depending on the relationship between the court rendering the judgment and the court that is considering whether to give the prior judgment stare decisis effect. When the court that made the prior decision is the same as the subsequent court, the general rule is that stare decisis applies, and the court should give great weight to its own prior decision before overruling it. n1 However, the prior decision is not absolutely binding precedent, and the court has discretion to depart from its own prior decisions when a compelling reason to do so exists. n2

While a decision of the same court or a coordinate court at the same level is not absolutely binding, when a lower court is considering giving stare decisis effect to the decision of a higher court to which the lower court owes allegiance, the general rule is the higher court's decision is absolutely binding on the lower court. n3

[2] Stare Decisis Effect of Higher Court Decision on Lower Court

Stare decisis is applicable in two situations. In addition to applying to all future decisions in the same court, n1 the doctrine applies to other courts owing obedience to that court. n2 State and federal courts owe obedience to the decisions of the Supreme Court of the United States on questions of federal law; thus, a judgment of the Supreme Court provides the rule to be followed in all courts regarding federal law. n3 Similarly, the district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and must follow it until the court of appeals overrules it. n4

A lower court must follow the higher courts binding precedent even if the lower court believes it to be erroneous. The lower court may not conclude that a higher court's recent case has implicitly overruled earlier precedent. In particular, if a Supreme Court precedent has direct application in a case before the circuit court, yet appears to rely on reasoning that has later been rejected in another Supreme Court decision or decisions, the circuit court must follow the case that directly controls, and defer to the Supreme Court the option to overrule its own decisions. n5 Additionally, lower courts must not take statements of the Supreme Court out of context. The Supreme Court's statements must be read in light of the Court's holding and, to the extent possible, in a manner consistent with the Court's intentions as contained in other

statements. n6

[3] Stare Decisis Effect in Specialized Federal Courts

There are numerous federal courts that have jurisdiction limited to special subject matter. Jurisdiction of the circuit courts of appeal to review decisions of these courts is defined by district court jurisdiction. n1 Probably the most important examples of specialized courts include the United States Court of Claims and the United States Court of International Trade. These courts owe obedience to the Court of Appeals for the Federal Circuit and the Supreme Court, but do not owe obedience to the holdings of the district courts or the regional courts of appeal. The Federal Circuit has jurisdiction over cases from these courts and over cases appealed from a district court whose jurisdiction is based in whole or in part on matters encompassed within the Federal Circuit's special competence, n2 which includes the interpretation and application of intellectual property laws such as patent, trademark, and copyright. n3 With respect to non-specialized issues in a case, the Federal Circuit gives stare decisis effect to the law of the regional circuit from which the case arose. n4

Another category of specialized federal tribunals includes the federal bankruptcy courts and bankruptcy appellate panels. n5 The stare decisis effect of the decisions of the bankruptcy appellate panels is not settled. In this regard, the Ninth Circuit has held that decisions of a bankruptcy appellate panel are not absolutely binding on Article III courts, including the federal circuit and district courts, at least to the extent of the Article III court's own jurisdiction. n6 Another court has held that because a bankruptcy court constitutes a unit of the district, known as the bankruptcy court for that district, a bankruptcy court is not inferior to a district court in its district; it is itself a division of and therefore equal to a district court in its district, and a district court's decisions are not absolutely binding on the bankruptcy court as an inferior court. n7

[4] Stare Decisis Effect in State and Federal Courts

The courts of one state do not owe obedience to the case precedents of the courts of another state, except when following the law of another state under its choice of law rules. n1 State courts also do not owe allegiance to the federal courts of appeal or the federal district courts, n2 but are bound by the decisions of the United States Supreme Court in matters of federal law. n3 However, state courts may deem lower federal court decisions persuasive authority, especially in areas of federal law. n4

In diversity cases and in cases of supplemental jurisdiction, federal courts are required to apply state law. A federal court, in applying the law of a state, is bound by stare decisis to follow the precedent of the state's highest court. n5 Thus, the federal court must follow the final decisions of state's highest court, and when there is no ruling by the state's highest court, the federal court must determine as best it can what the highest court of state would decide in the circumstances at hand. n6 This means that the federal court is bound to follow the precedents of the highest court of the state in exactly the same manner in which an inferior court in the state would be bound. n7

[5] Stare Decisis Regarding Administrative Agency Decisions

The stare decisis purposes of uniformity of treatment, stability, predictability, and convenience generally apply to administrative agency decisions as well as to judicial proceedings. n1 However, because they are departments of the legislative and executive branches of government, and have authority to adjudicate and engage in rule promulgation in response to changing policy goals, administrative agencies must retain the power to consider disputes on a case-by-case basis. Otherwise, the administrative process would become inflexible and incapable of solving the specialized and evolving disputes that may arise. The Supreme Court has indicated that administrative agencies are not required to establish a permanent rule when they first decide an issue, and must have latitude to adapt their rules and policies to changing circumstances. n2 Therefore, the principle of stare decisis is not as rigidly applied in administrative proceedings as it is in purely judicial proceedings. Thus, the following principles guide the application of stare decisis in

administrative proceedings:

1. Administrative agencies may establish their rules and policies on a case-by-case basis but should have articulable reasons for changes. n3

2. When acting in a judicial or quasi judicial capacity, an administrative agency as a matter of practice should tend to follow the precedents established by its prior decisions. n4

3. An administrative agency may overrule its prior decisions when based on changed circumstances. n5

4. When an administrative agency makes a new decision that reverses a previous policy or rule decision, the new decision may generally be given retroactive effect, n6 except when the hardship created by the retroactive application of the new decision is great enough to constitute arbitrary and capricious action under the Administrative Procedure Act. n7

5. To facilitate review based on the arbitrary and capricious standard, the agency's report and order should specify the reasons for any deviations from established precedents.

All administrative agency decisions are bound by Supreme Court decisions, and when an agency is subject to review by only the court of appeals, the position of the agency is analogous to that of a lower court. Thus, precedent established by the reviewing court is binding on the agency. n8 On the other hand, the decisions of those administrative agencies that are not limited to review by only one court of appeals must follow the law of the circuit that has jurisdiction over the review. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewGovernmentsCourtsJudicial Precedents

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Hubbard v. United States, 514 U.S. 695, 115 S. Ct. 1754, 1764, 131 L. Ed. 2d 779 (1995)* .

(n3)Footnote 2. *Johnson v. DeSoto County Bd. of Comm'rs, 72 F.3d 1556, 1559 (11th Cir. 1996)* (in contrast to principle of stare decisis consideration by district court of its own previous decision, principle of "binding precedent" requires district courts even in compelling circumstances to follow holdings of higher level court, such as their own court of appeals and Supreme Court).

(n4)Footnote 3. *In re Visness, 57 F.3d 775, 778 (9th Cir. 1995)* , *cert. denied, 516 U.S. 1099 (1996)* ; *see* [2], *below*.

(n5)Footnote 1. *See* [1], *above*.

(n6)Footnote 2. *Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1570 (Fed. Cir. 1993)* (citing **Moore's Federal Practice**).

(n7)Footnote 3. *Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1921-1922, 104 L. Ed. 2d 526 (1989)* ; *see Insurance Co. v. United States, 243 F.3d 1367, 1372 (Fed. Cir. 2001)* (circuit court must follow Supreme Court's interpretation of its own decisions, even if that interpretation may be dictum).

(n8)Footnote 4. *In re Korean Airlines Disaster, 829 F.2d 1171, 1173-1174 (D.C. Cir. 1987)* , *aff'd on other grounds, 490 U.S. 122 (1989)* (circuit court of appeals sets binding precedent for district courts in that circuit).

(n9)Footnote 5. *Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* ; *United States v. Weathers, 186 F.3d 948, 957 n.12 (D.C. Cir. 1999)* , *cert. denied, 529 U.S. 1005 (2000)* .

(n10)Footnote 6. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd., 237 F.3d 639, 642 (D.C. Cir. 2001)* , *rev'd on other grounds, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002)* .

(n11)Footnote 1. *Atari, Inc. v. J.S. & A. Group, Inc., 747 F.2d 1422, 1429 (Fed Cir. 1984)* (Federal Circuit jurisdiction is defined by district court jurisdiction).

(n12)Footnote 2. *Atari, Inc. v. J.S. & A. Group, Inc., 747 F.2d 1422, 1429 (Fed Cir. 1984)* (Federal Circuit jurisdiction is defined by district court jurisdiction).

(n13)Footnote 3. *28 U.S.C. § 1295*.

(n14)Footnote 4. *Registration Control Sys. v. Compusystems, Inc., 922 F.2d 805, 807 (Fed. Cir. 1990)* .

(n15)Footnote 5. *See* 18 *Moore's Federal Practice, § 201.60 et seq*. (Matthew Bender 3d ed.).

(n16)Footnote 6. *Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990)* .

(n17)Footnote 7. In *Re Baker, 264 B.R. 759, 762-763 (M.D. Fla. 2001)* .

(n18)Footnote 1. *Thomas v. Washington Gas Light Co., 448 U.S. 261, 277, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980)* .

(n19)Footnote 2. *Arizonans for Official English v. Arizona, 520 U.S. 43, 68-69, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* .

(n20)Footnote 3. *See Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1921-1922, 104 L. Ed. 2d 526 (1989)* .

(n21)Footnote 4. In re Korean Air Lines Disaster of Sept. 1, 1983, *829 F.2d 1171, 1176 (D.C. Cir. 1987)* , *aff'd on other grounds sub nom. Chan v. Korean Air Lines, 490 U.S. 122 (1989)* (while state laws vary, there is only single body of federal law).

(n22)Footnote 5. *Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992)* .

(n23)Footnote 6. *Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694, 707 (5th Cir. 1999)* , *cert. denied, 531 U.S. 917 (2000)* .

(n24)Footnote 7. *Riley v. Brown & Root, Inc., 896 F.2d 474 (10th Cir. 1990)* .

(n25)Footnote 1. *NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969)* (qualified role of stare decisis in administrative process); *Independent Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1258 (D.C. Cir. 1996)* (agency must treat similar cases in similar manner unless it can articulate legitimate reason for failing to do so).

(n26)Footnote 2. *Rust v. Sullivan, 500 U.S. 173, 186-187, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)* .

(n27)Footnote 3. *National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1201 (D.C. Cir. 1984)* (agency could not depart from its conclusion in prior decision without reasoned explanation).

(n28)Footnote 4. *Henry v. INS, 74 F.3d 1, 5 (1st Cir. 1996)* (agency may not adopt substantially inconsistent policies or rules that result in the creation of conflicting lines of precedent governing identical situations).

(n29)Footnote 5. *See Brock v. Williams Enters. of Ga., Inc., 832 F.2d 567, 574 (11th Cir. 1987)* .

(n30)Footnote 6. *SEC v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)* .

(n31)Footnote 7. *NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952)* ; *see 5 U.S.C. § 554.*

(n32)Footnote 8. *BPS Guard Servs., Inc. v. NLRB, 942 F.2d 519, 523 (8th Cir. 1991)* (administrative agencies must follow controlling precedent of superior judicial body).

(n33)Footnote 9. *Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
B. STARE DECISIS

3-30 Moore's Manual--Federal Practice and Procedure §§ 30.14through 30.29

[Reserved]

§§ 30.14[Reserved]

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
C. LAW OF THE CASE

3-30 Moore's Manual--Federal Practice and Procedure § 30.30

§ 30.30 Nature of Law of Casen*

[1] Definition of Law of Case

The "law of the case" doctrine provides that when a court decides on a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. This doctrine promotes the finality and efficiency of the judicial process and protects against the disruption of settled issues n1 by preventing relitigation of those issues in successive stages of a single case once those issues have been decided. n2 At the trial court level, the doctrine of the law of the case is a fundamental management device to permit logical progression toward judgment. Prejudgment orders remain interlocutory and may be reconsidered at any time; but efficient disposition of the case demands that each stage of the litigation build on the last and not afford an opportunity to re-argue every previous ruling. n3

The doctrine of law of the case is based on the public policy consideration that litigation should come to an end at some point. It is predicated on the premise that there would be no end to a suit if every intractable litigant could compel a court to listen to criticisms of their opinions, and that it would be impossible for a court to perform its duties satisfactorily, efficiently, and expeditiously if a question, once considered and decided, were to be litigated anew in the same case. n4 There is no distinction under the law of the case doctrine whether the "law" was established as a result of one party's waiver, agreement, or as a result of briefing, argument, and determination by the court. n5

[2] Mandatory and Discretionary Branches of Doctrine

[a] Two Branches of Doctrine

There are two branches of the law of the case doctrine, one mandatory and one discretionary. n1 Under the first, when an appellate court makes a remand to a lower court, the lower court is required to follow the mandate of the higher court after the remand, under the "mandatory" law of the case doctrine. n2 Under the second, when the law of the case doctrine is applied by a court to its own prior decisions, or to the decisions of a coordinate or equal court that has made a prior determination in the case, the doctrine is "discretionary" in nature. n3

[b] Mandate Rule

The "mandate rule" is the more powerful of the two branches of the law of the case doctrine. n3.1 It requires a lower court to honor the decisions of a superior court in the same judicial system. It essentially prevents lower courts from reconsidering issues that have already been decided in the same case by a higher court. Appellate courts frequently remand a case to a lower court for further proceedings based on the mandate of the superior court. n3.2 Therefore, under the mandate rule, an inferior court has no power or authority to deviate from the mandate issued to the inferior court by the appellate court on remand. n4 Courts consider the term "mandate rule" to be more precise than the phrase "mandatory law of the case." n5 On remand, the law of the case doctrine is rigid; the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry the mandate into effect according to its terms. n6

A district court must follow the mandate and, if not, may be compelled to do so by a second appeal n7 or by mandamus. n8 If a party wants to argue that the mandate decision is erroneous, the party should apply to the appellate court to depart from the mandate by a petition for rehearing, by a motion for recall of the mandate, n9 or by an appeal from the judgment rendered after completion of the proceedings for which the case was remanded. n10 A party may also move the district court under Rule 60(b) for relief from judgment without applying to the circuit court of appeals. n11

[c] Court's Discretion Regarding Its Own Prior Decisions

Even though the law of the case doctrine generally prohibits a court from reconsidering issues that have already been decided, the doctrine is not a limit on a court's power to reconsider its own decision on an issue if the court determines that such review is necessary. n12 The Supreme Court has held that although a court has the power to reconsider its own decisions or those of a coordinate court, it should not do so absent extraordinary circumstances showing that the prior decision was clearly wrong and would work a manifest injustice. n13 When a court applies the law of the case doctrine to its own prior decisions or those of a coordinate or equal court, the traditional formulations of the doctrine must be deemed as guidelines and not as rigid rules that would take away the informed discretion and sound practical judgment of the judge. n14 For example, a court may reconsider its own rulings when there has been a change in prevailing law or there is new evidence on the question at issue. n15

[3] Law of Case Compared With Other Preclusive Doctrines

The basic principle behind the law of the case doctrine bears a close resemblance to the doctrine of stare decisis. Like stare decisis, it serves the dual purposes of: (1) protecting against the disturbance of settled issues; n1 and (2) assuring the obedience of inferior courts to the decisions of superior courts. n2 Also like stare decisis, it is applied with more or less rigidity depending on which interest is served. A court that makes a decision has the power to reconsider it, so long as the case is within its jurisdiction. n3 But after the law of the case is determined by a superior court, the inferior court lacks authority to depart from that determination, and any change must be made by the superior court that established it or by a court to which the superior court itself owes obedience. n4

The law of the case doctrine is similar to claim preclusion in that both prohibit reconsideration of legal issues; however, while claim preclusion applies to claims in other cases between the parties, law of the case technically applies only to a single ongoing case. n5 Furthermore, in contrast to the doctrine of claim preclusion, the law of the case doctrine does not apply to issues or claims that were not actually decided; for this reason, failure to raise an issue on interlocutory appeal does not operate to preclude the issue on a later appeal from a final judgment, n6 even if other issues were raised by the party or an opponent in a permitted interlocutory appeal. n7

The doctrine of law of the case is similar to issue preclusion in that both promote the finality and efficiency of the judicial process by protecting against the disturbance of settled issues. n8 However, while the doctrine of issue preclusion forbids relitigation by the same parties in any future lawsuit of an issue determined by a valid and final judgment, n9 the law of the case doctrine provides that the law applied in decisions at one stage of litigation, must be

applied as the governing principle in later stages of the same litigation. Consequently, in contrast to issue preclusion, the law of the case doctrine operates only until a final judgment is obtained, after which it has no relevance, while issue preclusion requires a final judgment as a prerequisite to its application. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the CasePatent LawPreclusionLaw of the Case

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.20 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* .

(n3)Footnote 2. *Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996)* .

(n4)Footnote 3. *Lovett v. General Motors Corp., 975 F.2d 518, 522 (8th Cir. 1992)* (even when district court had made earlier interlocutory decision that plaintiff had standing, court did not violate law of case doctrine by granting motion in favor of defendant that same plaintiff lacked standing; when district court has determined that it incorrectly decided a legal question in interlocutory ruling, district court may correct decision and avoid later reversal).

(n5)Footnote 4. *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 231 (7th Cir. 1988)* .

(n6)Footnote 5. *Morris v. American Nat. Can Corp., 988 F.2d 50 (8th Cir. 1993)* (when issue became law of case as result of waiver, waiver did not act to contravene application of standard analysis applicable to law of case situations).

(n7)Footnote 1. *Conley v. United States, 323 F.3d 7, 12 (1st Cir. 2003)* (mandatory branch, referred to as mandate rule, strictly precludes lower court from contravening rulings or directives of higher court made at earlier stage of same controversy; discretionary brand provides that, with exceptions, court must respect and follow its own rulings made at prior stage in same case).

(n8)Footnote 2. *Rezzonico v. H & R Block, Inc., 182 F.3d 144, 148-149 (2d Cir. 1999)* , *cert. denied, 528 U.S. 1189 (2000)* ; *see* [b], *below*.

(n9)Footnote 3. *Perillo v. Johnson, 205 F.3d 775, 780-781 (5th Cir. 2000)* (when court is reviewing its own prior decision, law of case doctrine is matter of judicial discretion rather than judicial authority); *see* [c], *below*.

(n10)Footnote 3.1. *Conley v. United States, 323 F.3d 7, 12 (1st Cir. 2003)* .

(n11)Footnote 3.2. *Kerman v. New York, 374 F.3d 93, 109-110 (2d Cir. 2004)* (citing **Moore's Federal Practice**).

(n12)Footnote 4. *New York v. Microsoft Corp., 209 F. Supp. 2d 132, 141 (D.D.C. 2002)* ; *United States v. Insurance Co. of N. Am., 131 F.3d 1037, 1041 (D.C. Cir. 1997)* ("mandate rule" is application of law of case doctrine which provides that district court is bound by mandate of federal appellate court, and generally may not reconsider issues decided on previous appeal).

(n13)Footnote 5. *United States v. Wells, 519 U.S. 482, 117 S. Ct. 921, 926 n.4, 137 L. Ed. 2d 107 (1997)* (in this context, law of the case is something of a misnomer).

(n14)Footnote 6. *Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-428, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978)* ; *Donohoe v. Consolidated Operating and Prod. Corp., 30 F.3d 907, 910 (7th Cir. 1994)* (law of the case requires

district court to follow mandate).

(n15)Footnote 7. *In re Ivan F. Boesky Sec. Litig., 957 F.2d 65, 69 (2d Cir. 1992)* (appellate court retains right to control actions of district court).

(n16)Footnote 8. *Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-428, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978)* .

(n17)Footnote 9. *DeWeerth v. Baldinger, 38 F.3d 1266, 1271 (2d Cir. 1994)* .

(n18)Footnote 10. *In re Ivan F. Boesky Sec. Litig., 957 F.2d 65, 69 (2d Cir. 1992)* .

(n19)Footnote 11. *Fed. R. Civ. P. 60(b)*; *see DeWeerth v. Baldinger, 38 F.3d 1266, 1271 (2d Cir. 1994)* .

(n20)Footnote 12. *See* § 30.21.

(n21)Footnote 13. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* .

(n22)Footnote 14. *Prisco v. A & D Carting Corp., 168 F.3d 593, 607 (2d Cir. 1999)* ("second branch" of law of case doctrine, which holds that court should generally adhere to its own prior decisions in same case, is not absolute rule).

(n23)Footnote 15. *Conley v. United States, 323 F.3d 7, 13 (1st Cir. 2003)* .

(n24)Footnote 1. *Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996)* .

(n25)Footnote 2. *Davis v. United States, 417 U.S. 333, 342, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)* (court must apply latest law decided by superior court).

(n26)Footnote 3. *Gillig v. Advanced Cardiovascular Sys., Inc., 67 F.3d 586, 589 (6th Cir. 1995)* (citing **Moore's Federal Practice**).

(n27)Footnote 4. *See Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978)* .

(n28)Footnote 5. *State of Arizona v. State of California, 530 U.S. 392, 408-410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n29)Footnote 6. *Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994)* (interlocutory orders do not constitute law of the case).

(n30)Footnote 7. *Vintilla v. United States, 931 F.2d 1444, 1447 (11th Cir. 1991)* (law of the case at district court level becomes binding only when there has been final judgment).

(n31)Footnote 8. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (citing **Moore's Federal Practice**).

(n32)Footnote 9. *See Schiro v. Farley, 510 U.S. 222, 232, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)* .

(n33)Footnote 10. *Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 (5th Cir. 1995)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
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C. LAW OF THE CASE

3-30 Moore's Manual--Federal Practice and Procedure § 30.31

§ 30.31 Limitations On Doctrine of Law of Casen*

[1] Court Has Discretion to Reconsider Its Own Decisions

[a] Scope of Court's Discretion to Reconsider Its Own Decisions

When the law of the case doctrine is applied by a court to its own prior decisions, or to the decisions of a coordinate or equal court that has made a prior determination in the case, the doctrine is not absolute but discretionary. n1 Thus, even though the law of the case doctrine expresses the general rule that courts may not reconsider issues that have already been decided, the doctrine does not limit a court's power to reconsider an issue if the court determines that such review is necessary. n2 The Supreme Court has held that although a court has the power to reconsider its own decisions or those of a coordinate court, it should not do so absent extraordinary circumstances. n3 Therefore, when a court applies the law of the case doctrine to its own prior decisions or those of a coordinate court on the same level of the judiciary, the law of the case is deemed a guideline, rather than a rigid rule that would take away the informed discretion and sound practical judgment of the judge. n4 For example, a court may reconsider its own rulings when there has been a change in prevailing law or there is new evidence on the question at issue. n5

[b] Grounds Justifying Reconsideration of Decisions

One of the primary purposes of adjudication is a correct decision, and if a court is convinced that an earlier decision was clearly wrong, the law of the case doctrine does not preclude correction of the error. n6 The courts of appeals have identified three major grounds justifying reconsideration of issues which would otherwise be foreclosed as the law of the case: n7

1. An intervening change in controlling law. n8

2. The presentation of new evidence. n9

3. The prevention of manifest injustice through implementation of a clearly erroneous decision. n10

[2] Limitation of Doctrine to Issues Actually Decided

The law of the case doctrine applies only to issues that have actually been decided by the court and presumes a hearing and decision on the merits. n1 Thus, the doctrine applies to issues that the court has decided explicitly; and it also applies to everything decided by necessary implication, which means that based on the decision of the case, the particular issue must have also necessarily been decided by the court. n2 The doctrine does not apply to isolated statements by the court or to statements by the court which specify possible alternatives. n3 Furthermore, the law of the case doctrine does not apply to dicta, which is not binding as precedent. n4

[3] Inapplicability of Doctrine Because of Change in Law

[a] Decision of Higher Court

The law of the case doctrine generally binds a court to its own previous decisions on issues arising earlier in the litigation, and also binds a court to decisions entered by a higher court earlier in the litigation. n1 If any higher court to which the lower court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision in the period between the first and second decisions of the lower court, the court may disregard the law of the case effect of the first decision and apply the new precedent. n2 However, for an intervening authority to be controlling, it must both decide the issue under consideration and still remain in effect. n3

[b] Change in Statute

The law of the case doctrine does not limit a court's power to reconsider an issue if the court determines that circumstances makes such review necessary. Therefore, when the law changes in the period between the first and second decision under consideration, the court may not disregard the new law on the grounds of law of the case. n4 When the changed law is statutory and is determined to have retroactive application, the court must reexamine its earlier decision despite the doctrine of law of the case. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the Case

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 134.20, 134.21 (Matthew Bender 3d ed.).

(n2)Footnote 1. Allison v. Bank One-- *Denver, 289 F.3d 1223, 1247 (10th Cir. 2002)* (citing **Moore's Federal Practice** for proposition that lower court's ability to depart from its own prior decisions is discretionary).

(n3)Footnote 2. *Perillo v. Johnson, 205 F.3d 775, 780-781 (5th Cir. 2000)* (when court is reviewing its own prior decision, law of case doctrine is matter of judicial discretion rather than judicial power).

(n4)Footnote 3. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* ; *see* [b], *below*.

(n5)Footnote 4. *Prisco v. A & D Carting Corp., 168 F.3d 593, 607 (2d Cir. 1999)* ("second branch" of law of case doctrine, which holds that court should generally adhere to its own prior decisions in same case, is not absolute rule).

(n6)Footnote 5. *Conley v. United States, 323 F.3d 7, 13 (1st Cir. 2003)* .

(n7)Footnote 6. *In re Ford Motor Co., 591 F.3d 406, 411 (5th Cir. 2009)* (court has inherent authority to correct

its own errors and, in situations of transfer, also errors of transferor court).

(n8)Footnote 7. *In re Ford Motor Co., 591 F.3d 406, 411-412 (5th Cir. 2009)* .

(n9)Footnote 8. *CPC Int'l, Inc. v. Northbrook Excess and Surplus Ins. Co., 46 F.3d 1211, 1215 (1st Cir. 1995)* .

(n10)Footnote 9. *Virgin Atl. Airways v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)* .

(n11)Footnote 10. *FDIC v. McGlamery, 74 F.3d 218, 221 (10th Cir. 1996)* .

(n12)Footnote 1. *United States v. Hatter, 532 U.S. 557, 566, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001)* .

(n13)Footnote 2. *Office of Thrift Supervision v. Felt (In re Felt), 255 F.3d 220, 225 (5th Cir. 2001)* , *cert. denied, 151 L. Ed. 2d 693 (2002)* ; *United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186-1187 (9th Cir. 2001)* , *cert. denied, 543 U.S. 1040 (2000)* .

(n14)Footnote 3. *Taylor v. F.D.I.C., 132 F.3d 753, 761 (D.C. Cir. 1997)* ; *see Wyler Summit Partnership v. Turner Broad. Sys., 235 F.3d 1184, 1193 (9th Cir. 2000)* .

(n15)Footnote 4. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992)* , *cert. denied, 506 U.S. 981 (1992)* .

(n16)Footnote 1. *Perillo v. Johnson, 205 F.3d 775, 780-781 (5th Cir. 2000)* .

(n17)Footnote 2. *Pondexter v. Quarterman, 537 F.3d 511, 523 (5th Cir. 2008)* .

(n18)Footnote 3. *Athridge v. Aetna Cas. & Sur. Co., 604 F.3d 625, 632-633 (D.C. Cir. 2010)* .

(n19)Footnote 4. *Bradley v. School Bd. of Richmond, 416 U.S. 696, 715, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)* (court should apply law in effect at time of decision).

(n20)Footnote 5. *Kirkbride v. Continental Cas. Co., 933 F.2d 729, 732 (9th Cir. 1991)* (court of appeals reconsidered issue of removability because of enactment of new legislation).

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C. LAW OF THE CASE

3-30 Moore's Manual--Federal Practice and Procedure § 30.32

§ 30.32 Specific Applications of Law of the Case Doctrinesn*

[1] Interlocutory Appeals

Decisions of law that are subject to interlocutory appeals are given law of the case effect. n1 On the other hand, factual determinations made in interlocutory appeals do not generally establish the law of the case. n2 Furthermore, because the law of the case doctrine does not apply to issues or claims that were not actually decided, failure to raise an issue on interlocutory appeal does not operate to preclude the issue on a later appeal from a final judgment, even if other issues were raised in an interlocutory appeal. Interlocutory appeals are optional, not mandatory, and failure to take the appeal does not make the interlocutory order the law of the case for the appellate court on appeal from the final judgment. n3

[2] Doctrine Applicable to Transferred Cases

The doctrine of the law of the case is particularly suited in circumstances of lateral transfer of cases from one court to another in the federal system, because if a transferee court felt free to reconsider decisions of the coordinate transferor court, it would threaten to send litigants into a vicious circle of litigation that the doctrine is precisely designed to prevent. n1 Therefore, when a case has been transferred from one district court to another, any decisions rendered by the transferor court prior to the transfer are part of the record and become the law of the case, and are not subject to reconsideration except in the same manner as a court could reconsider its own decisions. n2 Similarly, when a case is transferred from one circuit court of appeals to another, all orders prior to transfer, including the transfer order itself, constitute the law of the case, and the transferee court has the power to reconsider decisions only when necessary due to extraordinary circumstances. n3 In the same manner that it is applicable to transfers, the doctrine of the law of the case is also applicable when the judge is replaced by a second judge, for example, by a reassignment. The doctrine requires the second judge in the case to conform to the decisions of the first judge, except in the same manner as the first judge could reconsider its own decisions; n4 for example, the second judge could reconsider the first judge's decision if a new development, such as a new appellate decision, convinces the second judge that the predecessor judge's ruling was incorrect. n5

Finally, the law of the case doctrine applies to decisions made by a state court prior to removal to federal court, and the court should apply that doctrine rather than claim preclusion. n6 Thus, the state court decision should be upset only

when justified by cogent reasons or exceptional circumstances. n7 Some courts have held that the application of the doctrine is only discretionary and need not be followed when the claim removed to federal court is based on a federal question. n8

[3] Applicability of Doctrine at Different Levels of Judiciary

[a] Application of Doctrine at Level of District Court

To organize their caseloads in an efficient manner, federal district courts have broad authority to dispose of cases in stages; n1 decisions made by a district court during any stage of litigation establish the law of the case. n2 However, the law of the case doctrine does not limit the court's power to reconsider or change its decision, it merely facilitates the ability of the court to build to its final judgment step by step by cumulative rulings. n3 A party that is dissatisfied may obtain review of a lower court decision, either by appeal, n4 by motion for judgment as a matter of law, n5 or by motion for a new trial. n6 Because these procedural devices for review are available, the law of the case doctrine does prevent relitigation of a substantive decision by other, inappropriate procedural attacks. For example, under the law of the case doctrine, a party may not challenge a earlier, substantive decision of the court through an attack on a jury instruction. n7

[b] Application of Doctrine at Level of Court of Appeals

The decision of a district court obviously does not control on appeal or it would defeat the purpose of appellate review. n8 However, the decision of an appellate court on an issue of law governs the issue during subsequent stages of litigation, and on any further appeal. n9 Furthermore, the decision of the appellate court establishes the law of the case that must be followed by the trial court on remand. n10 If there is an appeal from the judgment entered after remand, the decision of the first appeal establishes the law of the case to be followed on the second appeal. n11 However, the law of the case does not serve as an absolute bar to reconsideration of an issue by an appellate court in exceptional circumstances, such as when evidence on a subsequent trial was substantially different or when controlling authority has since made a contrary decision of law applicable to the issues. n12

[c] Doctrine Not Applicable to Supreme Court

The law of the case doctrine does not bind the Supreme Court in reviewing lower court decisions, and a petition for a writ of certiorari puts the entire case up for review by the Supreme Court. n13 However, in a recent case the Supreme Court has indicated that it may choose to apply the law of the case doctrine if it finds good reason to do so, as when the Supreme court has made a decision on the merits earlier in the same case. The Court has also stated that the Court's earlier denial of certiorari for lack of a quorum does not establish the law of the case when the case comes before the Supreme Court at a later stage of the proceedings, because that denial did not constitute a decision on the merits. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the CaseCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersPatent LawPreclusionLaw of the Case

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 134.20, 134.22 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Royal Ins. Co. v. Quinn-L Capital Corp., 3 F.3d 877, 881 (5th Cir. 1993) , cert. denied, 511 U.S. 1032 (1994)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Royal Ins. Co. v. Quinn-L Capital Corp., 3 F.3d 877, 881 (5th Cir. 1993)* , *cert. denied, 511 U.S. 1032 (1994)* .

(n4)Footnote 3. *United States v. United States Smelting, Ref. and Mining Co., 339 U.S. 186, 199, 70 S. Ct. 537, 94 L. Ed. 750 (1950)* .

(n5)Footnote 1. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (policies supporting doctrine of law of case apply with even greater force to decisions transferred from coordinate court than to decisions of substantive law).

(n6)Footnote 2. *In re Ford Motor Co., 591 F.3d 406, 411 (5th Cir. 2009)* (multidistrict litigation transfer).

(n7)Footnote 3. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (citing **Moore's Federal Practice**).

(n8)Footnote 4. *Minch v. City of Chicago, 486 F.3d 294, 301 (7th Cir. 2007)* .

(n9)Footnote 5. *Fujisawa Pharm. Co., Ltd. v. Kapoor, 115 F.3d 1332, 1339 (7th Cir. 1997)* .

(n10)Footnote 6. *Payne v. Churchich, 161 F.3d 1030, 1037-1038 (7th Cir. 1998)* , *cert. denied, 527 U.S. 1004 (1999)* .

(n11)Footnote 7. *Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 530-533 (9th Cir. 2000)* .

(n12)Footnote 8. *Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 (2d Cir. 1980)* .

(n13)Footnote 1. *See, e.g., Fed. R. Civ. P. 42(b)* (separate trials).

(n14)Footnote 2. *In re Resyn Corp., 945 F.2d 1279, 1281 (3d Cir. 1991)* .

(n15)Footnote 3. *Lovett v. General Motors Corp., 975 F.2d 518, 522 (8th Cir. 1992)* .

(n16)Footnote 4. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* .

(n17)Footnote 5. *Fed. R. Civ. P. 50(b).*

(n18)Footnote 6. *Fed. R. Civ. P. 59(b).*

(n19)Footnote 7. *Seahorse Marine Supplies, Inc. v. P.R. Sun Oil Co., 295 F.3d 68, 76-77 (1st Cir. 2002)* .

(n20)Footnote 8. *Williams v. Commissioner, 1 F.3d 502, 503 (7th Cir. 1993)* .

(n21)Footnote 9. *North River Ins. Co. v. Philadelphia Reinsurance Corp., 63 F.3d 160, 164 (2d Cir. 1995)* , *cert. denied, 516 U.S. 1184 (1996)* .

(n22)Footnote 10. *Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1279-1280 (10th Cir. 2010)* .

(n23)Footnote 11. *Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995)* , *cert. denied, 516 U.S. 1029 (1995)* .

(n24)Footnote 12. *See Carnival Leisure Indus. v. Aubin, 53 F.3d 716, 718 (5th Cir. 1995)* .

(n25)Footnote 13. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* .

(n26)Footnote 14. *United States v. Hatter, 532 U.S. 557, 566, 121 S. Ct. 1782, 1789-1790, 149 L. Ed. 2d 820 (2001)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
C. LAW OF THE CASE

3-30 Moore's Manual--Federal Practice and Procedure §§ 30.33through 30.49

[Reserved]

§§ 30.33[Reserved]

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
D. CLAIM PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.50

§ 30.50 Nature of Claim Preclusionn*

[1] Definition of Claim Preclusion

Claim preclusion in modern federal practice is synonymous with res judicata, n1 which means literally that a matter has been decided or adjudicated. n2 Claim preclusion specifically means the effect of a judgment to preclude the future initiation of a "claim for relief" between parties affected by that judgment because the claim should have been presented in the suit prior to entry of the judgment. n3 The crux of the claim preclusion doctrine is the concept of merger and bar. Merger provides that when a plaintiff succeeds in litigation and recovers a valid and final personal judgment, the plaintiff's judgment on the claim for relief is merged into the judgment, and the original claim for relief and all defenses to it, whether asserted or not, are eliminated. After the judgment becomes final, all of the plaintiff's rights and the defendant's liabilities with respect to each other are determined by the judgment. n4 If the plaintiff loses the litigation, the resultant judgment acts as a bar to any further actions by the plaintiff on the same claim. n5 The purpose of merger and bar is to prohibit claim splitting in a series of successive lawsuits. n6 The theory is that all facts, allegations, and legal theories that support a particular claim, in addition to all possible remedies and defenses, must be presented in one suit or are lost. n7

The doctrine of claim preclusion incorporates the Federal Rules of Civil Procedure expressions of "claim for relief" and "defenses" to describe that which is controlled by the doctrine. n8 Modern cases generally substitute "claim for relief" for the traditional phrase "cause of action" that was previously used to describe the factual connection between a pending case and a prior adjudication to justify application of the claim preclusion doctrine. The doctrine now is described as providing that a valid judgment bars a second suit on the same "claim for relief." n9

[2] Doctrine Does Not Prohibit Direct Attack

The doctrine of claim preclusion does not prevent a direct attack on a judgment, such as a direct appeal or one of the statutory procedures for directly attacking errors or deficiencies in a judgment. n1 However, a party who attempts to assert a new claim in a different proceeding regarding a matter contained in a previous judgment, rather than utilizing the appropriate statutory procedure for direct attack on the judgment, will be barred by the claim preclusion doctrine. n2 Methods of direct attack on a judgment include motions for judgment as a matter of law, n3 for amendment of the

judgment, n4 or for a new trial. n5 A party may also move to have the judgment vacated under Rule 60 on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, or satisfaction, release, or discharge. n6

[3] Purposes of Claim Preclusion

More than merely a matter of practice or procedure, claim preclusion is a doctrine required to further the public policy that rights once established by the final judgment of a court of competent jurisdiction must be recognized by those who are bound by the judgment in every way, and that a claim for relief that the parties had a full and fair opportunity to litigate should forever be established as between those parties after the judgment is rendered. The doctrine thus promotes conclusive resolution of disputes, which is the primary reason civil courts exist. n1 This need for final resolution of litigated claims often takes precedence over concerns of fairness or justice in individual cases. n2 Claim preclusion also relieves parties of the expense of multiple lawsuits, conserves judicial resources, and encourages public reliance on the adjudication process by minimizing inconsistent decisions. n3

The Supreme Court has cautioned against the mechanical application of claim preclusion, because it may govern grounds and defenses not previously litigated and on occasion it may block uninvestigated paths that may lead to truth. The Court noted that for the sake of finality and repose claim preclusion may shield the fraud and the cheat as well as the honest person; therefore, the doctrine must be invoked only after careful inquiry. n4

[4] Claim Preclusion Compared With Other Preclusive Doctrines

[a] Relation to Other Preclusive Doctrines

This subsection describes the most important similarities and differences between claim preclusion and other related preclusion doctrines, including stare decisis, law of the case, issue preclusion, and judicial estoppel. These preclusion doctrines have different effects depending on the type or stage of litigation under consideration, the matters that are precluded from reconsideration, and the parties that are affected. n1

[b] Stare Decisis

The doctrine of stare decisis is a general rule that requires courts to follow case precedent in their subsequent decisions. It means that a rule of law decided in a prior case should be followed without reconsideration in all subsequent cases within the same jurisdiction, provided the legal issue was actually argued and decided by the court in the prior case. n2 The purpose of stare decisis is to ensure that the law will not change erratically and that fundamental legal principles remain consistent. n3 The doctrine of stare decisis is similar to the doctrine of claim preclusion in that both rely on a similarity of parties, facts, and circumstances in earlier cases with the current case, and both doctrines are not applicable if parties, facts, and circumstances significantly differ. n4 Thus, stare decisis shares with claim preclusion a concern for stability and finality in the judicial system. However, claim preclusion bars relitigation of claims as to either issues of law or fact if such issues could have been raised and determined and is limited to parties or their privies, while stare decisis is not so limited. n5 On the other hand, claim preclusion is broader in its effect because it precludes relitigation of claims as to either issues of law or fact, while stare decisis applies only to questions of law. n6 Additionally, unlike claim preclusion, a court may decline to follow the doctrine of stare decisis in appropriate circumstances when it considers prior decisions to be erroneous or when there are changed circumstances that require reconsideration of the issues decided by the prior case. n7

[c] Law of the Case

The law of the case doctrine requires that when a court decides an issue, that court and any lower courts should continue to follow that determination during the pendency of that particular case. The law of the case doctrine states that a court should not revisit its prior rulings in subsequent stages of the same case absent compelling reasons. n8 However, unlike

claim preclusion, the law of the case is a discretionary doctrine and need not be applied if there has been an intervening change in the law, new evidence has been discovered, there has been clear error, or if injustice will result. n9 Thus, in contrast to claim and issue preclusion, the law of the case doctrine operates only until a final judgment is obtained, after which it has no relevance, while claim preclusion requires a final judgment as a prerequisite to its application. n10 Furthermore, in contrast to the doctrine of claim preclusion, the law of the case doctrine does not apply to issues or claims that were not actually decided. n11

[d] Issue Preclusion

The primary difference between claim preclusion and issue preclusion is that claim preclusion applies to entire claims for relief, whether litigated or not, while issue preclusion applies to particular issues that have actually been contested and resolved. Thus, claim preclusion is broader in scope than issue preclusion regarding the claims that are governed, but narrower in scope as to the parties to whom the doctrine may be applied. n12

While claim preclusion and issue preclusion advance the same purpose of finality in judicial proceedings, they do so in substantially different ways. Claim preclusion prevents parties and those in privity with them from raising claims for relief, or defenses that could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case. n13 Issue preclusion, on the other hand, precludes litigation of issues actually litigated and necessary to the outcome of the prior case, even if such issues are subsequently presented as part of a different claim for relief. Claim preclusion operates only between the parties to the prior litigation, while a stranger to the first action may invoke issue preclusion against a party to that action. n14

[e] Judicial Estoppel

The doctrine of judicial estoppel provides that when a party asserts a certain position in a legal proceeding, and succeeds in maintaining that position, that party may not thereafter assert a contrary position simply because his interests have changed, especially if it results in prejudice to another party that has acquiesced in the previously asserted position. n15 Unlike the doctrine of claim preclusion, judicial estoppel is not necessarily concerned with preserving the finality of judgments. Rather, the doctrine is based on considerations of the orderly administration of justice and regard for the propriety of court proceedings. n16 The doctrine of judicial estoppel also bars a party from taking inconsistent positions in the same litigation. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 131.01 et seq., 131.10 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n3)Footnote 2. *Taber Partners I v. Insurance Co. of N. Am., 875 F. Supp. 88, 92 (D.P.R. 1996)* .

(n4)Footnote 3. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* ; *Ohio Valley Envtl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 210 (4th Cir. 2009)* (citing **Moore's Federal Practice**).

(n5)Footnote 4. *Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 272 (1st Cir. 1996)* .

(n6)Footnote 5. *Kaspar Wire Works, Inc. v. Leco Eng. & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978)* .

(n7)Footnote 6. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 814 F.2d 844, 846 (1st Cir. 1987)* (res judicata generally binds parties from litigating or relitigating any issue that was or could have been litigated in prior adjudication and prevents claim splitting).

(n8)Footnote 7. *Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979)* .

(n9)Footnote 8. *Fed. R. Civ. P. 8*; *see Neoplan USA Corp. v. Taylor, 604 F. Supp. 1540, 1545-1546 (D. Del. 1985)* .

(n10)Footnote 9. *See Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1362-1363 (Fed. Cir. 2000)* (requirements of claim preclusion described in terms of "claim for relief").

(n11)Footnote 1. *Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir. 1985)* (citing **Moore's Federal Practice**).

(n12)Footnote 2. *Nasalok Coating Corp. v. Nylok Corp., 522 F.3d 1320, 1328-1329 (Fed. Cir. 2008)* (citing **Moore's Federal Practice**).

(n13)Footnote 3. *See Fed. R. Civ. P. 50(b).*

(n14)Footnote 4. *See Fed. R. Civ. P. 52(b)*; *Fed. R. Civ. P. 59(e).*

(n15)Footnote 5. *See Fed. R. Civ. P. 59.*

(n16)Footnote 6. *See Fed. R. Civ. P. 60.*

(n17)Footnote 1. *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* (citing **Moore's Federal Practice**).

(n18)Footnote 2. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* .

(n19)Footnote 3. *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)* .

(n20)Footnote 4. *Brown v. Felsen, 442 U.S. 127, 132, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979)* .

(n21)Footnote 1. *Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* ; *see § 30.01.*

(n22)Footnote 2. *Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993)* .

(n23)Footnote 3. *Randall v. Sorrell,, 243, 126 S. Ct. 2479; 165 L. Ed. 2d 482 (2006)* .

(n24)Footnote 4. *Anthony v. Small Tube Mfg. Corp., 580 F. Supp. 2d 409, 415 (E.D. Pa. 2008)* .

(n25)Footnote 5. *See AASI Creditor Liquidating Trust v. Raymond James & Assocs. (In re All Am. Semiconductor, Inc.), 427 B.R. 559, 565-566 (Bankr. S.D. Fla. 2010)* .

(n26)Footnote 6. *EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986)* .

(n27)Footnote 7. *Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.*

Ed. 2d 526 (1989) .

(n28)Footnote 8. *ATSI Communs., Inc. v. Shaar Fund, Ltd., 547 F.3d 109, 112 (2d Cir. 2008)* .

(n29)Footnote 9. *See Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)* .

(n30)Footnote 10. *State of Arizona v. State of California, 530 U.S. 392, 408-410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n31)Footnote 11. *See AASI Creditor Liquidating Trust v. Raymond James & Assocs. (In re All Am. Semiconductor, Inc.), 427 B.R. 559, 565-566 (Bankr. S.D. Fla. 2010)* .

(n32)Footnote 12. *Orca Yachts L.L.C. v. Mollicam, Inc., 287 F.3d 316, 318 (4th Cir. 2002)* .

(n33)Footnote 13. *Comm'r v. Sunnen, 333 U.S. 591, 597-598, 68 S. Ct. 715, 92 L. Ed. 898 (1948)* .

(n34)Footnote 14. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n35)Footnote 15. *New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* ; *see § 30.90 et seq.*

(n36)Footnote 16. *Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984)* .

(n37)Footnote 17. *Morris v. California, 966 F.2d 448, 452 (9th Cir. 1992)* .

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PART VIII Limits of Judicial Reconsideration
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D. CLAIM PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.51

§ 30.51 Summary of Requirements for Claim Preclusionn*

Claim preclusion bars a second suit on a claim for relief if all of the following three conditions exist: n1 (1) there is identity of parties or their privies; n2 (2) there has been an earlier valid, final judgment on the merits of a claim; n3 and (3) the second claim for relief is based on the same set of transactional facts as the first claim for relief. n4 Claim preclusion is an affirmative defense. n5 Consequently, the burden is on the party asserting claim preclusion to establish all three elements necessary for its application. n6 The party opposing claim preclusion may do so by showing prejudice based on the length of the delay in the opposition asserting the defense. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice*, § 131.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 210 (4th Cir. 2009)* ; *Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1362 (Fed. Cir. 2000)* .

(n3)Footnote 2. *See § 30.52*.

(n4)Footnote 3. *See § 30.53*.

(n5)Footnote 4. *See § 30.54*.

(n6)Footnote 5. *State of Arizona v. State of California, 530 U.S. 392, 408, 409, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* .

(n7)Footnote 6. *Allahar v. Zahora, 59 F.3d 693, 696 (7th Cir. 1995)* .

(n8)Footnote 7. *Hartman v. Wick, 678 F. Supp. 312, 322 (D.D.C. 1988)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.52

§ 30.52 Requirement of Identity of Partiesn*

[1] Statement of Requirement

The doctrine of claim preclusion will not bar a second action requesting the same claim for relief unless the parties to the second action are the same parties, or are in privity with the same parties. n1 The identity of party requirement is one factor that differs between claim preclusion and issue preclusion, in that the identity factor is more strictly applied in the doctrine of claim preclusion. n2

The requirement of identity of parties is based on the rule in American courts that a person may not be bound by a judgment in personam in litigation in which the person is not designated as a party, or to which the person has not been made a party by service of process. n3 Thus, the basis for limiting the operation of the claim preclusion doctrine to the parties involved in the previous litigation is the concept that everyone is entitled to his or her "day in court" before they are bound by an in personam judgment, as protected by the Due Process Clause. n4

[2] Opportunity of Party to Litigate

A party is not considered a "party or privy" for claim preclusion principles if the party or privy against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the prior proceeding. n1 Under this rule, the prior proceeding need only have provided a full and fair opportunity to litigate; therefore, claim preclusion may be applied if a party has notice of the opportunity but fails to take the opportunity. n2

In addition to the opportunity to litigate, the doctrine of claim preclusion is applicable only if the parties were in an adversarial position, including third parties. n3 The Federal Rules of Civil Procedure make liberal provision for joining parties as plaintiffs. If parties such as a plaintiff and a third-party defendant are not in an adversarial position, a judgment in one action on a claim will not bar a subsequent action on a claim between those parties. n4 This rule also applies when the parties were co-parties. n5

[3] Application of Claim Preclusion to Persons in Privity With Parties

Under the doctrine of claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. n1 Privity for claim preclusion purposes is a relationship between a party to the initial proceeding and a nonparty to that proceeding which establishes a judgment preclusive effect with respect to the nonparty. n2 The Supreme Court has held that there is a general rule against nonparty preclusion. n3 However, the Supreme Court has also held that there are six established exceptions to the general rule against nonparty preclusion. Thus, a nonparty is bound by the preclusive effect of a prior judgment in the following circumstances: n4

1. A nonparty that has agreed to be bound by the judgment on a claim in an action between others is bound by the terms of that agreement.

2. There is a pre existing substantive legal relationship between the nonparty and a party to the prior proceeding judgment. Thus, nonparty preclusion may be established legal relationships such as preceding and succeeding owners of property, bailee and bailor, and assignee and assignor.

3. In certain circumstances, a nonparty may be bound by a judgment because the nonparty was adequately represented by someone with the identical interests who was a party to the prior proceedings. n5 These could include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries. One party's representation of a nonparty is "adequate" to impose nonparty preclusion if, at a minimum: the interests of the nonparty and his or her representative are aligned, and either the party understood herself or himself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty; additionally, adequate representation sometimes requires notice of the original suit to the persons alleged to have been represented.

4. A nonparty is bound by a judgment if the nonparty assumed control over the litigation in the prior proceeding in which that judgment was rendered. Such a party has had his or her day in court even though the party was not a formal party to the litigation.

5. Preclusion applies when a nonparty who did not participate in the first proceeding later brings suit as the designated representative of a person who was a party to the first proceeding. Preclusion is also appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment.

6. Nonparty preclusion may apply under a special statutory scheme if the scheme is otherwise consistent with due process, such as in bankruptcy and probate proceedings.

[4] Exception to Application of Doctrine for Certain Parties

The doctrine of claim preclusion does not apply to certain persons even if they were parties in the previous action. Thus, the following are not subject to claim preclusion:

1. Party appearing in different legal capacity. Such a person may bring or defend multiple actions involving the same transaction or occurrence without being bound by or entitled to the benefits of the claim preclusion doctrine. For example, if a nonparty to a prior proceeding initiates a subsequent proceeding as an agent for a party who is bound by that prior judgment, the agent is also bound by the judgment. n1 But if the nonparty agent initiates the subsequent proceeding on his or her own behalf, claim preclusion is not necessarily applicable. In determining the persons who may benefit from or be subject to the preclusive effect of a judgment, the substance of the claim controls; it is the interests represented rather than the names appearing in the pleadings or on the judgment that control. n2 A government official who sues or is sued in an official capacity is not in privity with himself or herself in an individual capacity for purposes of claim preclusion. n3

2. Nominal party. Another type of party not subject to claim preclusion is a nominal party, who is a person identified as

a plaintiff or defendant, but who has no interest in the litigation, and has been included to meet some technical pleading requirement or for other procedural reason. n3.1 One typical example is when an assignee of a claim sues in the name of the assignor in whose favor the claim originally arose. The assignor has no interest in the outcome of the litigation, having assigned his claim to the assignee, and is considered a nominal party. Other nominal parties include next friends, guardians ad litem, the state in a suit on the bond of a public officer, and a husband who is a nominal party to a suit by or against his wife. n4 A judgment is usually not preclusive against a nominal party. n5

3. Party dismissed or severed before judgment. Parties who withdraw or are dismissed from the action, are severed, or settle before judgment, are not bound by the preclusive effects of the final judgment in the action. n6 It is not enough that a party stopped participating in the litigation. The party must formally withdraw from the action. n7 Similarly, a party actually included in a prior judgment may assert the effects of claim preclusion, even if that party initially resisted inclusion in the prior action. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 131.40 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Mullarkey v. Tamboer, 536 F.3d 215, 225 (3d Cir. 2008)* ; *see* [3], *below* (persons considered to be in privity with party for purposes of claim preclusion).

(n3)Footnote 2. *See Phillips/May Corp. v. United States, 524 F.3d 1264, 1268 (Fed. Cir. 2008)* (while claim preclusion only applies when parties are identical or in privity, issue preclusion applies when parties of privies have had adequate opportunity to litigate currently disputed issues in prior proceeding).

(n4)Footnote 3. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168 (2008)* .

(n5)Footnote 4. *Richards v. Jefferson County, 517 U.S. 793, 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)* .

(n6)Footnote 1. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168 (2008)* .

(n7)Footnote 2. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* .

(n8)Footnote 3. *See Fed. R. Civ. P. 14.*

(n9)Footnote 4. *Staffer v. Bouchard Transp. Co., 878 F.2d 638, 642-643 (2d Cir. 1989)* .

(n10)Footnote 5. *American Triticale, Inc. v. Nytco Servs., Inc., 664 F.2d 1136, 1147 & n.21 (9th Cir. 1981)* (claim preclusion would not apply in action between parties who were co-defendants in prior action because of plaintiff's failure to assert permissive cross-claim in prior action).

(n11)Footnote 1. *San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 336 n. 16, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005)* .

(n12)Footnote 2. *See Transclean Corp. v. Jiffy Lube Int'l, Inc., 474 F.3d 1298, 1305 (Fed. Cir. 2007)* .

(n13)Footnote 3. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168 (2008)* .

(n14)Footnote 4. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168-170 (2008)* .

(n15)Footnote 5. *See Muhammad v. Oliver, 547 F.3d 874, 880 (7th Cir. 2008)* .

(n16)Footnote 1. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168-170 (2008)* .

(n17)Footnote 2. *Chicago, Rock Island & Pac. Ry. Co. v. Schendel, 270 U.S. 611, 618, 46 S. Ct. 420, 70 L. Ed. 757 (1926)* .

(n18)Footnote 3. *Andrews v. Daw, 201 F.3d 521, 525-526 (4th Cir. 2000)* .

(n19)Footnote 3.1. *See Martin v. JBS Techs., LLC, 443 F. Supp. 2d 962, 966 (S.D. Ohio 2006)* (in determination whether privity between parties exists for claim preclusion purposes, nominal parties are not controlling; rather court examines substance of claim for relief to determine real parties in interest.).

(n20)Footnote 4. *Blanchard v. Terry & Wright, Inc., 331 F.2d 467 (6th Cir. 1964)* .

(n21)Footnote 5. *Penda Corp. v. United States, 44 F.3d 967, 972 (Fed. Cir. 1994)* .

(n22)Footnote 6. *Lynch v. Merrell-National Laboratories, Div. of Richardson-Merrell, Inc., 830 F.2d 1190, 1192-1193 (1st Cir. 1987)* .

(n23)Footnote 7. *Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1413-1414 & n.6 (8th Cir. 1983)* .

(n24)Footnote 8. *U.S. West Fin. Servs., Inc. v. Buhler, Inc., 150 F.3d 929, 932-934 (8th Cir. 1998)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
D. CLAIM PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.53

§ 30.53 Judgment Required for Claim Preclusionn*

[1] Valid Judgment

A judgment will have claim preclusive effect only if valid. n1 A judgment by a court of competent jurisdiction is generally presumed valid and not subject to collateral attack. However, a judgment that is void is a judicial nullity and subject to collateral attack at any time and in any proceeding. n2 Consequently, if a judgment is void, it will not support claim preclusion. Under the Federal Rules of Civil Procedure, a party may make a motion to the rendering court for an order vacating a judgment as void. n3 A typical void judgment is a judgment that has been rendered without personal jurisdiction. An in personam judgment entered by a court without personal jurisdiction over a party is void as to that party. n4 Even a defendant who defaults for failure to appear may subsequently attack a judgment in a collateral proceeding based on the lack of personal jurisdiction. n5

On the other hand, the following circumstances do not necessarily strip a valid judgment of its preclusive effect:

1. Lack of subject matter jurisdiction. Provided that it has been properly entered, n6 a judgment does not lose its claim preclusive effect because the court that entered the judgment lacked subject matter jurisdiction. Thus, once a party has been given a fair chance to contest a court's subject matter jurisdiction, the party generally cannot later challenge the judgment by resisting enforcement of the judgment; it should have been attacked by direct appeal. n7 In other words, because the issue of subject matter jurisdiction could have been raised in the prior proceeding, or if it was actually litigated, it may not be the basis of a subsequent action. n8

2. Erroneous judgment. A final, valid judgment is not subject to collateral attack even though it may be erroneous, and the judgment has a binding effect on the parties and their privies under the doctrine of claim preclusion no matter how erroneous it may be on either the facts or the law, until it is properly set aside. n9 A party may correct error in a judgment only by direct review by appeal and not by the filing of a new complaint concerning the same issues. n10

3. Judgment obtained by fraud. A judgment procured by fraud is generally not considered void and may still be the basis for claim preclusion. n11 However, there is authority that if the fraud is extrinsic, it may form the basis for an

independent suit for relief from the judgment, and therefore such a judgment would not have a claim preclusive effect. Extrinsic fraud is fraud used in procuring the judgment, n12 as opposed to intrinsic fraud, which is fraud in the transaction or series of transactions that were the basis of the claim resulting in the judgment. n13

[2] Final Judgment

[a] Finality Required

A judgment will have a claim preclusive effect only if the judgment is final. n1 In the federal district courts, a judgment is final and effective on entry in compliance with Rules 54, 58, and 79. n2 In a case involving multiple claims or multiple parties, one or more but fewer than all the claims or the claims by or against fewer than all the parties may be disposed of by final judgment under Rule 54(b), provided that the court determines expressly that there is no just reason for delay, and makes express direction for entry of judgment. n3 Therefore, in a case involving multiple claims or multiple parties, if the court makes the necessary determinations and certification under Rule 54(b), the judgment entered is final, and is entitled to res judicata effect with respect to the claims and parties specified. However, if the court refuses to make a Rule 54(b) certification, its ruling does not have preclusive effect as to any claims or parties until a final judgment disposing of all claims and all parties is entered. n4

[b] Effect of Appeal

Generally, a ruling that is not appealable may not be the basis for claim preclusion; thus, interim rulings, such as the denial of a summary judgment motion may not have claim preclusive effect. n5 Therefore, the concept of a final judgment for purposes of claim preclusion parallels in many respects the statutory requirement that appeals may be taken only from "final decisions" of district courts. n6 However, it is not a rigid rule, and the Supreme Court has construed the term "final decision" to include some collateral orders that are not appealable as final judgments. n7

A final judgment in federal court may be the basis for claim preclusion despite the fact that an appeal is pending, or could be taken in the future. n8 Furthermore, the fact that no appeal of the judgment was authorized by the controlling law does not change its preclusive effect, n9 nor does failure of a party to take an appeal within the time permitted in cases in which the right to appeal or to seek review is in the discretion of the appellate court. n10

When a judgment has been appealed, its preclusive effect remains unchanged during the pendency of the appeal, but may be affected by the appellate court's disposition of the case. n11 Thus, a judgment that has been vacated, reversed, or set aside on an appeal is stripped of claim preclusive effect. n12 However, if an appellate court reverses and remands with instructions to enter judgment for the appellant, the newly entered judgment is given claim preclusive effect. n13

[3] Judgment on Merits

[a] Nature of Judgment on Merits for Claim Preclusion Purposes

A judgment will have a claim preclusive effect only if the judgment is on the merits of a claim for relief. For the purposes of claim preclusion, a judgment is on the merits of a claim for relief when it is one that is based on the legal rights claimed, in contrast to mere matters of practice, procedure, jurisdiction, or form that do not go to the legal or factual sufficiency of the claim to relief. n1 Traditionally, a judgment is on the merits if it completely disposes of the underlying cause of action or determines that the plaintiff has no cause of action. n2

The Supreme Court has discussed the effect of the definition of the expression "operates as an adjudication upon the merits" in Rule 41 as it is applied to claim preclusion. n3 The Court stated that a dismissal that would not be characterized as being "upon the merits" under Rule 41(b) generally does not have claim preclusive effect. Thus, a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, or any other dismissal that is expressly "without prejudice," ordinarily does not preclude a subsequent action on the same claim. n4 However, a court

in which a subsequent action has been filed need not always accept the phrasing of a prior judgment of dismissal at face value, and may make an independent determination of its preclusive effects. The Supreme Court has noted that the primary meaning of "dismissal without prejudice" is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim. Such a dismissal will also ordinarily (though not always) have the consequence of not barring the claim from other courts, but its primary meaning relates to the dismissing court itself. Therefore, the effect of the "adjudication upon the merits" default provision of Rule 41(b) is simply that, unlike a dismissal "without prejudice," the dismissal in the present case bars refiling of the same claim in the dismissing district court. Such an adjudication is a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts. n5

[b] Default Judgment

A judgment by default may be the basis for claim preclusion to the same extent as any other valid, final judgment. n6 There are two types of default judgments: default for lack of appearance; and default when the party makes an appearance but defaults in pleading or otherwise fails to comply with the procedural rules of the court. If default was entered for lack of appearance, a party in a subsequent action may assert lack of personal jurisdiction to avoid the preclusive effect of the judgment. n7

[c] Dismissals

There are several types of dismissal of claims in federal court, and depending on the type, a dismissal may be considered on the merits, and claim preclusive, or not on the merits, and not claim preclusive. n8 The following are the rules for claim preclusion for the various types of dismissals:

1. Dismissal with prejudice. A dismissal with prejudice under Rule 12(b)(6) for failure to state a claim for relief constitutes a judgment on the merits, with the same preclusive effects as any valid final judgment. n9 When the court makes the same type of dismissal without prejudice, the judgment is not on the merits and does not have claim preclusive effect. If an action is dismissed for failure to state a claim, but the court does not specify whether or not the dismissal was with prejudice, it is presumed with prejudice, and the judgment has claim preclusive effect. n10

2. Voluntary dismissal. A plaintiff may voluntarily dismiss an action under the federal rules by giving notice prior to service of an answer or motion for summary judgment by the adverse party, n11 and after that time by stipulation signed by all of the parties who have appeared in the action. n12 Unless otherwise stated in the notice or stipulation, the dismissal is considered to be without prejudice and does not have claim preclusive effect. However, a notice of dismissal is deemed to be a judgment on the merits if the plaintiff has previously dismissed any action based on or including the same claim. n13 A dismissal on motion of a party is also considered without prejudice, unless the dismissal specifies otherwise. If the parties intend their resolution to permanently resolve their claims, they may stipulate to a dismissal with prejudice. Such an agreed judgment is considered to be on the merits for purposes of claim preclusion. n14

3. Dismissal for lack of subject matter jurisdiction or improper venue. This type of dismissal is not a determination of the value or efficacy of a claim, but rather a refusal to hear it, and the plaintiff, after such a dismissal, may pursue the claim in a proper forum. n15 Other dismissals in this category include those for failure of the plaintiff to comply with prerequisite to filing suit, such as exhaustion of administrative remedies. n16

4. Dismissal based on statute of limitations. If a district court enters a judgment that dismisses an action based on a federal statute of limitations, the dismissal is a judgment on the merits that has claim preclusive effect, unless it is expressly designated as being without prejudice. n17 However, the claim-preclusive effect of a statute of limitations dismissal in a diversity case is governed by the claim preclusion law of the state in which the federal court is located. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 131.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *King v. Union Oil Co., 117 F.3d 443, 445 (10th Cir. 1997)* ; *see New York v. New York, N. H. & H. R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L. Ed. 33 (1953)* (valid final judgment on merits acts as bar to any future relitigation of claim or cause of action asserted in prior case).

(n3)Footnote 2. *Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S. Ct. 343, 84 L. Ed. 370 (1940)* .

(n4)Footnote 3. *Fed. R. Civ. P. 60(b)(4)*.

(n5)Footnote 4. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482-483, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* .

(n6)Footnote 5. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n7)Footnote 6. *See* [2], *below*.

(n8)Footnote 7. *Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009)* (noting there are exceptions to prohibition against collateral attack only in exceptional circumstances).

(n9)Footnote 8. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, n. 9, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n10)Footnote 9. *Hallal v. Hopkins, 947 F. Supp. 978, 987 (S.D. Miss 1995)* .

(n11)Footnote 10. *Equitable Trust Co. v. Commodity Futures Trading Comm'n, 669 F.2d 269 (5th Cir. 1982)* .

(n12)Footnote 11. *Harris Trust & Sav. Bank v. Ellis, 810 F.2d 700, 706 (7th Cir. 1987)* ; *Browning v. Navarro, 887 F.2d 553, 563 n.17 (5th Cir. 1989)* .

(n13)Footnote 12. *Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106, 1109 (9th Cir. 2009)* (extrinsic fraud consists of acts which involve influence on litigation proceedings, and not acts which involve fact finder's consideration of merits of case).

(n14)Footnote 13. *See Browning v. Navarro, 826 F.2d 335, 344 n.11 (5th Cir. 1987)* .

(n15)Footnote 1. *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987)* .

(n16)Footnote 2. *See Fed. R. Civ. P. 54*; *Fed. R. Civ. P. 58*; *Fed. R. Civ. P. 79*; *see* Ch. 25, *Judgment*.

(n17)Footnote 3. *Fed. R. Civ. P. 54(b)*.

(n18)Footnote 4. *United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986)* .

(n19)Footnote 5. *Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994)* .

(n20)Footnote 6. *See 28 U.S.C. § 1291.*

(n21)Footnote 7. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-547, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n22)Footnote 8. *Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155, 158-160 (7th Cir. 1995)* , *cert. denied, 515 U.S. 1103 (1995)* .

(n23)Footnote 9. *United States v. Munsingwear, Inc., 340 U.S. 36, 38-39, 71 S. Ct. 104, 95 L. Ed. 36 (1950)* .

(n24)Footnote 10. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 400, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* .

(n25)Footnote 11. *United States v. 5 Unlabeled Boxes, 572 F.3d 169, 175 (3d Cir. 2009)* (if possible, decision on question of preclusion in second action should be postponed until appeal of first judgment has been concluded).

(n26)Footnote 12. *P&G v. Amway Corp., 242 F.3d 539, 546 (5th Cir. 2001)* , *cert. denied, 534 U.S. 945 (2001)* (judgment loses its claim preclusive effect when it is reversed and remanded on appeal).

(n27)Footnote 13. *Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1316 (5th Cir. 1971)* .

(n28)Footnote 1. *Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 943 (7th Cir. 1981)* .

(n29)Footnote 2. *See Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 570 (5th Cir. 1996)* .

(n30)Footnote 3. *See Fed. R. Civ. P. 41(b)*; *see Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505-506, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

(n31)Footnote 4. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n32)Footnote 5. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505-506, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* (adjudication "upon merits" under Rule 41(b) is not necessarily claim-preclusive; claim preclusive effect of federal court's dismissal of diversity case on state statute of limitations grounds is determined by federal claim preclusion law, which in turn incorporates claim preclusion law of state in which federal court sits).

(n33)Footnote 6. *Dillard v. Security Pac. Brokers, Inc., 835 F.2d 607, 608 (5th Cir. 1988)* , *cert. denied, 506 U.S. 1079 (1993)* (default judgment entered for failure of defendant to respond to discovery constituted judgment on merits for preclusion purposes).

(n34)Footnote 7. *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (defendant may take default and then challenge judgment on jurisdictional grounds).

(n35)Footnote 8. *Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2004)* .

(n36)Footnote 9. *NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990)* .

(n37)Footnote 10. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 241 (1st Cir. 2004)* .

(n38)Footnote 11. *See Fed. R. Civ. P. 41(a)(1)(A)(i).*

(n39)Footnote 12. *See Fed. R. Civ. P. 41(a)(1)(A)(ii).*

(n40)Footnote 13. *See Fed. R. Civ. P. 41(a)(1)(B)*; *see Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

(n41)Footnote 14. *See Fed. R. Civ. P. 41(a)(2)*; *see Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)* .

(n42)Footnote 15. *St. Pierre v. Dyer, 208 F.3d 394, 399-401 (2d Cir. 2000)* (dismissal for lack of subject-matter jurisdiction is not adjudication of merits and has no claim-preclusive effect).

(n43)Footnote 16. *Costello v. United States, 365 U.S. 265, 285, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)* (dismissal for failure to satisfy prerequisite to determination of matter on merits is to be considered as dismissal for lack of subject matter jurisdiction).

(n44)Footnote 17. *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)* .

(n45)Footnote 18. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

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PART VIII Limits of Judicial Reconsideration
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3-30 Moore's Manual--Federal Practice and Procedure § 30.54

§ 30.54 Requirement That Claims Be Based on Same Transactional Factsn*

[1] Statement of Requirement

If a person files a second civil action on a claim for relief, the claim is barred by the claim preclusion doctrine if the second claim is identical to the claim in the first action, n1 and was decided by a valid judgment on the merits. n2 There is no universal test to determine whether claims are identical for claim preclusion purposes. The "transactional test," used by most courts, requires the court to determine in a practical manner whether the claims share the same nucleus of facts. n3 This inquiry requires the court to consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or business usage. n4

The transactional test is not the only test employed by the courts to determine whether there is an identity of claims. Other tests include the "same factual allegations" test, in which the court analyzes the similarity of the allegations set forth in the pleadings, n5 and a hybrid test, which requires the court to consider the similarity of the acts complained of, the material facts alleged as the basis for the suit, and whether the witnesses and documentation necessary to prove the allegations in the actions would be the same. n6

[2] New Facts or Law Alone Not Sufficient to Establish Different Claim

The doctrine of claim preclusion is based on identity of claims, not identity of facts. n1 Consequently, if a claim merely alleges new facts that are part of the same transaction in support of the claim that has gone to judgment in previous litigation, the new claim is still barred under the doctrine of claim preclusion. However, if the new facts in themselves establish a new claim and independent grounds separate and distinct from the previous claim, then claim preclusion is not applicable. n2

A similar analysis applies to changes in the law. Thus, a change in statutory or case law does not extinguish the claim preclusion effect of a prior judgment, n3 unless a new statute or case law provides an independent basis for relief that did not exist at the time of the prior action. In such circumstances, the claimant from the prior adjudication may file a second action based on the new, independent claim for relief. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 131.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Apotex, Inc. v. FDA, 393 F.3d 210, 217-218 (D.C. Cir. 2004)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1363 (Fed. Cir. 2000)* .

(n4)Footnote 3. *Test Masters Educ. Servs. v. Singh, 428 F.3d 559, 571 (5th Cir. 2006)* .

(n5)Footnote 4. *Apotex, Inc. v. FDA, 393 F.3d 210, 217-218 (D.C. Cir. 2004)* .

(n6)Footnote 5. *Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226 (7th Cir. 1993)* .

(n7)Footnote 6. *Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991)* .

(n8)Footnote 1. *Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004)* ; *see also* [1], *above*.

(n9)Footnote 2. *Hatch v. Boulder Town Council, 471 F.3d 1142, 1150 (10th Cir. 2006)* , citing **Moore's Federal Practice**).

(n10)Footnote 3. *Baylor v. United States Dept. of Hous. and Urban Dev., 913 F.2d 223, 225 (5th Cir. 1990)* .

(n11)Footnote 4. *Sidney Coal Co. v. Massanari, 221 F. Supp. 2d 755, 774 (E.D. Ky. 2002)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.55

§ 30.55 Effects of Application of Claim Preclusionn*

[1] Preclusion of Claims Not Asserted in Prior Action

Under the doctrine of claim preclusion, any claim based on the same transaction or series of transactions will be barred, regardless of the number of different legal theories that may arise as a result of plaintiff's alleged damages. n1 Thus, the judgment in the prior action will preclude another action based on the same facts and asserted injury even though the subsequent action asserts a different legal theory to justify recovery. n2 Furthermore, even a good faith, inadvertent failure by plaintiff's counsel to advance a plausible theory in the first action will also fail to avoid claim preclusion. n3

Generally, an action must include all legal theories that may give rise to relief based on the same transaction or series of transactions, because all such theories comprise a single claim, which may not be split. n4

[2] Preclusion of Claims Not Asserted by Counterclaim in Prior Action

If a defendant to a previous action brings a subsequent action in which claims are asserted that might have been the subject of a counterclaim in the prior action, the application of the claim preclusion doctrine will depend on either of two factors: (1) whether the counterclaim was required to be interposed by a compulsory counterclaim statute or rule of court, n1 or (2) whether the relationship between the counterclaim and the plaintiff's claim in the prior action is such that successful prosecution of the second action would negate the prior judgment or impair rights established by the prior judgment. n2 If either of these factors is present, claim preclusion will prohibit alleging the claim in the second action. n3

The federal compulsory counterclaim provision generally requires that pleaders assert any claim against an opposing party which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. n4 If the claim should have been asserted as a counterclaim in the prior action pursuant to the applicable compulsory counterclaim statute, it will be precluded in the pending action. n5

[3] Preclusion of State Law Claims Not Asserted in Prior Action

If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. n1 A state court must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment. n2

A case may not be removed to federal court under the well-pleaded complaint rule if the only federal question in the case is raised as a defense to the plaintiff's claim, even if the defense is anticipated in the plaintiff's complaint, and even if both parties acknowledge that the defense is the only issue in the case. n3 Thus, because claim preclusion is a defensive plea, claim preclusion based on a prior federal judgment alone may provide no basis for removal. n4

[4] Remedies That Could Have Been Requested in Prior Action Are Precluded

Under the doctrine of claim preclusion, all available legal and equitable relief resulting from a transaction or series of transactions constitutes a single claim, and as a general rule, the plaintiff must seek all available relief in the first action. Any judgment in that action precludes a second suit requesting additional relief. n1 Furthermore, the merger of law and equity allowed joinder of legal and equitable claims in a single action; therefore, any claims are subject to the claim preclusion doctrine, whether they are legal or equitable. n2

[5] Defenses That Could Have Been Asserted in Prior Action Are Precluded

Under the doctrine of claim preclusion, a claim includes not only all available facts and legal and equitable relief that could have been asserted in the prior action, but also any defenses that could have been asserted against plaintiff's claim in that action. Claim preclusion bars all defenses, even "perfect defenses" for which no proof was offered. n1 A defendant may, for example, attempt to assert a new defense in an action to enforce a judgment. Thus, if a plaintiff obtains a valid judgment against a defendant on a debt or note, a defendant may not raise the defenses to the note in an action to enforce the judgment because those defenses could have been raised in the earlier action. n2

[6] Preclusive Effect of Multiple Inconsistent Prior Judgments

When a claim has been litigated to a valid final judgment on the merits, one party will usually assert claim preclusion in a second action initiated on the same claim between the same parties. However, if claim preclusion is not raised in the second action or is erroneously rejected by the court, the court may proceed to a judgment that is inconsistent with the previous judgment. In such cases of contradictory results, the rule is that preclusive effect is given to the last judgment entered. n1 Furthermore, the last in time rule applies no matter how many prior judgments exist. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 131.21, 131.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *In re Teltronics Servs., Inc., 762 F.2d 185, 193 (2d Cir. 1985)* (new legal theory does not amount to different or new claim for relief so as to defeat application of principle of claim preclusion).

(n3)Footnote 2. *Goldberg v. R.J. Longo Constr. Co., 54 F.3d 243, 246 (5th Cir. 1995)* (action to foreclose mechanic's and materialperson's lien precluded by prior action for breach of contract).

(n4)Footnote 3. *Lea v. Republic Airlines, Inc., 903 F.2d 624, 634 (9th Cir. 1990)* .

(n5)Footnote 4. *See Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 714-715 (9th Cir. 2001)* (Title VII claims were not exempt from application of claim preclusion based on prior suit in which plaintiff could have asserted Title VII claims but did not even attempt to amend complaint to include Title VII claims).

(n6)Footnote 1. *Burlington N. R. Co. v. Strong, 907 F.2d 707, 711-712 (7th Cir. 1990)* .

(n7)Footnote 2. *Martino v. McDonald's Sys., Inc., 598 F.2d 1079, 1085 (7th Cir. 1079)* , *cert. denied, 444 U.S. 966 (1979)* .

(n8)Footnote 3. *See Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc., 233 F.3d 697, 701-704 (2d Cir. 2000)* , *cert. denied, 532 U.S. 1019 (2001)* (claim alleging attempt to enforce an invalid reissue patent was compulsory counterclaim that was barred because it was not asserted in patent infringement action).

(n9)Footnote 4. *Fed. R. Civ. P. 13(a).*

(n10)Footnote 5. *Cuervo Resources, Inc. v. Claydesta Nat'l Bank, 876 F.2d 436, 436-437 (5th Cir. 1989)* .

(n11)Footnote 1. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397-399, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* .

(n12)Footnote 2. *Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 2373 n.9, 129 L. Ed. 2d 383 (1994)* .

(n13)Footnote 3. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* .

(n14)Footnote 4. *Rivet v. Regions Bank, 552 U.S. 470, 475-478, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* (removal may not be predicated on federal defense; defense of claim preclusion based on prior federal judgment may only be made in state court action).

(n15)Footnote 1. *Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983)* (party that has choice of more than one remedy for particular wrong may not assert them serially in successive actions but must advance all at once or be subject to preclusion for those not asserted).

(n16)Footnote 2. *Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963-964 (3d Cir. 1991)* .

(n17)Footnote 1. *In re Hopkins, 146 F.3d 729, 731-732 (9th Cir. 1998)* ; *see Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 670-671, 64 S. Ct. 268, 88 L. Ed. 376 (1944)* (defendant who fails to assert available defense in initial action is precluded from raising it in subsequent action involving same parties and transactions).

(n18)Footnote 2. Cf. *Dimock v. Revere Copper Co., 117 U.S. 559, 565, 6 S. Ct. 855, 29 L. Ed. 994 (1886)* (defense asserted in enforcement proceeding that debt had been discharged in bankrupcy could not be asserted because bankruptcy decree had been issued before judgment in underlying action but had not been asserted as defense in that action).

(n19)Footnote 1. *Robi v. Five Platters, Inc., 838 F.2d 318, 322-323 (9th Cir. 1988)* (discussing policy rationale for rule).

(n20)Footnote 2. *Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1530 n.2 (9th Cir. 1985)* (rule applicable even when there are three or more prior inconsistent judgments or proceedings).

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
D. CLAIM PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.56

§ 30.56 Procedural Considerations for Claim Preclusionn*

[1] Claim Preclusion Must Be Asserted as Affirmative Defense

Under the Federal Rules of Civil Procedure, claim preclusion is an affirmative defense n1 that must be raised in the answer at the first opportunity because the defense may be waived either implicitly n2 or by express agreement. n3 The purpose of the pleading requirement is to give the opposing party notice and a chance to argue why the imposition of claim preclusion would be inappropriate. n4 When the prior judgment that gives rise to the preclusion defense is rendered after the initial pleading stage in the pending litigation, the proper procedure is for the party to file a motion pursuant to Rule 15(d) to file an amended defensive pleading. n5 The standard the court must use to determine whether to grant an amendment for the party to assert an affirmative defense is whether the amendment will result in undue prejudice to the opposing party. n6 Therefore, the court will ordinarily grant a motion to amend if the motion is made early in the litigation. n7

[2] Methods of Asserting Claim Preclusion

In addition to asserting a preclusion defense in the answer, a defendant may raise the defense in any of the following ways:

1. Motion to Dismiss. Under Rule 12(b)(6), a party may file a motion to dismiss for failure to state a claim on which relief can be granted to be filed before any answer or other responsive pleading. n1 Courts have discretion to allow defenses based on the preclusion doctrines to be raised and determined in this manner if the grounds for preclusion appear on the face of the complaint or consist of matters of which the court may take judicial notice. n2

2. Motion for Summary Judgment. If the appropriate requirements are met, a party may assert claim preclusion in a motion for summary judgment. n3 Also, if a party has already raised the issue of claim preclusion in the pleadings and asserts that there is no triable issue of fact as to the application of res judicata, a timely summary judgment motion may be made to submit the matter to the court for determination. n4

3. Appeal. If the judgment that is asserted as the basis for claim preclusion is rendered while a case involving the same

claim is on appeal, a party may raise the preclusive effect of the judgment directly in the appeal by including it in the appellate briefs. n5 If the judgment that forms the basis for preclusion was entered after the appellate briefs were filed in the pending case, the court may permit a party to raise the assertion of claim preclusion at oral argument. n6 Alternatively, the claim preclusive effect may be raised by a motion to affirm. n7

[3] Court May Initiate Claim Preclusion

Even though the parties to the litigation may waive the claim preclusion defense, the trial court may nevertheless raise the defense on its own motion. This rule have been promulgated because the Supreme Court has decided that judicial power unalterably includes the power to render final judgments for all of the policy reasons that form the basis of the doctrine, and therefore the courts need not always accept waivers of claim preclusion. Thus, trial courts may in appropriate cases raise claim preclusion on their own motion. This rule is known as waiver subject to the control of the courts. n1 Before raising claim preclusion, a court must give the parties reasonable notice and an opportunity to be heard. n2

[4] Claim Preclusion in Context of Certain Actions

[a] In Rem and Quasi in Rem Judgments

A judgment in rem may be entered in an action based solely on a court's jurisdiction over tangible or intangible property. A judgment in rem is binding on all persons in the world as to the interests in the property. Similarly, a judgment quasi in rem is a judgment establishing the interests in property with respect to specific persons, by such means as attachment or garnishment. n1 Such a judgment is binding only with respect to the interests in the property (res) that were the subject of the action, and the claim preclusion doctrine will usually not bar subsequent actions brought to establish the personal liability of the parties. n2

[b] Declaratory Judgment

Judgments for declaratory relief in federal courts are governed by the Declaratory Judgments Act, n3 which provides that further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by the judgment. n4 Therefore, the general rule is that, whether or not a prior declaratory relief claim was successful, the doctrine of claim preclusion does not apply to the prior declaratory relief judgment. n5 Such a judgment does not act as a merger or bar, and a party may pursue subsequent actions for additional relief. However, the prior declaratory judgment is subject to application of issue preclusion principles. n5.1 Also, if a party requests in the initial action additional relief such as an injunction or damages, in addition to declaratory relief, the exception does not apply and any future claim is subject to claim preclusion, n6 and to dismissal to the extent the prior action for declaratory relief was dismissed with prejudice. n7

[c] Administrative Proceedings

Generally, preclusion principles apply to a prior administrative adjudication of a claim, n8 provided that minimum necessary procedural safeguards were employed in the proceeding, such as procedures similar to those employed by federal courts. n9 However, claim preclusion does not apply when not intended by Congress or the legislature. In diversity cases, state law and the intent of the state legislature controls the claim preclusive effect of an administrative adjudication. n9.1 When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts should apply claim preclusion. n10 Additionally, a judgment by a court on review of an administrative determination has the same preclusive effect as any other judgment of the court. n11

[d] Arbitration

Courts generally favor arbitration of disputed claims as an efficient method of directing appropriate disputes out of the courts and into an alternate forum. n12 The Federal Arbitration Act n13 requires district courts to order parties involved in commercial or admiralty disputes to arbitration with respect to all matters covered by valid arbitration agreements. n14

In general, arbitration awards have the same preclusive effects as court judgments. n14.1 However, an arbitration proceeding is based on contract, n14.2 and the intent of the parties as specified in the contract to arbitrate generally controls the power of the arbitrator to render binding "decisions" that have preclusive effect. n15 Furthermore, the Supreme Court has held that arbitration is not an appropriate forum to adjudicate some claims involving fundamental statutory and constitutional rights, and in such cases, arbitration decisions do not have claim preclusive effect. n16

Thus, an arbitration proceeding is essentially a court of limited jurisdiction, with the jurisdictional limits set by agreement of the parties. n17 With regard to the claim preclusion process of determining whether a claim asserted in a pending action should have been asserted in a prior arbitration proceeding, the scope of the prior claim is determined by the intent of the parties as specified in the agreement. Similarly, the validity of the arbitration award is determined in part by the authority bestowed on the arbitrator by the agreement. An award that exceeds such authority is invalid and thus has no preclusive effect. n18 Because the procedure followed in an arbitration proceeding is subject to agreement by the parties involved, the procedure need not comply with all of the rules of procedure and evidence followed by courts in order for the resulting judgment to have preclusive effect; all that is required is that the parties receive a fundamentally fair hearing. n19

[e] Injunction to Enforce Claim Preclusion

The typical procedure for asserting a claim preclusion defense is to assert it by pleading or motion in the action in which the claim is to be precluded. However, to avoid undue expense or other prejudice to relitigate the claim in the subsequent proceeding, a defendant may ask the initial judgment court to enjoin proceedings involving the same claim in other federal courts. n20 A federal court may also enjoin state proceedings under the All Writs Act, n21 which gives federal district courts authority to issue all writs necessary or appropriate in aid of their respective jurisdictions. The "necessary in aid of" language is generally referred to as the "relitigation exception" to the Anti-Injunction Act, which generally prohibits a federal court from enjoining a pending state court proceeding. n22 This exception recognizes that the concept of claim preclusion is a valid ground for a federal court to enjoin state court actions. n23 The relitigation exception applies only when a preclusive judgment has been made. n24 The statutory scheme gives the district court authority to issue an injunction to prevent or stay proceedings in other courts that would be subject to claim preclusion based on the court's prior judgment, n25 because a district court retains jurisdiction to enforce the judgments it enters. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 131.24, 131.50 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 8(c).*

(n3)Footnote 2. *Exxon Corp. v. Texas Motor Exchange, Inc., 628 F.2d 500, 507 n.3 (5th Cir. 1980)* (defendant's failure to raise issue of claim preclusion in trial court prevented consideration by appellate court).

(n4)Footnote 3. *Disher v. Information Resources, Inc., 691 F. Supp. 75, 82-83 (N.D. Ill. 1988)* , *aff'd on other grounds, 873 F.2d 136 (7th Cir. 1989)* (agreement to surrender claim preclusion defense made as part of settlement of initial case).

(n5)Footnote 4. *Blonder-Tongue Lab., Inc. v. University of Ill., 402 U.S. 313, 350, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)* .

(n6)Footnote 5. *Fed. R. Civ. P. 15(d)*; *see, e.g., Hogue v. Royse City, 939 F.2d 1249, 1256 n.10 (5th Cir. 1991)* (claim preclusion properly raised by amended answer filed less than three months after state court judgment and one week before defendant's summary judgment motion).

(n7)Footnote 6. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* .

(n8)Footnote 7. *See Atiya v. Salt Lake County, 988 F.2d 1013, 1017-1018 (10th Cir. 1993)* .

(n9)Footnote 1. *Fed. R. Civ. P. 12(b)(6)*; *see Brzostowski v. Laidlaw Waste Sys., 49 F.3d 337, 338 (7th Cir. 1995)* (trial court's dismissal on claim preclusion grounds).

(n10)Footnote 2. *Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994)* .

(n11)Footnote 3. *Fed. R. Civ. P. 56*; *see Meshulam v. GMC, 995 F.2d 192, 194-195 (11th Cir. 1993)* (summary judgment on basis of res judicata was proper since there were no triable issues of fact).

(n12)Footnote 4. *Woods v. Dunlop Tire Corp., 972 F.2d 36, 38-39 (2d Cir. 1992)* , *cert. denied, 506 U.S. 1053 (1993)* .

(n13)Footnote 5. *Lesher v. Lavrich, 784 F.2d 193, 195-196 (6th Cir. 1986)* (when state court action was on appeal at time district court entered judgment, preclusion claim could be raised on appeal).

(n14)Footnote 6. *Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 665-666 (11th Cir. 1984)* .

(n15)Footnote 7. *Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 298-299, 37 S. Ct. 506, 61 L. Ed. 1148 (1917)* .

(n16)Footnote 1. *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228, 115 S. Ct. 1447, 1459, 131 L. Ed. 2d 328 (1995)* (indicating claim preclusion as significant source for courts' independence).

(n17)Footnote 2. *State of Nevada Employees Ass'n, Inc. v. Keating, 903 F.2d 1223, 1225-1226 (9th Cir. 1990)* , *cert. denied, 498 U.S. 999 (1990)* (sua sponte application of preclusion not proper when court did not allow briefing on issue).

(n18)Footnote 1. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982)* .

(n19)Footnote 2. *Sherman v. Kirshman, 369 F.2d 886, 889 (2d Cir. 1966)* .

(n20)Footnote 3. *See 28 U.S.C. § 2201 et seq.*

(n21)Footnote 4. *See 28 U.S.C. § 2202.*

(n22)Footnote 5. *Harborside Refrigerated Servs., Inc. v. Vogel, 959 F.2d 368, 372 (2d Cir. 1992)* .

(n23)Footnote 5.1. *Empire Fire & Marine Ins. Co. v. J. Transp., Inc., 880 F.2d 1291, 1296 (11th Cir. 1989)* ; *see Gutherman v. 7-Eleven, Inc., 278 F. Supp. 2d 1374, 1377 (S.D. Fla. 2003)* .

(n24)Footnote 6. *Minneapolis Auto Parts Co. v. City of Minneapolis, 739 F.2d 408, 410 (8th Cir. 1984)* .

(n25)Footnote 7. *Gant v. Grand Lodge of Tex., 12 F.3d 998, 1003 (10th Cir. 1993)* .

(n26)Footnote 8. *Duvall v. AG of the United States, 436 F.3d 382, 389 n.6 (3d Cir. 2006)* .

(n27)Footnote 9. *Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)* .

(n28)Footnote 9.1. *Iowa Network Servs. v. Qwest Corp., 363 F.3d 683, 689 (8th Cir. 2004)* .

(n29)Footnote 10. *United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)* ; *see Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)* .

(n30)Footnote 11. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 484-485, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* ; *see, e.g., Dohmen v. Twin Rivers Pub. Sch., 207 F. Supp. 2d 972, 987 (D. Neb. 2002)* (claim and issue preclusion properly apply to administrative determination under the Individuals with Disabilities Education Act, *20 U.S.C. § 1415(f)*).

(n31)Footnote 12. *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 2006 U.S. LEXIS 1814, *6-*7 (2006)* ; *United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)* .

(n32)Footnote 13. *9 U.S.C. § 1 et seq.*

(n33)Footnote 14. *9 U.S.C. § 2.*

(n34)Footnote 14.1. *See United States Postal Serv. v. Gregory, 534 U.S. 1, 15-16 122 S. Ct. 431, 151 L. Ed. 2d 323 (2001)* ; *Anchor Glass Container Corp. v. Buschmeier, 426 F.3d 872, 874 (7th Cir. 2005)* .

(n35)Footnote 14.2. *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 2006 U.S. LEXIS 1814, *7 (2006)* .

(n36)Footnote 15. *Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)* .

(n37)Footnote 16. *See, e.g., Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 742-746, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)* (Fair Labor Standards Act).

(n38)Footnote 17. *Wolf v. Gruntal & Co., 45 F.3d 524, 527 (1st Cir. 1995)* .

(n39)Footnote 18. *Davis v. Chevy Chase Fin., Ltd., 667 F.2d 160, 172 (D.C. Cir. 1981)* .

(n40)Footnote 19. *Bell Aerospace Co. Div. of Textron, Inc. v. International Union, United Auto., etc., 500 F.2d 921, 923 (2d Cir. 1974)* .

(n41)Footnote 20. *Municipal Energy Agency v. Big Rivers Elec. Corp., 804 F.2d 338, 343 (5th Cir. 1986)* .

(n42)Footnote 21. *28 U.S.C. § 1651.*

(n43)Footnote 22. *See 28 U.S.C.S. § 2283.*

(n44)Footnote 23. *Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147, 108 S. Ct. 1684, 100 L. Ed. 2d 127*

(1988) .

(n45)Footnote 24. *In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 239 (3d Cir. 2002)* (essential prerequisite for applying the relitigation exception is that claims or issues must actually have been decided by the federal court).

(n46)Footnote 25. *Wesch v. Folsom, 6 F.3d 1465, 1471 (11th Cir. 1993)* , *cert. denied, 510 U.S. 1046 (1994)* .

(n47)Footnote 26. *Local Loan Co. v. Hunt, 292 U.S. 234, 239, 54 S. Ct. 695, 78 L. Ed. 1230 (1934)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
D. CLAIM PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure §§ 30.57through 30.69

[Reserved]

§§ 30.57[Reserved]

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
E. ISSUE PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.70

§ 30.70 Nature of Issue Preclusionn*

[1] Definition of Issue Preclusion

Issue preclusion, or collateral estoppel as it was previously known, means that an issue, once determined by a valid and final judgment, may not again be litigated by the same parties or privies in a future lawsuit. n1 In other words, issue preclusion applies to preclude relitigation of the same issues in a subsequent case once those issues have already been decided. n2 When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. n3 Issue preclusion deals with the relitigation of issues previously decided, even when those issues arise in a subsequent litigation on a claim not barred by claim preclusion. n4

[2] Purpose of Issue Preclusion Doctrine

The purpose of the issue preclusion doctrine is to conserve judicial resources, relieve litigants of the cost and vexation of multiple lawsuits, prevent inconsistent decisions, and encourage reliance on adjudication by minimizing the possibility of inconsistent decisions. n1 Some courts have noted that issue preclusion also tends to preserve judicial results by preventing inconsistent determinations. n2 The public policy underlying the doctrine is that one fair opportunity to litigate an issue is enough. n3

[3] Issue Preclusion Compared With Other Preclusive Doctrines

[a] Stare Decisis

The doctrine of stare decisis is a general rule that requires courts to follow case precedent in their subsequent decisions. It means that a rule of law decided in a prior case should be followed without reconsideration in all subsequent cases within the same jurisdiction, provided the legal issue was actually argued and decided by the court in the prior case. n1 The purpose of stare decisis is to ensure that fundamental legal principles remain consistent. In this regard, it shares with the issue preclusion doctrine a concern for stability and finality in the judicial system. However, issue preclusion precludes relitigation of issues that were actually decided, while stare decisis is a general doctrine that like

circumstances should be decided. Therefore, stare decisis is a more flexible and discretionary concept than issue preclusion. n2 Unlike stare decisis, which applies only to issues of law, issue preclusion also applies to issues of fact. n3 Another important difference between the two doctrines is that stare decisis is not limited to the parties to the original lawsuit or those in privity with the parties, while only a party or privy may be bound by the issue preclusive effect of a prior judgment. n4

[b] Law of the Case

The law of the case doctrine requires that when a court decides an issue, that court and any lower courts should continue to follow that determination during the pendency of that particular case. n5 Unlike issue preclusion, the law of the case is a discretionary doctrine, and need not be applied if there has been an intervening change in the law, new evidence has been discovered, there has been clear error, or if injustice will result. Thus, in contrast to issue preclusion, the law of the case doctrine operates only until a final judgment is obtained, after which it has no relevance, n6 while issue preclusion requires a final judgment as a prerequisite to its application. n7

[c] Claim Preclusion

The primary difference between claim preclusion and issue preclusion is that claim preclusion applies to entire claims for relief, whether litigated or not, while issue preclusion applies only to particular issues that have actually been contested and resolved. n8 Thus, claim preclusion prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or the party's privies and precludes the assertion of any legal theory, cause of action, or defense that could have been asserted in that action. Issue preclusion prevents relitigation of issues actually litigated and necessary for the outcome of the prior suit, even if the current action involves different claims. n9 Additionally, while claim preclusion operates only between the parties to the prior litigation, a stranger to the first action may invoke issue preclusion against a party to that action. n10 Issue preclusion also differs from claim preclusion in that issue preclusion is an equitable doctrine that should be applied only when the alignment of the parties and the legal and factual issues raised warrant it. n11

The doctrine of issue preclusion, unlike claim preclusion, forecloses relitigation of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment in a prior action between the parties or their privies, whether on the same or a different claim. n12 On the other hand, issue preclusion does not prohibit a party from litigating issues that were never argued or decided in the prior proceeding. To the extent the cause of action involved in the second proceeding is not "swallowed by the judgment" in the prior suit, the parties under issue preclusion are free to litigate points that were not at issue in the first proceeding, even though those points might have been tendered and decided at that time. n13 This difference allows the application of issue preclusion in some cases when the doctrine of claim preclusion is unavailable. n14

[d] Judicial Estoppel

The doctrine of judicial estoppel generally prohibits a party from asserting a legal or factual position that contradicts or is inconsistent with a prior position taken by the same party. n15 An important similarity between issue preclusion and judicial estoppel is that both doctrines require an identity of issues. Judicial estoppel does not apply if a litigant takes inconsistent positions with respect to issues that are only superficially similar. Thus, apparently inconsistent positions may not be judicially estopped if there is a significant legal difference between the contexts in which the two positions are asserted. n16

However, unlike the doctrine of issue preclusion, judicial estoppel is not concerned with preserving the finality of judgments. Rather, the doctrine of judicial estoppel is intended to prevent improper use of the judicial process, and to promote the orderly administration of justice and regard for the respect owed to judicial proceedings. n16.1 Although judicial estoppel is generally applied to a position taken in a subsequent lawsuit, the doctrine may also bar a party from

taking inconsistent positions in the same litigation. n17 Furthermore, judicial estoppel does not require that the issue have been actually litigated in the prior proceeding, while issue preclusion does require that the issue have been actually litigated and decided. Also, federal courts must apply a strict mutuality of parties rule with respect to issue preclusion if the rendering jurisdiction enforces such a rule, but mutuality of parties is not required for judicial estoppel. n18 Therefore, judicial estoppel may apply in a case when neither collateral estoppel nor equitable estoppel would apply. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCopyright LawCivil Infringement ActionsCollateral Estoppel & Res JudicataPatent LawPreclusionCollateral EstoppelTax LawFederal Tax Administration & ProcedureCollateral Estoppel & Res JudicataCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.01 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Flaherty v. Lang, 199 F.3d 607, 613 (2d Cir. 1999)* .

(n3)Footnote 2. *Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452, 456 n.3 (7th Cir. 1987)* (issues that have been fully and fairly litigated between private parties may not later be relitigated, even though second case involves legal issue fundamentally different from first case).

(n4)Footnote 3. *Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 20 F.3d 289, 293 (7th Cir. 1994)* .

(n5)Footnote 4. *Pfaff v. Wells Elecs., 5 F.3d 514, 517 (Fed. Cir. 1993)* .

(n6)Footnote 1. *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)* .

(n7)Footnote 2. *Butler v. Pollard, 800 F.2d 223, 225 (10th Cir. 1986)* (when trial court erroneously denies preclusion and makes findings inconsistent with earlier findings embarrassment of inconsistent findings occurs).

(n8)Footnote 3. *In re Castaneda, 81 B.R. 470, 472 (Bankr. N.D. Ill. 1988)* .

(n9)Footnote 1. *Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993)* , *cert. denied, 511 U.S. 1082 (1994)* .

(n10)Footnote 2. *Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* .

(n11)Footnote 3. *Meredith v. Beech Aircraft Corp., 18 F.3d 890, 895 (10th Cir. 1994)* .

(n12)Footnote 4. *Peregoy v. Amoco Prod. Co., 742 F. Supp. 372, 374 (E.D. Tex. 1990)* , *aff'd on other grounds, 929 F.2d 196 (5th Cir. 1991)* .

(n13)Footnote 5. *Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)* .

(n14)Footnote 6. *See Virgin Atl. Airways Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)* , *cert. denied, 506 U.S. 820 (1992)* .

(n15)Footnote 7. *SEC v. Ridenour, 913 F.2d 515, 518 (8th Cir. 1990)* .

(n16)Footnote 8. *Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)* (unlike claim preclusion, issue preclusion does not depend on whether claim is same as in first action).

(n17)Footnote 9. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (citing **Moore's Federal Practice**; difference between res judicata (claim preclusion) and collateral estoppel (issue preclusion)).

(n18)Footnote 10. *Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995)* , *cert. denied, 516 U.S. 864 (1995)* (issue preclusion does not require that the party benefitting have been a party to the earlier litigation).

(n19)Footnote 11. *Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 (5th Cir. 1995)* ; *see Olmstead v. Amoco Oil Co., 725 F.2d 627, 632 (11th Cir. 1984)* (no equitable exceptions to claim preclusion doctrine).

(n20)Footnote 12. *In re Duncan, 713 F.2d 538, 541 (9th Cir. 1983)* .

(n21)Footnote 13. *Sea-Land Servs. v. Gaudet, 414 U.S. 573, 593, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974)* .

(n22)Footnote 14. *North River Ins. Co. v. Allstate Ins. Co., 866 F. Supp. 123, 127 (S.D.N.Y. 1994)* (res judicata (claim preclusion) prohibits litigation of matters between parties that they may never have argued, so invoking collateral estoppel (issue preclusion) in given case may be permissible when invoking res judicata is not).

(n23)Footnote 15. *New Hampshire v. Maine, 532 U.S. 742, 749-750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* ; *Mintze v. Am. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 232 (3d Cir. 2006)* (citing **Moore's Federal Practice**).

(n24)Footnote 16. *Folio v. City of Clarksburg, 134 F.3d 1211, 1217-1218 (4th Cir. 1998)* (declining to apply doctrine of judicial estoppel because contentions that assessment was not a tax under state law but was a tax under federal law were not actually inconsistent).

(n25)Footnote 16.1. *New Hampshire v. Maine, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* .

(n26)Footnote 17. *Morris v. California, 966 F.2d 448, 452 (9th Cir. 1992)* , *cert. denied, 506 U.S. 831 (1992)* .

(n27)Footnote 18. *Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996)* , *cert. denied, 519 U.S. 1113 (1996)* .

(n28)Footnote 19. *Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166-1167 (4th Cir. 1982)* .

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PART VIII Limits of Judicial Reconsideration
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PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
E. ISSUE PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.71

§ 30.71 Summary of Requirements for Issue Preclusionn*

Issue preclusion applies if all of the following are true: n1 (1) the issue decided in the prior proceeding is identical with the issue presented in the current proceeding; n2 (2) the issue in the prior proceeding was actually litigated and was necessary to a final adjudication which was determined on the merits; n3 (3) the party against whom the doctrine is invoked was a party to the prior adjudication, or in privity with a party; n4 and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. n5 It is important to remember that unlike res judicata, issue preclusion does not bar a litigant from subsequently pursuing issues that were not raised in the first proceeding, even though the issue could have been raised. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.01 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *B-S Steel of Kan. v. Tex. Indus., 439 F.3d 653, 662 (10th Cir. 2006)* ; *see Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 146 (2d Cir. 2005)* .

(n3)Footnote 2. *See § 30.72*.

(n4)Footnote 3. *See §§ 30.73*, *30.75*, *30.76*.

(n5)Footnote 4. *See § 30.77[1]*.

(n6)Footnote 5. *See § 30.74*.

(n7)Footnote 6. *Kaspar Wire Works, Inc. v. Leco Eng. & Mach., Inc., 575 F.2d 530, 535-536 (5th Cir. 1978)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.72

§ 30.72 Identity of Issuesn*

[1] Requirement of Identical Issues in Both Proceedings

The doctrine of issue preclusion provides that a party may not dispute a right, question, or fact in a subsequent suit when the matter has particularly been put in issue in a prior proceeding and directly determined by a court of competent jurisdiction as a ground of recovery. n1 The doctrine applies only when the issues presented in each matter are identical. n2 This requirement means exact identity between the issues in the prior and current litigation n3 and merely similar issues do not qualify. n4 For example, issue preclusion does not require that interpretation of one written agreement be given to another agreement, even when the terms are very similar. n5 Moreover, issue preclusion does not apply when different statutes are applicable to a determination, even though the statutes are very similar in their significant terms. n6 In some instances, a court specifies that it is not deciding a specific issue; this practice may facilitate a later determination of the delineation of an issue for purposes of issue preclusion. n7

An issue decided in a criminal case conviction may form the basis for relitigation of the issue in a subsequent civil proceeding; however, issue preclusion is not appropriate if the issue sought to be precluded was not an element of the offense for which the conviction was obtained. n8

[2] Definition of Issue for Issue Preclusion Purposes

The starting point in a issue preclusion analysis is a determination of the precise issues that were litigated in the first action. n1 An "issue" for purposes of issue preclusion is a single, certain and material point arising out of the allegations and contentions of the parties. n2 An issue may concern only the existence or nonexistence of certain facts, or the legal significance of those facts. n3 Thus, deciding if issue preclusion applies requires a determination of whether there are differences in the two proceedings regarding the issues of facts or issues of law within the context of the specific procedure in which the doctrine of issue preclusion was raised. n4 The reason for categorizing the cases is that although the doctrine is applicable to both issues of fact and issues of law, it is the more readily applied to factual than to legal issues. n5

[3] Factors Considered in Determination of Issue Identity

Some federal courts have adopted guidelines to determine whether there is identity between the issues presented in two proceedings for purposes of issue preclusion, including whether: n1

1. There is a substantial overlap between the evidence or arguments to be advanced in the two proceedings. n2

2. New evidence or argument involves application of the same rule of law as that involved in the prior proceeding. A party may be precluded from relitigating an issue if evidence supporting the party's position on the issue could have been submitted in previously litigation but was not properly raised. n3 A party therefore may not avoid issue preclusion merely by offering evidence in the second proceeding that could have been presented and admitted in the first but was not. n4

3. Pretrial preparation and discovery relating to the matter presented in the first proceeding reasonably could be expected to have encompassed the matter sought to be presented in the second proceeding.

4. The claims involved in the two proceedings are sufficiently related.

[4] Identity of Factual Issues

The general rule that issue preclusion applies only if the issue in the prior litigation is identical to the issue in the subsequent litigation has a corollary which states that if there is a difference in pertinent facts sufficient to substantially change the issue, the doctrine of issue preclusion is inapplicable. This means that if there are differences in facts in the two cases that are essential to a judgment, issue preclusion is inapplicable in a subsequent action raising the same legal issues. n1 Therefore, whether issue preclusion applies depends in part on whether the controlling facts have changed significantly since the earlier judgment. However, a party may not assert a change in controlling facts to avoid issue preclusion when the facts allegedly showing a change in circumstances could have been discovered in the exercise of due diligence. n2

As a practical matter, the determination of whether facts should be considered identical for the purpose of issue preclusion should rely on a number of factors: n3

1. The procedural posture of the factual determination in the prior litigation, such as whether the fact determination was a judicial finding of fact or a jury's answer to an special interrogatory.

2. The discovery, evidence, affidavits, or admissions that supported the factual determination.

3. The relevancy of the factual determination to the substantive law governing the prior litigation, as compared to its relevance in the subsequent litigation.

Thus, the question of whether facts are identical or different is not an abstract inquiry, but rather is always decided in the procedural and legal context of each particular case. n4

[5] Identity of Legal Issues

Issue preclusion does not apply with respect to the determination of a legal issue if the issue presented in the first proceeding significantly differs from that presented in the subsequent proceeding. n1 Thus, the doctrine of issue preclusion does not apply when two relevant statutes under consideration vary in their significant terms. n2 Courts have used slightly differing language to express the principle that legal issues are not "identical" for issue preclusion purposes, including "significantly different," "substantially different," and "demonstrably different." n3 In the same

way, if the legal standards governing resolution of issues of fact are significantly different in two cases, issue preclusion does not apply, n4 nor does the doctrine apply if dfferent legal standards involve different burdens of proof, which is a separate ground for denial of issue preclusion. n5

[6] Effect of Length of Time Between Actions

The length of time may be a factor in a determination of whether an issue in a prior case is identical with another issue in a subsequent case. Thus, when an intervening time period has resulted in a factual change which alters the basis on which the earlier judgment depended, issue preclusion will not apply. n1 On the other hand, the mere passage of time, with out factual changes, between a prior and subsequent litigation does not bar issue preclusion. n2 Additionally, even if there is a factual change involved in the two proceedings because the events took place at different times, a court may order an issue precluded if there is a substantial overlap between the evidence or issues. n3

[7] Intervening Change in Law

The general rule that issue preclusion applies only if the issue in the prior litigation is identical to the issue in a subsequent litigation, n1 has a corollary which states that if an intervening change of law creates a change in the controlling legal principles governing a case, issue preclusion is no longer applicable. n2 After a significant change in law, issue preclusion no longer applies, n3 even though the issue has been actually litigated and determined by a valid and final judgment, and the determination was essential to the judgment. n4

The Supreme Court has held that issue preclusion is made inapplicable only if there have been "major changes in the law" relevant to the issue under consideration. n5 Whether issue preclusion applies depends on whether the legal principles have changed significantly since the earlier judgment. n6 The Court's use of the expression "major changes in the law," in this context indicates that a court must consider the significance of the change in the context of facts and in view of the underlying rationale for the issue preclusion doctrine, including judicial economy, finality, and prevention of repetitive litigation. n7 The change in law exception to the issue preclusion principle applies to change in case law precedent as well as revision to statutes. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.02 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Haberer v. Woodbury County, 188 F.3d 957, 961 (8th Cir. 1999)* .

(n3)Footnote 2. *Brewster of Lynchburg v. Dial Corp., 33 F.3d 355, 364 (4th Cir. 1994)* ; *Disabled Am. Veterans v. Commissioner, 942 F.2d 309, 313 (6th Cir. 1991)* .

(n4)Footnote 3. *Victory Highway Village, Inc. v. Weaver, 634 F.2d 1099, 1101 (8th Cir. 1980)* .

(n5)Footnote 4. *Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 408 (9th Cir. 1985)* .

(n6)Footnote 5. *Phipps v. United States, 515 F.2d 1099, 1100 (Ct. Cl. 1975)* .

(n7)Footnote 6. *Shriners Hosp. for Crippled Children v. United States, 14 Cl. Ct. 51, 55 (1987)* .

(n8)Footnote 7. *Hydranautics v. FilmTec Corp., 204 F.3d 880, 885-887 (9th Cir. 2000)* (in action alleging malicious prosecution of patent infringement case, issue of whether underlying patent had been obtained by fraud was

not precluded by judgment in infringement case, because court entering that judgment expressly stated that it was not addressing that specific issue).

(n9)Footnote 8. *SEC v. Zandford, 238 F.3d 559, 562 (4th Cir. 2001)* , *cert. granted, 534 U.S. 1015 (2001)* .

(n10)Footnote 1. *Flaherty v. Lang, 199 F.3d 607, 613 (2d Cir. 1999)* .

(n11)Footnote 2. *Paine & Williams Co. v. Baldwin Rubber Co., 113 F.2d 840, 843 (6th Cir. 1940)* .

(n12)Footnote 3. *Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 518 n.66 (E.D. Mich. 1974), aff'd on other grounds, 519 F.2d 119 (6th Cir. 1975)* , *cert. denied, 423 U.S. 987 (1975)* .

(n13)Footnote 4. *See* [4], [5], *below*.

(n14)Footnote 5. *Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313, 1317 (7th Cir. 1995)* .

(n15)Footnote 1. *Valley Disposal, Inc. v. Central Vt. Solid Waste Mgmt. Dist., 31 F.3d 89, 97-99 (2d Cir. 1994)* ; *Starker v. United States, 602 F.2d 1341, 1344 (9th Cir. 1979)* .

(n16)Footnote 2. *See Valley Disposal, Inc. v. Central Vt. Solid Waste Mgmt. Dist., 31 F.3d 89, 97-99 (2d Cir. 1994)* .

(n17)Footnote 3. *Yamaha Corp. v. United States, 961 F.2d 245, 257 (D.C. Cir. 1992)* , *cert. denied, 506 U.S. 1078 (1993)* .

(n18)Footnote 4. *Yamaha Corp. v. United States, 961 F.2d 245, 254-255 (D.C. Cir. 1992)* , *cert. denied, 506 U.S. 1078 (1993)* .

(n19)Footnote 1. *Montana v. United States, 440 U.S. 147, 159, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* (citing **Moore's Federal Practice**).

(n20)Footnote 2. *Klein v. Commissioner, 880 F.2d 260, 263 (10th Cir. 1989)* .

(n21)Footnote 3. *See, e.g., Starker v. United States, 602 F.2d 1341, 1344 (9th Cir. 1979)* .

(n22)Footnote 4. In *Re Hart, 130 B.R. 817 842 (N.D. Ind. 1991)* .

(n23)Footnote 1. *Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 290 (5th Cir. 2005)* .

(n24)Footnote 2. *Shriners Hosp. for Crippled Children v. United States, 14 Cl. Ct. 51, 55 (1987)* .

(n25)Footnote 3. *Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 290 fn 90 (5th Cir. 2005)* (citing **Moore's Federal Practice**).

(n26)Footnote 4. *Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992)* , *cert. denied, 508 U.S. 952 (1992)* .

(n27)Footnote 5. *Zip Dee, Inc. v. Dometic Corp., 886 F. Supp. 1427, 1440 (N.D. Ill. 1995)* .

(n28)Footnote 1. *Texas Pig Stands, Inc. v. Hard Rock Cafe Int'l, 951 F.2d 684, 691 (5th Cir. 1992)* .

(n29)Footnote 2. *International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 455 (1st Cir. 1963)* , *cert. denied, 375 U.S. 820 (1963)* .

(n30)Footnote 3. *Doschadis v. Anamosa Community School District, 13 F. Supp. 2d 945, 949 (N.D. Iowa 1998)* .

(n31)Footnote 1. *See* [5], *above*; *Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 290 (5th Cir. 2005)* .

(n32)Footnote 2. *Burlington N. R.R. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1238 (3d Cir. 1995)* .

(n33)Footnote 3. *Montana v. United States, 440 U.S. 147, 160, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* .

(n34)Footnote 4. *Comm'r v. Sunnen, 333 U.S. 591, 599, 68 S. Ct. 715, 92 L. Ed. 898 (1948)* .

(n35)Footnote 5. *Montana v. United States, 440 U.S. 147, 161, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* .

(n36)Footnote 6. *Montana v. United States, 440 U.S. 147, 155, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* .

(n37)Footnote 7. *Montana v. United States, 440 U.S. 147, 161-162, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* .

(n38)Footnote 8. *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 550-552 (6th Cir. 2001)* .

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PART VIII Limits of Judicial Reconsideration
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3-30 Moore's Manual--Federal Practice and Procedure § 30.73

§ 30.73 Prior Litigation Requirementsn*

[1] Requirement of Actual Litigation of Issues

[a] Nature of Actual Litigation

For issue preclusion to apply, the particular issue in the prior proceeding must have been actually litigated by parties. n1 In other words, the determination of an issue that has not been litigated in one proceeding is not barred in a later proceeding. n2 This is one of the variances of issue preclusion with claim preclusion, in that issue preclusion applies only to issues that were directly litigated and not to those that merely could have been litigated. n3

In determining whether a particular issue was actually litigated, it is controlling if the court in the previous action specified that a particular issue was not considered. n4 If a court cannot ascertain what was actually litigated, the court may not apply issue preclusion. n5 The burden of persuasion to establish the prerequisites of issue preclusion is on the party seeking preclusion. n6 Therefore, if the party seeking preclusion does not produce evidence that an issue was actually litigated in a prior litigation, that party will not have met its burden and issue preclusion should be denied in the second proceeding. n7

[b] Methods of Actual Litigation

A court's express finding on an issue in a valid judgment is enough to satisfy the litigation requirement of issue preclusion. n8 In determining which issues have been actually litigated, the federal court may look beyond the judgment and may consider the pleadings and the evidence in the prior action. n9 However, a court may not take evidence from the judge in the earlier suit to determine the meaning of the written judgment and determinations of the prior court. n10

A question of fact is actually litigated when put in issue by the pleadings, submitted to the trier of fact for its determination, and actually determined by the trier of fact. n11 In the appropriate circumstances, an issue that was clearly litigated may include by implication a connected issue. For example, an inference may be made that a court litigated and determined an issue if the party raising issue preclusion was unsuccessful on the matter based on that issue in the first action, but would have prevailed if the court had decided in its favor on the issue under consideration. In

other words, when the issue for which preclusion is sought is the only rational one that the fact finder could have found, then that issue is considered foreclosed by implication, even if no explicit finding of that issue has been made. n12 On the other hand, an issue that was raised by the pleadings but abandoned is deemed not actually litigated for purposes of issue preclusion. n13

[c] Sufficiency of Particular Devices as Litigation

[i] Stipulation of Parties

For issue preclusion purposes, an issue is not deemed to be "actually litigated" if it is the subject of a stipulation between the parties. n14 This means that if an issue has been established in a prior proceeding not by judicial resolution but by stipulation, the issue is deemed as not having been actually litigated, and therefore is the proper subject of proof in a subsequent proceeding. n15 Several courts have recognized, however, that issue preclusion should not necessarily be inapplicable merely because a party has entered into a stipulation. n16 Consequently, the rule has developed that a stipulation may be binding in a subsequent action between the parties provided that the parties have manifested an intention to that effect. n17 However, an intention to be bound to a stipulation may not be merely be inferred. If the evidence does not support a finding of intent, the parties will not be held to an issue included in a stipulation. n18

[ii] Consent Judgments

A consent judgment is treated in a manner similar to a stipulation. n19 Thus, issue preclusion generally does not apply when the issues sought to be precluded in a subsequent proceeding were allegedly determined in a judgment by consent. n20 The rationale for this rule is that, in a judgment entered by consent, none of the issues is actually litigated at a hearing or other determination of the merits by the court itself. n21 Issues that were addressed only in the trial court's adoption of a consent agreement, and were not contested or litigated, may be litigated in a subsequent action. n22

However the judgment may be conclusive with respect to one or more issues, if the parties have entered an agreement manifesting that intention, as is the rule with stipulations n23 This exception to the general rule that a consent judgment is not given issue preclusive effect is effective when the parties to a consent judgment intended to foreclose an issue from future litigation. n24 If the parties to a consent decree express clearly the intention that the decree to be entered does not only terminate the litigation of claims, but also determines finally certain issues, then their intention will be given effect by the courts. n25

The contractual nature of consent judgments dictates that the intent of the settling parties controls the determination whether a consent judgment is given issue preclusive effect. The district court's interpretation of the intent of the parties controls ambiguous passages in a consent judgment. n26 However, a consent judgment may not be given issue preclusive effect unless the party pleading issue preclusion proves from the record of the prior case or through extrinsic evidence that the parties intended the consent judgment to operate as a final adjudication of a particular issue. n27

[iii] Summary Judgments

Issue preclusion generally applies when the prior determination is based on a motion for summary judgment rather than a full-fledged trial. n28 Some courts qualify the application of issue preclusion to those circumstances in which the party currently objecting to issue preclusion had a full and fair opportunity to litigate the issue in question in the previous proceeding. For example, one court applied issue preclusion when a party failed to demonstrate that the party did not have a full and fair opportunity to litigate the issue in question. The court held that the objections he raised with respect to the issue preclusive effect of the previous determination should have been raised in an earlier appeal. n29 When an issue is raised and determined on a motion for summary judgment, and the trial court's ruling is essential to its decision, the requirements for issue preclusion are met. n30

[iv] Default Judgments

A default judgment is based on the policy that a defaulting defendant is deemed to have admitted plaintiff's allegations with respect to all the issues except damages. However, in the typical default case, none of the issues is actually litigated. Therefore, the general rule is that a default judgment rendered by a federal court will not support the application of issue preclusion. n31 However, there are two circumstances in which a default judgment may be given preclusive effect. The first is when the default judgment results from an agreement by the parties. In such cases, a default judgment may be conclusive with respect to one or more issues, provided that the parties have entered an agreement specifying that intention. The general rule against granting preclusive effect is deemed modified by agreement between the parties. n32

The second exception is when a party defaults not out of a failure to appear but by actively participating in the litigation for a period of time and then failing or refusing to follow court orders. n33 Such a party may be prevented from relitigating the issues that had been in contention during the period of participation in the litigation. In such cases of initial participation and later default, a court may conclude that a party that deliberately precludes resolution of issues through normal adjudicative procedures may be bound by issue preclusion in a subsequent proceeding. If so, the actual litigation requirement is satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity for defense on the merits but chooses not to do so. n34

[v] Dismissal With Prejudice

Generally, a dismissal is not considered to have issue preclusive, in contrast to, claim preclusive effect. Dismissal without prejudice is not considered an adjudication on the merits of a controversy and therefore is not entitled to issue preclusive effect. n35 Even a dismissal with prejudice, which means the party may not relitigate, is also usually deemed as not an adjudication on the merits, because such a dismissal also usually involves no litigation of any issues; therefore, a dismissal with prejudice has no issue preclusive effect. n36

[vi] Admission of Factual Issue

The general rule is that facts determined by admissions and stipulations ordinarily are not entitled to issue preclusive effect, because such facts have not actually been litigated. However, factual determinations made by judge or jury in a case that is actually litigated are not deprived of issue preclusive effect merely because the determinations rest in part on admissions or stipulations. A contrary rule could discourage the use of admissions and stipulations, because that use would deprive the winning party of a judgment that could be used in a subsequent proceeding to preclude relitigation of the facts that had been determined in that party's favor. Furthermore, because an attorney realizes that failure to properly admit facts will possibly subject the attorney to sanctions under Rule 37(c) ensures their reliability as much as a determination by a judge or a jury. n37

[2] Requirement That Issue Was Actually Decided

[a] Statement of Requirement

For purposes of issue preclusion, a judgment is deemed final regarding only those issues actually decided in a prior suit. n1 Therefore, to have preclusive effect in a later action, an issue must have been distinctly put in issue and directly determined in the prior suit. n2 Conversely, an issue that was not in litigation in one action may not be received as conclusively settled in any subsequent action on a different cause because it might have been determined in the first action. n3

The party seeking to preclude relitigation of an issue has the burden of showing that the same issue was actually decided in the prior litigation. n4 An issue directly raised in the pleadings, addressed by the parties, and decided by the court, is "actually decided"; n5 the mere fact that an issue is raised in a pleading does not establish that the issue was actually litigated and determined. n6

[b] Ambiguous Decisions on Issue

A decision that is ambiguous regarding the issue under consideration or that does not specify the issue will not be given issue preclusive effect because the decision does not decide that issue. n7 If there is no showing with regard to the issues that were actually decided, issue preclusion does not apply. If the basis of a decision is unclear, and it is therefore uncertain whether the issue was actually and necessarily decided in that litigation, then relitigation of the issue is not precluded. n8 The significance of what a court states that it decides is limited by the power and jurisdiction that the court has to decide particular issues. n9

[c] Implied Decision on Issue

A court may deem an issue "actually decided" for issue-preclusion purposes, even if it was not explicitly decided, provided that the issue either logically or practically constituted a necessary component of the decision reached in the prior litigation. n10 Thus, an issue that was necessarily implicit in a larger determination is given issue preclusive effect. n11 An issue that is distinctly presented in the pleadings and necessarily resolved may be reflected in the decision that encompasses that issue, even though the determination of the issue is not expressly stated in the decision. n12

[d] Verdicts

It may be difficult to determine what issues were actually decided when a jury submits a general verdict. n13 Consequently, most courts criticize the use of general verdict forms in large and complex cases involving many legal issues. n14 A better practice is for the court to require special verdicts or the submission of interrogatories to the jury pursuant to Rule 49. n15 In that way, the right to a jury trial of all factual issues is preserved, and the likelihood of a lengthy and expensive retrial is reduced. The court noted that the use of a special verdict form or interrogatories may also ease the task of reviewing a complex case. n16 If the court can determine that an issue was decided in a special verdict, even if the decision was by necessary implication, issue preclusion is applicable. n17 On the other hand, a compromise verdict makes it impracticable to determine whether a particular issue was actually decided, and it has generally been held that this type of verdict is an insufficient basis from which to conclude that an issue involved in compromise was actually decided. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.03 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Arkla, Inc. v. United States, 37 F.3d 621, 624 (Fed. Cir. 1994)* .

(n3)Footnote 2. *Wu v. Thomas, 863 F.2d 1543, 1548-1549 (11th Cir. 1989)* (in second employment discrimination suit under federal law, neither pleadings nor pretrial order in first suit actually raised issue of retaliation, which therefore was not barred in second suit).

(n4)Footnote 3. *Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983)* (collateral estoppel did not preclude consideration of intentional fraud, which had never been litigate in bankruptcy court).

(n5)Footnote 4. *McCluney v. Jos. Schlitz Brewing Co., 515 F. Supp. 700, 702 (E.D. Wis. 1981)* .

(n6)Footnote 5. *Mitchell v. Humana Hosp.-Shoals, 942 F.2d 1581, 1583-1584 (11th Cir. 1991)* .

(n7)Footnote 6. *Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 272 (1st Cir. 1996)* .

(n8)Footnote 7. *Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 272 (1st Cir. 1996)* .

(n9)Footnote 8. *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 469 (7th Cir. 1982)* , *cert. denied, 461 U.S. 958 (1982)* .

(n10)Footnote 9. *James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.7 (5th Cir. 1971)* , *cert. denied, 404 U.S. 940 (1971)* .

(n11)Footnote 10. *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 470 (7th Cir. 1982)* , *cert. denied, 461 U.S. 958 (1982)* .

(n12)Footnote 11. *Santopadre v. Pelican Homestead & Sav. Ass'n, 937 F.2d 268, 273 (5th Cir. 1991)* .

(n13)Footnote 12. *Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir. 1992)* .

(n14)Footnote 13. *Adolph Coors Co. v. Commissioner, 519 F.2d 1280, 1283 (10th Cir. 1975)* , *cert. denied, 423 U.S. 1087 (1975)* .

(n15)Footnote 14. *Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978)* .

(n16)Footnote 15. *Otherson v. Department of Justice, 711 F.2d 267, 274 (D.C. Cir. 1983)* .

(n17)Footnote 16. *GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1213 (S.D.N.Y. 1981)* .

(n18)Footnote 17. *Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383 (9th Cir. 1978)* .

(n19)Footnote 18. *Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979)* .

(n20)Footnote 19. *See* [i], *above*.

(n21)Footnote 20. *Gall v. South Branch Nat'l Bank of S.D., 783 F.2d 125, 127 (8th Cir. 1986)* .

(n22)Footnote 21. *Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987)* .

(n23)Footnote 22. *People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 178 (7th Cir. 1995)* .

(n24)Footnote 23. *See* [i], *above*.

(n25)Footnote 24. *Franco v. Selective Ins. Co., 184 F.3d 4, 9-10 (1st Cir. 1999)* .

(n26)Footnote 25. *Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987)* .

(n27)Footnote 26. *Ewart v. Y & A Group (In re Y & A Group Sec. Litig.), 38 F.3d 380, 383 (8th Cir. 1994)* .

(n28)Footnote 27. *Balbirer v. Austin, 790 F.2d 1524, 1528 (11th Cir. 1986)* .

(n29)Footnote 28. *Scripps Clinic and Research Found. v. Baxter Travenol, 729 F. Supp. 1473, 1475 (D. Del. 1990)* .

(n30)Footnote 29. *Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 712 (Fed. Cir. 1983)* .

(n31)Footnote 30. *Jarvis v. Nobel/Sysco Food Serv. Co., 985 F.2d 1419, 1425 (10th Cir. 1993)* .

(n32)Footnote 31. *United States v. Ringley, 750 F.Supp. 750, 758-759 (W.D. Va. 1990)* ; *see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)* (noting that requirement that issue must be actually litigated and decided applies in default judgment cases).

(n33)Footnote 32. *See Barber v. International Bhd. Of Boilermakers, Dist. Lodge No. 57, 778 F.2d 750, 757 (11th Cir. 1985)* .

(n34)Footnote 33. *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (defendant may take default and then challenge judgment on jurisdictional grounds); *see, e.g., Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210, 215 (3rd Cir. 1997)* .

(n35)Footnote 34. *Rally Hill Prods., Inc. v. Bursack (In re Bursack), 65 F.3d 51, 55 (6th Cir. 1995)* ; *Rountrey v. Lee (In re Lee), 90 B.R. 202, 206 (Bankr. E.D. Va. 1988)* .

(n36)Footnote 35. *In re Duncan, 713 F.2d 538, 544 (9th Cir. 1983)* .

(n37)Footnote 36. *Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 336-337 n.8 (9th Cir. 1990)* (dismissal for failure to exhaust administrative remedies did not have issue preclusive effect because earlier case was dismissed and issue was never decided); *St. Vincent's Hosp. v. Division of Human Rights, 553 F. Supp. 375, 379 (S.D.N.Y. 1982)* (when plaintiff requested dismissal with prejudice of state and federal employment discrimination claims in state suit removed to federal court, dismissal did not have issue preclusive effect on state administrative proceeding investigating same issues).

(n38)Footnote 37. *Kairys v. INS, 981 F.2d 937, 941 (7th Cir. 1992)* , *cert. denied, 507 U.S. 1024 (1993)* (most factual determinations are based on admissions or stipulations).

(n39)Footnote 1. *Jim Beam Brands Co. v. Beamish & Crawford Ltd., 937 F.2d 729, 734 (2d Cir. 1991)* , *cert. denied, 502 U.S. 1094 (1991)* .

(n40)Footnote 2. *Haring v. Prosise, 462 U.S. 306, 315, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983)* (issue has preclusive effect only if decision or verdict rests on its determination with regard to those matters in issue or points controverted in first proceeding); *Haberer v. Woodbury County, 188 F.3d 957, 961 (8th Cir. 1999)* (issue has preclusive effect only if particularly put in issue in prior proceeding and directly determined by court of competent jurisdiction as ground of recovery); *In re Freeman, 30 F.3d 1459, 1466 (Fed. Cir. 1994)* (requirement that issue have been actually decided is satisfied if parties to original action litigated issue and trier of fact decided issue).

(n41)Footnote 3. *Del Mar Avionics, Inc. v. Quinton Instrument Co., 836 F.2d 1320, 1324 (Fed. Cir. 1987)* .

(n42)Footnote 4. *Connors v. Tanoma Mining Co., 953 F.2d 682, 684 (D.C. Cir. 1992)* (party did not meet burden of showing that court of appeals actually decided issue in previous case that opposition was raising in present case).

(n43)Footnote 5. *Truck Ins. Exch. v. Ashland Oil, Inc., 951 F.2d 787, 792-793 (7th Cir. 1992)* ; *see Continental Can Co. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979)* (issue was actually litigated despite imbalance in quantity and quality of evidence introduced).

(n44)Footnote 6. *Matter of Troy Dodson Constr. Co., 993 F.2d 1211, 1214 (5th Cir. 1993)* .

(n45)Footnote 7. *Barnes v. Hodel, 819 F.2d 250, 252 (9th Cir. 1987)* , *cert. denied, 484 U.S. 1005 (1987)* .

(n46)Footnote 8. *Connors v. Tanoma Mining Co., 953 F.2d 682, 684-685 (D.C. Cir. 1992)* (basis of state court decision unclear).

(n47)Footnote 9. *Tutt v. Doby, 459 F.2d 1195, 1198 (D.C. Cir. 1972)* (court was without jurisdiction to enter

judgment for landlord for amount of rent due; therefore amount of rent due was not before court and not "actually decided").

(n48)Footnote 10. *Stoehr v. Mohamed Bin Bander Mohamed Bin Abdul Rahman Al Saud, 244 F.3d 206, 208 (1st Cir. 2001)* .

(n49)Footnote 11. *Church of Scientology Int'l v. Kolts, 846 F. Supp. 873, 885 n.9 (D.C. Cal. 1994)* (absence of due process violation was inferred from denial of motion for recusal).

(n50)Footnote 12. *Grubb v. Public Utilities Com., 281 U.S. 470, 477-478, 50 S. Ct. 374, 74 L. Ed. 972 (1930)* (constitutional validity of prior court order was litigated and necessarily resolved by implication).

(n51)Footnote 13. *Lary v. Ansari, 817 F.2d 1521, 1524-1525 (2d Cir. 1987)* , *cert. denied, 484 U.S. 964 (1987)* (if general verdict was rendered in prior action, it may be necessary in present action to determine certain issue).

(n52)Footnote 14. *See, e.g., GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1214 (S.D.N.Y. 1981)* .

(n53)Footnote 15. *Fed. R. Civ. P. 49*; *see Sea-Land Servs. v. Gaudet, 414 U.S. 573, 592 n.30, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974)* .

(n54)Footnote 16. *GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1214 (S.D.N.Y. 1981)* .

(n55)Footnote 17. *Biggins v. Hazen Paper Co., 111 F.3d 205, 210 (1st Cir. 1997)* (special verdict form and reasonable inference indicated facts that were determined by jury).

(n56)Footnote 18. *Harary v. Blumenthal, 555 F.2d 1113, 1116-1117 (2d Cir. 1977)* (question of entrapment was not necessarily determined against government because of compromise verdict).

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
E. ISSUE PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure § 30.74

§ 30.74 Full and Fair Opportunity to Litigate Requirementn*

[1] Party Has Right to Full and Fair Litigation

The determination of an issue may have issue preclusive effect in a later proceeding only if the earlier proceeding afforded the party against whom issue preclusion is asserted a hearing on that issue that complies with due process. n1 For example, the party against whom issue preclusion is invoked must have been fully represented in the prior action. n2

A right, question, or fact distinctly put in issue and directly determined as a ground of recovery by a court of competent jurisdiction precludes a party or the party's privy from relitigating the issue in a subsequent action. Therefore, the doctrine of issue preclusion recognizes that a person may not be bound by a judgment unless the person has had reasonable notice of the claim and an opportunity to be heard in opposition to that claim. n3 The rationale for this rule is that because claim preclusion denies a nonparty its day in court in the second proceeding the party must have had due process protection in the first proceeding. n4 Once a party is afforded a hearing on an issue that comports with due process, a court will make additional inquiry into a hearing's fairness for purposes of issue preclusion only in cases in which fairness concerns are pronounced, on the rationale that if the operation of issue preclusion always necessitated a full blown inquiry into fairness of prior proceedings, the value of preclusion would be greatly diminished, in that it would be more time consuming to litigate the quality of the first litigation than to relitigate the issues themselves. n5

[2] Factors Considered

A court may refuse to apply issue preclusion on the grounds of unfairness when any of the following factors exists: n1

1. The proceedings that form the basis for the issue preclusion assertion involve different forums that afforded litigants disparate measures of procedural protection. n2

2. The prevailing party concealed material information in the first proceeding. n3

3. The issue was not patently relevant to the initial proceeding; therefore, the party that is the subject of

the current preclusion assertion had no incentive to litigate vigorously the question in the first proceeding. n4

4. The losing party clearly lacked an incentive to litigate the point in the first trial, but the stakes of the second trial are of a vastly greater magnitude. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.04[1] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Avitia v. Metropolitan Club of Chicago, 924 F.2d 689, 691 (7th Cir. 1991)* .

(n3)Footnote 2. *Thomas v. GSA, 794 F.2d 661, 664 (Fed. Cir. 1986)* .

(n4)Footnote 3. *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982)* .

(n5)Footnote 4. *Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)* .

(n6)Footnote 5. *Avitia v. Metropolitan Club of Chicago, 924 F.2d 689, 691 (7th Cir. 1991)* .

(n7)Footnote 1. *Avitia v. Metropolitan Club of Chicago, 924 F.2d 689, 691 (7th Cir. 1991)* .

(n8)Footnote 2. *See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 n.15, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* .

(n9)Footnote 3. *Cf. Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1284 (Fed. Cir. 2000)* , *cert. denied, 532 U.S. 904 (2001)* (concealing material evidence in proceeding deprives opposition of fair trial).

(n10)Footnote 4. *Cohen v. Bucci, 905 F.2d 1111, 1112 (7th Cir. 1990)* .

(n11)Footnote 5. *Zip Dee, Inc. v. Dometic Corp., 905 F. Supp. 535, 538 (N.D. Ill. 1995)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.75

§ 30.75 Necessity of Determination of Issuen*

[1] Statement of Requirement

Before a court may apply issue preclusion, the party asserting the doctrine must show that the decision of the issue was necessary to a judgment reached on the merits in the prior litigation. n1 In other words, the issue under consideration must have been essential to the decision in the prior proceeding for issue preclusion to apply in the second proceeding. n2 Or stated conversely, relitigation is allowed if the determination of the issue in the first proceeding was not necessary to the judgment in the first proceeding. n3

When the jury or the court makes findings of fact on an issue, but the judgment is not dependent on those findings, the findings on the issue are not conclusive between the parties in a subsequent action based on a different cause of action. n4 In some instances, an issue may be subsumed in an issue that was explicitly determined in the first proceeding. n5 In order for a determination of fact subsumed in an earlier judgment to be preclusive in a later action, the determination of that issue must also have been necessary to the judgment. n6 The purpose of the "necessarily decided" requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation. n7

The circuit courts are not settled on the issue preclusive effects of multiple, alternative grounds for the decision in the first case. Some circuits hold that each alternative ground is deemed necessary for purposes of establishing issue preclusion unless the appellate court affirms on only one ground, in which case only that ground is given preclusive effect, n8 while others hold that neither ground is "necessary" unless an appeal is taken on that ground and the appellate court affirms. n9

[2] Determination of Necessity

To determine which issues were necessarily determined by the judgment in a prior proceeding, the court in the second proceeding should consider any applicable matters in addition to the judgment itself, including the pleadings, the evidence, and the record in the prior proceeding. n1 If the rendering court made no express findings on issues raised by the pleadings or the evidence, the court may infer that in the prior action a determination appropriate to the judgment

rendered was made as to each issue that was so raised, and the determination of which was necessary to support the judgment. n2

The Supreme Court has stated that when a court is determining whether to give issue preclusive effect to a prior adjudication which resulted in a jury verdict, the court should consider the record of a prior proceeding, the pleadings, the evidence, the charge, and any other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to preclude from consideration. n3 Thus, a court considering a prior general verdict may determine whether the jury necessarily decided a central issue by evaluating what was "logically and practically" a necessary component of the verdict, based on the entire record in the prior case. n4

[3] Issues Not Necessary for Prior Judgment

Courts have consistently found that determinations of several types of issues are not necessary to judgments. These determinations are listed here:

1. Inconsistent determinations. When there are multiple, irreconcilable determinations that result in an inconsistent determination with regard to an issue, the determinations do not have issue preclusive effect. n1 When two proceedings have resulted in inconsistent final judgments of the same issue, the general rule is that the later, not the earlier, judgment is entitled to preclusive effect. n2

2. Unclear determinations. When the record is so unclear or vague that it is not possible to ascertain whether the resolution of substantive issues was necessary to reach the decision to dismiss a case, issue preclusion is inapplicable. n3

3. Collateral or incidental determinations. When a court has collaterally or incidentally determined an issue that it would have had no jurisdiction to determine in an action brought directly to determine the issue, the judgment is not conclusive in a subsequent action brought to determine the issue directly. n4 The purpose of the "necessarily decided" requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation. n5

4. Unappealable determinations. Issue preclusion is not applicable, and relitigation of an issue is not precluded, if the party against whom issue preclusion is sought could not as a matter of law have taken an appeal of the judgment in the initial action. n6 The limitation that a preclusive finding must be necessary to support a judgment is explained at least in part by the difficulty of obtaining appellate review of unnecessary findings. The essential concept behind this requirement is that it is unfair to preclude relitigation if the party who would be bound by the prior determination had no opportunity for appellate review in the first case. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.03[4] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Benjamin v. Coughlin, 905 F.2d 571, 576 (2d Cir. 1990)* , *cert. denied, 498 U.S. 951 (1990)* .

(n3)Footnote 2. *Yates v. United States, 354 U.S. 298, 336, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)* ; *see Haberer v. Woodbury County, 188 F.3d 957, 961 (8th Cir. 1999)* (determination of issue must be essential to judgment in first

proceeding to give issue preclusive effect in second).

(n4)Footnote 3. *Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 n.2 (9th Cir. 1979)* .

(n5)Footnote 4. *Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979)* .

(n6)Footnote 5. *National Farmers Union Standard Ins. Co. v. Morgan, 966 F.2d 1250, 1253 (8th Cir. 1992)* .

(n7)Footnote 6. *McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C. Cir. 1986)* .

(n8)Footnote 7. *In re Freeman, 30 F.3d 1459, 1466 (Fed. Cir. 1994)* .

(n9)Footnote 8. *Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986)* (when court decides case on two grounds, each has preclusive effect).

(n10)Footnote 9. *Ritter v. Mount St. Mary's College, 814 F.2d 986, 993-994 (4th Cir. 1987)* .

(n11)Footnote 1. *Sullivan v. Gagnier, 225 F.3d 161, 166 (2d Cir. 2000)* .

(n12)Footnote 2. *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n, 804 F.2d 390, 395 (7th Cir. 1986)* .

(n13)Footnote 3. *Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970)* .

(n14)Footnote 4. *Hoult v. Hoult, 157 F.3d 29, 32 (1st Cir. 1998)* (record of testimony and jury arguments in prior battery case established that implicit jury finding of rape was necessary component of general verdict sufficient to preclude relitigation of that issue in subsequent defamation case).

(n15)Footnote 1. *Standefer v. United States, 447 U.S. 10, 22-23 n.17, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)* .

(n16)Footnote 2. *Metromedia Co. v. Fugazy, 983 F.2d 350, 366 (2d Cir. 1992)* .

(n17)Footnote 3. *Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 30 (2d Cir. 1986)* .

(n18)Footnote 4. *Tutt v. Doby, 459 F.2d 1195, 1198 (D.C. Cir. 1972)* .

(n19)Footnote 5. *In re Freeman, 30 F.3d 1459, 1466 (Fed. Cir. 1994)* .

(n20)Footnote 6. *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993)* .

(n21)Footnote 7. *Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.76

§ 30.76 Finality of Judgment in First Proceedingn*

[1] Requirement of Final Judgment

Issue preclusion is applicable only if the judgment or decision necessarily deciding the issue in the first proceeding was "final." n1 However, finality for purposes of issue preclusion is *not* synonymous with finality for purposes of the statutory appealability of a judgment. Thus, there is no requirement that the judgment ends the litigation and leaves nothing for the court to do but execute the judgment. n2 Rather, for purposes of issue preclusion, the term "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to have conclusive effect. n3 Factors to consider in determining whether a decision was adequately firm include whether: the parties were completely heard, the court supported its decision with a reasoned opinion, and the decision was subject to appeal. n4

For example, in the context of a declaratory judgment action, once the trial court has ruled on the issues submitted to it, either granting or denying declaratory relief, the court's grant or denial is deemed final for issue-preclusion purposes. The court's express refusal to decide certain issues does not deprive the declaratory judgment of finality, because the court in a declaratory relief action has discretion to refuse to decide any or all issues. n5 On the other hand, a magistrate judge's order does not qualify as a final judgment sufficient to have issue preclusive effect, because a magistrate judge's order has not been fully litigated and becomes final only if the district court makes it final. n6 A judgment loses its issue-preclusive effect when it is reversed and remanded on appeal. n7

[2] Finality of Justiciability Determinations

If a court enters a final judgment dismissing a claim for lack of jurisdiction or lack of venue, the judgment is not claim preclusive in that a party may subsequently bring the claim in a court of competent jurisdiction or proper venue. n1 However, such a judgment is considered issue preclusive, and bars relitigation of the issues actually litigated and necessarily decided in the judgment. n2 Thus, a dismissal for lack of personal jurisdiction precludes subsequent litigation of issues necessarily decided by the court in dismissing the first action. n3 Although dismissal of a complaint for lack of jurisdiction does not adjudicate the merits and therefore may not be given claim preclusive effect as to the claim that was asserted but dismissed, it does adjudicate the court's jurisdiction, and if a second complaint is filed the

court may not reconsider the same jurisdictional issue. n4

Issue preclusion also applies to standing determinations. When a prior action has determined that a plaintiff lacks standing to bring a particular claim, the plaintiff should be bound by the prior determination of the issue in a subsequent action in which the same standing issue arises. The treatment of standing in this regard is similar to that afforded jurisdictional issues. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 132.03[5] (Matthew Bender 3d ed.).

(n2)Footnote 1. *Kosinski v. Comm'r, 541 F.3d 671, 676 (6th Cir. 2008)* ; *Abbott Labs. v. Andrx Pharms., Inc., 473 F.3d 1196, 1204 (Fed. Cir. 2007)* .

(n3)Footnote 2. *Metromedia Co. v. Fugazy, 983 F.2d 350, 366 (2d Cir. 1992)* ; *see 28 U.S.C. § 1291.*

(n4)Footnote 3. *Martin v. DOJ, 488 F.3d 446, 455 (D.C. Cir. 2007)* .

(n5)Footnote 4. *Abbott Labs. v. Andrx Pharms., Inc., 473 F.3d 1196, 1204 (Fed. Cir. 2007)* (preclusion should be refused if decision in prior proceeding was merely tentative.

(n6)Footnote 5. *Henglein v. Colt Indus., 260 F.3d 201, 210-211 (3d Cir. 2001)* .

(n7)Footnote 6. *Stripling v. Jordan Prod. Co., 234 F.3d 863, 868 (5th Cir. 2000)* .

(n8)Footnote 7. *Kosinski v. Comm'r, 541 F.3d 671, 676 (6th Cir. 2008)* ; *P&G v. Amway Corp., 242 F.3d 539, 546 (5th Cir. 2001)* .

(n9)Footnote 1. *See Haywood v. Drown, ___ U.S. ___, 129 S. Ct. 2108, 173 L. Ed. 2d 920, 947 (2009)* ; *Coors Brewing Co. v. Mendez Torres, 562 F.3d 3, 9 (1st Cir. 2009)* .

(n10)Footnote 2. *Nunes v. Ashcroft, 375 F.3d 805, 809-810 (9th Cir. 2004)* ; *Muniz Cortes v. Intermedics, Inc., 229 F.3d 12, 14-15 (1st Cir. 2000)* .

(n11)Footnote 3. *Commercial Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1208-1212 (10th Cir. 2001)* .

(n12)Footnote 4. *North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 432-433 (11th Cir. 1993)* .

(n13)Footnote 5. *McCarney v. Ford Motor Co., 657 F.2d 230, 232-234 n.65 (8th Cir. 1981)* (standing determination does not reach merits, but involves questions of justiciability and is quasi-jurisdictional in nature).

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3-30 Moore's Manual--Federal Practice and Procedure § 30.77

§ 30.77 Procedural Considerations Regarding Issue Preclusionn*

[1] Party Considerations

[a] Requirement of Privity

Two of the requirements in the four-part test for issue preclusion involve parties to the prior and current proceeding. Thus, the party against whom the doctrine is invoked must have been a party to the prior adjudication or in privity with such a party and the party against whom the doctrine is raised must have had a full and fair opportunity to litigate the issue in the prior action. n1 A party in the second proceeding is in "privity" with a party in the first proceeding if after rendition of the prior judgment, he or she has acquired an interest in the subject matter affected by the judgment through or under one of the initial parties, as by inheritance, succession, or purchase. n2 A judgment in a first proceeding has preclusive effect in a later proceeding only if in the first proceeding the party against whom issue preclusion is asserted actually, fully, and fairly litigated the issue. n3

Based on these two party-related doctrines, the Supreme Court has stated that the doctrine of issue preclusion is generally not applicable to nonparties, and stated that the doctrine should be narrowly applied to nonparties. n4 However, the Court has stated the rule against nonparty preclusion is subject to exceptions, and recognized that the exceptions can be grouped into six nonexhaustive categories. Thus, nonparty preclusion applies in the following limited circumstances: n5

1. A nonparty that has agreed to be bound by the determination of issues in an action between others is bound by the terms of that agreement.

2. There is a pre existing substantive legal relationship between the nonparty and a party to the prior proceeding judgment.

3. In certain limited circumstances, a nonparty may be bound by a judgment because the nonparty was adequately represented by someone with the identical interests who was a party to the prior proceedings. These could include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries.

4. A nonparty is bound by a judgment if the nonparty assumed control over the litigation in the prior proceeding in which that judgment was rendered.

5. Preclusion applies when a nonparty who did not participate in the first proceeding later brings suit as the designated representative of a person who was a party to the first proceeding.

6. Nonparty preclusion may apply under a special statutory scheme if the scheme is otherwise consistent with due process, such as in bankruptcy and probate proceedings.

[b] Virtual Representation

The Supreme Court has expressly rejected the "virtual representation" theory, which some lower courts had used to provide for nonparty preclusion for judgments rendered by federal courts in federal question cases. Under that rejected theory, courts had allowed nonparty preclusion in certain cases when there had been "adequate" representation of the interests of the nonparty in the previous proceeding. In rejecting "virtual representation" as a exception to the general rule against nonparty preclusion, the Supreme Court stated that, because of the fundamental general rule against nonparty preclusion, the determination of nonparty preclusion should be governed by consideration of six discrete categories of exception to the general rule that were delineated by the court. n6

[c] Class Actions

The doctrine of issue preclusion applies to class actions, including the requirements for nonparty preclusion. However, the Supreme Court has stated that, in the class action context, the requirements and limitations of adequate representation are implemented by the procedural safeguards of *Federal Rule of Civil Procedure 23* in a properly conducted class action. Otherwise, a party's representation of a nonparty is adequate to impose nonparty preclusion only if, at a minimum: (1) the interests of the nonparty and his or her representative are aligned, and (2) either the party understood herself or himself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty; additionally, (3) adequate representation sometimes requires notice of the original suit to the persons alleged to have been represented. n7

If both the prior and subsequent lawsuits involve class plaintiffs, the question regarding nonparty preclusion is whether the two classes are substantially the same. If the composition of the classes differ, then issue preclusion does not prevent the new class from relitigating the common issue. n8 In some cases, the question as to whether the composition of the two classes is substantially the same may be a close one. Minor differences in class membership do not justify relitigation of the same issue, especially when the nature of the two classes' claims are closely related. As the differences in class membership grow more significant, the courts should look to those subgroups of the class in the subsequent action to determine whether they were adequately represented, such that their interests were fully and fairly considered in the prior action. n9

[2] Burden Considerations

[a] Burden of Asserting Issue Preclusion

The party asserting issue preclusion has the burden of showing with certainty what was determined by the prior judgment. n1 It is generally insufficient that the party introduce the decision of the prior court. Rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to ascertain the exact issues previously litigated. n2 On the other hand, the burden to show that there was no full and fair opportunity in a prior litigation rests on the party opposing issue preclusion. n3

[b] Burdens Affecting Application of Issue Preclusion

As a general rule, issue preclusion may be defeated by shifts in the burden of persuasion or proof or by changes in the degree of persuasion or proof required in the prior proceeding and the subsequent proceeding. n4 Thus, different standards of proof may make the doctrine of issue preclusion inapplicable in a subsequent case even between the same parties. n5 On the other hand, a final criminal judgment may have issue preclusive effect in a subsequent civil suit involving an identical issue. When a civil trial follows criminal proceedings that were based on the same facts, a different cause of action is involved, and the doctrine of issue preclusion rather than that of claim preclusion may apply. n6

Issue preclusion generally does not apply when the prior action involved a different, more rigorous, standard of proof. n7 In particular, issue preclusion does not apply if the party against whom preclusion is sought faced a significantly greater burden of persuasion in the first action compared with the second. n8 Conversely, issue preclusion does not apply when the party seeking to benefit from preclusion has a significantly heavier burden in the subsequent action than in the prior action. n9

[3] Issue Preclusion Must be Raised as Affirmative Defense

Under the Federal Rules of Civil Procedure, issue preclusion is an affirmative defense n1 that must be raised in the answer or at the first opportunity because the defense may be waived. n2 The purpose of this pleading requirement is to give the opposing party notice and a chance to argue why the imposition of issue preclusion would be inappropriate. n3 A party may raise an issue preclusion defense by motion rather than by answer if the defense's existence can be judged on the face of the complaint. n4

A party that intends to apply issue preclusion should raise the doctrine before trial if possible. n5 A party that is not aware of the prior determination of the issue before trial should raise the doctrine as soon as possible and may do so in an amended pleading under Rule 15(a), which allows a party to liberally amend before trial, n6 or under Rule 15(b), which allows a party to amend to conform to the evidence when the issues not raised by the pleadings are tried by express or implied consent of the parties. n7 The court may also allow issue preclusion to be raised by motion to dismiss. n8

[4] Issue Preclusion May be Raised by Summary Judgment Motion

A party may raise issue preclusion by a motion for summary judgment. n1 A determination made in a prior judgment is admissible at summary judgment because it is "a thing decided" and therefore conclusively established by the doctrine of issue preclusion. n2 Issue preclusion is properly raised on summary judgment when all the requirements of both issue preclusion and procedure for summary judgment are met, for example, when the party against whom issue preclusion is asserted had an adequate opportunity to respond to the motion. n3 When summary judgment is requested, the defendant raising the issue of issue preclusion has the burden of establishing it. n4

[5] Preclusive Effect of Administrative Proceedings

Issues litigated and decided in a prior administrative proceeding may have issue preclusive effect on issues asserted in a subsequent judicial action. n1 Provided a state administrative proceeding meets the minimum requirements discussed below, federal courts must accord the state administrative adjudications of legal and factual issues the same issue preclusive effect that such adjudications would receive in the state's courts. n2 The requirements for claim preclusion for administrative proceedings are virtually identical to those for a judgment in a civil action. Thus, if an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, issue preclusion will apply to preclude relitigation of fact issues provided that: n3

1. There was identity of issues.

2. The issues to be precluded were actually litigated and actually determined in the administrative proceeding.

3. The findings on the issues were necessary to the administrative decision.

4. There was identity of the parties or their privies.

5. The parties had a full and fair opportunity to litigate the issues in the administrative proceeding.

[6] Appeal

[a] Raising Issue Preclusion on Appeal

Most appellate courts have generally declined to allow a party to raise issue preclusion for the first time on appeal. n1 However, one circuit has allowed a party to raise issue preclusion for the first time on appeal when the issue related solely to the effect of an unchallenged judgment obtained against one defendant on the plaintiff's right to appeal judgments in favor of other defendants. n2 Furthermore, an appellate court has discretion to raise the doctrine of issue preclusion on its own initiative. n3

[b] Standard of Review for Issue Preclusion Determinations

When an appellate court reviews a trial court's determination that the prerequisites for issue preclusion have been met, that determination is treated as a mixed question of law and fact and is subject to de novo review on appeal. n4 A determination of whether to grant issue preclusive effect to a prior adjudication is reviewed under the abuse of discretion standard. n5

[c] Preclusive Effect of Appellate Decision

When an appellate court has decided a specific issue, the doctrine of issue preclusion generally prevents relitigation of that issue. n6 This principle applies even if the appellate court's finding is made in a summary procedure in which no testimony is taken and no cross examination is permitted. For example, if an appellate court has imposed sanctions on a party based on a summary finding that the party acted in bad faith, that party may not relitigate the question of bad faith when the opposing party files a subsequent suit for damages arising out of the bad faith conduct. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 *Moore's Federal Practice*, §§ 132.02, 132.04, 132.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See § 30.71.*

(n3)Footnote 2. *Haberer v. Woodbury County, 188 F.3d 957, 962 (8th Cir. 1999)* .

(n4)Footnote 3. *Killeen v. OPM, 558 F.3d 1318, 1323 (Fed. Cir. 2009)* .

(n5)Footnote 4. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168 (2008)* (general rule is that person is not bound by judgment in personam based on litigation in which person is not designated as party and has

not been made party by service of process).

(n6)Footnote 5. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168-170 (2008)* .

(n7)Footnote 6. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 172 (2008)* ; *see* [a], *above* (listing of six exceptions).

(n8)Footnote 7. *Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 168, 173 (2008)* .

(n9)Footnote 8. *Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1355 (2d Cir. 1992)* ; *see Coleman v. GM Acceptance Corp., 220 F.R.D. 64, 81 (M.D. Tenn. 2004)* .

(n10)Footnote 9. *Richards v. Jefferson County, 517 U.S. 793, 800-801, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)* (because of due process constraints, judgment may bind only parties to litigation and those represented by parties to litigation, even if nonparties share essentially identical interests with those who were joined as parties).

(n11)Footnote 1. *Kulak v. City of New York, 88 F.3d 63, 72 (2d Cir. 1996)* (burden of showing that issues are identical and were necessarily decided in prior proceeding rests with party seeking to apply issue preclusion).

(n12)Footnote 2. *Gruntal & Co. v. Steinberg, 854 F. Supp. 324, 337 (D.N.J. 1994)* , *aff'd on other grounds, 46 F.3d 1116 (3d Cir. 1994)* .

(n13)Footnote 3. *Kulak v. City of New York, 88 F.3d 63, 72 (2d Cir. 1996)* (issue preclusion does not block plaintiff's claims if plaintiff can show that plaintiff did not have a full and fair opportunity to litigate issues in prior proceeding).

(n14)Footnote 4. *Dias v. Elique, 436 F.3d 1125, 1129 (9th Cir. 2006)* (by contrast, claim preclusion not affected by such shifts); *Cobb v. Pozzi, 363 F.3d 89, 114 (2d Cir. 2004)* (party's success in earlier proceeding where it faced lower burden of proof does not mean that, against higher burden of proof in subsequent proceeding, that party would achieve same result).

(n15)Footnote 5. *Clark v. Bear Stearns & Co., 966 F.2d 1318, 1322 (9th Cir. 1992)* (clear and convincing evidence standard for state law fraud was more stringent than preponderance of evidence standard applicable to fraud claim under federal law).

(n16)Footnote 6. *Neaderland v. Commissioner, 424 F.2d 639, 641-642 (2d Cir.1970)* .

(n17)Footnote 7. *SEC v. Ridenour, 913 F.2d 515, 518 (8th Cir. 1990)* .

(n18)Footnote 8. *Newport News Shipbuilding & Dry Dock Co. v. Director, 583 F.2d 1273, 1279 (4th Cir. 1978)* .

(n19)Footnote 9. *F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422, 444 (N.D. Ohio 1984)* (issue preclusion did not apply, and antitrust plaintiff was not estopped from challenging decision regarding inadequacy of its bid, in view of differences in burden of persuasion).

(n20)Footnote 1. *Fed. R. Civ. P. 8(c)*.

(n21)Footnote 2. *State of Arizona v. State of California, 530 U.S. 392, 409, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)* (issue preclusion is ordinarily treated as affirmative defense that is lost if not timely raised); *Federal Ins. Co. v. United States, 618 F.2d 661, 663 (10th Cir. 1980)* (government abandoned reliance on res judicata or collateral estoppel when it failed to advance these issues in any way).

(n22)Footnote 3. *Blonder-Tongue Lab., Inc. v. University of Ill., 402 U.S. 313, 350, 91 S. Ct. 1434, 28 L. Ed. 2d*

788 (1971) .

(n23)Footnote 4. *Concordia v. Bendekovic, 693 F.2d 1073, 1075 & n.2 (11th Cir. 1982)* .

(n24)Footnote 5. *Federal Ins. Co. v. United States, 618 F.2d 661, 663 (10th Cir. 1980)* .

(n25)Footnote 6. *Fed. R. Civ. P. 15*; *see Federal Ins. Co. v. United States, 618 F.2d 661, 663 (10th Cir. 1980)* .

(n26)Footnote 7. *Fed. R. Civ. P. 15(b)*; *see Radio Corp. of Am. v. Radio Station KYFM, 424 F.2d 14, 17 n.3 (10th Cir. 1970)* (rule is applicable only when it clearly appears from record that issue not raised in pleadings and not preserved in pretrial order has in fact been tried and that this procedure has been authorized by express or implied consent of the parties).

(n27)Footnote 8. *Fed. R. Civ. P. 12(b)(6)*; *see Terrell v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989)* (motion to dismiss is sufficient to raise defense of issue preclusion).

(n28)Footnote 1. *Stoebner v. Parry, Murray, Ward & Moxley, 91 F.3d 1091, 1093 (8th Cir. 1996)* (issue preclusion defense may be raised by summary judgment motion for first time).

(n29)Footnote 2. United States v. "Monkey," *United States v. "Monkey", 725 F.2d 1007, 1011 n.4 (5th Cir. 1984)* .

(n30)Footnote 3. *Tyler v. Harper, 744 F.2d 653, 658 (8th Cir. 1984)* , *cert. denied, 470 U.S. 1057 (1984)* .

(n31)Footnote 4. *Havoco of Am., Ltd. v. Freeman, Atkins & Coleman, Ltd., 58 F.3d 303, 308 (7th Cir. 1995)* .

(n32)Footnote 1. *Electric Workers Local 58 Pension Trust Fund v. Gary's Elec. Serv. Co., 227 F.3d 646, 658-659 (6th Cir. 2000)* (decision by National Labor Relations Board in proceeding under National Labor Relations Act preclude relitigation of same issues in subsequent civil action brought under Labor Management Reporting and Disclosure Act).

(n33)Footnote 2. *Skysign Int'l v. City & County of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002)* .

(n34)Footnote 3. *United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)* .

(n35)Footnote 1. *See, e.g., Medtronic, Inc. v. Gibbons, 684 F.2d 565, 569 (8th Cir. 1982)* .

(n36)Footnote 2. *Chew v. Gates, 27 F.3d 1432, 1437 (9th Cir. 1994)* , *cert. denied, 513 U.S. 1148 (1994)* .

(n37)Footnote 3. *Allen v. City of Los Angeles, 92 F.3d 842, 848 n.7 (9th Cir. 1996)* .

(n38)Footnote 4. *Schiro v. Farley, 510 U.S. 222, 232, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)* ; *Town of North Bonneville v. Callaway (Bonneville), 10 F.3d 1505, 1508 (9th Cir. 1993)* .

(n39)Footnote 5. *Plaine v. McCabe, 797 F.2d 713, 718 (9th Cir. 1986)* .

(n40)Footnote 6. *In re Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994)* (patentee was prohibited from relitigating meaning of term decided by appeals court).

(n41)Footnote 7. *Hirschfeld v. Spanakos, 104 F.3d 16, 19-20 (2d Cir. 1997)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
E. ISSUE PRECLUSION

3-30 Moore's Manual--Federal Practice and Procedure §§ 30.78through 30.89

[Reserved]

§§ 30.78[Reserved]

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
F. JUDICIAL ESTOPPEL

3-30 Moore's Manual--Federal Practice and Procedure § 30.90

§ 30.90 Nature of Judicial Estoppeln*

Judicial estoppel is an equitable doctrine which gives the court discretion to reject a claim made by a party in a legal proceeding when that claim is inconsistent with a claim made by that party earlier in the same proceeding or in a previous legal proceeding. n1 Therefore, if a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, the court may reject a later contrary position, even though the party's interests have changed. n2 Judicial estoppel is intended to prevent improper use of the judicial process. Based on its equitable purpose, the court may examine three factors: n3

- The party's later position must be clearly inconsistent with its earlier position.

- The party has succeeded in persuading a court to accept that party's earlier position. If a court in a later proceeding were to accept an inconsistent position, it would create the perception that either the first or the second court was misled.

- If not estopped, the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposition party.

The Supreme court noted that in enumerating these three factors, it was not establishing inflexible prerequisites nor an exhaustive formula, and that additional equitable considerations should be considered to apply equitable estoppel in specific factual contexts. n5-7 Because the doctrine of judicial estoppel is characterized as equitable and discretionary in nature, the standard of review on appeal of decisions regarding the doctrine is abuse of discretion. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial EstoppelPatent LawPreclusionJudicial Estoppel

FOOTNOTES:

(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, §§ 134.30, 134.32 (Matthew Bender 3d ed.).

(n2)Footnote 1. *New Hampshire v. Maine, 532 U.S. 742, 749-752, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* (citing **Moore's Federal Practice;** Supreme Court applied doctrine of judicial estoppel to bar state from adopting boundary dispute assertion contrary to assertion state had successfully maintained in earlier litigation).

(n3)Footnote 2. *Mintze v. Am. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 232 (3d Cir. 2006)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *New Hampshire v. Maine, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* .

(n5)Footnote 5-7. [Reserved.]

(n6)Footnote 8. *Taylor v. Food World, Inc., 133 F.3d 1419, 1422 (11th Cir. 1998)* (circuit court reviews district court's application of judicial estoppel for abuse of discretion).

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PART VIII Limits of Judicial Reconsideration
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3-30 Moore's Manual--Federal Practice and Procedure § 30.91

§ 30.91 Purpose of Judicial Estoppeln*

The primary purposes of judicial estoppel are to prevent improper use of the judicial process and to promote the orderly administration of justice and regard for the respect owed to judicial proceedings. n1 Because the doctrine is equitable in nature, it is applied flexibly, n2 with the intent to achieve substantial justice. n2.1 Judicial estoppel may not be used as a technicality for defendants to undermine potentially meritorious claims, especially when the alleged inconsistency is insignificant and there is no evidence of intent to manipulate the court. Furthermore, judicial estoppel is not intended as a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity. n3 The courts should apply the doctrine of judicial estoppel in a manner that will achieve a resolution that is fair, based on the facts of the particular dispute. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial EstoppelPatent LawPreclusionJudicial Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.31 (Matthew Bender 3d ed.).

(n2)Footnote 1. *New Hampshire v. Maine, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* .

(n3)Footnote 2. *See § 30.92*.

(n4)Footnote 2.1. *See In re Walker, 323 B.R. 188, 195 (S.D. Tex. 2005)* .

(n5)Footnote 3. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996)* (establishing intent of party is required to apply judicial estoppel to party's argument).

(n6)Footnote 4. *Lafleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002)* .

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PART VIII Limits of Judicial Reconsideration
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3-30 Moore's Manual--Federal Practice and Procedure § 30.92

§ 30.92 Factors Considered in Application of Judicial Estoppel in Discretion of Courtn*

[1] Success in Earlier Contention

[a] Requirement of Success

Many courts applying judicial estoppel have held that the contention in the prior proceeding must have been successful. This requirement has also been expressed as "judicial adoption" of the prior inconsistent contention. The requirement that a court must have accepted the party's prior inconsistent contention ensures that judicial estoppel is applied in narrow circumstances. The prior success rule narrows the scope of judicial estoppel to the point at which the necessity of protecting judicial integrity outweighs the ramifications of that protection on the litigant and the judicial system. n1 However, few cases hold categorically that prior judicial success is absolutely required for application of judicial estoppel. Rather most cases say that judicial estoppel is particularly appropriate when the party succeeded in the prior proceeding but do not require that the doctrine may not be applied absent such prior success. n2 Other courts have gone to the extent of holding that judicial estoppel may apply even if the party was not successful in the prior proceeding if the court finds that its integrity was undermined by the party engaging in behavior designed to mislead or manipulate the court. n3

[b] Definition of Success

Success for purposes of judicial estoppel has been defined as some type of judicial adoption of the contention advanced by the party as part of a final disposition. n4 Settlement of a matter has also been held to constitute success for this purpose. n5 On the other hand, some courts have stated that settlement does not imply judicial approval and therefore does not constitute success. n6 A guilty plea does constitute "judicial acceptance" because the plea is reviewed by the court. n7 On the other hand, if a party prevailed at the trial level on the basis of a particular contention but abandoned that contention on appeal, the party is not deemed to have succeeded on that contention because the contention was not adopted by the appellate court in its final disposition of the case. n8

[2] Single Civil Action

All courts that follow the principle of judicial estoppel preclude the assertion of inconsistent contentions within a single civil action. With respect to a subsequent action involving the same parties, some courts allow the assertion of inconsistent contentions in the subsequent action, and such a court's formulation of the judicial estoppel doctrine states that the doctrine precludes parties from making inconsistent contentions in the same litigation. n1 Other courts hold that judicial estoppel applies to preclude inconsistent contentions asserted in the later of multiple civil actions. n2 Courts that apply the doctrine in subsequent actions use the rationale that judicial estoppel is appropriate when incompatible statements have been made in two different cases because inconsistent contentions in different suits are much harder to justify than inconsistent pleading within one suit. n3

Finally, some courts have held that for judicial estoppel to preclude an inconsistent assertion in a second proceeding, the assertion must have been made under oath in the first proceeding. n4

[3] Bad Faith

Some courts hold that judicial estoppel may be used to preclude a contention only if it is shown that the party seeking to assert an inconsistent contention has made the assertion in bad faith. n1 A similar formulation limits the doctrine of judicial estoppel to situations in which the party asserting an inconsistent contention seeks to gain an unfair advantage. n2 Some courts state that this requirement is the most important factor in the determination whether to apply the doctrine. Thus, if bad faith is required, a change in contentions will not give rise to judicial estoppel if the party making the contention can give a reasonable justification. n3

Some courts have held that a mere failure to disclose a claim does not evidence bad faith supporting imposition of judicial estoppel based on the claim, n4 while other courts have applied the doctrine in these circumstances. n5

[4] Other Requirements

One circuit has held that if the circumstances under which the doctrine of judicial estoppel will be applied are not clear, it may still be applied if the opposing party has relied to his or her detriment on the prior inconsistent contention. n1 Other courts hold that reliance by an opposition party in the subsequent action, or harm to that party, is not required for imposition of the doctrine. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial EstoppelPatent LawPreclusionJudicial Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.33 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996)* , *cert. denied, 519 U.S. 1113 (1997)* (prior inconsistent contention must have been accepted by court).

(n3)Footnote 2. *Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 601 n.3 (9th Cir. 1996)* .

(n4)Footnote 3. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)* .

(n5)Footnote 4. *Ahrens v. Perot Sys. Corp., 205 F.3d 831, 835-836 (5th Cir. 2000)* , *cert. denied, 531 U.S. 819 (2000)* .

(n6)Footnote 5. *Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 604 (9th Cir. 1996)* .

(n7)Footnote 6. *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., 44 F.3d 925, 930 (11th Cir. 1995)* , *cert. denied, 516 U.S. 1045 (1996)* .

(n8)Footnote 7. *Lowery v. Stovall, 92 F.3d 219, 225 (4th Cir. 1996)* , *cert. denied, 519 U.S. 1113 (1997)* .

(n9)Footnote 8. *McNamara v. City of Chicago, 138 F.3d 1219, 1225 (7th Cir. 1998)* , *cert. denied, 525 U.S. 981 (1998)* .

(n10)Footnote 1. *Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 605 (9th Cir. 1995)* (noting disagreement among courts on question whether judicial estoppel should be limited to assertion of inconsistent positions within single litigation).

(n11)Footnote 2. *Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982)* (judicial estoppel is appropriate when party takes inconsistent positions).

(n12)Footnote 3. *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990)* .

(n13)Footnote 4. *Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988)* (judicial estoppel is directed against those who would manipulate court system by calculated assertion of divergent sworn positions).

(n14)Footnote 1. *Klein v. Stahl GmbH & Co. Maschinefabrik, 185 F.3d 98, 109-111 (3d Cir. 1999)* (district court may not impose harsh sanction of judicial estoppel unless it finds that party has acted in bad faith; finding of bad faith must be based on more than inconsistency in factual positions asserted by party).

(n15)Footnote 2. *Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996)* , *cert. denied, 519 U.S. 1113 (1997)* .

(n16)Footnote 3. *Morris v. California, 966 F.2d 448, 453-454 (9th Cir. 1991)* , *cert. denied, 506 U.S. 831 (1992)* (change was justified by ineffective assistance of counsel in earlier litigation).

(n17)Footnote 4. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 364 (3d Cir. 1996)* .

(n18)Footnote 5. *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc., 989 F.2d 570, 571 (1st Cir. 1993)* , *cert. denied, 510 U.S. 931 (1993)* (when debtor obtains Chapter 11 bankruptcy relief based on his representations that he had no assets other than those scheduled, debtor is judicially estopped from asserting prepetition claims not disclosed during bankruptcy case).

(n19)Footnote 1. *Young v. United States Dep't of Justice, 882 F.2d 633, 639 (2d Cir. 1989)* .

(n20)Footnote 2. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir. 1996)* (unlike equitable estoppel judicial estoppel does not require that party urging estoppel demonstrate that party believed or relied on oppostion's prior inconsistent contention).

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART I. PRECLUSION PRINCIPLES APPLIED BY FEDERAL COURTS
F. JUDICIAL ESTOPPEL

3-30 Moore's Manual--Federal Practice and Procedure § 30.93

§ 30.93 Procedural Considerations Regarding Judicial Estoppeln*

[1] Court May Apply Doctrine on Its Own Initiative

A court may utilize the doctrine of judicial estoppel without the issue having been raised by a party, because judicial estoppel is discretionary in nature and because its purpose is to protect the courts against fraud and abuse. n1 On the other hand, if a party fails to raise the issue at its first opportunity, the failure may be deemed a waiver. n2 A court may find waiver only when the opposition can demonstrate that the party's failure to raise judicial estoppel at a particular stage of litigation resulted in prejudice to the opposition (the party sought to be estopped). n3

Finally, because the purpose of judicial estoppel is to protect the integrity of the court, a court is not required to accept even a voluntary waiver by a party of the doctrine. The purpose of the doctrine is to protect the judicial system from being plagued with inconsistent arguments, and to discourage the form of fraud that consists of withholding a litigant's best contention in the first of a series of proceedings because it is helpful to an adverse party in that suit, hoping to win that suit on a different contention, and then advancing the inconsistent best contention in a later suit in order to obtain additional relief. Therefore, a court may assert the doctrine on its own initiative regardless of whether any party raises or waives it. n4

[2] Law Applied

Judicial estoppel may arise in a federal diversity or supplemental jurisdiction action governed by the substantive law of a state under the *Erie* doctrine. Consequently, the issue arises of which law should govern the judicial estoppel issue, state law or federal law. Some circuit courts have held that judicial estoppel is a procedural doctrine to be governed by the law of the court in which the matter is pending. n1 Other circuit courts have held that judicial estoppel is substantive and apply state law regarding the doctrine. n2

In addition to the choice of law issue that arises when judicial estoppel is asserted in federal court in connection with a state law claim, there is also a question as to whether state law should apply when the prior inconsistent contention was originally asserted in state court. n3 One circuit has taken the position that the law of the forum in which the prior inconsistent contention was originally asserted should not control in the subsequent action. The court stated that

whether the prior contention was asserted in state or federal proceedings should not be determinative because the integrity problem concerns the court presently confronted with the inconsistent statement; when the prior statement was made, it wasn't inconsistent yet, so the first court is powerless to address the integrity issue. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial EstoppelPatent LawPreclusionJudicial Estoppel

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 134.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991)* , *cert. denied, 506 U.S. 831 (1992)* .

(n3)Footnote 2. *FDIC v. Houde, 90 F.3d 600, 607 (1st Cir. 1996)* (given party's failure to raise matter in timely fashion before district court, and to argue matter on appeal, circuit court regarded doctrine as having been waived).

(n4)Footnote 3. *McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562 (5th Cir. 1998)* .

(n5)Footnote 4. *Bethesda Lutheran Homes & Servs., Inc. v. Born, 238 F.3d 853, 857-858 (7th Cir. 2001)* .

(n6)Footnote 1. *See, e.g., Guinness PLC v. Ward, 955 F.2d 875, 899 n.20 (4th Cir. 1992)* (federal law applies).

(n7)Footnote 2. *In re Osborn, 24 F.3d 1199, 1207* & n.11 (l0th Cir. 1994).

(n8)Footnote 3. *Kale v. Obuchowski, 985 F.2d 360, 361 (7th Cir. 1993)* .

(n9)Footnote 4. *Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 603 (9th Cir. 1996)* .

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3-30 Moore's Manual--Federal Practice and Procedure §§ 30.94through 30.109

[Reserved]

§§ 30.94[Reserved]

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PART VIII Limits of Judicial Reconsideration
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PART II. RECOGNITION OF JUDGMENTS

3-30 Moore's Manual--Federal Practice and Procedure § 30.110

§ 30.110 Requirement of Full Faith & Credit For State & Federal Judgmentsn*

[1] Doctrine Requires Recognition of Judgments

The *Full Faith and Credit Clause of the Constitution*, n1 and its statute of implementation in the United States Code, n2 generally require courts in the United States, both federal and state, to recognize and give effect to valid judgments rendered by all other courts in the United States, both federal and state. n3 The *full faith and credit clause* means that a final judgment in one state, rendered by a federal or state court, which has jurisdiction over the subject matter and persons governed by the judgment, qualifies for recognition by all other federal or state courts throughout the United States. Judgments of courts are thus entitled to nationwide recognition under the full faith and credit doctrine, n4 and that includes the preclusive effects of an adjudication on parties and those "in privity" with the parties: the doctrines of claim preclusion and issue preclusion. n4.1

The United States Supreme Court has emphasized that the full faith and credit doctrine requires recognition of the *judgments* of other jurisdictions in the United States, but not necessarily the *laws* of other jurisdictions. The doctrine does not compel a state to substitute the statutes of other states for its own statues dealing with the particular subject matter, provided that the state is competent to legislate regarding that subject matter. n5

[2] Courts Bound by Doctrine

The full faith and credit doctrine requires recognition and enforcement of judgments in four primary situations:

1. State courts must recognize the judgments of other states. n1

2. State courts must recognize the judgments of federal courts. n2

3. Federal courts must recognize the judgments of other federal courts. n3 Federal courts utilize the doctrines of claim preclusion and issue preclusion, as well as the common law, to analyze the preclusive effect of decisions of other federal courts. n4

4. Federal courts must recognize state court judgments. n4.1 When giving preclusive effect to a state court judgment, a

federal court must apply the issue preclusion rules of that state. Additionally, when a state issue preclusion rule is modeled on federal doctrine, the court may consult federal law for guidance when interpreting the state preclusion rule. n4.2

The full faith and credit doctrine extends to territories in the same manner as if they were states. n5 However, the full faith and credit doctrine does not apply to judgments rendered by the courts of other nations. A different set of principles applies to the recognition and enforcement of foreign judgments, based on the doctrine of comity. n6 For a summary of the recognition of judgments of foreign nations, see *§ 30.115*.

[3] Authentication of State Court Judgments

Through the full faith and credit statute, Congress has provided for the authentication of state court judgments. n1 A person that wants to prove or have admitted a record or judgment of one court in another jurisdiction may authenticate the record or judgment by obtaining the attestation of the clerk, and any seal of the court annexed to the document, and also a certificate of the judge, chief justice, or presiding magistrate that the attestation is in due form. n2 The method of attestation specified in the full faith and credit statute is not exclusive; for example, a person may also authenticate a judgment in accordance with the rules of evidence of the forum court. n2.1 For example, Rule 902(4) of the Federal Rules of Evidence provides that a copy of an official record is self-authenticating if it bears a seal and attesting signature. n3 Once a judicial record or proceeding is authenticated, it has the faith and credit given to the proceeding in every court within the United States as the record or proceeding has by law or usage in the courts of the state from which the record or proceeding is taken. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.01 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *U.S. Const. Art. IV, § 1.*

(n3)Footnote 2. *28 U.S.C. § 1738.*

(n4)Footnote 3. *See Rimes v. Curb Records, Inc., 129 F. Supp. 2d 984, 987 n.15 (N.D. Tex. 2001)* (under full faith and credit statute, federal courts are required to give full effect to final judgments of state courts, subject only to narrowly circumscribed areas of collateral attack).

(n5)Footnote 4. *Baker by Thomas v. GMC, 522 U.S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) .*

(n6)Footnote 4.1. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S. Ct. 1517, 1527, 161 L. Ed. 2d 454 (2005) .*

(n7)Footnote 5. *Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 493-494, 123 S. Ct. 1683, 1687, 155 L. Ed. 2d 702,(2003)*

(N8)Footnote 1. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982) .*

(n9)Footnote 2. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* (while no federal legislation directly addresses claim preclusive effect of federal court judgment in federal question case, states may not give those judgments merely effect they would give their own judgments; rather, state must accord such judgment effect that United States Supreme Court prescribes as matter of federal common law).

(n10)Footnote 3. *Williams v. Ocean Transport Lines, Inc., 425 F.2d 1183, 1189 (3d Cir. 1970)* .

(n11)Footnote 4. *In re Goodman, 25 B.R. 932, 938 (E.D. Ill. 1982)* .

(n12)Footnote 4.1. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S. Ct. 1517, 1527, 161 L. Ed. 2d 454 (2005)* .

(n13)Footnote 4.2. *Raspanti v. Keaty (In re Keaty), 397 F.3d 264, 270-271 (5th Cir. 2005)* (citing **Moore's Federal Practice**).

(n14)Footnote 5. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n15)Footnote 6. *Allstate Ins. Co. v. Hague, 449 U.S. 302, 321 n.4, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* .

(n16)Footnote 1. *See 28 U.S.C. § 1738.*

(n17)Footnote 2. *28 U.S.C. § 1738.*

(n18)Footnote 2.1. *See Opoka v. INS, 94 F.3d 392, 394 (7th Cir. 1996)* (recognizing that court documents from state proceeding may be subject of judicial notice).

(n19)Footnote 3. *Fed. R. Evid. 902(4).*

(n20)Footnote 4. *28 U.S.C. § 1738.*

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3-30 Moore's Manual--Federal Practice and Procedure § 30.111

§ 30.111 State & Federal Court Judgments Have Preclusive Effect of Judgments of Court Where Rendered

The full faith and credit doctrine requires that courts in the United States give the judgments of state and federal courts the same preclusive effect as would the rendering court. n1 The full faith and credit statute, provides that state and federal courts must afford the decisions of judicial proceeding such faith and credit as the decisions have by law or usage in the courts of the state from which the decisions are taken. n2 The following corollaries result from the full faith and credit doctrine:

1. Judgments rendered by a state court must be given the same preclusive effect as the courts of the rendering state would afford them. n3

2. Judgments rendered by a federal court in a federal question case must be afforded the same preclusive effect as the rendering federal court would afford them. n4

3. The preclusive effect of judgments rendered by a federal court hearing a state law claim, pursuant to the federal court's diversity or supplemental jurisdiction, is governed by federal common law. With respect to some questions, such as the effect of a dismissal on statute of limitations grounds, the content of this federal common law must be borrowed from the law of the state in which the federal court sits, except when there is a federal interest in a uniform federal rule. n5

Therefore, the duty to recognize a judgment includes two interrelated components: (1) the granting of preclusive effect, and (2) the enforcement of the judgment. Thus, if the rendering court would grant the judgment claim preclusive effect, n6 the recognizing court must do so. Similarly, if the rendering court would grant the judgment issue preclusive effect, n7 the recognizing court must do so also. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsCivil

ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:

(n1)Footnote 1. *Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984)* .

(n2)Footnote 2. *28 U.S.C. § 1738.*

(n3)Footnote 3. *Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)* .

(n4)Footnote 4. *Heck v. Humphrey, 512 U.S. 477, 488 n.9, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)* .

(n5)Footnote 5. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

(n6)Footnote 6. *See § 30.50* et seq.

(n7)Footnote 7. *See § 30.70* et seq.

(n8)Footnote 8. *See Rimes v. Curb Records, Inc. and Leann Rimes Entertainment, Inc., 129 F. Supp. 2d 984, 986-987 (N.D. Tex. 2001)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.112

§ 30.112 Requirements for Application of Full Faith and Credit Doctrinen*

[1] Finality

For full faith and credit to apply to a judgment, the judgment must be final. n1 Thus, in general, nonfinal judgments are not entitled to full faith and credit. n2 For purposes of full faith and credit, a judgment is "final" if it is conclusive of the entire proceeding before the court. A judgment is final if it has no contingencies and if it represents completion of all steps in the adjudication between the parties short of execution or enforcement. n3 On the other hand, a partial judgment, which is a judgment of less than all of the individual claims or issues between the parties, is not final. n4 Similarly, a judgment that is subject to modification is not final. Examples of nonfinal judgments that are subject to modification include equity decrees or judgments for alimony or child support. n5

Finality of a judgment is determined by the law of the jurisdiction in which the judgment was rendered. n6 Furthermore, although there is some overlap in concepts, the test for finality for purposes of full faith and credit is not equivalent to the test of finality for the purpose of determining appealability under federal law. n7

[2] Validity

For full faith and credit to apply to a judgment, the judgment must be valid; n1 conversly, an invalid judgment is not entitled to full faith and credit. n2 For purposes of full faith and credit, a judgment is "valid" if the judgment is not void, based on: a constitutional infirmity, lack of jurisdiction or power of the rendering court, fraud, or some other fundamental reason. n3 Thus, a judgment is valid if all of the following are true:

1. The judgment was rendered by a court that had proper subject matter and personal or in rem jurisdiction; n4

2. The judgment and proceedings in which it was rendered complied with due process requirements; n5

3. The judgment was rendered pursuant to an exercise of power granted to the court that rendered it; n6 and

4. The judgment was not rendered as a result of extrinsic fraud. n7

Courts sometimes analyze the issue of validity with respect to three categories of judgments: valid, voidable, and void. The use of this terminology is best understood as expressing the courts' conclusions as to whether a judgment is subject to direct or collateral attack. Therefore, a valid judgment is subject to neither direct nor collateral attack and is entitled to full faith and credit. n8 A voidable judgment suffers from a defect subject to direct attack but is not subject to collateral attack and is also entitled to full faith and credit. n9 Void judgments are subject to both direct and collateral attack and are not entitled to full faith and credit. n10 A void judgment is subject to both direct and collateral attack, while a judgment that is merely voidable must be corrected through ordinary appellate or other direct procedures. The bottom line for full faith and credit purposes is to determine first whether the particular defect with the prior judgment is subject to collateral attack; if collateral attack is allowed, then the judgment is not entitled to full faith and credit. n11

[3] Based on Merits

A judgment is entitled to full faith and credit only if the judgment is based on the merits of the claims presented in the proceeding. n1 The relative degree of this requirement varies depending on the specific recognition given to the judgment, as stated in the following list:

1. When the recognition issue is whether the prior judgment is to be enforced by a recognizing court, the requirement that the judgment be on the merits is simply the requirement that the prior adjudication have resulted in an enforceable judgment, such as an award of damages; there is no separate requirement that the judgment be based on a trial on the merits or on summary judgment, in contrast to a default judgment or a judgment entered as a result of sanctions for misconduct. n2

2. When the recognition issue is whether the prior judgment is to be given claim preclusive effect, then "on the merits" means that the judgment must be rendered on consideration of the legal claim, as distinguished from consideration of an objection to subject matter jurisdiction, personal jurisdiction, service of process, venue, or any other ground that is not based on the legal or factual sufficiency of the claim to relief. n3

3. If the question is whether the prior judgment is to be given issue preclusive effect, then "on the merits" means that the issue in the prior case was decided on the legal or factual efficacy of the issue rather than on procedural or technical grounds or by consent. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.04 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Barber v. Barber, 323 U.S. 77, 81, 65 S. Ct. 137, 89 L. Ed. 82 (1944)* (to be entitled to full faith and credit, judgment must be final and not subject to modification).

(n3)Footnote 2. *Aiello v. City of Wilmington, 470 F. Supp. 414, 419 (D. Del. 1979)* , *aff'd on other grounds, 623 F.2d 845 (3d Cir. 1980)* (citing **Moore's Federal Practice** for proposition that principles of collateral estoppel are not applicable to nonfinal orders or judgments).

(n4)Footnote 3. *Stone v. Williams, 970 F.2d 1043, 1055 (2d Cir. 1992)* , *cert. denied, 508 U.S. 906 (1993)* .

(n5)Footnote 4. *FDIC v. McFarland, 243 F.3d 876, 892-893 (5th Cir. 2001)* (although consent judgment ordinarily becomes final on entry, partial consent judgment, covering fewer than all claims and parties in action, does not become final for purposes of registration until either (1) it is certified as final under Rule 54(b) or (2) judgment is entered disposing of remainder of case).

(n6)Footnote 5. *Ingram v. Hayes, 866 F.2d 368, 369 (11th Cir. 1988)* .

(n7)Footnote 6. *See Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 87 (2d Cir. 2000)* ; *Johnson Bros. Wholesale Liquor Co. v. Clemmons, 233 Kan. 405, 661 P.2d 1242, 1245 (1983)* , *cert. denied, 464 U.S. 936 (1983)* .

(n8)Footnote 7. *Hooks v. Hooks, 771 F.2d 935, 948 (6th Cir. 1985)* (finality for full faith and credit purposes is not equivalent to finality for purposes of appeal); *Maner v. Maner, 412 F.2d 449, 451 (5th Cir. 1969)* (pendency of appeal does not necessarily render nonfinal judgment that would otherwise be enforceable under doctrine of full faith and credit).

(n9)Footnote 1. *Shaffer v. Heitner, 433 U.S. 186, 210, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n10)Footnote 2. *Sun Oil Co. v. Wortman, 486 U.S. 717, 730 n.3, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988)* .

(n11)Footnote 3. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* (validity requires that rendering court proceeding provided due process of law under *Fourteenth Amendment*; no court may give effect to constitutionally infirm judgment).

(n12)Footnote 4. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-485, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* .

(n13)Footnote 5. *Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* (validity requires that rendering court proceeding provide due process of law under *Fourteenth Amendment*).

(n14)Footnote 6. *Fall v. Eastin, 215 U.S. 1, 12-13, 30 S. Ct. 3, 54 L. Ed. 65 (1909)* (full faith and credit does not extend jurisdiction of courts of one state to dispose of property in another state).

(n15)Footnote 7. *See Stoll v. Gottlieb, 305 U.S. 165, 172, 59 S. Ct. 134, 83 L. Ed. 104 (1938)* ; *Salvation Army v. Morris, 421 F.2d 805, 807-808 (10th Cir. 1970)* .

(n16)Footnote 8. *Shaffer v. Heitner, 433 U.S. 186, 210, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

(n17)Footnote 9. *Combs v. Chambers, 302 F. Supp. 194, 200 (N.D. Okla. 1969)* (general rule is that judgments of other states are entitled to full faith and credit even if irregular or erroneous).

(n18)Footnote 10. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* .

(n19)Footnote 11. *Sikes v. Global Marine, Inc., 881 F.2d 176, 178 (5th Cir. 1989)* ; *see* See *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* (judgment rendered in violation of due process is void in rendering state and is not entitled to full faith and credit elsewhere).

(n20)Footnote 1. *Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 (6th Cir. 1983)* , *aff'd on other grounds, 470 U.S. 532 (1983)* .

(n21)Footnote 2. *See Underwriters Nat'l Assurance v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982)* .

(n22)Footnote 3. *Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 943 (7th Cir. 1981)* .

(n23)Footnote 4. *See La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 905-907 (7th Cir. 1990)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.113

§ 30.113 Exception to Full Faith and Credit Doctrine for Certain Judgmentsn*

Under the common law, certain types of judgments have been excepted from the full faith and credit requirement and have not been recognized in jurisdictions other than those in which they were rendered. n1 Judgments that are not recognized outside the rendering jurisdiction include penal judgments, n2 and judgments of tribal courts. n3 These exceptions to the requirements of *Full Faith and Credit Clause* are thus extremely limited and may not be expected to be expanded. Although there may be a basis in public policy for these exceptions, the Supreme Court has frequently held that there is no general public policy exception to the requirements of full faith and credit. Indeed, full faith and credit may not be refused on the ground that the judgment of the rendering court is contrary to the public policy of the recognizing jurisdiction. n4 Formerly, judgments for taxes were excepted from the full faith and credit doctrine. However, this former exception has been abolished. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.05 (Matthew Bender 3d ed.).

(n2)Footnote 1. *Anglo-Am. Provision Co. v. Davis Provision Co., 191 U.S. 373, 374, 24 S. Ct. 92, 48 L. Ed. 225 (1903)* .

(n3)Footnote 2. *Huntington v. Attrill, 146 U.S. 657, 686, 13 S. Ct. 224, 36 L. Ed. 1123 (1892)* .

(n4)Footnote 3. *Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997)* , *cert. denied, 523 U.S. 1074 (1998)* (full faith and credit is not extended to tribal judgments by the Constitution or congressional act, and we decline to extend it judicially).

(n5)Footnote 4. *Baker v. GMC, 522 U.S. 222, 233-234, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998)* .

(n6)Footnote 5. *Her Majesty, Queen in Right of Province of British Columbia v. Gilbertson, 597 F.2d 1161, 1165 n.8 (9th Cir. 1979)* .

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3-30 Moore's Manual--Federal Practice and Procedure § 30.114

§ 30.114 Recognition and Enforcement of State Court Judgmentsn*

Under the full faith and credit doctrine, state court judgments are entitled to recognition by all federal and state courts. Thus, a federal court must give full faith and credit to a state court judgment. n1 The Supreme Court has stated that Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments arose would do so. n2 Similarly, each state must give full faith and credit to the judgments of its sister states. n3 The preclusive effect a federal court or a sister state court must give to a prior judgment rendered by a state court is determined by the law of the rendering state, including both state statutory and common law. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the United States. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditRooker-Feldman DoctrineConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.20 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 375, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996)* .

(n3)Footnote 2. *Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)* .

(n4)Footnote 3. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982)* (North Carolina court could not disregard Illinois judgment releasing insurance company from financial obligation to North Carolina insurance association).

(n5)Footnote 4. *Thomas v. Washington Gas Light Co., 448 U.S. 261, 270, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980)* .

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PART VIII Limits of Judicial Reconsideration
CHAPTER 30 RES JUDICATA AND RELATED DOCTRINES
PART II. RECOGNITION OF JUDGMENTS

3-30 Moore's Manual--Federal Practice and Procedure § 30.115

§ 30.115 Recognition and Enforcement of Federal Court Judgmentsn*

State courts are bound to recognize the judgments of the federal courts. n1 Likewise, federal courts must recognize the judgments of other federal courts. n2 Both state and federal courts must apply federal law to determine whether judgments in federal question cases are entitled to recognition. n3 Although it is clear that federal law governs the effect of a federal question decision rendered by a federal court, it is not settled whether federal law or state law should govern when a state law claim is heard in federal court, either based on diversity jurisdiction or pursuant to the supplemental jurisdiction statute. The Supreme Court has recently decided a case that provides some guidance in this area. The Court held that federal common law governs the preclusive effect of federal judgments but that federal common law rule should be borrowed from state law, reasoning that any other rule would produce the sort of forum-shopping and inequitable administration of the laws that the *Erie* doctrine seeks to avoid. n4

With respect to enforcement of federal court judgments, Congress has enacted a statutory registration process to facilitate collection of federal judgments. The statutory registration procedure obviates the need to commence a second action to enforce a money judgment from one district in another district where the judgment debtor's assets are situated. n5 For a discussion of this federal statutory registration and enforcement of judgments, see Ch. 26, *Post-Judgment Procedures*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawRelations Among GovernmentsFull Faith & Credit

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.30 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Pansy v. Borough of Stroudsburg, 23 F.3d 772, 784 n.13 (3d Cir. 1994)* .

(n3)Footnote 2. *Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1189 (3d Cir. 1970)* .

(n4)Footnote 3. *Heck v. Humphrey, 512 U.S. 477, 488 n.9, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)* (state courts are bound to apply federal rules in determining effect of federal court judgments on issues of federal law).

(n5)Footnote 4. *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* ; *see* *Erie R.R. v. Tompkins, 304 U.S. 64, 74-75, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n6)Footnote 5. *28 U.S.C. § 1963*; *see* *Urban Indus., Inc. v. Thevis, 670 F.2d 981, 985 (11th Cir. 1982)* .

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PART VIII Limits of Judicial Reconsideration
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PART II. RECOGNITION OF JUDGMENTS

3-30 Moore's Manual--Federal Practice and Procedure § 30.116

§ 30.116 Recognition and Enforcement of Judgments of Courts of Foreign Nationsn*

A court in the United States will recognize and enforce judgments rendered by courts in foreign countries, based on principles of comity, provided that the foreign judicial proceeding provided a minimum level of due process of law. n1 Neither the *Full Faith and Credit Clause of the United States Constitution* nor its facilitating statute n2 requires the recognition of foreign judgments. n3 Comity is a general directive rather than a specified compulsory standard, in favor of recognizing the validity and finality of judicial acts of other countries. n4 Additionally, vestiges of historic principles providing for limited recognition of international judgments remain in some forums, including a requirement of reciprocity. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawRelations Among GovernmentsFull Faith & CreditInternational LawDispute ResolutionComity DoctrineGeneral Overview

FOOTNOTES:
(n1)Footnote *. For a more complete discussion, see 18 Moore's Federal Practice, § 130.50 et seq. (Matthew Bender 3d ed.).

(n2)Footnote 1. *Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)* .

(n3)Footnote 2. *28 U.S.C. § 1738*.

(n4)Footnote 3. *See DeSilva v. DiLeonardi, 125 F.3d 1110, 1114 (7th Cir. 1997)* , *cert. denied, 525 U.S. 810 (1998)* (there is no international doctrine of full faith and credit; "comity" is some distance short of legal obligation established by full faith and credit statute).

(n5)Footnote 4. *Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)* .

(n6)Footnote 5. *McCord v. Jet Spray Int'l Corp., 874 F. Supp. 436, 437, 439 (D. Mass. 1994)* (reciprocity is no longer factor under federal law, but remains as factor under some state statutes, and federal court looks to state statute when jurisdiction is based on diversity).