

CIVIL PROCEDURE
CASES, PROBLEMS, AND EXERCISES
Fourth Edition

ALTERNATIVE CHAPTER 6/7

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ALTERNATIVE CHAPTER 6/7

PLEADING

[This Chapter is a condensed version of Chapters 6 and 7.]

■ ■ ■

A. PRESENTING WRITTEN CLAIMS AND OBJECTIONS TO THE COURT

This Chapter deals with how the parties present claims and issues to the court *in writing*. It does not discuss oral arguments made by the parties when the court conducts a hearing on a motion, or at trial. Instead, the focus is the rules governing how the parties inform the court and the opposing side of their claims, defenses, and other objections. It also deals with the consequences of failing to abide by those rules.

As with other topics in this book, the discussion deals only with the federal court system. For the many states that follow the Federal Rules, the analysis will be much the same. However, not all states apply the pleading rules the same way, especially the increasingly stricter standard the Supreme Court applies to pleading claims. It also bears note that some states have pleading systems that differ in fundamental ways from that set out in the Federal Rules.

1. PLEADINGS AND MOTIONS COMPARED

Parties can make written submissions in two basic ways: by a *pleading* or by a *motion*. Although attorneys and judges understand the difference intuitively, it can be difficult for a first-year student to distinguish the two. Like pleadings, most motions are in writing. Both must also meet most of the rules governing form set out in Federal Rule 10. Both ask the court to do something. So what is the difference?

Pleadings are comprehensive documents that recite all the party's claims or defenses. A case in federal court will involve a very limited number of pleadings. If there is a single plaintiff and a single defendant, the only pleadings will be a complaint (by plaintiff), an answer (by defendant), and possibly an answer to the answer or a reply (both by plaintiff). Additional pleadings may occur in a case involving multiple parties, as there may be pleadings for the cross-claims and third-party claims. Even so, the number of pleadings is strictly limited by Rule 7(a). All other requests to the court are made by motion, as provided in Rule 7(b).

Motions are best thought of as a “silver bullet.” They are both more specific and more immediate than a pleading. While a pleading sets out a legal roadmap for the entire litigation, a motion zeroes in on one or more issues in the case and asks the court to resolve them quickly. For example, if defendant thinks the court lacks venue, it can file a motion asking the court to dismiss the case immediately.

Note that a party can often raise the same issues in either a pleading or a motion. For example, a defendant may assert lack of venue either in a pre-answer motion, or as one of the defenses in her answer (a pleading). If defendant chooses to assert the defense in her answer, she will probably also then file a motion asking the court to dismiss the case for that very reason. In this latter case, the motion brings the issue to quick resolution.

2. ENSURING HONESTY AND GOOD FAITH

Pleadings and motions are not affidavits.¹ Unlike an affidavit, the party does not swear under oath that the statements made in the written document are true. Nevertheless, there are consequences for making intentionally false assertions in pleadings and motions. In the federal system, these consequences derive mainly from Rule 11. This Rule imposes a duty of honesty and fair dealing, and includes sanctions for violations.

a. Overview of Rule 11

Rule 11 requires that the attorney (or the party, if there is no attorney) sign all documents. If the document is not signed, by Rule 11(a) the court must strike it unless the paper is signed promptly after the attorney or party becomes aware of the problem. State procedural systems follow their own versions of Rule 11 for filed documents, and every jurisdiction maintains ethical standards for attorneys who take frivolous positions.

It is important to remember that Rule 11 applies to *all filed documents*, not just complaints and other pleadings. However, Rule 11 explicitly is inapplicable to discovery and disclosure requests, responses, objections and motions under the discovery provisions in Rules 26–37. Note that discovery requests are usually submitted directly to the other party or third parties, not to the court. On the other hand, the discovery rules contain their own veracity requirement in Rule 26(g).

Because Rule 11 applies only to written documents, it does not cover matters arising for the first time during oral presentations to the court, when an attorney may make a statement she might not have made had there been more time for research and thought. However, a litigant’s obligations regarding contents of filed papers do apply if the litigant continues to advocate positions contained in pleadings and motions after learning that the positions are no longer meritorious. The rule protects

¹ In certain rare cases, governing law does require particular pleadings to be verified.

litigants against sanctions if they withdraw or correct contentions after being notified about a potential violation.

b. Effect of Signing

By signing a pleading or motion, an attorney or unrepresented party is deemed to make certain representations to the court. Review Rule 11 to determine precisely which representations are made. Generally speaking, four different types of representations are involved:

- That the attorney made a *reasonable inquiry* into the accuracy of the matter represented;
- That all *factual assertions* (both claims and denials) are either true, likely to be true after further investigation, or in the case of denials, based on lack of information;
- That all *legal arguments* are supported either by existing law or a non-frivolous argument to extend or change the law; and
- That the document was not filed for any *improper purpose*.

Reasonable inquiry. Use of the words “reasonable under the circumstances” in Rule 11 codifies the previous judicial conclusion that the thoroughness of the inquiry required by Rule 11 depends in part upon the time available for investigation. As the Supreme Court acknowledged, “An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401–2, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

Absent time pressures, what should a reasonable factual inquiry include? For example, must counsel interview the available witnesses? May counsel rely on a document reciting the state of incorporation of a party to a lease? Or, must counsel review the relevant “original source” documents that are available to the client? See, e.g., *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003) (counsel’s reliance on lease’s erroneous description of state of incorporation does not satisfy reasonable inquiry requirement when document showing state of incorporation is available). In the case of client statements, the court in *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329–30 (2d Cir. 1995), stated that courts must determine whether there was “evidentiary support” corroborating factual representations.

Truth of factual assertions. Rule 11 does not require the impossible. Quite often, the evidence to prove or disprove a claim is in an opponent’s exclusive possession. Rule 11 permits a claim or answer to be based on information and belief. However, Rule 11(b)(3) requires a party to state explicitly when his factual contentions depend on an opportunity for further investigation or discovery. This puts the other side on notice that

the party currently does not have enough evidence to prove the claim or defense.

Legal arguments. Rule 11 explicitly allows a party to make a nonfrivolous argument for changing or extending the current law. Unlike unsupported factual assertions, the party need not disclose when its legal arguments run contrary to existing law.

In applying this standard, courts consider whether the attorney presented an objectively reasonable argument in support of the view of what the law is or should be. Rule 11 sanctions are not merited on the grounds of frivolousness merely because the court disagrees with an attorney's position on behalf of a client and rules for the opposing side. Dismissal for failure to state a claim for relief does not automatically justify Rule 11 sanctions for filing a paper that is unwarranted under existing law. *Tahfs v. Proctor*, 316 F.3d 584 (6th Cir. 2003).

On the other hand, is a legal position unwarranted by existing law if it is contrary to clear precedent? Contrary to a statute? When the attorney knew or should have known that the position taken on behalf of a client has no chance of success under the existing case law, sanctions are likely. But where does that leave the pleader who seeks to overturn long-standing precedents on an issue? How do you argue that Rule 11 would have permitted you to attack public school segregation in 1950? Wouldn't Rule 11 have chilled your enthusiasm for pursuing a novel legal theory like desegregation?

Rule 11 permits you to argue for an extension or modification of existing law. Under what circumstance is that argument likely to be most successful? Suppose that you have raised an issue of first impression in your jurisdiction. Even if courts elsewhere have ruled against your position, it would appear unreasonable to sanction you assuming that you have made a good faith argument for a change in the law. The important question is how to resolve the apparent conflict between the duty to represent your client zealously and Rule 11's purpose of reducing frivolous claims. Can you accommodate both goals?

Improper purpose. An attorney also violates Rule 11 when she submits a document for an improper purpose, such as harassment or delay. This provision comes into play mainly when the submission *is* supported by both fact and law. If a party raises defenses that are not likely to change the outcome of the case in any meaningful way, or repeatedly makes the same or similar arguments, a court may find an improper purpose.

c. The Safe Harbor

Most motions are filed with the court and then served on opposing parties. Rule 11 motions work differently. The motion for sanctions is first served on the party allegedly committing the violation. However, it cannot

be filed with the court until at least 21 days after service. During that period, if the violation is corrected by for example withdrawing an allegation, the motion should not be filed (in which case the court never sees it).

Under Rule 11(c)(2), after the 21 days expire, a separate Rule 11 motion must be filed describing the specific conduct that allegedly violated the rule. Most courts require strict compliance with the safe harbor provision and deny Rule 11 motions which fail to comply.

d. Sanctions

While sanctions are authorized for violations of Rule, they are not required. The trial court has discretion to determine whether to impose sanctions. It also has significant discretion to decide what sanctions should be imposed for a Rule 11 violation. However, the Rule states that the sanctions should be no more severe than reasonably necessary to deter repetition of the conduct by the offending attorney or party or comparable conduct by similarly situated persons.

If a court imposes a monetary sanction, it is ordinarily to be paid to the court as a penalty. However, monetary sanctions may be awarded to the party harmed by the violation if appropriate. Before sanctions are imposed, litigants must receive notice about an alleged violation and a chance to respond. If the court imposes sanctions, it generally must express its reasons for the sanction in a written order or on the record.

Who is liable for the Rule 11 violation? Of course, the particular attorney who signed the improper document is liable. Sanctions may also be imposed on other attorneys or parties responsible for the violation. “Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.” Rule 11(c)(1).

When is a represented party responsible for problems with a filed document? Does it matter whether the party signs the document? In *Business Guides, Inc. v. Chromatic Communications, Enters., Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991), the Court applied the reasonable inquiry standard to a represented party who signed a document along with counsel. Because the Rule concentrates on the person who signs the document, a represented party who does not sign a document does not appear to be subject to Rule 11. *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328 (11th Cir. 1992). Even if a party does not sign the document, should the party nevertheless be liable for providing false facts to the attorney?

B. PLEADING CLAIMS FOR RELIEF

The prior section dealt with both pleadings and motions. This section deals only with pleadings. The function of the pleadings is to set out the

parties' claims and defenses. By enumerating their specific arguments, the pleadings help establish a basic outline for the case. While the federal pleading system is far simpler and more forgiving than the system employed in the historic common-law courts, it still contains various requirements the parties must be careful to satisfy.

This section discusses how one pleads claims for relief. Section D discusses how the opposing party responds to those claims. It is important to note that the Rules set out in this section apply not only to plaintiff's complaint, but also to counterclaims, cross-claims, and all other claims asking the court for any form of relief other than dismissal or clarification. However, for simplicity's sake the following discussion will usually refer only to the complaint.

1. CONTENTS OF THE COMPLAINT

A proper federal complaint must include three basic components. First, it must contain a statement describing the basis for the court's subject-matter jurisdiction (state pleading rules often omit this requirement). Second, the pleader must include a statement of the claim or claims on which it seeks recovery. Third, the complaint must include a prayer for the relief plaintiff seeks.

Rule 10 also sets out some technical requirements involving the form of pleadings. For example, the pleader must include a caption with the parties' names and the file number of the case. Rule 10(b) provides that when a party makes separate claims, it should separate them into numbered paragraphs. Multiple claims are often referred to as separate "counts." A pleading may also include attachments, such as a copy of the contract forming the basis of the case. Finally, do not forget that Rule 11 requires all pleadings to be signed.

2. THE BASIC RULE 8 PLEADING STANDARD

The primary focus in evaluating a pleading is the statement of the claim. Rule 8(a)(2) sets out what appears to be a fairly easy standard: "a short and plain statement of the claim showing that the pleader is entitled to relief." It is clear this standard is intended to be easier than the historic common-law pleading standard, or the standard applicable in the systems of "Code pleading" that evolved in the mid-1800s. The purpose of Rule 8(a) is to put defendant on notice of exactly why it is being sued.

As interpreted, the Rule 8(a) standard requires the pleader to focus on *facts* rather than legal technicalities. Indeed, a party is not technically required to say anything about the legal theory it is using. Provided the facts fit into a recognized legal claim, the complaint is sufficient. On the other hand, unlike the purely factual allegations of Code pleading, Rule 8(a)(2) also allows the party to include some legal conclusions as a "shorthand" way of putting the other party on notice. As just one example,

it is perfectly acceptable for a party to claim defendant breached a contract between the parties, even though that statement is a legal conclusion.

The Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), indicate that this basic standard is not as easy to satisfy as may appear at first glance. These cases adopt a “plausibility” standard. Under this standard, plaintiff must include enough facts in its complaint to allow the court to conclude that plaintiff’s alleged version of the events could well have occurred. This standard is especially important when the same basic set of facts could be interpreted in more than one way, but only one version supports plaintiff’s claim.

The facts of *Twombly* illustrate this approach. Plaintiff in *Twombly* claimed defendants had entered into a conspiracy that violated antitrust law. However, the complaint merely showed defendants were all engaged in similar behavior. To the Court, these facts could be interpreted in two ways: that defendants had agreed to act that way (which would violate antitrust law), or that defendants were all merely mimicking the behavior of the others (which would not). The Court held that on the facts alleged it was not plausible to conclude there was an agreement. It therefore found plaintiff’s complaint insufficient.

The Supreme Court indicated that something can be “plausible” even if it is not the most likely conclusion to be drawn from the facts asserted. Therefore, plausibility is not the same as the standard used when dealing with competing inferences on a motion for summary judgment or judgment as a matter of law, which are discussed in Chapter 11. However, it is difficult to see exactly *how* the standard differs. For example, in *Twombly* itself one could argue that it was certainly “plausible” that several commercial entities acting in a highly similar fashion had entered into a secret agreement to act in that way, especially when they would benefit from acting in concert. For these reasons, *Twombly* and *Iqbal* have been the subject of extensive criticism not only in the academic literature, but also among the lower federal courts forced to apply the “plausibility” standard.

3. EXCEPTIONS TO THE BASIC STANDARD

The vast majority of claims are governed by Rule 8(a)(2)’s “short and plain statement” standard. However, for certain issues different rules require the pleader to include more. For example, Rule 9(b) requires a party who is asserting a claim for fraud or mistake to state the circumstances constituting fraud or mistake “with particularity.” This requires more than a bare-bones allegation. Instead, the party must include the actual statement made, when it was made, where it was made, and how the plaintiff relief on the statement. In addition to fraud and mistake, courts

typically apply this heightened standard to assertions of intentional misrepresentation.

Rule 9(g) sets out a different heightened pleading standard for “special damages.” This standard comes into play in two situations. First, some claims—typically those involving defamation or a similar claim—require specific allegations of how a party was harmed as part of the claim itself. Second, special damages also refers more generally to any injury that would not be expected from the underlying event. Thus, if a car crash victim had to receive mental counseling to deal with her memories of the event, the costs of that counseling would be special damages. Whenever a case involves special damages, the plaintiff must specifically describe and state the amount of those damages.

On the other hand, other subsections of Rule 9 *lessen* the pleading standard for certain issues. For example, Rule 9(a) relieves a party from any obligation to include a statement that it has the capacity to sue or be sued. Similarly, when a claim is conditioned on the satisfaction of one or more conditions precedent, the claimant need only allege generally that “all conditions” have been met, without specifically referencing what those conditions are. Finally, while Rule 9(b) requires a party to plead fraud with particularity, it also makes clear that other aspects of fraud, such as malice, intent, knowledge, and other conditions of the mind, need be alleged only according to the general standard of Rule 8(a)(2). In all these situations, defendant must raise the issue in its response if it wants the court to try that issue.

4. THE PRAYER FOR RELIEF

Plaintiff must also include a request for particular relief. Thus, if a plaintiff wants damages, it must include not only a general request for damages, but also an amount it considers itself entitled to recover. A plaintiff is free to ask for several different types of relief, even if they are logically inconsistent. For example, a plaintiff who sues a defendant for copyright infringement could ask the court for an injunction barring any future infringement as well as an order that defendant should pay plaintiff a royalty of 10% on any future infringement that occurs. If plaintiff wins, the court will select the most appropriate relief.

In most cases, the prayer for relief does not constrain the court. Thus, if plaintiff asks for damages of \$100,000, the court could, if the facts warrant, grant plaintiff a sum greater than \$100,000. The court can also grant different forms of relief than requested. One important exception to this freedom is a default judgment, which cannot exceed the amount requested, or differ in kind, from the prayer.

C. SERVICE OF PROCESS

A plaintiff commences a lawsuit by filing the complaint with the court. That filing informs the court what the case involves. However, for the pleading process fully to fulfill its function of providing notice, the pleadings also need to be delivered to the opposing party or parties. This delivery is referred to as “service of process,” and is governed generally by Federal Rule 4.

Service is intimately connected with personal jurisdiction, which you studied in Chapter 3. In order for a court to exercise jurisdiction over a defendant in the case, defendant must both be properly served, and the exercise of jurisdiction must satisfy the minimum contacts standard. While service on a defendant who resides or is physically present in the state presents no due process issues, service on out-of-state defendants requires application of the “minimum contacts” analysis discussed in Chapter 3.

1. SERVICE ON IN-STATE DEFENDANTS

a. What Is Served

Service of process involves two separate documents. The first is a copy of the complaint. The second is a “summons”: a brief document from the court directing defendant to respond to the complaint within a specified period of time, or risk having a default judgment entered against it. The summons and complaint are served together.

b. Who Serves

Plaintiff is responsible for effective service. In federal court, plaintiff herself cannot serve the papers. Plaintiff usually selects an appropriate person, typically a commercial process server who works for a fee, to serve defendant. A United States Marshal serves process only when ordered by the court. (In many state systems, by contrast, sheriffs (a state counterpart to the Marshal) regularly serve process.)

A plaintiff has 120 days after filing to serve defendant with the summons and complaint. When the 120 days have passed, the lawsuit can be dismissed. However, the period may be extended for “good cause.” The trial court has discretion to determine whether “good cause” exists. For example, if plaintiff can show that the limitations period has run, the court has the discretion to decide against dismissal and instead grant a motion to extend the time for service.

c. Methods of Service

Federal Rule 4 establishes service of process standards for federal courts. Specifically, Rule 4(e) and (h) regulate service on individuals, corporations and other associations. However, the methods enumerated in

Rule 4 are not exclusive. The Rule also clearly indicates that service on defendants may be effected by the law of the state in which the federal district court sits, or the state in which service occurs. State rules, for example, may authorize service by mail—certified, registered, first-class, express, or electronic.

The most desirable method of service for individuals is to serve them personally. Personal service avoids any question about whether a defendant has received notice about the lawsuit, and it is unlikely to produce due process objections. In-hand delivery is not always essential. What happens if a defendant attempts to evade service, or refuses to accept delivery after being informed by the process server of the nature of the papers? It is sufficient service that the process server touches the party to be served with the papers, or, if touching is impossible, leaves the papers in the defendant's physical proximity. The defendant does not have to possess the papers for effective service.

The Federal Rules also allow alternatives to personal delivery. One option for the process server under Federal Rule 4(e)(2) is to leave the papers at the defendant's "dwelling or usual place of abode with someone of suitable age and discretion who resides there." The term "resides there" has been broadly and naturally interpreted to apply to a landlord, an apartment manager, and a live-in maid. On the other hand, the term "resides there" has been held not to encompass a janitor or a ranch employee. It appears the common theme in the cases is not only whether the defendant is reasonably likely to receive the papers served, but whether the person to whom they are handed is a full-time resident of the defendant's dwelling house or usual place of abode.

Federal Rule 4(e)(2)(C) also authorizes substituted service on a defendant by delivery of a copy of the summons and complaint to an agent of the defendant. The rule applies only to service on individuals, and should be distinguished from Rule 4(h)(1)(B)'s service on an organization's managing or general agent. Courts look to whether an agency relationship exists, *i.e.*, there must be evidence that the defendant intended to confer authority to receive process on an agent. For example, an agency relationship may be implied from the terms of a power of attorney or from other circumstances.

Rule 4(e)(2)(C) also permits service on an agent authorized by law. For example, a state may provide that a nonresident business which registers to do business in the state can (or must) designate an agent for service. Service on the agent is the same as serving the business. If no agent is appointed, the Secretary of State automatically has authority to accept service on behalf of the business.

d. Service on Corporations and Similar Entities

Service within the United States on a corporation, partnership, or unincorporated association subject to being sued under a common name is made by 1) the waiver of service provision for individuals (discussed below); or 2) delivery of the summons and complaint to an officer, managing or general agent, or to any other agent appointed to receive service or authorized by law to receive service. Because the summons and complaint must be served on the designated person, it is insufficient merely to address the papers to the corporation generally.

For effective service on a corporate officer or managing or general agent, specific authorization by the corporation to accept service is unnecessary. Whether a person is regarded as a managing or general agent depends on the person's duties and authority rather than the name of the office. The governing principle is that service is to be made on someone who realizes her responsibilities to the corporation and knows what to do with the legal papers she receives. The record should show that the recipient of the summons and complaint had discretion in the operation of the defendant business, and that the recipient recognized the obligation to deliver the summons promptly to the defendant's appropriate personnel.

Service upon corporations and other entities is separate from considerations of service on individuals. For example, while it is permissible to serve an individual at his usual place of abode by handing process to a person of suitable age and discretion who resides there, the same type of service is not specifically authorized in the service rules for corporations. Thus, service on a corporation is improper when a copy of the summons and complaint is left with a person (who is not a managing agent or a designated person for service of process) at the corporation's headquarters.

2. SERVICE ON OUT-OF-STATE DEFENDANTS

The "federal" service methods listed in Rule 4 apply to defendants served anywhere in the United States. The federal court may also use state methods of service. When the defendant is located outside the state in which the federal court sits, two different state service rules may apply: the local service rules of the state where the defendant is served, and the out-of-state service rules of the state in which the district court sits.

Most states have a "long-arm statute" that allows state courts to serve defendants located outside the borders of the state. In many states, out-of-state service involves delivery of process to the Secretary of State or similar official, who in turn will send it to the defendant. Of course, the mechanics of service are not the most difficult problem with out-of-state service. Instead, the main question is whether it complies with due process to force defendant to defend the case in the forum. These issues are discussed in Chapter 3 (or Alternative Chapter 3) of this book.

3. WAIVER OF SERVICE

Federal Rule 4(d) imposes a duty on defendants to avoid unnecessary costs of formal service of process. To avoid costs, plaintiff can notify defendant that a lawsuit has been filed, and ask defendant to waive service. To avail itself of this option, plaintiff must make a formal request to defendant to waive formal service of process. The request must be in writing, conform to the approved form, identify the court, describe the consequences of both waiver and the refusal to waive, contain a copy of the complaint, be sent by first-class mail or “other reliable means,” and be addressed directly to defendant. Requests for waiver of service can be sent to both in-state and out-of-state defendants.

If a defendant refuses to waive service of process under Rule 4(d), plaintiff must proceed with normal service of process. Rule 4(m)’s 120-day period for completing service continues to run while the waiver of service request is made.

Rule 4(d) contains a non-economic inducement to waive formal service of process: a longer time for responding to the complaint. While a defendant has 21 days to answer a complaint following personal service, 60 days are available for a defendant with a United States address to answer the complaint following a waiver of service.

A defendant waives service of process by signing and returning the waiver form. The date of service is deemed the date when plaintiff files the returned form with the court.

4. SERVICE OF OTHER PLEADINGS AND MOTIONS

The discussion to this point has focused on service of plaintiff’s complaint. The same principles apply to pleadings that join other new parties to the case, such as impleader, which is covered in Chapter 8. However, service of pleadings on parties already joined to the case—including claims such as counterclaims and cross-claims—is much simpler. Because the parties involved already know of the basic dispute, the formal rules dealing with serving complaints do not apply. Instead, such pleadings are typically merely delivered to the attorneys for all other parties. A similar rule applies to motions. Note that a party to a case is entitled to receive all pleadings and motions even if a particular pleading or motion does not directly involve it.

D. RESPONDING TO CLAIMS

Defendant may respond to plaintiff’s complaint in various ways. As briefly discussed in Part A(1) of this Chapter, defendant may file a motion asking the court to dismiss for jurisdiction, venue, failure to state a claim, or some other problem. Or defendant may ask the court to transfer the case, or the judge to recuse herself from hearing the dispute. If plaintiff identifies

a problem with the case or the chosen forum, it may choose to dismiss the case, possibly in the hope of refileing later. Finally, if the case is not dismissed or transferred, defendant must eventually file its responsive pleading—the answer—in which it responds to all allegations made by plaintiff in the complaint.

This section explores the types of responses that lead to termination of the dispute. It starts with both voluntary and involuntary dismissals. Following that, it explores pre-answer motions that terminate the dispute, including dismissals for lack of jurisdiction and for failure to state a claim, as well as the strict timing rules applicable to these motions. Finally, it explores the rules governing defendant’s answer. The section does not explore other sorts of actions defendant may take that do not result in termination of the case, such as transferring venue.

1. DISMISSALS

Rule 41 deals with both voluntary and involuntary dismissals. Voluntary dismissals, the topic of Rule 41(a), are ordinarily made by plaintiff. For example, if a plaintiff decides that, upon further reflection, she does not want her claim to go forward, she may have the case dismissed by the trial court. Rule 41(b) concerns involuntary dismissals, which constitute a defendant’s remedy. The involuntary dismissal may occur as a result of the plaintiff’s failure to comply with rules like Rule 12(b)(6) or a failure to move the case at a pace satisfactory to the court.

a. Voluntary Dismissals

A plaintiff may dismiss her case at any time if she can get either the court or all the parties in the action (both plaintiffs and defendants) to agree. A court has considerable discretion whether to grant plaintiff’s request for dismissal. When dismissal is by agreement of the parties, they file a “stipulation of dismissal” with the court. While stipulated dismissals ordinarily occur as a result of a settlement, they are sometimes used when the parties all agree the case would be better heard elsewhere.

In some situations, a plaintiff can dismiss unilaterally, without the agreement of the other parties or a court order. Rule 41(a)(1)(A)(i) gives plaintiff a right to dismiss by filing a “notice of dismissal” before defendant files an answer or a motion for summary judgment. Note that most pre-answer motions, like a motion to dismiss for failure to state a claim, do not cut off plaintiff’s right to dismiss. Accordingly, plaintiff can forestall having the court throw out its case based on such a motion by voluntarily dismissing.

In some cases, a voluntary dismissal will prevent plaintiff from filing another action based on the same set of facts. In the case of dismissal by court order, plaintiff is free to refile unless the court says to the contrary in the order. Similarly, a dismissal by stipulation prevents plaintiff from

refiling only if it explicitly states plaintiff is precluded. Unilateral dismissal by notice is a bit trickier. Plaintiff is free to dismiss once by notice, and refile later. However, if plaintiff dismisses the same case twice, and the *second* dismissal is by notice, Rule 41(a)(1)(B) provides the second dismissal “operates as an adjudication on the merits,” which means plaintiff is barred from filing another action based on the same events.

b. Involuntary Dismissals

Rule 41(b) governs all situations in which the court dismisses plaintiff’s case on the request of defendant. Many grounds for dismissal, such as lack of jurisdiction or failure to comply with a court order in discovery, are covered elsewhere in this book. This section discusses the *effect* of such dismissals, as well as another ground for dismissal—dismissal for failure to prosecute (or “for want of prosecution”)—that typically occurs after the case is underway.

Dismissal for failure to prosecute. A court may dismiss a case for failure to prosecute when plaintiff fails to move the case along toward trial. No fixed time limits control these dismissals. A court should examine the totality of the circumstances in each case in deciding whether failure to pursue the case is serious enough to require dismissal under Rule 41(b). A lengthy period of inaction may justify a dismissal for failure to prosecute if it is the plaintiff who appears to be at fault, e.g., failing to follow an earlier warning to act with more diligence.

Most federal courts maintain a set of local rules, which often include a provision about the failure to prosecute. The typical local rule provides that if a case has been pending for a given length of time, or if no action has been taken in the case for a particular period, the case must be reviewed to determine whether there is an adequate excuse for the delay.

Appellate courts are reluctant to overturn these dismissals. The appellate standard of review for an involuntary dismissal due to delay is abuse of discretion. While that is a difficult burden for an appellant to satisfy, involuntary dismissals are sometimes set aside because the dismissal under Rule 41(b) specifically bars plaintiff from refiling the claim. Some appellate courts may be concerned about whether the trial court could have imposed less severe sanctions to move the case to trial. See, e.g., *Mann v. Lewis*, 108 F.3d 145 (8th Cir. 1997) (dismissal with prejudice excessive when dilatory conduct of counsel was not attributable to plaintiff). What are some examples of less serious sanctions?

Effect of involuntary dismissal. Rule 41(b) states, “[u]nless the dismissal order states otherwise,” all involuntary dismissals, except for dismissals for “lack of jurisdiction, improper venue, or failure to join a party under Rule 19,” operate as an “adjudication on the merits.” The phrase “adjudication on the merits” is in many contexts a term of art that means plaintiff may not file again in any court. If it means the same thing in Rule

41(b), a dismissal for failure to state a claim would prevent plaintiff from fixing the problems with its complaint and filing again, and a plaintiff whose case was dismissed based on the statute of limitations could not refile in a jurisdiction with a longer limitations period.

However, the Supreme Court has indicated that the Rule is not to be applied this literally. In *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the Court indicated the language of Rule 41(b) applies only when plaintiff refiles in the *same federal court*. If plaintiff files in any other court, state or federal, the effect of the earlier federal dismissal is usually governed by the law of the state in which the federal court that previously dismissed the action sits. Thus, as most states do not consider statute of limitations dismissals to prevent plaintiff from suing again in a state with a longer limitations period, a federal statute of limitations dismissal will usually also leave plaintiff free to file again. Most dismissals for failure to prosecute, by contrast, do prevent plaintiff from refileing.

2. PRE-ANSWER MOTIONS

A defendant can respond to the complaint either by motion or an answer. The answer, discussed in subsection 3 below, must address all of the allegations in the complaint, and either deny or admit liability. A motion, by contrast, focuses on one particular problem defendant has identified in the complaint, and asks the court to resolve that issue immediately. Motions are particularly useful when the problem might cause the court to dismiss the complaint, such as when the chosen court lacks jurisdiction or venue.

Not all defenses and objections can be raised by motion. For example, a party cannot use a pre-answer motion to ask the court to rule that the party did not commit the acts alleged in the opposing party's pleading. That issue must be raised in the answer, or after the answer by a motion such as summary judgment (discussed in Chapter 11, Part A). Federal Rule 12 allows only certain specified objections to be raised by pre-answer motion. Review Rules 12(b), (e), and (f) in your Supplement. Many of the listed objections involve jurisdiction (including service) and venue. Others, such as failure to join a necessary party, you will encounter later. Practicing attorneys tend to refer to the defenses by their number. Therefore, the defense of failure to state a claim is commonly referred to as a "12(b)(6)."

Note that a party is not *compelled* to raise these defenses in a pre-answer motion. The Rule explicitly provides that all defenses "must be asserted in a responsive pleading", but then, in the following sentences, allows the seven defenses to be made by pre-answer motion. Therefore, a party who objects to the court's venue need not raise a pre-answer motion, but can forego a pre-answer motion and include that defense in her answer. However, special timing rules govern when a party may raise some of these

defenses, especially if the party *does* file a pre-answer motion. These timing rules are discussed just below.

Rule 12(b) does not stand alone. First, Rules 12(e) and (f) also allow a party to object to allegations of the complaint by motion. Second, Rule 12(c) allows a party to ask the court to rule on the merits of the case once the pleadings are complete. All three of these rules focus on the substantive allegations, not defenses like jurisdiction and venue.

Third, and perhaps most often overlooked by first-year students, note that Rule 12 does not list all the issues that can be raised by motion. Suppose, for example, defendant feels the judge assigned to the case has a conflict of interest because her nephew is married to plaintiff's daughter. Defendant need not wait until the answer to raise this issue. Instead, he can file a pre-answer motion to ask the judge to recuse herself from the case. Although this claim is not listed anywhere in Rule 12, it is not one of the "defenses or objections" governed by Rule 12(b) because it does not deal with the complaint, service of the complaint, or the court's authority to decide the case. It is instead a procedural matter that has nothing to do with the merits or the court's (as opposed to the individual judge's) authority to adjudicate.

This section focuses on Rule 12 motions, especially those motions listed in Rule 12(b). Subsection (a) discusses the timing rules governing when a party must raise each defense. As you will see, the timing rules vary widely depending on the defense in question. Subsection (b) focuses on motions challenging the substantive allegations in a claim, which raise a number of unique considerations.

a. Timing Rules Applicable to Rule 12 Motions

Rules 12(g) and (h) set specific timing requirements for various Rule 12 defenses. If a defendant makes any motion under Rule 12, Rule 12(g) requires the party to include in that motion all defenses and objections then available that Rule 12 permits to be raised by motion. Many Rule 12 defenses that are not raised are lost: defendant can neither make a second pre-answer motion raising other defenses or objections, nor raise them in his answer. For example, a defendant who makes a motion to dismiss a complaint for failure to state a claim on which relief can be granted cannot thereafter raise, either by another motion or in its answer, defenses such as lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process.

Rule 12(h) contains several exceptions to the rule that a defense or objection is waived if it is not made by answer or by motion. The defenses of 1) failure to state a claim on which relief can be granted, 2) failure to join a necessary party (under Rule 19), and 3) failure to state a legal defense to a claim do not have to be asserted at the earliest opportunity. Under Rule 12(h)(2), they may be made in a later pleading, a motion for judgment on

the pleadings, or at trial. After trial, the three objections cannot be raised. By contrast, the defense of lack of *subject matter* jurisdiction is never waived, per Rule 12(h)(3). Subject matter jurisdiction is discussed below.

A defendant choosing to assert defenses and objections in an answer rather than by raising them in a Rule 12 motion waives most defenses or objections that are not included in the answer. Rule 12(h)(1)(B)(ii) requires a party to raise certain defenses no later than the answer, or an amendment to an answer allowed under Rule 15(a) “as a matter of course.” This latter reference is to amendments a party may make without the court’s permission, which are covered later in this Chapter.

If all this seems unfathomable, rest assured you are not alone. These timing rules often prove tricky to the newcomer. One way to make better sense of the technical language is to avoid the common practice of referring to defenses by their Rule 12(b) number. In other words, rather than referring to lack of venue as a “Rule 12(b)(3) defense”, think of it as “a defense that Rule 12 allows to be raised by pre-answer motion.” This usage better matches the language of the Rule, and accordingly helps avoid two common mistakes. First, it recognizes that the timing rules also apply to Rule 12(c), (e), and (f) motions, not only those made under Rule 12(b). Second, it takes into account that there are objections, such as conflict of interest, that can be raised by motion completely independently of Rule 12. These latter motions do not trigger the Rule 12(g) and (h) timing Rules, and the objections are not subject to waiver under those rules.

In brief, Rule 12(g)(2) bars successive pre-answer motions raising many of the defenses and objections listed anywhere in Rule 12. Rule 12(h)(1)(A) bars successive Rule 12 pre-answer motions and/or successive Rule 12 motions in the answer. Rule 12(h)(1)(B)(i) prohibits a Rule 12 objection altogether if it is not made either as a pre-answer motion or as a Rule 12 motion in the answer. All of these timing rules are subject to the explicit exceptions in Rule 12(h)(2) and 12(h)(3).

Subject-Matter Jurisdiction. The rules dealing with subject-matter jurisdiction are unique. Not only may either party raise the issue of subject matter jurisdiction at any time, but a court may raise it of its own accord, or “*sua sponte*.” As a result, a court may dismiss a case for lack of subject matter jurisdiction even though both parties are willing to have it heard in that court. Nor can the parties create subject matter jurisdiction where it would not otherwise exist by consenting in a contract to have claims under that contract heard by a particular court.

Even more unusual is that plaintiff may challenge subject matter jurisdiction. This result makes sense in a removal case, where defendant has taken the case to federal court. But plaintiff may also challenge subject matter jurisdiction in cases where plaintiff himself has chosen federal court. Moreover, plaintiff may challenge jurisdiction at any time. In other words, a plaintiff can bring a case in federal court, lose on the merits at

trial, and then move to dismiss the action for lack of jurisdiction. If the court dismisses, the unfavorable judgment is not binding—and plaintiff is free to sue again in a different court. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 2 L.Ed. 229 (1804).

PROBLEMS

1. Colbert sues Fallon for defamation. Before answering the complaint, Fallon files a motion to dismiss the complaint for insufficient process. The judge denies the motion. Can Fallon then move to dismiss for lack of personal jurisdiction?

2. Colbert sues Fallon for defamation. Before answering the complaint, Fallon files a motion to dismiss the complaint for lack of subject matter jurisdiction. The judge denies the motion. Can Fallon then move to dismiss for lack of personal jurisdiction?

3. Colbert sues Fallon for defamation. Before answering the complaint, Fallon files a motion to dismiss the complaint for insufficient process. The judge denies the motion. Can Fallon then move to dismiss for lack of subject matter jurisdiction?

4. Colbert sues Fallon for defamation. Before answering the complaint, Fallon files a motion to dismiss the complaint for insufficient process. The judge denies the motion. Can Fallon answer, raising the defense of lack of personal jurisdiction?

5. Colbert sues Fallon for defamation. If Fallon decides to answer the complaint rather than filing a Rule 12(b) motion to dismiss, can Fallon include a defense of insufficient process in the answer?

6. Colbert sues Fallon for defamation. If Fallon moves to dismiss the complaint for insufficiency of service of process, may or must Fallon move at the same time to dismiss for lack of personal jurisdiction?

7. Colbert sues Fallon for defamation in Missouri. Fallon files a timely motion to dismiss the complaint for lack of personal jurisdiction. The judge grants the motion. What is the effect of granting the motion?

8. Colbert sues Fallon for defamation in Missouri. Fallon answers the complaint and defends the case on its merits. Before trial begins Fallon files a motion to dismiss the complaint for lack of personal jurisdiction. How should the court react?

9. Colbert sues Fallon for defamation in Missouri. Fallon answers the complaint and defends the case on its merits and loses. Colbert files suit in Illinois to enforce the Missouri judgment. Fallon moves to dismiss the Illinois action, saying that the Missouri court lacked personal jurisdiction over him. How should the court react?

10. Colbert sues Fallon for defamation in Missouri. Fallon ignores the complaint and the Missouri court issues a default judgment for Colbert. Colbert takes the Missouri judgment to Illinois to enforce. Fallon defends

against the enforcement action on the ground that Missouri lacked personal jurisdiction over him. How should the court react?

11. Colbert sues Fallon for defamation in Missouri. Before answering the complaint, Fallon files a motion to dismiss the complaint for lack of personal jurisdiction. The judge denies the motion. Fallon does nothing else in the lawsuit and the court awards Colbert a default judgment. Colbert takes the Missouri judgment to Illinois for enforcement. How should the Illinois court react to any motion by Fallon to dismiss the Illinois enforcement action?

b. Dismissing for Failure to State a Claim

Most Rule 12(b) defenses deal with the court's authority over the case. A motion filed under Rule 12(b)(6) is different. It allows the court to look at the allegations in the complaint to determine whether plaintiff has any chance of recovery. However, the court does not determine whether what plaintiff says is true, or whether it has actual evidence to support its claim. Rather, it asks only whether plaintiff has drafted a legally and technically proper complaint. As long as the complaint seeks recovery under a theory recognized by governing law, and provides enough detail to comply with Federal Rules 8 and 9, it will survive a 12(b)(6) challenge.

In many cases, the complaint is defective because plaintiff omitted a key element, or failed to include enough detail to satisfy the "plausibility" standard. Courts in these situations rarely dismiss outright. Instead, they will usually give the claimant at least one opportunity to amend the pleading to add the missing details. In other cases, the pleading may contain ample facts, but those facts do not state a claim recognized at law. Here, the court is more likely to dismiss without leave to amend. Unless plaintiff can show that the complaint can be modified to allow recovery under a different legal theory, it would waste both the court's and defendant's time to allow plaintiff to amend when she simply has no chance of recovery under even the most prolix complaint.

In some situations, defendant will need to add a fact or two in order to prove plaintiff cannot prevail. For example, plaintiff's breach of contract claim might be based on an oral contract that violates the statute of frauds. In some of these cases, plaintiff's complaint will supply the missing fact; *e.g.*, plaintiff could specify the contract was oral. If plaintiff does not provide the crucial fact, however, the complaint is sufficient on its own, and will survive a 12(b)(6) challenge. Defendant's proper recourse in this situation is to file either a Federal Rule 12 motion for judgment on the pleadings (covered later in this section) or a motion for summary judgment under Federal Rule 56 (covered in Chapter 11). Nevertheless, many defendants will file a 12(b)(6), but attach affidavits or other proof of the missing facts to the motion. In these situations, Rule 12(d) provides that the 12(b)(6) motion will be converted into a motion for summary judgment, and treated under the provisions of Rule 56.

Recall that unlike the personal jurisdiction, service, and venue defenses, a party who files a pre-answer motion under Rule 12 does not waive the defense of failure to state a claim by failing to include it in that motion. Therefore, the defense of failure to state a claim to be raised at any point in the case, including at the trial itself.

A Rule 12(b)(6) motion does not operate as an admission of any facts. If the court finds the complaint properly states a claim, the defendant can then deny one or more of plaintiff's facts in her answer, and force plaintiff to prove those facts at trial.

Cases involving multiple claims have at times caused courts some concern. Suppose plaintiff alleges two claims against defendant. One of the claims is not recognized under governing law, but the other is. Should a court grant a 12(b)(6) dismissal in this situation? Most courts will simply dismiss the improper claim, leaving the other in place. A few, however, interpret Rule 12(b)(6) to require dismissal of the entire case. These courts typically turn to the Rule 12(f) motion to strike (discussed immediately below) to get rid of one or more, but fewer than all, claims.

c. Motions for a More Definite Statement and to Strike

Rules 12(e) and (f) give a defendant additional options. Rule 12(e) allows a party against whom a claim has been asserted to move for a more definite statement if the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." If the motion is granted, plaintiff has fourteen days to amend the complaint to make it clearer. In practice, however, Rule 12(e) is rarely invoked. If a complaint is indeed so vague or ambiguous that it does not fairly apprise defendant of what plaintiff is claiming, defendant will succeed on a Rule 12(b)(6) motion to dismiss for failure to state a claim. A vague or ambiguous complaint does not comply with [Rule 8\(a\)](#)'s notice pleading requirements.

The Rule 12(f) motion to strike serves two basic purposes. First, as discussed above, it allows a party to strike specific claims or allegations in a pleading. This often occurs when defendant wants to strike fewer than all claims or when plaintiff wants to strike portions of defendant's answer.

Second, the Rule also mentions striking "redundant, immaterial, impertinent, or scandalous matter." Mere redundancy or immateriality by itself rarely supports a motion to strike. However, in a few cases courts have struck particularly inflammatory allegations, or those that intrude too greatly on a party's privacy. Note, however, that a court will usually strike an allegation as "scandalous" only if it is both beyond the pale and of little relevance to the dispute. Scandalous allegations that are highly relevant are rarely struck.

3. THE ANSWER

If all defendant's challenges to jurisdiction and the complaint prove for naught, defendant will eventually have to respond to plaintiff's claims. If defendant does not respond, the court will enter default judgment against it, as discussed in Part F of this Chapter. Defendant's responsive pleading is called the "answer." In addition to responding to plaintiff's claims, defendant may use the answer to assert counterclaims against plaintiff and cross-claims against co-defendants.

Federal Rules 8(b) and 8(c) contain specific rules dealing with how defendant responds to claims in the answer, rules that are in many ways less forgiving than the rules governing plaintiff's complaint. Also, do not forget that the answer, like the complaint, is subject to the general requirements that pleadings be concise and direct (Rule 8(d)), and the veracity requirements of Rule 11 (discussed in Part A of this Chapter).

a. A Menu of Possible Responses

Defendant has a variety of options when answering a complaint. First, defendant can *admit* each and every allegation in the complaint. Any defendant in that position is probably better off negotiating with plaintiff to settle the case for less than plaintiff has sought in the complaint. Negotiation is preferable to admitting all the allegations immediately, which subjects defendant to a judgment for all the relief sought by plaintiff.

A more likely and preferred alternative is for defendant to *deny all or part* of the allegations in the complaint. Rule 8(b) requires that denials fairly respond to the substance of the allegation. Suppose defendant states in the answer, "Prove whatever you alleged" or "Your allegations do not even justify a response." Even though Rule 8(b) does not prescribe a proper model to deny allegations and even though these statements may characterize the defendant's initial reaction to the complaint, they neither admit nor deny the plaintiff's allegations and therefore cannot be said to meet fairly the substance of the allegation. A denial that does not meet the substance of the statements being denied is treated under Rule 8 as an admission.

General denial. What happens if defendant denies all the complaint's allegations, an option known as a general denial and recognized in Rule 8(b)(3)? Even though the Rules allow a defendant to make a general denial, its use is limited. First, it is unlikely plaintiff incorrectly stated all matters, such as the parties' identities and addresses. Second, as with all pleadings, a defendant's general denial of all allegations must have a good faith factual and legal basis under Rule 11. If plaintiff moves under Rule 12(f) to strike defendant's answer because defendant has failed to deny plaintiff's allegations in good faith, all plaintiff has to show is one defect in order for the entire answer to be stricken. True, the court granting the motion is

likely to permit defendant to file another answer, but the court may well question defendant's credibility.

Specific denials. Because it is unlikely defendant can make a general denial in good faith, [Rule 8\(b\)](#) permits defendant to specifically deny designated allegations. A specific denial is the most common method of answering a complaint when all allegations in a particular paragraph can be controverted. There is no magic formula for making a specific denial, other than for defendant to be clear about which allegations are being denied and which are not, e.g., "Defendant denies all the allegations in Paragraph 3."

Qualified denials. A defendant may prefer to admit some of the allegations in a paragraph but deny others. A general or specific denial is inappropriate because some allegations are being admitted. [Rule 8\(b\)](#) authorizes defendant to generally deny all allegations except those specifically admitted. This denial often is called a qualified denial, because it has the effect of a specific denial but is subject to express qualifications, e.g., "Defendant denies all the allegations in Paragraph 5, except those relating to identity and residential address."

Denial based on lack of knowledge or information sufficient to form a belief. [Rule 8\(b\)](#) states that if a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the defendant may say so in its answer. This statement has the effect of a denial. A defendant can use this type of denial when there is insufficient data to justify either an honest admission or a denial of plaintiff's allegation.

Denial based upon information and belief. A defendant who lacks first-hand or personal knowledge about the validity of one or more of the allegations in the complaint, *but* has sufficient information to form a belief about the truth or falsity of the allegations may assert a denial upon "information and belief." This type of denial is not explicitly authorized by [Rule 8\(b\)](#). However, federal courts allow it. A denial upon information and belief is most appropriate when the denial is based upon information from a third person. A denial upon information and belief is not available if the statements in the complaint address matters within defendant's personal knowledge, matters within the general knowledge of the community, or matters of public record.

Failure to deny. Under [Rule 8\(b\)\(6\)](#), a failure to deny allegations in the complaint usually constitutes an admission of the facts alleged. This rule applies both when defendant fails to respond at all, or when its response does not fairly respond to the matters alleged. There are two exceptions. First, allegations concerning the amount of damages specifically are exempted from the effect of [Rule 8\(b\)](#) and are not admitted by a failure to deny. Second, a party must only deny allegations in pleadings to which a responsive pleading is required. Allegations contained in a pleading (like

an answer) to which no response is required or permitted are automatically deemed denied.²

b. Affirmative Defenses

Defendant's answer may also contain one or more affirmative defenses. An affirmative defense involves the introduction of *new facts* that absolve defendant from liability for plaintiff's claims. For example, suppose plaintiff sues defendant for negligence, in a jurisdiction that recognizes contributory negligence as a defense. Plaintiff's complaint will discuss how defendant violated its duty of care, and the harm suffered by plaintiff. But a careful plaintiff will not mention anything about how she herself may have acted negligently. In such a situation, defendant may not in good faith be able to deny plaintiff's allegations. Instead, it needs to add a new allegation—that plaintiff was negligent—in order to prevail.

Rule 8(c)(1) requires defendant to include in its answer all affirmative defenses that may apply. The Rule is important because it puts the "burden of pleading" the defense on defendant. In the example given above, if neither party's pleadings discuss plaintiff's negligence, defendant will be precluded from introducing evidence of plaintiff's negligence at trial (unless the court allows amendment). A defendant must therefore be careful to identify and include all available defenses in its answer.

Rule 8(c) contains a list of affirmative defenses, including contributory negligence. However, that list is not exclusive. Courts have identified other matters that are affirmative defenses. Unfortunately, the rule provides no help in identifying the essential characteristics of an affirmative defense. Some recognized affirmative defenses not mentioned in Rule 8(c) are alteration of an instrument, comparative fault, condition subsequent, impossibility of performance, infancy, insanity, mistake, novation, privilege in defamation actions, rescission, and breach of warranty. When in doubt about whether a certain defense not listed in Rule 8(c) should be pleaded as an affirmative defense, the safe course is to plead it affirmatively, and in addition, to deny any relevant allegations in the complaint.

The Rule 12(f) motion to strike can test the legal sufficiency of an affirmative defense. Once defendant has raised an affirmative defense by answer, plaintiff may move for the defense to be stricken from the pleadings. A motion to strike a defense which is insufficient in law has the same function with respect to an affirmative defense that a motion to dismiss for failure to state a claim performs with respect to the complaint.

² The Rule 36 Request for Admission, used in discovery, provides a means for parties to ask other parties to admit these matters before trial.

4. ADDITIONAL PLEADINGS

In a case involving a single plaintiff and a single defendant, Rule 7(a) allows only four pleadings: the complaint, the answer, an answer by plaintiff when defendant includes a counterclaim in its answer, and a court-ordered reply to an answer. This subsection deals with the third and fourth pleadings.

Plaintiff's answer to defendant's counterclaim is conceptually just like defendant's original answer to plaintiff's claims. Like defendant, plaintiff must respond to all the allegations set out in the counterclaim. Failure to deny one or more of the allegations is treated as an admission of those matters.

A court may also order plaintiff to file a reply to defendant's answer. Courts will usually order a reply only when defendant's answer contains a potentially viable affirmative defense. Unless plaintiff can counter that defense, it may be fruitless to let the action proceed.

More complicated cases will involve additional pleadings. For example, when a party cross-claims against a co-party, the co-party must file its own answer in response. In cases involving intervention and impleader (covered in Chapter 8), there will be still other pleadings, with names such as a "third party complaint."

E. AMENDED AND SUPPLEMENTAL PLEADINGS

Rule 15 relates to amended and supplemental pleadings. Four sub-rules set forth when and under what circumstances pleadings may be amended, and provide for amendments to conform to the evidence, relation back of amendments, and presentation of supplemental matters. Note that Rule 15 applies only to pleadings, not motions. Amending a motion ordinarily requires the court's permission.

1. WHETHER PERMISSION IS REQUIRED

Rule 15(a) enables a party to assert new information that was overlooked or unknown to the pleader at the time the complaint or answer was filed. It also establishes a time period during which the pleadings may be amended automatically and grants the court broad discretion to allow amendments after that period has expired. The Rule also provides a "back door" way to amend during trial, when a party succeeds in presenting evidence on an issue not raised in the pleadings, and the other side fails to object.

a. Amendments Before Trial

As indicated by Federal Rule 15(a)(1), a pleading may be amended once without leave of court (as a matter of course) within twenty-one days after

it is served, or if the pleading is one to which a responsive pleading is required, within the earlier of (i) twenty-one days after the responsive pleading is served, or (ii) twenty-one days following a Rule 12 motion. The Rule applies to both complaints and answers. The provision allowing amendments to the answer as a matter of course is of special importance in the situation of defenses such as personal jurisdiction, which as discussed above in Part D(2)(a) of this Chapter, can be lost if not asserted very early in the case. Even if a party omits one of these defenses from its answer, it can still assert it in an amendment to the answer as a matter of course. Rule 12(h)(1)(B)(ii).

If the pleader cannot amend as a matter of course, she must obtain leave of court or consent of the adverse party. Rule 15(a)(2) provides that a court should freely give leave to amend when justice so requires. The decision as to whether justice requires the amendment is within the court's discretion, and is liberally construed. Courts consider the reasons why the pleader did not include the allegation in the original pleading, as well as the extent to which allowing amendment at the later date would delay trial or unduly prejudice the other party.

A court may impose conditions when granting leave to amend. The most common condition imposed on the amending party is payment of the costs the other parties will incur to deal with the new issues or theories asserted in the amended pleading. The trial court also may grant a continuance to provide additional time for the opposing party to prepare for trial.

A party can also amend without court permission by obtaining the consent of all opposing parties. If the parties consent, the usual motion procedure need not be followed, and the court must permit the amendment to be filed.

An amended pleading supersedes the original. The superseded pleading has no legal effect unless its successor pleading specifically refers to it and adopts or incorporates it by reference. Per Rule 15(a), when a complaint is amended, the defendant is entitled to amend the answer to meet the content of the new complaint.

b. Amendments at Trial

If a party at trial tries to introduce evidence on a point not raised in the pleadings, the other party may object. But what if the other party fails to object? Rule 15(b) provides for amendments necessary to cause the pleadings to conform to the evidence. One of the reasons for permitting such amendments is to insure that the pleadings support the judgment. Another is to take cognizance of the issues that were actually tried. The Rule goes further than authorizing amendments to conform to the evidence. It provides that if issues not raised by the pleadings are tried by

express or implied consent, they are treated as if they had been set out in the pleadings.

Moreover, when an objection to evidence is made at trial on the ground that it is not within the issues presented by the pleadings, the court may permit amendments freely if the presentation of the merits of the action will be served and the objecting party will not be actually prejudiced or seriously disadvantaged. Under such circumstances the court is authorized to grant a continuance of the trial to enable the objecting party to meet such evidence.

2. RELATION BACK OF AMENDMENTS

Federal Rule 15(c) provides that some amendments “relate back” to the date of the original pleading. Relation back is important because of the statute of limitations. Even if an amended complaint containing additional claims is filed after the limitations period expires, if it relates back to a pleading filed *before* the expiration date, the new claims are timely. Because the statute of limitations bars only claims, not defenses, relation back is particularly important for complaints and counterclaims.

Relation back of an amendment under Rule 15(c) has nothing to do with whether the amendment is as a matter of course. Amendments allowed as a matter of course do not necessarily relate back. Conversely, even if an amendment would relate back, the amending party may still need to obtain permission to amend.

Under Rule 15(c)(1), an amendment relates back to the date of the original pleading when either (a) the governing statute of limitations itself provides for relation back (which is relatively rare), or (b) the amendment asserts a claim that arises out of the same conduct, transaction, or occurrence as that contained in the original pleading. This test is essentially the “same transaction” used in basic joinder, which is discussed in Chapter 2.

In some cases, the party will want to change not only its claims, but also the party against whom those claims are asserted. Rule 15(c)(1)(C) allows claims changing parties to relate back. Such an amendment relates back if the amendment both meets one of the tests discussed in the prior paragraph as well as the additional requirements imposed by Rule 15(c)(1)(C). These additional requirements are that the new party receive sufficient notice of the existence of the basic case within the period for serving the complaint under Rule 4(m) (typically 120 days after filing, but the period can be extended). The “notice” called for in this rule is not the same as service. A party can receive notice of a case by reading about it in the newspaper, or hearing about it at a meeting. In addition, the notice qualifies as sufficient under Rule 15(c)(1)(C) only if it contains enough information that the party should know, but for the mistake in naming

someone else, the party would likely have been sued in the original pleading.

The specific reference to “mistake” in the Rule is usually applied literally. Therefore, a plaintiff who consciously chooses to sue some, but not all, defendants may not be able to avail itself of relation back if it later decides to add additional defendants. Such a plaintiff made no “mistake” about who it sued.

3. SUPPLEMENTAL PLEADINGS

Rule 15(d) allows a party to file supplemental pleadings. Unlike amendments, supplemental pleadings deal with matters that arise after the original pleading was served. Thus, if a party injured in an accident later dies, the plaintiff would use a supplemental pleading to add, for example, a wrongful death claim to the case. Supplemental pleadings always require court permission.

F. DEFAULT JUDGMENTS

What happens if a defendant simply does not respond to the complaint? In these situations, the court may issue a default judgment. Federal Rule 55 establishes the process for obtaining default judgments, as well as setting aside those judgments. Before a default or a default judgment can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which means that the party was effectively served with process.

Obtaining a default judgment is a two-step process involving (a) entry of default in the record, and (b) issuance of the default judgment. An entry of default is simply a notation of the fact of default, and cuts off the party’s right to further notice about the proceedings unless the party has appeared. The entry is made by the clerk of court, and requires no action by the judge. Rule 55(a) permits plaintiff (or in the case of other claims, the claimant) to file an affidavit showing that defendant (or other party) “failed to plead or otherwise defend” against the moving party’s claim. “Otherwise defend” refers to attacks on service of process, motions to dismiss, or Rule 12(e) motions for more specificity, any of which may prevent entry of a default without having to answer on the merits. Entry of a default for failure “to plead or otherwise defend” is not limited to situations involving a failure to answer a complaint, but instead applies to any pleading. For example, a plaintiff’s failure to answer a counterclaim may entitle the defendant to an entry of default on the counterclaim.

After a default is entered under Rule 55(a) and upon request of the party seeking the default judgment, a default judgment may be entered under Rule 55(b). Depending on the circumstances, the judgment may be issued by the clerk, or by the judge. The clerk may enter a default judgment

under Rule 55(b)(1) when the claim “is for a sum certain” and the defaulting party has not made any appearance in the case. Rule 55(b)(1) applies only when a party has never appeared in the case; it does not apply when a party appears (for example, by objecting to venue) and then merely fails to participate further. If damages are certain or can easily be computed, plaintiff submits an affidavit to establish the amount. In other cases, the judge will conduct a hearing to determine the remedy.

If defendant did appear, the situation falls within Rule 55(b)(2) and must be examined by a judge. The trial judge has discretion whether to enter a default judgment, and the judge may hold hearings to aid in the exercise of that discretion. The judge’s ability to exercise discretion is made effective by the requirement that the motion for a default judgment be sent to the defaulting party, enabling that party to appear and show cause why a default judgment should not be entered. At a hearing, the judge can require proof of the facts that must be proved to establish liability. If the amount of damages is not certain or capable of easy computation, the hearing may include that issue. Rule 54(c) limits the amount of relief to the amount and type of relief plaintiff sought in the complaint.

Rule 55(c) allows a court to set aside an entry of default for “good cause.” A default judgment is set aside for the same reasons as justify relief from a judgment under Rule 60(b), discussed in Chapter 12, part G. The trial judge will often require the party in default to show a meritorious defense to the claim as a prerequisite to vacating the judgment. Otherwise, there is no reason to reopen the case.

The foregoing discussion applies to default judgments stemming from defendant’s failure to appear. A court may also grant a default judgment against a party as a penalty for refusing to obey a court order or cooperate in discovery. In these cases, the procedure under Rule 55 is different. For example, when a default is entered as a sanction, the judge, not the clerk, will enter the default.

G. JUDGMENT ON THE PLEADINGS

Part D(2)(b) of this Chapter discusses the motion to dismiss for failure to state a claim. The 12(c) motion for judgment on the pleadings is in many ways plaintiff’s counterpart to the 12(b)(6). The 12(c) motion considers *all* the pleadings, not just the complaint. One situation where plaintiff will use the Rule 12(c) motion is when defendant’s answer either admits everything, or asserts a defense the law does not recognize.

As in a 12(b)(6) motion, a court hearing a motion for judgment on the pleadings *does not consider the evidence*, but looks only at the pleadings. If the pleadings, taken together, indicate one party should prevail, the court can grant judgment without considering the actual evidence.

Plaintiff is not the only party who can use the Federal Rule 12(c) motion. Suppose plaintiff sues defendant for alienation of affection. Defendant files an answer in which she denies she committed the facts alleged by plaintiff. Later, however—perhaps because the higher courts cleared up the law—defendant realizes that the law in that jurisdiction does not allow recovery for alienation of affection. Defendant in such a case can file a Federal Rule 12(c) motion for judgment on the pleadings. In this situation, the Rule 12(c) motion serves basically as a delayed motion to dismiss for failure to state a claim. See also Federal Rule 12(h)(2), which requires a party who wants to raise the defense of failure to state a claim after the pleadings are closed to use a Federal Rule 12(c) motion for judgment on the pleadings.