

I. Pleading

a. Types

i. Complaint

1. Rule 8: a complaint is a short and plain statement showing entitlement to relief. A party may plead in the alternative (Rule 8(e)(2)).
2. In *Bell Atlantic v. Twombly*, the Supreme Court ruled that Rule 8 requires the complaint to give rise to the plausibility of the allegation, abandoning the standard set in *Connley v. Gibson*, which stated that a complaint shouldn't be dismissed because there is no set of facts making the allegation plausible.
3. Rule 9(b): In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.
4. Rule 9(g): special damages must be specifically stated in the complaint, or they cannot be introduced at trial.

ii. Answer

1. A party has 20 days to answer, 60 if service is waived. This is extendable by consent of parties or leave of court.
2. In lieu of an answer, the defendant may do nothing (Rule 55) or file a Rule 12 motion.
3. Defendant must assert all affirmative defenses in the first pleading.
4. Defendant must specifically admit or deny each allegation.

iii. Rule 12 motions

1. Rule 12 motions may be included in the answer.
2. Rule 12(b)(6): Motion to dismiss
 - a. Complaint does not make a sufficient claim for relief.
 - b. Must be raised in first pleading.
3. Rule 12(c): Motion for judgment on the pleadings.
4. Rule 12(e): Motion for a more definitive statement.
5. Rule 12(f): Motion to strike scandalous or impertinent material.

iv. Counterclaims

1. Rule 7: All functioning complaints must be answered.
2. Rule 13(a): counterclaims that have a logical relationship to the original claim arise out of the same transaction or occurrence as the original claim, and so are compulsory.
3. Rule 13(b): Counterclaims that do not arise out of the same transaction or occurrence as the original claim are permissive.

v. Crossclaims must arise out of the same transaction or occurrence but are permissive (Rule 7).

b. Amendments

- i. Rule 15(a): A party may amend a pleading once as a matter of right prior to responsive pleading or within 20 days if no response is required. Otherwise a party may amend its pleading by consent of parties or leave of court. While courts freely grant leave to amend, they will consider

(1) delay, (2) prejudice, (3) whether the party is asking for leave to amend in good faith, or (4) repetitiveness. Amending the complaint waives plaintiff's right to appeal a 12(b)(6) dismissal.

- ii. Rule 15(b): When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if they had been, and the pleadings may be accordingly amended to conform to the evidence. Should a party object to the introduction of evidence because the pleading did not raise the issue, the court shall grant leave to amend, unless the party may show that doing so would prejudice the party.
 - iii. Rule 15(c): An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the applicable statute of limitations, (2) the new claim arises from the same transaction or occurrence, or (3) the amendment changes the party, Rule 15(c)(2) is satisfied, the amendment is made within 120 days of the original complaint, and the new defendant is informed and aware that he is the proper party in the suit.
- c. Rule 11
- i. The parties must sign every pleading claiming good faith and attesting that all allegations and factual contentions have evidentiary support or likely will upon further investigation.
 - ii. A party has a 21-day safe harbor period to withdraw a pleading after warning is given. Sanctions are discretionary, but may include monetary sanctions, preclusions, injunctions, and dismissal.

II. Joinder

- a. Rule 17(a): An action must be between the real parties in interest.
- b. Rule 17(c): Infants and incompetents may bring suit through a guardian.
- c. Rule 18(a): a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternate claims, as many claims as the party has against an opposing party.
- d. Permissive joinder of parties
 - i. Rule 20(a): If the right to relief arises out of the same transaction or occurrence or series of transactions or occurrences, and if any question of law or fact is common to all parties, parties may be joined.
 - ii. Rule 20(b): The judge has discretion to separate any claims that may confuse a jury and to alleviate any of the burdens of complexities that may arise from joinder.
 - iii. When there is only one party at fault among two potential candidates, it is permissible to join both in the proceedings.
 - iv. Rule 21: misjoinder of parties is not grounds for dismissal. The court has the discretion to drop or add parties.
- e. Mandatory joinder of parties
 - i. Rule 19(a): If feasible, the court must add parties whose presence will be necessary for a just result, regardless of the party's desire to be involved in the suit.
 - ii. Rule 19(b): Indispensable parties are those parties without which the case cannot proceed—to be distinguished from necessary parties—and

should they be unable to be joined, then the case should be dismissed. Courts will consider four things when determining if the case can proceed: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties; (2) the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

- f. Impleader
 - i. Rule 14(a): Defendant can bring in a third party if he believes the third party should be responsible for all or some of the damages the defendant can be found liable for. It doesn't matter if the plaintiff amends his complaint to include the third party. Impleader must occur within 10 days of answering claims, and then by leave of court.
 - ii. Rule 14(b): Plaintiff can implead a third party when there is a counterclaim.
- g. Interpleader (Rule 22) is a mechanism that allows a punitive defendant to preempt that suit and bring all the claimants in under one lawsuit.
- h. Intervention
 - i. Rule 24(a): A party may intervene as of right when a federal statute confers the right to intervene or if the party claims an interest relating to the property or transaction which is the subject of the action and that interest is not adequately represented by the existing parties.
 - ii. Rule 24(b): A party can apply for intervention if a federal statute allows it permissively, or if the party's claim or defense has a common question of law or fact with the main action.

III. Class Actions

- a. Certification
 - i. Rule 23(a): Prerequisites to a class action.
 - 1. Numberosity: joinder must be impractical. Many courts require there be at least 25 potential parties.
 - 2. Commonality: There must be questions of law or fact common to the entire class. One or two questions of law or fact that are common is enough to satisfy the commonality requirement.
 - 3. Typicality: the representative must preserve due process and fairness for the rest of the class.
 - 4. Adequacy: the representative and counsel must adequately address the concerns of the class. Courts will not allow collusion.
 - ii. Rule 23(b): Maintainable class actions.
 - 1. Prejudice classes: (a) If there are separate suits, there could be varying results. Inconsistent obligations could be imposed upon the defendant. (b) Results could impair the ability of other potential plaintiffs to protect their interests. In these class

actions, members do not have to be given notice or the opportunity to opt out.

2. Discrimination cases: opting out is not an option.
3. There can be any other kind of class action if the advantages outweigh the disadvantages. Common issues must predominate over individual issues. Courts consider (1) whether class mechanism is the superior device, (2) the interest of the members litigating individually, (3) the extent of the litigation being prosecuted, (4) implications of concentrating litigation into a single forum, and (5) manageability difficulties. Every class member must be given notice and the option to opt out.
- iii. Rule 23(e): the court must approve any settlement. After settlement is reached, every class member must be given notice and have the opportunity to object.
- iv. Rule 23(f): Parties can immediately appeal rulings on decisions to certify a class.

IV. Discovery

- a. The General Scope of Discovery
 - i. Rule 26(b)(1): parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.
 - ii. Rule 26(b)(2): Courts may place limitations on the scope of discovery if it is unduly burdensome on the other party. A party may object if it's unreasonably cumulative or duplicative, or if it's obtainable from some other source less burdensome.
 - iii. Rule 26(c): the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.
 - iv. Rule 26(e): A responding party has a duty to supplement.
 - v. Rule 26(f): A discovery conference to formulate a discovery plan must be held with the court.
 - vi. Rule 26(g): Attorneys must sign discovery requests and disclosures attesting to good faith.
 - vii. Rule 27 allows for pre-suit discovery to perpetuate testimony.
- b. Mandatory disclosure (Rule 26(a)): A party must reveal all tangible things that a party may use to support its claim or defenses, computations of claimed damages including the basis for those damages, the identity of witnesses likely to have discoverable information and the subject on which those individuals are likely to have knowledge, and insurance policies that would cover any judgment issued against the party. These must be disclosed within 14 days after the discovery conference.
- c. Depositions (Rule 30): Depositions are under oath and are generally limited to one day (seven hours) per witness and ten depositions per side. Deponent can only refuse to answer questions calling for privileged information.
- d. Rule 31: depositions upon written questions.
- e. Interrogatories (Rule 33): Interrogatories can only be issued to parties and must be answered under oath. The respondent has a duty to investigate. If the party

objects, he must put the reasons for the objection in writing and answer the interrogatory to the extent that it is not objectionable. Contention interrogatories ask for legal theories. These are generally deferred until the end of discovery. There is a presumptive limit of 25 interrogatories and a 30-day time limit.

- f. Discovery and Production of Property (Rule 34): Tangible items, including documents and electronic information, must be requested with reasonable particularity, and notice for request and expected reception of items must be given with a reasonable time, place and manner. Requests apply to anything that is within the respondent's possession, custody, or control. If respondent has objection, he must put those objections in writing while still delivering the requested items. Except by consent of parties or leave of court, a party must produce documents for inspection as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request, or for electronically stored information in its ordinarily maintained form or in a form that is reasonably usable. Generally, each party must bear its own financial burden for discovery.
- g. Physical and mental examinations (Rule 35): Examinations are allowed only if the issue is in controversy and only on the showing of good cause.
- h. Requests to Admit (Rule 36): If a party denies a fact later proven to be true at trial, the adverse party may request attorneys fees expended on litigating that fact.
- i. Material prepared in anticipation of trial
 - i. Rule 26(b)(3) provides work product protection. If the requesting party can demonstrate a substantial need for factual work product and undue hardship in obtaining it by some other means, then it may be discoverable.
 - ii. *Hickman v. Taylor* extends work product protection to oral statements.
- j. The extent of privileges and work product protection
 - i. Work product protection can be waived by disclosing it to a third party.
 - ii. If a party discloses privileged information, they waive privilege to the whole subject.
 - iii. *Upjohn Co. v. United States*: attorney-client privilege applies to upper level management as well as to lower level management if their duties and actions could bind the company in some legal way. Core work product—the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative—is not discoverable.
 - iv. Rule 26(b)(4): work of non-testifying experts hired in anticipation of trial is protected.
- k. Discovery abuse (Rule 37): If a party refuses to comply with a discovery request and a subsequent granted motion to compel, sanctions, including contempt, jury instructions for adverse inference, preclusion from introducing other evidence of the same category, preclusion for introducing elements concerning damages, or dismissal, may be imposed.

V. Case Management

- a. Rule 16(a): the court has the authority to call pretrial conferences on issues at its own discretion.
- b. Rule 16(b): After the parties comply with Rule 26(f), the court issues a scheduling order.
- c. Rule 16(c) gives the court a lot of leeway and authority to discuss a variety of different things that may come up in individual cases in pretrial conferences.
- d. Rule 16(d) discusses a final pretrial conference.
- e. Rule 16(e): pretrial orders guide the case.
- f. Rule 16(f): sanctions are appropriate for party's failure to comply with court orders, including court ordered deadlines and failure to participate in good faith.
- g. Rule 53: The court can appoint a master (1) to oversee a particular issue with or without the consent of the parties; (2) to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by some exceptional condition or the need to perform an account or resolve a difficult computation of damages; or (3) to address pretrial and post-trial matters that cannot be adequately addressed effectively and timely by an available district judge or magistrate judge of the district.

VI. Adjudication Without Trial

- a. Summary judgment
 - i. Rule 56(a): the acting plaintiff cannot move for summary judgment until either 20 days after the beginning of proceedings or the defendant moves for summary judgment.
 - ii. Rule 56(b): acting defendant can move for summary judgment at any time.
 - iii. Rule 56(c): Summary judgment shall be rendered if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
 - iv. Rule 56(d): the case does not have to fully adjudicate on the motion.
 - v. Rule 56(e): Affidavits used in support of motions for summary judgment are based upon personal knowledge. Other admissible evidence may be used to support a summary judgment motion.
 - vi. The movant has the initial burden of showing that there is no issue of material fact. If movant meets his or her initial burden, then the nonmovant has the burden of producing admissible evidence that raises a genuine issue of material fact. If the movant fails to meet the initial burden, the motion must be denied, regardless of what is filed in opposition.
 - vii. No evidence motion for summary judgment: the party not bearing the burden of proof can move for summary judgment on the basis that the adverse party has no evidence to prove causation. The adverse party must then come forward with evidence demonstrating that there is an issue of material fact.
- b. Dismissal of Actions
 - i. Voluntary dismissal

1. Rule 41(a)(1): Voluntary dismissal can be done (i) as of right by the plaintiff before a summary judgment motion or answer is filed or (ii) by consent of the parties at any time. Voluntary dismissals are dismissed without prejudice, unless otherwise stated in the motion of dismissal or the plaintiff has previously voluntarily dismissed the case in any court.
 2. Rule 41(a)(2): Except as provided in Rule 41(a)(1), an action shall not be dismissed at the plaintiff's insistence except upon order of the court and upon such terms and conditions as the court deems proper. If granted, it is without prejudice unless otherwise stated. If the court finds that in dismissing the claim it would have to dismiss a counterclaim, the court won't grant the dismissal unless the counterclaim can remain pending for independent adjudication by the court.
- ii. Involuntary dismissals (Rule 46(b)) are initiated by the defendant for either plaintiff's failure to prosecute or plaintiff's noncompliance with the rules or orders of the court. These dismissals are with prejudice.
 - iii. Default
 1. Rule 55(a): Upon failure to answer, court shall enter default against the defendant.
 2. Rule 55(b): (1) Upon default, if the complaint specified damages sought, the clerk shall enter judgment; (2) if the complaint did not specify damages, there will be a damages hearing. The defendant must be given three days notice prior to the hearing.
 3. Rule 55(c): With showing of good cause, defendant may have the default judgment laid aside.

VII. Alternative Dispute Resolution

- a. ADR processes: (1) Negotiation; (2) Mediation; (3) Arbitration.
- b. ADR and Civil Litigation
 - i. Courts may only order nonbinding mediation.
 - ii. Rule 68: if the judgment obtained by the offeree is not more favorable than the offer, court will order offeree to pay the costs that were accrued after the offer was made. Applies only to prevailing offerees.

VIII. Trial

- a. Trial by jury
 - i. Rule 38 requires a jury demand within 10 days of the answer, or it's waived.
 - ii. Selection and composition of the jury
 1. Rule 48: the court can determine the size of the jury between six and twelve. Unless the parties stipulate otherwise, the verdict shall be unanimous.
 2. Jurors who have a preconceived bias that will reflect upon the outcome of the case shall be stricken for cause.
 3. Parties have a limited number of preemptory challenges, which can be made for any reason, except for race or gender.

4. Conducting the voir dire (Rule 47) is left to the judge, who may ask the questions himself or allow the parties to ask.
- b. Motions for judgment as a matter of law (Rule 50)
 - i. The standard is the same as summary judgment. No evidence JML is permissible.
 - ii. If a motion for directed verdict is denied, it may be renewed within 10 days of judgment. If it was denied without reservation, however, a JNOV may not be granted.
 - c. Jury instructions
 - i. Courts have a duty to provide instructions that comply with the law, regardless of whether or not they write the instructions themselves or allow the parties to do so.
 - ii. Judges have a historical right to comment on the evidence.
 - d. Verdicts: a general verdict states the winner and the damages awarded, if any. A special verdict is a series of questions leading to the winner.
 - e. Rule 52(a): a judge in a bench trial must describe his findings of fact in writing with specificity and clarity, showing how he reached his findings. His conclusions of law must reasonably follow his findings of fact.
 - f. New trials
 - i. The power to grant new trials
 1. Rule 59(a): Judges can order new trials on any or all issues that arise within the trial that affect the ultimate outcome.
 2. Rule 59(b): Motions for new trials must be filed within 10 days of judgment.
 3. Rule 59(d): The court can order a new trial on its own motion within 10 days of entry of judgment, though the judge must specify why. If there has been a timely motion for a new trial, the court can grant a new trial for any valid reason not mentioned in the motion.
 4. Rule 61: there should not be a new trial for harmless errors.
 5. New trials can be granted for incoherent jury verdicts, jury misconduct, or the verdict is against the clear weight of the evidence.
 - ii. If the verdict is against the clear weight of the evidence, based on false information, or would otherwise result in a miscarriage of justice, then the trial court may grant a new trial. The verdict must represent a serious error in judgment by the jury. This requires a lower standard than a judgment as a matter of law.
 - iii. The power to set aside a judgment on grounds discovered after it was rendered.
 1. Rule 60(a): the court may correct clerical mistakes that arise from oversight or admission.
 2. Rule 60(b): Motion for a new trial on the basis of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud must be made within a reasonable time not to exceed one year.

3. Issues to consider when determining whether neglect was excusable: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay and (4) whether the moving party acted in good faith.
- iv. *Patrick v. Sedwick*: newly discovered evidence which could not by due diligence be discovered before the term for filing a new trial (1) must be made as would probably change the result of a new trial, (2) must have been discovered since the trial, (3) must be of such nature that it could not have been discovered before trial by due diligence, (4) must be material, and (5) must not be merely cumulative or impeaching.

IX. Big picture

- a. Pleading: Rules 7, 8, 11, 15, 55
- b. Pre-discovery motions: Rules 12, 15
- c. Joinder: Rules 13, 14, 17-22, 24
- d. Class Action: Rule 23
- e. Dismissal: Rule 41
- f. Jury demand: Rule 38
- g. Discovery: Rules 26-37
- h. Case Management: Rules 16, 53
- i. ADR
- j. Summary Judgment: Rule 56
- k. Jury role/judge role: Rule 39
- l. JML: Rule 50
- m. Instructions: Rule 51
- n. Verdict: Rules 49, 52, 54, 58
- o. JNOV: Rule 50
- p. New trials: Rules 59, 61